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Marbury v. Madison Around the World

Mark V. Tushnet
Georgetown University Law Center, tushnet@law.georgetown.edu

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Professor of Law
Georgetown University Law Center
tushnet@law.georgetown.edu

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MARK TUSHNET*

I. INTRODUCTION

The bicentennial of *Marbury v. Madison*,[1] coupled with a growing awareness among U.S. constitutionalists that other nations also have constitutions, has produced, probably predictably, a new conventional wisdom. The assertion as a fact that constitution-makers around the world have decided to emulate the U.S. institution of judicial review of legislation for its compatibility with fundamental law has escaped the banal Law Day speech into the law reviews.[2] Of course, it is accurate to note that lawmaking system designers have created courts with the power to determine constitutionality—systems that Bruce Ackerman calls "constrained parliamentarianism."[3] However, I believe it is misleading to think that these systems emulate the U.S. institution of judicial review.

To put the point somewhat strongly for emphasis, the U.S. system of judicial review is now something of an outlier among systems of constitutional review. In this Essay, I consider three aspects of such systems: the structures of review, the theories of review, and the forms of review. My aim is primarily one of description, aiming to highlight the ways in which the U.S. system resembles and differs from the newer systems of judicial review. The U.S. system of judicial review has close—and more distant—relatives in each of these categories. However, the U.S. system remains distinctive in that it combines particular elements into an overall system that is nearly unique in the world.

Comparative study might lead us to consider whether changing some aspects of our system of judicial review would improve the overall functioning of our version of constitutional democracy. Most, though not all, aspects of the U.S. system are embedded in the written Constitution and thus, for all practical purposes, are immune from amendment. Other aspects are entrenched, less formally, in the U.S. equivalent of unwritten constitutional

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* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank James Stoner for his comments on a much shorter version of this Essay.

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2. For an overview, see Louis Favoreu, *Constitutional Review in Europe*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 (Louis Henkin & Albert J. Rosenthal eds., 1990).

3. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 664-66, 668-69 (2000) (offering constrained parliamentarianism as an alternative to American and British lawmaking processes and recognizing the necessity of judicial review to safeguard the "operational realit[y]" of constitutional principles from capricious parliamentary legislation).

conventions of a sort that characterizes the British constitutional system. Reflection on experience with other systems of judicial review might lead us to consider altering those conventions. Yet, systems of judicial review are just that—*systems*—and changes in one or a few parts might have unexpected effects on others. In the end, comparison between the U.S. and other systems of judicial review is partly an exercise in civic education and partly an effort to restore "reflection and choice" in *our* system design.[4]

II. STRUCTURES OF JUDICIAL REVIEW

Scholars of comparative constitutional law have devoted a great deal of attention to the structures of judicial review.[5] This scholarship has made the important variables familiar, and I will confine my comments to only a few. First, constitutional review can be lodged either in a generalist court, which has jurisdiction over ordinary law (e.g., through statutory interpretation) as well as constitutional law, or in a specialist court.[6] The U.S. Supreme Court is a generalist court in this sense, one of only a handful around the world.[7]

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4. The phrase "reflection and choice" is from THE FEDERALIST NO. 1, at 89 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

5. By "structures of judicial review," I mean the formal design of the institutions of judicial review. I put aside, for present purposes, other institutional designs for *constitutional* review such as Ombuds-offices, parliamentary committees on the constitution, and the like.

6. The choice is related to the theory of judicial review held by institution designers. For a discussion, see Part III of this Essay.

7. One relevant factor in deciding whether to create generalist courts, perhaps relevant to the creation of the U.S. Supreme Court in 1789 and to other such courts more recently, is the number of judges eligible for high courts taken as a whole. A nation with relatively few competent judges might choose to use them intensively in a generalist court, rather than either concentrating the competent ones in a specialized constitutional court (or in the ordinary courts) or dispersing the competent judges among all the courts, with the risk that overall quality would be lower than could be achieved by concentrating the competent judges in one court or set of courts. Examples of the impact of the size of the available pool of judges are interesting. In Latvia, questions arose about the propriety of several Constitutional Court judges sitting to review a statute because some had "taken part in passing the disputed statute, and one of them was married to the [head of the legislature]." CAROLINE TAUBE, CONSTITUTIONALISM IN ESTONIA, LATVIA AND LITHUANIA: A STUDY IN COMPARATIVE CONSTITUTIONAL LAW 141 (2001). In response, the Latvian legislature amended the statute establishing the Constitutional Court and barred any challenges to the impartiality of such judges. The Court subsequently upheld the statute. *Id.* A cognate problem arose in *Marbury* itself: John Marshall was the Secretary of State who had failed to deliver Marbury's commission, and his brother James attested to the fact that the President had indeed signed the commission. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 146 (1803). For another example of the effects of the small size of a legal elite on constitutional structure, see Mark Tushnet, *Dual Office Holding and the Constitution: A View from* Hayburn's Case, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 196 (Maeva Marcus ed., 1992).

However, this consideration does not explain why Canada created a system of constitutional

Most of the world's constitutional courts are specialized courts, dealing solely with constitutional law; Germany's Constitutional Court is perhaps the most emulated of these specialized constitutional courts.

Second, the power to review legislation for its constitutionality can be concentrated in a single constitutional court, as in Germany, or dispersed so that every court has the power to rule on constitutionality, as in the United States.[8] Designers of a concentrated system usually must devise some system of referrals so that trial courts—or appellate courts with specialized statutory jurisdiction, as over administrative law—can refer cases that raise constitutional questions to the only court with power to rule on those questions.[9] Doing so is not all that difficult, although designers sometimes can make mistakes that lead to gaps in the possibility of judicial review for constitutionality.[10] In large nations, dispersed systems of judicial review pose a different problem—one that is more difficult to design around. The sheer number of decision-makers authorized to interpret the constitution makes it

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review in 1982 with a generalist constitutional court, nor why Great Britain's initial move in the direction of constitutional review, the system established by the Human Rights Act 1998, uses a generalist court. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 24(1) (authorizing judicial remedy "as the court considers appropriate and just in the circumstances" for the infringement of one's constitutional rights or freedoms); *id.* pt. VII (General), § 52(1) (stating that any laws inconsistent with the Canadian Constitution are, "to the extent of the inconsistency, of no force or effect"); Human Rights Act, 1998, c.42 (Eng.). It is at least possible that there is something about the common-law tradition that conduces to the choice of a generalist court for judicial review. Interestingly, the Blair government recently proposed to create a new Supreme Court, although the proposal lacked sufficient detail to determine whether the government envisioned a specialized court, as seems likely, or a generalist one. *See* DEP'T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 19-22 (2003) (consultation paper) (noting that establishing a new court would "restore a single apex to the UK's judicial system where all . . . constitutional issues can be considered"), *available at* http://www.dca.gov.uk/consult/supremecourt/supreme.pdf.

8. My personal favorite to illustrate this point is *Thompson v. City of Louisville*, 362 U.S. 199 (1960), in which the U.S. Supreme Court overturned a conviction on review of a decision by the police court of the city of Louisville, Kentucky, the highest state court in which review could be had of Thompson's constitutional claim. *Id.* at 202-03, 206.

9. Conceptually, system designers could create something like the U.S. "final judgment rule," allowing litigants to raise constitutional claims only after the highest court with jurisdiction over their nonconstitutional claims has finally resolved them. Often, however, the constitutional claim will be dispositive, and a final judgment rule would impose unnecessary costs of delay and uncertainty. Similar considerations have led to some relaxation of the final judgment rule in the United States. *E.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 485-86 (1975).

10. Designing a concentrated system of constitutional review for a small nation is, I suspect, easier than designing one for a large nation. Still, some rather large nations, like Germany, have concentrated systems of review. Accordingly, I think that a nation's size affects design issues but not the basic choice between concentrated and dispersed systems.

possible for a rogue judge to get away with an interpretation that would be rejected by the nation's highest constitutional court, but which that court lacks the time or other resources to review.[11]

Third, judicial review comes in what are conventionally called abstract and concrete forms. In abstract review, the constitutional court is authorized to consider the constitutionality of legislative proposals or statutes before they go into effect. For example, the Canadian Supreme Court, similar in *some* ways to the U.S. Supreme Court, has "reference" jurisdiction under which the government can seek that Court's views on the constitutionality of legislation the government has under consideration.[12] The basic constitutional designs in Germany and France placed abstract review at the core. In the early years of both systems, a limited number of government officials could present constitutional objections to the constitutional court before legislation took effect.[13] The number of officials authorized to do so has gradually expanded to the point that a minority outvoted in the legislature has an almost automatic right to invoke the constitutional court's jurisdiction.[14]

Scholars typically use the U.S. "case or controversy" requirement[15] to illustrate concrete review.[16] The constitutional convention rejected Madison's proposal to create a "Council of Revision" that would have exercised a form of abstract review. In its stead, they placed the case or controversy requirement.[17] Formally, the U.S. Supreme Court cannot determine the constitutionality of legislation in the absence of an individual plaintiff who has

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11. This problem is offset to some degree both by the fact that the rogue judge's interpretation prevails only within his jurisdiction and that higher courts are likely, though not guaranteed, to rein in the judge on issues of broader significance.

12. *See* Supreme Court Act, R.S.C., ch. 5-26, § 53 (1985) (Can.). *See generally* James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251 (1990) (discussing the historical basis for reference jurisdiction in Canada and evaluating both theoretical and practical concerns regarding its exercise). The reference jurisdiction can be used to finesse delicate political questions: By obtaining a determination that a proposal for which there is substantial political support would be unconstitutional if enacted, the government can place the blame for its refusal to enact the legislation on the constitutional court (rather than on the government's own disagreement with the proposal as a matter of legislative policy).

13. *See* Favoreu, *supra* note 2, at 41, 52-53.

14. *See* John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1131 (2001). However, that right is not always exercised.

15. U.S. CONST. art. III, § 2.

16. *See, e.g.*, Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST. L. 977, 979 (2001); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1852 n.100 (2001); Michel Rosenfeld, *Justices at Work: An Introduction*, 18 CARDOZO L. REV. 1609, 1611 (1997).

17. The Council of Revision idea was rejected, not primarily because it involved abstract review, but because it involved policy-based review of all state legislation.

suffered, or is imminently likely to suffer, harm resulting from the statute she seeks to challenge.[18]

It is worth noting here that the distinction between abstract and concrete review has blurred as nations gain experience with their systems of judicial review. In systems nominally committed to abstract review in centralized courts, referrals and review of final decisions by the ordinary courts can lead to some degree of concrete review. Furthermore, in the United States, standing and similar justiciability requirements have been loosened to the point that it is now almost routine for people to challenge legislation immediately upon its enactment—and have their claims adjudicated on the merits.[19] My favorite example is the successful challenge to the Communications Decency Act of 1996 (CDA), which was filed on the day the statute was to take effect and which resulted in an immediate preliminary injunction against the government.[20] Consequently, the government could not enforce the CDA until the Supreme Court ruled on the merits of the constitutional challenge.[21] The litigation structure of the challenge to the Bipartisan Campaign Finance Act of 2002 is the same: enactment, immediate constitutional challenge because the mere enactment has effects on campaign finance activities, and a ruling on the merits.[22] The case or controversy requirements of standing and ripeness remain formally in place, but, in fact today, a well-counseled potential litigant can design a lawsuit that is, in all but the most formal of senses, a version of abstract review.

Fourth and finally, systems vary in how they assure the independence of judges on constitutional courts. Although independence is, of course, a fundamental requirement, how it is achieved is not uniform. The U.S. choice of life tenure with no age qualification, either at entry or on exit (that is, minimum experience requirements or mandatory retirement ages), is quite unusual. The typical choice is to give constitutional court judges relatively long tenures, on the order of twelve to fifteen years, without the possibility of reappointment, coupled with age requirements for appointment and mandatory retirement. The U.S. system gives appointing authorities incentives, which designers of other systems of judicial review have thought inappropriate, to seek out young appointees who will be in a position to perpetuate the appointing authorities' vision of how the constitution should be interpreted years after the appointing authorities have left office.

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18. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

19. Although, in the ordinary case, legislators or other officials cannot initiate these challenges, there is a real possibility of coordination between representatives in the legislature who lose out and interest groups who supply plaintiffs for litigation.

20. *See* Reno v. ACLU, 521 U.S. 844, 861 (1997).

21. *See id.* at 864.

22. *See* McConnell v. Fed. Election Comm'n, 124 S. Ct. 619, 654 (2003) (describing the case's procedural history).

I conclude this sketch of the structures of judicial review with two observations about collateral matters. The first involves the difference between common-law and civil-law systems. To oversimplify, a judge in a civil-law system is a judicial bureaucrat for whom being a judge is a career choice made quite early in that person's legal career. Civil-law judges work in a bureaucratic hierarchy under the administrative supervision of higher judges whose judgments about the subordinates' performance affect the possibility of career advancement. This arrangement may be entirely adequate for the administration of ordinary, nonconstitutional law if one thinks—as most civil lawyers do—that the range of discretion in interpreting and applying ordinary law is relatively small. But, if there are differences in this respect between ordinary and constitutional law—a point I take up next—it might be unwise to give judges with that sort of career line a dominant, or perhaps even a large, role on a constitutional court. Rather, system designers might want to ensure, to the extent they can, that appointing authorities place a mix of experienced politicians, academics, and ordinary-law judges on the constitutional court.[23]

The second collateral observation is that many of the world's new constitutional courts have been created in nations emerging from a period of authoritarian government. Deciding who should be the judges on the constitutional court in such nations is quite difficult. Many of the judges already sitting will be tainted by their association with the prior regime. They will have rendered decisions that seem quite inappropriate after the transition. System designers might want to ensure that such judges not sit on the constitutional court—even if they survive standard lustration procedures aimed at ridding the new government of people who were deeply implicated in the prior system's operations. Looking outside the existing judiciary, to the academy and to politicians, might seem attractive.

However, countervailing considerations must be weighed against the desire to look outside the existing judiciary. After all, sitting judges will have experience in judging. Finding replacements for them creates a real risk that the public, already skeptical about the integrity of government because of its experience under the authoritarian regime, will see the new judges simply as stooges for the new government, lacking independence because of their ties to the new order that gave them their new jobs, rather than as spokespeople of "the law." Furthermore, sitting judges might defuse the charge of collaborationism by pointing to the degree to which strict legal positivism,

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23. Such judicial diversity could be advanced either by specifying qualifications in the constitution itself or by setting up the appointment system in a way that gives appointing authorities appropriate incentives. A fairly extended period of time should be used as a frame of reference when assessing the effectiveness of an incentive-based appointive system. Accordingly, the recent U.S. practice of requiring that Supreme Court nominees have some nontrivial judicial experience, when viewed in an appropriately long time frame, might not count against the U.S. system.

assuming its presence, pervaded the legal culture.[24] These judges could say, in effect, that their positivist commitments led them to enforce the laws of the old regime without regard to their personal views of the morality of those laws, and that, after the transition, they will just as faithfully enforce the laws in place under the new regime.[25]

III. THEORIES OF JUDICIAL REVIEW

By "theories" of judicial review, I refer both to accounts that describe constitutional law as ordinary law, whose only distinctive characteristic is that it is supreme over other law, and to accounts that describe constitutional law as a special kind of law, which I call "political law." Despite the distinction, it is important to emphasize that those who treat constitutional law as political law do not deny that constitutional law is *law* after all. Rather, they contend that the intimate relation between constitutional law and the permissibility of legislative choices gives constitutional *law* a political component that is absent from, or at least operates differently in, ordinary law.[26]

The difference between ordinary law and law with a political component (i.e., political law) is difficult to pin down. It is commonplace today for judges developing tort law or contract law—ordinary law in the usual sense—to make policy judgments that are indistinguishable in principle from those made by legislators. It is almost equally as commonplace for politics, brought into the academic literature via public-choice approaches to law-making, to be driven by voters' or legislators' preferences. However, it is quite hard to make sense of the idea that constitutional law, understood as political law, should be preference-driven.

Accordingly, the distinction between ordinary law and political law must be drawn on a more abstract level. We can begin with the following observation: the process of making ordinary law concentrates on the interpretation of texts that preexist the decision at hand, whereas the process of legislating is much more loosely tied to preexisting texts. Therefore, the "law" component of constitutional law draws our attention to the texts that the judges interpret; however, many of those texts use fairly abstract terms, such as "liberty" or "equality" or derivations of these terms.[27] Next, suppose that

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24. This consideration is related to the first collateral point because lawyers in civil-law systems seem to be more committed to legal positivism than lawyers in common-law systems.

25. A related but independent point is that the number of judges available to staff constitutional courts might be quite small because of the nation's size (in addition to, or rather than, because of the taint of experience under the prior regime). This complication can create interesting problems.

26. I develop this distinction in more detail in Mark Tushnet, *Institutions for Implementing Judicial Review*, *in* CRAFTING AND OPERATING INSTITUTIONS (Ian Shapiro ed., forthcoming).

27. For these purposes, terms such as "freedom of expression" and "establishment of religion" are abstract when compared with the terms used in the Twenty-Seventh Amendment

we refrain from accepting the strongest versions of public-choice accounts of the legislative process and, instead, agree that voters and legislators try, to some degree, to advance visions of good public policy rather than, or in addition to, mere self-interest narrowly defined. Among those visions will be the voters' and legislators' judgments about which policies advance liberty, equality, and the like—the same abstract constitutional terms that judges are also interpreting. Finally, by focusing on the role that principle plays in electoral and legislative politics, we can understand how constitutional law can be both legal (because of its attention to texts and inattention to preferences) and political (because of the abstract terms used in the texts and the attention voters and legislators give to principle).

In *Marbury*, Chief Justice Marshall built his argument for judicial review on the proposition that the Constitution is ordinary law, although supreme over other forms of ordinary law.[28] Perhaps Marshall was driven to this proposition because the Constitution's text did not specifically provide for judicial review. Contemporary judges deal with texts that *do* authorize judicial review, and, therefore, can rely on the text to justify judicial review rather than seeking to ground it in the idea of law itself, as Marshall had to do.

The idea that constitutional law was a special kind of law took hold in the twentieth century, particularly through the theorizing of the Austrian jurisprude Hans Kelsen, who incorporated his theories of judicial review into the design of the Austrian Constitutional Court, a model that inspired the more directly influential design of the German Constitutional Court.[29] Kelsen thought that a constitutional court had to be a special kind of court because constitutional law was a special kind of law.[30] That constitutional law was political law meant, to Kelsen, that a constitutional court had to (1) be specialized, so that its judges would appreciate the fact that constitutional law was *not* ordinary law; (2) be concentrated, so that judges on ordinary courts would not pollute ordinary law with the political character of constitutional law and so that judges on the constitutional court would not pollute constitutional law with ideas inappropriately drawn from ordinary law; and (3) engage in abstract review, so that the public would view judicial review as continuous with the political process of enacting laws, rather than as something superimposed on statutory law after its enactment.

How do the different theories of constitutional law as law—either ordinary or political—matter? On the ground level, they may affect the way in which judges are selected. If constitutional law is merely ordinary (though supreme) law, the selection criteria for constitutional court judges will include a large

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to the United States Constitution.

28. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

29. *See* Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES L. 49, 57 (2002).

30. *See* John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 52-53 (2002).

degree of attention to ordinary legal competence. Selection committees might be expected to ask the following questions: Is the proposed judge qualified in professional terms? Does she have a wide enough range of experience across legal areas to assure us that she is a generally competent lawyer?[31] In contrast, if constitutional law is political law, attention to legal competence will be supplemented by concern about whether the proposed judge can adequately assess the political dimensions of constitutional law.

The German system for appointing judges to the Constitutional Court is instructive here. The system requires the approval of two-thirds of the relevant bodies, which effectively gives a well-organized minority a veto.[32] At least in a political system with two (or only a small number of) political parties, the existence of a minority veto conduces to reasonably explicit dealmaking on appointments, with the governing party getting one or two appointments for each one the minority party gets.[33] Similar deals are possible, though more difficult to reach, in multi-party systems. Creating the two-thirds requirement acknowledges the political dimension of constitutional law by making it more likely that appointments will result from open political deals.[34] The fact that political deals occur in the open reflects the greater "comfort level" with giving political considerations an explicit role when the theory of judicial review is that constitutional law is different from ordinary law.

The contrast between Germany and the United States is again instructive. In the United States, the rhetoric of nominations and confirmations is one in which the claim that the nominee will simply follow the law has a great deal

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31. There may be some interaction between a theory of judicial review that treats constitutional law as ordinary law and a dispersed structure of judicial review. The more constitutional law is treated as ordinary law, the more lawyers there will be who are qualified to adjudicate issues of constitutional law. Because a dispersed structure requires more judges who are qualified to adjudicate issues of constitutional law than does a concentrated structure, it may be easier to operate a dispersed system if one's theory of judicial review treats constitutional law as ordinary law.

32. Ferejohn, *supra* note 30, at 57.

33. Obviously, the ratio will depend on the size of the governing party's majority, although the fact that the veto exists will push toward a one-to-one ratio.

34. I would make something, but not much, of the facts that the U.S. system treats constitutional law as ordinary law, has a simple majority requirement for appointment, and has proven to be quite resistant to dealmaking over judicial appointments. The exception may actually indicate the connection that I am drawing here. For many years, if the President belonged to one party and both senators from a state belonged to the other party, those senators had, as a matter of informal Senate practice, the power to veto court of appeals appointments allotted by tradition to their state. This led to some degree of accommodation between the President and the senators. The practice has weakened in recent years, largely because of the way divided government has developed, with increasing numbers of states having senators from a single party. This increased the number of times when a veto could be exercised to a level that presidents found difficult to tolerate. For statistics, see MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 181 n.59 (2003).

of purchase. It is extraordinary to find a nominee who would acknowledge that politics, in some sense, is an essential element in developing good constitutional law. Kelsenians and many mainstream U.S. legal academics would say that the rhetoric of merely following the law fails to capture the reality of constitutional adjudication.

IV. FORMS OF JUDICIAL REVIEW

So far, it should be clear that the U.S. model of judicial review is not one that is widely followed throughout the world. The combination of life-tenured judges on a generalist court with the system of dispersed judicial review, in which constitutional law is theorized as ordinary but supreme law, is, if perhaps not unique,[35] surely quite unusual.[36]

Until recently, however, another feature of the U.S. system *does* seem to have been emulated widely. This feature is what I have called the strength of judicial review.[37] Strong-form systems of judicial review have two elements: First, judicial review is comprehensive so that judges with the power to determine constitutionality have the power to determine the constitutionality of *every* (or nearly every) action by the legislature and the executive. Second, judicial review is binding on all branches, in the sense that nonjudicial actors feel a duty to conform their action to the constitutional interpretations offered by the courts even when the nonjudicial actors are not immediately subject to coercive sanctions from the courts.

Once again, *Marbury* is the likely origin of strong-form review, as evidenced by the Court's statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[38] Although *Marbury* did mention a category of cases in which the judgments of the political branches would be final[39]—a mention that developed into the political question doctrine—the existence of a category of constitutional questions outside the scope of judicial review will seem quite anomalous in a generally

35. I am not in a position to say that it is unique because I do not know enough about the variety of systems of judicial review in the world. One good maxim of comparative constitutional law is that any arrangement you can imagine occurs at least once somewhere in the world. However, the maxim provides no insight into the question of whether, or under what conditions, arrangements occur more than once.

36. This is particularly so when one adds to this description the fact that the U.S. Constitution is among the most difficult to amend.

37. For discussions of both strong- and weak-form systems of judicial review, see Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003) [hereinafter Tushnet, *New Forms*]; Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

38. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

39. *See id.* at 165-66.

strong-form system, and indeed the political question doctrine has not really flourished.[40]

Of course, saying that it is the judicial department's duty to say what the law is need not be taken to imply that no one else has such a duty[41] or that the Court's statements of the law control all others' decisions. In other words, *Marbury* did not have to become the origin of strong-form review. Indeed, whether the United States had a strong-form system was contested for quite a while, and, in my view, the history of the evolution of strong-form review remains to be written.[42] By 1893, the proposition that judicial review in the United States was strong-form review must have been an important conceptualization of review, for in that year James Bradley Thayer wrote his famous essay on judicial review,[43] whose arguments critical of judicial review make sense only on the assumption that he believed that judicial review *was* strong-form review.

We know that the United States adopted the strong-form system of judicial review no later than 1958 because the canonical statement of the assumptions underlying strong-form review came in *Cooper v. Aaron*,[44] the Little Rock school desegregation case decided in that year. According to the Supreme Court in that case, "[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . ."[45] It "follow[ed]," the Court said, that the Court's interpretations are "the supreme law of the land," and that "[e]very state legislator and executive and judicial officer is solemnly committed by oath" to support the

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40. For my analysis, see Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002). For a different view, see L. Michael Seidman, *The Secret Life of the Political Question Doctrine*, J. MARSHALL L. REV. (forthcoming 2004).

41. Further, to the extent that the *Marbury* Court justified judicial review by relying on the fact that judges take an oath to support the Constitution, *see Marbury*, 5 U.S. (1 Cranch) at 179-80, the fact that legislators and executive officials take a parallel oath justifies a departmentalist approach to constitutional interpretation.

42. One can impose on Barry Friedman's series of articles about the evolution of the so-called countermajoritarian difficulty an interpretive structure addressing the question of how the U.S. system became strong-form review, but doing so takes some work. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

43. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

44. 358 U.S. 1 (1958).

45. *Id.* at 18.

Constitution—meaning the Supreme Court's interpretations of the Constitution.[46]

Cooper was not controversial when it was decided, except, of course, among segregationists who were discredited because of their views on race. Over the next several generations, the idea that judicial review must be strong-form review became something akin to conventional wisdom. So, when Attorney General Edwin Meese reasserted a departmentalist view of constitutional interpretation in 1987,[47] a storm of protest erupted. The depth to which strong-form review has become embedded in constitutional law is illustrated as well by the lack of controversy over *City of Boerne v. Flores*,[48] in which the Court said that Section 5 of the Fourteenth Amendment did not give Congress the power to enact substantive laws resting on interpretations of the Constitution's rights-protecting provisions that differed from the Court's interpretations.[49] Similarly, in *Dickerson v. United States*,[50] which was even less controversial, Chief Justice Rehnquist rejected Congress's attempt to substitute its own judgment for that of the Court regarding what safeguards are necessary to secure a suspect's right against self-incrimination during custodial police interrogations.[51]

The actual decision in *Marbury* need not be taken as an example of strong-form review. The Court considered whether it was obliged to apply a statute that the Justices, exercising their own judgment about the Constitution's meaning, concluded improperly conferred authority on them to decide a substantive question.[52] Instead, *Marbury* could have been treated as what some have called a departmentalist decision in two possible senses. First, departmentalism might mean that each department has the final word on the constitutionality of legislation, executive actions, or judicial decrees affecting its own operation. So, for example, the courts have the last word on the constitutionality of statutes setting out their jurisdiction, while the President has the last word on the constitutionality of a judicial order directing the President to deliver a commission to someone whose nomination to a judicial position has been confirmed by the Senate. *Marbury* easily can be seen as departmentalist in this sense.

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46. *Id.*

47. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987) ("[C]onstitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.").

48. 521 U.S. 507 (1997).

49. *Id.* at 519, 535-36.

50. 530 U.S. 428 (2000).

51. *Id.* at 432. Congress's judgment was that the suspect's rights could be protected by a rule directing judges to exclude evidence produced by coercive interrogations; however, unlike the rule previously announced by the Court, the fact that the suspect had not been warned about his rights would be relevant to, but not dispositive of, the question of coercion. *Id.* at 435-36.

52. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 178 (1803).

Second, departmentalism might mean that *each* branch of government has the authority to exercise its independent judgment about *every* constitutional question. So, for example, the fact that Congress believed it had the power under the Constitution to give the Supreme Court original mandamus jurisdiction is an interesting datum for the Supreme Court to consider, but the Court need not take it as dispositive of its own evaluation of the constitutional question. And, similarly, the fact that the Supreme Court believed the Constitution did not authorize Congress to expand the Supreme Court's original jurisdiction is an interesting datum for Congress to consider when it takes up proposals that would do precisely that, but Congress need not take the Court's judgment to be dispositive on the issue.

The first version of departmentalism is straightforward and not difficult to implement. The second is more complicated, however, because it seems to set up a system in which the branches can be in repeated conflict over what the Constitution means. The possibility of continuing conflict is reduced once we realize that, on some questions, the *practical* possibility of conflict is quite small. Although Congress can pass as many laws expanding the Supreme Court's jurisdiction as it wants, the Supreme Court can simply continue to refuse to exercise the jurisdiction thrust upon it.[53] No crisis would arise as long as the people understood that we had a departmentalist constitutional system.

Furthermore, conflict, when and if it arose, might produce a deeper constitutionalism rather than crisis. It would demonstrate that constitutional law is indeed political law, and that conflicts over the proper interpretation of the Constitution have to be worked out through a political system that, although taking into account the Constitution's text, is not determined by the text or, worse, by authoritative interpretations of the text.

Early designers of modern systems of judicial review, including those who drafted the German Basic Law, seem to have assumed that judicial review needed to have a strong form.[54] In recent decades, though, alternatives to

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53. The scope of this point is broader than it might initially appear. It covers all cases in which Congress seeks to use the courts to implement laws the courts believe to be unconstitutional. If, for example, the courts believe that laws making it a criminal offense to burn a flag as a means of political protest are unconstitutional, there is not much Congress and the President can do about flag burning. They could throw the flag burners in jail without invoking legal processes, which, in turn, would lead to the invocation of the writ of habeas corpus as a way to challenge executive detentions unauthorized by law. Legislative and executive resistance to the writ would then raise questions about the scope of the clause barring the suspension of the privilege of the writ. *See* U.S. CONST. art. I, § 9, cl. 2. My own judgment is that, were the United States to reach this point, we would be in such serious constitutional trouble that deciding whether the Constitution was departmentalist in this second sense would be the least of our worries.

54. I should point out here that judges in a strong-form system can choose to defer to legislative judgments, as Thayer urged. *See* Thayer, *supra* note 43, at 135. Ordinarily, deference means deference to judgments about the wisdom of mere policy choices, but it could

strong-form judicial review have emerged. So, it might seem, the U.S. system of strong-form judicial review might become an outlier among systems of judicial review. In contrast to my view that the U.S. system is indeed an outlier with respect to structure and theory, I believe that the U.S. system will *not* become an outlier with respect to form because weak-form systems are likely to be transformed into strong-form systems of review. Weak-form systems are quite new, and the evidence about how they actually operate is quite thin. Therefore, much of what I say rests both on extrapolations from that evidence and on judgments about the dynamics of weak-form systems.

I explore three versions of weak-form review: (1) the Canadian notwithstanding clause, (2) interpretive mandates, and (3) democratic experimentalism.[55] Defenders of these forms of judicial review argue that these forms have the advantage over strong-form review of reconciling constitutionalism—which requires that the desires of democratic majorities at any one time yield to the requirements specified by constitution-makers at some earlier time—with democratic self-governance—which would seem to require that a democratic majority's desires be honored—in a way that preserves a larger and more appropriate role for self-governance than strong-form systems do.[56]

The Canadian notwithstanding clause, section 33 of the Canadian Charter of Rights and Freedoms, provides the simplest illustration of weak-form review. This clause provides that a legislature may make a statute effective for a period of no more than five years notwithstanding the statute's incompatibility with many of the Charter's fundamental rights provisions.[57] Functioning at its best, the notwithstanding mechanism would operate in the following way: The legislature enacts a statute, which is later challenged in the courts. If the courts hold that the statute is inconsistent with some Charter provision, the legislature then has the opportunity to reconsider the statute. At

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mean deference to legislative judgments about what a constitution means. The important point is that deference and the choice of issues on which the courts will defer are choices made by the judges, unconstrained by anything in the structure or theory of judicial review.

55. *See* sources cited *supra* note 37.

56. *See, e.g.*, KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001) (defending Canada's system in these terms). The usual objection to democratic self-government is that we cannot know that a government is democratic without some antecedent agreement on some substantive requirements for democracy, such as a broad franchise, the ability to disseminate one's political views without substantial governmental interference, and the like. The difficulty with this objection is that proponents of franchise restrictions, limitations on expression, and the like always contend—with reason—that the restrictions they propose are compatible with democracy properly understood. The real difficulty with democratic constitutionalism is determining how to resolve reasonable disagreements over these features of a system of governance. The most astute analysis of which I am aware is FRANK MICHELMAN, BRENNAN AND DEMOCRACY (1999).

57. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33(1), (3).

this point, the legislature can either (1) modify the statute to meet the courts' objections, in which case the courts again can review the legislation to see if the legislature has actually responded appropriately, or (2) re-enact the statute and protect it with a "notwithstanding" declaration.[58] The process, operating at its best, brings issues of fundamental rights to the attention of a legislature that might have overlooked them, offers a judicial assessment of the competing values implicated by the statute, and gives the legislature a chance to consider whether it agrees with the courts' assessment. Constitutionalism is respected because of the focused attention paid to fundamental rights (and because the courts' assessment might prevail), and self-governance is respected because the majority's considered judgment can become legally effective.

Interpretive mandates direct the courts to interpret legislation—sometimes all statutes, including those on the books at the time the interpretive mandate is enacted, and sometimes only post-enactment mandates—so as to ensure that the statutes, as interpreted, are consistent with the constitution. Typically, interpretive mandates do not require that courts ignore the evident meaning of a statute's terms, but they do require that courts subordinate their otherwise applicable modes of statutory interpretation to the interpretive mandate.[59]

The first Canadian Bill of Rights Act was an interpretive mandate,[60] as is the New Zealand Bill of Rights Act.[61] Although it is generally thought that the Canadian Bill of Rights Act has had little effect, some scholars believe that the New Zealand Act has been quite effective. The British Human Rights Act 1998, which took effect in 2000, contains an interpretive mandate that is supplemented by a power in the courts to declare legislation incompatible with

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58. My description omits many important details. For example, section 1 of the Charter states that the rights created elsewhere in the Charter may be limited when "demonstrably justified in a free and democratic society." *Id.* § 1. After a statute has been found incompatible with the Charter, a legislature might engage in a detailed fact-finding process and develop a record supporting a "demonstration" that the legislation is indeed justified in a free and democratic society. It could then re-enact the original statute unmodified, in hopes that the new record would persuade the courts that the rights violation was in fact justified, and, therefore, that the Charter was not violated. In addition, the Canadian Supreme Court has held that the notwithstanding clause can be invoked prospectively, before a court finds that the statute is inconsistent with the Charter. *See* Ford v. Quebec, [1988] 2 S.C.R. 712, 742-45. Prospective uses of the clause preempt dialogue. I originally thought that the *Ford* decision was unfortunate, but, upon reflection, I believe that the possibility of prospective invocation of section 33 is a valuable design feature of the system. For a brief discussion of this point, see Tushnet, *New Forms*, *supra* note 37, at 819 n.24.

59. For a discussion in the British context, see Geoffrey Marshall, *The United Kingdom Human Rights Act, 1988*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 107, 112-14 (Vicki C. Jackson & Mark Tushnet eds., 2002).

60. Canadian Bill of Rights, ch. 44, § 2, 1960 S.C. 519 (Can.), *reprinted in* R.S.C., app. III (1985).

61. New Zealand Bill of Rights Act, 1990, § 6 (N.Z.).

the European Convention on Human Rights if that legislation cannot be interpreted so as to make it compatible.[62] In the event that a declaration of incompatibility is made, the minister responsible for the legislation has the power to introduce amendatory legislation in the ordinary course, to place such legislation on a fast track for parliamentary approval, or even, in some circumstances, to amend the legislation directly subject to subsequent parliamentary approval or disapproval.

Democratic experimentalist judicial review is a new form described by Charles Sabel and his colleagues at Columbia Law School.[63] They use recent school finance decisions in the United States to illustrate this form of judicial review.[64] I have suggested that the South African Constitutional Court might be moving in the direction of utilizing democratic experimentalist review in cases involving social welfare rights.[65]

Democratic experimentalist review begins with a challenge to some practice as inconsistent with a constitutional provision that is stated at a rather abstract level.[66] The case for democratic experimentalism is strongest when the challenged practice is fairly widespread. The democratic experimentalist court acknowledges that the provision is open to a range of interpretations, but concludes that the questioned practice lies outside any reasonable interpretation. Rather than coming up with its own interpretation, though, the democratic experimentalist court directs everyone implicated in the challenged practice to come up with their own interpretations and, importantly, with alternative methods of implementing the provision pursuant to those varying interpretations.[67] The democratic experimentalist court also points out that each decision-maker ought to examine what the others do, both in interpreting the constitution and implementing their interpretations. These examinations

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62. Human Rights Act, 1998, c.42, §§ 3-4 (Eng.).

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

64. *See, e.g.*, James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

65. Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 U. CHI. J. INT'L L. 435, 448-49 (2002).

66. For a recent description of experimentalist practices and their stages, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

67. Sabel and his colleagues have focused on cases in which the courts, after holding that a constitutional provision, properly interpreted, identifies some goals that legislation must achieve, have allowed the relevant decision-makers to devise alternative methods for achieving those goals. In principle, though, democratic experimentalism can be applied to constitutional interpretation itself and, in my view, is most interesting when it is. *See, e.g.*, Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 972-73 (2003) (referring to the "hard cases" in which democratic experimentalism is used in this manner).

allow decision-makers to learn from each other. At the next stage, the democratic experimentalist court examines the varying interpretations and implementations that have been developed and identifies those that have worked least well. The court directs the decision-makers who chose bad interpretations to abandon them and to choose some other interpretation from the ones developed by other decision-makers. In addition, the democratic experimentalist court may modify its prior understanding of what the constitution means upon discovering that decision-makers who appear to be doing the best job have acted on constitutional understandings that differ from the one first articulated by the court. If everything goes well, practices will improve continuously as decision-makers learn from each other which interpretations are better, in their own view, and as the democratic experimentalist court learns from the decision-makers which interpretations are better, in its view.

Each version of weak-form judicial review seems to hold out the promise of augmenting democratic self-governance with a form of judicial review that promotes reasoned consideration of fundamental rights without imposing on democratic majorities the judges' view of what the constitution means. I have become skeptical about the claims made on behalf of weak-form systems of review, largely because such systems seem to me to degenerate into strong-form systems. I am skeptical because a combination of experience and analysis of incentives suggests that the relevant decision-makers—both legislators and judges—may drift toward transforming weak-form review into strong-form review.[68]

We now have two decades of experience with Canada's notwithstanding clause. It has been invoked in only a few instances, and the most important ones have been in political settings that brought the notwithstanding mechanism into some disrepute.[69] In probably the most prominent *non*-use of the notwithstanding clause, the Canadian government accepted a Supreme Court ruling sharply limiting the government's power to regulate tobacco advertising.[70] Apparently, the government briefly considered using the

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68. The arguments in the succeeding paragraphs are developed in a somewhat different form in Tushnet, *New Forms*, *supra* note 37.

69. After one minor use of the clause to forestall an anticipated holding that the Charter protected the rights of public employees to strike (a mistaken anticipation), Quebec made the first major use of the notwithstanding clause in order to insulate all of its statutes from Charter challenge. In *Ford v. Quebec*, the Canadian Supreme Court upheld that use of the clause, but the Court nevertheless managed to find a basis for invalidating the most controversial aspects of Quebec's law regulating the use of English on commercial signs. *See* [1988] 2 S.C.R. 712, 779-80. More recently, the government of Alberta used the notwithstanding clause to define marriage as an institution involving only heterosexuals, correctly anticipating judicial rulings finding that a bar on gay marriage violates the Charter's equality provisions. *See* Marriage Act, R.S.A., ch. M-5, § 2 (2000) (Can.).

70. RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199.

notwithstanding clause but, in the end, decided to modify its legislation to conform to the Court's requirements.[71]

In addition, Janet Hiebert's study of how government bureaucrats have responded to the Canadian Supreme Court suggests some degree of anticipatory over-deference.[72] Implicit in this finding is a recognition that the drafters of legislation in Canada are generally long-term civil servants. Their bureaucratic routines require that they submit proposed legislation to a unit charged with determining whether the draft is consistent with the Charter.[73] That unit and the other civil servants could, of course, evaluate potential Charter challenges by invoking their own understandings of the Charter. Instead, and reasonably, they seek to insulate the legislation from later invalidation by what Canadians have come to call "Charter proofing" the statute.[74] Charter proofing, then, is an expression of the civil servants' risk aversion. The problem Hiebert identifies is that the civil servants may overcorrect—that is, they may submit legislative proposals that fall well within the constraints that the Supreme Court would enforce, rather than proposals that press precisely up to the limits that the drafters think the Court would enforce.[75] If so, Charter proofing successfully forestalls later challenges, but at the cost, in the first instance, of whatever policy gains might attend more aggressive statutory language and, in the second instance, of giving the Supreme Court no chance to reflect on the legislature's views about what the Charter should be taken to mean.

Of course, the mere fact that Canadian governments have not invoked the notwithstanding clause might show only that governments generally have agreed with the Supreme Court. And even if they disagreed, the point of the notwithstanding clause was to make it politically costly for a government to enact its view of what the Charter allows when that view differs from the one held by the Supreme Court. The non-use of the clause, then, might reflect the governments' judgment that the political costs of disagreeing with the Supreme Court exceed the benefits of enacting statutes expressing that express the governments' view of the Charter's meaning. Note, however, that the political costs occur because the Canadian public must accept the Court's interpretation of the Charter, *whatever it is*, over the governments' interpretation. If the fear of political costs is part of the reason for the non-use of the notwithstanding clause, it seems to weaken the case that the clause fosters a valuable dialogue on what the Charter means. Furthermore, the existence of political costs suggests that the Canadian public has come to treat

71. ROACH, *supra* note 56, at 185.
72. JANET L. HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? (2002).
73. *See id.* at 54.
74. *Id.* at 54-55.
75. *Id.* at 55.

Canada's version of judicial review as a reasonably strong-form one despite the notwithstanding clause.[76]

The interpretive mandate gives courts the weakest role of all in a system that can still be called one with judicial review. Stated most generally, an interpretive mandate may be transformed into strong-form review as courts invoke it to interpret a statute "creatively" so as to avoid the conclusion that the legislature wanted to violate some fundamental right. Although legislatures might respond, their responses would be subject to further interpretation. Consider the situation after a court says that the language used by the legislature would, on ordinary interpretive principles, violate a fundamental right were it not for the interpretive mandate, which allows the language to be interpreted in a way that does not violate the right. Suppose the legislature disagrees with the court's conclusion that the language, without the interpretive mandate, *would* violate the fundamental right. What can it do? The legislature's only real option is to re-enact the statute, saying, in effect, that the legislature really meant what it said the first time. Perhaps the court would respond by reconsidering its own interpretation of the underlying right in light of the re-enacted statute, but it is more likely that the court would restate its own interpretation—again using the interpretive mandate.[77] Given this prospect, it is even more likely that the legislature would respond to the court's initial decision by modifying the legislation to fit the court's interpretation of fundamental rights.

Experience with democratic experimentalist review is much thinner, and, accordingly, my skepticism is less well-grounded and weaker. The risks with democratic experimentalist review are that it will degenerate into no review at all or that it will escalate into strong-form review. The risks arise because the higher courts might become frustrated with what they see as resistance by lower-level decision-makers to the higher courts' push toward experimentation, comparison, and adoption of best practices. Although directed to experiment with and compare various nonviolative practices, the lower-level decision-makers might make only the smallest possible modifications of what they had done before. This course is particularly attractive to the extent that the higher courts' directives do not change the

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76. *See* Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 670 (2003).

77. The express interpretive mandate in the British Human Rights Act raises a specific problem. *See supra* note 62 and accompanying test. Suppose the courts use the mandate to do something Parliament rejects, and Parliament enacts a statute making it clear that, in fact, it wanted to do what the courts said it did not want to do. The courts would then declare the legislation incompatible with the European Declaration of Human Rights. Undoubtedly, the losing litigant would have an extremely strong claim before the European Court of Human Rights (ECHR), in large measure because the British courts' declaration would have made it quite difficult for the British government to get the ECHR to apply its "margin of appreciation" doctrine to the statute. For a discussion of this doctrine, see Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 482-84 (2003).

political incentives the lower-level decision-makers face, for example, from the constituents who elect them.[78]

Frustration could lead the experimentalist court to declare victory and go home. That is, the court could abandon its own understanding of what the constitution means and adopt the understanding proffered by recalcitrant lower-level decision-makers, rather than moving slightly away from its prior understanding in light of the knowledge gained by the experience.[79] Alternatively, the frustrated experimentalist court could escalate the demands it makes of the lower-level decision-makers. Instead of giving them broad discretion to experiment, the court could take their resistance as a reason for confining their discretion narrowly.

South Africa's experience in enforcing social welfare rights illustrates the problem, although I emphasize that the decisions I discuss do not truly exemplify—except in an extended sense—the iterative process of democratic experimentalist adjudication. The story begins with the widely noted case of *Republic of South Africa v. Grootboom*.[80] There, South Africa's Constitutional Court confronted claims by homeless people that the government's policy failed to comply with the constitution's requirement that people were to be guaranteed decent shelter.[81] The plaintiffs' plight was extraordinarily desperate, and it had been exacerbated by government policies.[82] The Constitutional Court held that the government was under a duty to the

78. Liebman and Sabel, *supra* note 64, are alert to this problem and describe experimentalist processes working their way up from the bottom in ways that do alter the lower-level decision-makers' immediate political incentives.

79. Two examples come to mind. The first example involves New Jersey's tortured experience with a judicial attempt to induce suburbs to accept some low-income housing. Although the judiciary had a small degree of success, resistance was large, and—as I interpret the story—the New Jersey Supreme Court ultimately concluded that it had done all it could do and declared that the constitutional requirements it had articulated were in fact satisfied. *See* Tushnet, *New Forms*, *supra* note 37, at 828. In the second example, the Canadian Parliament responded to a Supreme Court decision regulating the admissibility of evidence in sexual assault cases with a statute essentially enacting the position taken by the Court's dissenters. ROACH, *supra* note 56, at 277-78. The Supreme Court then deferred to Parliament and held that the statute was consistent with the Charter's requirements. *Id.* at 279. Some commentators believe that the Court acquiesced in the face of insurmountable political opposition. *See, e.g.*, *id.* at 279-81. *But see* HIEBERT, *supra* note 72, at 110-16 (noting that the composition of the Court had changed in the intervening time and that the Court acknowledged the "need for inter-institutional respect"). The Court itself said that it had learned from Parliament's response, which might allow us to treat the decision upholding the statute as an example of the second round in a democratic experimentalist process.

80. 2000 (11) BCLR 1169 (CC), *available at* 2000 SACLR LEXIS 126. For further discussions regarding the significance of the *Grootboom* decision, see CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 224-37 (2001); Tushnet, *supra* note 65, at 448-50.

81. *Grootboom*, (11) BCLR at para. 13.

82. *See id.* at paras. 6-11.

plaintiffs, but that the duty did not extend to the point of assuring that the plaintiffs be provided decent housing.[83] Rather, the Court held that the government had to develop a plan for providing housing to the poor that specifically took into account the conditions of the desperately needy.[84] Although the plan might not actually address the specific problems of the plaintiffs before the Court, the constitutional requirement nevertheless would be satisfied so long as the government incorporated the class's needs into its overall housing program. The experimentalist aspect of this decision lies in the possibility of subsequent review of the plan developed by the government. In that review, the Constitutional Court could assess whether the government's plans reflect a reasonable judgment about ways of satisfying the constitution's social welfare requirements.

The South African Constitutional Court's next confrontation with constitutional social welfare rights led to a substantially more directive—and less experimentalist—oriented outcome. As the Court explained in *Minister of Health v. Treatment Action Campaign*,[85] South Africa is experiencing an HIV/AIDS epidemic.[86] Nevirapine is a drug that is quite effective in stopping transmission of HIV from mothers to their newborn children, particularly when coupled with counseling from nurses about breastfeeding and its alternatives.[87] Nevirapine's manufacturer agreed to supply a quantity of the drug sufficient for all pregnant women with HIV/AIDS in South Africa at essentially no cost.[88] The government set up several sites for the distribution of Nevirapine but did not make it available to all mothers with HIV/AIDS.[89] The government took the position that, while the drug could be made available everywhere, the accompanying counseling could not.[90] The government argued that the drug's long-term effects were unknown and that its program of restricted distribution allowed it to conduct well-designed research on those effects and other related questions.[91]

The Constitutional Court held that the government had to make the drug available at every public hospital.[92] The Court rejected the government's argument that the limited, yet essential, availability of counseling services justified its restrictive drug administration policy by noting that the government could train nurses to give the necessary counseling at relatively

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83. *See id.* at paras. 93-94 (noting that although the "Constitution obliges the state . . . . to provide access to housing," it does not require the state "to go beyond available resources or to realise these rights immediately").

84. *Id.* at para. 95.

85. 2002 (10) BCLR 1033 (CC), *available at* 2002 SACLR LEXIS 26.

86. *Id.* at para. 1.

87. *See id.* at paras. 2 n.3, 57-58.

88. *Id.* at para. 19.

89. *Id.* at paras. 10-11.

90. *Id.* at paras. 48-49.

91. *Id.* at paras. 51-55.

92. *Id.* at para. 135.

little cost.[93] From my reading of the opinion, the Court's only response to the argument regarding the need for research was that the constitutional guarantee of access to medical care was more important. In the decision's background, though, was the fact of recalcitrance: South African President Thabo Mbeki was a notorious skeptic about the claim that the specific virus which Nevirapine targeted was in fact the cause of AIDS. That is, the Constitutional Court may have viewed the government's litigating position as a bad-faith one—a subterfuge for simple disagreement with the science on which the plaintiffs relied. In my terms, then, the Court may have viewed the government as recalcitrant. And, in the face of such recalcitrance, the Court abjured the course it had taken in *Grootboom* of asking only for a plan that it could then review and, instead, directly imposed a significant regulatory requirement.

As I have indicated, experience with democratic experimentalist forms of review is thin, and I have extrapolated from cases that do not really involve experimentalist review to suggest why it might not be stable. In contrast, the reasons underlying the examples I have given—particularly the dynamics of judicial responses to frustrated expectations—seem, to me, more widely applicable. Still, it probably is worth continuing to experiment with experimentalist forms of review.

My discussion of the Canadian experience and the likely outcomes under interpretive mandates raises an important final question: Why should a person committed to democratic self-governance through constitutionalism be at all concerned if the people themselves accept—or at least acquiesce in—strong-form judicial review? Perhaps one might be concerned if it seemed that the people were acquiescing in a form of review that they did not fully understand. So, for example, one might be troubled if the people believed that the Canadian notwithstanding clause actually did promote dialogue between the courts and Parliament when, in fact, the courts' position routinely prevailed.

The possibility that a fully-informed people acquiesces in strong-form review is more interesting, I think.[94] To illustrate, consider a survey in which one could compare the judgments of the people as represented in the enacting legislature—the people at time-one—with the judgments of the people after the courts have spoken—the people at time-two. A democrat should not be bothered if those judgments differ, wholly or in part, because of the courts' decision. In this version of events, the courts' decisions inform the people's judgment about what the constitution means.

Suppose instead that the people at time-two agree with the people at time-one and disagree with the courts. At this point, it is worth turning back from forms of judicial review to the various structures of judicial review. All

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93. *Id.* at para. 83.

94. For a theoretical discussion of whether strong-form review is compatible with the notion of constitutional democracy, see Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 L. & PHIL. 353 (2003).

structures allow for some degree of political control of the courts. Some structural arrangements make it easier than others for the people at time-two to prevail, even if the official form of review is strong-form. Consider a structure that allows political control to be exercised quite rapidly—for example, through a system that allows constitutional amendments rather easily. The difference between strong-form and weak-form review nearly disappears in such a system. The courts can authoritatively declare that their decisions are final, but the ready amendment procedure means that the people at time-two can immediately implement a constitutional interpretation they prefer to the courts' interpretation.

The acquiescence of a democratic people in strong-form review raises a final paradox: Perhaps systems of judicial review can be strong-form only if, in theory, they are weak-form. The idea is that we have to distinguish between two kinds of judgments by the people at time-two. Those people might *accept* what the courts proffer as the correct interpretation of the constitution. Alternatively, they might *not rebel against* the courts' interpretation. But, the only reliable way to determine whether the people have accepted the courts' interpretation is to recognize that the people had a chance to reject it and refrained from doing so. Only weak-form systems offer that opportunity. Therefore, a democrat might find weak-form systems of judicial review easier to swallow than strong-form ones even if, in practice, the courts' exercise of the power of judicial review in a strong-form system was *never* rejected by the people at time-two. In contrast, although the democrat confronted with a strong-form system could be comfortable with decisions by the people at time-two to accept the courts' interpretations, the democrat could never be assured that the behavior she observed reflected such acceptance rather than resigned acquiescence.[95]

V. CONCLUSION

The quick survey I have given of modern forms of judicial review looks in two directions. From one perspective, the wide range of structures and theories of judicial review indicates that *Marbury*, taken as a reference to U.S.-style judicial review, actually has not been emulated widely. Nations adopting systems of judicial review typically believe that judicial review has a larger political content than *Marbury*'s theory of judicial review would have it. And, probably as a result, these nations have structured judicial review to ensure more regular and overt political supervision of constitutional courts that are,

95. James Stoner makes the intriguing suggestion, in correspondence with me, that the people of the United States have acquiesced in strong-form review *because* the Court has adhered to reasonably strict "case or controversy" requirements in the areas of foreign policy and military affairs, which—from the perspective of a certain kind of political theorist—are the only subjects truly important to preserving a people's ability to govern itself.

nonetheless, reasonably independent of the political branches in their day-to-day operations.

From the other perspective, however, if a reference to *Marbury* is taken as a reference to strong-form judicial review, modern forms of review may only seemingly differ from the U.S. system. The official accounts of interpretive mandates, the possibility of a politically easy override of supreme court decisions, and the like may distort the reality—at least in the long run. I suspect that as experience with judicial review accumulates around the world, we are likely to find that, in this sense, *Marbury* has indeed been emulated widely.