

## RIGHTS AND THE RULE OF LAW IN THIRD WAY CONSTITUTIONALISM

**THE NEW COMMONWEALTH MODEL OF  
CONSTITUTIONALISM.** Stephen Gardbaum.<sup>1</sup>  
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In an influential article in 2001,<sup>3</sup> Professor Stephen Gardbaum drew attention to a family resemblance between Commonwealth legal systems which offered some form of constitutional rights review, but within a framework that permitted the supremacy of the legislature. For example, Section 33 of the Canadian Charter of Rights and Freedoms permits legislative override of the Charter by the federal or any provincial parliament, and the United Kingdom's Human Rights Act 1998 empowers judges to declare acts of the UK Parliament incompatible with the European Convention on Human Rights, which leaves the impugned law on the books (sometimes for years). This combination of judicial review with continuing legislative supremacy, along with parliamentary and executive consideration of rights-compliance before legislation is enacted, has been noticed by others as well. Mark Tushnet classified such

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3. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

systems as having “weak form review,”<sup>4</sup> and Janet Hiebert has dubbed them the “parliamentary model.”<sup>5</sup>

In this book, Garbbaum deepens his analysis of these systems by identifying what he regards as the main characteristics of this model, and presenting an elaborate normative defense of them. He argues that the “New Commonwealth Model” found in Canada, New Zealand, the UK, and Australia represents a normatively compelling “third way” between the strong form, or “court-centric” form of constitutional rights review familiar in the United States and Germany, and the model of parliamentary sovereignty, which, in its classical British form, forbids judges to question the validity of any act of Parliament. Garbbaum’s book should be of interest to American constitutional lawyers, not only because the “counter-majoritarian difficulty” is a perennial concern, and Garbbaum engages to some extent with Bickel, Ely, Tushnet, Ackerman and other leading American constitutionalists. It is also because he defends a model of judicial review that is a radical departure from the American brand.

In this review essay, I illustrate how Garbbaum has illuminated an important phenomenon in comparative constitutional law. He has shown with unparalleled rigour and insight how the various interlocking features of the Commonwealth model of constitutional rights protection work, and has put forth a novel argument about how they ought to work. However, I will also argue that his exercise in theory building is problematic from methodological and substantive standpoints. In his quest to build an “internal theory of the New Model,” Garbbaum’s approach equivocates between describing the jurisdictions and prescribing how they should operate. His methodology of finding a third way between two schools of thought in British constitutional theory is marred by the failure of the distinction to be stable and convincing, and by the doomed attempt to blend irreconcilable positions about the value of judicial review in a rights-based democracy.

As to substance, my key gripe is with the crucial proposal that legislatures should consider, but ultimately disregard, judicial declarations that statutes violate rights if the legislature reasonably disagrees with the judgment. This idea, I argue, is

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4. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2009); *see also* Mark Tushnet, *Alternative Forms of Judicial Review* 101 MICH. L. REV. 2781 (2003).

5. Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?* 82 TEXAS L. REV. 1963 (2004).

incompatible with Gardbaum's own position about legislative failures to protect rights, it holds out a Panglossian hope for legislative cooperation, and it fails to acknowledge the very substantial rule of law problems we would have in a society where judicial decisions were treated like legal advice.

## I. AN OUTLINE OF THE BOOK

### A. THE THEORY OF THE NEW COMMONWEALTH MODEL

Part I sets out the "theory" of the New Commonwealth Model, whereas Part II sets out the "practice," namely, the way the model operates in some key jurisdictions that recently adopted bills of rights, including Canada (1982), New Zealand (1990), the United Kingdom (1998) and some Australian states (2004, 2006). Part I is an outline of the essential features of the model as Gardbaum defines it, a normative argument in defense of these features, and an exploration of how an ideal model ought to work.

So what are these features? The model essentially has four of them (pp. 25ff, *see also* 37–46, 77–94). The first characteristic is a *codified bill of constitutional rights*. This bill can be in a written constitution or in statutory form provided they have "some form of higher law status" (pp. 35–36). For example, while the Canadian Charter of Rights and Freedoms is a part of the entrenched Canadian constitution, the UK Human Rights Act 1998 (HRA), New Zealand Bill of Rights Act 1990 (NZBORA), and the Victorian Charter are all legislation passed through ordinary channels and (unlike the entrenched Canadian Charter) repealable under the ordinary legislative process. Even so, the perception in the UK is that the HRA is a "constitutional statute,"<sup>6</sup> and one can suppose the same for the NZBORA. This means that these statutes have a more hallowed status than ordinary law, making them politically harder to amend or repeal, and possibly giving them special legal status that would allow them to prevail over conflicting statutes under certain circumstances.

The second feature is that there is *pre-enactment political rights review*. The HRA imposes a duty on the UK Minister introducing a bill in Parliament to issue a formal "statement" to

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6. On the judicial recognition of this status, see *R (HS2 Action Alliance Ltd.) v Sec'y of State for Transport* [2014] U.K.S.C. 3, esp. [207]–[209].

Parliament that a bill complies or does not comply with the European Convention on Human Rights. The Joint Committee on Human Rights (a select committee of both Houses of Parliament—(JCHR)), furthermore, must report to Parliament on the human rights implications of any bill. Gardbaum regards the JCHR as truly exemplary of pre-enactment political rights review, and this reviewer wholeheartedly agrees. The Victorian Charter, and NZBORA, provide similar mechanisms. The Canadian Charter is not accompanied by any legislatively formalized mechanism as such, but the administrative practice is to inquire thoroughly into the Charter compatibility of proposed legislation, sometimes with a view to “charter proofing,”<sup>7</sup> at others with a good faith intention of compliance. These are all examples of pre-enactment political rights review, though they vary in quality. Gardbaum considers the Canadian approach to be weakest because the pre-enactment review is by the executive rather than the legislature<sup>8</sup> (pp. 122–23). For this type of pre-enactment *political* review to operate properly, he argues, it should be neither exclusively an executive nor legislative process, but rather both. And it should not be about averting legal risk, but rather be proactive and normatively wide-ranging, and thus free from the fetters that bind (or at least preoccupy) judges.

The third essential feature is *judicial rights review*. Gardbaum here envisages “constitutional review” (p. 83), and beyond the obvious features one would expect, his theory embodies a curious departure from standard models. While on the one hand, he is opposed to interpretive judicial supremacy, on the other, he argues that judges should not defer to legislatures on account of their democratic legitimacy. “Judicial rights review should be respectful but unapologetic. . . . [The passive virtues] would be structurally misplaced and counterproductive in a system of penultimate judicial review” (p. 85). So judges should give their judgments on the merits and not drift towards “reasonableness review” or any other representation-reinforcing standard. Why would they, if the legislature can have the final word? Gardbaum maintains that the court’s role is nonetheless to

inform the legislature and alert the citizenry of their rights concerns from a legal perspective posed by a piece of legislation. Here the virtues of skilled professionalism and judicial independence from electoral accountability within a

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7. Michael Plaxton, *Charter Proofing in Canada*, 8 Y.B. N.Z. JURIS. 217 (2005).

8. He contrasts this with the UK’s executive and legislative model (pp. 193–94).

majoritarian political system, especially a parliamentary one, play their role – not by conclusively or automatically rendering the ultimate decision, but by bringing a perspective to bear on it that may otherwise not be brought (p. 84).

This position of recommending a combination of “unapologetic” judicial review on the understanding that the legislature can merely disregard the declaration has also been advanced by Francesca Klug and Danny Nicol in the United Kingdom,<sup>9</sup> the latter being more skeptical of courts than Klug or Gardbaum. Here the skeptical reader will raise an eyebrow. If the courts are unapologetic but the legislature compliant, the recommendation might make things worse. And further, there is no discussion of epistemic grounds for judicial restraint, despite this being well tilled soil in the literature on the subject in both the U.S. and the Commonwealth.

The fourth, “critical, and distinctive, hybrid feature of the new model” is the *formal legal power of legislative reconsideration* (pp. 45, 87–94). The four legal systems he discusses all have formal ongoing legislative supremacy over (most) rights questions. Yet he argues further however that this formal power must be exercised from time to time if the normative arguments supporting the New Commonwealth Model are accepted. In his model, in other words, legislatures would have the last word, as a matter of both law *and practice*. None of the four systems actually respect the criteria/practice of legislative reconsideration as he sets it out. In brief, the UK and Canadian parliaments tend to accept or “comply” with court judgments, and the New Zealand and Australian ones have a paucity of caselaw and disinterested legislatures.

Although Gardbaum argues in favor of legislative reconsideration, he regards the development of “norms of legitimate use” to be an urgent task, and this is an especially helpful part of the book. The first is procedural: “the legislature must engage in serious and principled reconsideration of the judicial decision on the rights issue”<sup>10</sup> (p. 89). The second is substantive: if after careful engagement, the legislature decides it reasonably disagrees with the judgment, it should substitute its own judgment and thus affirmatively nullify or disregard the

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9. Francesca Klug, *Judicial deference under the Human Rights Act 1998*, 2 EUR. HUM. RTS. L. REV. 125, 131 (2003); Danny Nicol, *Law and Politics after the Human Rights Act*, 4 PUB. L. 722, 744 (2006).

10. He adds “respectful” as well (p. 89).

judgment. As he says in the discussion of Canada, “[t]he new model does not depend on courts exercising their power of the final word to defer to reasonable legislative disagreements, but on legislatures exercising theirs” (p. 123).

Part I of the book situates this model within some of the comparative constitutional law and constitutional theory literature, and presents an affirmative argument in favor of it. Gardbaum argues that it represents a “hybrid model” between legislative and judicial supremacy. In a succinct passage encapsulating the core idea of the system, he argues that

[t]he new model creates an institutional alternative to the traditional form of political constitutionalism and parliamentary sovereignty because it creates a different division between legislative and judicial power—granting greater power and responsibility to the courts for the protection of rights and a greater role for legal argument as a practical constraint on political decision-making (p. 44).

Whatever critical commentary that follows below, I think this basic insight is correct and highly valuable, and it does apply to various degrees in the four jurisdictions he discusses, whether or not they respect the normative prescriptions he elaborates in Part I of the book.

#### B. THE PRACTICE OF THE NEW COMMONWEALTH MODEL

Part II of the book is a valuable one hundred and twenty-page exploration of many of the features of the four interrelated legal systems and how constitutional review fits within them. In each chapter, the basic features of the jurisdiction are outlined; it is explained how it operates in practice; and the jurisdiction’s law and practice is assessed for its fit with the New Commonwealth Model outlined in the first part of the book.

The discussion of Canada is quite interesting, and Gardbaum is notably critical of the concept of “dialogue” between courts and legislatures, as well as of the arguments of Hogg, Thornton, Roach and others, who argue that the existence of a general limitations provision in Section 1 of the Charter or the remedy of suspending the effect of a declaration of invalidity do much work in curtailing judicial supremacy (pp. 118–20). I tend to agree with his arguments on this point. Instead, Gardbaum finds the power of legislative override in Section 33 to be the truly distinctive “new model feature” (p. 115, see generally pp. 114–21), though he also finds it in the Minister of Justice’s duty to report to the Canadian

parliament on the compliance of bills with the Charter of Rights. He criticizes both features for being ineffective, however: the reporting duty is legalistic and to date has never reported a bill as non-compliant, and the Section 33 override power has unfortunately “largely fallen into non-use”<sup>11</sup> (p. 110). The New Commonwealth Model would strongly urge that it be used more often.

New Zealand is the jurisdiction which comes closest to Gardbaum’s ideal theory, so it can be explored in a bit more depth. The New Zealand Bill of Rights Act 1990 (NZBORA) is a statutory bill of rights, as are the counter-parts in the UK and Australia. The NZBORA allows courts to quash executive action that violates any of the protected rights, but expressly states that courts have no power to disapply legislation and, uniquely in this family, provides for no expressly stated judicial power to declare statutes to be inconsistent with the bill of rights. The method of interpretation in NZBORA cases involving legislative infringements of rights is to (1) find the right to have been limited unreasonably under section 5; (2) seek to render a rights-consistent statutory interpretation (similar to an “as applied” challenge in U.S. constitutional law)<sup>12</sup> under Section 6; and, failing success here, (3) declare under Section 4 that the court is obliged to apply the statute and dismiss the claim. The effect of this process is that judges in effect find that statutes violate the NZBORA but not by way of official declaration. The result is that the claimant still loses the case, and Section 4 cases have less political salience.

Gardbaum assesses the impact of the NZBORA on the legislative process along two lines. The first is pre-enactment legislative rights review. In sharp contrast with Canada, the Attorney General in New Zealand has specified 59 reports of inconsistency since 1990, 28 on government bills and 31 on non-government bills (a crucial distinction in the Westminster system – the latter not normally expected to pass, and the Attorney General is a Minister who sits in the Cabinet). Of the first 22 government bills with such reports, 19 became law without relevant amendments, and the non-government bills “have not

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11. The best study I have seen on the use and origins of Section 33 is David Johansen and Philip Rosen, *The Notwithstanding Clause of the Canadian Charter*, PARLIAMENTARY BACKGROUND PAPER (Law and Government Division, Parliamentary Information and Research Service, Pub. No. BP-194-E, 2008; rev. 2012).

12. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) for a recent judicial discussion.

fares so well” as the government bills<sup>13</sup> (pp. 134–35). The second line of assessment is the impact of judicial findings (not declarations) of inconsistency on legislative behavior. Gardbaum could find four examples of where the courts had made findings that were subsequently considered by Parliament. In one case (same sex marriage), it is unclear whether the judgment was the prime mover; in another (compensation rights for prisoners), the legislative response was part nullification; and in a further (availability of a public law damages for executive breaches of the NZBORA), the legislature let the case stand rather than affirm or nullify it. On my reading, it was only one of the four cases – where the Court of Appeal in *R v Poumako*<sup>14</sup> “invited Parliament to reconsider” its application of retrospective penalty provisions – that there was any robust legislative response that would not otherwise have arisen. Gardbaum’s defense of the record of impact on the legislative process is that it is “sufficiently mixed to belie the claim of irrelevance” (p. 149), though he also accepts it is “fairly minimal.” In an apparent act of alchemy, he even interprets the *Hansen* episode (pp. 142–143), where Parliament not only disregarded a judicial finding of inconsistency but extended the reach of the impugned reverse-onus measure, as an example that illustrates what his model commends (p. 150).

The discussion of the United Kingdom focuses on debates in the UK about whether the Human Rights Act 1998 has made any difference (i.e., whether it was “futile”), and about the potent form of rights-consistent statutory interpretation under Section 3, as well as the impact of the Joint Committee on Human Rights on the legislative process. He is keen to establish that the UK system is “distinctive” from strong forms of judicial review, responding to local commentators who he regards as arguing that it is not strongly dissimilar. There are some methodological problems in this chapter concerning the collection of empirical data. On the number of section 3 findings that are tantamount to disappling statutes, Gardbaum derives the figure of “roughly twenty uses” from a speculative claim by a judge that it had not been used in more than a dozen cases in its first five years, and by a constitutional law and theory scholar, Aileen Kavanagh, that it had been used rarely (p. 171). This is at odds with the general rigor elsewhere in the book, but nevertheless symptomatic of a weakness regarding the treatment of empirical evidence (p. 171 n.

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13. See also Andrew Geddis, *The Comparative Irrelevance of the NZBORA to Legislative Practice*, 23 N.Z. L. REV. 465 (2009).

14. *R v Poumako*, [2000] 2 NZLR 695 (CA).



63).<sup>15</sup> What is more engaging in Gardbaum's discussion is his clear desire to see Parliament consider and disregard more judicial declarations of incompatibility. He argues that if Parliament continues to be "overly reluctant" to disagree with declarations of incompatibility, the wording of the Human Rights Act should be amended to clarify that Parliament is the supreme interpreter, for example by adopting the wording used in the Victorian Charter (pp. 201–02).

The experience in Australia is recent, and subject to a short but enlightening chapter. While the federal government in Australia rejected a national human rights act in 2010, the Australian Capital Territory adopted one in 2004 and the State of Victoria another in 2006. The ACT Charter allows courts to issue declarations of incompatibility, while the Victorian Charter opts for the language of "declarations of inconsistency." Both are functionally analogous to the UK remedy discussed above, though Gardbaum appears to think the text makes a principled difference. Whatever the principles, the practical difference is that courts have taken a timid approach – only one declaration has been issued between both jurisdictions since the adoption of the Charters, and it was overturned on appeal to the High Court of Australia. (p. 215) As Gardbaum readily acknowledges, the difficult issue for his theory is whether these charters, "as with New Zealand," operate sufficiently distinctly from a system of pure legislative supremacy to fit with his model (pp. 220–21).

### C. THE BOOK'S MANY MERITS

Gardbaum writes with admirable economy and clarity, and the book has a number of other outstanding merits. The first is the author's exceptional sensitivity to developments and literature in each jurisdiction he discusses. Gardbaum's understanding of the institutional characteristics of each key system, of the output of their courts and political actors, of the wealth of secondary literature, and of the interrelations between them, is unsurpassed. It is the culmination of over a decade of careful research into the

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15. The problem is compounded later in the chapter when he compares the figures for all declarations of incompatibility in the UK with declarations of unconstitutionality issued by the Canadian Supreme Court alone. My own calculations, found in Jeff King, *Parliament's Role Following Declarations of Incompatibility under the Human Rights Act*, in *PARLIAMENTS AND HUMAN RIGHTS: ADDRESSING THE DEMOCRATIC DEFICIT* (Hayley Hooper et al. eds., forthcoming from Hart Publishing), found the Canadian courts to issue at least three times the number, though there are further complicating factors such as the number of provincial legislatures in Canada.

area. A second noteworthy aspect was the comparison of the institutional features in each system. To my knowledge, this is the first time these have been aligned side-by-side for comparison in this way, and the general reader will gain a very nuanced understanding of all four jurisdictions after reading Part II of the book. The third advantage was the discussion of the role of strong presumptions of statutory consistency with rights, a topic sometimes known as “reading down statutes,” or “as applied challenges,” or “strong presumptions” of legislative compatibility with rights. Gardbaum has explored with exceptional care and accuracy the sovereignty implications of how judges use these presumptions in the UK, New Zealand, and Australia in particular, and reconciled that experience with the implications of his theory. Even better, fourthly, is the way in which he illuminates how the phenomenon of pre-enactment political rights review has operated. While I think the most illuminating work on this subject are deeper empirical studies, such as those carried out by Janet Hiebert and Hunt, Hooper and Yowell,<sup>16</sup> Gardbaum’s comparative and theoretical analysis alerts us to important nuances. A final advantage of this book is how it artfully pairs theoretical insight with refined understanding of institutional nuance, inviting favourable comparisons with writers such as John Hart Ely, Cass Sunstein and Alexander Bickel.

## II. CRITIQUE

I would make four key criticisms of Gardbaum’s book, the first two relating to how the ideas were put across, and the second two with the content of the book’s key normative proposals.

### A. EQUIVOCATION ABOUT DESCRIPTION

Gardbaum is unclear about whether the New Commonwealth Model is simply an account of the key features of the four jurisdictions, namely (1) bill of rights, (2) pre-enactment political rights review, (3) judicial review, and (4) legislative supremacy, or whether the model only includes such systems that

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16. See, e.g., Janet L. Hiebert, *Governing under the Human Rights Act: The Limitations of Wishful Thinking*, 2012 PUB. L. 29; Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, 4 INT’L J. CONST. L. 1 (2006); MURRAY HUNT, HAYLEY J. HOOPER & PAUL YOWELL, *Parliaments and Human Rights: Redressing the Democratic Deficit*, AHRC PUBLIC POLICY SERIES NO. 5 (Arts & Human. Res. Council, Swindon, U.K.), 2012, available at <http://www.ahrc.ac.uk/News-and-Events/Publications/Documents/Parliaments-and-Human-Rights.pdf>.

also respect what he describes as the “internal theory of the New Model”—namely unapologetic judicial review, legislative reconsideration, and so on. The difference between the two models is significant. Gardbaum’s book is on the one hand seeking to draw attention to a system and defend it as original and politically significant. But if we employ Gardbaum’s own theory as set out in this book, all four jurisdictions fail to respect this ideal in quite significant ways. So one does not know, when Gardbaum says the experiment “is working,” whether he means “it would work if the jurisdictions did what I recommend they do.”

This issue is best understood by considering an example. One of many is the discussion of how the Canadian system “institutionalizes the new model”:

[T]he [Canadian] Charter institutionalizes the new model through the pre-enactment reporting duty and section 33. . . . However, neither is operating satisfactorily or distinctly. Section 33 . . . is suffering from a serious practical problem due to its near non-use. . . . The same [problem] also occurs at the pre-enactment stage, where executive . . . and legal . . . review tend to predominate (pp. 127–28).

The reader is puzzled—on the assumption that “institutionalize” means “give effect to,” this passage sends a rather mixed message. Are they institutionalized or not? And is what institutionalized? Formal legislative supremacy, or a practice of reasonable disagreement? Which, in other words, is the “model”? This equivocation is found in other parts of the book as well. Notably, the “case” for the New Commonwealth Model is set out in chapter 3, prior to the “internal theory” of the model in chapter 4, where he expounds the various norms. Yet in reality, the “case” for the Model defends the acceptability of the systems in terms that must respect the norms he sets out in chapter 4—the two are in reality a continuous normative argument for a system that departs in important ways from the jurisdictions he examines. This book is better read as this normative argument. Yet the author wants to have things both ways, by claiming simultaneously to describe and justify a practice, implying that it only needs tinkering at the margins to fully respect the ideal it implicitly subscribes to. But the required tinkering is more fundamental than marginal, and there is no evidence that the jurisdictions actually subscribe to the principles he identifies. Indeed, on my understanding, the evidence from Canada is that Section 33 was never intended to be used regularly, and likewise

with Section 4 of the UK Human Rights Act, as the White Paper made amply clear.<sup>17</sup>

Sometimes Gardbaum claims that the “essential features” of the model are derived from the legal systems he describes (pp. 1–2, see also pp. 8ff, especially pp. 10–16), and he is, throughout Part II in particular, concerned with the question of fit. Yet at others, he candidly admits that the various systems often fail to live up to how the theory he announces is “supposed to work.” After clarifying that neither Canada, nor Australia, nor the UK effectively respect the crucial criteria of legislative reconsideration, he claims that New Zealand, “although certainly not ideal, especially in terms of the quality of legislative rights deliberation . . . still seems to be a fairly good example of how the new model is supposed to work” (p. 229). But the gap prompts a hard question: why call it the “New Commonwealth Model” if it does not in fact describe those jurisdictions? The problem is not just with legislative reconsideration, either. The pre-enactment rights review varies considerably in quality and character, and in none of these four jurisdictions is there anything like “unapologetic” judicial review. Democratic legitimacy is an omnipresent consideration conditioning the judicial role in the jurisprudence of these four jurisdictions.

In a section in chapter 9 Gardbaum asks whether the new model “is operating” in a distinct, intermediate manner, and lists, with admirable rigour and fairness, the many obstacles to the view that it is. One wishes he had concluded the section with “no, it isn’t,” and moved on. But that conclusion may have necessitated some invasive surgery elsewhere in the book. Indeed, the next section is entitled “Normative promise fulfilled?” and the answer would have been brief if the conclusion was that the model was not observed. But in this same section he claims that to some extent it has been, before concluding that “the NZBORA is operating in the most distinctly new model way, [but is] still far from the ideal described in Chapter 4” (p. 233). The Section 33 power of legislative override in Canada’s system, the essential “new model feature,” you may recall, is acknowledged as having

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17. On Canada, this is the clear conclusion of Johansen and Rosen, *supra* note 11, though that was the dominant rather than exclusive view; and for the United Kingdom, this is the explicit statement in the White Paper introducing the Human Rights Bill to Parliament: ‘2.10 A declaration that legislation is incompatible with the Convention rights will not of itself have the effect of changing the law, which will continue to apply. But it will almost certainly prompt the Government and Parliament to change the law.’ RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL 1997 (CM 3782, 1997).

the “practical problem” of not being used (p.127). These sound like evasive ways of saying “no,” but they also further complicate the message about what precisely the New Model is—what is actually occurring, or Gardbaum’s theory of what should occur.

#### B. METHODOLOGY OF THE THIRD WAY AND THE BLENDING OF POLITICAL AND LEGAL CONSTITUTIONALISM

But perhaps we should interpret the book as a program for reforming these jurisdictions, instead of describing them? This leads me to some problems with the methodology. The methodology that anchors the normative program is plain and repeated often: Gardbaum is “blending,” “mixing,” in the attempt to “combine and accommodate” two competing views, to create a “hybrid” theory that represents a “third way” or a “new third option” between the two poles, “the constitutionalist equivalent of the mixed economy” (pp. 34, 64, 67, 232). There is nothing inherently wrong with such an approach, of course. Yet the slogans alone evoke the fear that it might too easily seek a compromise between incompatible positions. And the fear is well placed.

The jurisdictional blending is an issue I have addressed above. But the principal objects of the blending in this book are the pros and cons of two schools of thought in British legal academia known as political and legal constitutionalism. “Political constitutionalism” earned its label from the important Chorley Lecture given by Professor John Griffith at the London School of Economics in 1978, and published the following year in the *Modern Law Review*.<sup>18</sup> Griffith’s was a claim that the UK constitution is largely shaped by political actors, and that judges play a minor role in articulating or enforcing its rules. He also criticized liberal forms of constitutionalism that sought to elevate principles and rights above the fray of politics. He was a political pluralist, most admirably described by Graham Gee as having an “agonistic” conception of politics,<sup>19</sup> one who thought that in the field of constitutional politics there was nothing but disagreement, and that liberal human rights principles such as those found in the ECHR were “the statement of a political conflict pretending to be

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18. J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979); see also Graham Gee and Grégoire C. N. Webber, *What is a Political Constitution?*, 30 OXFORD J.L. STUD. 273 (2010).

19. Graham Gee, *The Political Constitutionalism of J.A.G. Griffith*, 28 L. STUD. 20 (2007).

a resolution of it.”<sup>20</sup> Griffith, unlike some subsequent political constitutionalists, but compatible with the Marxist critique of bourgeois rights, was a rights-sceptic about both rights-rhetoric as well as judicial enforcement. His theory was pregnant with a critique of courts, and in his classic book *The Politics of the Judiciary*,<sup>21</sup> he sets out that normative case in polemical terms. But he claimed his project was more descriptive than normative.

The theory received its more explicit normative cast by subsequent writers, notably Adam Tomkins, and especially Richard Bellamy, whose book *Political Constitutionalism* is the most theoretically sophisticated version.<sup>22</sup> In this cast, the advocates of the theory generally adopt Jeremy Waldron’s argument (which is more similar to Griffith’s than has been generally noticed) that in a society like Britain or the U.S., where there is general respect for people’s basic rights, but reasonable disagreement over their meaning, considerations of political equality support assigning interpretive authority to legislatures rather than courts.<sup>23</sup> Furthermore, the argument runs, there are no strong instrumentalist or outcome-related arguments in favor of judicial interpretation.<sup>24</sup> To the contrary, the record suggests that, in America at least, judicial review has been at least as negative as positive, and, furthermore, the form of reasoning adopted by courts is unduly legalistic and pedantic, rather than institutionally and normatively wide-ranging as moral argument should be.

The other school of thought is “legal constitutionalism,” one whose basic feature is confidence in the capacity of judicially enforced principles and rights to help sustain a rights-based democracy. Legal constitutionalism is a label and refined category invented by (later) political constitutionalists to describe their intellectual enemies,<sup>25</sup> and a few legal scholars have accepted the challenge and adopted the label.<sup>26</sup> It is in my view perhaps

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20. Griffith, *supra* note 18, at 14.

21. J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977).

22. ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005); RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* (2007).

23. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

24. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1376–86 (2006). In *LAW AND DISAGREEMENT*, *supra* note 23, at 252–54 Waldron rejected the conceptual plausibility of instrumentalist arguments in favor of judicial review.

25. A clear exposition of it and its chief tenets is found in TOMKINS, *supra* note 22, at 11. Extremely few jurists, in my view, subscribe strongly to the six tenets he outlines.

26. Paul P. Craig, *Political Constitutionalism and Judicial Review*, in *EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE* 19 (Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill, Michael Ramsden, eds., 2010); Tom R. Hickman, *In Defence of the Legal Constitution*, 55 *U. TORONTO. L.J.* 981 (2005).

unfortunate, but at any rate those who accept the label nonetheless refashion the definition such that it is a more accurate portrayal of the more common view and bears little resemblance to the one created by the political constitutionalists as a foil.<sup>27</sup> The people charged as legal constitutionalists by writers such as Tomkins, Poole and others, are not mere apologists for judicial review, oblivious to the political side of the constitution, and critics of the regulatory state. To the contrary, their writings in my view often betray less preoccupation with courts than do those of many of the modern political constitutionalists.<sup>28</sup> British public lawyers, such as Jeffrey Jowell, Paul Craig, Dawn Oliver, Aileen Kavanagh, and the all-time favorite, Ronald Dworkin, have been identified as legal constitutionalists.<sup>29</sup> True, they do support what in Britain can be regarded as a strong judicial role in the protection of human rights (though something that would be unrecognizably timid in the United States, Germany or India). Yet they are hardly opponents of the basic welfare and regulatory state in the way the charge of “liberal-legalism” makes out,<sup>30</sup> nor are their writings insensitive to the role of Parliament and administration. Beyond their support for judicial review in some form, there is no commonality beyond this, neither in the view that judges have the common law power to disregard statutes, nor that we should have an entrenched bill of rights rather than the repealable Human Rights Act 1998, nor that judges should not give democratic legitimacy great weight in adjudication.<sup>31</sup> Above all there is certainly nothing to suggest in this British debate that there is any ignorance of the overwhelmingly important role

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27. See Craig, *supra* note 26; Hickman, *supra* note 26.

28. Nearly half of Paul Craig’s *ADMINISTRATIVE LAW* (Sweet & Maxwell eds., 7th ed. 2012) is about administration rather than judicial control, whereas Jeffrey Jowell’s *LAW AND BUREAUCRACY: ADMINISTRATIVE DISCRETION AND THE LIMITS OF LEGAL ACTION* (1976) concerned both judicial restraint and was an empirical study of adjudication involving participant observation in welfare decision-making. Dawn Oliver has edited several books on the UK Parliament and the law, as well as on the regulatory state, and she sat on the Royal Commission for the Reform of the House of Lords (Wakeham Commission), which reported to Parliament in 2000.

29. TOMKINS, *supra* note 22, at 11.

30. Adam Tomkins, *In Defence of the Political Constitution*, 22 *OXFORD J. L. STUD.* 157 (2002).

31. CHRISTOPHER FORSYTH (ED.), *JUDICIAL REVIEW AND THE CONSTITUTION* (2000) (demonstrating that writers such as Paul Craig and T.R.S. Allan agree that the authority for judicial review of executive action is derived from the common law rather than statute, but disagree strongly about whether the common law must respect the sovereignty of Parliament); Dawn Oliver, *Parliament and the Courts: a Pragmatic (or Principled) Defence of the Sovereignty of Parliament*, in *PARLIAMENT AND THE LAW* (Alexander Horne, Gavin Drewry, & Dawn Oliver eds., 2013); Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice*, 60 *U. TORONTO L.J.* 23 (2010).

played in the constitution by a (sovereign) Westminster Parliament.<sup>32</sup> I might add, too, that although political constitutionalism is a more coherent doctrinal position (having been defined by people who believe in it), there is also interesting work exploring its own nuances and internal differences.<sup>33</sup>

One can thus see that a normative argument based upon blending these two schools of thought will be on a perilous journey. We can turn now to Gardbaum's general definition of the two positions:

Roughly speaking, political constitutionalism stands for the proposition that the limits on governmental power inherent in the concept of constitutionalism – limits that qualify the noun in the term “constitutional democracy” – and especially those that are expressed in terms of individual rights and liberties, are or should be predominantly political in nature, enforced through the ordinary mechanisms of Madisonian-style structural constraints and especially, through electoral accountability. [. . .] By contrast, legal constitutionalists believe that these limits in general, and rights in particular, are or should be predominantly legal in nature and enforced through the power of courts to disapply acts that exceed them (p. 22).

This definition prompts the following objection: can one not believe that political protections do and ought to predominate in constitutional practice, while at the same time support constitutional judicial review in either restricted UK form or even strong form, as in Germany and America? The answer is surely yes. Even Dworkin took that view,<sup>34</sup> and the definition here ill suits several hardly-marginal writers who support a quite attenuated, politically sensitive role for constitutional adjudication,<sup>35</sup> as well as for those avowed political

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32. The one (outstanding) exception to this claim is the work of Professor T.R.S. Allan at Cambridge. Professor Allan's work is profound and important, but not representative of even a majority of those who favor constitutional judicial review. See T.R.S. ALLAN, *THE SOVEREIGNTY OF LAW* (2013).

33. See Gee & Webber, *supra* note 18; Marco Goldoni, *Two Internal Critiques of Political Constitutionalism*, 10 INT'L J. CONST. L. 926 (2012).

34. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 27 (1985) (“If all political power were transferred to judges, democracy and equality of political power would be destroyed. But we are now considering only a small and special class of political decisions.”).

35. There are many: JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1981); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004); CONOR GEARTY, *PRINCIPLES OF HUMAN RIGHTS ADJUDICATION* (2005); Rosalind Dixon, *A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue and Deference*, 47 OSGOODE HALL L.J. 235 (2009); AILEEN KAVANAGH,



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constitutionalists who see human rights adjudication in weak form systems not having strong legislative reconsideration as potentially compatible with their position.<sup>36</sup> In my view, the better approach here is to avoid the generalizations and keep disagreements focused on meaningful areas of dispute.

Gardbaum can parry here by justly claiming that whatever the issue with labels, he has focused the discussion by outlining the distinct pros and cons he associates with each school of thought. Political constitutionalism has two strengths, which for ease of reference for the remainder of this essay I will set off as such (pp. 51–61)<sup>37</sup>:

(PC1) parliamentary sovereignty permits a system that is “ultimately within the scope of the democratic principles of equal participation”; and

(PC2) legislators are better moral reasoners because they are not distracted by text, precedent etc.

But it also has weaknesses:

(PC3) legislatures are prone to pathologies and blind spots, such as the problem of political inertia, attending to minorities, and so on; and

(PC4) rights are better protected by courts because “legislative deliberation and political accountability are insufficient to ensure that burdened individuals are provided with the reasonable justification to which they are entitled.”

Each claim is problematic, however. In my view, the PC1 claim is not only dependent on a Waldronian view that, as often pointed out, neither accounts adequately for the problem of majoritarian legislative bias, nor explains why representative democracy is more egalitarian than populist measures such as ballot initiatives and referenda.<sup>38</sup> It is also in tension with Gardbaum’s own views of legislative defects. The claim at PC2 is

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CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT (2009); Alison Young, *Is Dialogue Working under the Human Rights Act 1998?*, 2011 PUB. L. 773 [hereinafter *Is Dialogue Working*]; Alison Young, *PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT* (2008).

36. See, e.g., Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 I.CON 86 (2011).

37. This is the core of his discussion of the strengths and weaknesses of both political and legal constitutionalism.

38. I address these arguments more fully in ch.6 of JEFF KING, *JUDGING SOCIAL RIGHTS* (2012), but similar criticisms can be found in the work of Ronald Dworkin, Dymitrios Kyritsis, and Aileen Kavanagh.

suspect too. The claim that parliamentarians are less fettered by text, etc., is at stark odds with the attitudinal model which finds it is almost impossible to find doctrinal constraints in the jurisprudence of some top courts, notably the U.S. Supreme Court.<sup>39</sup> The proportionality test, looking to Canada and Europe, is hardly a restrictive normative exercise.<sup>40</sup> On the other hand, PC3, a claim I tend to agree with, is ordinarily met with the following reply—legislative pathologies may exist, but they are unavoidable, less problematic and less illegitimate problems than those generated by judicial meddling.<sup>41</sup> And PC4 is a curious statement, with apologies to Matthias Kumm. Of course the enacted law was accompanied by a public justification, it was the protracted procedure known as the legislative process. The idea that every citizen is owed an individualized justification on the record in the courthouse seems to me neither persuasive nor sustainable. The bald acceptance at PC4, moreover, that legislative sovereignty under-enforces rights will (or ought to) be untenable to political constitutionalists, who have tended to deny it in strong terms,<sup>42</sup> and the claim is not backed up here by any evidence.

The fatal problem in my view is that PC1 and PC3 are mutually incompatible. It cannot be said that legislative supremacy “respects democratic principles of equal participation” while also conceding that it is ridden with pathologies that disadvantage some people systematically. Where the systematic disadvantage starts, the egalitarianism stops. So much is conceded by both Waldron and Bellamy, and their argument upon such concession switches to a different one – that courts are no adequate remedy for the legislative flaw.<sup>43</sup>

Legal constitutionalism, in this dialectic of arguments, is also problematic. Its two advantages are said to be as follows:

(LC1) it fosters public recognition and consciousness of rights, through the announcement in a bill of rights;

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39. JEFFREY A. SEAGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

40. GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009).

41. See generally BELLAMY, *supra* note 22, at ch. 3.

42. The usual cite here is to GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008). See, e.g., BELLAMY, *supra* note 22, at 95–97, and the vast literature I explore more generally in KING, *supra* note 38, at chapter 3. Indeed, the leitmotif of the functionalist school of public law is that judicial review has been corrosive of good administration.

43. BELLAMY, *supra* note 22, at 26–48; Waldron, *supra* note 24, at 1404.

(LC2) it can correct for legislative pathologies and blindspots, and correct the legislative under-enforcement of rights, by prompting legislators to use their deliberative capacity to evaluate concrete cases at the behest of adjudicators who are not electorally accountable at the ballot box (and are hence “politically independent” in this particular way).

Yet the disadvantages are noteworthy as well:

(LC3) courts will over-enforce constitutional limits, *Lochner*-style, by impeding progressive legislative change with conservative judicial rulings;

(LC4) courts can become the primary expositors of rights in society, allowing legislators’ rights sensibilities to wither.

The political constitutionalist will doubt the political invigoration resulting from a bill of rights, but also point out that we could adopt a non-justiciable bills of rights. And the judicial ability to correct for legislative pathologies (LC2), as the political constitutionalist will argue, must be better than what legislatures can achieve, net of the costs of judicial over-enforcement (PC4). That courts will over-enforce constitutional rights is the flip side of the claim (PC4) that legislatures under-enforce them. The legal constitutionalist, for her part, can say there is really very little evidence of over-enforcement in Britain and Canada, where the system works similar to a stronger style of judicial review. *Lochner* happened in the U.S., a century ago.<sup>44</sup> Unfortunately, we simply cannot square these competing claims in the realm of theory. They do not compute. We need recourse to some rigorous empirical studies. This is a problem in chapter 3, because it is entirely concerned with responding to assertions in constitutional theory literature when the questions of impact seem critical to the overall argument.

Of course, Gardbaum cannot be faulted for not addressing every counter-argument. It would disrupt the great flow of the

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44. The Canadian decision of *Chaoulli v Quebec (AG)* [2005] 1 S.C.R. 791 is a potential counter-example. See Sujit Choudry, *Worse than Lochner?*, in *ACCESS TO CARE, ACCESS TO JUSTICE: THE LEGAL DEBATE OVER PRIVATE HEALTH INSURANCE IN CANADA* (Colleen Flood, Kent Roach & Lorne Sossin, eds., 2005); cf. Jeff King, *Constitutional Rights and Social Welfare: A Comment on the Canadian Chaoulli Health Care Decision* 69 *MOD. L. REV.* 631 (2006). In the result, *Chaoulli* was largely ignored; Daniel Cohn, *Chaoulli Five Years On: All Bark and No Bite?*, (Working Paper presented to The Canadian Political Science Association Annual Meeting 2010), available at [www.cpsa-acsp.ca/papers-2010/Cohn.pdf](http://www.cpsa-acsp.ca/papers-2010/Cohn.pdf).

book if he did, and indeed it may have distracted him from expounding the features of the New Model systems. But on the other hand, when these arguments are meant to anchor the quite radical proposals of “no judicial deference” and “vigorous legislative reconsideration,” neither of which is actually found in the practice of these four jurisdictions, one is left wanting more. My sense is that the foundations of this theory are based on positions that are clearly rejected by adherents of both schools he tries to combine, and they are not reconcilable either. Someone must be wrong. Perhaps in future work Garbbaum will explore in greater detail why some of those positions were wrong, or why it is, in fact, and contrary to all expectations, possible to reconcile them.

### C. THE VIABILITY OF THE ARGUMENT FOR STRONG LEGISLATIVE RECONSIDERATION

My primary misgiving with the book is with its proposal that legislatures should disregard judicial declarations of rights in a *de rigueur* fashion. Garbbaum asserts that this criteria “permits the new model to neutralize legal constitutionalism’s democratic legitimacy problem” (p. 68). When outlining this feature in greater detail in chapter 4, he recalls that the case against judicial finality is that judicial reasoning is too legalistic (PC2), and also suggests, in different wording, that the ongoing and regularly asserted legislative supremacy “can also satisfy more general criteria of political legitimacy” (p. 89), by which he presumably means political equality. But he introduces another novel argument, namely, that the pathologies “can be countered by less restrictive procedural and/or substantive constraints on outcomes than a full judicial veto” (p. 89).

The large and unanswered question is, why should we expect the legislative pathologies Garbbaum highlights to be cured when the issue returns to Parliament and it is invited to disagree with the court? Garbbaum evidently believes that the two norms he commends for the exercise of this power of legislative reconsideration – good faith legislative engagement with the court’s reasoning, and disagreement only if the legislature reasonably disagrees – are going to be potent restraints on legislative behavior. It is an open question whether the first even *could* be a restraint. I am not certain that one can realistically expect parliamentarians to routinely debate the merits of legal reasoning. The *Hansard* I have reviewed, and all other studies on the UK Parliament’s consideration of judicial decisions under the

Human Rights Act 1998, suggests that parliamentarians are singularly uninterested in the reasoning of the courts, *even when they agree with the judgments*.<sup>45</sup> (That is not to say that parliamentary reasoning on the rights issues themselves is poor – I speak only of engagement with the judgment). Part of the reason is that Members of Parliament tend to think judgments are specialist law, and are outside their comfort zone. Another, quite serious reason is that some Members or Peers regard it as an affront to judicial independence to challenge the reasoning of judges. Another, more logistical reason, is that some judgments are often long, more often boring, and it isn't clear that busy parliamentarians with many irons in the fire are going to want to pore over the particulars of the judgments they are anyway welcome to ignore. Contrary to what lawyers may like to think, the experience in the UK has been that most declarations of incompatibility, which all but automatically come up for parliamentary consideration, have had a very “low profile” in Parliament.<sup>46</sup> This is because the issues have tended, in the UK at any rate, to be comparatively minor next to the major battles fought in other legislation, or even in the same legislation into which the remedial provision is inserted.

Let's assume, however optimistically, that Gardbaum is right that many of these problems could be overcome, and we could get Parliament to engage with the reasoning of the courts. This may well be an attractive idea, and a strength of this book is certainly its grasp of the institutional dynamics. The greater problem is with the idea that a standard of “reasonable disagreement” will do any work in disciplining the legislature's rejection of judicial decisions. The standard might have done some work if the parliament was entitled only to nullify the judgment if it thought the judgment was *unreasonable*. One could plausibly see the UK Parliament, for instance, only resolving on rare occasions that a judgment of the UK Supreme Court was *unreasonable*, even if it would be minded to disagree with it more often. But that is not what Gardbaum commends. His test is whether the legislature has its own reasonable judgment that is nonetheless at odds with the court's (perhaps reasonable) judgment. So the question is, when is the legislature going to conclude a debate in which it resolves that it

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45. King, *supra* note 15; see also Young, *Is Dialogue Working*, *supra* note 35, at 783–84; ARUNA SATHANAPALLY, BEYOND DISAGREEMENT: OPEN REMEDIES IN HUMAN RIGHTS ADJUDICATION 138–39 (2012);

46. Sathanapally, *supra* note 45, at 138–39; King, *supra* note 15, at the text accompanying note 87 (giving examples).

disagrees with the reasoning of the court, but believes that its own opinion is unreasonable? Of course, never. If not, then how is the practice of judicial review meant to overcome the legislative pathologies and blind spots? It may help with the logistical ones (the burdens of inertia), by drawing Parliament's attention to the issue and prompting a response. But what of the really pressing concern that Gardbaum acknowledges as part of the case for judicial review in the first place (PC3/LC2), namely, the "sensitivity to the rights . . . of various electoral minorities - whether criminal defendants, asylum-seekers, or minority racial, ethnic or religious groups . . ." (p. 54)? I am doubtful that the rule of legislative reconsideration, including the two normative guidelines outlined by Gardbaum, would extend real protection to these groups. Indeed, his candid admission that PC3 is a real problem appears to me inconsistent with the proposed solution. And the different track records evident in New Zealand and the United Kingdom appear to be to be partially, if not primarily, a result of the perceived obligation to respond.<sup>47</sup> If the reply here is that it is expected that legislatures will just agree with the court's decision most of the time, I feel that is counter-intuitive and the evidence for it is slim.

One is tempted to say that this is a minor flaw. But if we remove Gardbaum's specific rule of legislative reconsideration, we also need to let go of his proposal for "unapologetic" judicial review. And since the pre-enactment rights review he discusses is probably compatible with strong form systems of judicial review, what remains is a system that differs considerably from Gardbaum's New Commonwealth Model. It is important to recognize as well that there are many reasons one might support a system of weak form review without a regular practice of legislative reconsideration. Under such a system, the legislature enjoys ongoing legal authority to disagree with the courts and in some systems to repeal the bill of rights—both of which are quite meaningful powers. Yet Gardbaum wants much more disagreement. He regards his model as being close to what prevails in New Zealand, where the two local commentators observe that "the impact of the NZBORA on Parliament's behavior is so minimal in nature as to be almost irrelevant" and

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47. I discuss this obligation and adduce statements in the UK Parliament above in King, *supra* note 15.

that the Act results in “very limited insurance for rights protection” (p. 145).<sup>48</sup>

#### D. THE RULE OF LAW AND COURTS AS CONSTITUTIONAL ADVISERS

My final misgiving is about the rule of law and the authority of law in the brave new world of the ideal theory Gardbaum sets out. He envisages a constitutional system in which judicial declarations of rights are politely acknowledged and duly set aside. The idea that a court could merely provide an opinion that can be accepted or ignored—like the advice of a law officer—misconceives the nature of legal authority in the modern state. More importantly, it sends a mixed message to citizens about the scope of their rights under constitutional law. This view can be called the “courts as legal advisers” view.

In his excellent book, *Public Law and the Human Rights Act*, Tom Hickman considers a variety of such views, which he dubs the “principle–proposing” model of dialogue.<sup>49</sup> Some of these views, those of Klug and Nicol, have already been addressed above. Hickman rejects these views because they are incompatible with the proper constitutional role of the judiciary. Courts should hear arguments, not advance them to the legislative branches. I agree with Hickman’s conclusions about the proposal’s poor fit with current constitutional orthodoxy, but want to push on to argue why this constitutional orthodoxy should not be reconfigured in the way Gardbaum envisages.

To be clear, his view is not the same as, for instance, asking a court to declare the existence of constitutional convention without enforcing it.<sup>50</sup> The politicians can abide the convention or not, but they cannot in my view turn around and say the court was wrong about its existence. Its existence was settled by the judgment. Nor is Gardbaum’s proposed role for courts similar to the practice in some advisory opinions of declaring legal principles (or rules) to exist without enforcing them.<sup>51</sup> In such cases, the courts do not suggest such principles are “negotiable.”

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48. Citing Geddis, *supra* note 13, at 471; James B. Kelly, *Judicial and Political Review as Limited Insurance: The Functioning of the New Zealand Bill of Rights Act in ‘Hard’ cases*, 49 COMMONWEALTH & COMP. POL. 295, 296 (2011).

49. TOM HICKMAN, PUBLIC LAW AFTER THE HUMAN RIGHTS ACT 83–87 (2010).

50. Reference re a Resolution to amend the Constitution, [1981] 1 S.C.R. 753 (Supreme Court of Canada).

51. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Supreme Court of Canada).

By contrast, under the New Commonwealth Model, a person could fight her case up to the Supreme Court to obtain something declaratory of nothing more than an opinion. What does she get from court here? A view? Have her rights been violated or not, after the Supreme Court says so? These are not minor matters, and a patient citizen's tour through dialogue theory or the Waldronian line on reasonable disagreement will generate confusion (I have tried). Strategically, furthermore, people would have to look well past the courts when contemplating litigation. Impact litigation to help improve minority rights would have to reckon with the possibility that the legislature might even use the occasion raised by an adverse ruling to roll back protection even further. This could disincentivize resort to litigation, which would undo the supposed "hybrid" benefits of the model.

What I see as most problematic is the constitutional position of the courts. Without a norm requiring the legislature to not depart from judicial findings lightly, the courts will know that to issue judgments that will be ignored will undermine their credibility and thus institutional integrity.<sup>52</sup> It will ultimately result in an exercise of brinksmanship in which one of the two sides will back down—presumably the courts. That would undermine the very benefits of judicial review in the first place, and make "unapologetic" judicial review rather unlikely.

This gives occasion to comment on a debate at present in the United Kingdom, which is about whether Parliament should feel it appropriate to disregard declarations of incompatibility under the Human Rights Act 1998. The working presumption now is that it should not.<sup>53</sup> It ought to respond. But respond how? Should it always amend or repeal the law, or could it, for instance, respond by reaffirming the law by way of resolution? Either interpretation is plausible. My own view is that if Parliament regularly refused to repeal the impugned laws they would disrupt the constitutional arrangements put into place under the Human Rights Act 1998. It is true that Parliament has the clear legal authority to disregard a declaration. And it is clearly foreseen that it would be possible for it to do so in particular circumstances. No one has as yet outlined what such circumstances should be, because until the prisoner voting saga few thought that

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52. Some feared that this would occur in the UK, since the UK Parliament can not only ignore judicial decisions but must act affirmatively to remedy the incompatibility. It is not clear that it happened, has but the point is arguable.

53. King, *supra* note 15.



Parliament would disregard a declaration of incompatibility.<sup>54</sup> I would argue that such circumstances would need to be highly unusual: it should be on an issue where Parliament has engaged directly and at some length with the key issue, and where the law's amendment or repeal would have an adverse effect upon a very substantial number of people in the society, and where the exercise is perceived to be exceptional rather than the dawn of a new practice of disagreement. If the legislature wishes to feel unbound, it should rather repeal the Human Rights Act 1998. To treat declarations as negotiable is to belie the objective of the Act when it was introduced, which was to provide a remedy in domestic courts for violations of the European Convention on Human Rights. The better approach, and one observed by the governments and parliaments in the UK thus far, is to consider that so long as the Act remains in place, the presumption is that Parliament will amend the laws found incompatible. Should the courts' role under this arrangement be viewed as undesirable, the Human Rights Act 1998 should be repealed.

To be clear, the argument is not merely an interpretation of the purpose of the Act. There are compelling reasons of constitutional principle as well. To permit a declaration of incompatibility without any regular presumption of parliamentary action removing the incompatibility would be a cruel waste of time and money for litigants and defeat the *good* purpose of the Act, which was to provide claimants with real rather than illusory remedies in English courts for violations of their Convention rights. Although this analysis is limited to the situation in the UK, I believe that similar reasoning applies in respect of Section 33 in Canada. As noted above, in both jurisdictions, the intention upon introduction of these novel features was that they would be used, if at all, only in extremely rare circumstances.

In my view, Gardbaum's proposal stems from an attempt to have things both ways by hybridizing two views, neither of which had the authority problem to which I am drawing attention here. Supporters of judicial review may disagree strongly with each other about how much restraint judges should show to legislators. But they all agree that judicial decisions should be respected and observed. And Waldron, Bellamy, and Tomkins all make

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54. This is a moving target but most of the background can be found in Ian White, *Prisoners' Voting Rights* (SN/PC/01764) (London, Parliament and Constitution Centre, House of Commons Library, 15 May 2013) and *R (Chester) v Secretary of State for Justice; McGeoch v Lord President of the Council* [2013] UKSC 63.

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arguments about assigning clear interpretive authority to legislatures rather than courts. Garbbaum's theory would create a "dispersal of responsibility" (p. 68) for decision-making about rights between these authorities, but in so doing, he forgets that if these rights are to be law, we are entitled to expect authoritative legal ruling on their scope. I would regret to see judicial decisions become mere advice. I would prefer a form of judicial rights review that gives weight to the various valid concerns raised in this excellent book, urging judges to defer in appropriate cases to parliament, and, where judges perform within the role set out for them in the bill of rights, for parliament to return the favor.