The Commonwealth constitutional model or models?

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Stephen Gardbaum's *The New Commonwealth Model of Constitutionalism: Theory and Practice* (hereinafter "*NCM*") is a must-read in the growing literature on comparative constitutional law and deserves a broad international audience. Followers of Gardbaum's scholarship will know that the book marks the culmination of over a decade's worth of reflection. Gardbaum's first exposition of the book's central arguments appeared in 2001, in a widely-read article in the *American Journal of Comparative Law*.[1] The book marks a major elaboration and expansion of Gardbaum's earlier work, building on it while taking his ideas in important new directions, some of which were previewed in this journal.[2]

Before I explore the details and significance of the shift in Gardbaum's account, let me note several important contributions made by *NCM*. First, it sets out an alternative constitutional model for the judicial enforcement of bills of rights that serve as legal benchmarks for primary legislation; this model is distinct from the leading alternatives, which feature a system of judicial supremacy with ultimate authority lodged in a generalist supreme court (as in the United States) or a constitutional court (as in Germany). Second, the Commonwealth constitutional model—which Mark Tushnet has usefully termed "weak-form" judicial review, in contrast to systems of judicial supremacy or "strong-form" judicial review, to reflect the fact that it separates judicial review from judicial supremacy[3]—has a number of different components or stages: (a) pre-enactment political rights review of primary legislation by non-judicial institutions—i.e., the executive and the legislature; (b) judicial rights review; and (c) legislative reconsideration of court judgments which have held primary legislation to be inconsistent with the bill of rights. Third, it is a model that grows out of empirics,

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1 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp. L. 707 (2001).

2 Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 Int'l J. Const. L. 167 (2010).

3 Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 Wake Forest L. Rev. 813 (2003).

drawing on the constitutional experiences of Australia (in the state of Victoria and the Australian Capital Territory), Canada, New Zealand, and the United Kingdom. Gardbaum's methodology—in the best traditions of the common law—is to build up his model inductively by abstracting away from the national particularities of institutional details and practice. Fourth, Gardbaum's argument has analytical and normative components; he sets out the model as a conceptual matter of constitutional design, and then evaluates it in light of longstanding debates over the legitimacy of constitutional judicial review to enforce bills of rights. Fifth, Gardbaum uses his model to organize his descriptions of, and assess, the different jurisdictions under study in a series of highly informative and illuminating chapter-length case-studies that weave together institutional details, discussions of leading cases and legislative sequels, and the relevant academic literatures.

I want to pose a question to Gardbaum that comes from the title of his book, which refers to a "Commonwealth constitutional model"—that is, as a singular way of institutionalizing the relationship between courts, legislatures, executives, and bills of rights in a liberal democracy that exists in the jurisdictions under study. My question is whether there is a single Commonwealth constitutional model, or, in reality, a set of Commonwealth constitutional models which share common features, but also differ in important respects that should matter to Gardbaum and others who want to understand the manner in which bills of rights are enforced in the Commonwealth jurisdictions under study, for both analytical and normative purposes. The issue here is not simply the gap between analytical models and empirical reality, which Gardbaum readily acknowledges. As he frequently notes in *NCM*, under the Commonwealth model, jurisdictions lie along a continuum between the poles of legislative supremacy and judicial supremacy regarding the relative legal status of a bill of rights relative to ordinary legislation. I see an important shift between Gardbaum's original presentation of the abstract features of his model and the fully formed model presented in this book.

When Gardbaum originally set out his model (I will refer to this as "Gardbaum 1"), it consisted of two stages: judicial review of primary legislation in light of a bill of rights, and legislative reconsideration of court judgments that had found legislation to be inconsistent with that bill of rights. What is worth recalling from Gardbaum 1 is the sense—granted, not fully developed—that under the Commonwealth model, judges and legislatures performed distinct functions or roles. Judges should interpret bills of rights without fear of the consequences of judicial over-enforcement (à la *Dred Scott* or *Lochner*), because judges are not supreme. The reasons for deference that flow from judicial supremacy no longer exist. Judges can interpret rights broadly, and apply every stage of the proportionality analysis in a stringent manner to impose a very high burden of justification. Should a court hold that legislation contravenes rights in a manner that cannot be justified, legislatures have the benefit of a thoughtful, detailed judicial analysis of the rights-related objections to the legislation in deciding how to respond.

What does judicial review add to the legislative reconsideration of the issue? What courts do is to correct several well-known defects in the legislative process that may

have been present when the legislature first adopted the legislation under challenge. These include the unanticipated consequences of general legislation which set out abstract standards when applied to individual cases, especially in cases where the legislature lacks representation by the socially disadvantaged or marginalized who would have been alert to the disproportionate impact of legislation on their rights (e.g., women, the poor); the discounting of the rights of those who completely lack the political power to protect themselves in the political process (e.g., non-citizens, children); the prejudice or indifference toward the rights of discrete and insular minorities who may wield the right to vote and who—in Jeremy Waldron's helpful formulation—are not just topical, but decisional minorities because they are persistently on the losing side of legislative votes and the rights-violating political decisions; decisions made under panic in response to concerns about national security, etc. These pathologies of the legislative process serve as a basis for most contemporary justifications of strong-form judicial review, which presuppose that courts are less likely than legislatures to fall prey to these pathologies, because of the right of individuals to trigger the judicial process, the demands of justification imposed on courts to provide reasons for their rulings, the unelected character of judges, etc.

However, they can equally ground a case for weak-form review. On this view, the role of a court is to serve as an institutionalized forum for highlighting such issues to ensure that they cannot be ignored in subsequent legislative debates. Moreover, the task of legislatures in responding to court judgments is not simply to recapitulate the exercise just engaged in by a reviewing court—that is, to re-run the initial legislative process—but to give concerns about rights priority over all other competing considerations. Rather, the role of the legislature is to make an all-things-considered judgment in which rights-related considerations occupy an important, even central, place, but are by no means the only relevant or most important factor on the table. If the legislature sets aside the court's judgment, and either proceeds with its initial course of action or modifies it somewhat to adopt measures that impair the right to a lesser extent, but which are not necessarily the least rights-infringing measures, this disagreement does not mean that in making the legislative judgment the court has committed a legal error in interpreting and applying the bill of rights. Rather, it reflects the view that a broader range of considerations outweighs the reasons advanced by the court which may be entirely correct on their own terms. The value of judicial review is that it forces the legislature to reconsider the legislation in light of the views of a body expert in questions of rights protection and to respond to those views, and to be held politically accountable for decisions to disagree.

Gardbaum's shift in *NCM* from two to three stages (call this "Gardbaum 2") considerably complicates this picture of the respective roles of courts and legislatures. Not only does he add a third stage—prior to legislative enactment—he also disperses the responsibility for rights protection beyond courts to the executive and to the legislature. As a consequence, rights review is not confined to the courts. Rather, instead of taking place only during the process of judicial review, rights analysis also takes place during the process of legislative enactment and during legislative reconsiderations of legislation found to be inconsistent with bills of rights. Thus, there is not one, but two

different Commonwealth constitutional models on the table with differing conceptions of the roles of political and judicial institutions in rights protection and the way they interact. The contrast between Gardbaum 1 and Gardbaum 2 raises a number of interesting analytical and normative questions that warrant careful examination.

First, what forms do pre-enactment and post-judicial political rights review take? *NCM* (and hence, Gardbaum 2) builds on important work done by Janet Hiebert, who first studied post-judicial political rights review in Canada under the *Canadian Charter of Rights and Freedoms*, and then later devoted considerable attention to pre-enactment political rights review in the United Kingdom under the *Human Rights Act* by the Joint Committee on Human Rights (JCHR).[4] One question posed by Hiebert in this body of research has been how non-judicial institutions reason with rights. In principle, Gardbaum 1 and 2 offer different answers to this question. Under Gardbaum 1, political review occurs in the shadow of judicial doctrine. Pre-enactment review takes the form of legal risk management, and assesses the likely consistency of proposed legislation with a bill of rights. Post-judicial review, as discussed above, is an all-things-considered judgment in which rights are one consideration among others. By contrast, under Gardbaum 2, political rights review provides opportunities for the relevant institutions to offer their independent interpretations and application of rights-protecting provisions, which may be at odds with those of the courts—"a fully independent and less legalistic position" (p. 196), both before judicial review and afterward.

Hiebert usefully contrasts these two positions as "a culture of compliance" and "a culture of controversy."[5] The shift from the first to the second flows as a direct consequence of the institutional diffusion of rights analysis. Hiebert's conclusion is that, in practice, political rights review does not entail independent interpretations of bills of rights. Across the Commonwealth, prior to tabling of legislation, internal analysis by government legal advisors is largely confined to legal risk analysis. In the United Kingdom, the JCHR, which is by far the most highly developed and transparent system of pre-enactment political rights review in jurisdictions that follow the Commonwealth constitutional model, mainly consists of highly sophisticated legal analyses informed by the jurisprudence of the United Kingdom Supreme Court and the European Court of Human Rights. Moreover, Parliament appears to rarely offer counter-interpretations of the *European Convention of Human Rights* when considering how to respond to declarations of incompatibility by the British courts. The facts seem to fit Gardbaum 1 more than they fit Gardbaum 2.

Second, how do different institutions interact with each other at the different stages of rights review? Under Gardbaum 2, at each stage, an institution engages in a process of rights analysis. In principle, the products of this process at each stage are available to institutions further down the chain. Moreover, downstream institutions can

[4] Janet L. Hiebert, Charter Conflicts: What is Parliament's Role? (2002); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 Mod. L. Rev. 7 (2006); Janet Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights*, 4 Int'l J. Const. L. 1 (2006); Janet Hiebert, *Governing under the Human Rights Act: The Limitations of Wishful Thinking*, Public Law 27 (2012).

[5] Hiebert, *Governing under the Human Rights Act*, *supra* note 4, at 30.

approach the task of rights analysis in part by engaging with the views of upstream institutions that constitute part of the materials before it. Gardbaum 2 implies that this kind of interaction should take place. Indeed, since one of the goals of Gardbaum 2 is to diffuse responsibility over rights protection outside the courts, which each institution engaged in an independent rights-analysis, this is a short step away from saying these institutions are in a dialogue with each other as they engage in this task, as opposed to proceeding in splendid isolation.

Dialogue is a term that Gardbaum prefers not to use to describe his model, with good reason. The term has been used extensively by Canadian constitutional scholars to argue that Canada has rejected judicial supremacy, based on the fact that legislative sequels to judicial holdings of unconstitutionality under the *Canadian Charter of Rights and Freedoms* do not use the Canadian notwithstanding clause and have rarely faced subsequent constitutional challenge. Gardbaum rightly criticizes the Canadian scholarship, because it ignores that courts retain ultimate authority to adjudicate on the consistency of legislative replies and therefore enjoy supremacy. But it is possible to resuscitate the term dialogue to refer to the kind of inter-institutional exchange of views over rights protection described above.

The question is what evidence there is of such dialogue. *NCM* devotes some attention to this issue, relying on studies of the experience under the United Kingdom Human Rights Act, and notes that "the courts have generally followed the desired approach of a respectful attitude toward parliamentary rights deliberation of stage one, where it has occurred, without being overly deferential toward it" (p. 194). However, the broader evidence is more mixed. At issue is not only the attitude of reviewing courts toward pre-enactment political rights review, but also the frequency with which such dialogue occurs. According to one study, JCHR reports were referenced in seventy-two cases between 2000 and March 2012. But in comparison to 23,343 references to human rights issues over the same time period, "references to JCHR Reports are but a drop in a very, very large ocean."[6] The study also suggests that, in those few cases where the courts referred to JCHR reports, "there is very little evidence of clear and rigorous thinking about the different purposes for which reference can legitimately be made to such reports."[7] In the handful of cases where the study suggests that the JCHR reports were potentially persuasive, it was difficult to assess the extent to which the courts actually relied or engaged with the JCHR's analysis. The evidence does not support Gardbaum 2. Gardbaum 1, on other hand, is entirely consistent with this practice, because it does not propose that pre-enactment political rights review should exist as an autonomous source of constitutional meaning.

So the facts seem to fit Gardbaum 1 more than Gardbaum 2. This appears to be the case even in systems such as the United Kingdom's, that were deliberately built around the three-stage model set out and defended in *NCM*. Indeed, one can say that there is pressure for Gardbaum 2 to revert to Gardbaum 1. Why is this the case? Hiebert argues

[6] Murray Hunt, Hayley Hooper & Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit*, Arts & Humanities Research Council Series No. 5 (2012) at 46.

[7] *Id.* at 50.

that two of the core features common to Westminster democracies—cabinet dominance of the legislature in situations of majority government, and strongly disciplined political parties which do not provide much scope for legislators to stray from party positions—make it difficult for "a culture of rights" to emerge within legislatures—that is, either at stage 1 or 3. It may simply be too difficult to overcome these deeply rooted features of the Westminster model, even with creative institutional design. This raises the question of whether Gardbaum 1 satisfies the normative goals for Gardbaum 2, such that it is good enough. Chapter 3 of *NCM* argues that Gardbaum 2 harnesses the strengths of judicial supremacy and legislative supremacy while avoiding their weaknesses. In a nutshell, the case for Gardbaum 2 is that it vests ultimate authority in a democratically elected body and empowers politically independent judges to assess legislation for consistency with a rights-protecting instrument (both strengths), while correcting against the dangers of legislative under-enforcement of rights (by allowing judicial review to correct for pathologies in the legislative process) and judicial over-enforcement of rights (by allowing legislatures to have the word after judicial rulings). Gardbaum 1—a simplified and stripped down version of the Commonwealth constitutional model—can be defended on the same terms.

Let me conclude on this note. If Gardbaum 1 is good enough, then it is important to ensure that judicial decisions that legislation contravene bills of rights receive a legislative response. This depends on which institution bears the burden of legislative inertia. In cases where the court possesses the power to issue a declaration of invalidity (as in Canada), or to interpret legislation to be compatible with rights (as in the United Kingdom or New Zealand), judicial rulings stand absent a legislative response. The legislation is thrust back onto the legislative agenda, and the legislature must affirmatively act if it is to have the final say—either through an override (Canada) or through legislation that reverses the court's statutory interpretation (United Kingdom, New Zealand). This increases the likelihood that there will be a political debate on how to respond to the court's judgment, in which that judgment will hopefully play an important role of "checking, alerting, [and] informing" (p. 65). On the other hand, the declaration of incompatibility offers no such guarantee. The fact that such declarations in the United Kingdom have invariably been followed by legislative replies is more a function of the contingent fact that cases arising under the Human Rights Act may ultimately come before the European Court of Human Rights, which has the power to issue legally binding judgments to which Parliament must respond. Other jurisdictions seeking to implement Gardbaum 1 should reflect carefully on the true lessons of the British experience before adopting it.