How consequential is the commonwealth constitutional model?

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Stephen Gardbaum’s The New Commonwealth Model of Constitutionalism: Theory and Practice is one of the most important books about comparative judicial review and constitutional design published in recent years. In what may be seen as the culmination of Gardbaum’s groundbreaking work on the subject, the book offers a comprehensive, level-headed, and thought-provoking account of a model for arranging the judicial review of rights that has emerged over the past few decades in several prosperous, English-speaking, common-law jurisdictions. At the heart of this model, which Gardbaum calls the Commonwealth model, stands the idea that tensions between judicial review and democracy may be mitigated through the introduction of innovative constitutional mechanisms that embrace many of the supposed advantages of judicial review while alleviating its counter-majoritarian nature. These mechanisms allow legislative branches to limit or override rulings of unconstitutionality by the judiciary as long as they do so openly and explicitly. This core element of the Commonwealth model Gardbaum designates as “weak-form judicial review,” or the ex post element of the model. Another, complementary set of mechanisms, which Gardbaum categorizes under “pre-enactment political rights review,” constitutes the ex ante element of the model; among the oft-cited examples of these mechanisms are the famous “override” or “notwithstanding” clause (§ 33) in the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights Act’s “preferential” model of judicial review, and the British Human Rights Act’s “declaration of incompatibility.”

The book is divided into three main parts: (i) “Theory”—a discussion of what the Commonwealth model of constitutionalism is, what is new about it, and what the core normative case for it is; (ii) “Practice”—a meticulous exploration of the new model in action in Canada, New Zealand, the UK, and in two Australian subnational units:

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the State of Victoria, and the Australian Capital Territory; and (iii) an assessment of the new model’s various effects and manifestations in theory and practice. The book’s substantive take-home message appears to be threefold. First, the universe of judicial–legislative–executive branch relations viewed through the prism of judicial review (an enterprise that Gardbaum often refers to, perhaps over-expansively, as “constitutionalism”) is not a bipolar, dichotomous one, but one that follows a spectrum running from strong legislative supremacy to strong judicial supremacy, with the Commonwealth model occupying the middle ground. The jurisprudential evidence, he argues, shows that claims against the new model’s distinctness—for example, the claim that the model is, in practice, either no different from one of the traditional models or very likely to revert to one of them—are overly pessimistic. The Commonwealth model, he insists, offers a distinct and appealing third approach between two purer but flawed extremes. Second, from a normative standpoint, the Commonwealth model (or its various conceptual siblings: weak-form judicial review à la Mark Tushnet, the parliamentary bills of rights approach à la Janet Hiebert, or dialogical judicial review à la Peter Hogg) is preferable precisely due to its balanced, middle-of-the-road approach. Moreover, Gardbaum argues that it is non-use or misuse of prescribed powers that threatens the practical stability and distinctness of the new model and not (as some critics have claimed) with which branch these powers are placed at the outset. Legislative exercise of the final word, he suggests, should be understood as legitimate if it is based on a serious and principled reconsideration of the judicial view and offers a reasonable (by what standard, Gardbaum does not fully elaborate) resolution of the rights issue in question. Third, while the introduction of the Commonwealth model has had profound effects on how the constitutional sphere operates in each of the studied polities, these effects vary considerably from one polity to the next. There is clear evidence of a reversion to parliamentary sovereignty in Australia, a slide to judicial supremacy in Canada, and an overall more balanced approach in New Zealand and the UK. One may read between the lines that the model has, by and large, achieved its intended goals in the latter two jurisdictions, but considerably less so in Australia and in particular in Canada, where, although the façade of rights jurisprudence has been that of the Commonwealth model, actual practice has been moving in the direction of strong-form judicial review, mainly due to the near non-use of § 33 (which, in a nutshell, allows the Canadian federal government and provincial governments to declare that a law or part of a law overrides for a limited time a provision included in § 2, or in §§ 7–15 of the Canadian Charter of Rights and Freedoms), and the adoption of a court-centered proportionality analysis as the test for determining whether rights ought to be limited.

In all of this, Gardbaum sets a high standard for comparative constitutional law research. He introduces sharp definitions, asks forthright questions, and provides clear answers to those questions. He moves confidently from constitutional theory to practice, and back to theory. He analyzes a tremendous amount of information, jurisprudence, and ideas in an accessible, linear, reader-friendly fashion—in itself a splendid achievement. The significance of this book for the study of comparative judicial review is obvious, but it also contributes considerably to the literature on
constitutional design, a literature which has traditionally focused on democratization in post-conflict or post-authoritarian settings while mostly ignoring the challenges facing stable, prosperous democracies. Beyond this, the marker of every heavyweight work of arts or science, academic, or otherwise, is its ability to provoke questions and thought experiments that go beyond its immediate subject—and Gardbaum’s book scores on that count too.

Whether the Commonwealth model really gets us out of the well-rehearsed debate about the questionable democratic credentials of judicial review depends to a large extent on our willingness to replace the accepted, abstract approach to the subject with a pragmatic, compromise-driven outlook. But leaving that theoretical discussion aside, the first question an empirically minded scholar will ask is how transferable the model is to other settings, or what its applicability is to settings not explored in this book. At the outset, there appears to be a tension between the designation of the Commonwealth model as a “model” (which implies that it is readily transferable across political settings) and its connection to the Commonwealth. Is there something in the combination of characteristics shared by the countries under study—all relatively prosperous, stable democracies, and all current or former British colonies sharing a roughly similar legal tradition—that makes them conducive to this particular model of judicial review?

One of the main selling points of the Commonwealth model is its moderate nature and its potential to foster a relatively self-composed, dialogical constitutional discourse distinct from the American model’s polarizing and overly ideological debate about judicial activism. However, a true test of the legitimacy of this selling point is not included in the main cases Gardbaum studies. Indeed, most observers would classify Canada and New Zealand, for instance, as two of the most civilized, war-free and politically stable places on Earth before even considering their forays into constitutional innovation. True confirmation of the Commonwealth model’s supposed taming effects would require considering it in the context of a tumultuous political setting that nonetheless exhibits some of the preconditions to its application. Is the model likely to emerge in places such as Nigeria or India, where many but not all of these characteristics exist? And if not, why? Would it emerge or work effectively in, say, Pakistan, where a British legal tradition and formal judicial independence exist alongside near-permanent political unrest, including various forced regime changes, political assassinations, and major disagreements concerning the role of the military and of religion in public life? Is it likely to tame the edgy political sphere in Uganda, where President Yoweri Museveni has been ruling uninterruptedly since 1986 while judges have been wearing white legal wigs, quoting Lord Denning, and citing classic British sources such as *Black’s Law Dictionary*, *Russell on Crime*, and *Phipson on the Law of Evidence*? In other words, does the Commonwealth model have the capacity to induce and foster truly dialogical, *bona fide* judiciary–legislature relations independent of the legal tradition and political conditions surrounding those bodies, or can it do so only in settings that many would classify as moderate prior to and independent of the existence of the model? These are important questions, for if it turns out that the Commonwealth model is a rare and exclusive product that only a very specific subset
of circumstances is likely to yield and/or sustain, the model loses much of its promise as an effective middle-of-the-road approach for balancing active judicial review with parliamentary sovereignty.

There is a major debate in the political science literature on constitutional design between those who stress the significance of institutional arrangements to making constitutional democracy work and those who emphasize cultural and societal factors. Gardbaum’s arguments place him firmly in the former camp. Gardbaum finds considerable variance in the performance of the Commonwealth model qua institutional arrangement across the five jurisdictions that he examines. In other words, while the institutional setting is similar across jurisdictions, its functioning varies. These differences suggest that we should perhaps distinguish more clearly between the formal institutional aspects of the Commonwealth model (and for that matter of any other model of judicial review and constitutional rights protection) and the politics of its functioning or operation in each polity. The dynamics of constitutional court/political sphere relations, it would appear, are determined at least as much by the latter aspect as by the former. Recent comparative constitutional politics scholarship seems to support this claim.

The idea of delegation as an effective risk-reduction measure first emerged in the 1980s in the literature on the political motivations behind the creation of independent administrative agencies. From the politicians’ point of view, delegating policy-making authority to the courts can reduce both decision-making costs and the responsibility and risk faced by themselves and the institutional apparatus within which they operate. At the very least, the transfer to the courts of contested political “hot potatoes” offers a convenient escape for politicians who are unwilling or unable to settle public disputes in the political sphere. Delegation also helps politicians avoid difficult or “no win” decisions and/or the collapse of deadlocked or fragile governing coalitions. Politicians may seek to gain public support for contentious views by relying on

1 Those in the other camp, most notably Robert Dahl, suggest that formal institutions and constitutional arrangements are less important to the maintenance of democratic political institutions than the existence of socio-cultural conditions, civic traditions, and political realities that are hospitable to the spread and stable functioning of democracy. See, e.g., Robert A. Dahl, Thinking About Democratic Constitutions: Conclusions from Democratic Experience, in NOMOS 38: Political Order 175, 178 (Ian Shapiro & Russell Hardin eds., 1998). See also Robert Putnam et al., Making Democracy Work: Civic Traditions in Modern Italy (1993).


national high courts’ public image as professional and apolitical decision-making bodies. Alternatively, when politicians face obstructions to the implementation of their own policy agenda, they may favor constitutional review by a sympathetic judiciary in the hope that this will overcome those obstructions. Likewise, politicians may divert policy-making responsibility to a relatively supportive judiciary when current or prospective transformations in the political system seem to threaten their own political status or policy preferences.

Consider the reference procedure in Canada. Canada has an a priori/a posteriori, abstract and concrete review system that effectively blurs the distinct public policy effects of each of these “ideal type” models. In addition to the routine a posteriori and concrete judicial review procedures, the reference procedure allows both the federal and provincial governments in Canada to refer proposed statutes, or even hypothetical legal scenarios, to the Supreme Court of Canada or the provincial courts of appeal for an advisory opinion on their constitutionality. Through this channel, the Supreme Court of Canada was prompted to render some of the most significant rulings in Canadian constitutional history, including the Senate Reference (1980), the Patriation Reference (1981), the Quebec Veto Reference (1982), the Manitoba Language Rights Reference (1985), the Quebec Secession Reference (1998)—arguably the most significant political ruling the Court has delivered in its history—the Same Sex Marriage Reference (2004), and the Assisted Human Reproduction Act Reference (2010). By a request of the Government of Canada, the Supreme Court is currently contemplating a reference concerning a proposed Senate overhaul and the applicability to it of certain provisions of the constitutional amending formula. In many of these landmark cases, the reference procedure provided a more or less honorable way out for a besieged political sphere or for important stakeholders within it. A close consideration of the reference procedure in action would provide an effective illustration of how the analysis of a key constitutional feature is incomplete without a complementary analysis of the political reality that surrounds it.

Courts and judges, for their part, may take hold of an issue as a means of expanding their influence or reshaping their public image in the face of hesitation, disagreement, or inaction in the legislative or executive realm. An overwhelming body of evidence suggests that although constitutional courts and judges may speak the language of legal doctrine, their actual decision-making patterns, consciously or not, tend to correlate with policy preferences and ideological and attitudinal tilts. Their decisions also appear to reflect strategic considerations vis-à-vis their political surroundings, their professional peers, panel compositions, and the

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This can be explained by pointing to the costs that judges as individuals or courts as institutions may incur as a result of adverse reactions to their unwelcome decisions, or to the various benefits that they may acquire through the rendering of strategically tailored welcome ones. A wide array of empirically grounded studies suggests that constitutional courts and judges often consider factors that are not qualitatively different than those that political actors would consider. These range from the court’s legacy, reputation and public stature, to the judges’ relations with their epistemic communities of reference (the network of jurists), to the potential chilling effects of the political reaction to certain rulings, particularly in politically significant cases. There is little analysis along these lines in Gardbaum’s “institutionalist” take on high courts’ relations with their political surroundings.

Models of judicial review or of constitutional protection of rights are sometimes perceived by Gardbaum and others as ends in themselves, and not as a means to other, substantive ends such as democracy, human development, or equality. While the Commonwealth model has had a transformative effect on the language and practice of constitutional rights jurisprudence and rights legislation in the countries where it has been in effect, its independent influence on promoting progressive notions of democratic or distributive justice remains unknown. In other words, the quality of manners at the dining table and the quality of the food served on it are not the same thing.

In that regard, an element that is missing from this book is an exploration of the Commonwealth model’s capacity to generate policy outcomes that differ substantively from those generated by the strong form review model or the parliamentary supremacy model. An attempt to theorize along these lines is offered by Mark Tushnet’s thought-provoking book, Weak Courts, Strong Rights, where he argues, quite counter-intuitively, that weak-form judicial review may be more suitable and effective than a strong review model for advancing progressive notions of subsistence rights and, by extension, of distributive justice more generally. Ultimately, Tushnet makes a positivist, empirically testable argument about the possible effectiveness of weak-form judicial review in advancing the status of socioeconomic rights. This in turn may serve as a springboard for engaging in a comparative cross-disciplinary exploration of the intersection of socioeconomic rights and political realities. Gardbaum’s assessment of the Commonwealth model would have been more complete with an attempt to develop an argument of that nature, or barring that, an attempt to test Tushnet’s argument vis-à-vis policy outcomes in the examined jurisdictions as well as others that feature strong-form review.

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9 See Harry Glasbeek, From Constitutional Rights to “Real Rights”—“R-i-g-h-t-s Fo-or-wa-ard Ho!” 10 WINDSOR Y.B. OF ACCESS TO JUSTICE 468, 473 (1990).
A quick look at the Nordic countries—perhaps the true habitat of weak-form judicial review—can offer some valuable insights. Sweden, Finland, Norway, and Denmark—four of the most developed and prosperous nations on earth—have long adhered to a relatively generous welfare state regime while showing little enthusiasm (to put it mildly) for the American approach to rights and judicial review. Norway, for example, deferred giving human rights explicit constitutional protection until 1994. In Finland, substantive judicial review of legislation was explicitly forbidden prior to 2000. In Denmark and Sweden, nontechnical judicial review has seldom been practiced. The Danish Supreme Court has set aside legislation very few times in the past 160 years, with the Danish Constitution silent on the issue of judicial review; and the picture is much the same in Sweden. In the Nordic region, various combinations of well-established, ex ante parliamentary preview and restrained ex post judicial review have effectively mitigated the counter-majoritarian difficulty embedded in excessive judicial review and put in place an alternative, non-juridocratic way of protecting rights. Has this come at the expense of civil liberties in these countries? Hardly. In the reports published by international human rights watchdogs, including Amnesty International, Human Rights Watch, and their various counterparts, the sections on alleged human rights violations in each of the Scandinavian countries are slim to non-existent. Similarly, the status of individual freedoms in the Netherlands—one of the European countries that, until recently, had stringently opposed the idea and practice of judicial review—certainly has not been lower than in the United States, despite the latter’s having relied for more than two centuries on a widely celebrated Bill of Rights and having engaged for two centuries in active judicial review.

The widely respected United Nations Development Programme’s Inequality-adjusted Human Development Index—a measure of the average level of human development in a polity when inequality is taken into account—further supports these insights. The Nordic countries (which rely on low-key administrative review), alongside Australia (which has no constitutionally entrenched bill of rights) and the Netherlands (which until recently had no judicial review by law), are among the top twelve countries on the Index, along with small European countries such as Austria, Switzerland, and Slovenia (all of which are civil law countries, and none of which is considered a model of flashy judicial activism). With the exceptions of Japan (humble constitutionalism and limited judicial review) and the United States (extravagant constitutionalism and great judicial visibility), none of the world’s most populated countries are among the world’s leaders in terms of human development. In addition to moderate population size and stable electoral processes, the existence of a developed market economy, combined with centralized planning that cherishes public investment in science, education, and health care, appears to be the winning formula here. The net impact of variance on the judicial review axis appears, frankly, quite negligible.

All of these thoughts, however, are ruminations of a social scientist who studies comparative constitutional politics. Gardbaum is a distinguished scholar of comparative constitutional law who advances a vision of judicial review through the prism of the constitutional domain. In fact, one of the many merits of this book is Gardbaum’s
ability to remain focused on the task at hand: identifying the unique traits of the Commonwealth model of judicial review and, based on a meticulous comparative exploration of the model’s evolution in five jurisdictions, assessing its contribution to constitutional theory. *The Commonwealth Model of Constitutionalism* not only accomplishes these goals in full, but leaves the reader craving more.