Opening Remarks

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Strong and Weak Form Review Revisited

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- Traditionally constitutional review was final and unrevisable except through constitutional amendment with supermajority requirements (or regular replacement of judges)
- – Cooper v. Aaron in United States

- In early 1990s Stephen Gardbaum and I recognized that something new was happening

- Commonwealth model/weak-form review
- Decisions by constitutional courts could be revised by ordinary majorities
- Various forms: override/notwithstanding; declaration of incompatibility, interpretive mandate
- Defended as more consistent with democratic self-government in face of reasonable disagreements
- Opportunity to reconsider (in light of failures of understanding) and rationally disagree with judicial interpretation

- I want to stress the important feature of weak-form review, that the legislative action following the court's action would be guided by reference to constitutional norms – reasoned disagreement with the judges' constitutional interpretations

- One reason for weak-form review occurring in commonwealth nations is that in those nations there was a coherent theory of political constitutionalism (rather than judicial constitutionalism)

- According to political constitutionalism, constitutional norms are enforced primarily through politics
- For present purposes, two primary mechanisms
- First, a normative commitment among political elites to conform to the constitution (subordinating immediate policy to adherence to constitutional norms)

- Second, competition between parties – when one party took an arguably anti-constitutional action, the opposing parties would point that out and make it part of the campaign against the ruling party

- Notably, this second mechanism won't work well when there is a dominant party – India under the Congress Party and perhaps today under the BJP; South African under the ANC; and, one standard explanation for the way the Japanese Supreme Court has exercised its formal strong-form power is Liberal Party dominance

- But it's worth noting that if political constitutionalism doesn't work well where there's a dominant party, the examples all show that judicial constitutionalism – strong-form review – might not work well in such cases either
- Though the South African and Indian cases are quite complex, and not the focus of my lecture today.

- Today want to talk about the distinction between strong-form and weak-form review as seen with twenty or more years of hindsight

- First, about weak-form review
- First observation is that weak-form review hasn't spread beyond its initial jurisdictions (despite its apparent attractions)
- Notably, modern "populist" constitutions, like those in Latin America, retain strong-form review (but try to make the constitutional court more responsible to the people in the appointment process)

- And reform efforts in strong-form nations haven't argued for weak-form review but rather, again, for changes in appointment processes (India, Israel with qualifications)
- That weak-form review hasn't spread might suggest that the normative case for it isn't as powerful as I initially thought it was.

- Second, the initial prediction or sense was that it was unstable – either it wouldn't lead to invalidations or that it would become strong-form
- Neither has proven quite right, though the second is more accurate than the first
- Typically, declarations are followed by the legislature, as in strong-form review.

- Though that often is because the courts do identify overlooked problems rather than disagreements about constitutional interpretation
- Rarely there is permanent or near permanent resistance (British voting rights cases)

- And there have been statements by weak-form courts that, if they wanted to, they could do more than merely declare invalidity
- New Zealand – initially, only an interpretive mandate (interpret in light of bill of rights, even if it involves stretching the language, moving toward the possibility of declaration of invalidity

- Nothing yet on invalidating statutes that expressly override
- On the other side, some additional assertions of power to override in Canada
- Mostly in peculiar circumstances – overriding a lower court decision, overriding a decision dealing with a statutory regime that's about to be replaced, to avoid transition disruptions

- And sometimes political grandstanding – overriding a questionable lower court decision while also appealing to get it reversed
- Benefits have been more robust pre-enactment vetting, reducing the chance of facing a declaration of invalidity

- But we haven’t yet seen the benefit of weak-form review as a means of provoking principled and reasoned rejection of judicial reasoning
- I’ll return to this in my concluding discussion

- Developments with respect to strong-form review
- The major development is the emergence of less-than-final decisions – “semi-strong”
- The clearest example is the spread of deferred remedies
- That is, the court finds a statute unconstitutional but doesn’t make its decision immediately enforceable
- It gives the legislature some time – six months to two years – to adopt a replacement

- The court reserves the power to hold the replacement unconstitutional, so it's not like weak-form review
- But rewriting the statute to accommodate the court's objections is possible
- And, perhaps more important, the legislature can adopt minor revisions while leaving the core unchanged, even when the court's objections went to the core

- The legislature can use this as an opportunity to encourage the court to reconsider its initial decision
- In light of greater information provided by the legislature in the re-enacting process, for example
- And, though this hasn't happened yet to my knowledge, new judges might replace old ones and change the outcome
- Other developments were already present within strong-form review, but now can be seen in a somewhat different light

- Interpretation in light of the constitution, even where the interpretation is strained or inconsistent with traditional modes of interpretation
- Formally this allows the legislature to respond by enacting a “new” statute in the same words, insisting that they meant what they said, even though they now know that what they said might be unconstitutional

- Reading up or reading down – remedies for statutes that violate equality principles
- Reading up extends benefits to the excluded group, reading down limits benefits granted the included group
- Again, the legislature can respond by moving in the other direction – that is, if the court reads up, the legislature can deny benefits to all, and if the court reads down, the legislature can extend benefits to all

- Will conclude by discussing some normative issues associated with the distinction or the continuum
- Begin with something like the conditions for the development of weak-form review
- Strong tradition of parliamentary supremacy – no constitutional review at all
- Coupled with a perception that the existing system generated too many troubling examples of possible violations of fundamental rights

- Note that if there is no such perception, strong-form review might look a lot like parliamentary supremacy
- Because the strong-form court won't be invalidating many statutes (roughly, the situation in Japan)

- Parliamentary supremacy reflects a strong commitment, at least in theory, to the proposition that the people should have complete power to determine the legal conditions of their life
- Any form of constitutional review will be in tension with that
- But the experience of troubling times makes enough people think that there ought to be *some* limits on parliamentary power

- Yet, the tradition leads people to think that those limits should themselves be limited
- Weak-form review is a way of getting something like judicial input into the process without limiting parliamentary power “too much”
- In short, weak-form review is a way of accommodating democratic decision-making with a system of enforcing limits on majority power

- My own view is that this is a quite attractive institutional arrangement
- So why hasn't it been more widely adopted?
- First, can't rule out the possibility that the developments within strong-form review I've described – deferred remedies and the like – have been influenced by the normative attractiveness of weak-form review

- Though I wouldn’t emphasize that too much – those developments grew out of things that were present within strong-form systems even before the rise of weak-form review

- Second, there may be a sense that politicians can't be trusted to respond appropriately to weak-form review
- Instead of overriding court decisions only when legislators disagree in principle with the court's constitutional interpretations, legislators will override simply because they think that the legislation is a good thing even if unconstitutional

- So, strong-form review persists because of skepticism about the constitutional faithfulness of legislators
- That skepticism might well be justified
- This can be connected to the story I sketched about why a nation might adopt weak-form review
- Parliamentary supremacy coupled with recent experiences of abuses of power

- What do you infer from those abuses?
- Advocates of weak-form review have to say that those abuses are exceptional actions by politicians who generally conform to constitutional norms
- But an alternative inference is that political norms have changed, or are in the process of changing

- The norm guiding politicians used to be “respect the constitution” but now is “get the votes you need however you can”
- So, though we might have trusted politicians in the past to do the right thing most of the time, the experiences that lead us to redesign the system are a symptom of a general transformation of political norms

- And the sensible response to that transformation is to move from parliamentary supremacy not to an intermediate position like weak-form review, but to the strong-form system that allows judges to displace political judgments that no longer are guided by a norm of adhering to the constitution

- My conclusion, then, is that those scholars who have focused on developments within strong-form review are on stronger normative ground that those who have defended weak-form review

Closing Remarks

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