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WEAK AND STRONG JUDICIAL REVIEW

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Mark Tushnet's very interesting and subtle paper¹ raises many deep and important issues. My brief comments here will barely scratch the surface. I will argue only that, in the right context, strong judicial review is not as anti-democratic as Tushnet suggests.

Strong judicial review finds its paradigm in the United States, whereas Canadian law epitomizes weak judicial review. The difference between these legal systems comes out when a court overturns legislation on the basis of an interpretation of a constitutional clause where the interpretation is reasonable but still disputed by the legislature. Tushnet is especially concerned with cases involving laws that affect law-making, including restrictions on campaign finance or on government criticism, but his remarks are supposed to hold in other areas of constitutional law as well.

In a system of *strong* judicial review, there are only three ways to overturn or undermine a court's interpretation of the constitution: (a) The court can reverse itself. (b) The court can change its interpretation through informal common law development. (c) The legislature (or legislatures) can amend the constitution. A system of *weak* judicial review allows these three responses plus a fourth: (d) The legislature can simply pass the law again "notwithstanding" the constitutional clause or the court's interpretation of the constitutional clause. Such an "in-your-face" statute becomes valid law in Canada, but not in the United States.

Tushnet assesses these alternative legal systems by applying Michelman's standards for democracy, which require that people be "as self-governing as is achievable in the real world." Since

¹ "Forms of Judicial Review as Expressions of Constitutional Patriotism", by Mark Tushnet in this volume. All parenthetical page references in the text are to this article.



unanimity is often unachievable, the greatest achievable self-government occurs when “everyone could freely give their respect to a set of basic-law interpretations that not everyone honestly considers to be free from serious moral error.” This respect-ability is supposed to require “constant exposure of the interpreter . . . to the full blast of sundry opinions on the question of one or another interpretation” (Michelman as quoted by Tushnet on p. 360).

Tushnet never questions Michelman’s standards, so he seems to accept them. I, however, doubt that these are the right standards for assessing which system of judicial review is better. One reason is their lack of realism. No practical legal system could really face “the full blast of sundry opinions” especially if “the exposure to those opinions actually has to matter somehow” (p. 362). On constitutional issues, there are too many people who would talk too long. Actual courts cannot work without restricting the parties who get to speak during trials. It is also impractical for legislatures to let everyone speak while a law is being considered. Nobody hears everybody. So “the full blast of sundry opinions” is an illusion.

There still might seem to be a legal system to which “everyone could freely give their respect.” Presumably, people are able to respect a legal system when it could be justified from their point of view based on premises that they accept. If so, then I doubt that there is any substantial system that literally everyone could respect in any pluralistic society. There will always be some hold-outs whose beliefs are so distant from everyone else’s that we cannot justify the legal system based only on premises that they accept. The clearest examples lie in religious groups that favor theocracy. One person with such views is enough to prevent unanimity.

Moreover, in unusual circumstances, what increases self-government can lead to disaster either for minorities or for the whole society, and then self-government might be bad overall. In my consequentialist perspective, the right standard for judging strong judicial review and weak judicial review is their total consequences, including welfare, rather than merely effects on self-government. Self-government might be one good among others, but it is not the only good.

For these reasons, I would not want to assess weak and strong judicial review solely in terms of Michelman’s standards or solely

in terms of self-government. Nonetheless, since Tushnet focuses on self-government, I will, too, in this comment.

Tushnet's thesis is complex. At first, Tushnet says, "strong-form review as currently *practiced* in the United States does not satisfy the conditions of dialogue", so a system of weak judicial review is "possibly better, from Michelman's point of view" (pp. 355–356; my emphasis). In the end, however, Tushnet concludes, "strong-form review is compatible *conceptually* with Michelman's and Habermas' account[s] of constitutional democracy" (p. 379; my emphasis). Together, then, Tushnet's thesis seems to be that strong judicial review is compatible in principle but not in practice with Michelman's standards.

This picture gets complicated when Tushnet adds, "The common law process of dialogue . . . may be enough to establish that systems of strong-form judicial review are compatible with the requirements of self-government as Michelman describes them" (p. 374) and "particular nations' histories may lead one to think that . . . strong-form review is better for the United States" (p. 379). It is not clear to me how strong-form review can be "compatible with" (or "better for the United States" on) Michelman's standards, if its actual practice in the United States "does not satisfy the conditions of dialogue," as Tushnet claimed earlier. Perhaps Tushnet is claiming only that history might *mislead* one into thinking that strong-form review is better for the United States, when really it is anti-democratic as actually practiced. I will take that to be Tushnet's thesis, although his final thesis is not completely clear to me.

Tushnet's strategy is comparative. He argues that a system of weak judicial review is more democratic and, hence, better than a system of strong judicial review, so a system of weak judicial review is best. However, to determine what is best, we need to consider all alternatives. Why does Tushnet consider only two? Probably because these two are the most prominent models today. Still, neither strong judicial review nor weak judicial review is best if some third alternative is better yet.

In particular, I want to compare a third legal system that combines weak judicial review with strong judicial review. I like to call this system "combo", since it is like getting a coke and fries with your

burger, but it seems more dignified to call it the compound system. In a pure system with only strong judicial review, legislators *never* get to overturn judicial interpretations of constitutional provisions (other than by means of a new constitutional amendment). In a pure system with only weak judicial review, legislators *always* get to overturn judicial interpretations of constitutional provisions (simply by passing an in-your-face statute). In the compound system, legislators *sometimes* can and *sometimes* cannot overturn judicial interpretations of constitutional provisions (simply by passing an in-your-face statute).

Who decides which constitutional provisions are subject to which level of judicial review? This decision could be made by legislatures. When proposing a constitutional provision, the legislatures could be allowed to specify whether judicial interpretations of that provision can or cannot be overturned by a majority of a legislature simply by means of an in-your-face statute without going to the trouble of a new constitutional amendment. Although legislatures would be inclined to retain control over interpretation in most cases, they might sometimes have good reasons to give up the power to overturn judicial interpretations by simple majorities of legislatures. These reasons are close to the reasons why legislatures in the United States have chosen to protect some rights by means of a constitutional provision rather than by a mere statute.

This compound system reveals what Tushnet needs for his argument. It is not enough for him to sing the praises of weak judicial review, since weak judicial review is also available in the compound system. What Tushnet needs to show is that strong judicial review is never democratic, even when an elected legislature chooses it over weak judicial review when both options are available, as in the compound system.

One reason for rejecting strong judicial review might seem to be that strong judicial review does not allow the kind of dialogue that is essential to democracy on Michelman's view. But that's not accurate. As Tushnet recognizes, both systems allow some dialogue between the court and the legislature. In a system of strong judicial review, the legislature can, and often does, speak out against the court's interpretation. So do private citizens. The court might even listen and adjust its future rulings, if it is convinced by what is said.

It does not have to react, but it can. “The full blast of sundry opinions” is still an exaggeration, as I said, but a great deal of dialogue is possible in a system with strong judicial review.

Tushnet still might object that the dialogue under strong judicial review is “too little, too late”. Specifically, Tushnet suggests that, under strong judicial review, if courts were not exposed at the first trial to opinions that emerge later, there is “no simple way for courts to revisit their decisions” (p. 366). However, the courts are able to revisit issues if they want. Indeed, the United States Supreme Court does sometimes revisit issues fairly quickly, especially when legislatures modify their laws to meet the issues raised in court. For example, the United States Supreme Court declared a Georgia capital punishment statute unconstitutional in *Furman v. Georgia* 408 U.S. 238 (1972). Georgia then rewrote the statute so as to meet the objections of the Supreme Court, and the Supreme Court then upheld the new statute as constitutional in *Gregg v. Georgia* 428 U.S. 153 (1976). The Supreme Court even cited public opinion polls and actions by legislatures among their reasons for allowing the new statute in *Gregg*. This process looks like a dialogue between courts and legislatures (as well as citizens). Of course, the legislatures do not always get exactly what they want, and I am not endorsing the result in *Gregg v. Georgia*. Nonetheless, the resulting compromise reflects the various arguments given by both sides during the process of dialogue.

In contrast with this process, Tushnet lauds the ability of legislatures in a system of weak judicial review to pass “in-your-face” statutes. Such responses are hardly dialogue. There is no true dialogue when a wife objects to what her husband is about to do, and her husband responds, “Tough. I’m going to do it anyway!” Similarly, there’s no true dialogue when a court finds that legislation violates the constitution, and the legislature responds, “Tough. We are going to pass it again anyway.” This legislature is not responding to the court’s reasons. You might want to let the legislature pass in-your-face statutes if you want the legislature to have more power. Or you might want the court to have the power to reject in-your-face statutes. But a preference either way cannot be based on the value of dialogue, because there is so little true dialogue when people just repeat themselves in-your-face.

Thus, the objection to systems of strong judicial review can't be that such systems rule out dialogue. In a system of strong judicial review, dialogue takes a different form, but it does occur.

Instead, the difference between weak judicial review and strong judicial review is supposed to lie in where and when the dialogue ends. Tushnet writes, "Two things distinguish weak- from strong-form judicial review. First, the legislature has the power to repudiate the court's specification. Second, the interactive process of specification and revision can occur over a relatively short period" (p. 369).

The second objection is odd. Even if the process of specification and revision is quicker in weak judicial review than in strong judicial review, it is not clear that speed is always good. In some areas, such as free speech, we might prefer that laws not change too quickly. Many people will not feel safe to espouse unpopular views unless they are confident that those views will not be outlawed tomorrow or next year or even next decade. So there can sometimes be good reasons to favor a system that changes only very slowly.

Tushnet's point might instead be that, when the courts overrule a law that the people support, the people are not self-governing during the time while they wait for the court's interpretation to be reversed. The slowness of this process in a system of strong judicial review then shows that it is a major problem, if it is a problem. However, this objection to strong judicial review obviously assumes that there is something wrong with the court overruling the law in the first place. If there's nothing wrong with what the court does, then there's nothing wrong with taking a long time to reverse the court's decision. So this objection has no force by itself.

The other distinguishing mark of strong judicial review was that "the legislature has the power to repudiate the court's specification" under weak judicial review but not under strong judicial review. However, that is not quite accurate. Even in a system of strong judicial review, legislatures can pass a constitutional provision, and then courts are bound to follow the new amendment rather than their previous interpretation. For example, if legislators in the United States do not like the exclusionary rule, then they can repeal or modify the fourth amendment or pass a new amendment that specifies different remedies for violations of the fourth amendment.

Thus, despite what Tushnet suggests, legislatures have the final word on which interpretation is binding even in a system of strong judicial review.

Admittedly, legislatures in the United States are unlikely to fiddle with the Constitution in this way. However, that is because of our constitutional culture and our reluctance to pass new constitutional provisions, especially regarding the Bill of Rights. It is also because of how hard it is to pass a constitutional provision. The problem, if there is a problem, then results not from strong judicial review but instead from how hard it is to pass constitutional provisions. If it were easier to pass constitutional provisions, then legislatures would have more power. So maybe Tushnet's objection should be directed against the stringent amendment procedures rather than against strong judicial review.

Anyway, given the current context of the United States in which it *is* so difficult to amend the constitution, it is harder and, hence, less likely for a legislature to get its way in a system of strong judicial review. But the central question remains: does that make it undemocratic?

The mere fact that the legislature does not get what it wants is not enough to show that the legal system is undemocratic. If democracy requires self-government, which is government by the people, then, since sometimes the legislature does not express the will of the people, sometimes the legislature needs to be restrained for the sake of democracy. If a majority of the legislature could override constitutional interpretations by courts, then courts would be less able to prevent abuses by the legislature. That makes it rational for people to give courts the power of strong judicial review at least in cases where there are dangers that the legislature will act contrary to the will of the people.

It still might seem undemocratic for a court to restrict a legislature when the majority of the people side with the majority of the legislature against a court's interpretation of the constitution. However, such decisions need not be undemocratic if the court is properly authorized to restrict the legislature and the people in this way.

This point is missed by the standard analogy with drunkenness. If I never gave anybody permission to stop me, then it is not clear

why anyone has the right to control me when I am drunk as long as I am hurting only myself. Moreover, drunk people are responsible for getting drunk; and, after they are drunk, they lack some of the mental abilities and control that are normally necessary for responsibility. These disanalogies and others undermine this model for constitutional restrictions on legislation.

Here's a better analogy: At the start of a meal, I explicitly tell my wife not to let me eat any dessert that is too fattening, to use her own judgment to determine what is too fattening, and not to listen to any arguments from me about which desserts are too fattening. At the end of the meal, I ask for a piece of "Death by Chocolate". It is not my fault that I want this dessert, and I am not out of control (as in the case of drunkenness). Still, my wife says that I can't have this dessert, because it is too fattening in her judgment. I argue, but she ignores my arguments. We can even imagine that she is wrong, since a piece of "Death by Chocolate" really isn't too fattening, despite its name. Am I self-governing? Perhaps not at the moment. In the end, she governs whether I get dessert. However, considering the whole period of time, I control what happens, since my wife is just following my instructions. I do not get what I currently want (the dessert), but I do get what I want in another sense, because I wanted her to follow a procedure that she did follow. Moreover, it can be rational for me to favor this procedure and authorize her to follow it, if I know that this procedure is the best way for me to achieve my overall goals, including health. So I have no legitimate complaints about her restrictions on my behavior.

In the constitutional case, judges are like my wife. The people and legislature of a country rationally ask judges to enforce certain restrictions on legislatures at later times even if those people (or their descendants) and the legislators at that later time do not want those restrictions to be enforced. Just as I am self-governing and have no legitimate complaint against my wife, so the people and legislators at the later time have no legitimate complaint against the judges, because the judges are following instructions by the people at an earlier time. Moreover, the people remain self-governing because the judges are simply enforcing the will of the (earlier) people when the judges restrict the (later) people.

This analogy is, admittedly, imperfect. Although I am the same person at the beginning and at the end of the meal, the people who authorized the judges to interpret the constitution are not the same as the people who now oppose the judicial interpretation of the constitution. We need to distinguish the past people, who were citizens at the earlier time when the constitutional provision was passed, from the present people, who are citizens at the later time when the constitutional provision is interpreted and applied (and also from the future people who will live under the same legal system). The situation that concerns us occurs when the present people and legislature do not get what they want, because the present court interprets the constitution in a way that the present people dislike; but this present court is authorized by the past people and past legislature to interpret the constitution that these past people passed (so to speak).

If you think of the people at one particular moment in time, then their failure to get what they want seems to undermine government by “the people”. This perspective is reflected in Habermas’ view that “‘self-government’ means that ‘the addressees of the law are simultaneously the authors of their rights’” (p. 353 note 2). This simultaneity requirement seems to be violated when the authors are past and the addressees are present.

However, this requirement (so interpreted) is too stringent. If the individuals who make the laws had to be strictly identical with the individuals to whom the law applies, then we could not legitimately be bound by any law that was passed before we were old enough to vote. Since that’s absurd, it is not clear why “the people” must or should be viewed in terms of one particular moment in time.

It is at least as plausible to think of “the people” as spread over time, so that past and present and future people are all part of “the people”. This wider view makes it easier to see how “the people” can authorize judges to restrict “the people”. After all, the majority of the people who were around at the past time authorized judges to use their judgment in interpreting the constitution in the future and wanted their system of judicial review to be strong instead of weak. So, from the perspective of the past people, the people govern when judicial review is strong. Even the present people presumably support a legal system that allows them to bind future legislatures by passing constitutional provisions that will be subject

to strong (rather than weak) judicial review. So they have no legitimate complaint when past legislatures bind them in the very same way that they want to be able to bind future legislatures.

Tushnet might respond that no legislature, past or present, should be allowed to bind future legislatures. But notice that this restriction prevents current majorities from getting what they want, if they want to bind future legislatures. A dilemma results: If a legislature is *not* allowed to choose strong judicial review, and if the legislature wants to do so, then the *current* legislature cannot get what it wants. If the current legislature *is* allowed to choose strong judicial review, and if it does so, and if future judges interpret the constitution contrary to the wishes of future legislatures (as is likely), then *future* legislatures will not be able to get what they want. This leaves no way for legislatures to get what they want in all cases, if some legislatures want to bind other legislatures. Democracy is impossible if democracy requires that legislatures always get what they want.

The lesson, of course, is that this view of democracy is too simple. But Tushnet seems to presuppose this view of democracy if his argument is that strong judicial review undermines self-government and democracy because it frustrates the will of the (current) majority. What democracy really requires is that all power comes eventually from the people. That refined view of democracy is compatible with the people at one time putting restrictions on the people at future times by choosing strong judicial review.

This view of democracy would be problematic if it were irrational to restrict future people and legislatures by means of strong judicial review. But it isn't. Strong judicial review makes it harder for legislatures to change court interpretations of the constitution, and that can be good when there is reason not to trust legislatures. In some areas, legislatures seem prone to certain kinds of errors that courts might be more likely to avoid because of judicial training, access to relevant facts, and freedom from electoral pressures. Such considerations can justify the people in choosing a system with strong judicial review.

When it is fair and rational, the people "could freely give their respect to" a system with strong judicial review even when they disagree with particular judicial interpretations. The grounds for respect are the same as when I respect the outcome of a fair election,

even though I voted for the loser. I need not change my view that the loser would have made a better President or whatever, but I can still recognize that the authority of the winner is legitimate. Similarly, I can continue to think that the court misinterpreted the constitution even while I also recognize that their interpretation is binding law, because they had the legitimate authority within a fair system that was rationally chosen by the people.

Tushnet might deny that the people of the United States chose the system of strong judicial review, since it was imposed by the Court in *Marbury v. Madison* 5 U.S. 137 (1803). However, the people and government of the United States have accepted this system for 200 years. As Tushnet admits in the end, “the people of the United States seem both (a) committed to strong-form judicial review, and (b) sufficiently self-governing to count as participants in a process of constitutional democracy” (p. 375). This is our form of “constitutional patriotism”, and it seems to make us self-governing in practice, contrary to Tushnet’s claim that “strong-form review as it is currently practiced in the United States does not satisfy the conditions of dialogue” (p. 355).

In addition to his general arguments, Tushnet provides an insightful discussion of the development of United States law regarding criticism of the government. However, this discussion raises no new problems for strong judicial review. In the earlier cases that Tushnet cites, the Supreme Court upheld prosecutions under legislative statutes, so “The Court gave legislatures . . . no reason to respond by refining or repudiating the Court’s decisions” (p. 374). That lack of response is no grounds for accusing the Court of failing to listen to the legislature. There would have been no more dialogue and no quicker development under a system of weak judicial review. When the Supreme Court did finally overturn a prosecution in *Brandenburg v. Ohio* 395 U.S. 444 (1969), the legislature could not repudiate the Court’s interpretation, but it is not at all clear why that is a bad result, much less a bad procedure. Tushnet himself describes this result as “widely, perhaps universally, acceptable” (p. 370).

Special problems do arise if the freedom-of-speech clause is interpreted to prevent campaign finance reforms that might make it easier for challengers to unseat incumbents in the legislature. This

court decision might reduce the number of legislators who would approve judges who would reverse or refine the decision that favored incumbents. That would make it harder for courts to correct their decision, if it is mistaken. Still, it is not clear how likely this scenario is. Is there any evidence that legislators really do favor judges on this particular basis in appointment hearings? Even if this possibility is a problem, it is not obvious that it would be solved by weak judicial review. If judges in a system of weak judicial review overturn campaign finance reform that favors incumbents, then the legislators would be unlikely to pass an in-your-face statute that would make themselves less likely to win re-election. And even if strong judicial review might favor incumbents in some such way, this problem could be solved in other ways (such as term limits) without endangering free speech. Finally, it is not clear why any of this is undemocratic when the people chose the system.

In conclusion, I see no strong reason on the basis of self-government to prefer a system with only weak judicial review over a system with strong judicial review (whether or not that system is compound). There still might be other reasons to prefer weak judicial review, such as tendencies of judges towards errors of various sorts. However, that suggestion raises different issues beyond anything that I could cover in this short comment.²

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