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Review essay
With a little help from the courts: the promises and limits of weak form judicial review of social and economic rights

Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law
By Mark Tushnet, Princeton: Princeton University Press, 2008. 312 pp.
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Abstract

This is a review of Mark Tushnet's Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law. The review outlines the main arguments in the book and then moves to elaborate on two preconditions which are necessary for Tushnet's project to succeed: the existence of a strong civil society and an institutional willingness to implement social welfare rights. In addition, this review seeks to situate the book within Tushnet's broader constitutional theory project. In particular, the review attempts to reconcile this work with Tushnet's 1999 Taking the Constitution Away from the Courts, a work that initially seems to be diametrically opposed to his new book.

1 Introduction

The relatively recent prominence of socioeconomic rights discourse in constitutional law has given rise to two distinct types of scholarship. The first discusses their moral, legal and political justifications (e.g. Fabre, 2000), whereas the second attends to the practical implications entailed in enshrining such rights in a constitution (e.g. Barak-Erez and Gross, 2007). In his new book *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Professor Mark Tushnet takes on this latter aspect. Given that socioeconomic rights have come to be recognised in some form in various constitutions, he asks: How should courts exercising judicial review attempt to enforce them?

Readers familiar with Tushnet's work in constitutional theory, articulated most poignantly in *Taking the Constitution Away from The Courts* (Tushnet, 1999), will likely be surprised at his present embrace of judicial review. Indeed, *Weak Courts, Strong Rights* resumes the theme of *Taking the Constitution Away* in that authority over constitutional interpretation should be 'taken away' from courts, and, for the most part, given to the legislature and the people.[2] And yet, here Tushnet argues that judicial review can help make socioeconomic rights more robust, a seeming departure from his earlier work (e.g. Tushnet, 2006a).

1 I am grateful to Yuval Abrams, Faisal Bhabha, Alison Diduck, Shivi Greenfield, Alexis Loeb and to the anonymous referee of the IJLC for comments on a draft of this essay.

2 Tushnet has also argued for a less court centred constitutional theory elsewhere. See Tushnet (2003).

This review will proceed in three parts. The first part will offer a fairly close reading of the main arguments developed in the book. In particular, I will focus on Tushnet's argument that weak form judicial review, meaning a system wherein the judiciary does not have the last word over constitutional interpretation, has a tendency to degenerate into a strong form system. This discussion will be connected to Tushnet's argument that socioeconomic rights occupy the same theoretical space as civil and political rights, and are, in a sense, two sides of the same coin. Despite their theoretical similarity, however, socioeconomic rights present unique challenges for their enforcement, and Tushnet suggests a framework of weak form judicial review to address these challenges while still striving to maintain democratic legitimacy.

The second part of the review will address and attempt to resolve the problems entailed in Tushnet's solution. Specifically, I will argue that judicial enforcement of socioeconomic rights requires a hospitable environment for them to flourish. This means meeting two preconditions: first, a strong civil society; and second, a pre-existing institutional willingness to apply socioeconomic rights. I elaborate on each in turn and argue that failing to meet these preconditions makes the prospect of successful judicial enforcement of socioeconomic rights unlikely, or at least speculative.

The third and last part of the review attempts to answer the question posed earlier: How should readers consider Tushnet's constitutional theory as a whole, as it has been articulated over the past decade? Here I try to square *Weak Courts, Strong Rights* with Tushnet's previous writings, in particular his *Taking the Constitution Away From the Courts*, a book which takes a strong stance against judicial review.

I argue that despite the seeming tension, the two can be reconciled if we think of *Taking the Constitution Away* as a political manifesto and *Weak Courts, Strong Rights* as a pragmatic prescription. In other words, *Taking the Constitution Away* is a study in ideal theory, whereas *Weak Courts, Strong Rights* occupies the realm of non-ideal theory. If we were to design a constitution from scratch, argues Tushnet, we should not provide for judicial review. However, given that we already live in a system with judicial review, the question is how to design the adjudicative process so that it will meet objections from democratic self government[3] and be an effective tool in promoting rights, specifically socioeconomic rights.[4]

2 Summary of the book

2.1 On doing comparative constitutional law

Tushnet begins *Weak Courts, Strong Rights* by making an argument for the usefulness of comparative constitutional law. This serves as a helpful reminder that the current controversy in the US over the use of comparative law in constitutional interpretation has taken on exaggerated and politicised overtones.[5] Tushnet points out, and rightfully so, that looking at foreign constitutional law, aside from the pure intellectual interest, may be helpful when we encounter a new problem where there is

3 For a summary of such objections see Waldron (2006; 2001, pp. 232–254, 282–312).

4 By socioeconomic rights I mean the group of positive rights such as rights to housing, health care and education. Those are also called second generation rights, to distinguish them from first generation civil and political rights. As will be detailed below, Tushnet is not putting forth a normative argument that we *should* promote these rights.

5 See, e.g., Lawrence v. Texas 539 U.S. 558 (2003); Roper v. Simmons 543 U.S. 551 (2005); Tushnet (2006b; 2006c); Parrish (2007). In 2004, Republican Representatives Tom Feeney of Florida and Bob Goodlatte of Virginia proposed a non-binding resolution against the use of foreign law in judicial decisions. In response, Justice Scalia told Congress it was 'none of their business'. See Lane (2006, p. A19). It should be noted that in other jurisdictions, such as South Africa, Canada and Israel, there was never such a dispute, and, in fact, it could be argued that comparative law helped to establish the body of constitutional law in these countries.

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no settled precedent. To be sure, the comparativist must exercise caution when situating the foreign element within the specific institutional framework where it originated, and the foreign approach still needs to be compatible with domestic requirements.

With this presupposition in mind, what should we make of judicial review? On the one hand, judicial review as it is practised today seems to be a settled and permanent feature of US constitutional law. And yet, this was not always the case. Throughout American history there have been, and still are, disagreements as to the validity and kind of judicial review the US should have.[6] Thus, it is not implausible to suggest, as Tushnet does, that in terms of institutional design the question of which form judicial review should take is still an open question (*Weak Courts, Strong Rights*, p. 17). And here comparative constitutional law may be useful.

2.2 Strong form and weak form judicial review in constitutional law

The basic premise underlying Tushnet's argument is that courts and legislatures can have reasonable disagreements about the meaning of a constitutional provision (*Weak Courts, Strong Rights*, p. 21; Waldron, 2006, pp. 1366–1369). In these situations both interpretations will fall into a zone of reasonableness. From this it follows that there is no a priori or intrinsic reason to favour a judicial decision over a legislative one (*Weak Courts, Strong Rights*, p. 79).[7] However, the current form of judicial review in the US – termed strong form review – explicitly favours the finality of a judicial decision over a legislative one. Yes, constitutional decisions may be overruled by a constitutional amendment, but Article V makes that almost impossible. Thus the reality is that the Court is the final expositor of constitutional meaning.[8]

The problem of strong form review, Tushnet argues, lies precisely with the difficulty of overruling it (*Weak Courts, Strong Rights*, p. 22). In a strong form system, after a judicial decision has been made the people have no recourse, even if the Court happens to interpret the Constitution reasonably but in a way contrary to the also reasonable interpretation offered by the political branches. The broader question, then, is how can judicial review be reconciled with democratic self-government?[9] The answer proposed by Tushnet is weak form judicial review, which attempts to answer the problem of judicial finality by allowing the legislature to respond in real time to judicial pronouncements. The hope is that this will promote a dialogue between the branches, thus mitigating democratic objections.[10] The judiciary will still have its say, but the final word will rest with the legislature.

Weak form judicial review can take on various forms. It can be a mandate that the court interpret any enactment so that it complies with enumerated individual rights – an interpretation the legislature can reject by a subsequent enactment.[11] It can consist of incompatibility declarations – a process by which the court declares an enactment to be incompatible with constitutional commitments. There,

6 For a recent statement see Kramer (2004), arguing for judicial review but not judicial supremacy.

7 This assertion assumes that legislatures, executives and courts *do* reach reasonable disagreements. Tushnet deals with this claim in *Weak Courts, Strong Rights*, chapters 4 and 5. Using the case-studies of Clinton's impeachment in the House of Representatives and the Senate's practice on constitutional points of order, Tushnet argues that legislatures do a reasonable job of constitutional interpretation. Moreover, even if courts may do a better job on occasion, the differences are not likely to be great. It should be noted that Tushnet is *not* arguing that courts and legislatures are the same. There are important institutional, structural and procedural differences between the branches (*Weak Courts, Strong Rights*, pp. 93–96).

8 Such sentiments can be found in Cooper v. Aaron, 358 U.S. 1 (1958), City of Boerne v. Flores, 521 U.S. 507 (1997) and Dickerson v. U.S., 530 U.S. 428 (2000).

9 This is otherwise known as 'the counter-majoritarian difficulty'. See Bickel (1962).

10 The dialogic metaphor is accepted jargon for some weak form systems, such as Canada's and Britain's. See Roach (2001); Bateup (2006); Hogg and Bushell (1997); Hickman (2005).

11 As is the case in New Zealand. See New Zealand Bill of Rights Act of 1990, available at http://legislation.govt.nz/act/public/1990/0109/latest/whole.html.

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like in the UK, the legislature can choose not to amend the enactment, but it can also work toward complying with its constitutional commitments articulated by the court (*Weak Courts, Strong Rights*, pp. 27–31). It can be a regime where a court's decision is binding, unless the legislature actively overrules it.[12] Finally, weak form review can take the form of weak remedies. These are remedies that relegate the court to a monitoring role, while leaving the particulars to other branches.

2.3 The difficulty of sustaining weak form review

Much has been written in the past few years about weak form review.[13] The initial hope that weak form mechanisms will deliver real-time inter-branch dialogue has turned into scepticism that such dialogue can exist, let alone be ascertained.[14] Less sceptical commentators argue that, at best, such dialogue happens only infrequently (e.g. Manfredi and Kelly, 1999; Klug and Starmer, 2005; Huscroft, 2007). The main concern here is that weak form review is unstable, turning into strong form review, thus bringing back the same democratic tensions familiar from the US context. On this view, weak form review does not seem promising.

Tushnet's response suggests a different interpretation. He argues that what happened, most notably in Canada, is that the move toward strong form review reflected the considered judgment of the polity which came to favour judicial supremacy (*Weak Courts Strong Rights*, p. 44). Thus, if the shift to strong form occurs 'organically', it gives rise to fewer democratic objections.[15] Equating weak form review with democratic experimentalism (*Weak Courts, Strong Rights*, p. 66, fn55),[16] the repeated interactions between courts and legislatures are viewed as experiments in constitutional law. When experiments end, i.e. when the branches have reached a stable solution they find acceptable, so does weak form review. Thus, we can have strong form areas in a general system of weak form review and weak form areas, i.e. areas where the law isn't sufficiently established, in a general system of strong form review. Therefore, one should view the transformation from weak form to strong form as the reflection of a people on their constitutional commitments.

But an important question, I think, remains. Even if democratic objections are mitigated when the people decide to transfer their rights to the judiciary, what if the people change their minds? It seems then that even if an 'experiment has ended', we would need a mechanism which will allow for its re-examination. In other words, strong form review should never be too strong so as to preclude us from revising an existing legal arrangement.

2.4 The sameness of socioeconomic rights

Systems of weak form review purport to designate a larger role for legislatures in constitutional interpretation because the institutional mechanisms permit input after a judicial decision.[17]

12 As is the case in Canada with Section 33 of the Canadian Charter of Rights and Freedoms.

13 The first scholarly discussion is probably Stephen Gardbaum (2001).

14 For genuine dialogue one needs to show that the legislature received the judgment, considered it, deliberated, and then acted in a certain way which demonstrates some level of thoughtfulness. This will be very difficult to show.

15 To support his claim, Tushnet discusses Section 33 of Canada's Charter of Rights and Freedoms, which allows the national legislature and the provinces to override some judicial decisions. Aside from several notable exceptions, Section 33 has fallen into disrepute. If the legislature must go on the books as admitting it is violating a constitutional right, chances are it will be less inclined to do so, especially if the court's interpretation is a reasonable one, leading to greater parliamentary acquiescence.

16 For a presentation of the experimentalist agenda see Dorf and Sabel (1998).

17 This does not mean that legislatures will use their interpretational authority, but the possibility exists. Experience has shown that legislatures are capable of undertaking such tasks (*Weak Courts, Strong Rights*, pp. 147–148, referring to the process of issuing compatibility statements in Britain, and 'Charter Proofing' in Canada).

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However, it is clear that the original motivation behind weak form review was not to enhance the status of socioeconomic rights. In order to make that connection, Tushnet needs to pre-empt another argument, that courts should not enforce such rights in the first place. Enter the state action doctrine (*Weak Courts, Strong Rights*, pp. 161–195). The state action doctrine, which requires that in order for there to be a justiciable action the claim must be brought against a government action, is one of the core doctrines of US constitutional law, and one of the more complex ones.

The purpose of the state action doctrine is to track the public/private act/omission distinctions, making only public acts actionable while removing private acts from the scope of constitutional law. If the government acts, there is state action. Failure to act will usually not be considered an 'action' warranting judicial review.[18] While this classification is commonplace in liberal, and especially libertarian, circles, Tushnet argues the doctrine 'does no independent work' (*Weak Courts, Strong Rights*, p. 167).[19] A private act is private because a political authority decides what is private and what is public; a decision not to regulate is just like a decision to regulate, in the sense that they are both decisions. Nothing, then, is naturally private or public, because these categories are derived from a particular and pre-existing political philosophy.[20]

This last point has political and legal implications. Tushnet argues that the doctrine leaves in place the background rules of contracts, torts and property, choosing to make actionable only the decisions emanating from these background rules. In that sense, the state action doctrine is artificial, because both the background rules and the specific rules are the result of governmental choice. Think, for example, of our property law. There is nothing necessary about designing our property regime so as to allow a person complete control over his property to the detriment of others. But once that rule is in place we cease to question it. We accept it as natural, choosing only to adjudicate specific disputes that arise out of our antecedent commitment to that rule. The state action doctrine attempts to demarcate first order actions from second order choices regarding institutional design; but, again, these are all choices the state makes.

State action, then, is everywhere. It is in the details of specific state activities and it is in the second order choices about how legal regimes will look. The upshot, and problem, is that once we do away with the doctrine, everything is potentially the subject of litigation; particularly the background rules responsible for wealth distribution (*Weak Courts, Strong Rights*, p. 168).[21]

Tushnet's argument is that the background rules – the ones the courts are reluctant to interfere with – are, in fact, socioeconomic rights. When courts employ the state action doctrine they are saying that they will not enforce (or rather refuse to acknowledge) socioeconomic rights (the rights dealing with allocation of resources). The doctrine thus serves to maintain a hard distinction

18 The prime example here is DeShaney v. Winnebago County, 489 U.S. 189 (1989).

19 Here, Tushnet joins a long list of scholars who critique the distinction, the first being Robert Hale (Hale, 1923). See also Cohen (1927; 1933). For a sociolegal explanation of the decline of the distinction, see Kennedy (1982).

20 Similarly, Thomas Nagel argues that for the state not to act is equivalent to *choosing* or *opting* for the state not to act (Nagel, 1991, pp. 100–101). Nagel directs this claim to libertarians who hold that certain aspects of the economic system are natural and do not have to be justified. According to Nagel, however, when the state allows a laissez-faire system by deciding to enforce only rights which make such a system possible, the state makes a choice that rewards some and deprives others of what they could have under an alternative system. The state thus must justify its choice and is fully responsible for the results; for what it has done and for what it could have done under an alternative arrangement. I thank Shivi Greenfield for discussion on this point and for sharing an unpublished manuscript.

21 This was precisely the Court's concern in Washington v. Davis, 426 U.S. 229, 247 (1976) ('A rule that a statute designed to serve neutral ends is nevertheless invalid . . . if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.') (Opinion of White, J.). See also Levinson (1999, pp. 898–899), discussing the significance of this insight for remedial issues.

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between first and second generation rights. Now, while this may make sense in a jurisdiction that embraces the public/private distinction, there is nothing necessary about adopting this particular conception of constitutional law. Moreover, if this line of thought lies with state action, and if state action is unworkable, then so is the distinction between socioeconomic rights and civil and political rights which presupposes government action.[22]

2.5 Connecting weak form review with socioeconomic rights

The state action doctrine has proven to be less problematic in other jurisdictions, most notably Canada, Germany and South Africa. Equipped with a social democratic concern for welfare rights, these post World War II constitutions and judiciaries have managed to escape the problem of applying judicial review to socioeconomic rights. They did it either by specifically providing for socioeconomic rights in their constitution (South Africa), by interpreting non-constitutional norms with an eye to constitutional values (Germany), by changing the common law to cohere with constitutional values (Canada) and/or by holding the state accountable when it fails to regulate an area which has constitutional implications (Canada). For example, if Canada decides to regulate housing, it must provide for all aspects of that right, and a failure to provide a certain aspect which is deemed to be within the scope of that right can be tantamount to a constitutional violation (*Weak Court, Strong Rights*, p. 205). Potentially this means that the constitution will have horizontal implications. It will apply not only in conflicts between state and citizen, but also in private conflicts between two citizens or non-state actors.[23]

The immediate problem is one of scope. Questions of resource allocation, economic policy and social welfare are complex. Even if judicial review is theoretically permissible, there are still issues of judicial competence and democratic legitimacy to address. Unlike free speech cases, for example, there is the concern that courts will not be able to enforce their decisions having to do with socioeconomic rights (e.g. Christiansen, 2007). After all, ordering the state to permit a demonstration is not like ordering an overhaul in the health-care system. Weak form review is supposed to address that problem, not by decreeing the ultimate decision, but by partnering with the other branches and facilitating gradual changes without assuming a coercive role.

It should be clear by now that the emphasis of weak form review is on the remedies it provides. Indeed, weak form review calls into question the assumption that judicial review requires coercive orders (*Weak Courts, Strong Rights*, p. 228). In closing his book, Tushnet illustrates the kind of weak remedies he is referring to. First, courts can issue declaratory judgments regarding violations of socioeconomic rights. The hope there is that the political branches will then seek to remedy the declared violation, but without the courts having to specify exactly (or at all) what the solution should look like. In these cases, the rights are, in a sense, non-justiciable,[24] but there is an implicit

22 To be sure, there may be social–cultural–expressive reasons why the state action doctrine persists, but they are not analytical. Consequently, traditional judicial deference to legislatures on social and economic issues on grounds of policy, while intervening in civil and political rights such as free speech, may be unwarranted, at least conceptually.

23 Consider the *Dunmore* case, discussed in *Weak Courts, Strong Rights* (p. 210). The government repeals a law that required farm employers to bargain collectively with their employees. The workers sued to mandate their employers to enter collective bargaining, arguing that the absence of such a mandate violated their Charter right to freedom of association. The Court agreed, holding that government had an affirmative duty in that sphere, and the lack of a mandate impacted the workers' rights. However, it should be noted that the *Dunmore* case Tushnet relies on has not ushered in a new era of positive right enforcement in Canada, and even the legislative reaction to *Dunmore* has been lukewarm. See Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016; Carson and Smith (2003).

24 Though not exactly, because there is a positive judicial declaration of a constitutional violation. It is non-justiciable in that the claimants will not find a positive (and strong) remedy to that violation. The examples Tushnet uses here are from Ireland and India (pp. 238–241).

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expectation that non-binding decisions will be bolstered by an active civil society that will apply pressure on the political branches to fix the problem the court indicated.

Second, courts can impose real duties while still leaving the government broad discretion. The South African *Grootboom* case,[25] which Tushnet discusses (*Weak Courts, Strong Rights*, pp. 242–244), is a good example of weak remedies. There, petitioners, essentially homeless people who were evicted from private land, relied on South Africa's constitutional guarantee to a right to housing and sued, arguing that the government's plans for affordable housing did not address their plight. The Constitutional Court ordered the government to devise a new housing plan in which it must take into account people in the situation of the petitioners. Although the Court issued a decree, the government still had wide latitude in devising the particular plan.

Similar examples are familiar from the US. Think of the Supreme Court's use of the 'all deliberate speed' formula in Brown II,[26] or the school adequacy litigation in state courts.[27] In the latter, some courts have been successful in defining broad standards of an adequate education, allowing the state to design its own educational system and retreating to a supervisory role meant to enforce the ongoing reform process (Schrag, 2003).

Tushnet's ultimate point is this: weak remedies produce increased political and civic participation in the formation of the rights themselves. Moreover, weak form review is a legitimate and effective method for courts to work together with other branches without overstepping their boundaries. Moving in such a way may work out to provide a stronger version of the socioeconomic right, even though it did not come about through strong form judicial review.

3 Critique

Tushnet's argument is rich and complex, fusing together insights gleaned from disparate constitutional practices. In this review, I would like to focus mostly on his conclusion, that weak form review will enable a more robust version of socioeconomic rights. Parts 3.1 and 3.2 underscore two important preconditions – a strong civil society and a pre-existing institutional willingness to apply socioeconomic rights – which, I believe, are imperative for Tushnet's project to succeed. Part 3.3 squares *Weak Courts, Strong Rights* with some of Tushnet's previous writings on judicial review. Part 4 concludes.

3.1 The need for a strong civil society

At the outset, I believe it is important not to overstate Tushnet's overarching argument. Tushnet himself seems to recognise that a lot depends on his argument working out.[28] Most importantly, it seems to me that it is regime dependent and context specific to a point which may make generalisations difficult. Here is what may seem a trivial point, but should not, I think, be underestimated: For socioeconomic rights to be 'strong' in the Tushnetian sense, we need a polity that already possesses an interest in making these rights real, for two reasons. First, there needs to be an active civil society that can complement the work of the courts and which will make sure weak remedies turn into real results. Second, for courts to issue even weak remedies, there must be some

25 Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC) (S. Afr.).

26 Brown v. Board of Education, 349 U.S. 294 (1955). Tushnet acknowledges that Brown II was not particularly successful in promoting integration, but argues that there the remedial approach 'did not make conceptual sense given the nature of the constitutional violation'. However, he argues that the Court's general approach does provide a model for weak form review (*Weak Courts, Strong Rights*, p. 248).

27 See, e.g., Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989).

28 For some of his qualifications, see *Weak Courts, Strong Rights*, pp 251–258.

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institutional willingness on their behalf to do so, as opposed to simply rejecting claims relying on these rights.

Regarding the need for a strong civil society, consider, for example, a situation where a court finds that a privately financed health-care system violates a constitutional right to health because coverage is denied to those who cannot afford to pay.[29] Rather than devise a complete scheme of health-care coverage for the poor, the court tells the legislature that the problem of poor people without coverage needs to be addressed and gives it a year to come up with a plan that will meet the constitutional standard. So far this is in line with weak form review. Now, without an effective civil society – individuals, politicians, organisations, media – that will continue to push for such a plan, the chances that such a plan will in fact materialise are not clear.[30] This is so because there is no real sanction (other than perhaps public embarrassment) that attaches to the judicial remedy. This enables the legislature to 'get away with it'. To be sure, the problem of 'no sanction' is not confined to weak form review, but its potential does seem to increase there.

It would seem, then, that Tushnet's argument is circular. If weak form judicial review stands to be most effective in countries with a strong civil society, why do we need any kind of judicial review in the first place? Presumably, part of the role of weak form review is to remove political blockage or to instigate some kind of governmental action. But if that is the case, then wouldn't a strong civil society have already accomplished that? And if not, how can we expect weak form review to live up to its expectations when there is not a strong civil society to reinforce the courts' judgments?

A possible response could take the following approach: yes, we need a strong civil society which can mobilise politically, but that is often easier said than done. The hope, then, is that weak form review will be able to contribute to the formation of an engaged citizenry by letting it know that the courts cannot accomplish everything on their own. Here we may think of some sort of trade-off. Courts will stay out of particular areas, especially when it comes to 'policy', leaving more room for the political branches and the people to act. The trade-off is that in the short run things might not get done as quickly as they might have had courts been stronger. Moreover, to the extent that socio-economic rights are indeed rights, we are legitimising a time period (short as it may be) in which these rights are not granted a proper defence once a court has found the government to be in violation of the constitution. In the long run, however, weak form review has an educative value, in that it results in better self-government and a more democratic polity.[31]

This reading also answers the critique that political actors may at times be comfortable with judicial review because it allows for blame shifting.[32] If the difficult and controversial decisions are made by life-tenured judges, the legislator will be relatively immune from public criticism and will be better able to retain her seat. Weak form review undermines the blame shifting argument, because it forces legislators to make the decisions for which they are democratically accountable. Paradoxically, then, weak form review may contribute more to maintaining the separation of powers scheme than strong form review, even though the latter provides a clearer demarcation between the branches.

29 To make the issue less complicated, let's assume that the particular constitution provides for a right to health, or can be reasonably interpreted to provide for such a right.

30 Charles Epp argues that for individual rights struggles to succeed there needs to be a 'support structure' in place that will complement the work of constitutions and judiciaries. This support structure is comprised of organisations, collaborative networks between lawyers and activists, availability of financial means to carry through with litigation and monitoring post-judicial progress. See Epp (1998).

31 That is, if you subscribe to the view that essentially conceptualises democracy as a majoritarian process. On that view, there is something undemocratic about judicial review. Therefore, weakening the institution of judicial review stands to enhance democracy.

32 Graber (1993) argues that politicians may call upon the judiciary to address issues they would prefer avoiding because of political repercussions such as voter disapproval.

At this point it is important to keep in mind that much in the preceding paragraphs is speculative. Weak form review is a relatively young experiment, and whether it can bring about the changes Tushnet hopes for has yet to be determined decisively. It does seem clear, though, that weak form review needs a hospitable environment in which it can flourish. This does not just mean an engaged citizenry, but also institutional willingness from courts, agencies and legislatures, to co-operate on these issues in a thoughtful and beneficial manner. I turn now to this issue.

3.2 The need for institutional willingness

As I argued above, for socioeconomic rights to be strong we need some form of institutional willingness to implement these rights. When Tushnet is writing for an American audience – which is why, I believe, he discusses the state action doctrine in such detail – he is arguing that the traditional American aversion to social welfare rights is unfounded because it relies on an untenable conceptual distinction (public/private, act/omission). However, if that was all there was to it then we would expect that doctrine to dissipate. And yet it hasn't, suggesting that the real impasse is cultural–philosophical rather than legal.[33] This impasse is a view of government as curtailing rights rather than expanding them. In a way, American political culture (and this is a generalisation, of course) is committed to the notion of negative rights much more than positive rights because it is believed that human flourishing is best achieved with minimal governmental interference. Embracing socioeconomic rights also means a commitment to an enlarged role for the government in the public sphere, something which Americans traditionally are wary of.[34] This, then, calls into question the plausibility for weak form review to be implemented wholesale in the US.

It is perhaps no accident, then, that the relatively few successes of weak form review in the US, such as educational adequacy suits, happen at the state level where constitutions are more malleable, less entrenched and constitute less of a non-negotiable identity. Moreover, almost all state constitutions contain explicit mentions of some socioeconomic rights, thus resolving the state action problem.[35] To this we can add that many state judges are elected and may have an incentive to designate a larger role for the political branches so as not to alienate politicians whose support will be needed come election time.

The factor of institutional willingness, which is not strictly a part of judicial review, can be as important as how judicial review will be operationalised. To put it differently, judicial review can shift the order of priorities, making particular issues more salient than others. But getting a particular issue resolved will require the operation of politics. Here, courts cannot but rely on the political branches (and by extension on civil society) for realising the judicial decision.

In his example for weak form review in the US, Tushnet discusses educational adequacy suits, where states were found to be violating the state constitutional requirement to provide an adequate education. There have been several lawsuits stemming from such provisions, some successful and some not.[36] A comprehensive study conducted by William Koski suggests that legal norms in and of themselves are insufficient to bring about educational reform. Koski points to 'judicial attitudes' that made reform in some states possible, and to the inter-institutional conflict – with governors and legislatures – which sometimes made co-operation difficult (Koski, 2003; 2004, pp. 1228–1230). In particular, certain courts – based on their pre-existing political leanings – viewed judicial

33 Tushnet alludes to that (*Weak Courts, Strong Rights*, pp. 177–181).

34 See Calabresi (2006, pp. 1406–1407): 'American constitutionalism is exceptional in lacking guarantees of social and economic rights because American history and culture are far more hostile to those rights than are the history and culture of any other major Western democracy.'

35 Almost all state constitutions, for example, provide for education rights. See Thro (1989, p. 1661).

36 For details about each of the lawsuits see www.schoolfunding.info. For an overview and analysis see Thro (1994; 1990).

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intervention more favourably than others. In other words, they possessed the institutional willingness needed to carry out such reforms. Similarly, they needed the co-operation of legislatures and governors to make progress.

To be sure, every court needs the co-operation of other institutions to carry out its decisions (Cover, 1986). When it comes to socioeconomic rights, however, courts will need even more co-operation from other co-equal branches because the nature of these matters is that they require further deliberations and resource allocations. This is, of course, the nature of weak form review, that it leaves much to be decided after a court has ruled. Therefore, as the potential for institutional conflict and constraint grows, the potential failure of such an enterprise grows as well.

The conclusion is that weak form review can accomplish the task that Tushnet designates for it only if there is a good faith effort from all concerned; weak form review necessitates political conditions hospitable for its implementation. A case in point is the *Grootboom* litigation. *Grootboom* – heralded by legal scholars as perhaps the best example of enforcement of socioeconomic rights – has caused quite a stir in comparative constitutional law circles.[37] But the situation in its aftermath has been rather grim. Although South African Constitutional Court Justice Albie Sachs begins his 2007 article with the words 'Mrs Grootboom has had enough' (Sachs, 2007), Mrs Grootboom still hasn't received the government housing which was the subject of the litigation that ended in 2001 (Hweshe, 2008). My point is not that the decision has been a complete failure – recently 277 housing units were allocated to the group of over 1,000 petitioners[38] – but that implementing socioeconomic rights requires sustained co-operation over a relatively long period of time from other branches; and that, in itself, necessitates institutional willingness and an active civil society that can push for the implementation of court decisions.

For those who express scepticism that such conditions could ever be met, a recent case from the South African Constitutional Court suggests that this is not impossible. In *Occupiers of 51 Olivia Road Berea Township*,[39] the City wanted to evict 400 people from their homes, citing unsafe and unhealthy building conditions. Petitioners sought relief, citing their constitutional right to housing.[40] Instead of definitively resolving the case, the Constitutional Court took a different path, opting for weak form review. It ordered the parties to engage in meaningful deliberations, something it believed had not been done prior to the eviction requests, 'in order to alleviate the plight of the applicants . . . by making the buildings as safe and as conducive to health as is reasonably practicable'.[41] The Court held that if the City is aware that its decision to evict is going to make people homeless, and in so doing impact their constitutional right to housing, then it is, at the least, under a duty to engage meaningfully with the occupiers. The judicially sanctioned 'meaningful engagement' led to an agreement that the City would not evict the tenants, that it would renovate the buildings and that it would provide temporary accommodation. The parties also agreed to meet and discuss permanent housing solutions.

The lesson of *Occupiers of 51 Olivia Road Berea Township* is important. It demonstrates that weak form review has the potential to induce co-operation between government and the people and the capacity to remove political blockage – here in the area of housing rights – while letting the people fashion their own solutions, leaving the court in a monitoring role. Of course, identifying in advance the types of

37 A Lexis-Nexis search performed on 16 August 2009 shows that the case has been cited 169 times in American law review articles since it was decided in 2001.

38 See www.abahlali.org/node/3815.

39 Occupiers of 51 Olivia Road Berea Township v. City of Johannesburg, [2008] ZACC 1; 2008 (3) SA 208 (CC) (S. Afr.).

40 S. Afr. Const. § 26

41 Occupiers of 51 Olivia Road Berea Township v. City of Johannesburg, (Opinion of Yacoob, J. §5(2)).

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cases where weak form review will be successful is difficult, and perhaps impossible,[42] but the two preconditions I elaborated on – institutional willingness and a strong civil society – seem to be key.

3.3 Enhancing popular democracy — a constitutional project in Ideal and Non-ideal Theory

Readers of Tushnet's previous work, especially *Taking the Constitution Away from the Courts* (1999), might be perplexed when reading *Weak Courts, Strong Rights*. As Frank Michelman noted in his review of the former, 'the background preference is for democracy, the immediately implied default position is against judicial review (Michelman, 2000, p. 462). In his earlier book, Tushnet calls for a new constitutional amendment that will do away with judicial review and that will give the people, i.e. its representatives, the final word on constitutional interpretation.[43] And yet here, Tushnet is advocating judicial review, albeit weak, in order to arrive at more robust socioeconomic rights. Can the two be squared?

I think they can, and in two ways that are not mutually exclusive. The first is to think about *Taking the Constitution Away* as a political manifesto calling for reconceptualising the role of judicial review in American society. To borrow from John Rawls, *Taking the Constitution Away* is a study in Ideal Theory, whereas *Weak Courts, Strong Rights* is a project in Non-ideal Theory. The second is to think of ways by which judicial review develops democratically.

The distinction between Ideal and Non-ideal Theory was first offered by John Rawls in his *A Theory of Justice* (1971/1999, esp. pp. 7–8, 215–216, 308–309). Roughly, Ideal Theory describes the set of principles that would be appropriate to a morally and politically ideal order. Non-ideal Theory recognises that our political order is, well, not ideal. Thus, Non-ideal Theory accounts for the set of principles that are appropriate in these less than perfect conditions (Phillips, 1985).[44]

Now, if we were to design a legal system from scratch, with an eye toward enhancing popular democracy, majoritarianism and civic participation, *Taking the Constitution Away* would counsel us against incorporating judicial review in our constitutional structure.[45] In that sense, *Taking the Constitution Away* is an aspirational text. It is a prescription for institutional designers considering, perhaps for the first time, the role constitutional courts play in society. *Weak Courts, Strong Rights*, however, is a study in Non-ideal Theory because, despite the recent popular constitutionalist trend invoked by some scholars, US constitutional history and culture have made it practically impossible to do away with judicial review.[46]

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42 A possible explanation to the success of *Occupiers* as opposed to the relative success of *Grootboom* is that in *Grootboom* the problem was on a very large scale – thousands of families in the most desperate condition needing a home, whereas in *Occupiers* the problem was limited to 400 people. This explanation, however, is not convincing. In *Occupiers* the Court recognised that there might be 67,000 people living in unsafe conditions in Johannesburg, but that did not affect the remedy. The scale of the problem might be a factor in the success of weak form review, but it does not seem to be decisive.

43 Of course, the people will also have a say on constitutional interpretation through elections, political mobilisations, civil society, etc.

44 Rawls argued that the principles in Non-ideal Theory derive from Ideal Theory. For present purposes this should not concern us. See also Kelbley (2004, pp. 1531–1533).

45 It is important to note that, unlike Tushnet, I am not arguing that eliminating judicial review will, in fact, achieve these objectives. My purpose here is only to reconstruct that argument rather than agree with it. There are, of course, arguments which advocate judicial review as a way to enhance and increase public discourse and deliberation. See, e.g., Sunstein (1995).

46 Here I mean two things. First, public support for judicial review is strong in the US. It is not necessarily the situation in other countries. Indeed, there was vigorous public debate before the adoption of the UK Human Rights Act, and there is still a controversy over judicial review in Israel, for example. Second, support for judicial review should not be confused with academic criticism. Judicial review has been questioned for many years, but the public support endures and there is currently no politically viable option on the table to strip courts of their judicial review powers. For sources that show strong public support for the Supreme Court, see Friedman (1993); Schauer (2006).

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For better or worse, strong judicial review has come to be a defining feature of US constitutional law.[47]

Consequently, we need to figure out what *to do* with the institution of judicial review, or how best to conceptualise it so that it will fit our current goals (one of them being an original preference against judicial review).[48] This is precisely what *Weak Courts, Strong Rights* sets out to do with regards to socioeconomic rights.[49] Indeed, this book has a pragmatic ring to it: if we already inhabit a world with judicial review, here's how we can harness it to our benefit.[50] The way to do this is through weak form review, because on the one hand it preserves judicial review, and on the other it 'tweaks' it so as to increase the range of democratic possibilities, encourage deliberation and preserve the ultimate authority over constitutional interpretation with the people – a necessary element of self-government.

The second way one can square Tushnet's previous work with this book is by telling a story about how judicial review can develop democratically. Roughly, if the people opt for judicial review then the degree to which it is a counter-majoritarian practice is lessened. But unlike other countries that specifically provide for judicial review, the US Constitution does not. Still, weak form review allows for experimentation with constitutional rights. It enables a back and forth between legislatures, agencies and the courts until the specific issue has been sufficiently crystallised.[51] This is the dialogic conception of judicial review. Now, if weak form judicial review generates real-time constitutional dialogue, then one could argue that it does not raise the same democratic objections because it is the result of deliberations between all branches rather than one branch assuming the role of a final arbiter.[52]

4 Conclusion

Weak Courts, Strong Rights takes an instrumentalist approach to judicial review by arguing that the best way to enforce socioeconomic rights may be through weak remedies. It is therefore important to note what the book is not saying. Tushnet is not making the argument that people have a right to judicial review,[53] or that judicial review is an intrinsic aspect of a democratic regime,[54] or even that people should have constitutional socioeconomic rights (Fabre, 2000). Rather, the overarching argument is that if we already have a judicial system with judicial review, and it so happens we

47 It is important to note that popular constitutionalism of the kind that Tushnet and Larry Kramer (2004) subscribe to is not about completely eliminating judicial review. A better characterisation would be that when judicial review is confronted with 'The People' then the people should have the final word. This is apparent in Kramer's *The People Themselves* (2004), where he calls for 'judicial review, not judicial supremacy'. See also Brettschneider (2006). A different case is Jeremy Waldron, who opposes judicial review for jurisprudential reasons rather than offering an argument informed by American history, practice and culture. See especially Waldron (2006).

48 This is true insofar as one supports the essence of Tushnet's constitutional project.

49 Though not discussed in this review, Tushnet suggests (without fully analysing) that civil and political rights also developed in a similar fashion to what we now see in socioeconomic rights.

50 Again, by benefit I mean if one shares Tushnet's ideological position on judicial review.

51 According to Tushnet, weak form review can be replaced with strong form when enough experience has been accumulated to give us confidence that when the court delivers the final word it will not obstruct the principle of self-government. Weak form review accomplishes the right of majorities to enact their will when their enactments comport with a reasonable interpretation of the constitution, even if that interpretation differs from that of the courts (*Weak Courts, Strong Rights*, pp. 263–264).

52 For a similar argument, see Tushnet (2008).

53 Unlike Yuval Eylon and Alon Harel (2006), who argue that the purpose of judicial review is to provide a mechanism of reasoned justification to the citizen who believes his right has been impinged by the state.

54 Indeed, in *Taking the Constitution Away* Tushnet makes the opposite argument.

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are considering enforcing socioeconomic rights, then weak form review may be a possible way to do it more or less successfully while preserving other important democratic values.

For those among us who look to the courts for large-scale societal reform, the message in this book may be disappointing. Tushnet acknowledges that legislatures are imperfect, but then so are courts. More often than not, the two branches will have reasonable disagreements. In bringing about societal reform, however, courts can only play a minor, though important, role. The message in this book is that while courts can have a meaningful and legitimate role in a democratic society, they cannot go at it alone. For the project to succeed we need to immerse ourselves in politics and not just law. Professor Tushnet's thesis will therefore become a reality only when the political branches and the public at large will join the experiment he has outlined.

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