

Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law

by Mark Tushnet

Princeton, N.J., Princeton University Press, 2007. Pp. 272.

One of the interesting features of the global convergence towards constitutional supremacy and active judicial review has been the emergence of innovative mechanisms designed to address and mitigate the tension between rigid constitutionalism and judicial activism on the one hand, and fundamental democratic governing principles on the other. This bundle of institutional means has been loosely termed “weak-form” judicial review.¹ Whereas under “strong-form” judicial review (the approach established in the United States) judicial interpretations of the constitution are binding on all branches of government, “weak-form” review allows the legislature and executive to limit or override constitutional rulings by the judiciary—as long as they do so publicly.

Two familiar and oft-cited examples of such mechanisms are found in the *Canadian Charter of Rights and Freedoms*²: the “limitation clause” (section 1) and the “override clause” (section 33). Section 1 carries an inbuilt emphasis on judicial balancing between rights provisions and other equally important imperatives. Very few constitutional catalogues of rights reflect, in such a clear fashion, the notion that no constitutional right is “absolute.” Rights litigation and jurisprudence in the shadow of section 1 are inherently attentive to macro public policy considerations that are

1. See e.g. Mark Tushnet, “Weak-Form Judicial Review and ‘Core’ Civil Liberties” (2006) 41 Harv. C.R.-C.L.L. Rev. 1; Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale L.J. at 1354–59; Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 Am. J. Comp. L. 707.
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

“demonstrably justified in a free and democratic society”³ and that in most other constitutional democracies would fall beyond the purview of rights jurisprudence *per se*. The embedded subjection of Canadian rights jurisprudence to broad public policy considerations has led to sound, middle-of-the-road Supreme Court of Canada judgments on a host of potentially divisive issues.

However, Canada is not alone in this trend towards weak-form, dialogical review. Persisting political traditions of parliamentary sovereignty had to be taken into account by the framers of the new constitutional arrangements in Canada, as well as in other Westminster-style political systems such as those of Britain, Israel, South Africa, and New Zealand (to mention only a few examples). A noteworthy example of a weak-form review is provided by the British *Human Rights Act 1998*⁴ (entered into effect in October 2000), which effectively subjects British public bodies to the provisions of the *European Convention on Human Rights* (ECHR)⁵. The *Act* requires the courts to interpret “[s]o far as it is possible to do so” existing and future legislation in accordance with the *Convention*.⁶ If the higher courts in Britain decide that an Act of Parliament prevents someone from exercising their ECHR rights, judges make what is termed a “[d]eclaration of incompatibility.”⁷ Such a declaration puts ministers under political pressure to change the law (or so it is hoped). Formally, the *Convention* does not override existing Acts of Parliament; however, ministers must state whether each new piece of legislation that they introduce complies with the ECHR. What is more, the *Act* also provides for a fast-track procedure that allows Parliament to repeal or amend legislation found incompatible with the ECHR.⁸

Whereas in many other respects, the world has witnessed a profound judicialization of politics and policy-making, in matters of broad economic and social policies, the courts have generally been less active.⁹ With few exceptions, courts have not been particularly active in areas such as income distribution, eradication of poverty or subsistence rights (e.g. basic education, health care, or housing), all of which require wider state intervention and a change to public expenditure priorities.¹⁰ At the core of Mark

3. *Ibid.*, s. 1.

4. *Human Rights Act 1998* (U.K.), 1998, c. 42 [*Human Rights Act*].

5. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5.

6. *Human Rights Act*, *supra* note 4, s. 3(1).

7. *Ibid.*, s. 4.

8. *Ibid.*, s. 10.

9. See Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts” (2008) 11 *Annual Review of Political Science* 93.

10. See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

Tushnet's rich and thought-provoking new book *Weak Courts, Strong Rights*¹¹ stands the juxtaposition of the idea of weak-form judicial review with the problems of legitimacy deficit, injusticiability, and lack of enforcement capacity that are so often drawn upon to explain judicial passivity in matters concerning social welfare rights. Tushnet argues, quite counter-intuitively, that a 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.

To fully appreciate this intriguing argument, a few words on the status of social welfare rights in the United States are warranted. Unlike other countries (notably South Africa, Belgium, Spain and Brazil), the United States has no explicit constitutional guarantees of subsistence rights such as basic income, education, housing or healthcare. Moreover, unlike in other countries (e.g. India), such rights have not been protected under more generic provisions such as those of human dignity and/or security of the person. Indeed, the struggle for realization of subsistence social welfare rights through constitutional litigation in the United States has long sunk into constitutional oblivion. Liberal and progressive American constitutional scholars, perhaps with the exception of Mark Tushnet himself, have given up on any attempt to advance progressive notions of distributive justice through constitutional jurisprudence. As Sotirios Barber suggests, the most common view on both the right and the left in America is that the federal constitutional duties of public officials are limited to respecting negative liberties and maintaining processes of democratic choice.¹² The concept of a judicially enforceable right to minimum welfare was somewhat more prevalent in American constitutional discourse a few decades ago, before the 1980's, when people began to have their aspirations "chastened," to use Mark Tushnet's terminology.¹³ With few exceptions, subsistence rights have been conceived not as being judicially enforceable, but rather as being judicially "under-enforced" norms, as put by Lawrence Sager.¹⁴ Americans have therefore looked to legislatures, executives, and citizens to enforce these constitutional norms by taking the Constitution outside the purview of the courts. Because many Americans believe that the courts cannot possibly enforce subsistence rights guarantees, Tushnet argues that a weak-form judicial review, which leaves the final word to legislatures, may actually allow for *de facto* stronger social welfare rights protection under American constitutional law.

11. Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2007) [Tushnet, *Weak Courts*].

12. Sotirios A. Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003) at 23–41.

13. Mark Tushnet, "Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration" (1999) 113 Harv. L. Rev. 29 at 33.

14. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven, CT: Yale University Press, 2004) at 88.

Tushnet begins his discussion in this book by justifying his reliance on comparative constitutional law to address the issue at stake.¹⁵ He then describes how weak-form review functions in Britain and Canada, as well as the potential precariousness of this model.¹⁶ In the book's second part, Tushnet suggests that "weak-form" judicial review shifts some of the burden of constitutional interpretation away from the courts and discusses the extent to which legislatures are responsible for, and can be expected to enforce, constitutional norms on their own.¹⁷ The book's third part focuses on social welfare rights. Here, Tushnet explains the connection between the "state action" and "horizontal effect" doctrines, and the enforcement of social welfare rights.¹⁸ Tushnet next draws together the analysis of weak-form review with that of social welfare rights, explaining how weak-form review could be used to enforce those rights.¹⁹ He concludes by suggesting that there is a clear judicial path—not an insurmountable judicial hurdle—to a more effective practical enforcement of constitutional social welfare rights.²⁰ The book is cogently argued and is filled with illuminating insights, along with wide-ranging references to pertinent constitutional and political theory, as well as comparative constitutional jurisprudence, drawn predominantly from the English speaking, common law world.

Arguably, one of Tushnet's main achievements is his ability to go beyond the traditional call common among progressive activists to formally constitutionalize social welfare rights and /or to adopt a more generous judicial interpretation of such right provisions.²¹ Instead, Tushnet advances a more nuanced and politically sober account of the institutional conditions that are likely to be most conducive to the realization of such rights. This reflects the transition from a principled yet unrealistic approach to the realization of social welfare rights, to a more pragmatic, realist and even consequentialist way of dealing with them.²² Tushnet is a prominent constitutional theorist and one of the last genuine leftist-progressive Mohicans in mainstream

15. Tushnet, *Weak Courts*, *supra* note 11 at 3–17.

16. *Ibid.* at 18–76.

17. *Ibid.* at 79–157.

18. *Ibid.* at 161–95.

19. *Ibid.* at 196–226.

20. *Ibid.* at 227–64.

21. See e.g. K.D. Ewing, "The Case for Social Rights" in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone, eds., *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003) 323; K.D. Ewing, "Social Rights and Constitutional Law" [1999] P.L. 104; Cécile Fabre, "Constitutionalising Social Rights" (1998) 6 *The Journal of Political Philosophy* 263; Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000).

22. Such consequentialist arguments for and against social rights are also advanced by Kim Lane Scheppele, "A Realpolitik Defense of Social Rights" (2004) 82 *Tex. L. Rev.* 1921, and by Cass Sunstein, "Against Positive Rights" (1993) 2 *E. Eur. Const. Rev.* 35.

American legal academia. As with several other prominent figures of the Critical Legal Studies movement of the 1970's and 1980's, his more recent scholarship has undergone a pragmatic turn. Accordingly, his efforts in this book to salvage social welfare rights discourse in the United States through concrete and practical means (weak-form judicial review) seem to reflect a result-driven, "real-politik" approach to the issue at stake.²³ And in that respect, it is ultimately unclear what makes the weak-form review scheme more suitable for dealing with social welfare rights than with any other contentious issue (say, abortion, gay marriage, or the establishment of religion in the public sphere) where the legitimacy of judicial activism is constantly questioned on majoritarian or democratic grounds.

Related to this matter is the validity of the very distinction between strong and weak-form review. Section 1 of the *Charter* (and to a lesser degree the aforementioned section 33) has given rise to the idea of judicial review as "dialogue," a notion developed over the past decade by a number of leading scholars of Canadian constitutional law, most notably Peter Hogg.²⁴ According to the dialogue thesis, an apex court decision on a contested issue is seen not as a final judgment on the matter but as a judicial invitation for further conversation—a kind of democratic dialogue—between legislatures and society. After all, in most rule-of-law polities, under either a charter or other modern bill of rights, legislatures can still respond to court decisions by limiting or overriding the rights that the courts have proclaimed.²⁵ Even in the United States with its presumably strong-form review model (this is certainly true from a formal institutional perspective), a Supreme Court decision on a contested issue is not seen as a final judgment on the matter, but rather as a judicial invitation for further comment by the legislature and the wider society. Though many American scholars would dispute Louis Fisher's claim that "[f]or the most part, Court decisions are tentative and reversible like other political events,"²⁶ a growing number of constitutional theorists have propounded theories that regard American judicial review as an integral part of a healthy democratic conversation.²⁷ What is more, American executives and legislatures have frequently revised, hampered, or circumvented constitutional court rulings. Recent empirical studies question

-
- 23. A recent attempt to give this approach a more principled take is provided by Rosalind Dixon, "Creating Dialogue About Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited" (2007) 5 *International Journal of Constitutional Law* 391.
 - 24. See e.g. Peter W. Hogg & Allison Thornton, "The Charter Dialogue between Courts and Legislatures" in Paul Howe & Peter Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001).
 - 25. See e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).
 - 26. Louis Fisher, "The Curious Belief in Judicial Supremacy" (1991) 25 *Suffolk U.L. Rev.* 85 at 87.
 - 27. See e.g. Barry Friedman "Dialogue and Judicial Review" (1993) 91 *Mich. L. Rev.* 577; Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, MA: Harvard University Press, 2001).

the blurred distinction between “law” and “politics” by shedding light on extra-judicial determinants of judicial behavior or on the ways in which courts, governments, and parliaments compete with each other, overlap and even tacitly collaborate in certain areas of public policy making. In other words, from a *de facto* (not *de jure*) standpoint, constitutional dialogue, friendly or hostile, exists within the American system, too.

Tushnet’s mode of comparative inquiry adopted in this book may be termed the “self-reflection through analogy, distinction, and contrast” mode.²⁸ The underlying assumption is that whereas most relatively open, rule-of-law polities essentially face the same set of constitutional challenges, they may adopt quite different means or approaches for dealing with these challenges. By referring to the constitutional jurisprudence and practices of other presumably similarly situated polities, scholars and jurists might be able to gain a better understanding of the set of constitutional values and structures in operation in their own polities. Such a comparative inquiry also enriches, and ultimately advances, a more cosmopolitan or universalist view of constitutional discourse and practice. At a more concrete level, constitutional practices in a given polity (in this case, the United States) might be improved by emulating certain constitutional mechanisms developed elsewhere. Although Tushnet performs these tasks masterfully, there is—as he himself occasionally admits—a degree of wishful-thinking (not to say science-fiction) in the tone of parts of the book that at least implicitly suggest American constitutional jurisprudence and practice could be enhanced by setting its gaze overseas. Even though from an abstract standpoint Tushnet’s main argument makes a lot of sense, the likelihood of establishing a formally institutionalized (as opposed to a *de facto* dialogical) weak-form review in the United States, let alone the possibility that social welfare rights are re-introduced into mainstream American constitutional discourse, range, alas, from negligible to non-existent.

Ultimately, Tushnet makes a positivist, empirically testable argument about the possible effectiveness of weak-form judicial review in advancing the status of social welfare rights. However, it is in this respect that a few core questions remain unanswered. First, it is unclear just how well Tushnet’s argument concerning the relative efficacy of weak-form judicial review travels beyond the American context, with its rather idiosyncratic constitutional history, legacies, and practices. This would not have been an issue for a standard, parochial Americo-centric book. It is an issue, however, for a book that purports to engage in a genuinely comparative inquiry. More specifically, it is unclear whether Tushnet’s propositions hold true in the countries that he himself identifies as featuring weak-form review—namely, Canada, Britain and South Africa.

28. Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law” (2005) 53 Am. J. Comp. L. 125 at 126.

Unlike in the United States, the question of social and economic rights has been a central theme in the constitutional renewal that has taken place in South Africa over the last fifteen years. Ignoring the issue is unthinkable given the vast social and economic gaps in post-apartheid South Africa, the dismal living conditions in the densely populated shantytowns and the ever-accelerating HIV–AIDS pandemic. For starters, the new South African constitutional catalogue of rights explicitly protects positive social and economic rights, such as the rights to housing,²⁹ healthcare, food, water, social security,³⁰ and education.³¹ None of these positive rights provisions, however, imply an unqualified right to housing, healthcare, or education *per se*; instead, they merely ensure that reasonable state measures are taken to make further housing, healthcare and education progressively available and accessible. This innovative construction of “weak” rights requires the government to take reasonable measures, within its available resources, to achieve the progressive realization of each of these rights by establishing practicable programs of land reform, housing, education and healthcare.³² This approach therefore strikes a balance between constitutional commitments and political and economic realities.

Since the adoption of the new South African Constitution in 1996, the South African Constitutional Court has released several landmark rulings interpreting the scope and nature of protection under this innovative constitutional framework.³³ Two of those rulings—the *Grootboom* case³⁴ and the *Treatment Action Campaign* case³⁵—have generated extensive commentary both in South African and in foreign media outlets and law reviews. However, the actual reality of social and economic rights in South Africa is, alas, quite appalling. In the *Grootboom* case, for example, the Court dealt with the enforceability of social and economic rights and redefined the scope of the state’s obligations under section 26 of the *South African Bill of Rights*. A group of 900 homeless people were living in dismal circumstances in Grootboom, a part of the, informal and unrecognized settlement of Wallacedene in

29. *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, ch. 2, s. 26 [*South African Bill of Rights*].

30. *Ibid.*, s. 27.

31. *Ibid.*, s. 29.

32. See e.g. Mark Tushnet, “Social Welfare Rights and the Forms of Judicial Review” (2004) 82 *Tex. L. Rev.* 1895 at 1902–06 (discussing the South African Constitutional Court’s approach to dealing with the ‘weak substantive rights’ guaranteed in the South African constitution).

33. See e.g. *Minister of Health v Treatment Action Campaign (No. 2)*, [2002] 5 S. Afr. L. R. 721 (S. Afr. Const. Ct.) [*Treatment Action Campaign*]; *Government of RSA v Grootboom*, [2001] 1 S. Afr. L. R. 46 (S. Afr. Const. Ct.) [*Grootboom*]; *Sobramoney v Minister of Health (KwaZulu-Natal)*, [1998] 1 S. Afr. L. R. 765 (S. Afr. Const. Ct.).

34. *Grootboom*, *ibid.*

35. *Treatment Action Campaign*, *supra* note 33 (holding that the South African enumerated constitutional right to access to healthcare obliged the State to remove restrictions on Nevirapine—a drug that reduces the risk of mother to child transmission of HIV—and to take steps to make the drug more readily available).

the Western Cape Province.³⁶ The Court held that, “there is, at the very least, a negative obligation placed upon the State . . . to desist from preventing or impairing the right of access to adequate housing.”³⁷ The Court went on to note that the new South African Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of South Africans living in deplorable conditions throughout the country.³⁸ The Court added that “[t]he state must also foster conditions to enable citizens to gain access to land on an equitable basis.”³⁹

Four years later, a report in the South African *Sunday Times* described the *Grootboom* ruling in these terms:

Leaking sewage and piles of rotting rubbish smell so bad in Grootboom that you can actually taste the stench.

...

The *Grootboom* victory made headlines around the world, as noted by former [South African] Judge Richard Goldstone, who went on to serve the International Court of Justice in The Hague. The “uniqueness” of the *Grootboom* decision, Judge Goldstone told Harvard University’s Kennedy School of Government, would be remembered as “the first building block in creating a jurisprudence of socioeconomic rights.”

...

As far as the people of Grootboom are concerned, however, Goldstone’s “building block” is the only building material they have seen since the court ruled in their favor on October 4, 2000⁴⁰

Or take Canada—arguably the birthplace of weak-form judicial review. An inexplicable gap exists between Canada’s long-standing commitment to a relatively generous version of the Keynesian welfare state model and the outright exclusion of subsistence social rights from the purview of *Charter* provisions. During national and provincial election campaigns, Canadians consistently refer to health care and education as the two public policy issues about which they care the most. Moreover, a viable, publicly funded health care system is repeatedly cited by Canadians as one of the most important and distinctive markers of Canadian collective identity, compared with the lack of such a system in Canada’s neighbour to the south. The *Canada Health Act*⁴¹ enjoys near-sacred status in public discourse. This status was reiterated by the overwhelming public reaction to the landmark Supreme Court of Canada ruling in *Chaoulli v. Quebec (A.G.)*⁴² concerning the provision of private health care services in

36. *Grootboom*, *supra* note 33 at para. 4, n. 2.

37. *Ibid.* at para. 34.

38. *Ibid.* at para. 93.

39. *Ibid.*

40. Bonny Schoonakker, “Treated with Contempt” *Sunday Times [of South Africa]* (21 March 2004).

41. *Canada Health Act*, R.S. 1985, c. C-6.

42. *Chaoulli v. Quebec (A.G.)*, 2005 SCC 35, [2005] 1 S.C.R. 791, 254 D.L.R. (4th) 577.

Quebec.⁴³ Not too far behind health care and education are issues such as child care, welfare benefits, affordable housing, and so on.

Yet, despite the centrality of these issues on Canada's public agenda, as well as Canada's long-term commitment to a relatively generous version of a Keynesian welfare state, subsistence social rights are not protected by the *Charter* and have been altogether excluded from its purview by pertinent Supreme Court of Canada jurisprudence. The Supreme Court has repeatedly rejected claims that would have required the state to provide benefits to rights holders, either directly through a social program (e.g. health care, unemployment benefits) or indirectly through social legislation that imposes obligations on private actors (e.g. minimum wage, pay equity, rent control). According to Chief Justice Lamer in *R. v. Prosper*⁴⁴, "it would be a very big step for this court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments."⁴⁵ In its landmark ruling in *Gosselin v. Quebec (A.G.)*⁴⁶, the Supreme Court rejected the argument of an unemployed Montreal resident that section 7's "right to security of the person" prohibits cuts to welfare that would deny recipients basic necessities and that the charter's equality right provision entails substantive obligations to provide adequately for disadvantaged groups relying on social assistance. By a five-to-four decision, the court held that the "right to security of the person" does not guarantee an adequate level of social assistance by the state. In her majority opinion, Chief Justice McLachlin stated that section 7 restricts the state's ability to deprive people of their right to life, liberty, and security of the person but does not place any positive obligations on the state.⁴⁷ Two years later, in *Auton v. British Columbia (A.G.)*⁴⁸, the Supreme Court unanimously held that provincial health care plans are not required to fund special treatment regimes for autistic children. In *Newfoundland v. N.A.P.E.*⁴⁹, the Supreme Court gave preference to the province of Newfoundland and Labrador's budgetary difficulties over the implementation of pay equity laws aimed at equalizing remuneration to women employees in the provincial public sector. In *British Columbia v. Christie*⁵⁰, the Court

43. As is well known, the court ruled that limits on the delivery of private health care in Quebec violated Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. Three of the judges also ruled that the limits on private health care violated section 7 of the *Charter*, *supra* note 2. The decision could have significant ramifications on health care policy in Canada and may be interpreted as paving the way to a 'two-tier' health care system.

44. *R. v. Prosper*, [1994] 3 S.C.R. 236, 118 D.L.R. (4th) 154 [*Prosper* cited to S.C.R.].

45. *Ibid.* at 267 [emphasis in original].

46. *Gosselin v. Quebec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257 [*Gosselin* cited to S.C.R.].

47. *Ibid.* at paras. 81–84.

48. *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657, 245 D.L.R. (4th) 1.

49. *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, 244 D.L.R. (4th) 294.

50. *British Columbia (A.G.) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, 280 D.L.R. (4th) 528.

went on to rule that provincial tax on legal services did not infringe the right to access to justice of law-income persons. It was not until its recent ruling in *Health Services v. British Columbia*⁵¹ in June 2007, and after 20 years of a distinctly neo-liberal approach to the matter, that the Court recognized the right to collective bargaining as protected by the *Charter*. In other words, unlike Tushnet's argument, a paradigmatic model of weak-form protection of rights has failed to yield effective constitutional protection of social welfare rights.

More puzzling still is the difference that judicial interpretation, not institutional features of judicial review, makes. Section 7 of the *Canadian Charter of Rights and Freedoms* reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."⁵² Section 21 of the *Constitution of India* reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."⁵³ Despite the near identical wording of these provisions, in their interpretation two very different paths with respect to constitutional protection of subsistence rights have been taken. Such rights are appreciated in Canadian public discourse, but have been consistently pushed beyond the purview of section 7 by the Supreme Court of Canada. India, by contrast, features vast socio-economic gaps; yet its Supreme Court has consistently declared claims for subsistence social rights justiciable and enforceable through constitutional litigation that draws on section 21.⁵⁴ The extent of constitutional protection of subsistence rights in a given polity does not necessarily reflect the prevalence of such rights in that polity's public discourse.

These observations, drawn from the South African and Canadian experiences of weak-form review, lead us to yet another interesting aspect of this intriguing book. Because Tushnet takes a "real-politik" approach to advancing progressive notions of distributive justice, he at least implicitly raises the issue of the extra-judicial (e.g. historical, cultural, economic, ideological or political) determinants of a given polity's commitment to a relatively generous welfare regime. Unfortunately, there has not been any serious dialogue between the discourse (normative or empirical) concerning the constitutional status of positive rights and the literature concerning the polit-

51. *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40.

52. *Charter*, *supra* note 2, s. 7.

53. *Constitution of India*, Part III, s. 21, online: Indian Ministry of Law and Justice (Legislative Department) <<http://lawmin.nic.in/coi/coiason29july08.pdf>>.

54. See e.g. *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180; *Unni Krishnan, JP v. State of Andhra Pradesh*, A.I.R. 1993 S.C. 2178. Note that in 2002, a new section (21A) was added to the *Constitution of India*. It warrants that "[t]he State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

ical economy of welfare regimes and the modern welfare state more generally. In particular, no major work that this author is aware of addresses in a comparative fashion the possible causal links between: 1) the political salience of socio-economic inequality, and/or labour unions and other leftists political forces in a given polity; 2) levels of commitment to, and existence of, a well developed welfare regime (Keynesian, Marxist-socialist or otherwise) in that polity; and 3) constitutional protection (via law and/or jurisprudence) of social welfare rights in that polity. Leftist political forces have historically been influential in polities such as Brazil, India or Spain. All three countries feature strong constitutional support for social welfare rights. The United States' example may be compatible in that, much like Brazil or India, the United States features one of the most unequal distributions of income among advanced industrial societies; it has vast social and economic disparity (the second largest among western societies), and is controlled to a large extent by the sheer power of corporate capital. Unlike Brazil or India, however, a true socialist (let alone communist) political agenda has never garnered any meaningful popular support in twentieth century United States. And then we have countries such as Sweden or Norway—two of the most developed and prosperous nations on earth—that have long adhered to the notion of a generous welfare regime and a relatively egalitarian conception of distributive justice while being less than enthusiastic (to put it mildly) toward the notions of rights and judicial review. And there are, of course, numerous other variations among countries that may be derivative of differences in hegemonic cultural propensities or demographic trends, historical and institutional path dependence, domestic and international political economy factors or strategic behavior by constitutional courts vis-à-vis other political actors and/or the public. In short, there seem to be multiple paths and trajectories to the realization (or neglect) of social welfare rights, of which weak-form judicial review is only one possibility and is, alas, mainly hypothetical—at least in the United States, which is the focus of Tushnet's discussion.

In summary, Mark Tushnet has written an important book, featuring mastery of pertinent comparative constitutional law literature and an incredible ideas-per-ink ratio. The juxtaposition of the notion of weak-form judicial review with an attempt to realize social welfare rights—the thematic centerpiece of the book—raises more questions (analytical, normative and empirical) than it provides conclusive answers. But such is the case with any new formulation of a counter-intuitive thesis concerning the interdependence between judicial review, socio-economic trends and political reality. Any serious scholar of comparative constitutional law cannot afford to skip this book.

Ran Hirschl

Professor of Political Science and Law

Canada Research Chair in Constitutionalism & Democracy

University of Toronto