

LISA RABENEICK

A ›Blended System‹ of Judicial Review in Germany

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Lisa Rabeneick

A 'Blended System' of Judicial Review in Germany

The Use of Weak-Form Methods Within a
Strong-Form Review System

Mohr Siebeck

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To my parents

Acknowledgements

The book is the result of my doctoral research, which was approved as a doctoral thesis by the University of Münster's Faculty of Law in the winter semester of 2024. I have updated the book since to address, in particular, the most recent constitutional amendment of Art 93 and Art 94 of the Basic Law from December 2024. Besides, I have included new and updated scholarship generally as current as the end of February 2025.

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Hamburg, spring of 2025

Lisa Rabeneick

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List of Abbreviations

ACT	Australian Capital Territory
ACTHRA	Australian Capital Territory Human Rights Act 2004
BGBI	Bundesgesetzblatt
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungssammlungen des Bundesverfassungsgerichts
BVerfGG	Bundesverfassungsgerichtsgesetz
BVerwG	Bundesverwaltungsgericht
ECtHR	European Court of Human Rights
GG	Grundgesetz für die Bundesrepublik Deutschland
HRA	Human Rights Act 1998 (United Kingdom)
NZBORA	New Zealand Bill of Rights Act 1990
NZCA	New Zealand Court of Appeal
NZLR	New Zealand Law Reports
NZPD	New Zealand Parliamentary Debates
NZSC	New Zealand Supreme Court
O	Ontario Legislature
QHRA	Queensland Human Rights Act 2019
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
SCC	Supreme Court of Canada
SCR	Supreme Court Records (Canada)
SO	Annual Statutes of Ontario
SQ	Annual Statutes of Quebec
SS	Annual Statutes of Saskatchewan
VCHRR	Victorian Charter of Human Rights and Responsibilities 2006

A. Introduction

I. Proposal of a ‘blended system’ of judicial review

Which state organ within a particular state order should decide on the meaning of guaranteed rights? In Germany, this question is answered reflexively in favour of the German Federal Constitutional Court – the *Bundesverfassungsgericht*. After all, the Basic Law itself allocates the power to perform rights-based judicial review of other state organs’ actions, including the legislature’s, to the Court. Accordingly, the Court is understood to ultimately decide on the meaning to be given to those relevant guaranteed constitutional rights when deciding each specific case before it.¹

And yet, empowering courts to exercise rights-based judicial review, as such, does not necessarily mean that courts can assert *their* understanding of guaranteed rights or, where they do (such as in Germany), that they *always* should. Another state organ could be accorded the decision on what meaning should ultimately be given to the rights in question. Or, where that is not the case, courts could nevertheless be constitutionally required to sometimes defer to another state organ’s understanding of what the relevant rights mean.

This, at least, is suggested in the context of *weak-form judicial review* – an alternative form of rights-based judicial review that has developed in several Commonwealth countries. More specifically, that is, with a view to the legislature.² From this perspective, one of two questions can be formulated regarding the judicial exercise of rights-based review of legislation within a democratic state order providing for such powers. Firstly, *whether* the courts or the legislature should ultimately decide on the meaning of rights. Or secondly, where this decision has been accorded to the courts, *when* courts should nevertheless defer to the legislature’s rights understanding instead of asserting their own.

¹ A number of examples of this assertion are Peter Häberle, ‘Die offene Gesellschaft der Verfassungsinterpreten’ in (1975) 30 *JuristenZeitung* 297, 299; Christian Rau, *Selbst entwickelte Grenzen in der Rechtsprechung des United States Supreme Court und des Bundesverfassungsgerichts* (Duncker & Humblot 1996) 158; Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat* (2nd edn, Mohr Siebeck 2016) 31; Christian Hillgruber and Christoph Goos, *Verfassungsprozessrecht* (5th edn, CF Müller 2020) § 1 para 17.

² On the alternative form of review and the international debate around it below chapter B, section I.

While the first of these questions is answered in Germany in favour of the Court, *systems of weak-form judicial review* do so rather in favour of the legislature. Just as *strong-form review systems*, they empower courts to perform rights-based judicial review of legislation. But as a result of certain constitutional design mechanisms courts either cannot or cannot always assert their understanding of the relevant guaranteed rights. This may be because their decision-making is specified to be non-binding. Or it may be due to the legislature's power to (sometimes) override otherwise binding judicial decisions. In this way, legislatures are accorded, at a fundamental level, the decision on what meaning should ultimately be given to the guaranteed rights in question.³

In Germany, this kind of decision is, of course, allocated to a court – the German being a strong-form review system. This book focuses, thus, on the second question brought up in the context of the alternative form of judicial review: should this court, nevertheless, at times defer to the legislature's rights understanding in its decision-making, and when? I contend that weak-form judicial review is likewise relevant and applicable to this question. Understood in the sense of a certain *way of exercising* powers of rights review, it offers one way of conceiving how a court could sometimes refrain from asserting its rights understanding. This is by occasionally exercising its judicial review powers in a way that – beyond the above-mentioned constitutional mechanisms – additionally creates the alternative form of review on the institutional level.

In this way, this book explores part of the broader question of how the Federal Constitutional Court should exercise its constitutionally allocated powers of rights-based judicial review of legislation. As Grant Huscroft points out, the fact that 'the constitution authorizes the courts to engage in judicial review of legislation [...] and was intended to do so [...] says nothing [...] about how judges should go about the practice of judicial review in particular cases – that is, how they should exercise the power the constitution gives them.'⁴ In exploring this question, I take the alternative form of review seriously which has, so far, escaped the attention of German constitutional scholarship and jurisprudence⁵. I contend that weak-form judicial review and the related international debate around it are equally applicable to German constitutional law and scholarship.

³ Find details on these existing constitutional mechanisms in chapter B, section I.1., text to nn 20–38.

⁴ Grant Huscroft, 'Constitutionalism from the Top Down' (2007) 45 Osgoode Hall Law Journal 91, 91.

⁵ Some exceptions proving the rule are Roman Kaiser and Daniel Wolff, "Verfassungshütung" im Commonwealth als Vorbild für den deutschen Verfassungsstaat? (2017) 56 Der Staat 39 – the authors themselves find this at 41, fn 17; Almut Mareen Fröhlich, *Von der Parlamentssouveränität zur Verfassungssouveränität* (Duncker & Humblot 2009) 49–68 on the Human Rights Act 1998. Briefly mentioning the development are Christian Walter, in Günter Dürig, Roman Herzog, Rupert Scholz and others (eds), *Grundgesetz* (CH Beck 1962ff) vol 6, Art 93 (June 2017) para 60; Dieter Grimm, *Verfassungsgerichtsbarkeit* (Suhrkamp 2021) 389–91.

More specifically, I do so in the shape of proposing the creation of a 'blended system'⁶ of rights-based judicial review of federal legislation within the German constitutional order; to be achieved by the Court implementing weak-form review in instances in which it should refrain from asserting its rights understanding in relation to the legislature. Currently, this possibility is neglected in German constitutional scholarship and jurisprudence. In exploring the proposal of a blended system, I argue that weak-form review and the international debate around it are equally applicable to German constitutional law and scholarship.

Certainly, there are numerous dimensions to the broader question of how the Court should exercise its powers of rights-based judicial review of federal legislation. Some aspects that German constitutional scholarship is indeed more interested in are the Court's standard of review, the scope of review, or the Court's method of constitutional interpretation.⁷ In this way, German constitutional scholars do think about the judicial rights understanding and how it should be applied in the context of the Court's review of legislation. This includes how the legislature's application of the judicial rights interpretation should be assessed.⁸ By contrast, this book focuses on the issue of *when* the Court should assert its own rights interpretation in view of the legislature, in the first place. In other words, I am interested in the idea that the Court should sometimes defer to the legislature's understanding of what the relevant rights mean. This is different from the Court 'merely' deferring to the legislature's policy decision as one of possible options that fit within the framework of the judicial understanding of the relevant rights.

My attention is drawn to this idea of interpretive deference in the context of rights-based judicial review of legislation in view of certain assumptions underpinning weak-form judicial review. These are namely that there can be uncertainty regarding what guaranteed rights mean and that different state actors can reasonably disagree on their meaning.⁹ Against this background, should not a court consider whether it should sometimes defer in its decision-making to the legislative rights understanding, which may be equally reasonable? Adding to this notion is the fact that the concept of weak-form judicial review is primarily concerned with judicial review of legislative acts, as an answer to democratic

⁶ I adopt this notion and terminology from Mark Tushnet, *Weak Courts, Strong Rights* (Princeton UP 2008) 36.

⁷ I spell out this focus in the context of explaining the German neglect of weak-form review in chapter D, section II.2.b)bb), text to n 96ff.

⁸ In the context of Canadian dialogue with the notion of this distinction: Christopher P Manfredi and James B Kelly, 'Six Degrees of Dialogue' (1999) 37 *Osgoode Hall Law Journal* 513, 523; Huscroft, 'Constitutionalism' (n 4) 93–94. I understand the various legislative *Spiekräume* discussed in the context of the Court's constitutional review of legislation as an example of this viewpoint. Refer for this assessment to chapter F, section III.1.d)bb).

⁹ I lay out these assumptions in chapter D, section I.2.

concerns arising therefrom.¹⁰ Should not a court all the more consider interpretive deference to ward off such concerns?

From a German perspective, these ideas bring out the questions of whether the Court can and should, at times, perform weak-form rights-based judicial review of legislation and, thereby, refrain from asserting the judicial rights understanding. Put in terms of this book's proposal, my research interest is, therefore, whether the creation of a blended system of rights-based judicial review of federal legislation is desirable and permissible within the German constitutional order.

II. Argument for a 'blended system' of rights-based judicial review of federal legislation within the German constitutional order

I suggest that both is the case. In terms of the proposal's desirability, I argue for constitutional benefits brought on by the additional implementation of the alternative form of review (in appropriate cases) (E.). And while I identify a number of such benefits, two, in particular, account for the proposed blended system. Firstly, the former serves as a model to accommodate the possibility of uncertainty regarding the meaning of rights, as well as disagreement in this regard (E.I.). Secondly, it can help create a more appropriate constitutional balance between constitutional principles conflicting in the shape of the Court's review powers (E.II.). Specifically, I contend that the current preponderance of strong-form rights-based judicial review of legislation does not, per se, represent the required balance of principles conflicting in terms of the Court's exercise of its judicial review powers. That is, at least, when recognising existing constitutional tensions in the context of the Basic Law's principle of democracy (Art 20 I, II Basic Law) and separation of powers (Art 20 II 2 Basic Law) linked to the Court's exercise of strong-form review.¹¹

From the perspective of democratic legitimacy, these arise as the Court supplants decisions that can be attributed to the people to a greater degree than those of the Court in the sense that the normative connection between them is stronger. Consequently, the Court's strong-form review hinders the realisation

¹⁰ On this concern as part of its origin refer to chapter B, section I.1., text to nn 9–17.

¹¹ *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany) in the version of its last amendment of the 20th December 2024 (Federal Law Gazette I p 439). While this latest amendment concerns Art 93 and Art 94 Basic Law, and therefore provisions on the Court, it was intended simply to secure the status quo without making changes to the substance of the existing legal framework, by transcribing provisions of the ordinary law into the constitution. Thus, in its substance the legal situation has remained unchanged. On this see more specifically below, chapter C, section II.1.a)aa), text to nn 95–98.

of democracy. In terms of majoritarian decision-making, friction occurs as the Court should neither alter legislative majoritarian decisions, specify the substance of such decisions, nor override decisions designated for a parliamentary majority, especially in the context of rights. Moreover, from the perspective of a constitutionally (at least to some extent) required separation of powers, the Court – a judicial organ – acts functionally inappropriately when performing strong-form review. It exercises a legislative function in the substantive sense when supplanting the legislative decision on how the relevant rights apply and, incidentally, the underlying legislative decision of what these rights mean.

By performing weak-form rights-based judicial review of legislation and, thereby, refraining from asserting its judicial rights interpretation, the Court would neither displace the legislature's reasonable rights understanding, nor supplant or direct its (reasonable) decision on how the constitution – based thereon – applies in the specific case. As a consequence, the Court would ease resulting constitutional tensions linked to the principle of democracy and the separation of powers. In this way, I consider the additional implementation of the alternative form of review to allow the Court to strike, at times, a more appropriate constitutional balance when exercising its judicial powers. Ultimately, the Court would ensure that the constitutional principles governing its judicial review are realised to their best possible extent. To this effect, it would engage in the constitutionally set task of their optimisation.

These constitutional benefits, I contend, can certainly be captured within the German constitutional order. I understand the Basic Law to provide room for the implementation of at least some forms of weak-form judicial review on the institutional level (F). Certainly, the Court is not free to act as it pleases, being bound to the constitution as per Art 20 III of the Basic Law. But while there are constitutional constraints to how the Court may exercise its judicial review powers, they nevertheless do leave room for judicial techniques which the Court could employ to implement weak-form judicial review. Accordingly, I understand the proposed blended system to be permissible also within the German constitutional order.

To lay the groundwork for these arguments, I, firstly, set out the development of the new Commonwealth model of constitutionalism, as well as the resulting international weak-form debate (B.I.). Against this background I, secondly, specify this work's understanding of the terminological pair 'weak-form and strong-form judicial review' (B.II.). I go on to characterise the German constitutional system of review as a weaker strong-form system of review (C.). On this basis, I set out in detail my proposal of a 'blended system' of rights-based judicial review of federal legislation within the German constitutional order (D.I.). In this context, I briefly explore the absence of weak-form review ideas in Germany (D.II.), before placing the proposal within the German constitutional debate (D.III.). On this foundation, I lastly explore the above-mentioned benefits

of the proposed blended system (E.), as well as its implementation by the Court under the German constitutional order (F.).

If not otherwise indicated, English translations of German sources are my own.

B. An alternative form of judicial review within the German constitutional order

I. Weak-form judicial review and the related international debate

Thus far, the concept of weak-form judicial review and the international debate surrounding it have been overlooked in German constitutional scholarship and jurisprudence. As they make up this work's research interest, this chapter will introduce both to provide the necessary context for my proposal of a blended system of rights-based judicial review of federal legislation within the German strong-form system.

1. Development of the new Commonwealth model of constitutionalism

The 'new Commonwealth model of constitutionalism'¹ was brought about by the introduction of human rights instruments on the national level in Canada, New Zealand, and the United Kingdom. These countries 'were previously among the very last democratic bastions' of parliamentary sovereignty.² In a world where most liberal democracies feature bills of rights,³ the aim of these instruments was to create greater legal protection for fundamental rights than generally possible under traditional legislative supremacy.⁴ To this end, they assign courts some powers to review the conformity of legislation with those rights they guarantee.⁵

¹ This term was first introduced by Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *The American Journal of Comparative Law* 707.

² *Ibid* 709.

³ Briefly just Sujit Choudhry, 'After the Rights Revolution' (2010) 6 *Annual Review of Law and Social Science* 301, 302f, on the waves of democratisation that made bills of rights central components of liberal democratic constitutions; for more detail Michael Ignatieff, *The Rights Revolution* (House of Anansi Press 2000), who describes the shift to rights-based constitutionalism.

⁴ Offering this analysis are Gardbaum, 'The New Commonwealth Model' (n 1) 719; Janet L. Hiebert, 'Parliamentary Bills of Rights' (2006) 69 *Modern Law Review* 7, 8; Rivka Weill, 'The New Commonwealth Model of Constitutionalism Notwithstanding' (2014) 62 *The American Journal of Comparative Law* 127, 128; specifically on the Canadian notwithstanding clause also Mark Tushnet, 'Policy Distortion and Democratic Debilitation' (1995) 94 *Michigan Law Review* 245, 280.

⁵ Ran Hirschl, 'How consequential is the commonwealth constitutional model?' (2013)

Canada had already introduced the Canadian Bill of Rights in 1960 but kicked off this new trend by passing the Canadian Charter of Rights and Freedoms (Charter) in 1982. New Zealand followed suit and in 1990 the New Zealand Bill of Rights Act (NZBORA) entered into force. Shortly afterwards, the United Kingdom made the European Convention of Human Rights into national law in the form of the Human Rights Act (HRA) in 1998. More recently, one Australian territory and two states enacted similar legislation, namely the Australian Capital Territory Human Rights Act (ACTHRA) of 2004, the Victorian Charter of Human Rights and Responsibilities (VCHRR) of 2006, and the Queensland Human Rights Act (QHRA) of 2019.

While the extent to which these instruments authorise courts to exercise judicial review varies, a common underlying concept can be identified: a court is granted the power of rights-based judicial review of legislation, but the legislature, one way or the other, retains the authority to interpret ultimately the respective rights provision as a result of certain constitutional design mechanisms. Thereby, the respective bills of rights merely provide for penultimate judicial review: the respective courts ‘lack final authority to define and enforce constitutional rights’.⁶ Precisely to this effect, I understand the aforementioned human rights instruments to institute ‘weak-form review’⁷ – as an alternative to the prevalent strong-form rights-based judicial review of legislation.⁸

Significantly, the alternative weak form of review, thereby, presents a solution to constitutional concerns resulting from the latter. To be sure, German constitutional scholars tend to consider the German Federal Constitutional Court (referred to hereinafter as the Court) and its powers of strong-form judicial review of legislation as the crowning achievement of the *Verfassungsstaat*.⁹ Yet, in the aforementioned parts of the Commonwealth the question of judicial review of legislation remains one of the more contentious constitutional issues.¹⁰

11 International Journal of Constitutional Law 1086, 1086; Weill (n 4) 128, who is speaking of an ‘intermediate model’.

⁶ Rosalind Dixon, ‘The Core Case for Weak-Form Judicial Review’ (2017) 38 Cardozo Law Review 2193, 2194; Roman Kaiser and Daniel Wolff, “Verfassungshütung” im Commonwealth als Vorbild für den deutschen Verfassungsstaat? (2017) 56 Der Staat 39, 57.

⁷ Coined by Mark Tushnet, *Weak Courts, Strong Rights* (Princeton UP 2008) 18, 21. This terminology is not without critics: Aileen Kavanagh, ‘What’s so weak about “weak-form review”?’ (2015) 13 International Journal of Constitutional Law 1008.

⁸ I set out in detail my understanding of the distinct meanings of the terminological pair weak-form and strong-form judicial review in this chapter B, section II.

⁹ Examples are Fritz Ossenbühl, ‘Bundesverfassungsgericht und Gesetzgebung’ in Peter Badura and Horst Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht* (Mohr Siebeck 2001) vol 1, 34; Andreas Voßkuhle, in Peter M Huber and Andreas Voßkuhle (eds), *Grundgesetz* (8th edn, CH Beck 2024) vol 3, Art 93 para 13, notes that the spread of the *Verfassungsstaat* around the world is at the same time a triumph of constitutional justice.

¹⁰ To this effect Jeffrey Goldsworthy, ‘Judicial Review, Legislative Override, and Democracy’ (2003) 38 Wake Forest Law Review 451, 453; Leighton McDonald, ‘Rights, “Dialogue” And

Scholars in this context engage with whether and when a court, as a branch of government that is least accountable, should have the authority to ultimately interpret constitutional rights provisions and, on this basis, invalidate decisions made by a democratically elected majority.¹¹

Apprehension regarding judicial review of legislation is not uniquely harboured by scholars in these legal orders. It can be especially identified in the United States under the headline of the ‘counter-majoritarian difficulty’. The latter refers to the problem ‘that judicial review displaces decisions made by near-contemporaneous political majorities and therefore is open to the charge that it is undemocratic’.¹² As Barry Friedman sets forth, the counter-majoritarian difficulty has been the ‘obsessive concern’ of American constitutional scholars.¹³ To this effect, ‘reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing [in America] today’.¹⁴

The concerns, as the above makes clear, centre around the democratic legitimacy of exercises of strong-form judicial review. Should a court, as a branch of government that is least accountable, have the authority to ultimately interpret constitutional provisions and consequently invalidate decisions made by a democratically elected majority?¹⁵ When introducing weak-form rights-based

Democratic Objections To Judicial Review’ (2004) 32 Federal Law Review 1, 1ff and 19ff; Robert Wintermute, ‘The Human Rights Act’s First Five Years’ (2006) 17 The King’s College Law Journal 209, 215–16.

¹¹ Peter W Hogg and Allison A Bushell, ‘The *Charter* Dialogue Between Courts and Legislatures’ (1997) 35 Osgoode Hall Law Journal 75, 77; Gardbaum, ‘The New Commonwealth Model’ (n 1) 740; Samuel Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 Georgetown Law Journal 961, 962.

¹² Tushnet, ‘Policy Distortion’ (n 4) 245. Richard H Fallon, ‘The Core of An Uneasy Case for Judicial Review’ (2008) 121 Harvard Law Review 1694, 1694–95 notes how the debate on whether judicial review should exist has picked up.

¹³ On the counter-majoritarian difficult just Barry Friedman, ‘The Birth of an Academic Obsession’ (2002) 112 The Yale Law Journal 153, 158 – he criticises (p 162) that ‘[the] perfectly legitimate – indeed, deeply important – interest in democratic theory is not what drives most of the discourse in constitutional law and theory about the countermajoritarian difficulty. Legal academics are preoccupied with judges and judicial review. [...] It is only the Supreme Court that presents a particular problem of democratic accountability.’ This ‘obsession’, he argues, is contingent on historical developments, ‘primarily a product of liberal anxiety at mid-century’ (p 160). Stressing this lack of concern with the legitimacy of other state actors is also Christopher J Peters, ‘Persuasion’ (2001) 96 Northwestern University Law Review 1, 7–9. More generally regarding the prominence of the counter-majoritarian debate, Rosalind Dixon, ‘The Supreme Court of Canada, Charter Dialogue, and Deference’ (2009) 47 Osgoode Hall Law Journal 235, 238; Christoph Möllers, *Gewaltengliederung* (Mohr Siebeck 2005) 137; Justin Collings, *Democracy’s Guardian* (OUP 2015) 219.

¹⁴ According to Suzanna Sherry, ‘Too Clever by Half’ (2001) 95 Northwestern University Law Review 921, 921.

¹⁵ Voicing this concern are Gardbaum, ‘The New Commonwealth Model’ (n 1) 740; Issacharoff (n 11) 962. Specifically in the context of the Canadian Charter Allan C Hutchinson and Andrew Petter, ‘Private Rights/Public Wrongs’ (1988) 38 The University of Toronto Law Journal 278, 280; Hogg and Bushell, ‘The *Charter* Dialogue’ (n 11) 77; Christopher P Manfredi

judicial review of legislation in the more recent past, the aforementioned Commonwealth countries maintained, at least to some extent, a negative answer to said question. In other words, they answered the question of who ultimately decides on the meaning of rights in favour of parliament. The new Commonwealth model of constitutionalism is, thus, understood to have ‘the potential to reduce the democratic concerns associated with rights-based judicial review – in other words, to ameliorate what Alexander Bickel called the counter-majoritarian difficulty.’¹⁶ The latter, of course, denotes the concern that strong-form judicial review of legislation ‘[...] displaces decisions made by near-contemporaneous political majorities and therefore is open to the charge that it is undemocratic.’¹⁷

That said, only New Zealand and the United Kingdom have introduced wholly weak-form systems of rights-based judicial review. While two Australian states and one territory have enacted similar review mechanisms,¹⁸ the Canadian review system is not really considered a weak-form one. Rather, it presents a strong-form review system that includes a mechanism allowing for weak-form rights-based judicial review of legislation, in some instances.¹⁹

In this way, the Canadian system can be understood to illustrate the possibility of a strong-form review system that additionally provides for the alternative form of review. For my proposal of a blended system of review within the German constitutional order, the Canadian is, therefore, the more direct model. After all, I do not suggest creating a system of weak-form judicial review as encountered in New Zealand or the United Kingdom. Notwithstanding, the latter

and James B Kelly, ‘Six Degrees of Dialogue’ (1999) 37 *Osgoode Hall Law Journal* 513, 515–16; FL Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press 2000) 149ff.

¹⁶ Scott Stephenson, ‘Is the Commonwealth’s approach to rights constitutionalism exportable?’ (2019) 17 *International Journal of Constitutional Law* 884, 885; Alexander M Bickel coined said term in *The Least Dangerous Branch* (2nd edn, Yale UP 1986) 16ff. With this suggestion likewise Stephen Gardbaum, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 *International Journal of Constitutional Law* 167, 173; in this vein also Dixon, ‘The Core Case’ (n 6) 2196 and Rosalind Dixon, ‘The Forms, Functions, and Varieties of Weak(ened) Judicial Review’ (2019) 17 *International Journal of Constitutional Law* 904, 905. In the context of Canadian dialogue theory for example Christopher P Manfredi, ‘The Day the Dialogue Died’ (2007) 45 *Osgoode Hall Law Journal* 105, 122–23; Dixon, ‘The Supreme Court’ (n 13) 237; Aileen Kavanagh, ‘The Lure and the Limits of Dialogue’ (2016) 66 *The University of Toronto Law Journal* 83, 84. According to Rosalind Dixon, ‘Creating dialogue about socioeconomic rights’ (2007) 5 *International Journal of Constitutional Law* 391, 393, ‘dialogue theory argues for an intermediate approach to the judicial enforcement of constitutional rights, which allows courts both to define rights in relatively broad terms and to adopt strong remedies, provided they defer to legislative sequels that evidence clear and considered disagreement with their rulings.’

¹⁷ With this explanation Tushnet, ‘Policy Distortion’ (n 4) 245; also Rosalind Dixon, *Responsive Judicial Review* (OUP 2023) 46.

¹⁸ More details on these mechanisms can be found below in text to nn 20–29.

¹⁹ Below text to nn 30–40.

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