Osgoode Hall Law Journal

Volume 46, Number 4 (Winter 2008) Article 10

October 2008

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Citation Information

Jones, Scott. "Book Notes: Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, by Mark Tushnet." *Osgoode Hall Law Journal* 46.4 (2008) : 883-884.
DOI: https://doi.org/10.60082/2817-5069.1181
https://digitalcommons.osgoode.yorku.ca/ohlj/vol46/iss4/10

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# WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW, by Mark Tushnet[1]

SCOTT JONES

AS ONE OF THE PRE-EMINENT AMERICAN CONSTITUTIONAL SCHOLARS of the past few decades, Mark Tushnet has long been critical of US "strong-form" judicial review, arguing that the Constitution should be taken away from the courts and given back to the people. In *Weak Courts, Strong Rights*, Tushnet's comparative constitutional analysis sees him develop a more complex and nuanced approach to judicial review, ultimately concluding that "weak-form" models may hold the key to stronger legislative enforcement of social welfare rights.

*Weak Courts, Strong Rights* deals with two of the major theoretical questions that drive the study of comparative constitutional law. The first concerns the proper role of courts within constitutionally-based legal systems, while the second queries what substantive rights constitutions "do, should, or can" guarantee. Under strong-form judicial review, constitutional decisions of the judiciary are binding on the other two branches of government, while in a weak-form system there is scope for the legislature to reject such decisions. It is by exploring this more reserved role for the judiciary—manifested in a dialogical relationship with legislatures—that Tushnet finds answers to these questions.

The book is divided into three parts. In Part I, Tushnet uses chapter one to champion comparative constitutionalism as a tool with which to understand American constitutional law. He distinguishes three methodological approaches to "doing" comparative constitutional law: universalism, functionalism, and contextualism. The first two, of which he is critical, describe efforts to identify the shared principles and structures found within constitutional systems. Contextual-

1. (Princeton: Princeton University Press, 2008) 288 pages.

ism, on the other hand, focuses on the institutional and doctrinal contexts of specific ideas, suggesting that the migration of constitutional ideas does not occur without those ideas being modified in transition. The second chapter describes the different variants of weak-form judicial review as practised in New Zealand, Canada, and the United Kingdom, and contrasts them with the strong-form system in the United States. In chapter three, Tushnet turns his attention to a deeper analysis of weak-form systems, and, more specifically, what he describes as their instability or risk of transformation to strong-form systems. He concludes the chapter by asking whether or not, in weak-form systems, legislatures can usefully engage in constitutional dialogue.

Part II of *Weak Courts, Strong Rights* is dedicated to tackling this fundamental question. Tushnet acknowledges the skepticism that many people have over the ability—or will—of politicians, primarily concerned about re-election, to engage meaningfully in the constitutional project. In chapter four, Tushnet develops what he refers to as a constitution-based criterion with which to evaluate legislative performance, and hypothesizes that the differing abilities of the judiciary and legislature to interpret the Constitution are not as stark as one might assume. Applying this to a series of case studies in chapter five, he confirms his hypothesis, which he argues justifies the confidence that weak-form systems have in the interpretive abilities of the legislative and executive branches.

In Part III, Tushnet shifts his analysis to the judicial enforcement of social and economic rights. Here he suggests that social welfare rights already enjoy a degree of protection under the Constitution, and that their protection is not beyond the capacity of the judiciary. Chapter six focuses on the state action doctrine in US constitutional law, which Tushnet describes as the application of constitutional norms to property, contract, and tort law—or the "background" rules of law. It is through this doctrine that courts already enforce such rights. The next chapter looks at the related doctrine of horizontal effect in weak-form constitutional jurisdictions, and how the structure of judicial review in those jurisdictions makes it easier to solve the state action problem. In the final chapter, Tushnet concludes by examining how weak-form judicial review might be an effective and appropriate means of enforcing social welfare rights.

The author makes it clear that the purpose of *Weak Courts, Strong Rights* is not to suggest that judicial enforcement of those rights is a good or a bad thing. Rather, it is an attempt to show that, indirectly, courts already do this, and that weak-form judicial review may be a more attractive means of doing so.