

*Volume 51, Issue 1 (Fall 2013)*  
*On Teaching Civil Procedure*  
*Guest Editor: Janet Walker*

Article 13

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## Citation Information

Francis, Nicolas. "Book Notes: The New Commonwealth Model of Constitutionalism: Theory and Practice, by Stephen Gardbaum." *Osgoode Hall Law Journal* 51.1 (2013) : 349-351.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss1/13>

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## Book Note

### THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE, by Stephen Gardbaum<sup>1</sup>

NICOLAS FRANCIS

THE PROTECTION OF RIGHTS under constitutional law is usually considered to function under either one of two polar options: legislative supremacy,<sup>2</sup> derived from the British tradition of parliamentary supremacy; or constitutional supremacy,<sup>3</sup> derived from the American tradition of an entrenched, judicially enforced bill of rights. In his new book, *The New Commonwealth Model of Constitutionalism*, Stephen Gardbaum argues that a third, superior model of constitutionalism exists that draws on the strengths of the two traditional paradigms without harbouring the weaknesses found within either of them.

Gardbaum situates the new model in an intermediate position between the two traditional forms by identifying its three central features. First, there must be a legalized bill or charter of rights. Second, there must be some form of judicial power to interpret and enforce these rights by assessing legislation. Third, and most distinctively, there must be a legislative power that maintains the final word on the law by way of an override power.<sup>4</sup>

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1. (Cambridge, UK: Cambridge University Press, 2013) 270 pages.
  2. See e.g. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, UK: Cambridge University Press, 2007).
  3. See e.g. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996).
  4. *Supra* note 1 at 34.

The new Commonwealth model of constitutionalism is named after the four countries on which Gardbaum focuses (Canada, New Zealand, the United Kingdom, and Australia).<sup>5</sup> His book has two main goals.<sup>6</sup> It aims to present the new Commonwealth model as a novel model of constitutionalism, and it assesses whether and to what extent the model is currently operating. To achieve these goals, it is divided into two parts that respectively explore the theory and practice of the new model.

After a brief introduction in chapter 1, chapter 2 explains the new model and attempts to distinguish it from the two traditional forms of constitutionalism by identifying what is new about the new model.<sup>7</sup> Gardbaum argues that its novelty lies in its combining of two forms of rights protection—political rights review and weak-form judicial review—while providing a clear mechanism to separate judicial review from judicial supremacy.<sup>8</sup>

Chapter 3 shifts from an analytical to a normative argument, presenting the general case for the new model as a third and intermediate form of constitutionalism.<sup>9</sup> This chapter engages with the debate about the merits of judicial review.<sup>10</sup> Gardbaum argues that the new model permits “proportional representation” of the best arguments for legislative and constitutional supremacy, and minimizes the weaknesses of the two paradigms. This is because central to the new model is both weak-form legislative review and weak-form judicial review.<sup>11</sup>

Chapter 4 develops the internal normative theory for the new model by discussing how the model ought to ideally function.<sup>12</sup> This chapter explores the

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5. *Ibid* at 11.

6. *Ibid* at 16.

7. *Ibid* at 21.

8. *Ibid* at 33.

9. *Ibid* at 47.

10. See e.g. Richard H Fallon Jr, “The Core of an Uneasy Case for Judicial Review” (2008) 121:7 Harv L Rev 1693; Alon Harel & Tsvi Kahana, “The Easy Core Case for Judicial Review” (2010) 2:1 J Legal Analysis 1; Mattias Kumm, “Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review” (2007) 1:2 European J L Stud 1; Mattias Kumm, “Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review” in Matthias Klatt, ed, *Institutionalized Reason: The Legal Philosophy of Robert Alexy* (Oxford: Oxford University Press, 2009); Mark Tushnet, “How Different are Waldron’s and Fallon’s Core Cases for and against Judicial Review” (2010) 30:1 Oxford J L Stud 49; Waldron, *supra* note 2; Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007).

11. *Supra* note 1 at 61.

12. *Ibid* at 77.

norms that ought to govern each of the three stages of the new model, and also explores the question of when a legislature should exercise its legal override power.

In Part II, the book shifts from the theoretical to the practical. Chapters 5 to 8 describe four instantiations—Canada, New Zealand, the United Kingdom, and Australia respectively—of the new model. Within these chapters, Gardbaum assesses how successful each version of the model is in delivering the theoretical benefits discussed in Part I, and he identifies the major practical problems that have emerged within each jurisdiction.

Chapter 9 ties the previous chapters together and presents an assessment of the analytical and normative claims made in Part I in light of the “operational experience” presented in chapters 5 to 8.<sup>13</sup> In the process, Gardbaum also critically examines sceptical claims that the new model is unstable or insufficiently unique from constitutional supremacy. Acknowledging the difficulties in adhering to the theoretical framework of the new model, Gardbaum concludes by providing a series of reforms that may help the new model better achieve its normative goals in practice.

*The New Commonwealth Model of Constitutionalism* is an ambitious project with significant implications for constitutional theory and practice. The new model, if truly a viable alternative to legislative and constitutional supremacy, will fundamentally recast the choice constitutional drafters encounter when dealing with the subject of rights protection.

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13. *Ibid* at 222.