DETAINING NON-CITIZENS: POLITICAL COMPETITION AND WEAK V. STRONG JUDICIAL REVIEW

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ARTICLE

Detaining Non-Citizens: Political Competition and Weak v. Strong Judicial Review

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Outside the U.S., many constitutional scholars have noted the rise of 'weak' or weakened models of judicial review, which give legislatures broad powers to determine the (final) scope and meaning of constitutional norms. Yet, the normative attractiveness of this model remains underexplored. Some scholars have suggested that to be desirable, models of this kind require the existence of at least some degree of political competition. This article, however, goes further, and suggests that the normative desirability of weak, as opposed to strong, review depends on the degree to which political parties in fact compete over the protection of individual rights–or engage in actual processes of debate and contestation aimed at promoting both majority rule and the protection of individual rights. Competition of this kind also seems quite uneven across issues, even in systems with generally strong norms of political competition. In this sense the desirability of weak form review, as a rival to U.S. style models of strong form review, is also ultimately quite contingent and context-specific in nature. The article makes these arguments drawing on case studies of the protection of the rights for non-citizens in immigration detention in three countries with weak form systems of review for rights protections–i.e. the U.K., New Zealand, and Australia. It also suggests the broader relevance of these findings for debates over judicial review in the U.S,, and elsewhere.

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I. INTRODUCTION

Unlike the U.S., many constitutional systems adopt a distinctly "weak" approach to constitutional rights protection. In other words, they give courts broad power to interpret and enforce constitutional rights, but equally broad power to legislatures to override those rights via express powers of legislative "override," or flexible procedures for constitutional amendment.[1] This weakened model of judicial rights protection has important democratic advantages: by depriving courts of any *final* legal say over the scope and content of constitutional rights, it largely removes the bite to criticisms of judicial review based on the so-called "counter-majoritarian difficulty," or arguments by political constitutionalists about the tension between judicial review and commitments to political equality.[2]

At the same time, the normative attractiveness of this model clearly varies between countries. In competitive democracies, weak-form review of this kind is likely to lead to meaningful contestation about the scope and meaning of particular rights. In contrast, in dominant party democracies, legislative contestation about the best way to protect rights, or to balance competing rights and policy commitments, will often be quite limited.[3] Weak judicial review is thus inherently less normatively attractive in dominant party democracies than in more consolidated, competitive democratic systems.[4]

This article suggests that the normative attractiveness of weak-form review will vary based on the particular political dynamics within consolidated democracies and the degree to which political parties choose to compete over rights-based issues. Where parties compete over the protection of rights, weak-form systems may create meaningful contestation that increases that protection.[5] However, if parties choose not to compete, the protection of individual rights will often be extremely limited, thus limiting the "bite" of weak judicial intervention designed to protect and promote individual rights.[6] Ultimately, the article argues, constitutional theorists should be sensitive to background

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1 *See* Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS, IN COMPARATIVE CONSTITUTIONAL LAW (2009).

2 *See Id.*; Stephen Gardbaum, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013); Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong- v. Weak-form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007). *Cf.* Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); Jeremy Waldron, LAW AND DISAGREEMENT (1999).

3 Mark Tushnet & Rosalind Dixon, *Weak-form Review and its Constitutional Relatives: An Asian Perspective*, *in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA (Rosalind Dixon & Tom Ginsburg eds., 2014).

4 *Id.*

5 *Compare* David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484 (2002) *with* Po Jen Yap, *New Democracies and Novel Remedies*, PUB. L. (forthcoming 2017).

6 *Id.*

political conditions in a democracy when thinking about the virtues of weak versus strong-forms of review.

The article bases these arguments on case studies involving the detention of non-citizens under functionally weak, or at least moderately weak, systems of review in the U.K., New Zealand, and Australia. On one view, the detention of non-citizens is a classic area in which strong forms of review are desirable: non-citizens do not generally have the right to vote, and those in detention lack even basic access to the media and the "public square" necessary to advocate on their own behalf.[7] Yet, we suggest that the indirect representation of non-citizens' interests by political elites can mean that weak-forms of review are in fact sufficient to protect rights; whether or not this is the case largely depends on whether major political parties choose to contest the appropriate balance to be struck between the rights of non-citizens and competing policy interests.

In this sense, the focus of the article is not the "external" dimension to constitutional rights protection *per se*, but rather the protection of the rights of non-citizens by different constitutional systems, as a useful lens through which to explore the desirability of weak-form systems of review. While the selection of the relevant case studies is influenced by the focus on the external dimension to constitutions, it is also an attempt to adhere to something like a "most similar cases" principle–i.e., to identify cases that are substantively similar in terms of subject matter and formal institutional context (i.e., the degree to which they arise in systems of formally weak judicial review), but different with respect to the relevant dynamics of political competition.[8]

The remainder of the article is divided into three parts. Part I sets out the background of weak-form judicial review and its assumptions about the capacity for meaningful legislative deliberation about rights. It also summarizes prior work by one of the authors, together with Mark Tushnet, showing how these assumptions may not be met in dominant party democracies. Part II explores the three core case studies that form the focus of the article: the decisions of courts in the U.K., New Zealand, and Australia involving the detention of noncitizens deemed a security risk or making a claim of asylum. Part III offers a reflection on the lessons of this experience for debates over weak versus strong judicial review.

II. WEAK REVIEW AND DOMINANT VERSUS COMPETITIVE DEMOCRACIES

Scholars of judicial review have long focused on differences among countries in the "concentrated" versus "diffuse" nature of judicial

7 *See generally* David Weissbrodt, THE HUMAN RIGHTS OF NON-CITIZENS 2–3 (2008).

8 *Cf.* Ran Hirschl, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (2014).

review, and its exercise by specialized versus general constitutional courts.[9] In the last decade or so, constitutional scholars have increasingly considered another, distinct dimension to judicial review across countries: the degree to which it is "weak" versus "strong"-form in nature.[10]

As originally understood by Mark Tushnet, "weak-form review" was a largely typological description of a family of constitutional systems in which courts exercise meaningful powers of judicial review, but legislatures enjoy broad power to override or displace those decisions, often simply by way of ordinary majority vote.[11] The prototypical example of weak-form review is the form of review that exists under many "new Commonwealth constitutions" or constitutional rights charters, such as the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights (NZBOR), the Human Rights Act (HRA), and Australian state charters.[12] In all of these systems, other than Canada, constitutional rights instruments lack any formally entrenched legal status, so that legislatures have broad scope to override rights, both by way of amendment and by express repeal or override.[13] Courts also lack any of the kind of "strong" remedial power needed to deprive laws of legal effect and thereby undermine legislatures' powers of express repeal.[14]

In the United Kingdom, for instance, the Human Rights Act of 1998 was adopted as an ordinary statute. It gives specific, weak remedial powers to courts to reinterpret statutes in line with rights under the European Convention of Human Rights, or to issue "declarations of incompatibility" to Parliament to indicate a possible rights-based problem. But, these remedial powers do not affect the operation or validity of relevant laws.[15] In New Zealand, the Bill of Rights of 1990 likewise has the formal status of an ordinary statute, and authorizes courts to do no more than construe legislation so as to achieve a rights compatible interpretation.[16] And in Australia, with the exception of a very limited number of rights expressly protected under the federal Constitution, most rights are protected simply by a form of the clear statement rule: courts can protect various common law and human rights norms, but only so far as the statutory language and context

9 *See* Victor Ferreres Comella, *The Rise of Specialized Constitutional Courts*, *in* COMPARATIVE CONSTITUTIONAL LAW 265 (Tom Ginsburg & Rosalind Dixon eds., 2011); Tom Ginsburg & Mila Versteeg, *Why do Countries Adopt Constitutional Review?*, 30 J. OF LAW, ECON. & ORG. 587 (2014).

10 *See, e.g.*, Tushnet, *supra* note 1; Gardbaum, *supra* note 2.

11 Tushnet, *supra* note 1.

12 Gardbaum, *supra* note 2.

13 *Id.*

14 *Id.*

15 Human Rights Act, 1998, c. 42 §§ 3, 4.

16 The Court has also found that it implicitly has powers similar to those found in the Human Rights Act § 4, to issue "declarations of inconsistent interpretation". *See*, *e.g.*, *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

allows.[17] In Canada, the Canadian Charter of Rights and Freedoms enjoys a more entrenched status, and courts exercise stronger remedial powers.[18] However, the Charter also explicitly provides that the Canadian Parliament and provincial legislatures may pass laws "notwithstanding" or expressly overriding most of the key rights provisions under the Charter.[19]

Judicial review is arguably substantively or functionally weak in a range of other constitutional systems worldwide. Legislatures enjoy an effective power to overrule rights and court decisions interpreting rights, either by legislative override or constitutional amendment.[20] Article V of the U.S. Constitution makes the process of constitutional amendment so difficult that it effectively precludes the use of formal amendment for the purpose of judicial review.[21] But in many countries around the world, the formal requirements for constitutional amendment are far less demanding, and there is a much stronger tradition–or "culture"–of constitutional amendment.[22] In these countries, formal amendment is often a quite feasible means by which legislatures may override courts: consider Colombia and India as examples of this experience.[23] While there are important limits to formal powers of amendment in both countries, most forms of constitutional amendment can be passed by Congress or the Lok Sabha quite easily, thereby undermining supermajority requirements.[24]

In many cases, judicial review may also be weakened, *de facto,* by a range of executive actions, including the power of the executive not to uphold or implement court decisions, or to make judicial appointments that effectively seek to redirect a court's jurisprudence.[25] This is not the predominant understanding of 'weak-form' judicial review, but is a

17 Dan Meagher, *The Principle of Legality as Clear Statement Rule: Significance and Problems*, 36 SYDNEY L. REV. 413 (2014); James Spigelman, *The Common Law Bill of Rights* (10 March 2008) *in* STATUTORY INTERPRETATION AND HUMAN RIGHTS: MCPHERSON LECTURE SERIES, VOL. 3 (2008), 3–52.

18 Gardbaum, *supra* note 2 at 104–5.

19 *Id.* at 101–2.

20 *See* Peter Gerangelos, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS (2009).

21 Aziz Huq, *The Function of Article V*, 162 U. PA. L. REV. (2014).

22 *See* Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW (David Dyzenhaus & Malcolm Thornburn eds., 2016) (on the importance of weakness of review); Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686 (2015) (on culture).

23 *Id.* The exception, of course, is for amendments affecting the "basic structure" of the Indian Constitution, or creating an effective substitution rather than amendment of the Colombian Constitution. *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).

24 Dixon & Stone, *supra* note 3.

25 *See* Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 4 (2006)

version of the idea defended by proponents of "departmentalism" or coordinate construction.[26]

A key premise in favor of weakened judicial review is that legislators are just as capable as courts at engaging in processes of deliberation about the content and scope of constitutional rights.[27] The argument is that legislators not only have this capacity, they have an important advantage over courts in their ability to engage in deliberation that is both representative of, and responsive to, democratic majority understandings. At an abstract level, we may all agree that the protection of a core set of individual rights is essential to democracy.[28] But at a more concrete level, there is often broad–and reasonable–disagreement among citizens as to the precise scope and content of rights-based constitutional guarantees.[29] The most appropriate way to resolve disagreements of this kind in a democracy, political constitutionalists argue, is via some form of majority-based decision-making procedure.[30] In most cases, this will be the decision-making procedure that best approximates a commitment to formal equality among voters.[31] This poses a clear challenge to the legitimacy of strong forms of judicial review, which give courts, rather than legislatures, final say in the resolution of rights-based disagreements, even though courts are generally far less responsive to the logic of majority-based decision-making than legislatures.[32] This is also one of the key advantages of weakened judicial review. Giving legislatures the final, formal say on the scope and meaning of constitutional rights largely answers the democratic objections of political constitutionalists.[33]

Whether formal or functionally weak in nature, weak-form judicial review can play a valuable role in enhancing the protection of rights in a democracy.[34] It can highlight potential "blind spots" in legislation–i.e., ways in which laws may infringe rights in unintended or unforeseen ways, or in which they impose burdens that are largely unnecessary from

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26 *See, e.g.*, Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Mark Tushnet, *Alternative Forms of Judicial Review,* 101 MICH. L. REV. 2782 (2003) [hereinafter, *Alternative Forms*]; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 782-83 (2002).

27 Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 LAW & PHIL. 353 (2013).

28 Peter Kirchschlaeger, *The Relation between Democracy and Human Rights*, *in* GLOBALISTICS AND GLOBALIZATION STUDIES: ASPECTS AND DIMENSIONS OF GLOBAL VIEWS 112 (3d ed. 2014).

29 Waldron, *supra* note 2.

30 RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); *see* Mark Tushnet, *The Relation between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L. J. 2249 (2013)

31 Waldron, *supra* note 2.

32 Richard Bellamy, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 49 (2007).

33 Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL RIGHTS (2009).

34 Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193 (2017).

the perspective of a particular legislative objective. It can help counter legislative "burdens of inertia," or unwillingness on the part of legislators to address issues of importance to relatively small minorities. Such minorities may have little or no significance to electoral majorities; or their claims may divide legislative majorities in ways that cause all major political parties to ignore or overlook them.[35] This role is also particularly significant in cases where, as in the case of noncitizens in detention, those making claims for constitutional rights protection lack any or all means to protect themselves directly via the political process.

The normative attractiveness of weakened judicial review, however, will vary significantly between countries and contexts. Democratic deliberation regarding the scope and meaning of constitutional rights is not equally likely in all political contexts or systems. The dialogic potential of weak systems of review will generally depend on certain linguistic *and* political features of a democratic system: "The linguistic feature is that many constitutional provisions are stated in general terms, so that reasonable disagreements arise over their meaning and application in specific circumstances. The political feature is the existence of robust party competition."[36] In systems with robust political competition, it will often be strategic political considerations that lead legislators to engage in debate about the *constitutional* merits of particular legislation. But "even opportunistic uses of constitutional disagreement can contribute to sustaining a culture of constitutionalism, because politicians who use constitutional rhetoric must believe the voters care about the Constitution."[37] Similarly, the desire by one party to reveal flaws or inconsistencies in the opposing party's platform or policies can be an important impetus for public deliberation and debate about the particularities of various legislative proposals.[38]

In systems with weak democratic institutions or political parties, on the other hand, there will often be far fewer opportunities and incentives for deliberation of this kind. "The dominant party can be completely opportunistic about the Constitution, forcing through whatever policies they prefer in changing the Constitution if necessary,"[39] often without any of the kind of reasoned public deliberation that is a precondition for the desirability of weakened forms of review.

III. WEAK-FORM REVIEW AND RIGHTS-BASED POLITICAL COMPETITION

35 Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193 (2017).

36 Tushnet & Dixon, *supra* note 3, at 114.

37 *Id.*

38 *Id.*

39 *Id.*

An analysis of the political context for weakened judicial review, however, should not end with the distinction between competitive and dominant party democracies. It should also extend to the potential differences *among* competitive democracies, particularly the degree to which political parties in those democracies choose to compete over the protection of individual rights.

Party competition over issues of constitutional significance, even if purely for instrumental or strategic reasons, reinforces the importance of the constitution in the broader political culture.[40] Importantly, it also ensures that the government is subject to political pressures to maximize the protection of rights as it seeks to reach legislative policy objectives. Sometimes, the opposition may impose this pressure by demanding the protection as a condition of supporting a bill in the legislature, and thus of passing relevant legislation.[41] In other cases, the pressure may be self-imposed as the government seeks to shield itself from the political costs of unnecessarily or gratuitously infringing rights.

Without competition of this kind, there will often be little political accountability surrounding the government's response to weak form judicial decisions. If parties agree to implement a court decision without debating the appropriate balance to be struck between competing rights and policy interests, individual rights will still be relatively strongly protected, even if weak-form review becomes something closer to strong-form review in nature. But if parties agree not to compete over the *non*-protection of rights–i.e., to adopt only the minimum degree of rights protection necessary to avoid constitutional difficulties, and in no way to contest the appropriateness of that minimum–weak judicial review is likely to do very little to enhance the protection of individual rights. [42] This is true even for issues, such as the detention of noncitizens, that clearly affect minorities with little or no direct

40 Tushnet & Dixon, *supra* note 3. *Compare* Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

41 An example of this in the context of protecting the rights of non-citizens can be found in the Canadian response to offshore boat arrivals. In 2010, in response to the arrival of the *MV Ocean Lady*, a cargo ship carrying seventy-six Sri Lankan asylum-seekers, the minority Conservative government introduced Bill C-11, which made several significant changes to Canada's refugee system. Petti Fong, *76 Illegal Migrants Found on Ship Seized off BC*, THE STAR, Oct. 18, 2009 at https://www.thestar.com/news/world/2009/10/18/76_illegal_migrants_found_on_ship_seized_off_bc.html; Balanced Refugee Reform Bill, 2010, c C-11; Canada, *Parliamentary Debates*, House of Representatives, 26 April 2010, 1200 (Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism). Most controversially, it allowed the Minister of Citizenship, Immigration and Multiculturalism to designate certain countries as 'safe,' a designation which shaped the treatment of subsequent claims: Ibid 1214–15. Concern was expressed, both within parliament and more broadly, that this power would undermine individualized assessments and risked becoming a political tool: Ibid 1225 (Maurizio Bevilacqua); Canadian Bar Association, 'Bill C-11, Balanced Refugee Reform Act' (Submission, May 2010). After some debate, the government agreed to a compromise–necessary given its minority position–which required the Minister to act according to certain criteria. *See* Balanced Refugee Reform Act, S.C. 2010, c C-11, s 12.

42 This is the case, for example, in many dominant party democracies: *See* Tushnet & Dixon, *supra* note 3, at 114.

representation in the political process. In cases where political competition over the scope and protection of rights is strong, there tends to be meaningful deliberation surrounding the protection of individual rights, even in this context. If political competition is weak or absent, courts may need far stronger powers of review in order to protect individual rights.[43]

To illustrate this situation, this part of the article examines case studies involving the protection or non-protection, of non-citizens in detention under various weak-form systems of review. In the U.K., it suggests, there was real disagreement between the Labour government and the Liberal Democratic Party (LDP) and Conservative parties as to how best to respond to the decision of the House of Lords in *A (Appellants) v. Secretary of State for the Home Department (Respondents)*, which found a clear rights violation in laws providing for the detention or deportation of non-citizens deemed a threat to national security.[44] This led to significant contestation and, ultimately, compromise from the Westminster Parliament in response to the legal committee's decision.[45]

In both New Zealand and Australia, in contrast, there were clear limits to meaningful policy competition among the major political parties regarding how to respond to parallel court decisions on the constitutional permissibility of detaining asylum seekers. In New Zealand, with a few minor exceptions, all major political parties simply agreed to follow the court's reasoning in *Refugee Council of New Zealand Inc v. Attorney-General (No 1)* and allow for a system of conditional release and individualised assessment for asylum-seekers.[46] In Australia, while both major parties competed very publicly over a preferred location for an offshore detention regime, they at no point sought to contest whether offshore detention was in fact a desirable or appropriate means of balancing competing rights and policy interests.[47] As a result, when the High Court of Australia in *Plaintiff M70 v. Minister for Immigration and Citizenship* issued a weak–or statutory–decision giving increased protection to asylum seekers against arbitrary detention, Parliament

43 Scholars such as John Hart Ely have famously argued that courts should intervene broadly and strongly so as to protect the political process–i.e. to preserve the channels of political change–or so as to protect 'discrete and insular minorities' not adequately protected by the process, but quite narrowly and weakly in other areas: *see United States v. Carolene Products Co.*, 304 U.S. 144, n 4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Waldron and others, however, explicitly reject this understanding: the line between procedure and substance is notoriously difficult to draw consistently and objectively, and thus the whole idea of process-based review invites questions of evaluative judgement that may be the subject of reasonable disagreement among different interpreters: *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Waldron, *supra* note 2.

44 [2004] UKHL 56; 431 Parl Deb HC (6th ser.) (2005) col. 152.

45 *Government's Terror Bill Passed*, B.B.C. NEWS, Mar. 11, 2005, http://news.bbc.co.uk/2/hi/uk_news/politics/4341269.stm.

46 [2002] NZAR 717. *See* [2002] NZPD 11 June 2002.

47 Tom Iggulden, *Gillard and Abbott Clash over Migration Act*, LATELINE, Sep. 20, 2011, http://www.abc.net.au/lateline/content/2011/s3322133.htm.

simply passed new legislation effectively removing this additional rights protection without meaningfully considering its desirability.[48]

Thus, in countries such as the U.K., where there has been strong competition over the appropriate policy regarding the detention of noncitizens, we show that weak judicial review has operated quite well. It has led to both meaningful legislative deliberation *and* individual rights protection. In countries such as New Zealand and Australia, in contrast, we suggest that there has been very limited political competition around the appropriate policy regarding the detention of key classes of non-citizens (i.e., asylum seekers), and a resulting lack of meaningful legislative deliberation and/or individual rights protection.

We do not suggest that these patterns are necessarily stable across different issues or time-periods within these countries. Our aim is not to categorize these constitutional systems as in more or less "good working order" from the perspective of individual rights protection.[49] Rather, it is to use these examples–as examples of systems with relatively similar degrees of weak-form rights protection, addressing comparable issues–to demonstrate a more general dynamic within consolidated democracies.[50]

A. Weak-Form Review in Good Working Order: the Detention of Non-Citizens in the U.K.

Amid a climate of widespread public anxiety following the terrorist attacks of 9/11, the U.K. Parliament introduced the Anti-Terrorism, Crime and Security Act 2001 (U.K.), which was intended to "overhaul, modernise and strengthen the law relating to the growing problem of terrorism."[51] Controversially, the Act empowered the Secretary of State for the Home Department to detain non-citizens without prosecution for a criminal offence. This power was derived from statute s 21, which allowed the Secretary to issue a certificate for a non-citizen if he or she reasonably believed that they were a terrorist and their "presence in the United Kingdom [was] a risk to national security."[52] A person for whom a certificate had been issued could then be deported from the U.K.. If a person feared for his or her safety in the country to which he or she would be deported, or there were practical considerations preventing deportation, s 23 provided that the person could instead be detained indefinitely.[53] Recognizing that this detention would contravene article

48 (2011) 244 CLR 144. See Migration Legislation Amendment 2011 (Offshore Processing and Other Measures) Bill 2011 (Austl.).

49 Waldron, supra note 2, at 1360.

50 On this principle of case selection, or the 'most similar cases' principle, *see generally* Hirschl, *supra* note 8. On the relevant systems as weak-form on rights, *see, e.g.*, Rosalind Dixon, *An (Australian) Partial Bill of Rights*, 14 INT'L J. CONST. L. 80 (2016).

51 A v. Home Secretary [2004] AC 56 (H.L.) 5 (appeal taken from Eng.).

52 Anti-Terrorism, Crime and Security Act 2001 c. 24 § 21 (UK).

53 *Id.* at § 23.

five of the European Convention of Human Rights,[54] which guarantees the right to liberty, the U.K. government gave notice of an intention to derogate to the extent necessary to enable the scheme.[55]

The Secretary of State proceeded to issue certificates for eleven people, nine of whom were subsequently detained.[56] None of the detainees were the subject of any criminal charges, and future charges appeared unlikely.[57] The detainees appealed to the Special Immigration Appeals Commission, which found that the power to issue a certificate and subsequently detain certain persons was incompatible with the Convention, as it impermissibly discriminated between British citizens and foreign nationals.[58] The Court of Appeal subsequently reversed this finding.[59] On appeal, the House of Lords found that s 23 was incompatible with the Convention on the basis that, even if the U.K. was in a state of emergency, it was a disproportionate reactionary measure.[60] The Lords concluded that the detention of foreign nationals could not be strictly required under the circumstances, given that the detention of British nationals was not also required.[61] The Lords agreed with the initial finding that the scheme discriminated on the grounds of nationality, rendering it incompatible with article fourteen of the Convention. A declaration of incompatibility was subsequently issued under s 4 of the *HRA*.

In response to this decision, the Labour Government introduced the Prevention of Terrorism Bill of 2005. In introducing the Bill, Secretary of State Charles Clarke made clear that Parliament "should not simply renew the current legislation, which the Law Lords so overwhelmingly regard as flawed."[62] Instead, he proposed a new scheme, which empowered the Secretary to make control orders applicable to both British citizens and foreign nationals.[63] These orders could carry a range of restrictive conditions (such as restricting possession of certain items, association, and movement) and were divided into two categories: derogating and non-derogating orders.[64] Derogating orders would

54 Convention for the Protection of Human Rights and Fundamental Freedoms,, Sep. 3, 1953, 213 U.N.T.S 222.

55 Human Rights Act 1998 (Designated Derogation) Order 2001 (UK) SI 2004/3644. Article 15 of the *Convention* permits a party to derogate from art 5 in this manner '[i]n time of war or other public emergency threatening the life of the nation.'

56 A v. A v. Home Secretary [2004] AC 56 (H.L.) 1-2 (appeal taken from Eng.).

57 *Id.* at 3.

58 A v. Home Secretary, [2002] EWCA Civ 1502.

59 *Id.*

60 A v. Home Secretary [2004] UKHL 56. Lord Hoffman found that there was no 'threat to the life of the nation' within the meaning of article 15 and allowed the appeal on this basis. *Id.* at 96. Lord Walker dissented, noting that the impugned provisions represented "only a small…part of Parliament's response to the events of 11 September 2001." *Id.* at 210. He proceeded to find that the impugned provisions were "not offensively discriminatory, because there are sound, rational grounds for different treatment." *Id.* at 215.

61 A v. A v. Home Secretary [2004] AC 56 (H.L.) 43 (appeal taken from Eng.).

62 431 Parl Deb HC (6th ser.) (2005) col. 152.

63 *Id.*

64 *Id.*

involve a deprivation of liberty inasmuch as they required a person "to remain in a particular location at all times, or some similar measure"[65] and would accordingly entail a derogation from Article five of the Convention. As a result, it was proposed that they could only be made in circumstances of public emergency, where the Secretary of State was satisfied on the balance of probabilities that the subject was involved in terrorism and the order was "strictly required for the purposes of protecting the public."[66] In addition, both Houses of Parliament would be required to confirm the order within forty days.[67]

The Bill was immediately met with strong criticism. For example, its measures were described, in one instance, as "the most draconian, far-reaching and potentially dangerous provisions put before the House in the past half-century."[68] Indeed, it was argued that the legislation was more punitive than the previous scheme and moved in a direction that the Law Lords "did not envisage or encourage."[69] Particular emphasis was placed on Lord Hoffman's caution in *A v. Home Secretary* against creating "the impression that all that was necessary was to extend the power to United Kingdom citizens as well" on the basis that "such a power in any form is not compatible with our constitution."[70] Concerns were voiced, not only by members of the Conservatives and Liberal Democrats, but also by those within the Labour party itself.[71] During the Bill's initial debate in the House of Commons, these concerns crystalized into four main issues, which were echoed by the Joint Committee of Human Rights in its preliminary report on the Bill. The concerns demonstrate a significant degree of rights-based contestation.[72]

First, main parties recognized that the primary issue was the division of powers between the executive and the judiciary. The Conservatives and Liberal Democrats argued that "the judiciary's responsibility for the liberty of the individual" was a longstanding principle of British government.[73] In view of this, they claimed that allowing the Secretary to make orders amounting to a deprivation of liberty on the grounds of "national security" would "subvert [Britain's] traditional constitutional division of powers" and erode a history of judicial rights protection.[74] Next, both parties criticized the Bill for requiring a low prima facie standard of proof to justify making an order. They argued that, given the serious implications of such a standard, either the criminal standard of

65 *Id.*
66 *Id.* at 153.
67 *Id.* at 153.
68 *Id.* at 166.
69 *Id.* at 156.
70 *See id.*
71 *See*, *e.g.*, *id.* at 366.
72 JOINT COMMITTEE ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, 2004-5, HL 61, HC 389. *See also* JOINT COMMITTEE ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL, 2004-5, HL 68, HC 334.
73 *Id.* at 392.
74 *Id.* at 392.

"beyond reasonable doubt" or at least the civil standard of "balance of probabilities" should apply.[75] Third, the parties raised the concern that the subject of a proposed order would not have access to the evidence against them.[76] This would only be available to their "special advocate," and the Secretary would not be bound to disclose evidence on which he or she did not intend to rely, compromising the norms of procedural fairness that underlie the British legal system.[77] Finally, the capacity of the special advocates was called into question, given evidence of their already limited resources in terms of both time and money.[78]

Recognizing the potential of the Bill to adversely affect rights, Secretary of State Charles Clarke committed to "seeking as wide a consensus as is possible."[79] Demonstrating a degree of loyalty to this statement, 230 amendments were made between the Bill's Second Reading and the Committee Stage.[80] Many of these amendments were procedural, but a significant number were rights-protective, such as the introduction of a time limit for judicial confirmation of non-derogating orders, and a positive obligation on police to continue considering criminal prosecution.[81] Significantly, the Secretary responded to calls for greater judicial involvement by introducing amendments which allowed derogating orders to be made by the High Court, thereby publicly acknowledging concerns regarding the separation of powers and the significance of detention as a function of judicial power.[82] Many members of the House of Commons welcomed these amendments as a "significant step to remove one of the worst offences of the measure."[83]

Following these amendments, debate centered on whether the distinction between derogating and non-derogating orders should remain. First, members of the House of Commons argued that because the government was willing to allow judicial involvement in derogating orders, which involve more serious threats, it stood to reason that they should similarly allow judicial involvement in non-derogating orders.[84] Second, the opposing parties called into question the underlying distinction based on deprivation of liberty, with members arguing that any of the restrictions that would potentially be imposed under a control order could be considered a deprivation of liberty.[85] The issue was so

75 *Id.* at 361–2, 691.

76 *Id.* at 673. *See also id.* at 678 (Kevin McNamara, voicing these criticisms as a member of the Labour party).

77 *Id.* at 361–2, 713–14.

78 *Id.* at 370.

79 431 Parl Deb HC (6th ser.) (2005) col. 682.

80 *Id.* at 648.

81 *Id.* at 689.

82 *Id.* at 683. The new procedure allowed the Secretary of State to bring an *ex parte* application, with an order to be issued if the judge found a prima facie case. If successful, the order would then be referred to the full court for a closed session *inter partes* hearing, where a special advocate would appear to represent the interests of the subject of the order. *Id.* at 686.

83 *Id.* at 716.

84 *See id.* at 692.

85 *Id.* at 692–99.

deeply felt and strongly debated that a move to collapse the distinction was only very narrowly defeated (the move was defeated by 267 votes to 253).[86]

The House of Lords continued this rigorous debate, successfully passing a number of amendments that extended the powers of the judiciary to allow the High Court to make non-derogating orders, and standardized the procedure applying to derogating and non-derogating orders.[87] Another significant set of amendments added a sunset clause to the Bill and imposed review periods to ensure oversight of the powers conferred.[88] When the Bill was returned to the House of Commons, these amendments were strongly contested, triggering a "constitutional crisis" as the Bill bounced back-and-forth between the Houses.[89] Due to time constraints imposed by the expiry of the existing powers to detain, these issues had to be resolved over the course of one sitting day, which became the longest in the history of the House of Lords (over thirty hours).[90] After much negotiation, a compromise was reached and the Bill was passed, retaining the distinction between derogating and non-derogating orders and the capacity of the executive to issue non-derogating orders, with the caveat that the entire scheme would be reviewed after one year.[91]

This narrow timeframe led to criticism of the Bill on the basis that it was rushed.[92] However, in comparison to the examples from New Zealand and Australia discussed *infra*, the debate of the Bill is notable due to the depth of discussion regarding rights and the relatively small role played by party politics. David Davis, a Conservative MP, praised this as the result of a conscious decision on the part of the Labour government not to take "[t]he easy political line…[and] tub-thump about the threats, to raise the temperature and talk about draconian penalties for terrorists."[93] While the threat of terrorism was acknowledged, and the importance of ensuring national security emphasized, each of the key parties appeared to be committed to critically exploring the rights-based implications of the legislation.

Significantly, the debate sought to engage with the views of the British public, with repeated references to media reports and opinion polls on the topic.[94] Members also drew on expert reports and opinions, as well as statements of the Law Lords in previous cases and Britain's

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86 *Id.* at 756.

87 670 Parl Deb HL (5th ser.) (2005) col. 516–20.

88 *Id.* at 663.

89 Ian Leigh & Roger Masterman, MAKING RIGHTS REAL: THE HUMAN RIGHTS ACT IN ITS FIRST DECADE 213 (2008).

90 *Government's Terror Bill Passed*, B.B.C. NEWS (Mar. 11, 2005), http://news.bbc.co.uk/2/hi/uk_news/politics/4341269.stm.

91 Prevention of Terrorism Act 2005, c. 2. § 13.

92 SELECT COMMITTEE ON THE CONSTITUTION, FAST-TRACK LEGISLATION: CONSTITUTIONAL IMPLICATIONS AND SAFEGUARDS, 2008–9, HL 116-II, at 49–50.

93 *See* 431 Parl Deb HC (6th ser.) (2005) col. 354.

94 *See*, *e.g.*, *id.* at 675, 716, 776; 670 Parl Deb HL (5th ser.) (2005) col. 153.

long history of guarding against deprivations of liberty, ranging from the Magna Carta and Blackstone's commentaries to issues arising from the internment of those involved in the struggles in Northern Ireland.[95] This diverse range of sources demonstrates not only an attempt to be representative of public interests but also the potential significance of the nature and history of an issue in creating a robust political debate. The final form of the Bill might be understood to diverge from the Law Lord's decision inasmuch as it expands the power to detain to apply to citizens and foreign nationals alike, in the manner warned against by Lord Hoffman. However, this result must be viewed as the product of meaningful political contestation over how best to protect and balance rights, demonstrating the deliberation that forms an underlying condition of effective weak-form review.

B. Weak-Form Review and Non-Competition: De Facto Strong Form Review in New Zealand

Contemporary political approaches to the detention of asylum seekers in both New Zealand and Australia can be traced to the so-called *Tampa* crisis of 2001.[96] The crisis was triggered when the *MV Tampa*, a Norwegian freight ship, rescued 433 asylum seekers from a small wooden fishing boat in international waters to the north west of Australia.[97] When it tried to take the asylum seekers to the Australian territory of Christmas Island, the government responded by threatening that the crew would be charged with people smuggling if the ship entered Australian waters.[98] After a tense stand-off, which prompted significant political upheaval and public outcry,[99] the New Zealand government intervened, taking 130 asylum seekers to New Zealand where their claims were assessed.[100] The remaining asylum seekers were taken by Australia to the small Pacific island nation of Nauru for their status to be determined.[101]

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95 431 Parl Deb HC (6th ser.) (2005) col. 379–80, 390.

96 *See* Ann Beaglehole, *Looking Back and Glancing Sideways: Refugee Policy and Multicultural Nation-Building in New Zealand*, *in* DOES HISTORY MATTER? MAKING AND DEBATING CITIZENSHIP, IMMIGRATION AND REFUGEE POLICY IN AUSTRALIA AND NEW ZEALAND 105 (Klaus Neumann & Gwenda Tavan eds., 2009); Cheryl M. R. Sulaiman-Hill et al., *Changing Images of Refugees: A Comparative Analysis of Australian and New Zealand Print Media 1998-2008*, 9 J. IMMIGRANT & REFUGEE STUD. 345 (2011).

97 Peter Mares, BORDERLINE: AUSTRALIA'S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE TAMPA 121 (2nd ed., 2002).

98 Donald Rothwell, *The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty*, 13 PUB. L. REV. 118, 118 (2002).

99 Mares, *supra* note 94, at 125; J. Olaf Kleist, *Refugees between Pasts and Politics: Sovereignty and Memory in the Tampa Crisis*, in DOES HISTORY MATTER? MAKING AND DEBATING CITIZENSHIP, IMMIGRATION AND REFUGEE POLICY IN AUSTRALIA AND NEW ZEALAND 81 (Klaus Neumann & Gwenda Tavan eds., 2009).

100 Beaglehole, *supra* note 93, at 111.

101 Mares, *supra* note 94, at 125–26.

Although New Zealand was praised for its humanitarianism,[102] conservative commentators and politicians expressed concern that the country would be seen as "a soft-touch country for illegal immigration" and become a target for people smugglers and those whose claims of persecution lacked merit.[103] Prompted by these fears and the focus on national security in the wake of 9/11, the center-left Labour government sought to tighten border control.[104] On September 19th, Lianne Dalziel, Minister for Immigration, issued a new executive policy in the form of an Operational Instruction.[105] This instruction provided that immigration officers should exercise the power authorized by s 128(5) of the Immigration Act 1987 (NZ) to detain asylum seekers in certain circumstances "where the interests of national security or public order and safety arise."[106]

The Instruction specified a number of factors justifying detention, such as situations where the identity of the "refugee status claimant" could not be satisfactorily ascertained, where they carried no valid travel or identity documents (or had destroyed them), or where a preliminary assessment indicated that their claim lacked strength.[107] These factors were divided into two categories: those which justified detention in a refugee "accommodation center" and those more serious circumstances which justified detention in a penal institution.[108] While New Zealand's immigration legislation had allowed for the detention of refugee status claimants since 1978,[109] the Operational Instruction marked a substantial shift in approach, made apparent by the immediate increase in the proportion of claimants detained. Between October 1999 and September 2001, less than 5% of the 595 asylum seekers arriving in New

102 Beaglehole, *supra* note 93, at 109.

103 *See* (10 June 2002) 601 NZPD 284 (Statement of Stephen Franks).

104 *Refugee Council of New Zealand Inc. v Attorney-General (No 1)* [2002] NZAR 717, (HC) at [73].

105 Minister for Immigration (NZ), *Operational Instruction: Exercise of Discretion Pursuant to Section 128(5) of the Immigration Act 1987 to Detain Persons Who Have Claimed Refugee Status*, Sept. 19, 2001.

106 *Id.*

107 *Id.*

108 *Id.*

109 New Zealand first introduced legislation allowing for the detention of persons who had been refused temporary immigration visas in 1978, pending their departure from the country. Immigration Act 1964, §§ 14(1A), 14A(1). This power was gradually expanded, allowing detention for up to 28 days and detention of persons suspected of being ineligible of a permit. Immigration Act 1987 §§ 128, 128B. Immigration Act 1987 § 128A provided that the twenty-eight-day maximum excluded any period during which judicial review of an immigration decision was being undertaken. In 1999, further amendments were introduced, allowing for extensions of seven days on the twenty-eight-day limit.

Zealand were detained. [110] In the first four months of the new scheme, that figure jumped to 94%.[111]

In early 2002, the Refugee Council of New Zealand challenged the validity of the scheme and was granted standing to appear on behalf of all refugee status claimants in detention.[112] The Council argued that the power to detain in s 128(5) of the Immigration Act 1987 (NZ) did not apply to refugee status claimants or, alternatively, that it could not be construed as empowering the policy in light of the right to liberty contained in s 22 of the NZBOR and New Zealand's international rights obligations.[113] In an interim judgment delivered on May 31st, Justice Baragwanath found that despite the prohibition on bail in s 128(15), all detained refugee status claimants were eligible for conditional release.[114] This eligibility arose under s 128A, which provided for release where judicial review was sought of the decision to detain. Since the Refugee Council had been granted standing to appear for all detained claimants, the claimants all fell within s 128A.[115] As this argument had not been advanced by the Council, nor argued by the parties, Justice Baragwanath ordered an adjournment to allow for further submissions, with applications for release to commence in the interim.[116]

Assuming that s 128 enabled the detention regime,[117] Justice Baragwanath turned to consider the principles that should guide release under s 128A, and the detention of asylum seekers more broadly. He concluded that the Refugee Convention, and particularly article 32.1, established the qualifying principle that, "restrictions on movement be

110 *Refugee Council of New Zealand Inc. v Attorney-General (No 1)* [2002] NZAR 717, (HC) at [17]. It should be noted that the figures for the period September 2001–January 2002 included the asylum seekers from the *Tampa*, who were all detained. When they are removed from the figures, the percentage of detained claimants declines to 85.6%. *Attorney-General v Refugee Council of New Zealand Inc.* [2003] 2 NZLR 577 (CA) [134].

111 *Id.*

112 *Id.* at [2].

113 Relevantly, § 129X(2) of the Immigration Act 1987 (NZ) incorporated New Zealand's commitments under the Refugee Convention into the Act by requiring that immigration officers have regard to the Convention in carrying out their duties. *See also* § 129D, which required that immigration officers carry out their functions "in a manner that is consistent with New Zealand's obligations under the Refugee Convention."

114 *Refugee Council of New Zealand Inc. v Attorney-General (No 1)* [2002] NZAR 717 (HC) [4].

115 *Id.*

116 *Id.* at [5]. Baragwanath J's order that refugees be able to apply for conditional release was immediately challenged by the New Zealand government, who sought a stay. This was rejected on June 4th. *see Attorney-General v Refugee Council of New Zealand Inc.* [2003] 2 NZLR 577 (CA) [60]. The following week, on June 10th, New Zealand media reported that the first refugee had been granted conditional release. New Zealand Press Association, *Refugee First to Win Rights*, N.Z. HERALD, June 10, 2002, at A3. Justice Baragwanath handed down his final on June 27th, affirming and expanding upon the reasoning in his interim decision: *Refugee Council of New Zealand Inc. v Attorney-General (No 2)* [2002] NZAR 769 (HC).

117 Given the serious rights implications of detention and the importance of maintaining public confidence in the judiciary, Justice Baragwanath left the construction of s 128 open and invited the parties to consider whether it may be more appropriate for Parliament to address the scope of the section. *Refugee Council of New Zealand Inc. v Attorney-General (No 1)* [2002] NZAR 717 (HC) [52].

no more than 'necessary.'"[118] In this context, "necessary" could be taken to mean "the minimum required, on the facts as they appear to the immigration officer: (1) to allow the Refugee Status branch to perform their functions; (2) to avoid real risk of criminal offending; and (3) to avoid real risk of absconding."[119] He emphasised that this should be, but was not currently, an individualised assessment. In fact, he concluded that under the current regime, detention was the default–"essentially undiscriminating."[120] As a result, he found that the policy went beyond what was necessary using the above criteria, noting that, "there is no evidence that such a regime is necessary for all or even a great number."[121] In these circumstances, Justice Baragwanath concluded that the statutory prohibition of conditional release was a "clear breach" of New Zealand's international obligations, as well as the NZBOR, inasmuch as it maintained the detention of those who, on an individualized assessment, should be released.[122]

As this case was in motion, the New Zealand Parliament was in the process of considering the Transnational Organised Crime Bill of 2002. The Bill primarily focused on increasing penalties for people smuggling and creating offences to disincentivize the employment of people who lacked a valid visa.[123] However, it also included provisions allowing for the conditional release of detained asylum seekers on the application of an immigration officer.[124] This was seen as means by which to balance the perceived risks posed by asylum seekers "while promoting the interests of [refugee] claimants both in terms of the Refugee Convention and the New Zealand Bill of Rights Act."[125] Shortly before Justice Baragwanath's interim judgment, the Standing Committee on Foreign Affairs, Defence, and Trade, noted the legal challenge and urged that there be "some urgency in updating the law in this area."[126] Despite this push, when the Bill was debated following its Second Reading, very little attention was given to the provisions allowing for conditional release.[127] The lack of contestation around these provisions indicates an acceptance from both major parties that compliance with the Refugee Convention

118 *Id.* at 6.
119 *Id.* at 7.
120 *Id.* at 111.
121 *Id.* at 85.
122 *Id.* at 49, 111.
123 2002 598 NZPD 617 28 February 2002 (George Hawkins, Minister for Police).
124 *Id.* at 623 (Keith Locke).
125 FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE, TRANSNATIONAL ORGANISED CRIME BILL, 13 (2002).
126 *Id.* at 14. Green party leader, Keith Locke, nevertheless noted his reluctance to amend these provisions prior to final judgment in the High Court challenge, expressing concern that the amendments were predicated on the assumption that s 128 applied to refugee status claimants.
127 In fact, they were only mentioned twice; once when Green party leader Keith Locke warned that while they "might seem a step forward…[they] could be part of a process of legitimizing the routine imprisonment of asylum seekers." [2002] 601 NZPD 200 30 May 2002 (Keith Locke).

should underlie asylum seeker policies, and a corresponding lack of competition over rights protection.

Before the Bill next came before the Parliament, Justice Baragwanath handed down his interim decision, and detained refugee status claimants began to be granted conditional release. Then, on June 11th 2002, Prime Minister Helen Clark called an early election due to the collapse of the Labour party's coalition partner.[128] That same day, reports emerged that a boat carrying asylum seekers had left Indonesia and was bound for New Zealand,[129] further fuelling concern among those who saw the country as an "easy target" in the wake of *Tampa*.[130] As a result, the Bill was given urgent status to allow it to pass prior to the election.[131] While it may be anticipated that these events and the pressures they created would undermine protection of asylum seekers' rights–or in the very least, lead to contestation–the rights protections contained within the Bill were expanded in response to Justice Baragwanath's interim decision with very little debate, demonstrating a degree of political non-competition and a willingness on the part of the major parties to comply with the Court.

After considering Justice Baragwanath's interim findings, Green party Leader Keith Locke proposed the insertion of provisions to enable asylum seekers to make their own applications for conditional release.[132] These amendments expanded the already proposed provisions in a substantial way by giving individuals a right to apply for conditional release, actively addressing Justice Baragwanath's concern regarding the "wholesale" nature of detention and its prohibition on release.[133] The amendments were immediately accepted by Minister for Immigration Lianne Dalziel[134] and Dr. Wayne Mapp, member of the center-right National party. Although Dr. Mapp noted his resistance to the implication that the conditions in detention centers were "harsh and draconian," he readily acknowledged that the amendments carried a "certain logic" and accepted them on this basis.[135] The extent to which Parliament was guided by Justice Baragwanath's interim judgment is also evident in the response to his suggestion that Parliament consider extending legal aid to asylum seekers applying for conditional release.[136] Once again with little debate, this was taken up by the Minister for

128 The election was officially called the following day. Peter Aimer, *Polls that Count: From One Election to the Next*, in VOTERS' VETO: THE 2002 ELECTION IN NEW ZEALAND AND THE CONSOLIDATION OF MINORITY GOVERNMENT 1, 14 (Jack Vowles et al. eds., 2004).

129 Bernie Steeds, *Govt Warns NZ-Bound Asylum-Seekers of Risk*, EVENING POST, June 11, 2002, at 3.

130 *See* [2002] NZPD 11 June 2002 (Stephen Franks), (Warren Kyd).

131 *Id.* at (Michael Cullen, Leader of the House).

132 *Id.* at (Keith Locke).

133 *Id.*

134 *Id.* at (Lianne Dalziel).

135 *Id.* at (Dr Wayne Mapp).

136 *Refugee Council of New Zealand Inc. v Attorney-General (No 1)* [2002] NZAR 717 (HC) [114].

Immigration Lianne Dalziel, who committed to further investigate the issue.[137]

Parliament did not, however, respond to every aspect of Justice Baragwanath's decision. Despite Keith Locke's urging, the test of necessity applied by Justice Baragwanath was not explicitly incorporated into the legislation. While this could be read as demonstrating a degree of resistance to the decision, displaying the push back expected within a weak-form review model, it is worth noting that s 129X(2) already required immigration officers to act in accordance with the Convention. As a result, it is arguable that the test of necessity already applied to guide immigration officers' actions. On appeal, the Court of Appeal found that the Operational Instruction was not inconsistent with this approach, explicitly incorporating the test through its reference to "necessity."[138] In matters of substance, however, it is clear that Parliament responded to Justice Baragwanath's decision, making amendments with very little deliberation in a manner that suggests that, although the final outcome was rights-protective, it lacked the contestation central to effective weak form review.

C. Weak-Form Review and Non-Competition: Uncontested Legislative Override in Australia

Like New Zealand, Australian political and legislative treatment of asylum seekers also finds its roots in the *Tampa* crisis. Capitalising on the threat carried in the image of an approaching boat and the concern over national security prompted by 9/11, the center-right Liberal-National coalition government established a discursive and legal divide between refugees resettled through humanitarian programs and asylum seekers arriving by boat.[139] The latter group were repeatedly characterized as "illegal" "queue jumpers"–a characterization that shaped how they came to be seen in the public consciousness.[140] In turn, this justified a series of increasingly punitive policies, at the heart of which lay a scheme of mandatory offshore detention in Nauru and Papua New Guinea–known as the "Pacific Solution"–paired with the introduction of temporary protection visas requiring renewal every three years.[141]

Following the 2007 election, in which asylum seeker policy was a key political issue, the incoming center-left Labor government proceeded to dismantle this scheme, citing its expense, legal complexity, and negative impact on Australia's international human rights reputation.[142] However,

137 [2002] NZPD 11 June 2002 (Lianne Dalziel).

138 *Attorney-General v Refugee Council of New Zealand Inc.* [2003] 2 NZLR 577 (CA)[28].

139 Jane McAdam, *Australia and Asylum Seekers*, 25 INT'L J. REFUGEE L. 435, 436 (2013).

140 *Id.* at 436.

141 *Id.* at 439.

142 Craig Skekhan, *Pacific Solution to End but Tough Stance to Remain*, SYDNEY MORNING HERALD, Dec. 8, 2007, http://www.smh.com.au/news/national/pacific-solution-ends-but-tough-stance-to-remain/2007/12/07/1196813021259.html; Evidence to Senate Standing

increasing numbers of boat arrivals, particularly in the period from 2009 onward, created growing political pressure to take a "tough" stance and led to declining public support and internal party conflict.[143] In 2011, the Labor government gave in to this pressure and turned back to offshore processing, marking the beginning of a period of political consensus on this issue matched by a failure to meaningfully consider the rights of those detained offshore.[144]

Moving away from previous policies, the Labor government sought to develop offshore processing, first in East Timor,[145] and then Malaysia.[146] On May 7th, 2011, the governments of Australia and Malaysia announced an arrangement that would allow up to 800 asylum seekers arriving in Australia "unlawfully" to be transferred to Malaysia, where their claims for refugee status would be processed.[147] In return, Australia would accept 4,000 refugees over the course of four years.[148] In a formal agreement signed on July 25th, Australia committed to meeting "all costs arising under the Arrangement" with regard to the transferred individuals.[149] The arrangement was celebrated by the government as an effective means by which to "break the people smugglers' business model" and thereby reduce boat arrivals in Australia–a claim premised on the view that transferring asylum seekers to Malaysia would send a strong message of deterrence, given Malaysia's distance from Australia and the fact that many boats carrying asylum seekers were thought to depart from Malaysia.[150]

The arrangement was empowered by existing provisions of the Migration Act 1958 (Cth), introduced by the previous coalition government to facilitate the Pacific Solution.[151] Section 198A(1) enabled immigration officers to take asylum seekers arriving offshore to a country in which a declaration under s 198A(3)(a) was in force. Section 198A(3)(a) provided that the Minister for Immigration and Citizenship may declare that a country:

Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 19 February 2008, 116, 123 (Chris Evans, Minister for Immigration and Citizenship). *See also* McAdam, *supra* note 140, at 439.

143 Janet Phillip & Harriet Spinks, *Boat Arrivals in Australia since 1976* 13 (Parliamentary Library, Background Note, 2011).

144 The Greens party remain an exception to this: *Migration and Refugees*, THE GREENS, http://greens.org.au/policies/immigration-refugees.

145 Tom Allard & Kirsty Needham, *No Refugee Centre for Us: East Timor*, SYDNEY MORNING HERALD, Mar. 29, 2011, http://www.smh.com.au/national/no-refugee-centre-for-us-east-timor-20110328-1cdlo.html.

146 A.A.P., *Gillard Announces Malaysia Solution*, SYDNEY MORNING HERALD, May 7, 2011, http://www.smh.com.au/national/gillard-announces-malaysian-solution-20110507-1ed0h.html.

147 *Id.*

148 *Id.*

149 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 165 (Austl.).

150 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 2011, 9610 (Chris Bowen, Minister for Immigration and Citizenship) (Austl.).

151 See Select Committee for an Inquiry into a Certain Maritime Incident, *Final Report: A Certain Maritime Incident*, 12 October 2002, 10.73.

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
(iii) provides protection to persons who are give refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
(iv) meets relevant human rights standards in providing that protection.[152]

The Minister proceeded to make a declaration with respect to Malaysia pursuant to this section. However, the "Malaysian Solution," as it became known, drew immediate criticism from local human rights groups, who expressed concern regarding the country's "extensive record of ill-treatment of refugees."[153] Unlike Australia, Malaysia was not a party to the Refugee Convention and did not recognize the status of refugees in domestic law, nor had existing procedures for processing refugee claims.[154] No element of the arrangement required Malaysia to treat the transferred asylum seekers in a manner that complied with the Convention, leaving their rights potentially exposed.

The arrangement was challenged in the High Court in the case of *Plaintiff M70 v Minister for Immigration and Citizenship* by two asylum seekers who sought an injunction and prohibition under s 75(iii) and (v) of the Australian Constitution preventing their removal to Malaysia.[155] A 6:1 majority accepted the plaintiffs' argument that Malaysia did not meet the criteria set out in s 198(3)(a). Justices Gummow, Hayne, Crennan and Bell, along with Justice Kiefel, writing separately, determined that the listed criteria were a question of fact and must be objectively satisfied before the power to remove for offshore processing in s 198A(1) was enlivened.[156] Justices Gummow, Hayne, Crennan and Bell concluded that the criteria in s 198A(3)(a) could only be satisfied if a country was a signatory of the Refugee Convention, reading a degree of rights protection into the scheme.[157] Similarly, Justice Kiefel concluded that when determining whether the criteria were satisfied, it was necessary to look to domestic legal obligations and consider their relationship with human rights standards.[158] Chief Justice French approached the matter slightly differently, concluding that the Minister's opinion or belief with respect to each of the criteria was a jurisdictional

152 Migration Act 1958 (Cth) s 198A(3)(a).

153 Tamara Wood & Jane McAdam, *Australian Asylum Policy all at Sea: An analysis of Plaintiff M70/2011 v Minister for Immigration and Citizenship and the Australia–Malaysia Arrangement*, 61 INT'L & COMP. L.Q. 274 (2012).

154 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 168 (Austl.).

155 (2011) 244 CLR 144.

156 *Id.* at 195.

157 *Id.* at 199.

158 *Id.* at 232–3.

fact.[159] This opinion or belief must be based on consideration of the domestic laws of the relevant country and its international legal obligations. If the Minister misconstrued what the criteria required, as occurred in this case, the power would not be enlivened.[160] Accordingly, the Minister's declaration was found by the majority to be *ultra vires*. However, because the decision hinged on a failure to comply with the statutory requirements of the Migration Act 1958 (Cth), and not some broader constitutional or rights-protective principal, it was inherently vulnerable to legislative override.

In response, the Labor government immediately introduced the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill of 2011 which sought to remove the criteria listed in s 198A(3). Prime Minister Julia Gillard strongly argued that it was in the "national interest" to "give executive government the power it needs to have offshore processing."[161] As this language suggests, the government continued to fully support offshore processing without meaningfully considering the desirability of the rights-protections read in by the Court. The amendments were opposed by the Liberal party, who instead advocated offshore processing in Nauru.[162] While at times they cloaked their argument in the language of rights, emphasizing, for example, that Nauru was a signatory to the Refugee Convention (albeit, a very recent one),[163] deeper analysis demonstrates that this rights contestation was merely facial and was invoked to further policy and political objectives.

This is evident first in the Liberal party's discursive focus during the Bill's debate. Here, discussion of how to best and most appropriately ensure rights protection, in the manner indicated by the Court or otherwise, was marginalized while the focus was placed on the importance of securing the nation's borders and preventing "illegal arrivals."[164] In this vein, repeated emphasis was placed on the number of boats arriving during the Labor government's term, framed as proof of the party's "failure" to secure the country's borders.[165] Thus, the debate became one regarding the competence of the Labor government, with Liberal party leader Tony Abbott claiming that a "government which cannot protect the borders of our country is a government that is

159 *Id.* at 180–1.

160 *Id.* at 181.

161 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 2011, 9608, 9615 (Austl.).

162 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2011, 11168 (Tony Abbott, Leader of the Opposition) (Austl.).

163 Kirsty Needham, *Nauru Signs Refugee Convention*, SYDNEY MORNING HERALD, June 18, 2011, http://www.smh.com.au/national/nauru-signs-un-refugee-convention-20110617-1g830.html.

164 *See, e.g.*, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2011, 11166, (Tony Abbott, Leader of the Opposition) (Austl.).

165 *See, e.g.*, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2011, 11168 (Tony Abbott, Leader of the Opposition), 11175 (Scott Morrison), 11189 (Michael Keenan), 11198 (Bob Baldwin) (Austl.).

incapable of doing its job. A Prime Minister who is incapable of protecting the boarders of our country is a Prime Minister who has manifestly failed in the highest task she has."[166] Through this approach, the Liberal party's refusal to support the legislation became not a claim for rights, but a refusal to endorse "bad policy from a bad government."[167] Prime Minister Gillard responded by characterizing the Liberal party's resistance as a "reckless act of partisanship" furthering their own political interests.[168] In 2016, Tony Abbott acknowledged a certain degree of truth in these claims when he suggested that opposing the amendments might have been a "mistake" and the product of "hyper-partisan" politics.[169]

The extent to which the to-and-fro over Malaysia and Nauru can be understood as the result of reputational competition is further apparent in the fact that, the following year, the Labor government was successful in passing its amendments, with the caveat that offshore processing would occur on Nauru.[170] These eventual amendments provided that the only factor to be considered in designating a country for regional processing was "the national interest," opening the way for countries with a poor human rights record, such as Malaysia, to conduct offshore processing in the future.[171] It thus became clear that once the Liberal party achieved reputational success through securing its preferred location, it took no issue with the removal of statutory rights protections. Instead, the party focused once again on Labor's perceived "policy failures," which they argued resulted in not only deaths at sea but significant numbers of "illegal arrivals" and substantial costs.[172] As in the earlier debate, this focus distracted from discussion of the substance of the amendments and the desirability of offshore processing. This highly politicized debate makes clear that the parties

166 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 September 2011, 11169.

167 *Id.,* at 11168.

168 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 2011, 11018 (Julia Gillard, Prime Minister) (Austl.).

169 Mark Kenny, *Scott Morrison Says He Followed Tony Abbott's Orders on Malaysia Solution*, SYDNEY MORNING HERALD, Aug. 18, 2016, http://www.smh.com.au/federal-politics/political-news/scott-morrison-says-he-followed-tony-abbotts-orders-on-malaysia-solution-20160818-gqvroz.html; Rachel Baxendale, *Labor Reacts to Tony Abbott's Admission He Erred in Opposing Malaysian Deal on Asylum Seekers*, THE AUSTRALIAN, Aug. 14, 2016, http://www.theaustralian.com.au/national-affairs/labor-reacts-to-tony-abbotts-admission-he-erred-in-opposing-malaysian-deal-on-asylum-seekers/news-story/0c2f4694e3acaf8aaeaa5abc0b0c2938.

170 *Migration Legislation Amendment* 2011 (Offshore Processing and Other Measures) Bill 2011 (Austl.).

171 The constitutional validity of these provisions was affirmed in *Plaintiff S156/2013 v Minister for Immigration and Boarder Protection* (2014) 254 CLR 28 (Austl.).

172 *See* Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2012, 8512 (Tony Abbott) (Austl.).

chose to pursue reputational competition over rights-protective competition.[173]

Since *M70*, both the Liberal and Labor parties have continued to strongly support mandatory detention and offshore processing in the face of repeated and strident criticism from international rights bodies.[174] In 2013, the United Nations Human Rights Committee made approximately 150 findings that Australia had breached its obligations under the Refugee Convention and called for an end to offshore processing.[175] Again in 2016, the United Nations demanded that Australia close its offshore detention centers following the release by *The Guardian* newspaper of the Nauru files–over 2,000 leaked documents which revealed extensive sexual and physical abuse within the centers.[176] This lack of action strengthens the argument that rights-based arguments were invoked simply to further political goals while non-competition over rights protection remained the dominant approach. In fact, despite this criticism, both parties have acted to protect offshore processing. For example, in 2015, the Migration Amendment (Regional Processing Arrangements) Act 2015 was passed with bipartisan support and very little debate to retrospectively validate elements of the arrangement with Nauru in response to another High Court challenge.

IV. CONCLUSION: IMPLICATIONS FOR COURTS AND CONSTITUTIONAL DESIGN

173 It should be noted that members of the Greens party did question the merits of offshore processing and the rights protections it offered. *See, e.g.*, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2012, 8502 (Adam Bandt) (Austl.).

174 In lead-up to the 2016 election, the Labor party did appear to soften their position slightly, possibly in response to internal divisions within the party. Jared Owens, *Federal Election 2016: Asylum Divisions Derail Bill Shorten Pitch*, THE AUSTRALIAN, May 11, 2016, http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-asylum-divisions-derail-bill-shorten-pitch/news-story/b9185a402ba2a46cded10216e394f4ae; Gareth Hutchens, *Bill Shorten Says Labor "Open" to Resettling Refugees in New Zealand*, THE GUARDIAN, Aug. 24, 2016, https://www.theguardian.com/australia-news/2016/aug/24/bill-shorten-says-labor-open-to-resettling-refugees-in-new-zealand; James Massola, *"This Is a Sick Game and it Needs to End": Labor Splits over Asylum Seekers*, SYDNEY MORNING HERALD, June 28, 2016, http://www.smh.com.au/federal-politics/political-news/this-is-a-sick-game-and-it-needs-to-end-labor-splits-over-asylum-seekers-20160428-gogw6u.html. Leader Bill Shorten indicated that he would support media access to detention centres and the party's policy statement indicated an an intention to comply with the UN Convention on Refugees. Latika Bourke, *Bill Shorten Says Labor Would Allow Journalists Back into Asylum Seeker Detention Camps*, SYDNEY MORNING HERALD, June 14, 2016, http://www.smh.com.au/federal-politics/federal-election-2016/bill-shorten-says-labor-would-allow-journalists-back-into-asylum-seeker-detention-camps-20160613-gpi97v.html. However, the party's policy still remains 'strong support for offshore processing'.

175 U.N. Human Rights Committee, *FKAG and others v Australia*, UN Doc. CCPR/C/108/D/2094/2011 (Aug. 20, 2013); U.N. Human Rights Committee, *MMM and others v Australia*, UN Doc. CCPR/C/108/D/2136/2012 (Aug. 20, 2013).

176 Ben Doherty, *United Nations Reiterates Demand for Australia to Close "Dire" Detention Centres,* THE GUARDIAN, Aug. 13, 2016, https://www.theguardian.com/australia-news/2016/aug/13/united-nations-reiterates-demand-for-australia-to-close-dire-detention-centres.

Strong-form judicial review raises a number of problems of democratic legitimacy. It gives courts with little institutional reason to be responsive to democratic constitutional understandings the final say in interpreting open-ended constitutional guarantees, the concrete scope and meaning of which are open to reasonable disagreement among citizens. Strong-form review is also clearly no guarantee of the effectiveness of judicial review in protecting rights. Although strong-form review can offer more reliable protection against certain forms of rights infringement, a number of scholars have shown that there are clear limits to the capacity of courts to create social and political change.[177] The turn to weakened forms of judicial review, therefore, makes a great deal of normative sense if we are to reconcile commitments to constitutional rights and democracy. The article shows, however, that the relative attractiveness of weakened forms of judicial review will vary significantly by context, not only as between strong and weak democracies. Even within strong, consolidated democracies, the normative desirability of weakened forms of judicial review will vary based on the degree to which major political parties compete over the appropriate balance between the protection of rights and competing social interests. If political competition over the scope and protection of rights is strong, weakened forms of judicial review may be effective in protecting rights. In contrast, if political competition is weak or absent, courts may need to have far stronger powers of review in order to protect individual rights.

This poses a clear challenge for democratic systems wishing to create forms of review that are strong enough to ensure the protection of individual rights, while still weak enough to achieve a balance between constitutional rights and a commitment to democratic self-government. If judicial review is too strong in protecting individual rights, there may be serious democratic objections to it, even where it is designed to protect vulnerable minorities such as noncitizens in detention–an objective it may achieve with varying levels of success.[178]

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177 *Compare* Gerald N. Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

178 This is evident in the U.S. in the case of *Hamdan v. Rumseld*, 548 U.S. 557 (2006) and the legislative response to it. In *Hamdan*, the Supreme Court held 5:3 that military commissions established by the Bush administration without congressional authorization to try detainees at Guantanamo Bay were beyond executive power, an outcome that ultimately protected the rights of detained non-citizens. However, enabled by a strong political consensus, Congress responded by introducing legislation that essentially overrode this decision. *See* Military Commissions Act of 2006, 10 U.S.C. §§ 948–949 (2006). In Canada, when the Supreme Court held in *Charkaoui v. Canada*, [2007] S.C.C. 9 (Can.) that provisions of the Immigration and Refugee Protection Act impermissibly infringed rights protected in the Charter of Rights and Freedoms, Parliament responded by introducing amendments which expressly sought to render the scheme compliant with the Charter, but which took a narrow view as the scope of the rights in question. When these amendments were challenged, the Court held that although the legislation could go further in terms of rights protections, it should be interpreted in light of Parliament's intention to comply with the Charter, meaning that once again political will limited the effect of judicial action: *Canada v. Harkat*, [2014] 2 S.C.R. 43 (Can.). Similarly, in Israel, when the Supreme Court

But if judicial review is too weak, it will often be ineffective in ensuring even some minimum degree of protection against the dangers of quite severe forms of rights infringement.–for example, as seen in the Australian case study, long-term and quite punitive forms of detention in circumstances where there may well be plausible alternatives, which allow for much greater enjoyment of individual liberty. Processes of constitutional design may offer some solutions to this dilemma. There may, for instance, be ways of combining strong and weak forms of review in different contexts, which can go some way toward addressing this difficulty. One way to do so is by exempting certain rights from the scope of an override power.[179] Another is by "tiering," or varying the difficulty of constitutional amendment.[180] No design solution, however, will ever be fully effective in ensuring that the strength of judicial review is perfectly calibrated to the strength of political competition in a particular context. For this to occur, judges themselves must be willing to adjust the relative strength of judicial review to the particular political context.[181] This suggests a far more complex relationship between democracy and weak-form review than many proponents of the model have suggested to date, because at the heart of weak-form review lies the notion that in a democratic society these complex value judgments should be taken out of the hands of judges, giving legislators the final say over the scope of constitutional rights.[182] Yet, as the article shows, whether or not this is truly desirable, from a democratic perspective, will often depend on the particularities of political competition on an issue. Thus, it may turn out that weak-form judicial review is only partially capable of reconciling commitments to judicial and legislative supremacy.[183] True reconciliation may ultimately require both legislators and judges–not simply constitutional designers–to contribute in an active and ongoing way to achieving this balance.

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held that an amendment to the Prevention of Infiltration Law contravened the Basic Law, the Knesset responded by introducing further amendments that were also found to infringe the Basic Law. *See* HCJ 7146/12 Adam v. Knesset (2013) (Isr.); HCJ 7385/13 Eitain v Israeli Government (2014) (Isr.). When the legislation was amended a third time, the Court upheld certain elements of it while striking down others. HCJ 8665/14 Desta v. Minister for Immigration (2015) (Isr.). This to-and-fro process demonstrates the extent to which the capacity of the courts to create change can often be limited by the broader political context.

179 *See, e.g.*, § 33 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

180 *See, e.g.*, Rosalind Dixon & David Landau, *Tiered Constitutional Design*, (Working Paper 2017).

181 Rosalind Dixon, *Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193, 2197 (2017).

182 Tushnet himself has acknowledged this in earlier work: *See, e.g.*, Tushnet & Dixon, *supra* note 3.

183 *Cf.* Tushnet, *supra* note 2; GARDBAUM, *supra* note 2.