Weak-Form Judicial Review and "Core" Civil Liberties

Mark Tushnet[*]

I. Introduction

Two important legacies of the Rehnquist Court are its vigorous defense of free speech rights and its equally vigorous defense of judicial supremacy in constitutional interpretation. For instance, the Rehnquist Court ratcheted up the protection given commercial speech,[1] protected flag-burning as a means of political protest,[2] and struck down regulations targeted at hate speech.[3] Chief Justice Rehnquist himself was not an enthusiastic supporter of many of these decisions. In contrast, he was a strong defender of judicial supremacy—what I call strong-form judicial review—in which the courts have the final and unrevisable word on what the Constitution means, with legislatures and executive officials having no substantial role in informing the courts' constitutional interpretations. The clearest example of the Rehnquist Court's commitment to strong-form review came in *City of Boerne v. Flores*.[4] In holding that Congress has no power to "alter" the interpretations the Court had given the Constitution,[5] the Court took its own decisions as defining the meaning of constitutional terms, even though the alternative definition Congress had developed was a reasonable one.

In this Essay, I want to unearth some subordinated strands in the Rehnquist Court's free speech jurisprudence. For example, the Rehnquist Court allowed Congress to regulate campaign finance in ways subject to credible First Amendment objections,[6] and to impose obligations on cable televi-

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[*] Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank Janet Hiebert for a particularly useful formulation of the central inquiry in this Essay.

[1] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (invalidating a state ban on advertising prices for alcoholic beverages); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (invalidating a state law severely restricting advertising of tobacco products).

[2] Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

[3] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) (invalidating an ordinance making it an offense to burn a cross when doing so will "arouse anger" on the basis of race, color, creed, religion, or gender). *Cf.* Virginia v. Black, 538 U.S. 343 (2003) (upholding a state law making it an offense to burn a cross with the intent to intimidate).

[4] 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, as beyond Congress's power to enforce Section 1 of the Fourteenth Amendment).

[5] *Id.* at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[6] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), discussed in the text ac-

sion systems that would almost certainly be unconstitutional were they imposed on newspapers.[7] These decisions, I suggest, do not rest simply on the kind of deference to legislative judgment that fits comfortably into a system of strong-form review. Rather, they represent what I call a managerial model of the First Amendment, which accords legislatures a large role in setting rules that, in the judges' eyes, aim to maximize either the amount or the diversity of views disseminated through society.

The managerial model exemplifies what I call weak-form judicial review, a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short run.[8] Drafters of constitutions have recently embraced weak-form judicial review because it appears to go a long way toward overcoming the well-known "countermajoritarian difficulty" of strong-form judicial review.[9] The basic justification for weak-form review, which I develop in more detail in Part II, is that it provides an institutional mechanism for implementing statutes that are consistent with reasonable interpretations of constitutional rights, while precluding the implementation of statutes inconsistent with unreasonable interpretations. Most of the discussions of weak-form review describe its use in constitutional systems outside the United States, because there is scant prospect of the U.S. system, which is in practice one of pervasive strong-form review, being transformed into one of weak-form review. Even discussions of weak-form review as it has been, or might be, implemented in the United States have focused on substantive rights at the periphery of contemporary constitutional law, such as the right to education, or rights expressly protected by constitutionally mandated prophylactic rules.[10]

One reason for this focus may be a sense that weak-form review is especially inappropriate for core constitutional rights, such as the right to free expression or the right to be free from invidious racial discrimina-

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companying *infra* notes 55–56 and note 59.

[7] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997), discussed in the text accompanying *infra* notes 51–52 and in note 58.

[8] Having the ability to revise judicial interpretations in the short run, legislatures clearly can do so in the medium run. What matters is that they are not confined to revision over the long run alone. Part II of this Essay defines weak-form review more precisely and gives examples.

[9] The term, of course, is Alexander Bickel's, although—because he did not devote much attention to the possibility of weak-form judicial review—he treated the difficulty as one connected to the institution of judicial review as such. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (Yale Univ. Press 1986) (1962) (describing the countermajoritarian difficulty). *But see id.* at 35–46 (describing and criticizing James Bradley Thayer's "clear mistake" rule, which can be understood as a version of weak-form review).

[10] *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1022–28 (2004) (discussing right-to-education cases); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 452–55 (1998) (discussing Miranda v. Arizona, 396 U.S. 868 (1969)).

tion, perhaps because legislatures that disagree with judicial interpretations of core rights are thought to be likely to infringe on those rights rather than offer reasonable alternative interpretations. This Essay examines that proposition. After describing weak-form review in Part II, I turn in Part III to its potential application in cases involving the First Amendment. I begin that discussion by sketching the ways in which hints of weak-form review can be seen in the Rehnquist Court's First Amendment cases that fit within the managerial model, and continue by explaining why those hints might not be confined to the relatively narrow topics where they have appeared. Part IV considers the reasons for refraining from engaging in weak-form review with respect to the heart of the First Amendment: regulation of speech critical of government policy.

In brief, weak-form review should be understood as a method of working out the best understanding of what the Constitution properly protects through a process of exchange between the courts and legislatures over time. Eventually, the interactions should produce a settled and correct understanding, as I argue has happened with respect to the central rights protected by the First Amendment.[11] A brief conclusion returns to the comparative enterprise by connecting my analysis of weak-form review in First Amendment contexts to the "margin of appreciation" doctrine in European law.

II. Weak-Form Review Defined

The United States Supreme Court, supported by our legal culture and the American public, has adopted judicial review in a strong form.[12] The *locus classicus* articulating our commitment to strong-form review is *Cooper v. Aaron*'s description of "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," from which the Court said it "follows that the interpretation [of the Constitution] . . . enunciated by this Court . . . is the supreme law of the land, and . . . [is] of binding effect on the States," including "[e]very state legislator and

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[11] My argument is closely connected to that made by David Strauss in his defense of the use of the common-law process in constitutional adjudication. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

[12] It would be helpful were I able to cite such things as surveys dealing with public and elite support for strong-form review, but I am not a scholar of such polls and doubt that pollsters will have formulated their questions in ways that actually probe for differences in views on strong- and weak-form review. One hint is provided in James L. Gibson, Gregory A. Caldeira, & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998), which reports that 76% of those surveyed expressed an "institutional commitment" to the Supreme Court, where that term was defined as "an 'unwillingness to make or accept fundamental changes in the functions of the institution.'" *Id.* at 348–50. I suspect that some part of that number is attributable to institutional conservatism, fear of the unknown, and a bias in favor of the status quo, but my guess is that even taking those considerations into account the "institutional commitment" of the American people to the Supreme Court as it currently functions is rather high.

executive and judicial officer."[13] The Rehnquist Court reiterated the point in *City of Boerne v. Flores*:

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[14]

In a system of strong-form review, the courts' resolution of constitutional questions is final and binding on the political branches. This does not mean that those resolutions are fixed for all time, or even that Congress and state legislatures cannot do things to change them. Obviously, we have the power to amend the Constitution to alter the judicial resolution of a constitutional question.[15] The Court's reference to stare decisis in the *Boerne* opinion suggests another mechanism: the political branches can use the appointment process to change the Court's composition over time until there are enough justices who will repudiate the earlier interpretation. What characterizes strong-form review, then, is that judicial interpretations of the Constitution are unchangeable by the legislature in the short and medium run.[16]

Comparative analysis shows how weak-form review, in contrast, allows legislatures to make their own constitutional interpretations stick even when inconsistent with relatively recent judicial interpretations.[17] For instance, Sections 1 and 33 of the Canadian Charter of Rights and Freedoms might be taken as models for constitutional language creating judicial review.[18] Section 1 provides that the rights guaranteed by the Charter

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[13] 358 U.S. 1, 18 (1958).

[14] 521 U.S. 507, 536 (1997) (citations omitted).

[15] And we have done so several times. *See* U.S. CONST. amend. XI (repudiating the holding in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)); U.S. CONST. amend. XIV (repudiating in its first sentence one holding in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); U.S. CONST. amend. XVI (repudiating the holding in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)).

[16] Courts can reverse themselves in the short run, and even without a change in membership that might have been aimed at reversing a controversial decision. Except in unusual circumstances, the legislature cannot induce a reversal in the short run. *But see* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871) (reversing by a vote of 5-4 and after two new justices had been appointed to the Court, the decision a year earlier in Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), which had been decided 4-3 by a short-handed Court).

[17] For a good introduction to weak-form review, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

[18] The Charter of Rights and Freedoms is the "Bill of Rights" portion of the Canadian Constitution. Formally, the Charter (and the Canadian Constitution as a whole) are enactments by the British Parliament. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), *as*

are subject to "such responsible limits prescribed by law as can be demonstrably justified in a free and democratic society."[19] Section 33 provides that Canadian legislatures can make statutes effective for renewable five-year periods, "notwithstanding" their inconsistency with selected Charter provisions, including the provisions dealing with freedom of expression.[20] Section 33 could be interpreted as authorizing parliaments to enact legislation inconsistent with the way in which the courts have interpreted Charter provisions.[21]

My view is that these provisions have not worked in practice to create an effective system of weak-form review,[22] and thus I continue the expo-

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reprinted in R.S.C., No. 5 (Appendix 1985); Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.). The Canadian Constitution was "patriated"—that is, made amendable solely by the Canadian people—in 1982. *See* Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) § 2 ("No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.").

[19] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) § 1. In R. v. Oakes, [1986] S.C.R. 103, the Supreme Court of Canada outlined a multi-stage test for determining when a rights violation is "demonstrably justified":

> First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom." . . . It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
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> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."

Id. Paras. 73, 74 (citations omitted).

[20] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) § 33.

[21] I mean to distinguish here between parliamentary actions that legislators concede to be inconsistent with the Charter as they understand it, and actions that legislators take on the ground that the courts have misinterpreted the Charter.

[22] For competing views from Canadian scholars, compare KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001) (arguing that the Charter has created an effective system of dialogue between the Canadian Supreme Court and Canada's national parliament), *with* JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE? (2002) (arguing that there has not been a truly effective dialogue on the Charter's meaning because the Supreme Court has resisted dialogue and Canada's parliaments have not tried vigorously to engage in it). The reasons for my agreement with

sition of weak-form review by describing how an effective system would use the Charter's language. Consider a regulation of commercial expression—for example, a regulation of advertising for sweetened cereals, whose target audiences are children. Suppose the Supreme Court finds the regulation unconstitutional. The Court says that the goal of promoting health by diminishing children's consumption of sweetened cereals is a permissible one, but concludes that the regulation as enacted sweeps within its coverage too much expression that need not be regulated in order to accomplish a significant reduction in consumption.

The legislature has two kinds of response available under the Canadian Charter. The Section 1 response is this: Bolster the record supporting the legislation so that it provides a better—a more "demonstrable"—justification for the statute's scope. For example, the legislature might compile evidence, if it can, showing that narrowing the statute's scope would create administrative problems by requiring regulatory agencies to act outside of their areas of competence or else leave advertisements on the market that contribute significantly to the demands children make on their parents. Note, though, that the Section 1 response takes the Court's interpretation of the Charter to be correct and disagrees only with that interpretation's application to the statute.[23] The legislature attempts to show—"demonstrate"—that the violation the Court discerned is indeed justifiable given the Court's own understandings about what is needed to justify a violation. The Section 1 response, that is, does not involve a dialogue between courts and legislatures about the general meaning of Charter provisions.

In contrast, the (idealized) Section 33 response does involve such a dialogue. To continue the example, the parliament might enact a Section 33 override of the Court's decision because, in the legislature's view, the Charter's provisions dealing with freedom of expression are simply inapplicable to commercial speech.[24] This use of a Section 33 response would be predicated on a disagreement between the court and the legislature over what the Constitution means, not merely how it should be applied.[25]

Hiebert's views can be found in my reviews of these books. Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. TORONTO L.J. 89 (2003); Mark Tushnet, Book Review, 2 INT'L J. CON. L. 734 (2004).

[23] ROACH, *supra* note 22, at 8, describes what he calls "in-your-face" Section 1 responses. These responses involve what appears to be the simple reenactment of the invalidated legislation with relatively little done to bolster it. Roach treats these responses as involving decisions by parliament that merely *purport* to accept the Court's interpretations, and argues that in such instances parliament should rely on the Section 33 response. *See id.* at 281.

[24] For an extended argument from a Canadian scholar that denying constitutional protection to commercial expression does not violate basic principles of freedom of expression, see ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION (2003).

[25] I refer to an "idealized" version of the Section 33 response because Section 33 itself does not clearly distinguish between a legislative response that is concededly inconsistent with the legislature's own understanding of the Charter, and a response that is inconsistent only with the courts' understanding of the Charter. I have noted elsewhere that the language of Section 33 might have been clearer on what was being overridden. As written,

Another example, the British Human Rights Act, allows for the possibility of overt disagreement over meaning rather than application. The Human Rights Act provides that the House of Lords, in its judicial capacity exercised by the Law Lords, can declare that a statute is incompatible with fundamental human rights norms.[26] The expectation in Great Britain is that the government would respond to such a declaration by modifying the statute to eliminate the incompatibility, as has been invariably true to date.[27] But, in principle, the government could respond to a declaration of incompatibility by saying that it disagreed with the House of Lords' interpretation of the fundamental rights, offering its own reasoned justification for an alternative interpretation.[28]

I have sketched three mechanisms by which legislatures in systems with weak-form review might respond to judicial interpretations of the Constitution with which they disagree: The Section 1 response attempts to bolster the justifications for rights violations in terms the courts have already indicated they would accept, while the idealized Section 33 response and the possibility of parliamentary disagreement with a declaration of incompatibility both allow legislatures to offer their own alternative interpretations. The possibility of disagreement over the meaning of constitutional provisions guaranteeing fundamental rights provides the basis for defending weak-form review as a good, perhaps even the best, institutional implementation of democratic constitutionalism. I conclude this Part by ex-

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Section 33 requires the legislature to say to the public, "We are making this statute effective notwithstanding what the Charter says." A better expression of weak-form review would allow the legislature to say, "We are making this statute effective notwithstanding what the Supreme Court has said the Charter says." As Canadian constitutional scholars have pointed out to me, this point might be taken to demonstrate that the Charter actually establishes strong- rather than weak-form review.

[26] Human Rights Act, 1998, c. 42, § 4, *available at* http://www.opsi.gov.uk/acts/acts1998/80042--a.htm. The norms are most of the norms embodied in the European Convention on Human Rights. The primary exception is the provision in the European Convention requiring signatories to provide effective remedies for Convention violations. As I understand it, the exception was made to ensure that British courts would not hold that merely giving themselves the power to make a declaration of incompatibility was itself a violation of the Convention because such a declaration would not be an effective remedy for the underlying substantive violations.

[27] The most dramatic example involves the House of Lords' declaration that certain provisions of the Anti-terrorism, Crime and Security Act 2001 were incompatible with the European Convention (and were not protected against a declaration of incompatibility by a domestically valid derogation from the Convention). A v. Sec'y of State for the Home Dep't [2004] UKHL 56 (appeal taken from U.K.), *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm. The incompatibility arose from two features of the legislation: it applied only to non-citizens, and it was excessive in relation to the goals the government validly could pursue. The government immediately responded by eliminating the incompatibility: it extended the statute's coverage to citizens, and it adopted regulatory measures less restrictive than those initially imposed. Prevention of Terrorism Act, 2005, c. 2, *available at* http://www.opsi.gov.uk/acts/acts2005/20050002.htm.

[28] Obviously, the government would also have to be willing to defend its preferred interpretation against a challenge brought in the European Court of Human Rights.

plaining briefly why weak-form review is a defensible method of enforcing a constitution's provisions, before turning in the next Parts to aspects of U.S. constitutional law that can be seen as our version of weak-form review.

Constitutionalism provides both the structure for, and constraints on, democratic self-governance.[29] Some constitutional constraints, though controversial in such contexts as constitution drafting, provide the framework within which self-governance occurs. For example, people could reasonably disagree about whether a parliamentary system or a separation-of-powers system is the better structure for democratic self-governance.[30] Once a structure is chosen, though, people work within it—or attempt to change it by the constitution's provisions for amending the document. Notably, constitutional provisions setting up these basic structures are rarely unclear or subject to interpretation, which makes it relatively inconsequential whether judicial review takes a strong or a weak form with respect to the basic structural choices.[31]

Other provisions, and particularly provisions identifying fundamental rights, are different, and here the choice between strong- and weak-form review can matter a great deal. It is not that they are unconnected to the structures of self-governance.[32] What distinguishes provisions dealing with

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[29] For an elegant explanation of the relationship and tension between constitutionalism and democratic self-governance, see FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999).

[30] *See, e.g.*, Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that "constrained parliamentarianism" is the better structure); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001) (arguing that the U.S. system of separation of powers is the better structure).

[31] This is not to say that interpretive questions never arise in connection with particular structural provisions. For example, there is today some controversy over the extent to which Congress can control the President's decisions in areas closely related to his responsibilities as commander-in-chief of the armed forces. There is no controversy, though, nor could there be, over the proposition that the United States has a separation-of-powers system. The interpretive disagreements are about details of the structure we have. In contrast, interpretive disagreements about many fundamental rights provisions such as the First Amendment and the Equal Protection Clause arise from basic disagreements over the contours of our constitutional system. Consider here competing views about the constitutionality of the regulation of hate speech and pornography, and competing views about the constitutionality of affirmative action.

[32] To take the obvious example, protections of freedom of expression are intimately bound up with democratic self-governance to the point that the Australian High Court has held that Australians enjoy an implied constitutional right of political expression (of uncertain contours) inferred from the fact that the constitution describes Australia as a democracy, even though Australia's constitution does not contain a bill of rights protecting freedom of expression. Australian Capital Television Pty., Ltd. v. Commonwealth (1992) 177 C.L.R. 106. For an overview of the High Court's jurisprudence on the implied right of political communication, see Dan Meagher, *What is "Political Communication?" The Rationale and Scope of the Implied Freedom of Political Communication*, 28 MELB. U. L. REV. 438 (2004). John Hart Ely's account of the U.S. Constitution gives a central place to constitutional provisions that, he argues, are representation-reinforcing. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). These constitutional provisions simultaneously con-

fundamental rights from provisions dealing with basic structures is that the former, unlike the latter, are typically stated in rather general terms. Provisions that typically use general terms often differ from more specific provisions in other normatively significant ways: as the example of the First Amendment shows, provisions cast in general terms may identify core constitutional liberties. These facts have important implications for designing the institutions of judicial review, which are supposed to ensure that legislation comports with constitutional constraints. The general terms in which fundamental rights are cast, though, means that there often will be reasonable disagreement about whether any specific statute violates those constraints.[33] The disagreement can take two forms: whether a particular statute "squares with" the constitutional provision, and what the metric is.[34]

How should the government settle such reasonable disagreements? Judicial review still seems to be the best way to strike down a statute that is inconsistent with any reasonable interpretation of the Constitution's specification of fundamental rights. We might try to direct the courts to invalidate legislation only when it is truly unreasonable, that is, inconsistent with any reasonable interpretation of constitutional language.[35] Strong-form review makes that strategy risky, though, because there might be reasonable

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strain and enable democratic self-governance as embodied in the basic structure of the U.S. constitutional system. This combination of constraint and empowerment can be understood to characterize a wider range of fundamental rights than Ely acknowledged. A right to be free from torture, for example, or a right to privacy can be understood as essential to guaranteeing that those who participate in the processes of self-governance have sufficient independence of mind to make that participation meaningful: a person who must worry about being tortured if she offends the authorities, or about having his intimate personal affairs disclosed by public officials he offends, can fairly be described as not being fully self-governing. For Ely's discussion of whether the right to privacy is fundamental in his view, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). For the leading work in political theory on the connection between non-domination and democracy, see PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

[33] The existence of strongly reasoned dissents in cases with strongly reasoned majority opinions demonstrates this.

[34] I draw the "squares with" metaphor from United States v. Butler, 297 U.S. 1, 62 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.").

[35] See the Constitution of Sweden for one effort to do so, which appears to have been successful at least in the sense that the court has not actually invalidated legislation to any significant extent.

> If a court or any other public body considers that a provision conflicts with a provision of a fundamental law, . . . the provision may not be applied. However, if the provision has been approved by the Parliament or by the Government, it may be set aside *only if the fault is manifest*.

Regeringsformen [RF] [Constitution] 11:14 (Swed.) (emphasis added).

disagreement about what is unreasonable.[36] That is, the courts might (mistakenly but conclusively) hold that a statute is inconsistent with any reasonable interpretation of the constitution. More generally, if the courts have the last word, as with strong-form review, the people run the risk of losing their ability to govern themselves by regulating fundamental rights pursuant to *their* reasonable interpretation of the constitution's constraints on self-governance.

Weak-form review offers a solution to this problem.[37] Courts are given the opportunity to explain why a challenged statute is unconstitutional. Having done so, they step aside and let the legislature respond. To the extent that courts have some advantage over legislatures in constitutional interpretation, and that legislators recognize the existence of such an advantage, the legislative deliberations will be informed but not controlled by what the courts have said. But, in the end, if enough legislators believe that the court's constitutional interpretation is not as good as their own, weak-form review allows the legislators to have their way—putting the people in a position to govern themselves while simultaneously operating within the bounds set by the constitution.[38]

The defect inherent in weak-form review is that it provides a means by which legislatures can make effective their unreasonable constitutional interpretations. The extent to which this defect will actually infect adopted legislation is an empirical question.[39] Experience with weak-form review is thin enough that no firm judgments on that question are possible. Two points are worth noting, though. First, even in strong-form systems, it is rare for legislatures to enact statutes that are insupportable according to

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[36] There is an additional risk in the U.S. system, which combines life tenure with the absence of any constitutional provision describing the contours of judicial review. That combination means that no one has the power to ensure that judges actually adhere to *any* particular interpretive strategy. Politicians and scholars can say to the judges that they ought to invalidate only statutes that are unreasonable under any view of the Constitution, but once the judges are appointed there is little anyone can do if they happen to disregard that advice and invalidate statutes that are inconsistent with their own reasonable interpretations of the Constitution, even if alternative interpretations are also reasonable. (This point treats as ineffective the threat of impeachment for adopting what politicians regard as an improper approach to constitutional interpretation.) *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 163 (1999) ("We cannot guarantee that judges will act 'appropriately' when we appoint them, or by offering them a [compelling] constitutional theory . . . .").

[37] At this point in my argument I think it unnecessary to specify which of the possible mechanisms of weak-form review is desirable. (I am not sure that the choice among mechanisms is susceptible to reasoned analysis, and am inclined to think that the choice when made will depend on the historical and political circumstances under which it occurs.)

[38] Provisions for constitutional amendment achieve the same result, but, in a system like that of the United States, where the amendment process is a difficult one, legislators can implement their preferred—and, by hypothesis, reasonable—constitutional interpretations only in the long run.

[39] One can design institutions that reduce the risk that the legislature will adopt such laws—a legislative committee or staff charged with vetting legislation to ensure that it is supported by some reasonable constitutional interpretation, for example—but the risk cannot be eliminated entirely.

any reasonable constitutional interpretation.[40] And this occurs even though legislators know that enacting such statutes is for all practical purposes almost cost-free because such statutes will almost certainly be invalidated.[41] Second, and perhaps more important, one has to recognize that judicial decisions sometimes—in my view, quite often—bar legislatures from acting on entirely reasonable constitutional interpretations, and that this preclusion is as much a cost to democratic self-governance as is the adoption and enforcement of statutes inconsistent with any reasonable constitutional interpretation.[42]

There might be a more limited concern with weak-form review. A critic might think weak-form review desirable, or at least acceptable, in connection with some constitutional provisions, but think it unacceptable in connection with other provisions. Here, I consider the suggestion that weak-form review should be avoided with respect to core constitutional liberties—those that go to the essence of the people's ability to govern themselves.[43] Among the best candidates for such a liberty is the First Amendment's guarantee of free expression. In the next Part, I argue that the First Amendment is too broad to be a good candidate for denying the people, through their representatives, the power to adopt and make effective their own interpretations of what free speech requires, even if judges disagree.

III. Weak-Form Review and the Supreme Court's First Amendment Jurisprudence

The First Amendment, as interpreted by the Supreme Court, deals with many matters, such as speech critical of government policies, commercial expression, pornography, and libel. The standard approach the Court takes to First Amendment issues is well known. It includes the distinction between content-based and content-neutral regulations, and doctrines that place substantial limits on content-based regulations. The core of First Amendment doctrine fits comfortably with strong-form review because

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[40] *See supra* note 33 and accompanying text (referring to the incidence of strongly reasoned dissents in constitutional cases).

[41] Only "*almost* cost-free" because there are costs to adopting statutes that will be invalidated: the displacement of other items on the legislative agenda, the costs of litigation, and the like.

[42] Systematic evaluation of the net costs (or benefits) of strong- and weak-form review is an extraordinarily complex task. For a guide to how it could be done, see Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 O.J.L.S. 275 (2002) (outlining the steps needed to evaluate the choice between strong-form judicial review and legislative protection of constitutional rights).

[43] Another possibility would be to allow weak-form review with respect to provisions whose application to particular statutes calls for the resolution of contested questions of social fact, such as whether enforcing the exclusionary rule in civil proceedings brought by the government will deter substantively unconstitutional conduct. United States v. Janis, 428 U.S. 433 (1976) (concluding that the application of the exclusionary rule in civil tax proceedings would not deter unconstitutional conduct). My personal view is that there is substantial overlap between this approach and the one described in the text.

the Court gives little weight to legislative judgments that a regulatory scheme advances First Amendment interests.

There is, however, another approach.[44] Occasionally, the Supreme Court has acknowledged the possibility that legislatures have a role to play in interpreting the First Amendment. These acknowledgements give rise to what I call the managerial model of First Amendment law.[45] In the managerial model, legislatures have the power to adopt regulations that, in their judgment, increase the availability of expression—net, or on balance. The mere fact that a regulation suppresses some speech, even on the basis of its content, is insufficient to show that the regulation is unconstitutional, if the regulation promotes more speech than it suppresses.[46] This might be consistent with strong-form judicial review if the managerial model left it to the courts to determine whether the net contribution of a regulation to the dissemination of ideas was positive.[47] But it does not. The managerial model requires that the courts defer to legislative judgments about the net contribution of regulation to speech.[48] That is, the managerial model fits

[44] My thinking on this question has been decisively influenced by Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1 (2000). For a related metaphor, see Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 Mo. L. Rev. 59 (2005) (alluding to the title of Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America (1988)).

[45] I use the term "managerial" in a manner related to but different from that employed by Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 164 (1996) (referring to "managerial domains," where "the state organizes its resources so as to achieve specified ends."). Post deals primarily with the managerial approach to a segment of government regulation of speech, such as subsidies and the operation of government-owned facilities. With respect to that segment, Post argues that the government as manager can pursue what he calls instrumental goals, such as profit maximizing. *See, e.g.*, Lehman v. Shaker Heights, 418 U.S. 298 (1974) (upholding a city's ban on renting advertising space on the side of city buses to those seeking to disseminate political messages). *See also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713 (1987) (relying on a related concept). My approach treats the managerial view as both broader and narrower. It is broader because it is available across the entire domain of regulation; it is narrower because the sole relevant managerial goal is maximizing the dissemination of ideas.

[46] The managerial view is therefore at odds with the statement in Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam), that "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

[47] Two standard approaches that seek to minimize the scope of managerial judgment should be noted. One emphasizes that the relevant constitutional doctrine incorporates limitations on permissible managerial judgments, which reduces the tension between the managerial view and the dominant strand of First Amendment theory. This move is prominent in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The other proposes new doctrinal limitations that would allow one to claim with some plausibility that the managerially inspired rules, as modified, satisfy the dominant strand's strict standards. *See, e.g.*, Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998). Both moves are effectively critiqued in R. Tushnet, *supra* note 44.

[48] Deference on questions of fact implements what I referred to earlier as the "Section

better with weak- than with strong-form review. Further, it offers itself as a comprehensive account of the First Amendment, dealing with all First Amendment issues and not simply those involving telecommunications law, copyright, and some other discrete topics.[49] And, its presence in First Amendment doctrine shows that there need be no deep incompatibility between weak-form review and judicial protection of fundamental liberties.

I begin by pointing out cases where the Court has acknowledged the legislature's role in making *constitutional* choices when regulating speech. I then consider and reject the possibility that those cases are somehow set apart from the mainstream of First Amendment adjudication because of their peculiar subject matters.[50] Instead, I argue, the cases provide at least hints of the managerial model. The aim in this Part is to demonstrate that the U.S. Supreme Court's First Amendment jurisprudence provides some space for weak-form review. Part IV examines the dominant strand of First Amendment jurisprudence and argues that strong-form review is indeed appropriate for laws restricting speech critical of government policy. This is only true because that jurisprudence has emerged from a long process of interaction between courts and legislatures—that is, it has emerged from what can be conceptualized as a temporally extended system of weak-form review. That discussion raises what seems to me the only remaining question: whether the temporal extension, that is, the long period over which interactions occur, is somehow essential to the development of good constitutional doctrine with respect to core constitutional rights.

Turner Broadcasting System, Inc. v. FCC, an important recent case involving the First Amendment implications of regulating communications technology, involved the "must carry" provisions of federal communications law.[51] Those provisions required cable television systems to commit some channels to local broadcast stations in order, Congress asserted, to ensure that local stations, which provided distinctive services to their communities, could survive. The Court upheld the provisions, emphasizing a number of factors. The subject matter was a "regulatory scheme[ ] of inherent complexity" involving "assessments about the likely interaction of industries undergoing rapid economic and technological change."[52] The Court emphasized the "reasonableness" of Congress's predictive judgments about

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1" version of weak-form review, in which courts accept legislative judgments about the application of constitutional norms to specific statutes.

[49] I do not want to present here a full defense of the managerial model; that is a project for another time. Rather, I want to establish only that the managerial model is present in contemporary First Amendment doctrine. For the moment, I simply observe that (in my not entirely unbiased judgment, I admit) R. Tushnet, *supra* note 44, demonstrates that the managerial model makes sense of some problems with which standard First Amendment doctrine has difficulty, and offers better solutions to other problems than does the standard doctrine.

[50] I note that it is possible to insert each decision I discuss into standard free speech doctrine, but I believe—and intend to argue in a more developed version of this argument—that the resulting doctrinal structures are unappealing.

[51] 520 U.S. 180 (1997).

[52] *Id*. at 196.

the economics of cable and broadcast television. At the least, *Turner Broadcasting* shows that First Amendment cases sometimes require the resolution of contestable factual assertions, and may not be sharply distinguishable from other domains of constitutional law. Or, put another way, cases in the constitutional core—that is, those involving the First Amendment—might have some characteristics of cases at the Constitution's periphery, such as those involving government regulation of business.

Justice Breyer's dissent in a case striking down regulations of the distribution of indecent material over the World-Wide Web illustrates a related feature of First Amendment doctrine.[53] The dissent referred to an earlier opinion that had praised "constructive discourse between our courts and our legislatures" as "an integral and admirable part of the constitutional design."[54] Justice Breyer referred to the fact that the anti-pornography statute resulted from deliberations in Congress responding to a prior decision invalidating Congress's first stab at the problem. Even though Justice Breyer was writing in dissent, his observations indicate that the idea that interaction between the Court and Congress over the Constitution's application, if not over its meaning, has reached the U.S. Supreme Court.

The Court itself endorsed inter-branch dialogue with respect to political speech, the core of the First Amendment, when it upheld the McCain-Feingold campaign finance reform law.[55] The doctrine the Court articulated is not relevant here—what matters is the majority's statement that "[w]e are under no illusion that [the McCain-Feingold law] will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."[56] As—they need not have added—is the question of how *the Court* will respond. That is, even though the opinion upheld the legislation and therefore does not count as an exercise of strong- or weak-form judicial review, the opinion came close to explicitly endorsing the idea that the substantive law of the First Amendment would be shaped by interactions among the public acting as campaign donors, Congress acting as regulator, and the Supreme Court acting as the (provisionally) final determiner of the Constitution's meaning. That idea is the one that underlies weak-form judicial review.[57]

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[53] Ashcroft v. ACLU, 542 U.S. 656 (2004). The Court merely approved a trial court's decision that, given the record before it, the government had not shown that technology was inadequate to limit minors' access to pornographic material without limiting the access of adults as well.

[54] *Id*. at 689 (Breyer, J., dissenting) (quoting Blakely v. Washington, 542 U.S. 296, 326 (2004) (Kennedy, J., dissenting)). Justice Kennedy was the author of the Court's opinion from which Justice Breyer was dissenting.

[55] McConnell v. FEC, 540 U.S. 93 (2003).

[56] *Id*. at 224.

[57] For a related example of dialogic review, dealing with the problem of articulating constitutional doctrine in a domain where the factual predicates for applying doctrine change rapidly, see Stuart Minor Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999).

I do not want to claim too much about these cases. At most they provide only hints of weak-form review, and the predominant strand of First Amendment doctrine points in the direction of strong-form review. Still, what are we to make of those hints? Against the claim that they demonstrate an alternative view of First Amendment law (the managerial model), it might be said that they are limited to the First Amendment's periphery. In the main, the cases involve relatively new social phenomena—cable television and the Web obviously so, the new methods of campaigning only slightly less. Where the phenomena are new, perhaps an interactive form of review is especially appropriate, giving both Congress and the courts the opportunity to learn about the new phenomena, their constitutional implications, possible new techniques—both technological and social—of regulation, and the like.

There is another sense, though, in which the problems presented in *Turner Broadcasting* and the McCain-Feingold case are neither new nor peripheral to the First Amendment. The dissenters in both cases mounted strong arguments that the restrictions at issue were content-based. The goal of the regulation in *Turner Broadcasting* was the preservation of local broadcast stations because Congress believed that they would distribute locally oriented programming, that is, because of the content they distributed.[58] In the McCain-Feingold case, the Court upheld regulations of political advertisements—again a content-based rule.[59] I think it better to understand these cases as raising to greater prominence the managerial model.

That model's best expression comes in copyright law. Consider the analysis the Supreme Court offered when in *Eldred v. Ashcroft* it upheld the Sonny Bono Copyright Extension Act of 1998.[60] Quoting an earlier decision, the Court said that "copyright [was] . . . the engine of free expression."[61] As that engine, the constitutional law of copyright has two components. First, copyright law promotes free expression—even though it allows, indeed requires, that courts suppress speech that infringes copyright. Second, the Court in *Eldred* repeatedly emphasized that it should defer to congressional judgments about the proper scope of copyright (and, by necessary inference, about the proper scope of the First Amendment),[62] at

[58] *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 229, 234 (1997) (O'Connor, J., dissenting) (reiterating her earlier conclusion in Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994), that the regulations were content-based).

[59] *See McConnell*, 540 U.S. at 248 (Scalia, J., dissenting) (describing the statute as "a law that cuts to the heart of what the First Amendment is meant to protect"); *id.* at 288 (Kennedy, J., dissenting) (referring to prior cases imposing "a rigorous standard of review" for cases involving "suppression of speech").

[60] 537 U.S. 186 (2003).

[61] *Id.* at 219 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).

[62] *See, e.g.*, *id.* at 205 n.10 ("'it is not our role to alter the delicate balance Congress has labored to achieve'" (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990))); *id.* at 212 ("We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.").

least where Congress had "not altered the traditional contours of copyright protection."[63]

These two components are important parts of the managerial model of free speech law. They connect that model to weak-form review by asserting that the Court should defer to Congress on the very scope of permissible legislation. A decision that upholds a copyright statute against First Amendment challenge defines the scope of the First Amendment's protection. Deference to the legislature on that question implements the Section 33 version of weak-form review, in which the legislature's definition of the content of a constitutional right prevails over a contrary judicial judgment.[64]

The mere existence of the managerial model in the Supreme Court's jurisprudence demonstrates that the case for strong-form review of First Amendment claims cannot rest on a sweeping assertion that legislatures will infringe on First Amendment rights rather than offer reasonable interpretations of the First Amendment's meaning when they legislate on matters implicating that Amendment. That observation does not rule out the possibility that legislatures are sufficiently likely to adopt unreasonable constitutional interpretations in some discrete areas implicating core constitutional rights such that we should avoid weak-form review in those areas.[65] The next Part of this Essay takes up that possibility.

IV. Strong-Form Review as the Result of Weak-Form Review over Time

The managerial view of the First Amendment—and, equivalently, weak-form review in First Amendment cases—is an account of the roles of legislatures and courts in free speech cases quite generally, even though it is easiest to see in cases involving problems relatively new to the courts. Yet, although the managerial view is not confined to such problems, the fact that it is most evident there may account for the sense that weak-form review and the managerial approach are inappropriate in some First Amendment domains. I alluded earlier to implementation problems, and suggested that one could not simply allocate strong-form review to fun-

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[63] *Id.* at 221.

[64] Because we do not have weak-form review in the United States, the managerial approach is only structurally similar to weak-form review, not a version of it. In particular, under the managerial view, the courts do not initially express their own constitutional interpretation, except insofar as they hint in their opinions that, were they to consider the question of interpretation as an initial matter, they might not come to the same conclusion that the legislature did. For an example of such a hint, see *Eldred*, 537 U.S. at 208, where the Court stated: "we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."

[65] And, perhaps, that we should avoid weak-form review entirely because it is difficult to design a system of judicial review that will be weak-form with respect to some rights, strong-form with respect to others.

damental rights and weak-form review to other matters. Perhaps, though, the line could be drawn within the domain of fundamental rights. This Part explores that possibility, suggesting that strong-form review is most defensible with respect to problems the courts have grappled with over many years.

How might we identify the line between the domain in which weak-form review is appropriate and that in which strong-form review is? One possibility is that weak-form review invites repeated interactions between legislatures and courts over constitutional meaning. One characterization of such interactions is that they illustrate why weak-form review is sometimes called "experimentalist."[66] But sometimes an experiment ends when the community simply concludes that it has.[67] Strong-form review might be appropriate in such circumstances and weak-form review appropriate when genuine uncertainty exists in the relevant community about what the First Amendment really means.

The history of regulation of speech critical of government policy exemplifies how this experimentalist review might "end." The place to begin is with Robert Bork's fundamental insight,[68] which can be put this way: democratic self-governance means that the policy choices made by democratically elected representatives are entitled to be implemented as effectively as is practically possible, and speech critical of those policy choices reduces the likelihood of effective implementation to some degree. Speech critical of government policies can be said to interfere with or undermine those policies, and thus to interfere with or undermine democratic self-governance.[69] Providing constitutional protection for such speech therefore hinders democratic self-governance, illustrating the tension between self-governance and constitutionalism as enforced by means of judicial review.

Free speech law began by adopting an extremely generous standard of review of regulations aimed at speech critical of government policies. Such speech could be regulated, according to the Supreme Court's early rulings, when legislatures made it a criminal offense to impede the implementation of substantive policies and when properly instructed juries concluded that the speech at issue had a tendency to increase the likelihood of interference with the government policies.[70] The Court also held that legislatures could impose criminal sanctions on a category of speech if they

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[66] *See, e.g.*, Dorf & Sabel, *supra* note 10.

[67] For a discussion of this phenomenon in the physical sciences, see PETER GALISON, HOW EXPERIMENTS END (1987).

[68] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[69] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1061 (5th ed. 2005), deals with this aspect of free speech law under the heading "Speech That 'Causes' Unlawful Conduct." That characterization captures by far the largest part of the phenomenon, but probably not all: Consider the possibility that speech critical of government policy will reduce the enthusiasm with which some citizens support the policy, and thereby reduce the civic resources available to implement it.

[70] This is a perhaps non-standard but nonetheless accurate description of the holding in Schenck v. United States, 249 U.S. 47 (1919).

reasonably concluded that speech falling within the category had a general tendency to increase the likelihood of interference with democratically chosen policies.[71]

Under pressure from powerful dissenting opinions written by Justices Holmes and Brandeis,[72] the Court revised its approach. Holmes and Brandeis argued that the "bad tendency" test was a flawed standard for juries to apply because experience showed that juries were too ready to find a significant threat to the implementation of government policy in speech that actually was quite unlikely to impair government policy to any significant extent.[73] They made a similar point about legislative overestimation of the threat posed by speech falling within proscribed categories.

It took more than two decades for the Court to acknowledge the force of these arguments, with Chief Justice Vinson writing in 1951 that the Court's decisions in the intervening years "inclined toward the Holmes-Brandeis rationale."[74] When it did, the Court modified the standards in two ways. It eliminated the distinction between statutes aimed at protecting substantive policies from impairment by means of speech and statutes aimed at regulating a category of speech. More important, it directed that juries be instructed that they could find liability only if they went through a calculation taking account of both the degree of risk and the magnitude of harm to the implementation of government policies.

Once again, experience placed this standard under pressure, and for the same reasons as before. Juries instructed as the Court directed in 1951 convicted defendants of violating the law when, as the Court came to see things, the risks to government policy were not large enough. The Court turned to a new strategy of controlling jury (and prosecutorial) overreaching. It would allow regulation of speech critical of government policy only when the speech itself had certain characteristics that the Court believed could be readily identified.[75] In doing so, the Court made it easier for judges to throw out erroneous convictions if they concluded that the speech at issue did not have those characteristics.

Brandenburg v. Ohio[76] took the final step. *Brandenburg* further refined the list of characteristics required before speech critical of government policy could be regulated: The speech had to use words that were an "in-

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[71] Gitlow v. New York, 268 U.S. 652 (1925).

[72] *See* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring on jurisdictional grounds); *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[73] And, implicitly, the review of jury verdicts for unreasonableness was an inadequate check on such errors.

[74] Dennis v. United States, 341 U.S. 494, 507 (1951) (plurality opinion of Vinson, C.J.).

[75] *See* Yates v. United States, 354 U.S. 298 (1957) (allowing regulation only of speech advocating unlawful action, but not of speech advocating the doctrine that under some circumstances unlawful action was appropriate).

[76] 395 U.S. 444 (1969).

cit[ement]" to "imminent lawless action."[77] Judges could examine the challenged speech and determine whether the words were a proscribable incitement. *Brandenburg* addressed the role of juries as well. Judges were to instruct them that the defendant had to have acted with a specific mental state and that the circumstances were such that lawless action was likely to occur. The Court's formulation meant that the words of incitement had to have been "directed" at producing imminent lawless action and had to have been "likely to . . . produce such action."[78]

Over the course of nearly fifty years, the Court revised free speech doctrine to reach a point that has remained stable for almost as long.[79] The decisions have several characteristics that resonate with aspects of the ideas underlying weak-form review.[80] First, the Court upheld the regulations at issue in the cases defining the core of First Amendment doctrine, until *Brandenburg*. Doing so gave the legislative and executive branches the opportunity to continue to develop regulations that would generate additional experience with the way in which governments actually went about regulating speech critical of government policy. Second, the Court regularly reviewed cases that allowed it to invoke collateral doctrines to invalidate speech restrictions without directly disparaging the core of existing doctrine.[81] Third, these cases also gave the Court information about how that core actually worked in practice. That experience led the Court to revise the same doctrine. The stability of the *Brandenburg* revision can be taken as the consolidation of strong-form review in cases involving speech critical of government policy—the consolidation being shown by the fact that the Court reversed a conviction and thereby precluded the accumulation of additional experience with free speech regulations.[82] We can describe the Court as allowing governments to experiment with speech restrictions, ending the experiment when, in the Court's judgment, the experiment had yielded all relevant evidence. The doctrinal stability since *Brandenburg* shows that the

[77] *Id*. at 447.

[78] *Id*. Formulated to deal with problems associated with decisions by prosecutors and juries, the *Brandenburg* test has been applied to cases in which private parties seek injunctions or damages from judges. *See, e.g.*, NAACP v. Claiborne Hardware Corp., 458 U.S. 886, 928 (1982).

[79] Contemporary sedition convictions in terrorism-related cases have been based on jury instructions framed in the terms *Brandenburg* set, and on review the courts of appeals have relied on *Brandenburg*. *See, e.g.*, United States v. Rahman, 189 F.3d 88, 114–15 (2d Cir. 1999) (rejecting a facial challenge to 18 U.S.C. § 2384 (2000), which prohibits seditious conspiracies to use force to overthrow the United States government).

[80] Only "resonate with," because the Supreme Court understood itself to be exercising strong-form review.

[81] These are the "subsequent cases" referred to in Dennis v. United States, 341 U.S. 494, 507 (1951).

[82] An alternative account would be that the Court finally realized that its efforts to encourage legislatures and executive officials were not succeeding, and imposed its own restrictive rule. That account might be correct, but a full version would have to explain the timing of the Court's realization.

Court's judgment on the disutility of additional experimentation was correct.[83]

We should note several points about this general account of the transformation of weak-form into strong-form review.

(1) The analogy to experiments does suggest that the repeated interactions encouraged by weak-form review might be a good way of generating good constitutional doctrine.[84]

(2) The account suggests why the Supreme Court may be attracted to the managerial view and weak-form review in what it regards as new First Amendment domains. Using weak-form review makes it easier for the Court to adapt or change course as experience builds. Yet, as my discussion of the managerial view indicates, First Amendment domains do not come pre-labeled "old problem" or "new problem." The *McConnell* majority thought that regulating modern forms of campaign finance was a new problem; Justice Kennedy thought that it was the classical problem presented by government efforts to regulate speech based on content. Frederick Schauer has suggested that whether the relevant community sees a problem as within the scope of the First Amendment or outside it is in the end a question for sociologists, not lawyers.[85] The same may be true of the issue of characterizing a First Amendment problem as old or new.

(3) The account connects weak- and strong-form review. Recall that the basic difference between those forms is temporal: weak-form review allows for legislative responses to judicial decisions over a shorter period than strong-form review does. But, the accumulated force of weak-form decisions provides the basis for replacing that form with strong-form review. Weak-form review exercised over time becomes strong-form review—and properly so, as experience teaches us what the Constitution really means in a particular domain.

At least one question with this account of free speech law remains unanswered. The account relies on the development of consensus within the relevant community that doctrine has reached a stable resting place—that is, a correct answer. Identifying that community may be more difficult than it initially seems. After all, free speech questions arise only when legisla-

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[83] For a related account stressing the importance of experience in developing First Amendment doctrine, see FREDERICK SCHAUER, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM 47, 53–55 (G. Nolte ed., 2005).

[84] The account resonates with pragmatic accounts of the process of law-making by judges. *Cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 98 (Mark DeWolfe Howe ed., 1963) (describing the transformation of repeated jury rulings into judge-made rules). We might contrast the development of First Amendment doctrine dealing with speech critical of government policy, which developed over an extended period, with First Amendment doctrine dealing with false statements that injure reputation, where the Supreme Court's first intervention, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), set a rather rigid standard, which many observers believe to be unsound.

[85] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

tures defend their regulations of speech as being consistent with the First Amendment. That very assertion might be taken as a demonstration that the needed consensus is lacking. In addition, federalism complicates the analysis even more with respect to state and local regulations, because one justification for federalism is that it allows individual communities to disagree with the normative (in this context, the constitutional) judgments made by even an enormous majority of other communities. And, of course, the idea motivating weak-form review is that reasonable disagreement—that is, lack of consensus—over constitutional meaning is pervasive. I have no strong intuitions about how to resolve the problem of identifying when a consensus exists within the relevant community.[86]

Experience in Europe may suggest one approach to an answer here. The European Court of Human Rights (ECHR) enforces the European Convention on Human Rights, a set of fundamental rights. In 1976, the ECHR articulated the "margin of appreciation" doctrine.[87] According to that doctrine, each nation adhering to the Convention can properly have its own understanding of how the Convention's provisions apply to particular problems and its own understanding of what those provisions mean.[88] Variation in application and interpretation is allowed within a "margin of appreciation." As to the former, the ECHR referred to the "direct and continuous contact with the vital forces of their countries," which gave national governments a better sense than the ECHR of how it made sense to apply the Convention in specific circumstances.[89] As to the latter, the ECHR referred to the "rapid and far-reaching evolution of opinions" on the content of human rights guarantees.[90]

The ECHR has implemented the margin of appreciation doctrine in a manner consistent with my argument that weak-form review properly develops into strong-form review over time, thereby accommodating concerns about the identification of the relevant community within which consensus should be sought. The ECHR's technique has been to narrow that margin over time with respect to specific interpretive problems as experience accumulates in the ECHR and in domestic courts, producing a more "Europe-wide" view—perhaps a consensus—on how to deal with those problems.[91]

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[86] The relevant community might include law professors who specialize in free speech and constitutional law, and perhaps for them (and even for everyone) the correct standard for identifying when a consensus exists is Justice Stewart's: We know it when we see it. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also* text accompanying note 84 *supra* (arguing that the answer to a similar problem is likely to be sociological rather than legal). The search for consensus should not be confined to the Court itself, for that would reduce the process of experimentation to one of self-reflection.

[87] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

[88] I have formulated these points so as to evoke again the distinction drawn earlier, in the text accompanying *supra* notes 18–25, between the "Section 1" and the "Section 33" response to a judicial interpretation of a constitution.

[89] *Handyside*, at ¶ 48.

[90] *Id.*

[91] For a discussion, see R. St. J. Macdonald, *The Margin of Appreciation*, *in* THE

Although U.S. constitutional doctrine does not expressly invoke margins of appreciation, a full account of the emergence of strong-form review in First Amendment cases might profit from incorporating that idea. Perhaps we might take the Rehnquist Court's sporadic invocation of the managerial model of First Amendment law as the parallel in U.S. law to the invocation of the "margin of appreciation" doctrine—and its generally vigorous protection of free speech rights as the result of historical processes by which that margin was narrowed.

V. Conclusion

Weak-form review offers a normatively attractive mechanism for alleviating the counter-majoritarian difficulty. One common objection to the creation of weak-form review is that it is unsuitable for core liberties like free speech. By fleshing out the notion of weak-form review and the managerial model of First Amendment law, we can make sense of some aspects of U.S. constitutional doctrine that are difficult to understand using standard First Amendment doctrines and the idea of strong-form review. Having seen how the managerial model and the idea of weak-form review illuminate existing constitutional doctrine, perhaps some of the concerns about weak-form review itself might be alleviated.[92]

European System for the Protection of Human Rights 83 (R. St. J. Macdonald et al. eds., 1993), *excerpted in* Louis Henkin et al., Human Rights 564–66 (1999).

[92] I think it appropriate as well to use a final footnote to observe that this essay has been informed by comparative constitutional law without arguing that institutional or doctrinal developments in other constitutional systems should be directly incorporated into U.S. constitutional law. As I have suggested elsewhere, the function of comparative constitutional law is to assist our thinking about domestic constitutional law. *See* Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 Conn. L. Rev. 649 (2004).