

Comments on Prof. Gardbaum's paper/Gideon Sapir

Steve Gardbaum was my favorite professor at Northwestern. He also sat in my doctoral committee. I learned a lot from him and consider him my mentor. Hence, I'm really delighted to humbly comment on his paper. Since I was given a very short time, my comments will be short and concise, and will not cover even half of what I wish to say.

A. On page 14 Steve explains that one of the strengths of his democratic defense of constitutional balancing is that it enables us to "transcend the traditional either/or nature of judicial review and the binary choice of judicial versus legislative supremacy." I'm not sure that this argument carries the day. The reason for my hesitation lies in the fact that no matter what the justification for balancing is, at the end of the day it is the court that decides who wins the case. In this respect, it makes no difference what parameters the court reviews. Is there a difference between a court that overrules the legislature on the basis of its finding that a right was infringed and a court that overrules the legislature on the basis of its finding that the legislature improperly balanced between rights and interests? In both cases the court is given the upper hand.

The fact that balancing apparently does not transcend the binary choice between judicial and legislative supremacy becomes clearer when Stephen moves on to discuss the implications of his democratic defense for constitutional rights adjudication. The very need to discuss the proper role of the court proves my point.

As Stephen seems to admit, it is the employment of a relatively deferential standard of judicial review that partially resolves the tension between the competing demands to supremacy. But if this is the case, it is not clear how and why balancing makes a system of judicially enforced constitutional rights more democratic. It is the attitude of the court – its adoption of some sort of 'judicial minimalism' – that does all the work, not the act of *balancing*.

B. While I am not convinced by Stephen's explanation of how balancing reduces the tension between legislative and judicial supremacy, I think that that the democratic defense is more successful in reducing the tension between past and current citizenry – what we sometimes call the Dead-Hand Problem. Balancing enables the present generation to remain loyal to the rights entrenched in the Constitution and at the same time to remain free to strike its own balance between these rights and public interests. In this way the present generation is partially released from the grip of past generations.

C. On page 8 Stephen argues that balancing contrasts with the Canadian (and if I may add the Israeli) notwithstanding clause. But where exactly does this contrast lay? I can think of two possible answers:

According to the first, the contrast lies in the result that each mechanism can produce. While balancing might result either in a compromise between rights and interests or in a complete override, the notwithstanding mechanism always ends up with a complete override. The right is pushed aside.

According to the second answer, the contrast lies in the conditions that should be met in each case. For balancing to be acceptable, the legislature must provide some kind of substantive justification for limiting the right, and must meet certain cumulative requirements (which differ from one balancing formula to another). Notwithstanding is different. It involves a simple act of brute power. Its legitimacy depends only on the fulfillment of formal and procedural requirements.

But is the dichotomy so sharp? I'm not sure.

1. Per the first answer, I see no reason why the notwithstanding mechanism should not be allowed to strike a compromise between rights and public interests, rather than produce only a complete override.
2. Per the second answer, Stephen says that "the difference between a legally limited and a legally unlimited override power is the existence of substantive judicial review of its exercise." However, at least in Israel, the Supreme Court made it perfectly clear that the notwithstanding mechanism is required to satisfy not only formal requirements but also certain substantive criteria. In the famous *Mitrael* case, Chief Justice Barak held that if the legislature used the notwithstanding mechanism to violate a right too harshly, the court would intervene and cancel the override. Put differently, at least in Israel, not only balancing but also the notwithstanding mechanism involves cost-benefit evaluation.
3. Finally, it is indeed Stephen who have described in his writings, so nicely, the new commonwealth model as an independent model and not as a mere compromise

between the English and the American extremes. But in the current paper, Stephen describes this model somewhat differently. Stephen describes it as a "weak form judicial review", as a compromise between two poles: judicial supremacy on the one extreme and political supremacy on the other. But a few years ago Stephen taught us that the commonwealth model can be understood as proposing a completely new rationale--that of a *Dialog*. As I understand it, one underlying assumption behind the commonwealth model is similar to Jeremy Waldron's: reasonable and civilized people can legitimately disagree. But where does the disagreement begin? It seems that most people would agree on an abstract set of values to be anchored in a constitution. Most people would probably agree also on whether in a certain context, a right was infringed. The disagreement would typically begin in what Steve call's "the second step," where one is asked to decide whether the infringement is justified. As a matter of fact, on page 25 Stephen claims that this is indeed the case in many or even most of the cases that the American SC handles. If this is true, then the commonwealth mechanism may—and in my opinion, should—be understood as a means by which the legislature and the court can exchange opinions as to the proper balance between rights and public interests. While using the notwithstanding mechanism - or any other compatible commonwealth mechanism - the legislature does not override the constitution but rather presents its understanding of the proper interpretation of the constitution.

If I'm right, then contrary to Stephen's assertion, the notwithstanding and balancing mechanisms are not so different. Both involve balancing and both require substantive evaluation. For the notwithstanding mechanism to work properly, both the legislature and the court should adopt a balancing mode.

D. On page 11 Stephen says that balancing between rights and interests is in a much more urgent need of normative justification than balancing between rights. This is so, Stephen contends, because in conflicts between two constitutional rights claims, balancing is unavoidable and thus does not require justification, but between a constitutional right and a public interest, it isn't.

I'm not sure that the distinction Stephen makes between the two types of conflicts - right v. right and right v. public interest - is convincing for our purposes.

As Stephen admits, actually there might be alternatives to balancing even in conflicts between competing rights. That would be the case if we assume a normative hierarchy between rights. But, it seems to me that each of the two alternative conceptions in the case of rights v. interests – the one Stephen denotes "Rights as Trumps" and the one he denotes "excluded reasons" – both assume the existence of normative hierarchy. As for "rights as trumps" – it seems that those who hold that rights should always trump think so exactly because they assume that rights always stand above interests in the normative hierarchy. As for "excluded reasons", here the opposite is presupposed – those who think that certain reasons should always win

against rights assume that these reasons always occupy a higher ground than rights in the normative hierarchy.

If I'm right, then, the existence of alternatives for balancing in both scenarios – the one that deals with conflicts between rights and the other that deals with conflicts between rights and interests - depends on the existence of a normative hierarchy. Hence - if there is a need to provide normative justification for balancing in the case of rights v. interests it is no less necessary to provide justification for balancing in conflicts between rights.

In conclusion, I would like to say that I really enjoyed Stephen's paper and learned a lot from it. There is no doubt in my mind that Stephen's paper will make yet another important contribution to Constitutional theory. I feel privileged that I was given the opportunity to comment on this paper and very much hope that Stephen would find my comments helpful.