Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts

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I. INTRODUCTION

The idea of constitutionally entrenched rights originated in the United States, and its spread throughout the world in the latter half of the twentieth century—both at national and supranational levels—is a reflection of the perceived success of American constitutionalism. But while constitutional rights and judicial review have proven popular, the American vehicle for rights protection has not. The U.S. Bill of Rights looks old and deficient compared to modern bills of rights. Its negative orientation—the idea that rights are state-*limiting* concepts[1]—is widely regarded as either inadequate or downright harmful given more benign conceptions of the state, larger public sectors, and more extensive welfare-state policies, not to mention greater antipathy towards the exercise of private economic power. Increasingly, rights are seen not simply as important individual interests that must be immunized against state interference, but as entitlements that the state must fulfill, not only for individuals but for groups. The focus of the U.S. Bill of Rights on the civil and political rights of individuals is presumed to come at the expense of group economic and social rights,[2] environmental rights, and so on—so-called second and third generation rights.

As a result, international bills of rights like the International Covenant on Civil and Political Rights (ICCPR),[3] regional bills of rights like the European Convention on Human Rights (ECHR),[4] and domestic bills of rights like the Canadian Charter of Rights and Freedoms[5] and the South

1. For an American critique of the idea of positive rights see Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

2. Keith Ewing's work is typical here. *See, e.g.*, K.D. Ewing, *The Unbalanced Constitution*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS 103 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2001).

3. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (in force Mar. 23, 1976) [hereinafter ICCPR].

4. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 (in force Sept. 3, 1953) [hereinafter ECHR].

5. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter].

African Bill of Rights,[6] tend to be lengthier and more specific than the U.S. Bill of Rights. They may run to several pages, setting out various rights in detail complete with numerous subsections. Rights that the U.S. Supreme Court has inferred from the text of the U.S. Bill of Rights are likely to be enumerated in these newer bills of rights,[7] along with additional rights—both negative and positive in their orientation—that have no American counterpart.[8]

A further difference is that individual rights are not regarded (or at least presented) as unalloyed goods in other jurisdictions, and as a result bills of rights in these places are likely to include provisions that establish specific limitations on rights, and even statements of responsibilities.[9] They may authorize and facilitate the establishment of

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6. S. AFR. CONST. 1996 ch. 2 (§§ 7-39).

7. *See, e.g.*, S. AFR. CONST. 1996 § 14 (right to privacy); ICCPR, *supra* note 3, art. 17(1) (same).

8. *See, e.g.*, S. AFR. CONST. 1996 § 10 (right to human dignity); ICCPR, *supra* note 3, art. 17(1) (right to protection from unlawful attacks on honour and reputation). The South African Bill of Rights sets out a number of positive economic and social rights. *See, e.g.*, S. AFR. CONST. 1996 §§ 26, 27, 29 (setting forth the right to housing; the right to health care, food, water, and social security; and the right to education, respectively). The Canadian Charter appears to be a more orthodox statement of civil and political rights by comparison, but the Supreme Court of Canada has suggested that there may be scope for its guarantees to be interpreted as establishing positive economic and social rights. *See* Grant Huscroft, *A Constitutional "Work in Progress"? The Charter and the Limits of Progressive Interpretation*, 23 SUP. CT. L. REV. 2D 413, 434-37 (2004) (Can.), *reprinted in* CONSTITUTIONALISM IN THE CHARTER ERA 413, 434-37 (Grant Huscroft & Ian Brodie eds., 2004) (criticizing Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429). Conversely, some rights set out in the U.S. Bill of Rights have no international counterpart, and indeed were deliberately omitted from other bills of rights. The Second Amendment right to bear arms is the most obvious example here. The right to property is often another example.

9. For example, Article 19 of the ICCPR, *supra* note 3, sets out particular limits on freedom of expression, in addition to asserting that the exercise of the right carries with it particular responsibilities:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Id.

additional limitations on rights in order to ensure that the pursuit of state action is not stymied or unduly restricted.[10] At the same time, debate about the extent to which rights apply or should apply to limit the power of private parties, as opposed to state actors, remains ongoing.[11]

So while the *idea* of rights-based constitutionalism has spread, there are substantial differences between the U.S. Bill of Rights and more modern bills of rights, differences that extend beyond degree to matters of kind. The same is true of the concept of judicial review itself. "Strong" judicial review[12]—the ability of judges not only to hold legislation unconstitutional but to deny it legal effect—is now well established in the United States. The premise once asserted so

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Moreover, the ICCPR includes a positive obligation on states to enact hate speech legislation. *Id*. at art. 20(2).

Equality rights provide another good example. Bills of rights that include an equality provision typically include a provision ensuring that "affirmative action" programmes are not found to be inconsistent. This is not necessarily viewed as a limit on the right to equality, however; some such provisions are considered as an example of equality in action. *See* Canadian Charter, *supra* note 5, § 15(2); Lovelace v. Ontario, [2000] 1 S.C.R. 950 (discussing section 15(2)); *see also* New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 19(2); S. AFR. CONST. 1996 § 9(2). The ICCPR includes a general non-discrimination guarantee, but is silent on affirmative action. Nevertheless, the United Nations Human Rights Committee has stated that the principle of equality sometimes requires states to take action to redress conditions that cause or perpetuate discrimination, and that preferential treatment is legitimate. *See* U.N. Econ. & Soc. Council (ECOSOC), Comm'n on Human Rights, General Comment No. 18: Non-discrimination (1989), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies 146, U.N. Doc. HRI/GEN/1/Rev.7 (2004), *available at* http://www.ohchr.org/english/bodies/hrc/comments.htm.

10. The Canadian Charter is the model here. The first provision in the Charter purports to guarantee the enumerated rights and freedoms, while at the same time providing that those rights and freedoms may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter, *supra* note 5, § 1. Section 5 of the New Zealand Bill of Rights Act 1990 is modeled on section 1 of the Canadian Charter. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109. The South African Bill of Rights contains a more detailed, but essentially similar provision. S. AFR. CONST. 1996 § 36.

11. The state action doctrine remains a matter of controversy even in the United States. *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003) (proposing a new approach). Extensive debate has occurred about the possible horizontal application of the United Kingdom Human Rights Act, 1998, c. 42. *See* Ian Leigh, *The UK's Human Rights Act 1998: An Early Assessment*, *in* LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 323, 336-42 (Grant Huscroft & Paul Rishworth eds., 2002). In Canada, the leading case is *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, discussed in PETER W. HOGG, 2 CONSTITUTIONAL LAW OF CANADA § 34(2)h (4th looseleaf ed. 1997 & Supp. 2005). In New Zealand, see PAUL RISHWORTH, GRANT HUSCROFT, SCOTT OPTICAN, & RICHARD MAHONEY, THE NEW ZEALAND BILL OF RIGHTS 99-109 (2003). In some countries constitutional rights apply to private as well as public parties. South Africa is an example in this regard. S. AFR. CONST. 1996 § 8.

12. On the strong-weak dichotomy, see Mark Tushnet, *Judicial Review of Legislation*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES 164 (Peter Cane & Mark Tushnet eds., 2003).

controversially by Chief Justice Marshall in *Marbury v. Madison*—"It is, emphatically, the province and duty of the judicial department, to say what the law is"[13]—is now taken for granted. Yet the spread of bills of rights (even bills of rights that are broader in scope than the U.S. model) has not always been accompanied by the spread of strong judicial review. A weaker form of judicial review exists in countries like the United Kingdom and New Zealand, where judges are specifically precluded from "striking down" legislation on the basis of inconsistency with protected rights. Canadian judges have greater power. They may "strike down" legislation they find to be inconsistent with protected rights, but in theory they do not have the last word: provincial legislatures and the Federal Parliament can, to a limited extent, legislate "notwithstanding" Charter rights.[14]

Whether judicial review is characterized as strong or weak, or even something in between, there are important differences in the bodies of case law that different bills of rights have spawned. The vast body of law developed by the U.S. Supreme Court in interpreting the U.S. Bill of Rights was once prominent in the decisions of foreign courts and international tribunals charged with interpreting bills of rights. Increasingly, however, it seems less relevant.[15] In some ways this was an inevitable development; constitutional rights may have American

13. 5 U.S. (1 Cranch) 137, 176 (1803). *Cf.* Randy E. Barnett, *The Original Meaning of the Judicial Power* (Boston Univ. Sch. of Law Working Paper Series, Pub. Law & Legal Theory Working Paper No. 03-18, 2003), *available at* http://ssrn.com/abstract=437040.

14. The Canadian Charter allows ordinary legislation to be passed "notwithstanding" most, but not all Charter rights, but only for five-year, renewable terms. Canadian Charter, *supra* note 5, § 33. The notwithstanding clause does not apply retroactively. Ford v. Quebec (Att'y Gen.), [1988] 2 S.C.R. 712, 788. The impact of the notwithstanding clause is widely misunderstood and its effects exaggerated. In our view the Canadian setup, in practice, mimics the United States in giving the judges the last word. *See infra* text accompanying note 72.

15. The use of American authority in Canadian courts, where it might be expected to be most relevant, has decreased as the body of Charter case law has grown. *See* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 29-30 (1998) (tying the diminished authority of American law in Canada and in other countries to the Rehnquist Court). Early in the life of the Charter, the Supreme Court of Canada warned against "drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances . . . ." Rahey v. The Queen, [1987] 1 S.C.R. 588, 639 (La Forest, J.); *see also* PETER W. HOGG, 1 CONSTITUTIONAL LAW OF CANADA § 3.5 (4th looseleaf ed. 1997 & Supp. 2005).

parents, but children outgrow their parents and go their own way.[16] The question we pose is, should the children be welcomed home? To what extent, if any, should American courts heed the rights jurisprudence of foreign courts and international tribunals?

There is no doubt that internationalism, as we will call it, is the order of the day in many courts.[17] However, there is a significant difference: modern bills of rights may permit, if not require, consideration of the decisions of foreign courts and international tribunals. The New Zealand Bill of Rights is an example of the permissive approach. Its preamble affirms New Zealand's commitment to the ICCPR, and the similarity of its provisions to those of the Canadian Charter of Rights and Freedoms was intended to make Canadian precedents relevant in New Zealand.[18] The South African Bill of Rights is an example of the mandatory approach. It specifically instructs South African courts to have regard to international law in interpreting it, while making clear that reference to foreign law is permissible.[19] The United Kingdom Human Rights Act is another example of the mandatory approach. Among other things, it specifically requires courts in the United Kingdom to take into account the decisions and advisory opinions of the European Court of Human Rights interpreting the ECHR.[20]

No such authorization or instruction is found in the U.S. Bill of Rights, and until recently the U.S. Supreme Court has generally been dismissive of the human rights jurisprudence of foreign courts and

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16. The rights as children metaphor was used by Judge Guido Calabresi in his concurring opinion in *United States v. Then,* 56 F.3d 464, 469 (2d Cir. 1995) ("Wise parents do not hesitate to learn from their children.").

17. Countries that once turned to England for guidance in the development of the common law and constitutional law began to look beyond the United Kingdom for influences once ties to the English legal system, and in particular the formal authority of the Judicial Committee of the Privy Council, began to wane and ultimately ceased. *See* L'Heureux-Dubé, *supra* note 15, at 17-21. The Judicial Committee of the Privy Council was the highest court in Canada until 1949; in Australia, Privy Council jurisdiction remained in limited form until 1986, and in New Zealand until 2004. On the abolition of Privy Council appeals, see HOGG, *supra* note 15, § 8.2.

18. In its White Paper proposing the New Zealand Bill of Rights, the Government noted that "reference to the International Covenant in the preamble will open the way for the courts to refer to the Covenant in interpreting and applying the Bill." MINISTRY OF JUSTICE, A BILL OF RIGHTS FOR NEW ZEALAND: A WHITE PAPER, 1985, A.J.H.R. A.6 § 10.13 [hereinafter White Paper]. Moreover, it is clear from the White Paper that many important decisions in the drafting of the New Zealand Bill of Rights were made in order to facilitate the importation of case law from foreign courts. One reason proffered for adopting a general reasonable limits provision based on the Canadian Charter was that "New Zealand courts will be able, in this respect as in others, to take advantage of the developing jurisprudence of the Canadian courts" *Id*. at § 10.26(e).

19. S. AFR. CONST. 1996 § 39(1).

20. Human Rights Act, 1998, ch. 42 § 2(1).

international tribunals, if it has noticed it at all.[21] Of course, foreign and international developments have not been ignored completely. In *Furman v. Georgia*,[22] for example, some members of the Court canvassed legislative developments in Canada and the United Kingdom abolishing capital punishment in discussing the requirements of the Eighth Amendment.[23] Likewise, sporadic reference to foreign legislation and case law can be found in various other cases—and not always by proponents of internationalism[24]—but it could not be said to have had any significant influence on their outcomes.

This appears to be changing at least for some of the Justices of the U.S. Supreme Court. The most significant use of foreign authority by the Supreme Court occurs in recent controversial cases such as *Lawrence v. Texas*[25] and *Roper v. Simmons*,[26] both of which involve changes in constitutional law, and both of which reveal deep divisions within the Court as to the relevance and legitimacy of the use of foreign authority. In *Lawrence*, Justice Kennedy's opinion for the Court cites decisions of the European Court of Human Rights[27] in contradicting a

21. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 832 (1999) (describing the unwillingness of American courts to consider foreign jurisprudence as reflecting "an attitude of legal hegemony").

22. 408 U.S. 238 (1972).

23. *Id*.; *see also* Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (citing the laws of several countries in regard to the death penalty and juvenile offenders).

24. See, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 945 n.1 (1992), in which Chief Justice Rehnquist cites and contrasts Canadian and West German decisions on the constitutionality of abortion regulation in his dissenting opinion. The Chief Justice cites case law and legislative developments in making the point that assisted suicide is an issue in a number of countries in *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997). In *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Ginsburg's concurring opinion, with which Justice Breyer joined, referred to the International Convention on the Elimination of All Forms of Racial Discrimination, which the United States has ratified, and the Convention on the Elimination of All Forms of Discrimination Against Women, which it has not, in making the point that the Court's approach to affirmative action (allowing it, subject to an end point) was in accordance with the international standards they established. *Bollinger*, 539 U.S. at 344. *See infra* notes 52-53 and accompanying text (discussing the Conventions).

25. 539 U.S. 558 (2003).

26. 543 U.S. 551 (2005).

27. The Court cited *Dudgeon v. United Kingdom,* 1981 Y.B. Eur. Conv. on H.R. 444, to demonstrate that the claimed right to engage in private homosexual conduct was not insubstantial in Western civilization. Kennedy writes:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected

central holding of *Bowers v. Hardwick*,[28] which the Court overruled. Among other things, Justice Kennedy's opinion for the Court in *Roper* refers to the United Nations Convention on the Rights of the Child, the ICCPR, and the abolition of the death penalty in the United Kingdom and in countries that once executed juveniles in concluding that the Eighth Amendment precludes the execution of juveniles.[29] Justice Kennedy notes that the "overwhelming weight of international opinion [is] against the juvenile death penalty . . . ."[30]

The debate has continued outside the parameters of the Court's constitutional decisions. Justices Breyer and Ginsburg have gone out of their way to promote the use of foreign authority on several occasions.[31] The unprecedented public debate between Justices Scalia and Breyer in 2005 is further proof of the importance of the unfolding controversy.[32]

> elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon* v *United Kingdom.* See *P.G. & J.H.* v. *United Kingdom*, App. No. 00044787/98, ¶ 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v. *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v. *Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

Lawrence, 539 U.S. at 576-77.

28. 478 U.S. 186 (1986).

29. *Roper*, 543 U.S. at 576; Convention on the Rights of the Child art. 37, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 43, 55.

30. *Roper*, 543 U.S. at 578. Justice Kennedy describes world opinion as not controlling, but rather as providing respected and significant confirmation of the Court's conclusion. Justice O'Connor criticizes the Court's result, noting that "evidence of an international consensus does not alter my determination that the Eighth Amendment does not, *at this time*, forbid capital punishment of 17-year-old murderers in all cases." *Id.* at 604 (O'Connor, J., dissenting) (emphasis added). At the same time, however, she repudiates Justice Scalia's view that foreign and international precedents have no place in Eighth Amendment jurisprudence. *Id*. As Justice Scalia puts it: "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand." *Id.* at 624 (Scalia, J., dissenting).

31. *See, e.g.*, Stephen Breyer, Keynote Address to American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003); Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address to the American Society of International Law (Apr. 1, 2005), *in* 99 AM. SOC'Y INT'L L. PROC. (forthcoming Jan. 2006), *available at* http://www.asil.org/events/AM05/ginsburg050401.html; *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1040-42 (2004).

32. *See* Antonin Scalia & Stephen Breyer, The Relevance of Foreign Legal Materials in U.S. Constitutional Cases, A Conversation Before the U.S. Association of Constitutional Law (Jan. 13, 2005), *in* 3 INT'L J. CONST. L. 519 (2005).

Despite these developments, in our view the use of foreign and international law in interpreting the U.S. Bill of Rights is for the most part undertheorized.[33] Nor has the U.S. Supreme Court justified or explained the use of foreign materials in the few cases in which they are cited. Even Sanford Levinson, who describes himself as someone who identifies with "cosmopolitanism" rather than "parochialism,"[34] says of the Court:

> To be sure, they cite foreign materials, especially when they are in accordance with what one suspects are pre-existing views. What seems strikingly lacking, though, is any real analysis of them or explanation, beyond the ostensible force provided by their very existence, of why we should be impressed by them.[35]

For many proponents, the case for rights-based internationalism in American courts is self-evident, and requires no justification. We disagree.

To put it bluntly, what is added to the persuasiveness of a rights-based argument in an American court by indicating that a similar argument based on a different bill of rights has been accepted by a foreign court or international tribunal? It seems that just about any argument about rights can already be made in an American court. Nothing precludes one from making a novel or unusual argument. Hence the point of invoking international authority is not simply to allow new arguments to be made; rather, it is an attempt to confer some sort of higher status on an argument, and so a greater level of persuasiveness than it would otherwise have. Moreover, this increased persuasiveness is supposed to follow simply because a similar argument has been accepted elsewhere. This raises another question: What is it about foreign judges and members of international tribunals that makes their views on rights questions presumptively persuasive? Why might one think their views on moral questions are better than those of American voters, legislators, and judges?

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33. For more general treatments of internationalism, see Choudhry, *supra* note 21; Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L. L. 409 (2003); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

34. Sanford Levinson, *Looking Abroad when Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 363 (2004). Levinson adds: "I am no fan of Justice Scalia. I find his militant provincialism embarrassing; I much prefer the cosmopolitanism expressed by the Canadian justices and by Justice Breyer." *Id*. at 358.

35. *Id.* at 362.

The unspoken premise need not be that internationalism leads to better answers; rather, it might just be that internationalism facilitates *different* answers, and so may help to mitigate some of the more conservative strictures of the Court's doctrine. The decisions of foreign courts and international tribunals are increasingly more politically liberal than those of their American counterparts, and hence more to the liking of rights-claimants. The President of the American Civil Liberties Union, Professor Nadine Strossen, is surprisingly candid in advocating the use of foreign authority in interpreting the U.S. Bill of Rights on this basis:

> In the ACLU's ideal world, all individual rights would receive the maximum protection consistent with civil libertarian principles, and, in support of our claims for each right, we would cite whatever source of legal authority offered the most protection—not only the US Constitution, but also, alternatively, state constitutions, federal or state statutes, or international human rights principles. This is an upward-ratcheting approach. In other words, the US Constitution—as interpreted by the Supreme Court—sets a floor under our individual rights, but it should not set up a ceiling over them.
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> Under this civil libertarian approach, to the extent that increased protection for individual rights is offered by other binding legal authorities, domestic or international, they should prevail over US constitutional law. In contrast, though, whenever these other authorities purport to undermine rights protected by the US Constitution, the Constitution trumps them. In the same vein, we believe that government officials should respect fundamental rights even if they are not expressly articulated in any constitution, treaty, or any other explicit source of law.[36]

Leave aside the obvious rejoinder that people disagree about how rights ought to play out, and about what is their "maximum protection consistent with civil libertarian principles." A further initial, preliminary response to such views as Professor Strossen articulates is that comparative rights-based work is difficult at the best of times, and the difficulty increases as the interpretive enterprise broadens. Constraints exist of both a practical and subjective nature. Practical constraints include limits not only on the expertise of counsel (not to mention limits on clients' ability to pay for this sort of work), but also on the expertise of courts, even assuming their openness to internationalism.[37] So where

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36. Nadine Strossen, *Liberty and Equality: Complementary, Not Competing, Constitutional Commitments*, *in* LITIGATING RIGHTS, *supra* note 11, at 149, 153 (footnotes omitted).

37. Justice Claire L'Heureux-Dubé of the Supreme Court of Canada once lamented that although Canadian law is cited by courts in countries like Zimbabwe, South Africa, and Israel, litigants in the Supreme Court of Canada "do not put [cases from these countries] before us as often as they should." L'Heureux-Dubé, *supra* note 15, at 27. The reference to Zimbabwe stands out like a sore thumb, but it is not the first time that country's jurisprudence has been invoked by a judge promoting internationalism: Justice Breyer acknowledged that he "may have made what one might

does internationalism begin and end? The answer is that the limits on internationalism are likely to coincide with the normative preferences of the party advancing the international perspective. Counsel are likely to cite the decisions of foreign courts and international tribunals that favour their position rather than participating in the sort of global rights dialogue some romanticize.[38]

Thus, even courts open to internationalism are unlikely to have a complete picture put before them. More likely, they will have a snapshot of a particular aspect of law from a few countries, which may or may not be representative of the array of international approaches on offer. Those countries are more likely to have common law legal systems than civilian; more likely to be English-speaking than any other language; more likely to be European than Asian; and so on. Numerous political factors may be relevant when proffering foreign law. Likewise, it would be most surprising if even courts otherwise open to internationalism were not selective about the jurisprudence they were willing to take into account. As Fred Schauer has hypothesized:

> The political reputation of the donor country, both internationally and in the recipient country, is a causal factor in determining the degree of reception in the recipient country of the donor country's legal ideas, norms, and institutions, even holding constant the host country's evaluation of the intrinsic legal worth of those ideas, norms, and institutions, and even holding constant the actual legal worth of those ideas, norms, and institutions.[39]

In other words, other than predicting that there will be few citations of Zimbabwean authority, it is difficult to be more specific.[40] Courts

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call a tactical error in referring to a case from Zimbabwe—not the human rights capital of the world." Scalia & Breyer, *supra* note 32, at 528.

38. Of course courts may well ask clerks to research the decisions of foreign courts and international tribunals, but this poses its own difficulties, quite apart from the problems of legitimacy that arise when courts consider material not put before them by counsel. Presumably once courts demonstrate an interest in particular case law, counsel will do their best to oblige. On the notion of "dialogue," see *infra* Part III.F.

39. Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253, 258 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000).

40. Schauer speculates on the reasons why the decisions of some countries may be more likely than others to be influential internationally. *Id.* at 258-61. In addition to the reasons he proffers, it is fair to say that courts are more likely to be apprised of the decisions of a foreign court when counsel are comfortable with the law of the relevant jurisdiction. The movement of lawyers and the international experience they bring with them makes them more likely to be conversant in more than one legal system than in the past.

receptive to internationalism do not explain why they cite particular authority in particular circumstances, still less do they say why that authority should be preferred to authority that is *not* canvassed—authority that may be quite different.[41]

That initial, preliminary response notwithstanding, we emphasize that our concern is not with internationalism *per se*, but with internationalism in American courts. There is no doubt that that there is increasing pressure on U.S. courts (not least from legal academics) to accept the decisions of foreign courts and international tribunals as relevant, if not persuasive authority in interpreting the U.S. Bill of Rights.[42] American courts are accused of being old-fashioned, if not parochial; of failing to understand that human rights are a global concern; and of failing to appreciate that state-based conceptions of human rights are inadequate, if not incoherent. With so many courts and tribunals in the rights business, why not benefit from their experience? Why not welcome the children home?

The answer, we suggest, is that international rights jurisprudence has less in common with American law than is usually assumed. The children have changed significantly since they left home. Foreign courts and international tribunals speak the same language of rights, but they have different understandings of what rights are, and how they are to be understood. Not just that, but conceptions of the state and its role, and the role of courts, differ widely. Many countries have a conception of democracy that is far less majoritarian, and far less concerned with institutional checks and balances than the American model. The very basics of American constitutionalism are, in important ways, foreign to many of the jurisdictions that have adopted bills of rights.

These differences are important to those who are concerned with the countermajoritarian difficulty,[43] where the fear is of unelected judges interpreting vague, amorphous rights guarantees so as to frustrate the will of the elected representatives of the people. However, they matter even to those who are relatively unconcerned or sanguine about

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41. McCrudden, *supra* note 33, at 515-16, argues not only that judges should cite international authority that they have relied on, but also that the criteria they used to determine which international decisions they relied on should be acknowledged.

42. Pressure to do so also comes from the judges of foreign courts. *See, e.g.*, Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002) (regretting the U.S. Supreme Court's historic unwillingness to consider foreign authority); Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211 (1994) (suggesting that America could benefit from considering the decisions of Canadian courts); L'Heureux-Dubé, *supra* note 15, at 39-40 (lamenting the failure of the Rehnquist Court to consider Canadian precedents (among other things)).

43. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

American judges using the *American* Bill of Rights to gainsay *American* legislators. Gainsaying the decisions of American legislators on the basis of the decisions of foreign courts or international tribunals is harder to justify; it can call in aid a smaller (and in our view less convincing) set of possible justifications for overriding the will of the elected representatives of the people.

In this article we argue that internationalism poses significant challenges for American constitutionalism that have not adequately been acknowledged by its promoters.

Our argument will come in three parts. In the first part, we will set out some of the main features of human rights jurisprudence in other countries with bills of rights and under international law, highlighting those features that distinguish it from American law.

In the second part of this article we will consider the main arguments employed to justify and defend the power exercised by judges under bills of rights-style instruments. We will indicate which of those justifications we think are potentially applicable when a domestic bill of rights is the source of the judges' power. Likewise, we will indicate which of those justifications we think are potentially applicable when it is the decisions of foreign courts and international tribunals that are being raised (and in some sense relied upon) to justify the exercise of judicial power. Our conclusion will be that in the latter case the potential justifications are fewer.

In the third and final part of this article, we will look at recent case law from Canada, New Zealand, and the United Kingdom and indicate what may lie in store if internationalism becomes commonplace in American courts. We will argue that there has been a noticeable, and in our view undesirable, ratcheting-up effect in the rights-based jurisprudence of these common law legal systems as each draws on the most expansive case law of the others. It is the importation of this jurisprudence—a jurisprudence based on a similar abstract rights language but different concrete understandings and constitutional premises—that in our view raises concerns for American constitutionalism, concerns that cannot easily (if at all) be assuaged. Nor can such a practice easily be justified. It cannot easily be justified by those who think the right of all to participate in social decisionmaking lies at the heart of democracy and needs protecting; more tellingly, it cannot easily be justified even by those who support judicial review under a domestic bill of rights.

II. PART I—THE SPREAD OF RIGHTS-BASED CONSTITUTIONALISM

A. Post WWII Developments

Consider the number of international human rights instruments to which most democracies—and not just democracies—have acceded since the end of World War II. The main three, the Universal Declaration of Human Rights (UDHR)[44] and the two covenants it spawned, the International Covenant on Economic, Social and Cultural Rights (ICESCR),[45] and the ICCPR, are often referred to as the International Bill of Rights. The UDHR is a statement of aspirations, but it nevertheless sets the tone for the adoption of the latter two treaties, which include dozens of rights that are prescribed in one form or another. These span from basic protections (such as the right to life,[46] or to liberty and security of the person[47]), to somewhat vaguer entitlements (such as the economic, social, and cultural rights said to be indispensable for one's dignity and the free development of one's personality[48]), to rights that for many people in the world are best described as "wishful thinking" (such as the right to rest and leisure,[49] or the right to a standard of living adequate for the health and well being of oneself and his or her family, including food, clothing, housing, medical care, and necessary social services[50]). And that is just to mention the main international human rights instruments.[51] A variety of specific international treaties address such things as racial discrimination,[52] discrimination against

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44. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

45. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (in force Jan. 3, 1976) [hereinafter ICESCR].

46. UDHR, *supra* note 44, art. 3; ICCPR, *supra* note 3, art. 6.

47. UDHR, *supra* note 44, art. 3; ICCPR, *supra* note 3, art. 9(1).

48. UDHR, *supra* note 44, art. 22; ICESCR, *supra* note 45, arts. 9, 15.

49. UDHR, *supra* note 44, art. 24; ICESCR, *supra* note 45, art. 7(d).

50. UDHR, *supra* note 44, art. 25(1); ICESCR, *supra* note 45, art. 11(1).

51. On international human rights generally, see A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD (4th ed. 1996). On the ICCPR, see ALEX CONTE, SCOTT DAVIDSON & RICHARD BURCHILL, DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (2004), and SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIAL, AND COMMENTARY (2d ed. 2004).

52. Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

women,[53] and so on—some, but not all of which the United States has acceded to in whole or in part.[54]

A more complete account of the International Bill of Rights would go on to clarify that the rights protected by the ICCPR were meant to be realized by signatory states immediately, while those protected by the ICESCR were meant to be realized progressively. It would go on to explain the reporting obligation on member states and the subsequent establishment of an optional protocol that allows individuals to bring complaints against their states for violating the ICCPR to the United Nations Human Rights Committee (UNHRC), an enforcement mechanism that supplements the obligations those states owe to one another.[55] However, for our purposes we do not need to paint such a complete account. We want only to trace the main features of international rights jurisprudence and to show its effect on other common law legal systems.

Recall that it was only in the last half of the twentieth century, and more particularly in the last two or three decades, that rights-based constitutionalism was widely adopted elsewhere. Recall, too, that the U.S. Bill of Rights led by example, though the International Bill of Rights has also provided inspiration for the adoption of bills of rights in

53. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, Annex, U.N. DOC. A/Res/54/4/Annex (Oct. 15, 1999).

54. Proponents of international human rights are fond of pointing out that the United States is one of only two countries (the other being Somalia) that have signed, but never ratified, the Convention on the Rights of the Child, *supra* note 29. Indeed, Justice Ginsburg has lamented that the United States has not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women*, supra* note 53. Ginsburg, *supra* note 31 ("sadly, the United States has not yet ratified"). The anodyne nature of these sorts of treaties facilitates the criticism: How could anyone be against concepts like the best interests of children? The problem, of course, is that these sorts of terms come to mean very different things in a variety of contexts when interpreted by the expert bodies that oversee the treaties, not to mention the domestic courts that may rely on them to reshape national law. In Australia, see Minister of State for Immigration and Ethnic Affairs v. Teoh, (1995) 183 C.L.R. 273; in Canada, see Baker v. Minister of Citizenship & Immigration, [1999] 2 S.C.R. 817, both involving deportation decisions.

55. On the legal significance of decisions of the UNHRC, see Scott Davidson, *Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee*, *in* LITIGATING RIGHTS, *supra* note 11, at 305, and Elizabeth Evatt, *The Impact of International Human Rights on Domestic Law*, *in* LITIGATING RIGHTS, *supra* note 11, at 281.

many countries.[56] Canada entrenched its Charter of Rights and Freedoms as part of a massive package of constitutional reform in 1982;[57] New Zealand enacted the New Zealand Bill of Rights Act,[58] a statutory bill of rights, in 1990; South Africa entrenched its Constitution, which includes a bill of rights, in 1996;[59] and in 1998 the United Kingdom enacted the United Kingdom Human Rights Act, a statutory bill of rights that incorporates the ECHR into domestic law.[60] Save for Australia, where there is still no bill of rights at the Commonwealth or State level,[61] rights-based constitutionalism has become a defining

56. The UNHRC has on several occasions expressed the view that accession to the ICCPR entails the obligation to adopt a bill of rights. The Committee's view is usually expressed in terms of regret. For example, the Committee has expressed regret that New Zealand adopted a statutory bill of rights rather than a constitutional model, and that its bill of rights precludes judges from striking down legislation, as discussed *infra* Part II.B.2. *See* U.N. General Assembly, Human Rights Committee, *Concluding Observations of the Human Rights Committee: New Zealand 03/10/1995*, U.N. DOC. CCPR/C/79/Add. 47; A/50/40, paras. 166-91 (Oct. 3, 1995). This view that the ICCPR requires the adoption of a bill of rights, or any particular bill of rights, is plainly erroneous. The ICCPR requires that the rights it protects be observed by member states, but the way in which a country complies with the ICCPR is a matter for that country to determine. Rights may be protected by legislation and common law, among other things. *See* Janet McLean, *Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act*, 4 N.Z. L. REV. 421 (2001) (answering the UNHRC's criticism of New Zealand); *see also* Matadeen v. Pointu (1999) 1 A.C. 98 (P.C.) (appeal taken from Mauritius).

57. Passage of the Canada Act 1982 by the U.K. Parliament, often referred to as the patriation of the Canadian Constitution, established a domestic amending formula, whereas prior to 1982 formal amendments to the Canadian Constitution had to be approved by the U.K. Parliament. *See* HOGG, *supra* note 15, §§ 1.3-1.4. A number of amendments to the Canadian Constitution were effected by the Canada Act in 1982, the most significant being the inclusion of the Canadian Charter of Rights and Freedoms, the first thirty-four provisions of the Canada Act 1982. *See* Canadian Charter, *supra* note 5. Prior to the adoption of the Charter, Canada had a statutory bill of rights at the federal level. The Canadian Bill of Rights 1960 is now largely redundant, although it is noteworthy that this Act includes a right to the protection of property that the Charter does not, along with additional procedural due process protections, and so may supplement Charter protections against the federal government in some contexts.

58. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109.

59. *See* S. AFR. CONST. 1996 ch. 2 and *supra* text accompanying note 6.

60. Human Rights Act, 1998, ch. 42 § 2.

61. In 2004 the Australian Capital City of Canberra, which is known as the ACT or Australian Capital Territory (not a part of any of the Australian States, its status being akin to that of the District of Columbia), enacted a statutory bill of rights. There is, of course, ongoing academic interest in the adoption of a bill of rights. *See, e.g.*, GEORGE WILLIAMS, A BILL OF RIGHTS FOR AUSTRALIA (2000). On the other hand, there are strong antipodean opponents of bills of rights. *See, e.g.*, JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT (1999); James Allan, *A Defence of the Status Quo*, *in* PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 175 (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., 2003); Tom Campbell, *Judicial Activism—Justice or Treason?*, 10 OTAGO L. REV. 307 (2003). The State of Victoria appointed a Committee to investigate the adoption of a statutory bill of rights in 2005, led by Professor Williams. Professor Williams's committee issued a report in January 2006 recommending the

feature of most English-speaking common law legal systems, and many other legal systems as well.

B. How Other Bills of Rights Work

In order to see how bills of rights work in other countries, let us consider the experience of Canada, New Zealand, and the United Kingdom, three common law countries that have recently adopted bills of rights.

1. Canada

As we noted, Canada has an entrenched bill of rights that includes a detailed list of rights and freedoms. Two main features distinguish the Canadian Charter of Rights and Freedoms (Charter) from the U.S. Bill of Rights. First, the Charter includes an explicit abridging provision, section 1, which guarantees the enumerated rights and freedoms but at the same time declares that those rights and freedoms are subject to reasonable limits. Thus, legislation is consistent with the Charter if the limits it imposes on rights are considered reasonable and justified in a free and democratic society.[62]

Some Canadian commentators argue that this feature makes rights adjudication under the Charter qualitatively different than under the U.S. Bill of Rights.[63] The Charter, they say, does not protect rights absolutely, the suggestion being that the U.S. Bill of Rights does. In our view this reflects a basic misunderstanding.[64] The difference between rights adjudication in the two countries is that rights adjudication is broken down into a two-step process under the Canadian Charter, whereas under the U.S. Bill of Rights the two steps are merged. Under

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adoption of a state bill of rights. STATE OF VICTORIA, DEPT. OF JUSTICE, RIGHTS, RESPONSIBILITIES AND RESPECT: THE REPORT OF THE HUMAN RIGHTS CONSULTATION COMMITTEE (2005), *available at* http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Report/$file/HumanRightsFinal_FULL.pdf.

62. Section 1 of the Canadian Charter, *supra* note 5, provides as follows: "The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

63. *See, e.g.*, KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001) (Can.).

64. *See* James Allan, *The Author Doth Protest Too Much, Methinks*, 20 N.Z. U. L. REV. 519 (2003); Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. TORONTO L.J. 89 (2003) (both reviewing ROACH, *supra* note 63).

the Charter, rights are defined without regard to the justification for limiting them. As a result, it may be meaningless to speak of rights in Canada without taking into account the justifiability of particular limitations. In contrast, to say that someone has a right under the U.S. Bill of Rights is to make the stronger claim that there is no justification for limiting an individual's freedom. The Canadian two-step process allows judges to define rights generously, because the real work comes at the justificatory enquiry that follows. The difference is largely one of form rather than substance. The leading Canadian case delineating the scope of permissible limitations on Charter rights, *R. v. Oakes*,[65] establishes a proportionality test with which American courts have long been familiar.[66]

In neither country, then, are rights generally treated as absolutes.[67] The real question is the extent to which limitations are upheld by the highest courts in the two countries, and there is no doubt that the Supreme Court of Canada has reached results different, if not opposite, to those reached by the U.S. Supreme Court in a number of comparable leading cases. For example, the Supreme Court of Canada has, like the U.S. Supreme Court, held that the freedom of expression protects speech without regard to its content.[68] However, this holding is *not* equivalent to the meaningful "content neutrality" idea in First Amendment law. In Canada, content neutrality means only that expression enjoys prima facie constitutional protection regardless of its content. Anything with expressive content is, in other words, within the ambit of the protected freedom, and the state must justify the establishment of limits upon the freedom of expression. At the justificatory stage, however, the content of expression *is* relevant not only to the state's reasons for establishing limits upon it, but to the extent to which particular limits can be justified.

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65. [1986] 1 S.C.R. 103. *See generally* HOGG, *supra* note 11, § 35.

66. Compare the test under *Oakes*, [1986] 1 S.C.R. at 138-39, with the test set out by the U.S. Supreme Court for evaluating limitations on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980).

67. The Supreme Court of Canada has often asserted that all rights are subject to the reasonable limits clause in the Charter, *see, e.g.*, R. v. Sharpe, [2001] 1 S.C.R. 45, 95, but this appears to us to be an overstatement. As a practical matter, some rights are treated as absolutes. For example, it is inconceivable that a Canadian court would conclude that legislation infringing the right not to be subject to cruel or unusual treatment or punishment, Canadian Charter, *supra* note 5, § 12, is justified. A court minded to uphold treatment or punishment in difficult circumstances would likely conclude that the right had not been breached. *Accord* HOGG, *supra* note 11, § 35.14(f).

68. Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927; *see also* R. v. Butler, [1992] 1 S.C.R. 452 (protecting pornography); R. v. Keegstra, [1990] 3 S.C.R. 697 (freedom protects "hate speech").

Pursuant to section 1, the state has been able to uphold significant content-based restrictions in a variety of contexts.[69]

The reasonable limits provision allows a measure of deference to Canadian legislatures, but a second key feature of the Charter cuts the opposite way. Section 33, the "notwithstanding clause," authorizes both the Federal Parliament and provincial legislatures to legislate "notwithstanding" some (but not all) Charter rights—to pass ordinary legislation that applies regardless of those Charter rights.[70] This clause was crucial to the passage of the Charter. The provinces insisted on it as the price of their consent to the package of constitutional amendments that included the Charter,[71] but it has not proven to be the provision that either its proponents assumed or its opponents feared.

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69. So, for example, the criminalization of obscene material and hate speech has been upheld. *See Butler*, [1992] 1 S.C.R. at 497; *Keegstra*, [1990] 3 S.C.R. at 786.

70. Section 33 of the Charter provides as follows:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Canadian Charter, *supra* note 5, § 33.

For a variety of views on section 33, see Jamie Cameron, *The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 135; Janet L. Hiebert, *Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 169; Tsvi Kahana, *What Makes for a Good Use of the Notwithstanding Mechanism?*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 191; Howard Leeson, *Section 33, The Notwithstanding Clause: A Paper Tiger?*, *in* JUDICIAL POWER AND CANADIAN DEMOCRACY 297 (Paul Howe & Peter H. Russell eds., 2001); Peter H. Russell, *Standing Up for Notwithstanding*, 29 ALTA L. REV. 293 (1991); John D. Whyte, *On Not Standing for Notwithstanding*, 28 ALTA. L. REV 347 (1990). Based on his concern about the power of the U.S. Supreme Court, Robert Bork's suggestion that consideration be given to amending the U.S. Constitution to establish a congressional override in ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 117-20 (1996), was widely criticized.

71. Nine of ten Canadian provinces ended up consenting. Quebec did not agree to the 1982 repatriation (from the United Kingdom) of the Canadian Constitution nor to the addition of the Charter of Rights. Indeed, Quebec has never formally signed on

Section 33 was designed to overcome concerns about empowering the judiciary to override the decisions of the legislature, but it addresses this concern only to a limited extent. By invoking this provision Canadian legislatures can suspend the effect of judicial decisions interpreting some Charter rights for nonretroactive,[72] renewable five-year periods.[73] The automatic expiry of a notwithstanding declaration means that the default position is judicial supremacy in interpreting the Charter.

The notwithstanding clause is often relied on by those who argue that the Charter establishes a weaker form of judicial review than the U.S. Bill of Rights because it denies courts the last word as to the meaning of Charter rights. However, things are not what they seem. The notwithstanding clause has never been used by the Federal Parliament—not one single time—and has been disavowed by successive Prime Ministers since the Charter was passed. Its use has come to be seen as undermining the Charter, in part because judicial decisions interpreting the Charter have come to be seen as synonymous with the Charter itself.[74] Most Canadians appear to have accepted what many Americans continue to contest—the idea that the judiciary is the exclusive interpreter of the Constitution, or at any rate the only branch of government whose views matter. Even controversial and unpopular judicial decisions—cases the federal government lost in court—have not been reversed by Parliament. Indeed, no attempt has even been made to do so, despite the power majority governments have in a Westminster parliamentary system.[75] Examples of controversial decisions not overridden include one extending the right to an oral hearing to thousands claiming refugee status,[76] one prohibiting the establishment of limits on tobacco advertising,[77] one causing thousands of persons charged with crimes to be released on the basis that the state had taken too long to try them,[78]

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to the Canadian Constitution, but it applies in Quebec in any event. *See* HOGG, *supra* note 15, § 4.1(c).

72. This limitation on the clause was inferred by the Supreme Court of Canada in *Ford v. Quebec (Att'y Gen.)*, [1988] 2 S.C.R. 712.

73. Canadian Charter, *supra* note 5, § 33(3)-(5).

74. *See* Grant A. Huscroft, *"Thank God We're Here": Judicial Exclusivity and its Consequences*, 25 SUP. CT. L. REV. 2D 241 (2004) (Can.).

75. A majority government describes the situation in which the governing political party holds a majority of seats in the legislature or parliament. Strict party discipline, which is typical in Westminster parliamentary government, means that all members of the governing party almost always support legislation proposed by the government.

76. Singh v. Minister of Employment & Immigration, [1985] 1 S.C.R. 177. The decision in *Singh* has cost the federal government billions of dollars on an ongoing basis.

77. RJR-MacDonald, Inc. v. Canada (Att'y Gen.), [1995] 3 S.C.R. 199 (five-four decision).

78. R. v. Askov, [1990] 2 S.C.R. 1199.

and one establishing same-sex marriage,[79] among others. Thus, the decisions of Canadian courts are, in effect, final unless the Court changes its mind.[80] It is significant that, outside of Quebec (the only province that opposed passage of the Canada Act 1982 which entrenched the Charter), the notwithstanding clause has only ever been used three times by provincial or territorial governments,[81] and never to overturn a judicial decision.[82]

Accordingly, the notwithstanding clause is essentially irrelevant as far as provincial legislatures and the Federal Parliament are concerned. But it may be highly relevant to courts in interpreting the Charter. Arguably, the notwithstanding clause frees Canadian courts to be *less* deferential to elected legislatures than they otherwise would have been in the absence of such a clause, because it allows judges to act on the basis that their

79. Halpern v. Canada (Att'y Gen.), 65 O.R.3d 161 (2003). Not only was this Ontario Court of Appeal decision not reversed by legislation, the Government capitulated by refusing to appeal to the Supreme Court, then proposing to enact legislation to extend the impact of the decision across the country—this only six years following Parliament's earlier affirmation of the traditional definition of marriage. Modernization of Benefits and Obligations Act, 2000 S.C., ch. 12 (Can.). The Government attempted to avoid political fallout by involving the Supreme Court of Canada on an advisory basis, something permitted under Canadian law. Huscroft, *supra* note 74, at 261 (discussing Government's strategy). The Supreme Court of Canada refused to advise whether or not the limitation of marriage to opposite-sex couples infringed the Charter, however, reasoning that there was no need to do so since the Government had not appealed the decision in *Halpern* and had proposed legislation to permit same-sex marriage in any event. *See Reference re* Same-Sex Marriage, [2004] 3 S.C.R. 698.

80. Which it does from time to time. The decision in *Askov* was softened considerably in *R. v. Morin*, [1992] 1 S.C.R. 771, which is now the leading case on section 11(b) of the Charter, the right to be tried within a reasonable time.

81. Moreover, these three examples turn out to be irrelevant. *See* HOGG, *supra* note 11, § 36.2. Saskatchewan's use of the notwithstanding clause in 1984 to protect collective bargaining legislation was redundant because the Court held that the freedom of association did not include the right to strike. Retail, Wholesale & Dep't Store Union v. Saskatchewan, [1987] 1 S.C.R. 460. Alberta's invocation of the notwithstanding clause in 2000 to preserve the common law definition of marriage is irrelevant given that the province does not have constitutional jurisdiction over the status of marriage. *See Same-Sex Marriage*, [2004] 3 S.C.R. 698. The third case involved territorial legislation that included a notwithstanding declaration, but never came into effect. Land Planning and Development Act, 1982 S.Y.T., ch. 22, § 39(1) (not yet in force), *cited in* HOGG, *supra* note 11, § 36.2 n.12a.

82. One consequence of judicial exclusivity is that it would appear to create an incentive to invoke the notwithstanding clause in order to preempt judicial review, thus immunizing the legislation from Charter scrutiny. *See* Ford v. Quebec (Att'y Gen.), [1988] 2 S.C.R. 712 (precluding the notwithstanding clause from being invoked retrospectively creates a similar incentive). *See* HOGG, *supra* note 11, § 36.6.

decisions are not final.[83] Ironically, in other words, section 33 may have the unintended consequence of making Canadian judges *less* deferential to legislators than American judges, who decide constitutional cases in the knowledge that their decisions can only be overturned by constitutional amendment.

Whether or not this is the case, the fact is that the U.S. Supreme Court has developed a number of techniques designed to facilitate judicial deference—a more minimalist approach to judicial review—in order to minimize the need to answer constitutional questions. More to the point, these techniques are not used by the Supreme Court of Canada to the same extent, as we will see below.

In sum, despite structural differences between the two bills of rights and the analytical frameworks that must be used in interpreting and applying them, judicial review under the Canadian Charter is similar to judicial review under the U.S. Bill of Rights in that both are strong forms of judicial review. Judicial deference is a feature of the jurisprudence of both the Supreme Court of Canada and the U.S. Supreme Court, but it is unpredictable: structural differences, as well as political and cultural differences, may lead to very different results.

2. New Zealand and the United Kingdom

New Zealand and the United Kingdom are jurisdictions with unwritten constitutions, meaning that neither country has an overarching document that constitutes government and sets out the limits on power and how separation is to be maintained. Both of these jurisdictions, however, do have statutory bills of rights that are subject to the ordinary processes of amendment.[84] Thus, decisions interpreting the rights they protect can, at least in theory, be undone by the passage of ordinary legislation. There is no need for the sort of supermajority ordinarily required for a constitutional amendment.

As we noted above, New Zealand's Bill of Rights came first, and with little fanfare. A proposal to adopt a supreme law bill of rights was

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83. The judiciary sometimes has it both ways in this argument. In regard to the few rights that are not subject to the notwithstanding clause, the Court has claimed that heightened scrutiny is warranted as a result. *See, e.g.*, Sauvé v. Canada (Chief Electoral Officer) (*Sauvé II*), [2002] 3 S.C.R. 519. One might equally have argued that the opposite conclusion is appropriate—that, given the need for a constitutional amendment (virtually impossible to obtain) to overturn a judicial decision interpreting rights not subject to the notwithstanding clause, judges should be *more* rather than *less* deferential to the legislature in interpreting those rights.

84. The Constitution Act 1986 does some of the work a written constitution would in New Zealand, but it is ordinary legislation, and there remains a considerable role for unwritten constitutional norms in any event. *See* PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 112-16 (2d ed. 2001).

strongly opposed[85]—ironically, by the New Zealand legal community, among others—and in order to pass even a statutory bill of rights it was necessary for the government to water down the proposal considerably. In particular, a provision was added rendering the New Zealand Bill of Rights subordinate to all other legislation in the event of a conflict—that is, specifically precluding the courts from holding inconsistent legislation of no force or effect, whether the other legislation was passed prior to or following the passage of the New Zealand Bill of Rights.[86] Against that, a reading-down provision was included. It instructs courts to interpret other legislation consistently with the protected rights and freedoms of the Bill of Rights, if they can. Only in the event that the judges decide they cannot read the other statute's provisions as consistent with the New Zealand Bill of Rights must the other legislation prevail. In order to minimize the chances that future inconsistent legislation would be passed, a provision was also added requiring the Attorney General to report to Parliament whenever proposed legislation was thought to be inconsistent with the New Zealand Bill of Rights.[87] The changes were designed to preserve parliamentary sovereignty. Thus the Prime Minister who proposed the bill referred to it as a "parliamentary bill of rights."[88]

This must seem to American eyes to be as enervated a bill of rights as can be imagined.[89] In practice, however, it has not worked out that

85. The history of the New Zealand Bill of Rights is discussed in RISHWORTH ET AL., *supra* note 11, ch. 1. *See also* James Allan, *Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990*, 9 OTAGO L. REV. 613 (2000).

86. Section 4 of the New Zealand Bill of Rights provides as follows:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109. The impact of this provision is discussed in RISHWORTH ET AL., *supra* note 11, at 126-31.

87. The idea here, borrowed from Canadian legislation, is that the legislature is unlikely to pass legislation if apprised of its inconsistency. The flaw in this idea is the assumption that questions of consistency with the New Zealand Bill of Rights are matters of law amenable to brightline answers that legislators will or should accept. *See id.,* ch. 4.

88. 502 PARL. DEB., H.R. (1989) 13038 (N.Z.) (Rt. Hon. Geoffrey Palmer, moving introduction of the Bill).

89. Justice Brennan, for example, considered that a statutory constitutional bill of rights was of little use, and that judicial power to enforce constitutional rights as against

way.[90] The "reasonable limits" provision based on section 1 of the Canadian Charter, designed for use with a supreme-law bill of rights model rather than a statutory model, was retained. New Zealand judges have used this provision, together with the reading-down provision, in creative ways.[91] As a result, they are rarely required to conclude that another statute's wording is so plain that it must be read as inconsistent with the New Zealand Bill of Rights. This interpretive power allows New Zealand judges to achieve much of what an American judge could do under the U.S. Bill of Rights;[92] moreover, in the event that an interpretive solution is not possible, New Zealand judges have asserted that they have not only the power, but also the duty, to issue declarations of inconsistency in appropriate circumstances.[93]

The New Zealand experience suggests that it is a mistake to assume that statutory bills of rights necessarily establish a weak form of judicial review where legislation is concerned. Much depends on how far the judges are prepared to go in reading down otherwise clear statutory language and whether or not the legislature is prepared to respond.

The New Zealand Bill of Rights was one of the models for the U.K.'s Human Rights Act 1998, and in particular for the apparent preservation of parliamentary sovereignty. Like their New Zealand counterparts, U.K. judges were denied the power to strike down or invalidate legislation for unconstitutionality. Still, the U.K. Human Rights Act includes a reading-down provision similar to that in the New Zealand Bill of Rights, requiring courts to interpret legislation consistently with the protected rights whenever possible.[94] It specifically requires judges to issue "declarations of incompatibility when they conclude that another

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the legislature was a prerequisite of meaningful constitutionalism. *See* William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1 (1991).

90. The New Zealand Court of Appeal set the tone for the New Zealand Bill of Rights early on by reading-in a remedies provision to cover executive action in breach of rights and establishing a public law cause of action for its breach (similar to a *Bivens* action, but much wider in scope). *See* Simpson v. Attorney-General (*Baigent's Case*), [1994] 3 N.Z.L.R. 667; *see also* RISHWORTH ET AL., *supra* note 11, at 814-31 (discussing *Baigent's Case*).

91. *See, e.g.*, Ministry of Transp. v. Noort, [1992] 3 N.Z.L.R. 260 (C.A.), *available at* 1992 NZLR LEXIS 657 (reading a right to counsel into legislation authorizing roadside breath testing).

92. Allan, *supra* note 85; McLean, *supra* note 56.

93. *See* Moonen v. Film & Literature Bd. of Review, [2000] 2 N.Z.L.R. 9 (C.A.); *see also* RISHWORTH ET AL., *supra* note 11, at 833-37. Subsequently, legislation was passed establishing a procedure for obtaining declarations, but only in regard to claims of discrimination in breach of the New Zealand Bill of Rights. *See id*. at 836.

94. Human Rights Act, 1998, ch. 42, § 3 (U.K.).

statute is inconsistent with the enumerated rights but is sufficiently clearly worded that it must be upheld."[95]

Too little time has passed since the U.K.'s Human Rights Act has come into force to do more than signal how the reading-down provision might come to be used. Consider, however, the recent case of *Ghaidan v. Mendoza*.[96] In that case, the House of Lords held that the requirement to read-down legislation in order to avoid inconsistency with the Human Rights Act enables a court to depart from the unambiguous meaning that a piece of legislation would otherwise bear. Lord Nicholls of Birkenhead made the claim in these words:

> It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning. . . .
> . . . Section 3 may require the court to . . . depart from the intention of the Parliament which enacted the legislation. . . .
> . . . .
> . . . It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant [meaning bill of rights compliant].[97]

Lord Steyn agreed that the reading-down provision applies even if there is no ambiguity in the statute. He suggested in clear terms that the interpretation adopted need not even be a reasonable one,[98] and strongly urged that the English courts opt to use this reading-down provision—more bluntly, to interpret away any judicially perceived flaws in legislation—as the primary remedy and to resort to declarations of incompatibility only in exceptional circumstances. For his part, Lord Rodger adopted a sort of "judicial vandalism" test, the implication being that anything short of drastic rewriting of legislation is acceptable.[99]

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95. *Id.* § 4. The U.K. Human Rights Act also goes further than the New Zealand Bill of Rights by setting out a process empowering the executive branch of government to respond to judicial declarations of incompatibility, going so far as to allow the ordinary legislative process to be dispensed with on a temporary basis. *Id.* § 10.

96. Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [2004] 2 A.C. 557 (appeal taken from Eng.) (U.K.).

97. *Id.* at 571-72.

98. *Id.* at 574.

99. *Id.* at 597. However, as Lord Millett notes in dissent, what the majority does in this case looks to many to amount to judicial vandalism. *Id.* at 583 (Millet, L., dissenting).

It is crucial to realize that in reaching this result their Lordships overruled one of their own House of Lords authorities—a case on the meaning of exactly this same statutory provision, an authority only five years old, and one that had held the meaning to be clear.[100] So the potential power of these reading-down provisions should not be underestimated. Even Lord Millett, in dissent, agreed that "even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, [section] 3 may require it to be given a different meaning."[101] The only constraint he would have the judges impose on themselves is that the meaning they give the statutory provision be "intellectually defensible."[102] Yet it is important to note that he means this *not* as any very high hurdle to be cleared. According to Lord Millett, the court "can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point."[103]

This goes to show that New Zealand and U.K. judges are in something of a different position when it comes to rights. Unlike their American counterparts, they cannot "strike down" legislation for inconsistency with their bills of rights. Nevertheless, they have considerable room to read-down legislation, arguably to the point of redrafting statutes the judges find inconsistent with the indeterminate rights guarantees in their statutory bill of rights.[104] Use of the reading-down power to redraft statutes is not only hard to distinguish from a power to invalidate or strike down statutes, as Janet McLean has written, it is also the very thing that American courts sometimes do, rather than take the larger step of declaring legislation unconstitutional.[105]

Be this as it may, both the New Zealand and U.K. bills of rights include interpretive tools that allow courts to turn ostensibly weak judicial review into something much stronger where legislation is concerned. The extent to which judges in those jurisdictions will use those tools or will prefer a more cautious approach is an empirical

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100. *See* Fitzpatrick v. Sterling Hous. Ass'n, [2001] 1 A.C. 27, 33 (H.L.) (appeal taken from Eng.) (U.K.).

101. *Ghaidan*, [2004] 2 A.C. at 585 (Millett, L., dissenting).

102. *Id.*

103. *Id*.

104. Of course, the legislature can respond with a new statute, but that too is then to be read by the judges as consistent with the enumerated rights, *if possible*.

105. McLean, *supra* note 56, at 427-30; *see also* RISHWORTH ET AL., *supra* note 11, at 124-26 (comparing "as applied" invalidity and "reading down").

question.[106] The important point is that judges in both countries interpret and apply their bills of rights in the context of parliamentary sovereignty—any decision they make can be overturned by a simple legislative majority.

3. Summary

We hope that this brief sketch of how rights-based judicial review operates in three other common law countries is enough to emphasize that great care must be taken in relying on what courts in those and other jurisdictions say about rights, however similarly the respective rights provisions in their bills of rights may appear to be. Unlike in the United States, it may be that discussions of rights are but a prelude to a second-stage discussion focused on considering the extent to which particular limitations on rights can be justified. Similarly, it may be that much more of the work of rights-based case law is being done under the guise of statutory interpretation, and hence that there is less reticence to appeal to rights-based norms. Nor should one forget that judicial decisions in these jurisdictions can, in theory if not necessarily in practice, be overcome by passage of ordinary legislation. For these reasons and more, there is every reason to be wary of taking the decisions of foreign courts at face value where rights are concerned.[107]

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106. New Zealand judges breathed life into the New Zealand Bill of Rights under the leadership of the President of the Court of Appeal, Sir Robin Cooke. Prior to passage of the Bill of Rights, Cooke had flirted with the idea that judges could invoke common law authority to refuse to give effect to legislation that infringed fundamental rights. *See* Michael Kirby, *Lord Cooke and Fundamental Rights*, *in* THE STRUGGLE FOR SIMPLICITY IN THE LAW: ESSAYS FOR LORD COOKE OF THORNDON 331 (Paul Rishworth ed., 1997) (discussing and criticizing Cooke's heretical idea). The Court's record since Cooke's retirement is mixed. *See* Petra Butler, *Human Rights and Parliamentary Sovereignty in New Zealand*, 35 VICT. U. WELLINGTON L. REV. 341 (2004) (arguing that New Zealand judges have been careful with their power and generally respected institutional roles). *But see* Allan, *supra* note 85 (providing an opposite argument). It is early days in the United Kingdom, as we have noted, but the section 3 reading-down provision is proving to be an important judicial tool.

107. The difficulties involved in understanding the decisions of foreign courts may be exacerbated under a regional instrument like the ECHR. The European Court of Human Rights is often required to reconcile competing conceptions of rights from the various member states. The Court applies a "margin of appreciation," meaning that it will often allow a range of interpretations of the protected rights. The difficulty lies in knowing when the margin of appreciation will apply, and to what extent. *See, e.g.*, Handyside v. United Kingdom, 1976 Y.B. Eur. Conv. on H.R. 506. *See generally* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 12-15 (1995); Timothy H. Jones, *The Devaluation of Human Rights Under the European Convention*,

C. Non-American Conceptions of Judicial Review

Although Chief Justice Marshall's opinion in *Marbury* in 1803 is usually taken as the starting point, it took a considerable amount of time for judicial review to become well established in the United States.[108] It was one thing to assert judicial power to refuse to give effect to laws the Court considered unconstitutional, but quite another to exercise that power secure in the knowledge that the other branches of government would respect the Court's orders. The heyday of judicial review did not come until the Warren Court and the civil rights movement in the 1950s, and viewed in context it was a radical period. Yet, as many have pointed out, this was the period that countries like Canada took as the *defining* period as far as judicial review is concerned.[109] Advocates of judicial review considered that courts had power to do great good in reforming society, and proposed the adoption of bills of rights with progressive goals in mind. *Brown v. Board of Education*[110] is the sort of decision that is supposed to be typical: the U.S. Supreme Court is widely assumed to have ended racial segregation. Chief Justice Warren showed what courts could do with a bill of rights, and problems with judicial review demonstrated by some of the Court's prior decisions were either ignored or supposed to have been precluded by the use of different language to define rights in more modern bills of rights.

It is important to pause here to emphasize the extent to which the American conception of judicial review differs from that of other countries with bills of rights. To start, the U.S. Supreme Court's role is constitutionally limited; it may pronounce only upon actual cases or controversies. Secondly, although judicial review is well established in

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1995 PUB. L. 430 (U.K.); R. St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993). Different problems arise in the context of interpreting international bills of rights. To say the least, the decisions of the UNHRC interpreting the ICCPR are often sparsely reasoned, consisting of little more than recitations of fact and argument, followed by brief conclusions. *See* JOSEPH ET AL., *supra* note 51, at 50.

108. *See* Michael W. McConnell, *Toward a More Balanced History of the Supreme Court*, *in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 141 (Christopher Wolfe ed., 2004). Justice Brennan observed that "the federal courts played only a negligible role in protecting civil liberties until almost a century later, in the 1930s, and most of the progress we have made in America was accomplished within the last four decades." William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 OXFORD J. LEGAL STUD. 425, 430 (1989).

109. Justice L'Heureux-Dubé of the Supreme Court of Canada has acknowledged that cases from the 1950s, 60s, 70s, and early 80s—spanning the Warren and Burger Courts—have been the most influential, among other reasons, because these Courts "attempted to make the principles of their constitution relevant for modern times." L'Heureux-Dubé, *supra* note 15, at 20.

110. 347 U.S. 483 (1954).

the United States, its legitimacy is not taken for granted. As a result, a variety of rules and interpretive techniques have been devised over the years in an attempt to limit the scope of judicial review, and so respect the roles of the other branches of government: standing, mootness, ripeness, the *Ashwander* doctrine, the political questions doctrine, and so on.[111] To be sure, some of these concepts have foreign analogues, but they are understood differently in other jurisdictions, and are in general far less significant. For example, standing requirements tend to be less onerous in other common law countries, reflecting the concern that constitutional rights not go underenforced.[112] Moreover, foreign courts are more likely to decide moot cases as a matter of their discretion, typically on the basis that the Court's guidance is needed. Judges in other jurisdictions demonstrate (or sometimes affect) little concern about the legitimacy of judicial review, certainly far less than their American counterparts.[113]

For instance, Canadian judges are fond of denying the need to legitimate the exercise of their power. In an early case under the Charter, *Reference re B.C. Motor Vehicle Act*,[114] Justice Lamer of the Supreme Court of Canada replied to an argument raising concerns about the legitimacy of judicial review as follows:

> This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility.

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111. *See generally* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 85-116 (1988).

112. Standing has been liberalized throughout the English common law world. *See* HOGG, *supra* note 11, § 56.2 (discussing standing in Canada); WILLIAM WADE & CHRISTOPHER FORSYTHE, ADMINISTRATIVE LAW 695-700 (9th ed. 2004) (discussing standing in various common law nations). The concept of a political questions doctrine has been considered and rejected in Canada. *See* Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441; *cf.* LORNE SOSSIN, BOUNDARIES OF JUDICIAL REVIEW: THE LAW OF JUSTICIABILITY IN CANADA 131-200 (1999). The doctrines of ripeness and mootness exist, but there is no "case or controversy" requirement in other jurisdictions, and courts are not shy about wading into controversies they consider require judicial resolution. Obiter dicta is a prominent feature of decisions of the Supreme Court of Canada. *Id*.

113. Something much larger may be going on as well. Judicial willingness to address constitutional issues may reflect the view that constitutional rights are the province of the judiciary, rather than the other branches of government.

114. [1985] 2 S.C.R. 486.

> Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.[115]

Other members of the Supreme Court of Canada have emphasized that they did not ask for the powers the Constitution bestows on them, as though they are disinterested parties who are simply required to uphold the Charter (as they interpret it).[116]

But whether or not they are concerned about justifying the exercise of their powers, there is no doubt that judges in most common law countries tend to regard the interpretation of bills of rights as a task to which the judiciary is uniquely suited, even as they acknowledge the nonlegal aspects involved in defining rights. In regard to the New Zealand Bill of Rights, the New Zealand Court of Appeal has asserted as follows:

> Of necessity value judgments will be involved. . . . Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.[117]

Governments in other countries with bills of rights also tend to acquiesce to judicial assertions of authority to an extent that Americans do not. Indeed, they may base important political decisions upon the judiciary's heightened role. Some courts, like the Supreme Court of Canada, have an advisory jurisdiction, allowing the federal government to ask hypothetical questions of the Court by means of a reference procedure.[118] Many of the most important constitutional law cases in Canada are in fact decisions on reference questions. In 1998, the Supreme Court of Canada delivered its decision on whether or not the province of Quebec could unilaterally separate from Canada, and whether there was any right to do so as a matter of international law. The Court answered those questions in the negative, and in the course of doing so went far beyond the questions asked to deliver an extensive decision outlining its view on the fundamental postulates of the

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115. *Id.* at 497. Ironically, "fundamental justice," the term whose meaning was at issue in this case, was chosen for section 7 of the Canadian Charter in order to avoid the substantive due process problems of *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court of Canada held that it had a substantive component in any event. *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. at 497.

116. *See* Huscroft, *supra* note 74.

117. Moonen v. Film & Literature Bd. of Review, [2000] 2 N.Z.L.R. 9, 16-17 (C.A.) (Tipping, J., for the court).

118. Provincial governments can ask reference questions of provincial courts of appeal, and the decisions on such questions usually end up in the Supreme Court of Canada on appeal.

Canadian Constitution—principles the Court inferred from the Constitution and conferred actionable status upon.[119]

D. Different Interpretive Theories, Premises, and Conceptions of Rights

"Living constitutionalism"—the notion that the meaning of constitutional rights evolves and changes in accordance with the needs of contemporary society—has been embraced by courts in most common law countries with bills of rights. Seminal statements include the "living tree" metaphor announced by the Judicial Committee of the Privy Council (then the highest court in the British Commonwealth) in *Edwards v. Attorney General*.[120] That case, which long predates Canada's adoption of the Charter, established that the Canadian Constitution is

> a living tree capable of growth and expansion within its natural limits. . . . Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation . . . .[121]

In *Minister of Home Affairs v. Fisher*, the Privy Council held that bills of rights should be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give individuals the full measure of the fundamental rights and freedoms referred to."[122] These sorts of statements were embraced by the Supreme Court of Canada early in the life of the Charter. In *Hunter v. Southam, Inc.*, Justice Dickson wrote:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily

119. *Reference re* Secession of Quebec, [1998] 2 S.C.R. 217; *see* Richard S. Kay, *The* Secession Reference *and the Limits of Law*, 10 OTAGO L. REV. 327 (2003).

120. [1930] A.C. 124 (P.C. 1929) (appeal taken from Can.).

121. *Id*. at 136 (Sankey, L.). It is interesting to note the similarity of Lord Sankey's remarks to those U.S. Supreme Court Justice Brandeis made in an unpublished draft dissenting opinion. Several years before Lord Sankey's remarks, Brandeis wrote: "Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions." BICKEL, *supra* note 43, at 106-07. Chief Justice Taft requested that he remove those remarks from the opinion: "[T]hey are certain to be used to support views that I could not subscribe to. Their importance depends, as old Jack Bunsby used to say, on their application, and I fear that you and I might differ as to their application." *Id*. at 108.

122. [1980] A.C. 319, 328 (P.C. 1979) (appeal taken from Berm.).

> enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[123]

It is ironic that originalism was so quickly rejected in Canada, given how much easier it would have been for judges to engage in the sort of interpretive enterprise that it requires—easier, that is, than with the U.S. Bill of Rights, which is so much older. Nevertheless, progressive interpretation of the sort envisaged in *Southam* is largely uncontroversial today in Canada.[124]

Judges from other countries with bills of rights have made similar statements.[125] For example, President Cooke of the New Zealand Court of Appeal insisted that the New Zealand Bill of Rights there be interpreted in a way that "keep[s] pace with civilization."[126] Similarly,

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123. [1984] 2 S.C.R. 145, 155.

124. Ian Binnie, *Constitutional Interpretation and Original Intent*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 345 (Justice Binnie, of the Supreme Court of Canada, discussing the Canadian rejection of originalism); *cf*. Huscroft, *supra* note 8.

125. The Privy Council, which remains the highest court for a few British Commonwealth countries, set out the following interpretive approach in *Reyes v. The Queen*, [2002] UKPC 11, [2002] 2 A.C. 235 (appeal taken from Belize):

> [T]he court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society . . . .

Id. at 246 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

Justice Kirby of the High Court of Australia, where there is not even a bill of rights to interpret, has urged the use of an interpretive technique that ensures the Constitution is "constantly evolving." *See* Al-Kateb v. Godwin (2004) 219 C.L.R. 562, *available at* 2004 WL 1747386, at *623. Although Australia has no State or Commonwealth bill of rights, the judges have sometimes read in "implied rights." *See, e.g.*, Lange v. Austl. Broad. Corp. (1997) 145 A.L.R. 96; Theophanous v. Herald Weekly Times Ltd. (1994) 182 C.L.R. 104; Austl. Capital Television Pty. Ltd. v. Commonwealth (1992) 177 C.L.R. 106; Nationwide News Pty. Ltd. v. Wills (1992) 177 C.L.R. 1; *see also* Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELBOURNE U. L. REV. 1 (2000) (rejecting originalism); Jeffrey Goldsworthy, *Interpreting the Constitution in its Second Century*, 24 MELBOURNE U. L. REV. 677 (2000) (replying to Kirby's views).

126. Ministry of Transp. v. Noort, [1992] 3 N.Z.L.R. 260, 271 (C.A.), *available at* 1992 NZLR LEXIS 657, at *35.

Justice Barak, President of the Supreme Court of Israel, has endorsed Justice Dickson's above remarks from *Southam*:[127]

> Resort to the ultimate purpose of a constitution allows the constitution to address life's changing realities. At the founding of the constitution, its authors lay a basis for the document that is intended to exercise control over the future. This control—lest it become mastery—must be flexible enough to allow development. That is the meaning of the metaphor, "a living constitution." Its life is not expressed in imposing old constitutional principles on new circumstances. The aliveness of a constitution means giving modern content to old constitutional principles. That is also the meaning behind the metaphor comparing a constitution to a living tree.[128]

These sorts of statements presume a controversial understanding of what it means to have a constitution. For example, Justice Barak describes a constitution as "sit[ting] at the top of the normative pyramid. It shapes the character of society and its aspirations . . . . It is at once philosophy, politics, society, and law."[129] That being so, one might wonder what it is that makes constitutional interpretation a job for judges. The larger problem, however, is that these statements all appear to overlook the role of the elected branch of government in facilitating change. It is as though bills of rights must cover everything—absolutely everything—that may arise, through the process of evolutionary interpretation.[130]

Progressive interpretation suggests ever-expanding conceptions of rights, but clearly there must be, and are, limits to the courts' interpretive generosity. Judges in progressive interpretation jurisdictions invariably value things other than rights—things such as ameliorative welfare state policies—and need to make allowances in order to protect them *from* individual rights. Early in the life of the Canadian Charter, Chief Justice Dickson did just this, holding that although the Charter was to be interpreted generously and progressively, courts were not to allow Charter rights to be used to undermine progressive social policies. In *R.*

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127. [1984] 2 S.C.R. 145.

128. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 390 (Sari Bashi trans., 2005) (citations omitted).

129. *Id.* at 370 (citation omitted); *cf.* Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045 (2004).

130. One of us has written at length about the problems with this sort of vision of judicial review and bills of rights. *See* Huscroft, *supra* note 8, at 424-27. The other of us has made more general arguments against this sort of interpretive approach. *See* James Allan, *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of 'Original Intent'*, 6 LEGAL THEORY 109 (2000).

v. Edwards Books & Art Ltd., he wrote: "In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."[131]

There is a contradiction here that is not easily reconciled. After all, it is usually supposed that rights protect individual interests regardless of the situation of the rights holder. Even assuming that it were uncontroversial who the "better situated" and the "less advantaged" are, the notion that rights should have less purchase when they conflict with socially progressive legislation seriously undermines many rationales used to justify and defend rights; it also sets the judges up as unchallengeable determiners of what counts as socially progressive.

Consider the treatment of free speech rights in the United States and elsewhere. In the United States, robust First Amendment protection results in the protection of speech many Americans consider to be offensive at best, and harmful at worst—everything from flag burning to hate speech and pornography—a degree of protection for speech not seen anywhere else. The views of theorists like Catherine MacKinnon—considered radical and rejected in American constitutional law[132]—are accepted to varying degrees in many other countries with bills of rights. Indeed, the major free speech cases come out differently in the United States than in most other common law countries. Compare *American Booksellers Ass'n v. Hudnut*[133] with *R. v. Butler*[134] (a Canadian case upholding criminal law prohibition on possession of obscene materials); *R.A.V. v. City of St. Paul*[135] with *R. v. Keegstra*[136] (a Canadian case upholding the criminalization of hate speech); *New York Times v. Sullivan*[137] with *Hill v. Church of Scientology* (a Canadian case rejecting the need for reform of defamation law),[138] *Lange v. Atkinson* (a New Zealand case making modest reform to defamation law),[139] and *Reynolds v. Times Newspapers Ltd.* (a U.K. case also making modest reform in the same area).[140] Although the *Sullivan* case has inspired arguments aimed at limiting the protection afforded politicians and public

131. [1986] 2 S.C.R. 713, 779.
132. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 40-42 (1997).
133. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).
134. [1992] 1 S.C.R. 452.
135. 505 U.S. 377 (1992).
136. [1990] 3 S.C.R. 697.
137. 376 U.S. 254 (1964).
138. [1995] 2 S.C.R. 1130. Note that federal legislation criminalizing defamatory speech in some circumstances was upheld as a reasonable limit on the freedom of expression in *R. v. Lucas*, [1998] 1 S.C.R. 439.
139. [2000] 3 N.Z.L.R. 385 (C.A.).
140. [2001] 2 A.C. 127 (H.L.) (appeal taken from Eng.) (U.K.).

figures in other countries, invariably courts in those countries conclude that reputation deserves greater protection than American law provides.[141] Numerous additional examples could be given in areas like election campaign spending,[142] openness of trials,[143] child pornography,[144] and so on. First Amendment case law, a defining feature of American constitutional law, is rejected as extreme in many countries with bills of rights.

The U.S. approach to freedom of speech is not the only thing that has been rejected. Liberty rights are often given less robust interpretations in other countries. For example, in *Kyllo v. United States* the U.S. Supreme Court held unconstitutional a thermal imaging search under the Fourth Amendment,[145] but in *R. v. Tessling* the Supreme Court of Canada unanimously held that thermal imaging did not constitute an unreasonable search and seizure under the Charter.[146] By contrast, when it comes to equality the highest courts in other countries are likely to provide a far more expansive interpretation than the U.S. Supreme Court, whose formal equality approach is usually deprecated. In countries like Canada and

141. The most protection for reputation, and hence the least for freedom of expression, is provided in Canada. (Australia, without a bill of rights, provides more protection for freedom of expression.) *See* Symposium, *A Symposium on Defamation and Political Expression*, 2000 N.Z. L. REV. 385 (including articles by John Burrows, Michael Gillooly, Rosemary Tobin & Geoff McLay). *See generally* HOGG, *supra* note 11, § 40.10; IAN LOVELAND, POLITICAL LIBELS: A COMPARATIVE STUDY (2000); Adrienne Stone & George Williams, *Freedom of Speech and Defamation: Developments in the Common Law World*, 26 MONASH U. L. REV. 362 (2000).

142. *Compare* Harper v. Canada (Att'y Gen.), [2004] 1 S.C.R. 827 (holding that third party election spending limits did not unconstitutionally limit freedom of expression) *with* Buckley v. Valeo, 424 U.S. 1 (1976) (finding that certain parts of the Federal Elections Campaign Act violated candidates' rights to free speech).

143. *Compare* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (reversing order limiting the publication of trial facts because order violated right to free press) *with* Gisborne Herald Co. Ltd. v. Solicitor-General, [1995] 3 N.Z.L.R. 563 (C.A.) (holding that trial considerations outweighed right to freedom of expression). The Canadian approach is more similar to the American. *See* Dagenais v. Can. Broad. Corp., [1994] 3 S.C.R. 835 (declaring publication ban on trial facts unconstitutional under Canadian Charter).

144. *Compare* R. v. Sharpe, [2001] 1 S.C.R. 45 (holding restrictions on child pornography to be constitutional) *with* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (declaring ban on virtual child pornography unconstitutional because overbroad in restricting freedom of speech).

145. 533 U.S. 27 (2001).

146. [2004] 3 S.C.R. 432. Ironically, the Court's unanimous judgment was written by Justice Binnie, a leading proponent of progressive interpretation. *See* Ian Binnie, *Constitutional Interpretation and Original Intent*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 345.

South Africa, "substantive equality"—equality of outcome rather than equality of opportunity and the like treatment of similarly-situated individuals—is the rule, at least nominally. Equality rights are generally understood as protecting the disadvantaged, who may be defined having regard to membership in a particular group on the basis of inherent characteristics. Limits on the rights of those considered "advantaged" may not be considered a violation of equality rights at all.[147] Where equality rights are found to be infringed, however, the infringement is less likely to be held to be justified than limits on liberty rights.

None of this should come as any surprise, given the inherent contestability of rights and the way in which understandings are shaped by culture and history. Indeed, concepts like freedom of speech and equality are embraced by so many because commitment to them requires so little consensus as to detail. Agreement at the level of moral abstraction allows widespread disagreement and dissensus down at the level of drawing difficult social policy lines to be finessed. Hence any country might cherish these rights and regard them as fundamental, all the while affording them a different degree of protection. That is just the nature of rights: they are proclaimed at the level of abstract, indeterminate generalities to which all, or nearly all, can assent. Yet these same rights guarantees play out and have real effect down in the Waldronian quagmire of detail,[148] where lines are drawn in highly (and often hotly) contested and debatable social policy areas in which there is neither political nor legal consensus as to where those lines should be drawn. Rights-based constitutionalism is about empowering judges to draw debatable, contentious lines down in that quagmire of detail on the basis of largely indeterminate rights that command almost universal approval and endorsement up in the Olympian heights of moral abstractions. It should come as no surprise, then, that the American approach to hate speech differs from the Canadian one, and that people on both sides of the issue are convinced not only of the rightness of their own positions, but of their commitment to the protection of rights.

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147. *See, e.g.*, *President of S. Afr. v. Hugo*, 1997 (6) BCLR 708 (CC) (male parents denied pardon given female parents); Weatherall v. Canada (Att'y Gen.), [1993] 2 S.C.R. 872 (male inmates denied privacy rights from opposite sex guards accorded female inmates); *see also* Grant Huscroft, *Discrimination, Dignity, and the Limits of Equality*, 9 OTAGO L. REV. 697 (2000).

148. *See* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993); *see also* James Allan, *Bills of Rights and Judicial Power—A Liberal's Quandary*, 16 OXFORD J. LEGAL STUD. 337 (1996); James Allan, *Rights, Paternalism, Constitutions and Judges*, *in* LITIGATING RIGHTS, *supra* note 11, at 29.

Accordingly, the constitutionalization of rights proceeds, in our view, in spite of differences as to where lines must be drawn for particular rights and, relatedly, in spite of interpretive differences across countries.

III. PART II—TO HAVE DOUBTED ONE'S OWN FIRST PRINCIPLES:[149] REVISITING THE DEFENCE OF JUDICIAL REVIEW

In this second part we propose to set out the main theoretical arguments employed to justify the transfer of power to unelected judges under bills of rights—arguments used to attempt to rebut the countermajoritarian critique. Our goal here is *not* to mount a theoretical attack on (or defence of) any of these rationales, though we may refer the reader to instances of both on occasion. Rather, our goal is to enunciate the rationales in a way that makes it clearer whether, or to what extent, they justify internationalism in interpreting the U.S. Bill of Rights.

A. The Sirens Argument

The claim here is that bills of rights provide a sort of insurance, by which people choose—democratically and in advance—to minimize the possibility that legislation may be passed under the distorting influence of panic, fear, or anger. Responsibility for the protection of enumerated rights, approved by the people or by their representatives, is handed over to an independent, unelected judiciary, in the hope that that branch of government is more resistant to panic, fear, and anger and so more likely to keep its head in times of perceived crisis. The usual analogy here is to Ulysses tying himself to the mast of his ship in order to avoid the temptation of the Sirens' beguiling song.[150] Knowing our potential for moral weakness in the future—the possibility of punishing the exercise of free speech when we disagree with the content of the speech, say, or of clamping down on religious views with which a majority disagrees—we

149. This subtitle deliberately echoes Justice Oliver Wendell Holmes's well known maxim: "To have doubted one's own first principles is the mark of a civilized man." Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915).

150. For an analysis of the philosophical merits (or more accurately lack of merits) of this analogy see Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, *supra* note 148, at 47, and Jeremy Waldron, *Freeman's Defense of Judicial Review*, 13 LAW & PHIL. 27, 36-37 (1994).

entrust certain decisions to others. We "tie ourselves to the mast" so that the ship of state is not tempted by majoritarian impulse.

As an argument to justify the power of an unelected judiciary the Sirens Argument is premised on a sort of compact or bargain-type thinking, albeit a notional one. The judges are acting as the agents or delegates of the people and of the people's representatives enforcing second-order constraints on their first-order preferences, but constraints the people (or an earlier generation of people) have chosen to place on themselves. To make the point in more modern terms, it is as though the people arrived at a cocktail party and handed over their car keys to the judiciary, instructing them not to return the keys if too much alcohol is consumed.

In our view, the Sirens rationale is more persuasively available in the context of domestic rights guarantees than international ones. Whatever other flaws or strengths this justification for increased judicial power might have, it requires the people (at some point in time) specifically to have consented to some set of constitutionalized rights and to have handed over interpretation and oversight of those rights to their judicial host.

Where rights-based norms, standards, and line-drawing answers come from the decisions of foreign courts and international tribunals, it is hard to see how the American people and their elected representatives can be said to have consented to the importation of these standards.[151] Imagine that you handed your car keys over to a host in a jurisdiction in which the blood alcohol upper limit is 0.08 and she decides, on her own initiative, that an upper limit of, say, 0.03 (in line with that of country *X* or *Y*) is morally preferable. When you turn up at the end of the party with a blood alcohol reading of 0.04, she refuses to return your keys.

Now, on the merits of what is the best or most sensible approach to drinking and driving, this host—who draws on international and comparative norms—may be well be right. But that substantive issue is irrelevant to defending the host's power on the basis of the Sirens Argument. The people agreed to have judges oversee a 0.08 limit, period. The view of foreign hosts is simply irrelevant.

Notice, too, that this problem of relying on a Sirens Argument rationale cannot easily be sidestepped by moving from the relative objectivity of numbers to a more morally overlain concept such as "drunkenness." Suppose that your keys are to be returned unless you are drunk. That was the earlier agreement, the basis on which you gave the host the power to

151. In other jurisdictions, however, it is possible that the people may have given their consent to the importation of these standards. *See supra* text accompanying notes 18-20 (discussing New Zealand, South Africa, and the United Kingdom).

control your keys. The concept of drunkenness, however, is relatively indeterminate. There is a large penumbra of doubt or uncertainty[152] over what qualifies. There is also an ambiguity. Was the host to enforce the prevailing standard of drunkenness in the United States at the time of the party, or was she to enforce some other view—even one from abroad or inspired by international practice—if she thinks it to be a better view?

The latter option, when tied explicitly to the bargain-type thinking underlying a Sirens Argument, is only persuasive to the extent one believes it reflects the deal that was entered into at the time of being tied to the mast. One needs to be persuaded that this was the intention of those entering into the bargain. In other words, did those who adopted the U.S. Bill of Rights seek to have these moral issues determined on the basis of what were the prevailing standards in other countries? This seems highly implausible.

A more plausible alternative may be to picture the Ulysses bargain as allowing the host to enforce her own best moral view of what counts as drunkenness. This is to take the well-known Dworkinian line that the moral terms in a bill of rights were intended to be handed over to unelected judges for them to give their best moral understanding of the concepts.[153] On this view, the adopters knew and intended that the understanding of these terms would change over time, progressing as society's understanding of drunkenness developed and advanced.

For our purposes, however, the point is *not* whether one finds that sort of progressive approach to interpretation attractive.[154] The point is that it is not easily connected to the Sirens Argument. It works if, and only if, you really did instruct the host to apply her own moral standard of drunkenness, *and* you were prepared for her standard to be informed or influenced by foreign standards. Recall, of course, that your decision to

152. This is the metaphor made famous by H.L.A. HART in his THE CONCEPT OF LAW (1961) (discussing "penumbra of uncertainty," *id.* at 131, and "penumbra of doubt," *id.* at 119).

153. *See, e.g.*, RONALD DWORKIN, *The Forum of Principle*, *in* A MATTER OF PRINCIPLE 53-57 (1985); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115 (Amy Guttman ed., 1997). For a full argument on the extent to which Dworkin can be understood as an originalist (in the above sense), see Jeffrey Goldsworthy, *Dworkin as an Originalist,* 17 CONST. COMMENT. 49 (2000).

154. Context matters here. It may not be attractive, but it may nevertheless be legitimate if it were agreed upon in adopting the rights guarantee in the first place. *See* Allan, *supra* note 130.

hand over the keys to someone else was motivated by the fear of moral weakness on your own part.

The issue, then, is how far one can stretch the notion of a bargain in which one seeks to bolster his or her own potential moral weakness. How far can the notion of asking the host to enforce her own moral views of drunkenness be stretched before it collapses into an explicit bargain to enforce foreign moral standards? Clearly there is some room for stretch here, but perhaps not as much as is sometimes assumed. It seems plausible to suppose that most people entering into a Ulysses-type bargain would want either some sort of idea of the standards being brought to bear (meaning originalism of some sort or other) *or* some sort of idea of whose views would count. They will not fear their own moral weakness more than they fear the moral weakness of every other person or group. There will be limits to their willingness to have others' views preferred to their own. They may well be content to hand the decision over to *this* host, or to *American* judges in the future. Equally, however, they may well balk at foreign or international moral standards being determinative, or even relevant, even if such standards only become determinative because this host or this U.S. judge thinks them to be good standards. At that point the Sirens rationale has been stretched dangerously thin.

It bears repeating, nonetheless, that this is not to say that such an approach to interpretation is not a good one; it is simply to say that, when it is tied explicitly to the bargain-type thinking of the Sirens rationale, the connection becomes somewhat tenuous.

It follows that American judges who appeal to international and comparative rights-based case law for authority to override the will of the American people are likely to require some further justification beyond a Sirens-type argument.[155]

B. The Constitutional Argument

The assertion here, not unrelated to the Sirens Argument, is that written constitutions, and so any standard bill of rights they contain, are a way to lock in and make difficult to alter particular outcomes—outcomes that

155. The Sirens example may pose different sorts of problems depending upon the nature of the rights guarantee in question. It should not be supposed that the international community will always adopt more progressive or more generous interpretations that have the effect of broadening the scope of a right. Indeed it may be that the international community is less sympathetic to some rights than others. Property rights, for example, may well be subject to narrower interpretations outside the United States, and reliance on international authority in this regard would have the effect of limiting rights rather than broadening them. In these circumstances, the judges themselves may be vulnerable to the Sirens' song the people sought to avoid.

appear to be just and appropriate at the time the constitution is drafted. As Justice Scalia has put it:

> It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that "evolving standards of decency" always "mark progress," and that societies always "mature" as opposed to rot.[156]

Put differently, constitutions are a better bet than what Larry Alexander has described as "the vicissitudes of democratic politics."[157] "We may believe that we have the best rules we can ever have, and that there is far more danger of loss of political wisdom and morality or of political akrasia than there is danger that wide agreement on better rules will be thwarted."[158] In other words, we opt for a constitution and a bill of rights because we prefer to risk "rigidity rather than risking security."[159]

Our concern here is with the relevance of foreign and international case law. This argument makes it even plainer that the underlying justification for allowing the unelected judiciary to void acts of the legislature is not applicable to decisions founded on the decisions of foreign courts or international tribunals. It would be odd, to say the least, to distrust future American politicians while being sanguine about future developments in the courts of other countries, or international tribunals (none of which existed, of course, when the U.S. Bill of Rights was ratified). If concern about the vicissitudes of democratic politics and the likelihood of mistaken change by American voters explains the decision to lock in a set of rights, then calling in aid a foreign elite to, in effect, update and alter that set of rights through interpretive processes is

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156. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 153, at 3, 40-41.

157. Larry Alexander, *Introduction* to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 1, 8 (Larry Alexander ed., 1998).

158. *Id.* at 2. Justice Jackson famously referred to the purpose of withdrawing certain subjects from the "vicissitudes of political controversy" in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

159. Alexander, *supra* note 157, at 4.

bizarre. Constitutionalism designed to preserve, rather than facilitate growth or change, is about making things hard to change for *everyone*; it is not about giving an elite body of foreign judges or experts a place in the debate about how rights should play out in the United States.

Thus, this second argument, which we have called the Constitutional Argument, also seems applicable only to domestic rights guarantees. That said, it gives rise to an interpretation dilemma that must be considered. The dilemma is this: if the Constitutional Argument is going to work on its own terms—assuming, in other words, that a distrust of future politics is on balance warranted[160]—then the judges have to be prepared to give effect to what appear to be the original intentions of the enactors, or the original understandings of the protected rights. They must, as Justice Scalia has put it, treat the U.S. Bill of Rights as confirmatory rather than amendatory.[161]

It is observable, however, that they do not. The apparent triumph of the "living constitution" means that the Constitutional Argument rests on questionable empirical foundations even as regards domestic rights guarantees. The more a bill of rights is thought of as a changing, evolving document, one that needs to keep pace with changing social values (and even with civilized developments elsewhere), the *more* room judges will have to appeal to and incorporate into American law developments from other jurisdictions and international law, but also the *less* they will be able to appeal to the Constitutional Argument to justify those actions. (Here we refer to those provisions amenable to expansive interpretation, provisions like the Equal Protection and Due Process Clauses.)

Accordingly, the way in which a domestic bill of rights is interpreted by a country's judges may well gut the Constitutional Argument on

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160. One of us has argued explicitly that it is not warranted. *See* JAMES ALLAN, SYMPATHY AND ANTIPATHY: ESSAYS LEGAL AND PHILOSOPHICAL (2002); Allan, *supra* note 61, at 192-94.

161. *See* Antonin Scalia, *The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?*, *in* LITIGATING RIGHTS, *supra* note 11, at 19, 22. There need not be a strict dichotomy between confirmatory and amendatory bills of rights. Modern bills of rights may be both confirmatory in some respects and amendatory in others, although it is noteworthy that bills of rights are often sold on the basis that they are in fact confirmatory, the idea being that they would not change all that much. The New Zealand Bill of Rights is a good example here. Among other things, the White Paper, *supra* note 18, asserted that, even in entrenched, supreme law form, "for the most part it would not control the *substance* of the law and of the policy which would continue to be elaborated in, and administered by, present and future parliaments and governments." *Id.* § 4.14. The White Paper is discussed in Grant Huscroft, *Rights, Bills of Rights, and the Roles of Courts and Legislatures*, *in* LITIGATING RIGHTS, *supra* note 11, at 3, 5-8. On the other hand, the South African Bill of Rights is obviously more amendatory than confirmatory in nature, in view of the apartheid regime it replaced.

purely empirical grounds, namely that at the point of application judges do *not* in fact pay much regard to the original intentions or understandings of the rights that were chosen to be locked in. Rather, they adapt them to what they, the judges, see as changing social values and conditions. The more this is an accurate description of what is happening, the less one can justify *any sort* of judicial power in terms of preferring the potential dangers of rigidity over the potential dangers of wise majoritarian actions being stymied today. "Living constitution" interpretive techniques do not threaten rigidity, at least not for the judges. They threaten illegitimate or insufficiently restrained judicial power—kritarchy—but certainly not rigidity. Only the people and their elected representatives are locked in under this interpretive approach.[162]

The decisions of foreign courts and international tribunals are more likely to be relevant where a bill of rights is seen as a living, evolving instrument and progressive interpretation is favored. Without more, however, such an interpretive approach does not justify the decision to empower an unelected judiciary to override the will of the people and their elected representatives. Something more is required, and in the case of reliance on rights-based internationalism that something more does not seem to flow from the Constitutional Argument, and only very weakly from the Sirens Argument.

Hence, we have still to find a solid rationale applicable to internationalism in American courts.

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162. Given progressive interpretation, it follows that the efforts of those who would carefully draft a new bill of rights or an amendment with the idea of correcting a perceived "mistake" or inadequacy—perhaps one revealed by the decision of a foreign court under a provision in another country's bill of rights—are largely misguided or misplaced. Putting aside any Waldron-style concerns about the legitimacy of such an enterprise, attempts to prescribe or preclude certain interpretive outcomes are likely to fail in a constitutional system in which progressive interpretation is orthodox. For instance, Canada's Charter excluded the term "due process" in order to avoid the U.S. Supreme Court's "substantive due process" case law, only to be stymied a few years after passage of the Charter by the Supreme Court of Canada's decision that the alternative term chosen, "principles of fundamental justice," had substantive as well as procedural content. *See Reference re* B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. New Zealand avoided the use of the term "equality," preferring the term "discrimination," in order to minimize interference with social policy, only to find that the ostensibly more simple prohibition on discrimination had the same effect. *See* RISHWORTH ET AL., *supra* note 11, at 366-97.

C. The "Yes There are Objectively Right Answers" Argument

Under this heading falls all professions to the effect that disputes about rights have mind-independent right answers (the first leg of claim), and that unelected judges are in a better position to find those right answers than are elected legislators (the second leg of claim). This argument comes in a variety of guises ranging from simple intuitionism, to calling in aid "right reason,"[163] to the sophisticated, elaborate Dworkinian version with its reference to a fictional judge Hercules[164] and extensively worked out concept of integrity.[165]

Notice that this argument can succeed only if the first and second legs *both* succeed themselves. Even assuming that mind-independent right answers to moral questions (and so, to disputes about the rights in a bill of rights) exist, there is no reason to entrust such disputes to judges unless they seem better placed "to discover" or "to find" such answers. Conversely, and perhaps more obviously, the case for antimajoritarian decisionmaking processes appears to diminish if mind-independent moral answers and answers about the coverage and ranking of bill of rights' rights do not in fact exist.[166]

Jeremy Waldron points out that the first leg actually subsumes two separate issues, a metaphysical or ontological question and an epistemological question. Even if we assume that mind-independent right answers to moral and rights disputes exist, it does not follow that human beings have any way of knowing what those right answers are.[167] Indeed, Waldron goes on to argue that in a world of widespread moral disagreements and dissensus there is in fact no way to know—nothing remotely comparable to finding and testing right answers in the empirical, material, scientific world where regularities of like effect following like cause are imposed from without on human minds—what these assumed to exist moral right answers might be. If Waldron be persuasive, that too erodes the case for antimajoritarian decisionmaking processes.

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163. *See, e.g.*, T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 2 (2001).

164. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1977).

165. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 176-275 (1986).

166. Dworkin has latterly come to the conclusion that his legal theories require him explicitly to defend this position. *See, e.g.*, Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 89 (1996). One of us has argued that Dworkin's argument there signally fails. *See* James Allan, *Truth's Empire—A Reply to Ronald Dworkin's 'Objectivity and Truth: You'd Better Believe It'*, 26 AUSTL. J. LEGAL PHIL. 61 (2001), *reprinted in* SYMPATHY AND ANTIPATHY: ESSAYS LEGAL AND PHILOSOPHICAL, *supra* note 160, ch. 3.

167. *See* Jeremy Waldron, *The Irrelevance of Moral Objectivity, in* NATURAL LAW THEORY 158, 173-75 (Robert P. George ed., 1992).

The Right Answer Argument depends, therefore, on strong judicial review under a bill of rights being understood as a substantive exercise, not as itself a procedural or voting or head-counting exercise.[168] Yet here at last we have a rationale that is potentially applicable when the decisions of foreign courts and international tribunals are relied on by domestic judges to overrule the elected branches. If there be a mind-independently right answer to what the ambit and scope of, say, the freedom of speech under the First Amendment should be and how it should apply, *and* if the judges know (or are most likely to know) what this answer is, then all of us committed to rights should welcome the enunciation and imposition of that answer by the judges. More to the point, we should welcome this answer even if American courts, in finding it, need to consider the decisions of foreign courts or international tribunals. The source of the rights matters far less than the 'rightness' of their application.

If found convincing, this "Yes There Are Objectively Right Answers" Argument would clearly justify and support the transfer of power to judges under the U.S. Bill of Rights. In addition, it would also lend support to the use of the decisions of foreign courts and international tribunals.

D. The "Judicial Process is Superior to the Political Process" Argument

Legal academics are, in general, unabashedly elitist in preferring judicial resolution to political resolution. A cynic would say that this is because judges have proven more likely than legislators to deliver the sort of first-order judgments on rights questions they prefer—though that answer is given less often in the United States these days.[169] Few outside the United States suppose that this situation will not continue. For many, however, the preference for judicial review reflects disrespect, if not disdain, for the democratic process. Legal academics

168. *See* Waldron, *Freeman's Defense of Judicial Review*, *supra* note 150, at 29-32 (arguing that such judicial review *is* at core purely procedural—that is, the decisionmaking rule is simply that the most judicial votes wins, whatever the substantive merits of competing judgments).

169. And hence may possibly explain the enthusiasm of some for interpretation outside the Court. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

are less likely to see the value in the democratic process than political theorists or philosophers.

Robert Nagel has written much in this vein. As he notes, the operation of the democratic process invariably involves compromises that fail to satisfy the protagonists completely. They are likely to appear incoherent or unprincipled compared with what appear to be principled resolutions in a court of law, replete with lengthy statements of reasons (that, outside of the constitutional law community, are almost sure to go unread).[170]

It is not surprising that democratic processes are thought by some to fare badly when compared to the judicial processes. After all, judges have numerous advantages over politicians. For example, they are not subject to anything remotely like the scrutiny and criticism politicians endure from the public and the press on a daily basis.[171] Indeed, given the power they exercise judges lead a privileged existence: they are beholden to no one, and are virtually secure for life in their appointments.[172]

We do not mean to suggest that there is anything inappropriate about the independence of the judiciary. The point is that a variety of considerations make it difficult to fairly assess the claim that judicial resolution is inherently superior to political resolution as a matter of process. There is little doubt, however, that the judicial process is more attractive to most lawyers and legal academics than the political process, where lawyers have no special expertise as far as getting elected is concerned and only modest advantages in understanding and utilizing legislative machinery. More to the point, in the legislative process lawyers cannot insist that issues are resolved on their terms, pursuant to the sorts of processes with which they are familiar.

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170. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 119 (1989) ("Compared to the detached, careful evaluation of briefs and evidence in light of an explicit, consistent set of legal values that is the ideal of the judicial process, the legislative process is a nightmare of irrational decision making.").

171. Judges in most other common law countries are not subject to scrutiny prior to their appointment. Nor is their performance once in office subject to invasive scrutiny. Bob Woodward and Scott Armstrong's THE BRETHREN: INSIDE THE SUPREME COURT (1979), an exposé of the workings of the U.S. Supreme Court, has no counterpart, and judicial biographies are rare—and often hagiographic rather than critical in any event. *See, e.g.*, ROBERT J. SHARPE & KENT ROACH, BRIAN DICKSON: A JUDGE'S JOURNEY (2003); Rande Kostal, Book Review, *Shilling for Judges: Brian Dickson and His Biographers,* 51 MCGILL L.J. (forthcoming 2006).

172. Unlike in the United States, where Supreme Court justices serve for life, the highest appeal court judges in most other common law countries serve during "good behaviour" until fixed retirement ages that vary from jurisdiction to jurisdiction. It is almost unheard of for a judge to be removed from office.

This point is even more forceful outside the United States. Americans regard the court as a political institution no less than the other branches of government, and understand its work in political terms; Canadians, New Zealanders, the English, and others are more likely to see the courts' resolution of rights questions in legal rather than political terms. Relatedly, American academics often suppose that the judiciary in these countries must be apolitical, or at least less political than the American federal courts.[173]

Even assuming an apolitical bench in any comparable country, however, this in itself would not go very far in justifying rights-based internationalism. For this fourth argument to justify internationalism it is not enough to believe that the judicial process is superior to the legislative one in the United States; one also needs to believe that foreign or international judicial or quasi-judicial processes are superior to the American legislative process. Whatever the latter's faults may be thought to be, that is unlikely to be a widely held belief.

This fourth argument seems largely inapplicable to international and foreign rights-based law.

E. The "Judges Achieve Better Outcomes" Argument

The assertion here is a straightforward empirical, and indeed utilitarian one, not unrelated to the Right Answer Argument outlined above. It is that judges achieve better outcomes than elected legislators. That alleged fact, according to this argument, justifies rights-based constitutionalism. Indeed, the assertion is often a point of pride, especially for judges. Speaking on the occasion of the twentieth anniversary of the passage of the Canadian Charter of Rights, Justice Iacobucci of the Supreme Court of Canada asked rhetorically whether Canadians were better off as a

173. This is a mistake, in our view, and may be a considerable one at that. The Executive in most common law countries enjoys considerably greater power than American presidents when it comes to appointing judges to the highest courts. In Canada, for example, judges are appointed to the highest courts in all of the provinces as well as to the Supreme Court of Canada by members of the governing party (the Prime Minister and Minister of Justice) without confirmation hearings or approval procedures. One political party, the Liberal Party, has been in office for the better part of a generation—all but about nine of the last forty-two years—and as a result has appointed the vast preponderance of superior court judges sitting in Canada. It is not surprising to find that there is a relative homogeneity of outlook as a result—certainly, there is no right-left dichotomy on any Canadian appellate court—but this should not be confused with an apolitical outlook.

result of passage of the Charter.[174] He supposed, as only a judge could, that politics would have stood still had the Court not effected change through its Charter decisions, ignoring the long history of progressive legislative change prior to passage of the Charter.

Putting this problem aside, consider the ways in which judges and judicial review might achieve better outcomes than the legislative branch. It is worth remarking that the claimed better consequences—the utilitarian benefits of affording the judiciary the last word when it comes to various enunciated rights—might be achieved in terms of the welfare of certain minority groups or it might result in terms of rights themselves. Hence, the claim might be that particular groups (say, African Americans, gays and lesbians, or women) do better—have their positions more widely or deeply or intensely improved—under unelected judges than elected legislators. Alternatively, the claim might be the more encompassing one that rights themselves, or rights-based outcomes, are better protected and more fully realized across the whole population where judges are given a powerful say under the U.S. Bill of Rights.

Now obviously this claim is difficult to verify no matter how it is couched, since on either account it involves not simply identifying the good that may occur—assuming there is agreement on what constitutes a good outcome—but weighing it up with the bad. As Jeremy Waldron has observed, that bad includes more than simply the loss to the democratic process.[175] Cases such as *Dred Scott v. Sandford*,[176] *Plessy v. Ferguson,*[177] and *Lochner v. New York*[178] spring to mind on the negative side of the ledger.

In any event, on this sort of argument the source of the rights being better protected by the unelected judges does not matter all that much; it is the good consequences that matter. Therefore this argument, should one find it persuasive, also provides at least some support to a judiciary prepared to rely on rights-based internationalism to gainsay the decisions of American legislators.

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174. Frank Iacobucci, *The Charter: Twenty Years Later*, 19 SUP. CT. L. REV. 2D 381 (2003) (Can.).

175. *See, e.g.*, Jeremy Waldron, *Eisgruber's House of Lords*, 37 U.S.F. L. REV. 89, 93 (2002); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. (forthcoming 2006).

176. 60 U.S. (19 How.) 393 (1857).

177. 163 U.S. 537 (1896).

178. 198 U.S. 45 (1905).

F. The Dialogue Argument

The argument here is that rights-based constitutionalism gives rise to a dialogue of sorts between the elected branch of government and the unelected judiciary. On this account, judicial decisions can usually be understood as leaving room for a legislative response that allows a legislative purpose to be achieved, albeit by different means. Of course, where the particular bill of rights is a statutory one, as in the United Kingdom or New Zealand—where judges do not have the power to strike down or otherwise refuse to apply legislation they consider inconsistent with rights—the dialogue metaphor seems plausible. Obversely, where the bill of rights is entrenched with no explicit means for the legislature to overrule the judiciary, as it is in the United States, the dialogue metaphor appears less plausible.

Be that as it may, there are overtones here of a separation or balance of power type argument.[179] In addition to any purported long-term benefits from diffusing power (including partly to the judiciary), the Dialogue Argument also contains a set of assumptions, some of which seem almost Whiggish in the central role they afford to rationality and the possibility of better decisionmaking after consultation and debate. Hence, a dialogue between the judges and the legislature (over the specific content to give to vague, amorphous rights guarantees, over the relative ranking and scope of those rights, and over how they should relate to other social policy concerns) will lead to better decisions. Justice Brennan described the role of an "active judiciary" as

> the calmer, cooler party to a dialogue from which the community benefits over time. . . . To the extent that reason and reflection have any role to play in moral judgment and constitutional adjudication—and I believe that their role is considerable—the dialogue in which the courts and the legislature engage is a salutary one.[180]

Such a dialogue, according to this argument, leads both parties to think again, to compromise, and to reach outcomes together they could not have done apart or independently.

The Dialogue Argument seems to take for granted that the metaphor of a "dialogue" is an accurate description of what takes place between judiciary and legislature under a bill of rights regime. In fact, the relations and interactions between unelected judges and elected

179. *See infra* Part III.G.
180. Brennan, *supra* note 108, at 433-34.

legislators may look almost nothing like a dialogue.[181] Indeed, attempts at dialogue are sometimes met with great hostility from the Court, along with an assertion of judicial superiority in interpreting the Constitution, as the fate of the Religious Freedom Restoration Act demonstrates.[182] Nevertheless, this Dialogue Argument does give some, albeit rather slight, support to the practice of referring to international jurisprudence on rights questions. If we are talking about a process in which the quality of decisionmaking increases together with the level and amount of consultation and debate, then presumably the more input the better. Of course, the dialogue here would expand beyond the elected branches of government and the unelected domestic judiciary to include new participants, namely the foreign judges and international officials who have pronounced on rights-based claims. These new participants would not be given a full or guaranteed say; their influence would depend on whether the domestic judges wished to listen to their views on particular rights issues. Having made that qualification, it is worth noting that the same qualification is true of the Dialogue Argument in the domestic context. American judges may listen to American legislators and alter and shape their understanding of rights in the light of the views of the elected branches. Then again, they may not; nothing requires that they do so. It all depends on whether the unelected judges are inclined to listen, as opposed to "covering their ears, and chanting the mantra: 'It is emphatically the province of the judiciary to say what the law is.'"[183]

Nevertheless, if found convincing this rationale provides some support for rights-based internationalism.

G. The Balance of Power Argument

If it be true that power corrupts, then dividing up that power and establishing countervailing checks and balances may seem a wise idea in many circumstances. On this view, bicameralism, with a genuine house of review, seems desirable. Perhaps also federalism. Why not go the whole hog and give significant power (under the aegis of operating a bill of rights) to unelected judges? The claim here, then, is that a bill of rights sets up another branch of government that has significant—but not

181. Jeremy Waldron, *Some Models of Dialogue*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 7.

182. City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), was beyond congressional power under the Fourteenth Amendment).

183. Jeremy Waldron, *Some Models of Dialogue*, CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 8, at 7.

too great—powers. Clearly this sort of thinking is at least somewhat reflected in the judgment of the Framers of the American Constitution.

This rationale, however, cannot easily be stretched to encompass the decisions of foreign courts and international tribunals. In one sense, of course, power can be diffused anywhere. Yet it is unlikely that a majority of Americans would consent (nor did they in fact actually consent) to establishing an explicit balancing and checking role for judges of foreign courts or members of international tribunals, even if that role be only at the discretion of American judges hearing particular cases.

This argument seems to us plausibly applicable only in regard to domestic rights guarantees.

H. The Tyranny of the Majority Argument

The spectre of the potential "tyranny of the majority" is often raised as justification for the transfer of power from the elected branch of government to the judiciary. Leave aside the fact that any convincing weighing up of relative dangers needs to balance the potential threat of majority rule and the spectre of a tyranny of the majority against the potential threat of minority rule and the spectre of a tyranny of the unelected few. The Tyranny of the Majority Argument seems to function simply by claiming that majoritarianism—letting the numbers count—comes with too big a price tag; it is too likely to lead to the sacrifice of individual rights. Majority rule needs to be tempered by placing in the hands of the judiciary the power to ensure that legislation (passed on the basis of representative majoritarianism) can be struck down when it is considered by judges to be inconsistent with certain enumerated individual rights and that inconsistency is not (again, thought by the judges to be) reasonable or defensible.

The Tyranny of the Majority Argument is a recurring theme in constitutionalism, not only in the United States. Here is an example from the extrajudicial writings of Chief Justice McLachlin of the Supreme Court of Canada:

> [I]t is wrong to suggest, as some do, that anything that limits what the elected majority might wish to do—including judges—is anti-democratic. This notion that Parliamentary democracy resides only in majority rule is both false and dangerous. It is *false* because, as we have seen, the power of elected officers is necessarily limited by the law in a constitutional democracy. And it is dangerous. It offers no protection against the tyranny of the majority and it overlooks the need to accommodate and validate minoritarian views essential to

> long-term democratic stability. . . . In a pluralistic constitutional democracy, majorities are not permitted to impose their moral values, their conception of the good life, at the expense of those who do not control political life. Each Canadian is a member of a minority, in one sense or another. Each of us can see, from that perspective, that democratic rule is not the same as majority rule.[184]

Notice the subtle, yet important, suggestion by Chief Justice McLachlin that the judiciary is the only branch of government interested in protecting rights. This deprecation of the elected branch of government resonates with the public in many countries; the people are only too willing to think the worst of politicians, and to presume that legislators are prone to excesses. As Jeremy Waldron has observed, however, criticism of democratic majoritarianism overlooks the obvious point that the Court is itself a majoritarian institution. The same hotly contested issues that legislators address are faced by judges, and like legislators judges decide cases by voting on their outcome. A five-four decision of the United States Supreme Court is as effective as a nine-zero decision in striking down legislation that might have been passed by a unanimous legislature.

Be that as it may, the Tyranny of the Majority Argument is in some ways similar to the preceding Balance of Power Argument. The difference is this: If you fear majoritarianism and seek to temper it, then rights-based norms, standards, and line-drawing answers from foreign courts and international tribunals may be seen as yet another useful constraint.

This argument provides some support for rights-based internationalism.

I. The "Bills of Rights Change Nothing" Argument

This is the home of the cynic. For the cynic, judges operating under the U.S. Bill of Rights always have an eye on popular opinion, on what would have been the result of democratic decisionmaking. True, the judges can get slightly ahead of, or fall slightly behind, the public mood. But they are unlikely to do so for very long.[185] Some cynics therefore see no benefit in bills of rights, with the powerful judiciaries they establish. Others seem to see them as roughly equivalent to Roman circuses, a pleasant diversion for many and so worth having for that reason, if not for any other.

This argument seems to work only for domestic rights guarantees. To the extent that it justifies the kind of transfer of power to the judiciary that comes with a bill of rights, it fails to do so for rights-based

184. Beverley McLachlin, Chief Justice of Canada, Judging, Politics, and Why They Must be Kept Separate, Address Before the Canadian Club of Toronto 2 (June 17, 2003), *available at* http://www.canadianclub.org/speeches/speech_2926.pdf.

185. *See* Mark Tushnet, *Scepticism about Judicial Review: A Perspective from the United States*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS, *supra* note 2, at 359, 365.

internationalism. American judges may have an eye on popular opinion in the United States, but it is much less credible—in fact downright implausible—to assert that foreign rights-based decisionmakers are concerned with American public opinion and will not get too far ahead of, or fall behind, it. Indeed, their views may differ greatly, which is precisely why some want to import their decisions.

J. Summary

We have outlined the main sorts of arguments commonly used to justify the adoption of a bill of rights and the resulting rights-based constitutionalism that follows in its wake. Four of these arguments—the Constitutional, Superiority of the Judicial Process, Balance of Power, and Cynic's Arguments—provide no or virtually no support for the use of the decisions of foreign courts or international tribunals in American courts. In other words, even if you are inclined to think that these arguments are available rationales in the context of domestic rights guarantees, they will not help justify appeals to rights-based internationalism.

On the other hand, five of the above arguments—namely, the Sirens, Objectively Right Answers, Judges Achieve Better Outcomes, Dialogue, and Tyranny of the Majority Arguments—potentially work to varying extents in justifying the use of the decisions of foreign courts and international tribunals. In other words, if (and only if) you find these arguments persuasive justifications in the context of domestic rights guarantees, you will also have grounds to find them so for international and comparative law rights guarantees.

In our view, however, none of these latter five arguments—alone or in tandem, and even taking account of the interpretation dilemma—suffices to justify the use of foreign and international authority in interpreting the U.S. Bill of Rights. This is the more so if it is accepted that rights-based internationalism produces a ratcheting-up effect—that the incentives lie far more on the side of increasing the range of situations to which indeterminate, amorphous rights guarantees apply, at the expense of democratic law making powers.

Making a brief case for the likelihood of that ratcheting-up effect is the object of the third part of this article.

IV. PART III—THE RATCHETING-UP EFFECT OF FOREIGN AND INTERNATIONAL LAW

We began in Part I by arguing that the rights-based jurisprudence of other common law countries and international tribunals rests on distinctly non-American premises and understandings of rights, quite apart from clear differences in the various sorts of bills of rights. Approaches to the interpretation of rights differ along with judges' perceptions of their role, to say nothing of the background democratic institutions and checks and balances. In the second part, we set out the sorts of justifications typically employed in attempts to rebut the countermajoritarian difficulty, the seeming illegitimacy of unelected judges drawing too many of society's social policy lines—lines that must be drawn when abstract, amorphous rights guarantees have to be applied to everything from abortion to euthanasia, hate speech, and religious freedom. We also indicated which of those justifications we thought were potentially applicable when it is foreign and international rights-based law and norms that are being used to justify the exercise of judicial power, noting that there are fewer such plausible justifications once it is the views of foreign judges and international experts that are being relied upon to gainsay American legislators.

Our main thesis, as noted at the start of this paper, is simply that Americans should be more wary than most when it comes to the decisions of foreign courts and international tribunals. As we have noted, unlike some who have adopted bills of rights, Americans have never agreed that the decisions of foreign courts are or should be relevant; they have not empowered their courts to engage in rights-based internationalism for domestic purposes. Nor have they instructed or authorized their judges to engage in the sort of global dialogue that many jurists suppose to be their duty.[186] It is incumbent on proponents of rights-based internationalism to make the case for it. In our view the similarities between the U.S. Bill of Rights and other bills of rights are insufficient to overcome the considerable differences between American and other forms of constitutionalism. The arguments just outlined and elaborated in detail in Parts I and II, above, form the first two branches of our case for that conclusion.

The third and final ground we give for being wary of foreign rights-based constitutionalism is the tendency it has to produce a ratcheting-up effect, one where judges in each jurisdiction are tempted to draw on the most

186. *See, e.g.*, L'Heureux-Dubé, *supra* note 15, at 40 ("No longer is it appropriate to speak of the impact or influence of certain courts on other countries, but rather of the place of all courts in the global dialogue on human rights and other common legal questions.").

expansive interpretations of judges from other jurisdictions, while almost never being tempted to rely on their more restrictive interpretations. Justice Scalia's critique of this practice is short and to the point: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."[187]

Consider the New Zealand experience we outlined above, where the judges took an enervated, statutory bill of rights—a parliamentary bill of rights, according to its sponsor—and in fewer than a dozen years conferred quasi-constitutional status upon it, interpreting it in a manner more suited to what they thought it should say. They emphasized the reading-down provision; established a power to issue declarations of inconsistency; and created a cause of action for breach of rights.[188] Much of this was accomplished by pointing to the decisions of foreign courts and international tribunals, and arguing that what bills of rights required elsewhere—even bills of rights that were wholly unlike New Zealand's because entrenched and constitutionalized—should also be required in New Zealand. *Baigent's Case*[189] is perhaps the most obvious and egregious example of this tactic of pointing to broader, more expansive practices abroad to ratchet-up the practice at home. In *Baigent's Case* the New Zealand Court of Appeal (then New Zealand's highest domestic court) drew support from judicial decisions from Canada, Ireland, India, the West Indies and more, as well as from decisions of the United Nations Human Rights Committee (UNHRC) under the ICCPR, in order to create a public law cause of action for breach of the New Zealand Bill of Rights, and did so despite the deliberate decision of the New Zealand Parliament to omit a remedies provision.[190]

Not all of the New Zealand decisions have been so expansive as regards rights, but even the more conservative decisions of New Zealand courts make an important point. For instance, the New Zealand Court of Appeal rejected the argument that legislation allowing only opposite-sex marriage was inconsistent with the prohibition on discrimination on the ground of

187. Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).
188. *See* Allan, *supra* note 85.
189. *Baigent's Case*, [1994] 3 N.Z.L.R. 667.
190. *Id.; see* James Allan, *Speaking with the Tongues of Angels*, [1994] 1 N.Z. BILL RTS. BULL. 2; J.A. Smillie, *The Allure of 'Rights Talk':* Baigent's Case *in the Court of Appeal*, 8 OTAGO L. REV. 188 (1994).

sexual orientation in *Quilter v. Attorney General*.[191] The plaintiffs in that case then complained to the UNHRC but the Committee held that the ICCPR did not provide a right to same-sex marriage.[192] Yet it is noteworthy that neither of these decisions features in the recent Canadian decisions holding that the opposite-sex requirement in the law of marriage violated the Charter. This is precisely the sort of picking-and-choosing that can be expected with internationalism. In a world of sometimes widely-differing decisions and no settled comparative law methodology, the normative preferences of the judges hearing particular cases are likely to determine whether or not a particular foreign or international precedent makes its way into a judicial decision.

The direction of movement seems to us to be virtually all one way, towards recognizing more and more instances in which rights guarantees apply—and hence, less and less room for democratic decisionmaking. It is rare to find examples of domestic judges pointing to foreign cases or the decisions of international tribunals in support of decisions to limit or rein in the range or reach of rights.

The issue of prisoner voting entitlements reinforces this last point. Numerous countries including the United States, the United Kingdom, Australia, and New Zealand place some sort of restrictions on whether and when prisoners can exercise the franchise.[193] The same was true in Canada, before two decisions of the Supreme Court of Canada.[194] In the second of those two decisions the Chief Justice of Canada, writing for a five Justice majority, dismissed out of hand the approach taken in other countries:

> I conclude that denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all *self-proclaimed*

191. [1998] 1 N.Z.L.R. 523 (C.A.); *see* RISHWORTH ET AL., *supra* note 11, at 377-80 (discussing *Quilter*).

192. Joslin v. New Zealand, Commc'n No. 902/1999, U.N. GAOR Human Rights Comm., 75th Sess., Supp. No. 40, at 214, U.N. DOC. A/57/40 (Vol. II) (2002), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/668/60/img/N0266860.pdf?OpenElement.

193. Many United States jurisdictions restrict or completely deny voting rights to prisoners. *See, e.g.*, CAL. CONST. art. 4, § 2 (no right to vote in prison or on parole); COLO. CONST. art. 7, § 10 (no right to vote while in prison).

194. In *Sauvé v. Canada (Att'y Gen.)*, [1993] 2 S.C.R. 438, the Supreme Court of Canada struck down a blanket ban on prisoner voting. Later, in *Sauvé II*, [2002] 3 S.C.R. 519, in a five-four decision the Supreme Court of Canada struck down a legislative compromise taking away the franchise only from those convicted of more serious offences.

> *democracies* adhere to this conclusion says little about what the Canadian vision of democracy embodied in the *Charter* permits.[195]

Certainly there was no suggestion that the understandings of rights in these other countries lent any support at all to the Canadian Parliament's decision to limit the right to vote.

"[T]he persuasive force of international law,"[196] as Justice Kirby of the High Court of Australia calls it, is near to being a one-way street. Reliance on it does and will carry with it a ratcheting-up effect; it will almost never be used to pare back the scope and ambit of situations that rights guarantees are held to protect. That, in our view, is a third reason why Americans should be wary about making use of the rights-based decisions of international bodies and foreign courts.

V. CONCLUSION

The idea of constitutionally entrenched rights originated in the United States and it has spread widely in the latter half of the twentieth century. There is increasing pressure on American judges to heed the human rights jurisprudence of foreign courts and international tribunals when interpreting the U.S. Bill of Rights. It is widely assumed that the influence of rights-based internationalism is wholly benign and a force for good.

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195. *Sauvé II*, [2002] 3 S.C.R. at 548 (emphasis added). The gratuitous reference to "self-proclaimed democracies" presumably includes the United States, New Zealand, and Australia, all of which are referred to in Justice Gonthier's dissenting opinion. *Id.* at 588, 591 (Gonthier, J., dissenting).

196. Al-Kateb v. Godwin (2004) 219 C.L.R. 562, *available at* 2004 WL 1747386, at *629. Justice Kirby has written and spoken at length about the internationalization of rights-based law, claiming that the "willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years." *Id.* at *627 (citing Canada, Germany, India, New Zealand, and the United Kingdom, in addition to the United States). To his dismay, his approach has not *yet* been adopted in Australia. *Id.* at *622. However, he asserts confidently: "[W]ith every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail." *Id.* at *629. Kirby suggests that they will be viewed as notorious precedents like *Dred Scott*, "with a mixture of curiosity and embarrassment." *Id.*; *see also* Justice Michael Kirby, International Law—The Impact on National Constitutions, Lecture at the Annual Meeting of the American Society of International Law (Mar. 29, 2005) (expanding on his views), *available at* http://www.asil.org/pdfs/kirbygrotius050401.pdf.

We have argued that this assumption, however widespread, is a dubious one. Americans have more reasons than others to be especially wary about rights-based internationalism.

The reason for this is not (or not largely) because American constitutional law is becoming ever less relevant in other countries with bills of rights—though we think that is the case. Nor is it because (or largely because) top foreign common law judges face nothing like the scrutiny of top U.S. judges when appointed, while international law "experts" win their posts via an even more opaque, political trade-off reliant process—though that too is true.

Instead, the three main reasons we have given for counseling wariness on the part of Americans when it comes to rights-based internationalism are these: First, quite apart from differences in bills of rights and understandings of rights across various countries and internationally, the very basics of American constitutionalism—the conception of the state and its role, the relevance of institutional checks and balances, and so on—are not shared internationally, and sometimes differ greatly. These differences combine to create a comparison of apples and oranges. When the U.S. Supreme Court considers a decision from a top common law court or international tribunal about how an abstract, indeterminately phrased right should apply to a concrete and specific issue, it is nothing like the situation when it considers its own precedents.

Our second reason for wariness is that bill of rights adjudication takes place against the backdrop of the countermajoritarian difficulty. It is one thing—and perhaps in itself a difficult thing—to justify the power handed to domestic judges to interpret a domestic bill of rights adopted after debate and disagreement and some sort of head counting exercise some time in the nation's past. It is a significantly different thing—and we have argued in Part II above a much more fraught and dubious thing—to try to justify giving a role to the decisions of foreign courts and international tribunals to gainsay elected American legislators. In fact, we have argued that no justifications, alone or together, exist to justify American judges making use of comparative and international rights-based law to trump the American democratic process.

The third and last main reason for wariness is the likelihood, the strong likelihood, of a ratcheting-up effect accompanying any shift to greater reliance on foreign precedents. We think the former will certainly attend the latter, and cause an overall diminution of the scope for democratic decisionmaking in the United States.

Comparative constitutional law is a worthwhile exercise in a variety of contexts, most obviously in the drafting of constitutions. Indeed it is a necessary exercise in interpreting bills of rights in some

countries. However, it has less of a place in interpreting the U.S. Bill of Rights than its proponents have established. America's top judges should think twice before constitutional rights come home to roost.