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The New Commonwealth Model of Constitutionalism

I. Introduction

Comparative constitutional law takes as its starting point and key subject matter the astonishing growth of constitutionalism that has taken place around the world in the last sixty years.[1] Within the discipline, the central narrative of this growth focuses on two periods and sets of developments: the creation of domestic charters of fundamental rights and their enforcement through the adoption of judicial review of legislation in many western European countries and Japan following World War II, and the constitution-making and creation of constitutional courts that has taken place in central and eastern Europe since 1989.[2] Notwithstanding important and fascinating differences in the forms that these developments have taken (study of which is a core element of the discipline), however, the fundamental story is one in which the essentials of the American model of constitutionalism have been adopted.

These essentials stipulate a necessary and fundamental incompatibility between legislative supremacy and the effective protection of fundamental rights, so that opting for the latter requires "constitutionalizing" them in the following specific sense. First, granting fundamental rights higher legal status than legislation. Second, entrenching them against ordinary legislative amendment or repeal.

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1. Comparative constitutional law textbooks tend to begin by recounting this development as supplying the raw material of the discipline. See Mauro Cappelletti & William Cohen, *Comparative Constitutional Law: Cases and Materials* (1979), Chapter 1: "The History and Contemporary Expansion of Judicial Review"; Vicki Jackson & Mark Tushnet, *Comparative Constitutional Law* v-ix (1999). See also, Kommers, "The Value of Comparative Constitutional Law," 9 *John Marshall L. Rev.* 685, 686 (1976) (citing the "relative success of newly created constitutional courts" and "the spreading phenomenon of judicial review in various parts of the world" as causes of the rise of comparative constitutional law as a taught discipline in the United States); Ackerman, "The Rise of World Constitutionalism," 83 *Virginia L. Rev.* 771 (1997) (arguing that American legal academics should contribute their fair share to the analysis of the "enlightenment hope in written constitutions" and constitutional courts that is currently sweeping the world).

2. Id. For a brief discussion of these developments, see infra Part II.

Third, enforcing their higher legal status by means of judicial power to set aside conflicting legislation, exercise of which is unreviewable by ordinary legislative majority. To only slightly paraphrase John Marshall, individual rights are either supreme law, entrenched and enforced by an unreviewable judiciary or they are ordinary law changeable by legislative majority: "between these alternatives there is no middle ground."[3] The adoption of this model in western Europe and elsewhere after 1945, and again in central and eastern Europe after 1989, typically involved moving from one side of the incompatibility to the other: a historic and deliberate switch from legislative to constitutional supremacy, by means of entrenching bills of rights as supreme law and granting to some set of judges (or quasi-judicial officials) the unreviewable power to invalidate incompatible legislation.[4] In short, the recent growth of world constitutionalism has been the growth of the model of constitutionalism invented in the United States.

There has, however, been a collectively less noticed set of developments among a different group of countries in the last twenty years that presents an intriguing alternative to this model, an alternative that rejects its central axiom that the claims of legislative supremacy and the effective legal protection of fundamental rights are necessarily incompatible and mutually exclusive so that a legal system can

3. These essentials were first spelled out by Chief Justice John Marshall in the course of finding a power in the U.S. Supreme Court to invalidate congressional legislation that conflicts with the Constitution, notwithstanding that no such power is explicitly contained in its text. Marshall made these arguments in the context of constitutional law generally, rather than fundamental rights specifically, but this does not alter the argument once such rights are included in the Constitution. According to Marshall, "Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. " Since the Constitution is indeed supreme law, then courts must have the power to disapply conflicting congressional acts as part of their ordinary duty to adjudicate a case or controversy to which they both apply. Marbury v. Madison, 1 Cranch (5 US) 137 (1803), at 177.

4. Although legislative supremacy and effective fundamental rights protection are thus viewed as incompatible, in that the first expresses the claims of unlimited majoritarianism and the second that of its limits, they do not form a binary system such that every legal system must adopt one or the other. Thus, a number of legal systems both past and present place legal limits on legislative power without directly protecting fundamental rights. Federalism and the separation of powers are the major examples. Prior to their interwar dictatorships, both Germany and Austria instituted a form of judicial review to enforce separation of powers limits on the various branches of the government. This was the original design of the French system under the Fifth Republic, with judicial review policing the boundaries between legislature and executive power rather than protecting fundamental rights. Australia has a constitution with judicial review of federalism but without a bill of rights. This was, of course, to some extent the original form of the U.S. Constitution prior to the adoption of the Bill of Rights in 1791 (although there are a few rights in the main body of the Constitution) and before the Fourteenth Amendment's incorporation of the Bill of Rights against the states in the twentieth century.

endorse one or the other but not both.[5] Between 1982 and 1998, each of the Commonwealth countries of Canada, New Zealand, and the United Kingdom -- countries that were previously among the very last democratic bastions of traditional legislative supremacy — adopted a bill of rights in a form that self-consciously departed from the American model by seeking to reconcile and balance the rival claims, to create a middle ground between them rather than adopt a wholesale transfer from one pole to the other. Most noticeably, while granting courts the power to protect rights, they decouple judicial review from judicial supremacy by empowering legislatures to have the final word. It is, of course, the perceived tension between the two claims within a democratic political system that is often thought to create the countermajoritarian difficulty[6] and the various related discontents associated with traditional judicial review. Accordingly, these countries have created a new third model of constitutionalism that stands between the two polar models of constitutional and legislative supremacy.

Most recently, as the centerpiece of what has been described as "a remarkable new age of constitutionalism in the UK,"[7] the British Parliament enacted the Human Rights Act of 1998[8] [hereinafter "the HRA"]. By incorporating the European Convention on Human Rights into domestic law,[9] this Act creates for the first time in Britain a comprehensive charter of rights that in *content* is broadly comparable to both those in the United States and the modern success stories of the

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5. By "collectively less noticed," I mean primarily that there is little comparative constitutional law scholarship looking at these developments as a whole. There has, of course, been a good deal of scholarship in each of the countries in the group on the developments individually, see work cited in infra Part III. Within the U.S., there has been some discussion of the developments in Canada. See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 39 (1991) (Canadian Constitution shows how "rights can appear in strong, but not absolute, form"); Michael J. Perry, *The Constitution in the Courts: Law or Politics?* 196-201 (1994) (advocating consideration of the Canadian "override" mechanism in the U.S.); Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," 94 *Mich. L. Rev.* 245 (1995) (Canadian experience suggests there may be no real alternative to Thayerian "judicial minimalism" as the solution to the problem of democratic debilitation).

6. The term was coined by Alexander Bickel, *The Least Dangerous Branch* 16 (1962). For discussion of the issue, see infra Part IV.C.

7. Bogdanor, "Devolution: The Constitutional Aspects," in *Constitutional Reform in the United Kingdom: Practices and Principles* (1998).

8. 1998 Human Rights Act (c.42). The Act came into force on October 1, 2000.

9. The United Kingdom was an original party to the European Convention on Human Rights, an international treaty concluded under the auspices of the Council of Europe in 1950. The Convention contains a set of individual rights and freedoms that the parties undertake not to violate and is applied and enforced by the European Court of Human Rights, sitting in Strasbourg, France. The treaty does not require the parties to incorporate the rights as part of their domestic law, although most have done so, meaning that individuals in those countries may seek relief for violations of these rights from domestic courts without filing a case with the Strasbourg court. The HRA was enacted to incorporate the ECHR into domestic UK law for the first time.

standard narrative. But the *manner* in which these rights have been incorporated under the HRA, as was the case with the Canadian and New Zealand bills of rights before it, amounts to a deliberate rejection of the American model of constitutionalism with its perceived excesses of judicial power. In its place, an attempt has been made to create institutional balance, joint responsibility, and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights that these countries believe the legitimate core claims of parliamentary sovereignty require.

The experiment by these three Commonwealth countries to transcend Marshall's law of the excluded middle and to reconcile what the dominant paradigm posits as incompatible values is obviously an interesting and important one, for if successful it would create analytical and practical space in domestic and comparative constitutional law that was generally thought not to exist. Rather than a mutually exclusive choice between two incompatible poles, the Commonwealth model suggests the novel possibility of a continuum stretching from absolute legislative supremacy to the American model of a fully constitutionalized bill of rights with various intermediate positions in between that achieve something of both. Moreover, although all three of the Commonwealth bills of rights reject the American model in that they seek to render the protection of a bill of rights consistent with their traditional conceptions of democracy and parliamentary sovereignty, each does so in a different way and thus occupies a different position on this continuum between the two poles.

In addition to its significance in offering novel institutional options, the new model suggests solutions to a number of practical and theoretical problems that have long been thought to bedevil the American model. By attempting to create joint responsibility and genuine dialogue between courts and legislatures with respect to fundamental rights, the new model promises both to reinject important matters of principle back into legislative and popular debate and to provide a radically direct resolution of the democratic difficulties associated with traditional judicial review.[10]

This article identifies, analyzes, and evaluates the new Commonwealth model of constitutionalism. Part II briefly describes the essential characteristics of the dominant American model of constitutionalism and its widespread adoption around the world in the last sixty years. In Part III, I explain how each of the three Commonwealth countries has rejected this model in enacting its recent bill of rights and the different way in which each has attempted to reconcile what the dominant model takes to be irreconcilable. In Part

10. Tushnet labels these two problems created by judicial review "democratic debilitation" and "democratic displacement" respectively. See Tushnet, supra n. 5, at 246-47.

IV, I assess this new model of constitutionalism. Section A sets out in greater detail its general nature and features. Section B compares the Commonwealth and American models by analyzing (a) the potential benefits and advantages of the former, (b) the extent to which they are distinctive to it, and (c) the new model's impact on existing justifications for traditional judicial review. Section C considers which of the three versions of the new model — the Canadian, New Zealand, or British — is the most likely to bring about its general benefits.

II. The American Model of Constitutionalism and its Widespread Adoption After 1945

The United States Constitution was, of course, both the product of a successful revolution and a successful revolution in itself — in constitutionalism and constitutional thought.[11] It was framed first and foremost in direct contrast to the British constitution[12] which, whatever the general merits of its claims to adequately protect liberty, was adjudged by its former American colonial subjects to have utterly failed to protect their common law rights and liberties. Squarely and self-consciously rejecting the fundamental British constitutional doctrine of the sovereignty of Parliament,[13] the new United States created a system of government premised on the notion that legislative power is legally limited and soon empowered courts to enforce these limits.[14] On each of the following three issues, the

11. The U.S. Constitution was the first modern written constitution and the first ever to have effective status as supreme law. The explanation of the Constitution's provisions set out in the Federalist Papers underscores the originality of its republican attempt to cure the diseases of ancient republics and to protect liberty through the structural mechanisms of checks and balances. See also Gordon S. Wood, *The American Revolution: A History* 159-62 (2001) (describing the Constitution's retention of sovereignty in the people rather than merely deriving it from them and depositing it in an institution of government as "one of the most creative moments in the history of political thought.").

12. The British constitution is not a single document or group of documents, but is the aggregate set of laws (statutory and common law), rules, principles, conventions, and practices that collectively define the composition, functions, and interrelationships of the institutions of government, and delineate the rights and duties of the governed.

13. The classic definition of the sovereignty of Parliament is that of Dicey: "Parliament. . .has the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 38 (8th ed., 1920). Dicey describes the sovereignty of Parliament as "from a legal point of view, the dominant characteristic of our political institutions." Id., at xviii.

14. These limits are first that a few legislative powers are denied to both federal and state governments, then the total remaining legislative powers are divided between nation and states in the federal system under the doctrine of enumerated powers. Federal legislative power is further limited by the doctrine of separation of powers, and from 1791 also by the Bill of Rights. The Fourteenth Amendment was ultimately interpreted to incorporate almost all of the limits contained in the Bill of

United States Constitution gave the opposite answer to that of the British constitution, and in so doing defined the polar differences between the legislative and constitutional supremacy models of constitutionalism. First, the U.S. Constitution, including the Bill of Rights and all subsequent amendments, is the supreme law of the land, which means that it prevails in the case of conflict with any other legal rule, federal or state, whether that other legal norm came into being prior or subsequent to the Constitution.[15] By contrast, in Britain, Acts of Parliament are the supreme law of the land and their content is legally unlimited.[16] Second, the U.S. Constitution is "entrenched" in the sense that it cannot be amended by ordinary legislative act but only by the special and distinct supermajority procedure set out in Article V.[17] In Britain, the sovereignty of Parliament means that it can amend or repeal any previous legislation by ordinary majority. Indeed, it can do so either expressly or impliedly. Under the doctrine of implied repeal, a subsequent statute in conflict with a prior one repeals the latter to the extent of the conflict. This doctrine is a central mechanism for ensuring that Parliament cannot bind its successors in form or substance and that each succeeding Parliament enjoys the same full and equal sovereignty as its predecessors.[18] Third, the supremacy of the U.S. Constitution is enforced by the judiciary, which has the power and duty to set aside any legal rule, including federal legislation, that conflicts with it, and against

Rights against the states. Of course, the Constitution itself contains no clear grant of the power of judicial review to the courts, but was inferred by Chief Justice Marshall (and others) from the status of the Constitution as supreme law, itself (with respect to federal legislation) a structural inference from its written nature. See Marbury v. Madison, supra n. 3.

15. U.S. Constitution, Art. VI, section 2, as interpreted by Marbury, supra n. 3, to grant supremacy to the Constitution over conflicting Acts of Congress.

16. See Dicey, supra n. 13.

17. The procedure is that Congress proposes amendments by two-thirds majorities of both houses, which must be ratified by three-quarters of the state legislatures (or by conventions in three-quarters of the states as determined by Congress). Alternatively, Congress must call a constitutional convention for proposing amendments when two-thirds of the state legislatures so request, ratification by the same three-quarters of state legislatures (or state conventions). U.S. Constitution, Article V. Professors Bruce Ackerman and Akhil Amar have separately argued that this formal supermajority procedure is not exhaustive but may be supplemented by more informal, populist ones. See Bruce Ackerman, *We the People: Foundations* (1991); Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V," 94 *Colum. L. Rev.* 457 (1994).

18. In Ellen Street Estates Ltd. v. Minister of Health, [1934] 1 KB 590, at issue was a 1919 Act that contained a provision that subsequent conflicting statutes "shall cease to have or shall not have effect. . .". A 1925 Act conflicted with the 1919 Act but the Court of Appeal held that the 1919 Act must give way to it. "The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If, in a subsequent Act, Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature."

whose decisions federal and state legislatures are powerless to act by ordinary majority.[19] Even with the required two-thirds supermajority of both houses, Congress can only propose constitutional amendments; it is the state legislatures (or conventions) that must ratify them. In Britain, the sovereignty of Parliament means that no court has the power to question the validity of an Act of Parliament, the supreme law of the land.[20]

Prior to 1945, the model of legislative supremacy, as exemplified not only by the British doctrine of parliamentary sovereignty but also by the French doctrine that acts of the legislature are the supreme expression of the peoples' general will,[21] was the dominant model of constitutionalism throughout the world, particularly with respect to the issue of individual rights and civil liberties.[22] The very few

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19. It is sometimes claimed that Congress has the power to respond by limiting the jurisdiction of the federal courts, including the Supreme Court, by ordinary majority under the power granted to it by Article III, section 2, cl. 2. Use of this power would still not enable Congress to overturn individual decisions already handed down by the courts (which would presumably retain their precedential value), but to prevent specified categories of cases from being heard in the future. More importantly, "the power to regulate jurisdiction has never served as a significant limit on the power of judicial review," Tushnet, supra n. 5, at 285-87. For more on this topic, see infra nn. 152-54.

20. I am here stating the traditional British conception of parliamentary sovereignty. This has been altered in the following way by the UK's membership of the European Union ["EU"]. Under EU law, EU law is supreme over all domestic law and judges are required to enforce this supremacy by giving effect to EU law in cases of conflict. British courts have accepted that this requirement follows from membership of the EU, and was made applicable to the UK by its European Communities Act, 1972. Accordingly, this statute impliedly authorizes such a power in the courts. See Regina v. Secretary of State for Transport ex parte Factortame Ltd. [1991] AER 70 ("Under the terms of the European Communities Act of 1972 it has always been clear that it was the duty of a United Kingdom court. . .to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.") It has similarly been interpreted to oust the doctrine of implied repeal, which would also be inconsistent with the supreme status of EU law. Parliament remains at liberty to amend or repeal the ECA and there is some suggestion by the courts that should Parliament ever expressly declare that it intends to act inconsistently with EU law the courts will obey Parliament, although this seems inconsistent with the full supremacy of EU law. See Macarthys Ltd. v. Smith [1979] 3 AER 325 ("if the time should come when our parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms, then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."). The traditional conception has also been altered by the HRA in the ways discussed in infra Part IIIC.

21. Article 6 of the Declaration of the Rights of Man, 1789, stated that statutes (lois) are the supreme expression of the general will. This was interpreted as meaning that Parliament's enactments enjoyed the status appropriate to the expression of the will of the sovereign. See John Bell, *French Constitutional Law* 25 (1992).

22. The fact that the form of legally unlimited legislative power is often the vehicle for non-constitutionalist, dictatorial regimes, should not mislead one into denying that it is a form of constitutionalism. In many Latin American countries the form of the American model, adopted during the nineteenth century, has also been the vehicle for dictatorship. See Allen Brewer-Carias, *Judicial Review in Comparative Law* 156 (1989). What both of these facts suggest is that constitutionalism cannot be reduced to form.

courts that had the power to review the constitutionality of national legislation for violations of fundamental rights fell into one or more of three categories: they were recent or brief experiments; their claims to such power were heavily contested; or they exercised it in theory but not in practice. Thus, Ireland expressly established judicial review under its 1937 Constitution,[23] which included protection of fundamental rights. The first two specialized constitutional courts were established in the new republics of Austria (1920-1933) and Czechoslovakia (1920-1938), but the jurisdiction of the former was limited until 1929 to petitions from the other branches of government and dealt only with separation of powers issues.[24] In Spain, a specialized court, the Court of Constitutional Guarantees, operated from 1933 to 1936 under the ill-fated Second Republic.[25] In Weimar Germany, the two highest general courts on occasion claimed for themselves the power of judicial review despite silence on this issue in the Constitution, but in practice rarely exercised it and never with respect to individual rights.[26]

The obvious and catastrophic failure of the legislative supremacy model of constitutionalism to prevent totalitarian takeovers, and the sheer scale of human rights violations before and during World War II, meant that, almost without exception, when the occasion arose for a country to make a fresh start and enact a new constitution, the essentials of the polar opposite American model were adopted. In order effectively both to protect, and express their commitment to, fundamental human rights and liberties, country after country abandoned legislative supremacy and switched to an entrenched, su-

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In Canada, Australia, Germany, and Switzerland, some form of judicial review of the federalism boundaries between central and provincial governments appeared before 1945, but not with respect to individual rights.

23. Irish Constitution, Article 34, Section 3, clause 2: "Save as otherwise provided in this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised. . .in any court. . .other than the High Court or the Supreme Court."

24. The Austrian Constitution contained no bill of rights, due largely to Hans Kelsen's view that individual rights ("norms of natural law") were inappropriate for judicial review. Discussing the work of the Austrian Constitutional Court, Cappelletti and Cohen observe that "laws which curtailed individual liberties remained practically speaking outside the ambit of [court] control." Cappelletti & Cohen, supra n.1, at 87.

25. On the structure and jurisdiction of this court, see Brewer-Carias, supra n. 22, at 225-26.

26. The decision of the Reichsgericht of 4 November 1925 asserted the power of judicial review most clearly. But as one commentator describes the situation, German courts "did not [use the power] to protect fundamental rights." Favoreu, "Constitutional Review in Europe," in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin & Albert Rosenthal eds., 1990). See also Brewer-Carias, supra n. 22, at 204 ("nevertheless, the situation of the system of judicial review [in Germany] up to 1933 was not completely clear so that judicial review of federal laws by all courts was not always accepted and was frequently criticized.").

preme law bill of rights that was judicially (or quasi-judicially) enforced. These included the three Axis powers, Germany (1949), Italy (1948), and Japan (1947); Spain (1978), Portugal (1982), and Greece (1975) when they emerged from authoritarian dictatorship; France under the current Fifth Republic (1958),[27] as well as Cyprus (1960), Turkey (1961), and Belgium (1984). Austria reinstated its constitutional court and 1929 constitution, with amendments, in 1945. Currently, within western Europe, only the Netherlands and Luxembourg have not changed their constitutions to depart from the traditional model of legislative supremacy and do not permit any form of judicial review of legislation.[28] Until last year, Finland was a third member of this exclusive group but under its new Basic Law, a very limited power of judicial review is granted to the courts.[29] This brings it more or less into line with the three other Nordic countries of Sweden, Denmark, and Norway, which essentially share a tradition in which an ultimate, residual power of judicial review is acknowledged in theory but in practice gives way to legislative supremacy.[30] Switzerland permits judicial review of state (cantonal) but not federal legislation.

A second concentrated burst of constitutionalization has taken place in central and eastern Europe since the breakup of the Soviet system in 1989. The creation of constitutional courts exercising the power of judicial review has been a universal phenomenon, alongside new constitutions and entrenched bills of rights. They include Poland (1986)[31], Hungary (1990), Russia (1991), Bulgaria (1991), Czech

27. In France, the conseil constitutionnel has exercised judicial review with respect to individual rights only since 1971, when it interpreted the preamble to the 1958 Constitution as incorporating both the 1789 Declaration of the Rights of Man and the rights contained in the preamble to the 1946 constitution of the Fourth Republic. CC decision no. 71-44 DC of 16 July 1971. The conseil, which is less a court than an independent body appointed by the political institutions, exercises only a prori review. That is, it may review statutes for consistency with the Constitution only before they are officially promulgated by the President. See infra n. 43.

28. Article 120 of the Dutch Constitution states: "The constitutionality of Acts of Parliament shall not be reviewed by the courts."

29. See Husa, "Constitutionality in Nordic Countries," 48 *Am. J. of Comp. L.* 345, 365 (2000), Section 106 of the Basic Law, 2000 "enables limited review of the constitutionality of the laws in the courts; rejection to apply of the provision of the law (sic), where the application of the provision of a law would result in a clear controversy with the Constitution in general and Basic Law particularly. The court can thus give priority to the regulation of the Basic law." This is an innovation in Finland and complements the existing review conducted by a legislative committee prior to enactment.

30. The power of judicial review has almost never been used. On the four Nordic countries, see id.

31. Poland was the only country in the old Soviet-bloc to have a constitutional court, which was established in 1986 with very limited powers to try and head off opposition to the regime. After the fall of the Communists, the court's powers of judicial review were enlarged in 1989. Until 1997, parliament could override a court decision invalidating a statute by a two-thirds majority, but the override power was abolished in the 1997 Constitution.

Republic (1992), Slovak Republic (1992), Romania (1992), and Slovenia (1993).[32] In addition, there have been at least twenty new constitutions adopted among African countries since 1989, many containing bills of rights and judicial review, most prominently perhaps South Africa in 1996.[33]

To be sure, both the contents of the fundamental rights protected and the forms of judicial review adopted in western Europe after 1945, and again in eastern Europe and Africa after 1989, differ in interesting and important ways from the situation in the United States. In terms of the content of rights, although very broadly-speaking they are similar, there are three main differences. First, whereas the United States Constitution is famously a "charter of negative rights,"[34] containing only lists of things that federal and state governments are prohibited from doing to its citizens, some of the newer constitutions also contain certain positive rights, things that governments are required to do for them.[35] Second, whereas in the United States, rights provisions bind only the government and not private actors, with the single exception of the Thirteenth Amendment, a few of the newer constitutions permit the "horizontal" application of certain rights provisions so that they can effectively bind ordinary citizens.[36] Third, obviously specific rights are present in some constitutions that are absent in the United States and vice

32. For analysis of their provisions, see Henckaerts and van der Jenght, "Human Rights Protection under the New Constitutions of Central Europe," 20 *Loyola Int. and Comp. L. J.* 475 (1998); Ludwikowski, "Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe," 3 *Cardozo J. Int'l. & Comp. L.* 73 (1995).

33. See Alston, "A Framework for the Comparative Analysis of Bills of Rights," in *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* 1-2 (Philip Alston ed., 1999).

34. See, e.g., DeShaney v. Wisconsin, Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) for a well-known affirmation by the Supreme Court of this position. See also Jackson v. City of Joliet, 715 F. 2d 1200, 1206 (7th Cir.) (1983) ("Our Constitution is a charter of negative rather than positive liberties. . .The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them". Posner, J). See also, Currie, "Positive and Negative Constitutional Rights," 53 *U. Chi. L. Rev.* 864 (1986).

35. Two examples are Hungary, where the Constitutional Court has on several occasions declared that Parliament is acting unconstitutionally by omission (see "Refolution," 12 *Am. U.J.Int'l L. & Pol'y* 87, 96 (1997), and Germany. In its first abortion decision, the German Constitutional Court held that constitutional provisions protecting human dignity and the right to life required the legislature to make abortion a crime (in its second, the Court held that abortion need no longer be criminalized but must still be deemed unlawful). First Abortion Decision, 39 *BVerfGE* 1 (1975). Similarly, the guarantee of broadcasting freedom in Article 5(1) has been held to require the state to establish a legal framework in which all significant interests can make themselves heard. Television I Case, 12 *BVerfGE* 205 (1961).

36. This may be achieved directly, with the creation of a constitutional tort action, as in Ireland (see Hosford v. John Murphy & Sons [1987] I.R. 621) and South Africa, or indirectly, as in Germany, by requiring private law to be interpreted in light of the Constitution (the so-called *Drittwirkung*, or reciprocal effect, of the Basic Law on civil law).

versa, and with respect to common rights, there are differences in the levels of protection and the extent to which rights may be limited.[37]

With respect to the forms of judicial review, there are again a number of important and well-known differences between the United States and Europe in particular. First and most conspicuously, is the prevalence of the "concentrated" system of judicial review, often known as the "European" or "Austrian"[38] model, in which typically only one court in the legal system — usually termed the constitutional court — is granted the power of judicial review. Moreover, this one court has generally not been the existing highest court but a new one whose sole function is to exercise this power and whose members are appointed in a different, more overtly political, manner than judges of the ordinary courts.[39] These ordinary courts cannot declare a statute unconstitutional but may, and sometimes must, refer the issue to the constitutional court. This compares with the "diffuse" or "decentralized" system in the United States and elsewhere, in which every court, state and federal, has the power of judicial review.[40] Second, is the issue of who can seek judicial review of legislation. The standard distinction between "abstract" and "concrete" judicial review refers to whether the constitutionality of legislation may be challenged by private citizens in the context of a "case or controversy," or only by certain specified political actors seeking what is essentially a binding advisory opinion in which the validity of the legislation is considered in the abstract and outside the context of any particular set of facts or application.[41] In the United States, of course, only concrete judicial review is possible under Article III. Elsewhere, most systems permit both abstract and concrete judicial review.[42] Third is the issue of the timing of judicial review. Can legislation be challenged as unconstitutional only before final enactment ("a priori review"), only after it has taken effect ("a posteriori re-

37. For example, unlike the U.S. Constitution, the three bills of rights considered in this article all expressly contain permissible limits on those rights. See infra n. 136.

38. Because the first constitutional court in Europe, the Austrian, which operated from 1920 to 1933, was of this variety.

39. For some details on the appointment mechanisms for constitutional court judges, see infra nn. 137-40.

40. In significant part, this difference turns on agreement or disagreement with Marshall's argument that judicial review is part of the ordinary judicial function of deciding cases and controversies. See Marbury v. Madison, supra n. 3. If one accepts this characterization, it follows that since all courts exercise the ordinary judicial function, they should also have the power of judicial review. European systems tend to view judicial review as an extraordinary, more political function and so as inappropriate for the normal courts. For addition legal, institutional, and cultural reasons explaining the choice of the centralized system in Europe, see Cappelletti & Cohen, supra n. 1, at 73-83.

41. See id. at 84-95.

42. For example, Canada, Germany, Italy, Spain and Portugal permit both abstract and concrete review; France permits only abstract review.

view"), or both. In the United States, of course, the answer is only after and for an unlimited time; in France, it is only before. Most other countries follow the United States on this issue, although there are usually time limits for seeking abstract review.[43] Finally, there are significant differences in the style of judicial opinions and methods of reasoning, most of which are traceable to general common law versus civil law orientations. One interesting and important sub-issue is whether dissenting opinions are permissible. Although the clear tendency is in the permissive direction, some countries insist on the appearance of unanimity in the belief that dissenting opinions undermine the perceived authority of the court and objectivity of constitutional law.[44]

Notwithstanding these important and interesting differences in both the content of fundamental rights and the form of judicial review adopted by the many countries that abandoned legislative supremacy in order to give greater protection to individual rights — differences which are central objects of study in comparative constitutional law courses and texts — they ultimately constitute variations *within*, not from, the American model of constitutionalism since they all share its essential features. A specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal by ordinary legislative majorities, and is enforced by an independent court (in France the body is termed a "council"), which has the power to set aside and disapply legislation that it finds in conflict with these rights and against whose decisions the legislature is legally powerless to act by ordinary political means. These essentials once again define a constitutional arrangement that is in each respect the polar opposite of the situation in which legislative supremacy reigns. Under the latter, the legislature is not legally limited at all; its legislative acts constitute the highest form of law known to the legal system; there are no laws that it cannot by ordinary majority amend or repeal; and no other institution has the power to question the validity of any of its legislative acts. The terms legislative and judicial supremacy thus refer to which institution is primarily entrusted with the task of declaring and protecting citizens' rights and liberties.

43. For example, in Germany the time limit for political institutions to seek abstract review of a statute is 30 days. Spain switched from a priori to a posteriori in 1985.

44. Currently, Austria, France, Italy, and Belgium do not permit dissenting opinions from their constitutional courts. The permissive tendency is perhaps explicable by a sense that as the Court's general legitimacy grows over time, the concerns about authority and objectivity diminish. It should not be forgotten that Chief Justice Marshall imposed a strong presumption of unanimity on his colleagues in the U.S. Supreme Court's early days.

III. THE THREE COMMONWEALTH BILLS OF RIGHTS

Like the other countries just discussed, the Commonwealth countries of Canada, New Zealand, and the United Kingdom have in the last twenty years sought to create greater legal protection for fundamental rights than is possible under traditional legislative supremacy. But unlike the others, these three have attempted to do so while deliberately *refusing* to embrace the American model and, in particular, the final word it grants to the judiciary on what is the law of the land. As a result, they have created a new third model of constitutionalism in between a fully constitutionalized bill of rights and full legislative supremacy. Canada was the pioneer, while the other two countries that share legal, political, and cultural traditions with it, observed, learned from, and ultimately adapted the Canadian example which they used as a common starting point.

A. *The Canadian Charter of Rights and Freedoms, 1982*

Prior to 1982, Canada's federal and provincial legislatures collectively exercised the same parliamentary sovereignty enjoyed by the mother Parliament at Westminster. Although under the British North America Act of 1867, effectively Canada's existing constitution, the allocation of legislative power was constitutionally divided among federal and provincial legislatures, all legislative power was exhausted by this allocation. None was "retained by the people" as beyond the authority of all legislatures so that total legislative power was unlimited and no court had power to set aside any legislative act except on allocative, or federalism, grounds. As one commentator describes the situation: the only constitutional question was "which jurisdiction [federal or provincial] should have the power to work the injustice not whether the injustice should be prohibited completely."[45]

In 1960, the federal parliament enacted the Canadian Bill of Rights [hereinafter "the CBOR"], a statute which requires that "every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe. . .any of the rights and freedoms herein recognized and declared."[46] These rights, set out in Section 1, which declares them to "exist without discrimination by reason of race, national origin, color, religion, or sex" include "the right. . .to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; the right. . .to equality before the law and the protection of the law; freedom of relig-

45. Peter W. Hogg, *Constitutional Law of Canada* 429, n. 74 (1977).
46. Canadian Bill of Rights, S.C. 1960, c. 44, Section 2.

ion; freedom of speech; freedom of assembly and association; and freedom of the press."[47] This ordinary statute bill of rights, which binds only the federal government and not the provinces, was the first of the series of novel experiments in the three Commonwealth countries that sought to reconcile parliamentary sovereignty and the protection of fundamental rights, and forms the backdrop against which all the later versions were considered and compared.

The CBOR does not specify what the courts are empowered or required to do if, in the absence of an express parliamentary declaration, a statute cannot be construed consistently with any of the protected rights. Are they to apply the statute or invalidate it? Although eventually, ten years after its enactment, a bare majority of the Canadian Supreme Court agreed on the latter, the case in which they did so is the only occasion on which the CBOR has ever been employed to strike down an inconsistent statute.[48] Overall, and notwithstanding this single decision, the CBOR is almost universally thought to have been ineffective because of the courts' tendency to interpret its impact and their power through the traditional lens of parliamentary sovereignty, thereby limiting the scope and effectiveness of the rights protected.[49] Thus, whether or not they agreed that courts were empowered to invalidate inconsistent statutes, many judges diluted the CBOR by adopting the so-called "frozen concepts theory," which interpreted it as merely codifying the existing (largely common law) rights of citizens as they stood in 1960 and not creating any new ones.[50] This interpretation had the effect both of immunizing all pre-1960 statutes, since such statutes expressed and determined the content of these rights, and giving narrow scope to the meaning of the rights when assessing them against subsequent statutes. In addition, the textually unqualified and abstractly expressed

47. Id., Section 1.

48. R v. Drybones [1970] 3 C.C.C. 355. By a majority of five to four, the Court held that it had power to declare "inoperative" a statute that, in the absence of an express parliamentary override, could not be read consistently with a protected right. Section 94 of the 1952 Indian Act, which made it an offense for an Indian to be intoxicated off a reserve, was held inoperative as in conflict with the provision of the CBOR containing the right to equality before the law, since non-Indians were not subject to a similar prohibition. The four dissenting judges argued that they were required to apply the statute notwithstanding the conflict on the basis that had parliament intended to grant them this novel power, it would have done so expressly.

49. See, e.g., Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms," 44 *Law & Contemp. Problems* 169 (1981) (describing weaknesses of the CBOR).

50. The term was coined by Tarnopolsky, see id. The language of Section 1 which gave rise to this "frozen concepts" interpretation was the following: "It is hereby declared that in Canada there have existed and shall continue to exist. . .the following human rights and fundamental freedoms. . ." The "have existed" language was interpreted by these judges to mean that the laws in existence at the time of the bill of rights expressed and determined the content of the rights, thus meaning they could not be in violation of any of the rights.

rights were sometimes interpreted as too general to affect the interpretation of, or be held in conflict with, subsequent parliamentary measures.[51] In these ways, the ordinary statute, unentrenched bill of rights was adjudged to have less reconciled parliamentary sovereignty and fundamental rights than permitted the former to swallow the latter in precisely the way that the standard model of mutual exclusivity would predict. Its perceived failure only seemed to confirm the stark choice: either parliamentary sovereignty or protection of fundamental rights, but not both: no middle ground is available. But neither Canada nor the other two Commonwealth countries were finished with the experiment of reconciliation.[52]

The next major development was enactment of the Canadian Charter of Rights and Freedoms as Part 1 of the Constitution Act of 1982. Section 1 of the Charter "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." In Sections 2 and 6 to 15, the Charter sets out the substantive rights and fundamental freedoms that are granted to "everyone." These include "the fundamental freedoms" of mobility, religion, thought, belief, opinion and expression; the right to life, liberty and security of the person; and equality rights.[53]

The Charter was an integral part of the "repatriation" of the Canadian constitution from the United Kingdom negotiated by Prime Minister Pierre Trudeau and technically achieved by Section 2 of the UK Parliament's Canada Act of 1982.[54] As is well known, Trudeau desired a fully constitutionalized status for the Charter along the lines of the American model, but several provincial first (i.e., prime) ministers objected in principle to the consequent abandonment of the traditional doctrine of parliamentary sovereignty, as well as to provincial subjection to nationalized rights.[55] The major compromise reached at the eleventh hour was the insertion into the Charter of the

51. See dissenting opinion of Pigeon, J in Drybones.

52. The CBOR, however, remains in effect and was not repealed by the Charter.

53. Charter, Section 15: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

54. This stated that "No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law." Canada Act, 1982, Section 2.

55. See, e.g., Weiler, "Rights and Judges in a Democracy: A New Canadian Version," 18 *U. Mich. J. L. Ref.* 51 (1984), at 64-65. Although the Canadian Supreme Court had held, in an advisory opinion sought by Trudeau in the middle of the constitutional crisis, that legally, the consent of the provinces was not required for the federal government to proceed with the patriation project, it also stated that constitutional convention required such agreement, but without specifying how many provinces must agree. In the end, Quebec was the only province not to consent to the compromise. On the Patriation Reference case, see Edward McWhinney, *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* 80-89 (1982).

Section 33 "notwithstanding" clause, borrowed from Section 2 of the 1960 Bill of Rights but transformed in the new context. This clause enabled provincial and federal legislatures to override by ordinary majority the rights contained in the Charter for a renewable period of five years.[56] Thus, Section 33 was specifically designed as a compromise between traditional parliamentary sovereignty and the American model of constitutionalism, but a compromise of a different sort than that contained in the 1960 Bill of Rights.[57] In the latter, the provision functioned as a *limitation* on Parliament's ability to override the protected rights in the traditional context of parliamentary sovereignty, whereas in the new context of a constitutionalized, higher law Charter, the override functions as a special *power* or outlet for Parliamentary action.[58] The question, of course, was would the Charter succeed in reconciling the two values any more than had the Bill of Rights?

As an initial matter, let us consider the ways in which the Charter adheres to, and departs from, the essentials of the American model discussed above. First, on the legal status of the Charter, Section Section 52 of the Constitution Act declares that "the Constitution of Canada," defined to include the 1867 British North America Act and amendments together with the Constitution Act itself (of which the Charter forms Part 1) is the supreme law of Canada and that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no effect." Under Section 32, the Charter (unlike the CBOR) applies to the legislatures and governments of both Canada and the provinces.

Second, the Charter is entrenched in that the Constitution of which it is part can be amended only under the provisions contained in Sections 38-49 of the Constitution Act, the general formula of which requires the consent of both Houses of Parliament and at least two-thirds of the provinces containing a minimum of fifty per cent of the population of all the provinces.[59]

56. For text and discussion of section 33, see infra n. 61.

57. That the political leaders viewed Section 33 as a compromise of this sort is not intended to suggest that there were not those who thought it independently and intrinsically justified as structuring the optimal system of rights protection for Canada, both at the time and subsequently. Paul Weiler was one of the academic architects of Section 33. See Weiler, "Of Judges and Rights, Or Should Canada Have a Constitutional Bill of Rights?." 1980 *Dalhousie Rev.* 205 (proposing the legislative override of constitutional rights as the distinctive Canadian solution to the problem of judges and rights in a democracy). See also, Brian Slattery, *A Theory of the Charter* (1987); Weinrib, "Living with the Override," 35 *McGill L. J.* 541 (1990);

58. See Weiler, supra n. 55, at n. 97.

59. The general amendment procedure is contained in Section 38 (1): "An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by (a) resolutions of the Senate and House of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the

Third, although there is no explicit provision granting the courts the power to strike down laws inconsistent with the Charter, this seems the clear intent of Section 52 of the Act and Sections 1 and 24 of the Charter (the enforcement clause) taken together,[60] and the Supreme Court of Canada has acted accordingly since 1982.[61] As stated above, with the exception of the one deeply-divided occasion under the CBOR, this was a new departure for the Canadian courts — and, indeed, for the English-speaking Commonwealth countries as a whole — which had previously only had such power in relation to the task of policing the federal-provincial allocation of legislative powers.

Thus far, the Constitution Act and the Charter adopt all the essential features of the American model: (1) fundamental rights enjoying the status of supreme law, (2) entrenched against amendment or repeal by ordinary legislative majority, and (3) enforced by courts granted the power of judicial review. The compromise extracted by those against complete abandonment of parliamentary supremacy and which was designed to prevent full adoption of this model is the provision contained in Section 33 of the Charter. This provision rejects the very final feature of the standard model, which is that the court's exercise of its power to strike down legislation conflicting with a fundamental right is final and cannot be overridden by the legislature. For this is precisely what Section 33 empowers legislatures to do.[62]

Section 33 (1) declares as follows: "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 [the substantive rights provisions] of this Charter." Under Section 33 (3) and (4), such a legislative override of a Charter right has effect for a maximum period of five years and may be reenacted.[63]

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then latest general consensus, at least fifty per cent of the population of all the provinces."

60. As quoted above, Section 52 states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no effect." Section 24(1) of the Charter states that: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

61. See Bayard W. Reesor, *The Canadian Constitution in Historical Perspective* 403 (1992).

62. Section 33 also permits preemptive overrides; i.e., immunizing legislative provisions from judicial review under the Charter. See infra n. 72-73.

63. Section 33 (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. Section 33 (4): Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

As intended by those who insisted on its inclusion as the price of consenting to the constitutionalizing of the Charter rights, the override provision would preserve at least that essential and core element of parliamentary sovereignty which grants to legislatures (rather than courts) the ultimate power to determine whether or not an enactment is the law of the land. In this way, Section 33 would formally limit judicial power. As more affirmatively envisioned by some, Section 33 would provide the institutional basis for a new conception of rights protection in the context of a democratic political system, a contextually attractive alternative to U.S.-style judicial supremacy.[64] Whereas Charter rights are constitutionally presumed to prevail where they conflict with a legislative enactment, that presumption may be expressly rebutted by a legislature acting by ordinary majority, creating a role for both courts and elected representatives in balancing rights against other societal claims. Moving from the legal to the political implications of Section 33, it was to be expected that use of Section 33 by a legislature would be politically costly rather than routine, forcing principled discussion and justification on the merits before alerted voters would likely accept limitations on their rights.[65] In this way, beneficial dialogue between courts and legislatures would replace the American model's judicial monologue. Checks and balances would be imported into the very function of rights protection.

As is well known, things did not work out in the expected way.[66] Two months after enactment of the Constitution Act, and in response to the Act's passage without its consent,[67] the Quebec National Assembly passed Bill 62, a blanket and preemptive use of Section 33 to immunize itself as much as possible against the constitutionalized Charter.[68] This single statute did four things.[69] First, it repealed and re-enacted all of the province's pre-Charter legislation with the addition of an override clause to each (the "omnibus" feature). Second, the override clause added to each was of a "standard" form, simply repeating the language of Section 33, to the effect that that "[T]his Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982." Third, it automatically added such a standard override clause into all new legislation.

64. See Weiler, supra n. 57, at 46-47; see also Weinrib, Slattery, supra n. 57.

65. See Weiler, supra n. 55, at 81-82: "In a society sufficiently enamored of fundamental rights to enshrine them in its constitution, invocation of the non obstante [notwithstanding] phrase is guaranteed to produce a lot of political flak."

66. For more detailed descriptions of how things turned out, see Weinrib, surpa n. 57; Tushnet, supra n. 5, at 287-92.

67. See supra n. 55.

68. Act respecting the Constitution Act, 1982, S.Q. 1982, c.21.

69. See Weinrib, supra n. 57, at n. 7.

Fourth, it gave the override clauses retroactive effect to cover the two-month period since the Charter had come into operation.[70]

In its first case interpreting Section 33 in 1988, *Ford v. Quebec*, the Canadian Supreme Court upheld this controversial use over claims that its omnibus and standard features violated both the letter of a specificity requirement and the spirit of the enterprise.[71] The Court did so by interpreting Section 33 as containing only minimal formal requirements, satisfied in this case, and therefore as providing only very limited scope for judicial review of exercises under it.[72] It invalidated only the retroactive application of the override, applying to the text of Section 33 the traditional presumption of statutory interpretation in favor of prospective only effects. The permissibility of a preemptive use of the override, as distinct from one responding to a court declaration of unconstitutionality, was not an issue in *Ford* and seems to be have been assumed, although obviously the decision in the case resolves any doubt on the subject.[73]

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70. The Charter came into effect on April 17, 1982 and Quebec's bill was enacted on June 23, 1982. The override was made retroactive to April 17.

71. Ford v. Quebec, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577. There were two prongs to the argument that Quebec's use of the standard override violated a specificity requirement. First, only one Charter provision may be overridden per statute ("notwithstanding *a* provision . . .of this Charter")(emphasis added). Second, the override must specify in words which Charter right is being overidden, simple reference to section numbers of the Charter is insufficient ("the Act. . .shall apply notwithstanding *a provision included* in sections 2 or sections 7 to 15 of this Charter.")(emphasis added). Words not numbers are needed in order to make clearer to voters what the legislature is proposing. The textual argument against the omnibus use of the override is that the clause states that the legislature may declare "in *an* Act. . .that *the* Act. . .shall operate notwithstanding. . . ." (emphasis added). The Court in Ford rejected all three arguments.

72. The Court held that "Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case." Ford, at 740-41. The formal requirement is for an express declaration only, and both use of numbers rather than words and the omnibus use of the override were sufficiently express. More substantial review than this would require the court to go beyond form and review the justification for its use. For a powerful critique of the decision, see Weinrib, supra n. 57, at 553-59.

73. The textual argument for use of the override only in response to a court decision of unconstitutionality, and not preemptively, is that otherwise the legislative provision does not operate "notwithstanding" the Charter's other provisions. Absent a prior declaration of unconstitutionality, the legislature presumably assumes that its acts are consistent with the Charter. See Tushnet, supra n. 5, at 279-80 (citing Perry, supra n. 5, at 199-201, Slattery, supra n. 57, at 742; Weiler, supra n. 55, at 90, n. 114).

In upholding a preemptive use of the override, the Ford court did not prohibit use in response to a court decision, although there has been a suggestion that the bar on retroactive effect of an override significantly disables legislatures from reversing adverse court decisions. See Butler, "The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain," 17 *Ox J. Leg. St.* 323 (1997) Subsequent use of the override, however, would appear to ensure that an invalidated statute can be enforced from the date of the override notwithstanding the court decision. Only overturning the individual result in the case appears to be ruled out.

Interestingly, although some have suggested that the Court's decision to give Section 33 a more formal and easily satisfied interpretation than arguably either the text suggests or its framers intended was prompted (like its interpretation of the CBOR) by a traditional orientation towards parliamentary sovereignty,[74] the actual result of the entire episode has been quite the opposite. Far from triggering a swift rolling back all the way down the slope to the starting point of traditional parliamentary sovereignty, as was largely the case with the CBOR after 1960, a constitutional convention appears to have arisen, at least with respect to Canada's other provinces and the federal Parliament, that the override provision should not be used at all.[75] In fact, it has been used only once by a province other than Quebec, and this was shortly before the *Ford* decision itself. This was by Saskatchewan when it used Section 33 to end a strike by its public servants and override that province's Court of Appeal decision that the Charter contained an implicit right to strike, a decision reversed by the Canadian Supreme Court in 1987.[76]

Accordingly, whatever its theoretical potential for balancing parliamentary sovereignty and judicial review and thereby presenting a new structure of rights protection, Section 33 has been no more effective in practice than was the CBOR in reconciling the two,[77] although interestingly (Quebec apart) it has been ineffective in exactly the op-

74. See Tushnet, supra n. 5., at n. 203, referring to a conversation in which Bruce Ackerman made this point. See also Weinrib, supra n. 57, at 557 (suggesting the Ford court misunderstood the changed system the Charter introduced).

75. See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* 147 (1991). This convention seems to have arisen in part also as a result of Quebec's response to that part of the Ford decision invalidating its French-only sign law for violating Section 3 of Quebec's own Charter of Rights. After Ford, Quebec renewed its Charter override which was due to expire in a few months. Heard, among others, attributes the collapse of the Meech Lake Accord recognizing Quebec's "separate society" status to this renewal of the override.

76. Saskatchewan v. Retail, Wholesale & Dep't Store Union, [1987] 1 S.C.R. 460 (Can). Saskatchewan Bill 144 of January 1986, which forced the union back to work and provided the terms of a new collective agreement, contained a clause exempting it from the Charter. This was deemed necessary because of a 1984 Saskatchewan Court of Appeal decision striking down similar legislation on the basis that it infringed the freedom of association as guaranteed in the Charter. See Lesson, "Section 33, the Notwithstanding Clause: A Paper Tiger," 6 *Choices IRPP* 3-20 (2000).

77. Of course, even with Ford, it is possible that legislatures will adopt a norm that the override should only be used in response to Supreme Court decisions. See, e.g., Editorial, 42 *Crim. L.Q.* 1 (1999), advocating this position. The existing norm, however, appears to be occasional routine and preemptive use in Quebec and total non-use everywhere else. Peter Hogg has argued that even with the convention against using the override, the new Charter regime has in fact ushered in the hoped-for dialogue between courts and legislatures in that most statutes struck down by courts have been reenacted by legislatures with appropriate modifications. Hogg, "The Charter Revolution: is it Undemocratic?." The McDonald Lecture in Constitutional Studies, given at the University of Alberta on March 22, 2001 (copy on file with the *Am. J. Comp. L.*) This is an interesting observation, and does reflect a difference from U.S. practice, but I do not believe it is quite the same dialogue that proponents of the new model had in mind.

posite direction. Whereas the CBOR did not reduce the majoritarian difficulty posed by unlimited parliamentary sovereignty, the convention against its use has prevented Section 33 from tempering the countermajoritarian difficulty posed by an unlimited power of judicial review. In both cases, the result has been a swift retreat to the two poles, albeit opposite ones.

Overall, then, it seems fair to say that the Canadian experience has probably done little to undermine Marshall's claim that no possible middle ground exists. The institutional experiments to try and carve out some have not, however, ended there. When the subsequent bills of rights were considered and enacted in New Zealand and the United Kingdom, participants in the debates were extremely well aware of the above events in Canada, which as a fellow Commonwealth country with a similar legal culture and tradition of parliamentary sovereignty was viewed as a far more relevant example than either the United States or western Europe. Let us now turn to consider whether either was able to achieve a more successful reconciliation.

B. *New Zealand's Bill of Rights Act, 1990*

Like the Canadian Charter, the New Zealand Bill of Rights Act of 1990 (hereinafter "the NZBORA") began life as a government proposal to fully constitutionalize a set of fundamental rights on the standard model that ran into overwhelming political opposition in defense of the country's traditional conception of democracy and parliamentary sovereignty, and was accordingly amended in an attempt to reconcile the two. Although the substantive provisions of the NZBORA were modeled on and are very similar to those of the Canadian Charter, the manner in which the NZBORA attempts to reconcile the two, however, is quite different.

The Labour Government of Geoffrey Palmer published a White Paper in 1985 that proposed the enactment of a fully constitutionalized, supreme law bill of rights. The White Paper met with widespread opposition from legal and political circles on the basis that it was unnecessary and that it departed too far from the country's legal and political traditions, which were very much in the British mold of parliamentary sovereignty. As a result, the Government was forced to back down and eventually reintroduced an amended version of the bill of rights that was enacted along bitterly divided party lines.[78]

78. For details of the story, see Rishworth, "The Birth and Rebirth of the Bill of Rights," in Grant Huscroft & Paul Rishworth, *Rights and Freedoms in the New Zealand Bill of Rights Act 1990 and the Human Right*(1995); Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming Our Political System* (1993); Joseph, "The New Zealand Bill of Rights," 7 *Pub. L. Rev.* 162 (1996).

Like the Canadian Bill of Rights of 1960, the NZBORA is an ordinary statute — rather than a supreme law — bill of rights that is not entrenched but can be amended or repealed like any other statute. Moreover, under no circumstances can any of the rights contained in the NZBORA override a conflicting statute. Section 4 expressly prevents the courts from invalidating any statute for inconsistency with the rights contained in Section 1, and specifically ousts what would otherwise be the normal rule that prior conflicting statutes are impliedly repealed by the rights contained in the subsequent BOR.[79] In this sense, its legal force is *less* than that of an ordinary statute rather than more as with the Canadian Charter.

On the other hand, the basic method for enforcing the rights it contains is one which grants the NZBORA a quite special status vis-à-vis ordinary statutes. This method is to impose a duty on the courts to interpret all other statutes consistently with the rights contained in the NZBORA, whenever possible. In the words of Section 6, "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." Thus, although its legal status is that of an ordinary statute, the NZBORA is a framework statute that determines how all other ordinary statutes are to be given meaning. Moreover, it does so by legislating not a set of "neutral" interpretive tools — such as whether the courts may or may not take legislative history into account, or whether the *ejusdem generis* and *expressio unius est exclusio alterius* canons are to be presumed — but a set of substantive rights.

Accordingly, the NZBORA may be thought of as an *interpretive* bill of rights rather than an *overriding* one, such as the Canadian Charter: if and only if a statute cannot be interpreted consistently with the bill of rights will it trump them. These two types of bills of rights represent two different methods of protecting rights that may both be consistent with preserving key elements of parliamentary sovereignty and granting legislatures an institutional role in rights protection. Under an overriding bill of rights, such an interpretive duty is less urgent because the protective legal force lies in the court's power to set aside conflicting statutes rather than its interpretive power to force a legislature to pay the political costs of clear and explicit rights violation. As a result, for example, the Canadian Charter does not impose such an interpretive duty on the courts.

79. "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 this enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights." New Zealand Bill of Rights Act 1990, Section 4.

As we have just seen, the NZBORA protects the rights it contains by the interpretive duty it places on the courts under Section 6 and the consequent political cost it imposes on the legislature of enacting a measure that so clearly violates a protected right it cannot be read consistently with it.[80] It protects parliamentary sovereignty under Section 4 by declaring that such inconsistent legislation cannot be invalidated by the courts and prevails over the NZBORA regardless of when it was enacted. Although, therefore, legally, the NZBORA protects a particularly strong version of parliamentary sovereignty — in that there can be no questioning at all of the validity of an Act of Parliament — it does transfer important powers to the courts in order to protect fundamental rights: namely, the power to control the meaning of statutes in a way that is alien to traditional canons of statutory construction. Moreover, these two provisions of the NZBORA, Sections 4 and 6, clearly pull in opposite directions.[81]

In this regard, the experience of Canada under its 1960 Bill of Rights is highly relevant. The NZBORA has essentially the same legal status and employs the same protective mechanism as the CBOR, and yet, as discussed above, it was generally perceived that the Canadian judges rendered the CBOR so ineffective that the stronger measure of the Charter was needed.[82] In fact, in three respects, the CBOR is, as a matter of text, *more* protective of fundamental rights and *less* protective of parliamentary sovereignty than is the NZBORA. First, the CBOR does not contain a provision like Section 4 of the NZBORA expressly denying courts the power of judicial review, but was silent on the issue of how its rights were to be enforced. As discussed above, a bare majority of the Canadian Supreme Court eventually interpreted this silence to grant it the power to invalidate inconsistent statutes, although it was only exercised once and even then in the less controversial context of a statute predating the bill of rights.[83] Second, the CBOR's Section 2 notwithstanding clause states that only by express statement can Parliament override the rights it contains, so that absent such statement, there seemed good reason to believe that a subsequent conflicting statute would not pre-

80. Obviously, this political cost is imposed on the legislature only with respect to inconsistent statutes enacted after the NZBORA, not before, even though the legal duty on the courts applies to both.

81. The consistency of, and relative priority between, sections 4 and 6 have been a constant source of confusion in New Zealand. This is part of the so-called "4-5-6 problem," see infra n. 87.

82. See supra nn. 47-52.

83. This is less controversial in that the doctrine of implied repeal, whereby a previous statute is impliedly repealed by a later one to the extent of the conflict, is a typical feature of the sovereignty of parliament in Commonwealth legal systems. Certain dicta in Drybones, and a few later cases, suggested that the power of invalidation extended also to subsequent inconsistent statutes.

vail over the CBOR, unlike the case with the NZBORA.[84] Third, under the CBOR, the duty to interpret legislation in line with fundamental rights was stated in absolute terms and was not qualified by a "so far as possible clause" as is the NZBOR. Taken literally, this would imply that a statute could never conflict with a right.[85]

As we have seen, notwithstanding these textual supports, the Canadian courts were thought to have done an ineffective job of protecting rights. By contrast, and contrary to many expectations — and some hopes — that the enforced change from a constitutional to an ordinary statute bill of right would effectively kill it, the NZBORA has received a quite different judicial response that did the CBOR.[86] Although there have been some thorny problems of methodology and application stemming from its patchwork drafting (the so-called "sections 4-5-6 puzzle"[87]), which have led some to conclude that the NZBORA has not worked well in practice,[88] substantively there seems to be as much of a consensus that the New Zealand courts have been enthusiastic protectors of fundamental rights as there is that the Canadian courts were not under the CBOR.

From the beginning, New Zealand's highest court, the Court of Appeal, insisted (a) that the NZBORA must be interpreted broadly and purposively, rather than narrowly and technically, and (b) that the ordinary law status of the rights did not affect their importance or meaning.[89] On the basis of this "rights centered"[90] approach to the NZBORA, the Court of Appeal quickly employed the new rights in the official action context of criminal procedure, establishing a prima facie exclusion rule for evidence obtained in breach of the rights to legal

84. Indeed, this was the majority's rationale in Drybones, see supra n. 48, albeit in the context of a prior statute. The language of the override provision expressed parliament's intent that absent such a declaration, the right must prevail.

85. Although the Canadian Supreme Court did not take it literally. The majority decision in Drybones was premised on the inconsistency of Section 94 of the 1952 Indian Act and the CBOR's guarantee of equality before the law.

86. See Rishworth and Joseph, supra n. 78. See also Taggart, "Tugging on Superman's Cape," in *Constitutional Reform in the United Kingdom: Practice and Principles* 85-97 (1998).

87. The problem is what sequence or methodology should a court use in deciding cases under the NZBORA given the seeming inconsistencies between Section 4 (courts have no power to invalidate conflicting statutes and ousting of implied repeal rule), Section 5 ("justified limitations on rights"), and Section 6 (courts' interpretive duty).

88. See e.g., Butler, supra n. 73 (arguing, inter alia, that the judicial choice of whether to give priority to Section 4 or Section 6 is effectively a subjective one, leading to significant legal uncertainty).

89. See R v. Butcher [1992] 2 NZLR 257, 264 -65 (Cooke P) and 269 (Gault J); R v. Te Kira [1993] 3 NZLR 257, 261 (Cooke P) and 277 (Thomas J). This last point is in direct contrast to arguments made by some Canadian judges. See the dissenting opinion of Pigeon, J in Drybones ("I also fail to see how it can be said that to read s.2 as little more than a rule of construction is to fail to give effect to the Bill. On what basis is it assumed that anything else was intended in an Act that is not of a constitutional character?"). Id. at 40-41.

90. This is the term used by New Zealand commentators, see supra n. 78.

counsel and against unreasonable searches and seizures,[91] and a cause of action for compensation for breach of the NZBORA.[92] In terms of its interpretive duty, the Court of Appeal has taken a generally liberal but not radical view of its ability to read statutes consistently with the Bill of Rights, accepting that it will do so whenever the statute can reasonably be given a consistent meaning but not where a strained interpretation would result.[93].

Overall, the courts have been consistently robust in their protection of rights and important players in the growth of a culture of rights that many commentators describe as having taken hold.[94] Why the New Zealand and Canadian experiences with legally similar ordinary statute bills of rights should have differed so much is not entirely clear, although the intervening period of thirty years between their enactments has been one in which both the practice and legitimacy of judicial articulation and enforcement of rights in general, and within the Commonwealth countries in the administrative law context in particular, has grown substantially. The failure of the CBOR was also common knowledge in New Zealand so that the courts might well have consciously desired to avoid repeating the error.

Finally, an important procedural feature of the NZBORA is that under Section 7, the Attorney-General is required to scrutinize all bills introduced into the House of Representatives and bring to its attention any provisions that appear inconsistent with the rights and freedoms in the NZBOR.[95] Again this is similar to a provision in the CBOR that is absent from the Canadian Charter,[96] reflecting the different strategies of interpretive and overriding bills of rights. Although the former do not deny a legislature the power to act inconsistently with fundamental rights, they seek to force the legislature into self-conscious, publicized, informed, and principled debates regarding rights, requiring clear statements of legislative decision to violate them.[97] The general idea is that it is appropriate for the legis-

91. R v. Kirifi [1992] 2 NZLR 8
92. Simpson v. Attorney-General [Baigent's Case[, [1994] 3 NZLR 667
93. Ministry of Transport v. Noort [1992] 3 NZLR 260, 272 (Cooke P).
94. The change in New Zealand legal culture towards rights centered jurisprudence is a common theme in much academic writing on the effect of the NZBOR. See, e.g., Taggart, supra n. 86, at 97; Joseph, supra n. 78, at 168-69.
95. "Where any Bill is introduced into the House of Representatives, the Attorney-General shall, (a) in the case of a Government Bill, on the introduction of that Bill; or (b) in any other case, as soon as practicable after the introduction of the Bill, bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms in this Bill of Rights." Bill of Rights Act, Section 7.
96. Such a duty was placed on the Minister of Justice with respect to federal acts under Section 3 of the Canadian Bill of Rights, 1960.
97. Although in the New Zealand context, it has been argued that a parliamentary decision to enact a statute in the face of an A-G opinion that it violates rights, does not necessarily mean that parliament has manifested intent to violate a right.

lature to have the final word on what is the law of the land but only where there are mechanisms designed to ensure that in its decision-making procedures, rights are taken seriously.

C. *The United Kingdom's Human Rights Act, 1998*

The Human Rights Act of 1998, which came into force on October 2, 2000, was the centerpiece of the present Labour Government's election manifesto commitments for constitutional reform,[98] and has been described as "a turning point in the UK's legal and constitutional history."[99] Its enactment is also the culmination of a decades-long debate in the United Kingdom about the merits and legal possibility of some form of codified bill of rights in general, and the incorporation of the European Convention on Human Rights [hereinafter "the ECHR."] into domestic law in particular.[100] The constitutional debate surrounding these proposals took place in the context of the following traditional conundrum: on the one hand, an ordinary statute bill of rights would likely provide insufficient legal protection for them; on the other, more protection than this was problematic if not impossible under the British constitution and its central doctrine of parliamentary sovereignty.[101]

The novelty of the Government's solution to this conundrum lies in the manner in which the ECHR has been incorporated, which the Government claims in effect protects "Convention rights"[102] to the maximum extent possible within the parameters of parliamentary sovereignty as traditionally understood. There is no doubt that in the British legal and constitutional context, the mere existence of a set of codified rights constitutes a radical change in legal and political cul-

Some MPs could disagree with the A-G opinion that there is a conflict. See Butler, supra n. 73, at 336-37.

98. The others were devolution of power from Westminster to Scotland and Wales, reform of the House of Lords, an elected mayor and a new authority for London, freedom of information, and a referendum on the voting system for general elections.

99. Lester, "The Impact of the Human Rights Act on Public Law," in *Constitutional Reform in the United Kingdom,* supra n. 7, at 105.

100. The modern debate began with a 1968 pamphlet written by Anthony Lester, a prominent lawyer. Other advocates for an entrenched bill of rights included Michael Zander, *A Bill of Rights* (3rd. ed. 1985); Ronald Dworkin, *A Bill of Rights for Britain* (1990), and Lord Scarman, a prominent sitting judge, who made a highly publicized speech in his Hamlyn Lectures in December 1974.

101. Once again, this latter holds that Parliament can make or unmake any law on any matter and no court is competent to question the validity of a duly enacted Act. See supra n. 13.

102. This is the term the HRA uses to define those ECHR rights that have been incorporated. Excluded are Article 1 ("The High Contracting parties shall secure to everyone within their jurisdictions the rights and freedoms defined in Section I of this Convention.") and Article 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

ture, independent of the exact form and legal status that they possess. This is because it replaces the existing conception of civil liberties as residual in nature – citizens are free to do whatever statute, common law and delegated legislation[103] do not prohibit them from doing — with a primary or affirmative set of rights that limit what citizens may be prohibited from doing in the first place. HRA thus promises to force discourse about rights into the forefront of a legal culture from which they were previously largely absent. But from the perspective of comparative constitutionalism, it is the form and legal status of these rights, together with the mechanisms for protecting them, that are of great interest since, even taking the government's characterization of the incorporation at face value, they add something new to the existing options. They suggest a third variation on the theme of partial, but not full, constitutionalization of fundamental rights

The essential provisions of the HRA regarding "primary" (i.e., parliamentary) legislation are the following. Section 1 defines the rights and freedoms contained in the ECHR and its protocols, with the exception of Articles 1 and 13 (which are excluded), as "the Convention rights." Under Section 3, all courts must interpret and give effect to primary (as well as secondary) legislation in a way which is compatible with the Convention rights, "so far as it is possible to do so." Under Section 4, if one of the specified higher courts is satisfied that it is not possible to do so and that the primary legislation in question is therefore incompatible with a Convention right, it may make a formal declaration of that incompatibility. However, under Section 4(6), notwithstanding such a declaration, no court has the power to set aside or disapply such legislation, which continues to have full effect and validity. Once a declaration has been made, HRA creates no legal duty on either Parliament or the government to respond in any way, but it does empower the relevant minister to make a "remedial order" under Section 10 and Schedule 2. This "fast track" procedure permits a minister to amend incompatible legislation by order laid before and approved by both Houses of Parliament.[104] HRA obviously did not need to empower Parliament to amend or repeal such legislation since the power clearly already exists. The Government has repeatedly stated its belief that the normal course of action would be that such a declaration "will almost certainly prompt

103. "Delegated legislation" is the generic British term for legislation resulting from Parliament's delegation of its legislative powers to the executive branch. It is sometimes referred to as "subordinate" or "secondary" legislation, and most is made in the form of statutory instruments. See Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law* 334-38 (8th ed., 1998).

104. The detailed procedures for a remedial order are extremely complex. See Section 10 and Schedule 2. They were also among the most controversial aspects of the bill and the Government was forced to amend its original scheme, which permitted less parliamentary supervision of remedial orders.

the Government and Parliament to change the law."[105] Under Section 19, whenever a new piece of legislation is being considered in Parliament, the relevant Minister must make a statement in writing before its Second Reading either that in his or her view the Bill is compatible with the Convention rights or that although he or she is unable to make such a statement, the government nevertheless wishes to proceed with the Bill. Finally, Section 6 makes it unlawful for a "public authority," defined to exclude Parliament but to include the courts, to act in a way which is incompatible with a Convention right.

In order to determine whether, and how, the HRA reconciles parliamentary sovereignty and fundamental rights protection in any meaningful sense, it is necessary to consider both (a) the claimed and actual legal status of the Convention rights, and (b) the political aspects of HRA in addition to the legal ones. With respect to the three central legal issues, the Government claims that it has given "further effect"[106] to Convention rights without (i) giving them the status of supreme law, (ii) entrenching them against amendment or repeal, and (iii) granting courts the power of judicial review. This is why the Government claims it has incorporated the rights without departing from the traditional understanding of parliamentary sovereignty. Let us consider each of these three issues carefully.[107]

105. This language is taken from the Government's White Paper of October 24, 1997. Section 2.10. In parliamentary debate, government ministers acknowledged that only with respect to highly controversial matters of principle, such as abortion, could it foresee not amending or repealing legislation in response to a court declaration of incompatibility. See Hansard for October 21, 1998, debate involving Jack Straw, the Home Secretary: "In the overwhelming majority of cases, regardless of which party was in government, I think that Ministers would examine the matter and say, 'a declaration of incompatibility has been made, and we shall have to accept it. We shall have to remedy the defect in the law spotted by the Judicial Committee of the House of Lords.'. . .Although I hope that it does not happen, it is possible to conceive that some time in the future, a particularly composed Judicial Committee of the House of Lords reaches the view that provision for abortion in. . .the United Kingdom. . .is incompatible with one or other article of the convention. . .My guess —it can be no more than that — is that whichever party was in power would have to say that it was sorry, that it did not and would not accept that, and that it was going to continue with the existing abortion legislation."

106. This is the term the preamble to HRA uses to describe their manner of incorporation into domestic United Kingdom law: "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights." The word "incorporation" is not used. Indeed, in parliamentary debate, Lord Irvine, the Lord Chancellor, argued that HRA gave "further effect" to the ECHR without "incorporating" it as part of UK law. The Government's White paper, however, referred to the Government manifesto commitment as introducing "legislation to incorporate the European Convention on Human Rights into United Kingdom law." White Paper: Introduction and Summary.

107. There has, of course, been a great deal of academic commentary in Britain on all aspects of the HRA. Among the most incisive are Ewing, "The Human Rights Act and Parliamentary Democracy," 62 *Modern L. Rev.* 79 (1999); Feldman, "The Human Rights Act 1998 and Constitutional Principles," 19 *Legal Stud.* 165 (1999); Wade, "The United Kingdom's Bill of Rights," in *Constitutional Reform in the United King-*

In terms of their legal status, Convention rights are clearly not supreme law, with higher normative force than statute law, since under Section 4 (6), a statute declared by the courts to be incompatible with a Convention right continues to have full legal effect. Indeed, as with the NZBORA, Convention rights are not intended to have even the full legal force of an ordinary statute because the textual application of Section 4(6) to statutes that predate HRA (and not only to subsequent ones) means the exclusion of the standard doctrine of the implied repeal of an earlier inconsistent statute by a later.[108] It is for this reason that both the Government and its critics agree that technically, Convention rights have not been "incorporated" as part of ordinary domestic law at all but are to have effect in some other way. This point incidentally makes clear that Convention rights *could have* been granted greater protection within the traditional doctrine of parliamentary sovereignty.

On the other hand, there are features and implications of the HRA that give Convention rights greater legal protection than rights contained in ordinary statutes. First, of course, is the interpretive duty placed on all courts to interpret statutes consistently with Convention rights wherever possible. This is contrary to the normal method of statutory interpretation, in which consideration of the plain meaning of the text rather than statutory purpose is still primary,[109] and will substantially reduce the occasions on which a conflict will be found resulting in statutes trumping Convention rights.

Second, in those few cases where a conflict cannot be avoided, the political expectation, if not the legal duty, is that Convention rights will ultimately trump. This is the result not only of the judicial power granted by HRA to declare incompatibility but also of the very important fact that HRA purports to exclude the normal rule by which a Convention right would be impliedly repealed by a subsequent incompatible statute,[110] so that it continues to have whatever legal force Convention rights have. This is a clear implication of the

dom: Practice and Principles 61-68 (1998); Marshall, "Patriating Rights — With Reservations: The Human Rights Bill 1998," id., at 73-84.

108. This clear textual implication of HRA was made explicit by the Attorney General in debate in the House of Lords. See Lords Hansard, 18 November 1997, column 522: "The scheme of this Bill is that if statutes are held incompatible on convention grounds, then it is for Parliament to remedy that. We do not wish to incorporate the convention rights, and then, in reliance on the doctrine of implied repeal, allow the courts to strike down Acts of parliament."

109. See e.g., Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law* 100-12 (1987) (arguing that "English judges generally emphasize the overall primacy of the ordinary meaning of words used in the statute far more than do most American judges" and characterizing the general English position to be that statutory purpose should only be considered when the statutory text is unclear). Notwithstanding certain judicial and other statements to the contrary and the more recent limited use of ministerial statements as interpretive tools (Pepper v. Hart, [1993] AC 593), this is still the general position.

110. See the doctrine of implied repeal, supra n. 18.

statutory text which does not limit declarations of incompatibility to prior statutes, for were subsequent conflicting statutes to impliedly repeal Convention rights, there would of course be no basis for a declaration of incompatibility. It is the flip side of their not being incorporated as ordinary domestic law. This implication was also expressly affirmed by the Lord Chancellor in debate.[111] It remains to be seen whether or not the courts will give effect to the Government's intention in this regard, for there is longstanding precedent that as part of the doctrine of parliamentary sovereignty, Parliament lacks the power to immunize its statutes against subsequent implied repeal.[112] Accordingly, this important aspect of HRA is inconsistent with the traditional conception of parliamentary sovereignty. Thus, as a result of the combination of excluding implied repeal and granting a power to declare incompatibility, Convention rights are expected to be politically, though not legally, supreme law.

Third, unlike Canadian legislatures under Section 33, Parliament cannot override a Convention right in a specific case, that is without generally and expressly amending or repealing that Convention right. If Parliament attempted to say that a subsequent statute is to apply notwithstanding a conflict with a Convention right, such a statement would appear to have no additional legal effect, for nothing in HRA prevents a court from declaring an incompatibility in these circumstances. Of course, in response, Parliament may not amend the incompatible statute on the basis that it had made clear its intention all along, but the point is that Parliament cannot *immunize* its measure against this judicial scrutiny in the way that the override permits Canadian legislatures to do so. Only a clear and express general amendment or repeal of a Convention right can create such immunity, and even then, the courts may still apply their interpretive duty to the issue of reading what Parliament has done.

On the issue of entrenchment, the Government stated in its White Paper that entrenching Convention rights against subsequent amendment or repeal by ordinary legislative majority was neither "necessary" nor "desirable," since this "could not be reconciled with our own constitutional traditions, which allow any Act of Parliament

111. "The convention rights will not. . .become part of our domestic law, and will therefore not supersede existing legislation *or be superseded by future legislation.*" Lords Hansard, see supra n. 106, at Column 522 (emphases added) .

112. Whether the courts will adhere to the Government's intentions is another matter for there is longstanding precedent to the effect that parliament lacks the power to exclude the implied repeal of its statutes. See Ellen Street Estates Ltd. v. Minister of Health, supra n. 18. Such an ouster of the doctrine of implied repeal would not, however, be entirely unprecedented for the courts have recognized this in the context of European Union law. They have interpreted the European Communities Act of 1972, by which EU law was incorporated into domestic UK law, as excluding implied repeal with respect to subsequent statutes in conflict with a provision of EU law. Only express intent to legislate inconsistently with EU law and/or to amend or repeal the ECA would be effective. See supra n. 20.

to be amended or repealed by a subsequent Act of Parliament."[113] As just discussed, however, and *unlike* the NZBOR, the effect of ousting the normal rule of implied repeal by subsequent conflicting statute (assuming the courts permit this) is to weakly entrench Convention rights since, unlike ordinary legislation, they can only be expressly repealed or amended. Until this occurs, Convention rights continue to have full legal force and the specified courts are empowered to render a declaration of incompatibility in the face of a subsequent conflicting statute in precisely the same way as with a prior statute — indeed even, as I have suggested, in the face of an express Parliamentary statement that the Convention right is to be overridden.[114] This has the effect of forcing Parliament into expressly declaring its intention of amending or repealing a Convention right, usually with a ministerial statement to this effect under Section 19. The political costs of so doing are obviously greater than the stealth approach of implied repeal that is not available, and this adds some political entrenchment to the weak form of legal entrenchment.

Finally, the issue of judicial enforcement leads to consideration of the most novel individual feature of the HRA, the power granted by Section 4 to declare an Act of Parliament incompatible with a Convention right that does not carry with it the power to invalidate such an Act. Just as the notwithstanding clause is a Canadian invention,[115] this power is original to HRA. Both in its White Paper and during parliamentary debate on the Bill, the Government repeatedly stated that it had decided not to grant courts the power of judicial review because of the importance it attached to parliamentary sovereignty.[116] But even without the further power of setting aside the in-

113. White Paper, Section 2.16

114. As I have noted above, this is inconsistent with the traditional British conception of parliamentary sovereignty and has only ever been previously applied with respect to European Union law, although in this case, the ouster of the implied repeal rule was undertaken by the judiciary in obedience to the European Court of Justice. See supra n. 20.

115. A version of the Canadian legislative override (with a two-thirds majority requirement) was briefly adopted in Poland between 1986 and 1997, see supra n. 31. It has also recently been adopted in Israel with respect to the revised Basic Law-Freedom of Occupation, a law with constitutional status. S.8 permits legislative override of the protected rights by absolute majority of Knesset members for a maximum period of four years with no provision for renewal. The power has been used once, soon after it enactment, in the Import of Frozen Meat Law of 1994, which prohibits importation of non-kosher meat.

116. It is important to note again, however, that in the context of EU law, British courts have the power of judicial review and it has been claimed that this is consistent with parliamentary sovereignty since Parliament remains legally free to expressly amend or repeal the European Communities Act, 1973, which makes EU law part of domestic UK law. See supra n. 20. (One difference, however, is that the courts, rather than Parliament, gave themselves this power, interpreting it as part of the total package of EU law incorporated by the ECA). This is a second possible way in which the Government is wrong to suggest it has protected Convention rights to the maximum extent possible consistently with parliamentary statutes (the first was ousting the

compatible Act, which the Government stated the courts did not want and it had no mandate to grant,[117] this power to question an Act of Parliament is itself unprecedented in Britain outside the EU law context[118] and is in obvious tension with the second limb of the traditional doctrine of parliamentary sovereignty. It effectively splits the power of judicial review into two separate functions — determining whether there is a conflict between a Convention right and a statute, and invalidating the latter if there is — and granting only the first to the courts while leaving the second to Parliament.[119] But even though HRA does not *require* remedial action by government and Parliament in response to a declaration, which would have been to cede the substance of the second function, the Government has repeatedly stated that the normal result of a declaration will be amendment or repeal.[120] Thus, at the very least, the exercise of a court's legal power to declare a statute incompatible with a Convention right puts the "continuing operation" of the statute into serious question and in most cases will force the political institutions to amend or repeal it.

Whether or not this ingenious splitting of the judicial review function between courts and Parliament is technically consistent with parliamentary sovereignty as the Government claims, the political power that this transfers to the higher judiciary is undoubtedly a radical step in the context of British legal and constitutional culture. In determining whether there is an incompatibility, the higher courts will inevitably be engaged in precisely the same sort of controversial and contested constitutional decision-making as constitutional courts exercising both functions, something that the British version of the separation of powers traditionally prohibited.

Moreover, in terms of judicial power and culture, the duty to interpret primary legislation in line with Convention rights will likely be at least as important as the power to declare incompatibility. For this gives to the courts substantial scope to rewrite acts of Parlia-

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implied repeal of prior statutes). This would still be slightly different from Canada in that the override does not amend or repeal the Charter, but postpones its effect on specific statute for five years — perhaps an easier step for a legislature to take.

117. See White paper, Section 2.13 ("There is no evidence to suggest that they [the courts] desire this power [of judicial review], nor that the public wish them tom have it. Certainly, this Government has no mandate for any such change.").

118. See supra n. 20.

119. The analytical separateness of these two functions has sometimes been acknowledged in the context of criticizing Chief Justice Marshall's opinion in Marbury v. Madison. He is faulted — and occasionally praised — for dealing with the easier issues of (1) whether a statute repugnant to the Constitution can be the law of the land, and (2) whether a court faced with such a statute is bound to apply it, but evading the more difficult issue of (3) who decides if the statute is repugnant. Although this criticism is intended to suggest that a court might have the power of judicial review without the independent power to decide if there is a conflict, analytically at least, the converse should also be true, and now Britain has done just this.

120. See supra n. 108.

ment employing a broad, purposive method of interpretation that is once again alien to the British conception of judicial function under the separation of powers.[121] The result of both is to place the onus squarely and unambiguously on Parliament if it wishes to act inconsistently with a Convention right, a price that the Government may not be willing or able to pay. HRA thus involves a very interesting mix and division of powers between courts and legislatures in the protection of Convention rights. It is less straightforward and direct than the Canadian override in that a legislature is not simply faced with the option of overturning or preempting a court decision, for there is no binding decision without parliamentary response to the declaration of incompatibility.

IV. Evaluating the Commonwealth Model of Constitutionalism

The American model of constitutionalism views legislative supremacy and the effective protection of fundamental rights as mutually exclusive, ultimately requiring a legal system to choose one or the other. The period since the end of the Second World War is understood as a period in which there has been a tremendous growth in world constitutionalism precisely because there have been widespread changes in this basic choice from legislative supremacy to constitutionalized bills of rights, as the inadequate protection of fundamental rights characterizing the former was almost overnight viewed as unacceptable given the European and Japanese experiences.

Although this fundamental choice between the two polar options is thus understood as a necessary one, it has never been viewed as costless since the theoretical and practical problems associated with each of the options are well known. The problem with legislative supremacy is, in short, the problem of legally unlimited majoritarianism: no formal, legal guarantee of fundamental rights against duly enacted measures of the legislature, whatever statutory, common law, conventional, cultural, or moral rights the particular legal system might at any given time recognize or express.

The problems with a fully constitutionalized bill of rights are very well documented, within the United States which invented it, the many countries that rejected it in the past, and the few that continue to do so for the same basic reasons. In short, the judicial veto of legislation replaces government by the people with the *gouvernement des juges* regarding many of the most important and controversial issues to be resolved in a political community. It gives final decision-making power on fundamental, usually hotly-contested matters of

121. See supra n. 109.

principle and on the issue of what is and is not the law of the land to the branch of government that is least accountable and which, if it is representative at all, represents the sovereignty of the past over the present. In so doing, it disables representative institutions and displaces popular self-government. This inherent problem is made worse because whatever the theory, this final word is rarely, if ever, a purely mechanical or self-evident one, but leaves substantial interpretive discretion in the courts exercising the power in particular cases and contexts. As Jeremy Waldron argues, judicial review is no less a non-democratic decisionmaking procedure because the people voted for it than is a dictatorship.[122] Additionally, it has long been argued that judicial review discourages and debilitates legislative and popular discussion of the weightiest matters by withdrawing responsibility for the final decision, and weakens the political capacity of the people by replacing popular with judicial accountability.[123]

Notwithstanding these very widely acknowledged problems, there is I believe an important aspect of the real tension between judicial review and popular sovereignty that — for historical reasons — is not fully appreciated in the United States and has resulted in a failure to comprehend fully why the claims of legislative supremacy were, and continue to be, so powerful and compelling to so many other countries. In Europe and elsewhere, legislative supremacy is often understood as the distinctive institutional manifestation of popular sovereignty, the notion that all political power derives from and remains with the people. Moreover, popular sovereignty is not generally perceived as an empty political truism for it was typically the concrete and hard-fought result of centuries of struggle between the people on the one hand, and the monarch (usually supported by church and aristocracy) over where ultimate power lay. During the course of this struggle, popular sovereignty was generally institutionalized in the legislature and monarchical power in the executive and judiciary. Legislative supremacy thus reflected the historical triumph of the people against the rival claims to supremacy of the Crown and a narrow political elite.[124]

122. Jeremy Waldron, *Law and Disagreement* 255-62 (1999).

123. The classic argument is that of James Bradley Thayer, *John Marshall* (1901). Thayer considered that the tendency of legislatures in the context of aggressive judicial review to leave consideration of constitutional constraints to the courts and to assume that whatever they can constitutionally do they may do, meant that "honor and fair dealing and common honesty were not relevant to their inquiries." Moreover, since judicial review involved the correction of legislative mistakes from the outside, it results in the people losing the "political experience, and the moral education and stimulus that come from. . .correcting their own errors. [The] tendency of a common and easy resort to this great function [is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Id., at 103-07.

124. The best known examples of this triumph are Parliament's defeat of the monarch's claim to rule by divine right in the English civil war, and the French revolution.

By contrast, in the United States (the product of a colonial revolution rather than a people's one in this sense), popular sovereignty has been a given from its founding and as a result tends to seem like a truism for it is hard to contemplate the alternatives, even though, of course, the revolution was fought and the Constitution framed in the immediate context of one of them. Accordingly, the institutions of government do not have the same histories or sets of social meanings. And in particular, legislatures are not conceived of in the same way as the *distinctive* collective organ of the people. Rather, they are one among several organs of government set up as necessary evils, and in principle no less alien or "of us" — and probably more dangerous — than the executive branch, both of which are to be viewed with pragmatic suspicion and played off against each other.[125] In this context, placing legal limits on the legislature does not seem like placing limits on "ourselves" or transferring power from the people; rather it seems no different than placing legal limits on the executive — both are limits that the people impose upon their elected leaders. Of course, the creation of "this context" was a central aspect of the revolutionary political thought underlying the Constitution.[126]

The "new hybrid breed of bill of rights"[127] that this article considers were self-consciously designed to provide a new solution to the old problem of the incompatibility of legislative supremacy and the effective (that is, judicial) protection of fundamental rights. The solution is new because it rejects the idea that the two are necessarily incompatible so that only one or the other is possible. The new bills of rights are premised on the idea that it is possible to have what is essential to both: judicial protection of fundamental rights *and* the legislature retaining the right to have the last word on what is the law of the land. Contrary to the traditional view originating with Chief Justice Marshall that none is possible,[128] they claim to have

125. See, e.g., James Madison, *Federalist* 48 ("But in a representative republic where the executive magistracy is carefully limited. . .and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.").

126. Gordon Wood argues that the distinctive and most radically creative feature of the Constitution was precisely its refusal to institutionalize popular sovereignty in any political organ. See supra n. 11.

127. This is how one New Zealand legal academic describes the development of the NZBORA: a bill of rights which fits within the paradigm of parliamentary supremacy but which, unlike the Canadian Bill of Rights of 1960, is not rendered insignificant on that account. See Rishworth, supra n. 78, at 4. But I think this notion usefully captures the essence of all three Bills of Rights considered here.

128. Made in the context of constitutional norms generally rather than specifically those protecting fundamental rights. See supra n. 3.

found a middle ground between the two and institutionalized this analytical space. In what follows, I first elaborate on the general form of this new solution. I shall then explain the potential benefits and advantages of the new model, ask whether they are distinctive to it, and assess what impact the new model has on existing justifications for traditional judicial review framed in the context of the bipolar choice. Finally, I shall consider which of the three versions of the new model is likely to be the best one in terms of achieving its general and unique benefits.

A. *The Nature of the New Model*

The new model of constitutionalism attempts to carve out coherent middle ground between fundamental rights protection and legislative supremacy. The two are not necessarily mutually exclusive, as has previously been assumed, because it is possible to have what is most valuable in each without giving up anything essential. More specifically, the Commonwealth model proposes that with respect to two of the three distinct legal issues that jointly define the polar opposites — legal status of fundamental rights and judicial enforcement — there are viable intermediate positions between the traditional either/or choices.

First, the Commonwealth bills of rights reject the proposition that the legal status of fundamental rights must either be supreme law or else they are on a par with ordinary statute law and so bind the legislature only contingently at the latter's whim. Each of the three proposes an intermediate legal status. Charter rights in Canada have been given less than full supreme law status because although ordinarily they trump all other legal norms, they can be trumped by ordinary state or federal legislative majority without being amended or repealed. Under the NZBORA, the interpretive duty placed on the courts means that fundamental rights trump potentially conflicting statutes unless the latter cannot be read in a way that renders them consistent. In this sense, they are neither supreme nor ordinary law. In Britain, the same interpretive duty plus the judicial power to declare incompatibility gives Convention rights higher legal status than ordinary law but something less than supreme law.

With respect to the issue of judicial enforcement, the Commonwealth countries suggest that it is similarly not necessarily true that either courts have the ultimate power to invalidate laws conflicting with fundamental rights, which the legislature is powerless to reinstate, or else they have no power to enforce them at all. Once again, each of the three Commonwealth countries has produced something in between these two, a role for courts in enforcing fundamental rights that falls short of the full-scale power of judicial review. Thus, in Canada, courts exercise judicial review but subject to the power of legislatures to immunize conflicting statutes or reinstate invalidated ones. In New Zealand, courts enforce fundamental rights not by invalidating statutes but by interpreting them in line with rights whenever possible. In Britain, courts do the same and, in addition, have the power to call a conflicting statute into question by declaring an incompatibly with a fundamental right, triggering the expectation (though not the legal requirement) that such a statute will be amended or repealed by the legislature.

On the third legal issue of entrenchment, neither Canada nor New Zealand offers anything in between the traditional polar positions, but Britain does. In Canada, Charter rights can only be amended or repealed by specified provincial and national supermajorities, along the lines of the American model.[129] By contrast, the NZBORA can be expressly amended or repealed by ordinary legislative majority, and impliedly repealed by subsequent conflicting statute although, under the interpretive duty, only if such statute cannot be interpreted to avoid the conflict. Under the HRA, however, this usual doctrine of implied repeal does not apply to Convention rights, meaning that they can only be amended or repealed expressly, which amounts to a limited form of entrenchment in between the two poles.[130]

In these specific ways, then, the hybrid bills of rights suggest the possibility that the claims of legislative supremacy and effective fundamental rights protection are not mutually exclusive but rather form a continuum ranging from the most absolute conception of legislative supremacy at one pole, to the American model of a constitutional bill of rights at the other. Thus, moving along this continuum from the legislative supremacy end, the NZBORA occupies a position closest to, but still a little removed from, the pole. It is removed because although it does not permit the legal supremacy of legislation to be questioned in any way, it does through the interpretive duty it imposes on the courts, limit the circumstances and manner in which legislation will prevail over the bill of rights. It grants to the courts power they did not previously have under orthodox canons of construction to interpret restrictions on rights narrowly. The HRA occupies a position further along the continuum towards the American model pole than that of the NZBOR, because in addition to the interpretive duty it also imposes on the courts, the HRA both prevents the implied repeal of its provisions by subsequent legislation altogether and grants to the higher courts the power to formally declare an incompatibility in the case of a conflict that the courts cannot interpret away. Such a declaration is normally expected to trigger a legislative

129. Constitution Act, 1981, Section 38 (1).
130. See infra nn. 87-89.

response that results in the right prevailing over the conflicting statute. Finally, the Canadian Charter lies in between the American model and the HRA in that it adopts all the essentials of the former save for the legislative override of Charter rights.

Of course, whatever the analytical niceties of this continuum in suggesting the existence of middle ground between the two poles, the newly institutionalized positions along it will only be attractive or plausible to the extent they genuinely balance and address the perceived problems with both of the polar choices. The claim again is that what is valuable and essential in both fundamental rights protection and parliamentary sovereignty can be had at the same time without their associated problems. To recap. What is valuable and essential in fundamental rights protection is obviously adequate legal protection of the rights. The associated problem is that a fully constitutionalized bill of rights gives to courts rather than the legislature the final say on what the law of the land is. Conversely, the core essential of parliamentary sovereignty is that the legislature should be empowered to have this final say, and its associated problem is that adequate rights protection is thereby impossible.

In purely legal terms, then, each of the Commonwealth countries now protects rights more effectively than under its original regime of full and absolute legislative supremacy. Canada by instituting a limited overriding bill of rights; New Zealand by a purely interpretive one; and Britain by a mixture of the two. On the other hand, each also preserves the core element of parliamentary sovereignty, as they see it, by ensuring that the legislature may, if it chooses, have the last word on what the law of the land is. In Canada by exercising the override; in New Zealand by enacting legislation that expressly or by unambiguous implication limits rights; in Britain, first by express limitation and then by refusing to amend or repeal the statute after a judicial declaration of incompatibility.

B. *Comparing the Commonwealth and American Models of Constitutionalism*

What are the potential benefits and advantages of this new model? Are they exclusive to it or can the same results be achieved within the broad church of the American model? What light, if any, does the new model shed on existing justifications for the American model framed within the context of the traditional bipolar choice?

1. The Potential Benefits of the New Model

Analytically and institutionally, the major impact and contribution of the new model is to open up a range of intermediate possibilities where none were previously thought to exist. The new question might become, not which of the two polar position shall we occupy, but where on the spectrum should we be. Almost certainly, there can be no global answer to this question, for ultimately the choice will likely depend, at least in part, on normative preferences among the values that are likely to be culturally and historically specific. But even so, the new model will likely make three important contributions to this decision.

First, to the extent that a legal system chooses one of the polar positions on the merits despite awareness of these new options, because it prefers traditional judicial review or is wedded to the strongest version of legislative supremacy, then its choice is that much more self-conscious and transparent as a result. Second, to the extent that an existing choice was not fully informed in this way, but was premised on the notion that the only available options are the two polar ones, the hybrid Commonwealth solution promises to reopen and complicate matters in a healthy way. Third, empirical evidence of the actual record of the Commonwealth experiments in protecting rights can supplement and help inform the normative issue of what trade-off between the two values is appropriate and required. So far, the concern at the Canadian record is the converse one of whether it adequately protects parliamentary sovereignty. In New Zealand, a "new culture of rights" has developed around the Bill of Rights, although mostly this has concerned judicial review of administrative acts, which does not raise the incompatibility in the same way as legislation. In Britain, it is obviously too soon to tell.

In addition to creating options where none were previously thought to exist, the Commonwealth model suggests four specific and tangible benefits in comparison with the polar position of the American model. These are: (a) addressing the legislative and popular debilitation problem that has concerned many observers of traditional judicial review; (b) transforming constitutional rights discourse from a judicial monologue into a richer and more balanced inter-institutional dialogue; (c) enhancing the legitimacy of the courts' role by creating a partial division of labor with respect to the common, and perhaps inevitable, task in constitutional adjudication of balancing individual rights against public policy imperatives, and (d) reducing, if not eliminating, the tension between judicial protection of fundamental rights and democratic decisionmaking. Let us consider each of these in turn.

At least since James Bradley Thayer identified it at the end of the nineteenth century, it has been widely acknowledged that one of the major institutional costs of judicial review is that it tends to debilitate both legislative consideration of matters of high principle and popular responsibility for rights protection through the ballot.[131] This is because where legislatures do not have final responsibility,

131. See Thayer, supra n. 122.

there is a tendency, both on their part and that of the electorate, to leave matters of constitutionality and rights to the courts.[132] Over time, this devaluation of legislative discourse may not only sap the self-governing capacity of the people but may also be an important factor in the displacement of public in favor of private interest that many believe characterizes and demoralizes contemporary politics.

By granting to legislatures the power to have the final word on what the law is, the Commonwealth model promises to break this vicious circle and reinvigorate legislative and popular political debate. Whether exercising their power to override the Charter, responding to a declaration of incompatibility, or clearly legislating in a manner that cannot be interpreted consistently with the bill of rights, legislatures are provided with new and powerful incentives for not simply delegating responsibility for considering matters of principle to the courts. No longer will the courts' consideration necessarily be final. On the other hand, the exercise of this legislative power will not likely be routine but undertaken in the focused glare of publicity – triggered by the required ministerial statements, court decisions, or use of the override — and will presumably carry a high political burden of justification as to why individual rights should not prevail. In this way, the expectation is that legislatures will be forced to face, and deliberate in principled manner about, the same controversial and indeterminate legal, political, and moral issues that courts face in the context of constitutional adjudication.[133]

Closely linked to this is the fact that judicial monopoly and monologue on the topic of the meaning and scope of constitutional rights may be replaced with inter-institutional dialogue between courts and legislatures that would improve the quality and dimensions of constitutional analysis. For the problem of debilitation is not only a self-induced one on the part of legislatures. Under the doctrine of judicial supremacy, which gives them the final say, courts often actively resent attempts by legislatures to participate in the task of constitu-

132. The converse problem has also been noted and termed "the juridicalization of politics." This is that, with judicial review in place, legislatures become overly concerned with the issue of constitutionality and what the courts will uphold and tend to believe that whatever is constitutional is good policy. See Alec Stone, *The Juridicaliztion of Politics in France* (1991), suggesting that this phenomenon has taken place in France since the advent of judicial review. Stone himself recognizes that this is more likley to be a problem in countries like France with abstract judicial review where constitutional challenges become a virtually automatic final stage of the legislative process than in countries like the U.S. with only concrete review (and, it might be added, stringent standing rules). It should be noted that Thayer himself, although better known for the opposite concern, also subscribed to this view. See Thayer, supra n. 122, at 103-07. Tushnet terms this the "problem of policy distortion," see supra n. 5.

133. As we have seen, thus far this expectation has not been met in Canada. I compare the three bills of rights in terms of likelihood of ensuring this benefit, as well as the others, in the next section.

tional interpretation, declaring it a usurpation of their authority.[134] Although analytically distinct, judicial supremacy leads easily to judicial exclusivity and institutional disrespect for the constitutional opinions of the elected branches of government. It can also result in the over-legalization of constitutional discourse and the consequent snuffing out of forms of popular constitutionalism.[135] The enforced dialogue, competition, and joint responsibility between courts and legislatures that the Commonwealth model aims to ensure promises to add new dimension and perspective to the task of constitutional interpretation and to enrichen the enterprise.

This dialogue may also lead to a better and more appropriate division of labor between courts and legislatures in constitutional analysis than under a system of judicial supremacy. Constitutional rights are rarely absolute, whether or not express limitations are contained in the text.[136] In this context, constitutional adjudication requires both specification of the permissible limits and determination of whether the limits have been exceeded in any particular case. To the extent that this second task involves, as it usually does,[137] assessing both the importance of the legislative goal and the rationality, necessity, or proportionality of the challenged law as a means for achieving it, there is often a sense that here courts are in danger of straying too close to the terrain of policy and preference.

The Commonwealth model offers the possibility of a rough division of labor in which courts effectively have the final say on the first, more law-like task of specifying the constitutional standard, and legislatures on the second, the application of this standard. This is because legislatures are perhaps most likely to satisfy their *political*

134. For recent examples of this tendency in the United States, see City of Boerne v. Flores, 521 U.S. 507 (1997) and Kimel v. Florida Board of Regents, 120 S.Ct. 631 (2000)(Court holds that in exercising its power to enforce the Fourteenth Amendment, Congress may only enforce the Court's interpretation of the amendment and not its own). For recent academic commentary critical of the Court's position as overreaching, see McConnell, "Institutions and Interpretation, A Critique of City of Boerne v. Flores," 111 *Harv. L. Rev.* 153 (1997); Kramer, "Foreword: We the Court," 115 *Harv. L. Rev.* 5 (2001); Coker & Brudney, "Dissing Congress," 100 *Mich. L. Rev.* 80 (2001); Barkow, "More Supreme Than Court," 102 *Colum. L. Rev.* (forthcoming). For a general defense of judicial monopoly in constitutional interpretation, see Alexander & Schauer, "On Extrajudicial Constitutional Interpretation," 110 *Harv. L. Rev.* 1359 (1997).

135. This, in particular, is the theme of Larry Kramer, id.

136. All three Commonwealth bills of rights contain such express limitations. Section 1 of the Canadian Charter states that its rights and freedoms are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 5 of NZBORA exactly duplicates this wording. HRA copies the strategy of the ECHR that it incorporates, which is to specify individual limits on particular rights rather than a general limit on all rights. The U.S. Constitution, of course, generally contains no express limits but this has not meant rights are interpreted as absolute.

137. On the prevalence of balancing in modern American constitutional law, see Aleinikoff, "Constitutional Law in the Age of Balancing," 96 *Yale L.J.* 943 (1987).

burden of justification not by disputing a court's determination of the scope and content of a right, or by announcing they are simply overriding it, but because they disagree with the court on the seemingly less inherently "judicial" function of weighing the reasons for limiting the right in a particular case. In this process, courts might actually be emboldened in their interpretation of the content and scope of rights, knowing that they will not necessarily have final responsibility for the balancing function or for rejecting majority views.[138] This might lessen the perception that courts are engaged in discretionary policymaking, which in turn may result in both better and more appropriate constitutional decisionmaking and greater legitimacy attaching to the courts' functions.

Finally, the new model is, of course, self-consciously designed to provide a new institutional solution to the old problem of the tension between judicial review and democracy. Its claim is that judicial protection of rights need not be incompatible with the core essential of legislative supremacy that requires elected lawmakers to have the power of the final word. This is obviously the most straightforward and direct way of "dissolving" the counter-majoritarian difficulty: judicial review is subject to majoritarian override in one of the three different ways provided. I will consider the impact of this solution on the existing justifications in Part 3 below.

2. Can these Benefits be Achieved Without Rejecting the American Model?

As I indicated at the outset, the discipline of comparative constitutional law is much occupied with institutional variations exhibited among the many countries that have adopted the essential features of the American model of constitutionalism since 1945. Some of these variations are designed to lessen the tension between judicial and legislative supremacy by creating procedural and institutional bridges across the substantive gulf dividing them. The same goal has been attempted in the United States through the characteristic mechanism of self-regulation: by courts imposing constraints on their own exercise of the judicial review power. Can the potential benefits of the Commonwealth model be achieved by suitable variations and reforms of this sort within the American model and, in particular, without departing from the doctrine of judicial supremacy?

138. The general argument that the override might result in greater judicial protection of rights because judges will have less fear of frustrating the democratic process has been made in the Canadian context. See Dale Gibson, *The Law of the Charter: General Principles* 125-26 (1986). Another way of making this point is that the new model might help to solve the acknowledged problem of judicially underenforced constitutional norms where the courts have the final word. See Sager, "Fair Measure: the Legal Status of Underenforced Constitutional Norms," 91 *Harv. L. Rev.* 1212 (1978).

A popular procedural attempt to temper the acknowledged tension between constitutional and legislative supremacy with respect to rights protection is to enhance the role of the legislature in the appointment of judges exercising the incompatible power. While substantively, the courts retain the final word on what the law is that is the central feature of the American model, some procedural reconciliation is achieved by giving the legislature the final word on who is to exercise this power over its enactments. In Europe, both the characteristic single, specialized constitutional court and the method of selecting its members are premised on a denial of Chief Justice Marshall's justification of judicial review as a normal and routine part of the ordinary judicial function.[139] Thus, the ordinary system of judicial appointment and promotion — a purely executive, and largely bureaucratic, function performed by the Ministry of Justice or its equivalent[140] — is replaced with a more openly political one in which members of the constitutional court are typically selected either directly by the legislature alone with due and open regard to judges' party affiliation, or by the two branches of the legislature and the executive each selecting a third.[141] By contrast, in the U.S. the appointments process is far less geared towards procedural reconciliation with legislative supremacy as federal judges are nominated by the head of the (directly elected) executive branch and the legislative role is limited to Senate approval or rejection by majority vote. A second related procedural mechanism common in Europe is to have fixed term, non-renewable appointments to the constitutional court, rather than life tenure, to ensure more frequent legislative input into its membership.[142]

Although legislative selection of constitutional judges and fixed terms may perhaps reduce the tension between constitutional and legislative supremacy, they do not address its main source. This is less the procedural issue of their method of appointment than the substantive one of their function. Here it is important to distinguish between the separate issues of judicial review as an undemocratic decisionmaking procedure and the claim of legislative supremacy. Even directly elected judges (as at the state level in the United States) would not address the latter. Members of a constitutional court fully and directly appointed by the legislature are still not the

139. See supra n. 39.

140. See Cappelletti & Cohen, supra n. 1, at 80-83.

141. Thus in Germany, the two chambers of the legislature, the Bundestag and the Bundesrat each select eight members of the Constitutional Court (6 must be sitting federal judges). The Court is divided into two senates of eight judges. In France, the President, National Assembly, and Senate each select three members of the constitutional council. Somewhat unusually, in Italy, the President, the Parliament, and the highest courts each select five members of the Constitutional Court.

142. Michael Perry has suggested this procedure might usefully be imported into the U.S. See Perry, supra n. 5, at 201.

equivalent of a legislative committee because of the critical difference that the full legislature does not have the power to override its decisions and have the final word. Moreover, it is not obvious that legislative selection does or could provide the potential benefits. Apart perhaps on the specific question of judicial appointments, it is unclear how this reduces the debilitation problem or creates inter-institutional dialogue, and to the extent it does, it potentially threatens another important systemic value: the independence of the judiciary. Particularly might this be so in those few systems where judges' terms are fixed and renewable, but it could also arise under the more common arrangement of fixed and nonrenewable terms.[143] By contrast, the great innovation of the hybrid bills of rights is to create an *official* division of labor between courts and legislatures in the responsibility for rights protection that does not depend on obligations or incentives created by the system of appointment.

The theory of minimal judicial review advocated initially at the end of the nineteenth century by James Bradley Thayer[144] and adopted to varying degrees by his protégés and other members of the U.S. Supreme Court during the twentieth,[145] is the leading theory of self-regulation. The fact that this theory has been expressly written into the constitutional texts of Sweden and Finland indicates, however, that the self-regulatory nature of minimal judicial review is not essential.[146] Under the formula proposed by Thayer himself, only where a legislature has made a "very clear mistake" with respect to the constitutionality of its enactment, "so clear that it is not open to rational question," should a court strike it down.[147] This rule of deference represents both a procedural attempt to justify judicial review by tempering its acknowledged tension with democratic decisionmaking, and an attempt to address one of its institutional consequences, the problem of democratic debilitation, by limiting the scope of the

143. Spain has nine year, and Portugal six year, renewable terms. Even in the many countries with fixed tern non-renewable terms, judges will often need to have post-constitutional court careers.

144. See Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 17 (1893); Thayer, John Marshall, supra n. 122.

145. Justices Oliver Wendell Holmes and Felix Frankfurter were Thayer's leading protégés on the Supreme Court.

146. The Swedish constitution permits the invalidation of a statute only where there is an "obvious or apparent" conflict (*uppenbar*) with the Constitution, and the Finnish only where there is a "clear controversy" (*ilmeinen ristiriita*). See Husa, supra n. 29, at 361, 365.

147. Thayer, The Origin and Scope, supra n. 144, at 144. Thayer claimed that this rule was not his invention but was in fact the established rule in the first half of the nineteenth century. Thayer applied this rule only to federal court review of federal statutes, because it involved the lawmaking prerogatives of a co-ordinate branch of government. When federal courts review state laws, they are not dealing with a coordinate branch, but are the representatives of the paramount federal government and their task is drawing allocation of power lines.

power.[148] Alexander Bickel's view that, with respect to judicial review, courts should exercise the "passive virtues"[149] is another expression of this restraining ideal, as too are more generic strong presumptions of constitutionality. In a sense, the theory opts for de jure judicial review and de facto legislative supremacy, the respective scope of each depending on the particular criterion of "clear error." Thayer's alternative formulation of "beyond a reasonable doubt" which, like its criminal counterpart, seems to call for unanimity, obviously creates a very strong presumption of constitutionality.[150]

A comparison with the hybrid bills of rights suggests that minimal judicial review may be an inferior solution with respect to both polar values. With respect to rights protection, the result in a context in which radical yet reasonable disagreement in constitutional adjudication is endemic would likely be substantial underenforcement and underprotection — far more so than under any of the three versions of the hybrid bill of rights. This again illustrates the general point that the effectiveness of rights protection is not simply a function of their legal status. In effect, the minimalist theory inverts the interpretive duty imposed on courts in the United Kingdom and New Zealand, and under the CBOR, for it requires courts to interpret the Constitution as consistent with the statute under challenge whenever there is no "clear error," rather than reading the statute in the light of the bill of rights. On the other hand, however, minimal judicial review would still violate parliamentary sovereignty whenever it does justify exercise of the power since the legislature has no legal power to insist that its clear error stand, although admittedly this is not the strongest type of case for an override. This "all or nothing" feature of the theory means that little real balancing of the two values occurs and from this perspective it seems inferior to the hybrid bill of rights.

With respect to democratic debilitation and inter-institutional dialogue also, a strong presumption of constitutionality may quite simply create inadequate incentives for the legislature or the people to engage in the desired principled debates as compared with the Commonwealth model. Rather than feel obligated to conduct such debate, the legislature may simply leave it to the lawyers to come up with the required plausible case for constitutionality if and when the time comes. And without an express legislative invocation of its power to

148. See Thayer, supra n. 122.

149. See Bickel, *The Least Dangerous Branch*, supra n. 6, at 111-99 (the "passive virtues" refer to the numerous procedural ways in which courts can avoid answering constitutional questions: they include the standing, mootness and ripeness doctrines, the political question doctrine, independent and adequate state law ground, answering only the narrowest question necessary to decide a case, and the discretionary certiorari power).

150. Thayer, supra n. 144, at 149.

preempt or override individual rights, voters may well have insufficient notice or information to trigger their concerns.[151]

A final possibility, at least within the U.S. version of the American model, is that achieving the same result as a legislative override mechanism is actually already within Congress's enumerated power to control the jurisdiction of the federal courts, including the Supreme Court.[152] Arguably, broadly interpreted, this power could be used to limit or even end the power of judicial review. But quite apart from the facts that (a) as Mark Tushnet has noted in this context, Congress's jurisdictional power has never been employed or understood in this way[153] and (b) there would likely be serious constitutional difficulties in doing so given Marshall's inherent constitutional status of judicial review, this would not amount to achieving the same benefits *within* the American model but abandoning that model for one of the two alternatives. Congressional abolition of judicial review would simply enact full parliamentary sovereignty, and more limited, particularized use of the congressional power would create yet another version of the Commonwealth model giving the legislature power to have the final word. In all likelihood, its opaque, highly technical, and indirect character[154] would be less likely to bring about the benefits associated with the other three more open and express methods. But again, the precise issue here is not whether the U.S. *could* change its current constitutional practice and adopt the Commonwealth model — by congressional action or constitutional amendment — but whether it can reap the benefits of this model without doing so.

3. The Impact of the New Model on Existing Solutions to the Problem of Judicial Review

As we have seen, one of the obvious theoretical benefits of the new model is that it offers a direct solution to the democratic problems associated with judicial review by giving the majoritarian branch of government, not the courts, the final say. One asserted justification of judicial review does not address this issue but relies instead on the perceived normative superiority of fully constitutionalized rights protection regardless of any democratic

151. After noting the failure in practice of the Canadian override mechanism to solve the debilitation problem as some had hoped, Tushnet concludes that Thayerian judicial minimalism may be the only plausible candidate. He notes, however, that there might be other institutional alternatives. See Tushent, supra n. 5, at 299-301. Obviously NZBORA and the HRA are examples of such alternatives.

152. Under Article III, Section 2, cl. 2, the Supreme Court's appellate jurisdiction is stated to be subject to "such exceptions, and under such Regulations as the Congress shall make."

153. See Tushnet, supra n. 5, at 285-87.

154. See id.

costs or inconsistency.[155] But others attempt to confront the problem head on, attempting to "dissolve" it by claiming that traditional judicial review is consistent with, and may even promote, democracy and popular self-government. Such theories were constructed, of course, in the context of the polar choice: either judicial supremacy or no judicial protection at all. The question now considered is what plausibility do these existing theories retain when faced with the new alternative of an intermediate, less powerful judicial role. In this section, I shall consider the three most influential justifications of this sort.

The first of these is the "representation reinforcement" theory associated with John Hart Ely[156] and footnote 4 of Carolene Products,[157] but whose origins may be traced at least as far back as Chief Justice Marshall's opinion in *McCulloch v. Maryland*.[158] The argument is that judicial supremacy is not only compatible with, but actually enhances, representative democracy and popular sovereignty when its exercise is limited to perfecting the democratic process by enforcing those rights that bear on full and equal political participation. These include voting, free speech, and anti-discrimination rights.

In the specifically comparative context of the new model in which we are considering it, there appear to be two problems with this theory. First, whatever the extent to which the United States Constitution may best be interpreted as predominantly containing procedural rights of democratic participation, this is not a plausible account of the fundamental rights contained in the constitutions framed in the aftermath of World War II, and so cannot provide a justification for full judicial review regarding the many substantive provisions they contain.[159] Second, the gap between popular sovereignty and legisla-

155. Very broadly speaking, this was the position taken by many European countries who adopted judicial review after 1945 in the light of their own, or others', recent human rights records. But note that effective rights protection may turn out to be greater under the new model because courts feel less constrained by fear of ousting majority views.

156. John Hart Ely, *Democracy and Distrust* (1971).

157. United States v. Carolene Products Co., 304 U.S. 144 (1938)(in a footnote to his opinion for the Court in this case, Justice Stone suggested that the normal presumption of constitutionality attaching to state social and economic regulation may be inappropriate in cases where "legislation. . .restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

158. McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819) ("But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control.").

159. For example, Germany's Basic Law places the substantive value of human dignity first, and at the center of its scheme of constitutional values. In the (representative) view of one commentator, the German Constitutional Court has made it clear that Article 1(1) (which states that "the dignity of man is inviolable. To respect and protect it is the duty of all state authority") "expresses the highest value of the Basic Law, informing the spirit and substance of the entire document." See Donald Kom-

tive supremacy on which the theory relies is one that runs counter to the European tradition for the reasons stated above. Particularly, though not only, in this context, the goal of perfecting democratic procedures by disabling the democratic institutions seems paradoxical. By contrast, the Commonwealth bills of rights protect *both* procedural and substantive rights, but in ways that do not completely disable the representative institutions in the name of their own perfection.

The second theory makes an even more direct democratic appeal to the people over the head of the institution that claims to represent and express popular sovereignty. This theory minimizes not the exercise of judicial review, as with Thayer, but the conception of what judges who exercise it are doing. Finding its source in the defenses of judicial review provided by Chief Justice Marshall and Alexander Hamilton,[160] the argument relies on the democratic source and authorship of the Constitution by We the People and sees the task of the courts as simply protecting and enforcing their work product against the legislature with little independent input. In addition, some versions of this argument prescribe a method of constitutional interpretation that adheres strictly to the text that the people enacted to constrain the legislature, or else their — or the framers' — original intent.[161] Bruce Ackerman has given dynamic form to this venerable argument by positing a more complex judicial function of interpretive synthesis of successive interventions by We the People over time.[162]

The general problems with this solution are well known. First, it is driven by justification rather than observation and does not plausibly describe the actual process of constitutional adjudication. Even with the most tightly drawn text conceivable, this is necessarily less mechanical and gives more discretion to the courts than the structure of the solution would seem to permit. Such discretion, however democratically granted, is in serious tension with the principle of popular self-government and undermines the idea of judicial review as a simple precommitment strategy by the sovereign people.[163] Second, given the entrenchment of fundamental rights and the consequent difficulty of amendment, it gives primacy not to current popular sov-

mers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 298 (2nd ed., 1997).

160. For Marshall, see Marbury, supra n. 3 ("The principles, therefore, so established [by the people] are deemed fundamental. And as the authority from which they proceed is supreme (the people), they are designed to be permanent"). For Hamilton, see *Federalist* 78 ("It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order. . .to keep the latter within the limits assigned to their authority. . .. .the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

161. The claim is that the best evidence of the people's work product that the Court is obligated to protect is the text that they ratified and/or the contemporary understanding of what the words they ratified meant to them.

162. Ackerman, *We the People*, supra n. 17.

163. See Waldron, supra n. 122, at 255-81.

ereignty but that of the past, without adequate justification. By contrast, a hallmark of traditional parliamentary sovereignty is the doctrine that past legislatures cannot bind future ones, ensuring that current majorities enjoy the full sovereignty of their predecessors. Once again, in the comparative context, there is the additional problem that this solution is premised on the American conception of the legislature as lacking a distinctive connection to the people and popular sovereignty.[164] This lends a democratic plausibility to the claim that the courts are the true guardians of popular sovereignty that would be lacking elsewhere. In short, it fails to take the legislature seriously enough as the institutional manifestation of popular sovereignty.

But putting these general problems to one side, the theory itself, like the others considered, was framed in the context of the bipolar choice: either traditional judicial review or full legislative supremacy. The challenge that the new Commonwealth model poses is whether the limits on judicial power that it creates might better comport with the underlying structure of the theory's appeal to popular sovereignty. In other words, might the judicial role in protecting fundamental rights be more appropriately a checking function on the legislature rather than a trumping one, forcing the legislature to think in serious and principled terms before it exercises its power of the final word? The asserted gap between popular and legislative sovereignty can be filled by information and electoral accountability. The courts' role becomes that of fully alerting the people to potentially unconstitutional acts, so that the legislature can be made fully answerable to them.

Finally, there is the justification for the choice of the American model associated with Alexander Bickel.[165] This stresses the division of function and relative abilities of courts and legislatures so that the necessary discussion of general principle is best undertaken by the former because only it has the requisite independence, time, and motivation. But from the Thayerian perspective, even if true, this judicial capacity for high principle is not a purely independent variable but is at least in part a product of judicial review itself. It takes the consequence of judicial review as a justification for it. One of the most important potential advantages of the hybrid bills of rights is that they attempt to transcend any division of function by creating strong incentives for legislatures to enter into constitutional modes of discussion. Thus, in Canada, legislatures must decide whether to exercise the overriding power; in New Zealand, whether to render a statute impossible to read consistently with a relevant right; and in Britain, how to respond to a declaration of incompatibility. In this

164. See supra nn. 124-26.
165. Bickel, supra n. 6, at 23-28.

sense, Bickel's argument is a bootstrapping one: legislatures might be unprincipled in significant part because they do not have the responsibility of the final word.

C. *Which of the Three Versions of the Commonwealth Model is Most Likely to Provide its Distinctive Benefits?*

As the continuum sketched above makes clear, although the bills of rights in all three Commonwealth countries exemplify the new model of balancing, rather than choosing between, the claims of parliamentary sovereignty and fundamental rights protection, each of them draws a different balance between the two. Thus, although each bill preserves the core element of parliamentary sovereignty while protecting fundamental rights, each places a different weight on the two values. With respect to rights, each bill grants greater legal protection to fundamental rights than the country previously granted, ranging from the strongest legal protection in Canada, to lesser protection in the United Kingdom, to the weakest in New Zealand. Conversely, in terms of reducing the democratic problem associated with this given level of rights protection, each provides that the final decision on what the law is may be made by the legislature, but the manner in which it may do so means that New Zealand reduces the problem the most, the United Kingdom next and Canada the least. Put another way, formally, Canada appears to depart furthest from absolute parliamentary sovereignty and creates the greatest political costs for a legislature that seeks to exercise its legal power to override rights, the United Kingdom next, and New Zealand the least. Which of these three represents the strongest version of the new, hybrid solution? Which is most likely to provide its benefits?

Let me bracket two issues. First, as with the merits of the new model as a whole, the general answer may, for many, ultimately depend on a greater normative commitment to one or other of the two values. Thus, if traditional judicial protection of fundamental rights is deemed more important than any democratic costs it entails, then the Canadian example will seem a priori more attractive than the other two, and the American model more attractive than the Canadian. Second, the formal, legal balance contained in the various bills of rights may not be the most important variable in determining whether and how much balance between the two values is achieved in practice. As discussed in Part III, for example, the experiences of Canada and New Zealand clearly illustrate this point that context, legal and political culture, and historical contingency play at least as much of a role. Thus, the legally similar CBOR and NZBOR had quite different results in practice in terms of judicial protection of rights, and the intended compromise between the two poles that Section 33 of the Charter was designed to implement has become neutralized by constitutional convention.

From the perspective of both addressing the legislative and popular debilitation problem and creating inter-institutional dialogue between courts and legislatures, the optimal method of enabling a legislature to have the last word on what the law is would be one that (a) raises the political costs of rights infringement by forcing it to face squarely and deliberately the issue of principle involved when it chooses to exercise this power, but (b) does not raise them so high that the power is unusable. Unfortunately, both the Canadian solution of Section 33 and the NZBORA probably fall short of the optimal on the first.

With respect to Canada, the first requirement suggests that the legislative override should not be used routinely or too bluntly otherwise it will fail to trigger the desired heightened awareness. The *Ford* decision permitting both omnibus and standard, gunshot-style, overrides does just this. Of course, *Ford* might have been decided differently,[166] but even if the maximal specificity argument had been accepted so that (i) each statute must contain its own override provision and (ii) that provision must express in words which particular rights are being overridden and how, this would still permit preemptive overrides (which was not an issue in the case). Arguably even such specific preemptive overrides would still fail to raise the political costs sufficiently. The inherently hypothetical nature of future rights violations under an immunized statute may not adequately concentrate political minds compared to actual concrete violations as determined after the event by a court. Preemptive overrides thus deprive the legislative and popular debate of the valuable input of a considered judicial view on the relevant issue.

Under the NZBORA, either fundamental rights prevail under the courts' interpretive duty or the courts find that a (prior or subsequent) statute cannot be interpreted consistently with the rights, in which case the statute prevails. Legally, traditional parliamentary sovereignty is heavily protected. Courts have no power to question legislative acts and even prior statutes deemed to be in conflict with the bill of rights will survive and not be impliedly repealed by the latter. Institutionally, however, Andrew Butler has argued that a major problem with the NZBORA is that it gives ultimate responsibility to the courts for protecting *both* fundamental rights and parliamentary sovereignty.[167] According to Butler, this is because the only

166. In fact, a lower court did decide the same issues differently. The Quebec Court of Appeal held that Quebec's blanket and standard uses of the override violated the specificity requirement of Section 33. Alliance des Professeurs de Montreal v. A.G. Quebec, [1985] C.A. 376, (1985) 21 D.L.R. (4th) 354. This decision, which was overruled in Ford, is discussed in Weinrib, supra n. 57.

167. See Butler, supra n. 73, at 336-38.

question at issue is one of statutory interpretation and the courts are the final interpreters of statutes. In this context, they must resolve the rival claims of fundamental rights and parliamentary sovereignty themselves, without being able to rely on the legislature squarely exercising its own sovereignty claim through a special mechanism as in Canada and the United Kingdom. Moreover, he argues, even where the legislature enacts a measure despite a Section 7 inconsistency statement from the Attorney-General, this too is ultimately subject to court interpretation and there may well be plausible reasons for not finding a conflict.[168]

If there is a problem with the NZBORA in terms of reaping the full benefits of the new model, I am not convinced that this is it because the legislature can always respond to a court interpretation not to its liking and amend the relevant statute in a way that makes its intent to trump a right incontrovertible and interpretation-proof. Indeed, as discussed above, this scenario appears to exemplify the distinctive method by which interpretive bills of rights protect both values. The problem seems rather the converse one, and is similar to that of the Canadian override in practice: preemptive use by the legislature of this power. Where the legislature makes explicit its intent to oust a right at the time of initial enactment, rather than in an amendment responding to a court decision with which it disagrees, the likelihood is that the political costs will be too low. As with the preemptive override in Canada, the legislature will not be forced to debate in the public spotlight created by an adverse court decision,[169] and the valuable input of the court's view on the matter will be absent. The Section 7 statement by the Attorney-General, while helpful, may well be insufficient for these purposes.

The HRA deals directly with this problem. It does not permit any preemptive use of a legislative override (whether routinized or specific), because the remedial order provisions only come into play reactively, i.e., after a judicial declaration of incompatibility. Parliament lacks the power of a Canadian or the New Zealand legislature to immunize its actions against subsequent judicial questioning. No matter how expressly Parliament states its desire to violate a Convention right in a given statute, the courts are still empowered to declare incompatibility after its enactment. Thus, Parliament can always be faced by such a declaration. Only repeal of a particular Con-

168. Id., at 335-36, and supra n. 97. Butler convincingly argues that the courts' interpretive leeway here stems from plausible alternative explanations of legislative intent than clear desire to trump a right. For example, MPs may disagree with the Attorney General that the proposed measure conflicts with a right.

169. Although court decisions under the NZBORA are always likely to be somewhat less dramatic than under the Charter or the HRA, given that they will be ones of statutory interpretation rather than invalidating a statute or declaring it incompatible with a protected right.

vention right or the HRA as a whole can create the immunity. In this way, it may ensure both that the political costs of an override are not too low and that the legislative debate is informed by the judicial view.

Although the HRA thus appears to be superior in this important respect to both the NZBORA and how the Canadian override has worked in practice, it is important to note that it contains a different default rule to both for exercise of the legislature's power to have the last word in response to a court decision. Whereas use of the override (in Canada) or power to amend a statute by expressly trumping rights (in New Zealand) require affirmative action on the part of the legislature, under the HRA a statute declared incompatible with a Convention right stands unless amended or repealed by Parliament. It is, once again, too soon to know for certain, but this may mean the political costs of a *reactive* override will not be quite as high as in Canada or New Zealand. If so, this in turn might result in either a second advantage or a first disadvantage compared to the other two: more frequent triggering of the desired debates and dialogue, or too easy use of the passive override.

V. CONCLUSION

It is now commonplace to observe that there has been a tremendous growth of constitutionalism in the world since 1945. Although certainly true, this general statement runs the risk of failing to distinguish between two quite different developments that have taken place. The first is a change *to* constitutionalism in many countries; the second is a change *from one form of constitutionalism to another* in several others. The distinction is overlooked in large part because until very recently, both types of change have resulted in adoption of the American model of constitutionalism, and this in turn has added to an existing parochial tendency to understand this as the only such model.

Without doubt, of the two developments, the change to constitutionalism has been the more significant and remarked upon. After 1945, it encompassed those countries that had suffered from fascist and military dictatorships in the interwar years, particularly Germany, Austria, Japan, Italy, Spain, and Portugal. And since 1989, it has spread to the countries in central and eastern Europe newly liberated from communist dictatorship.

Although, as discussed, all these countries have adopted the essentials of the American model of constitutionalism, it is a mistake to think of this as the only available such model. As exemplified by the pre-Bill of Rights United Kingdom, Canada, and New Zealand, as well as interwar and Fourth Republic France, and contemporary Holland and Luxembourg (as well as Denmark and Norway in practice), the polar opposite of full legislative supremacy is an equally venerable form that constitutionalist legal and political systems may take. This is so even though this same legal form is very often the one under which non-constitutionalist governments may also operate, although, to be sure — as the history of many Latin American countries testifies — the legal form of the American model is no guarantee of the substance either.

Among the countries previously adhering to the legislative supremacy model of constitutionalism, some, such as Belgium and France have, since 1945, shifted to the opposite pole of the American model. In addition, those west European countries that changed from dictatorships to constitutionalism also chose this model in preference to reverting to their general pre-dictatorship constitutionalist system of legislative supremacy. More recently, of course, Canada, New Zealand, and the United Kingdom have shifted from this model in order to ensure more formal, legal guarantees of individual rights. While this change is expected and intended to have important consequences in terms of developing cultures of rights, this also represents a change within constitutionalist legal and political systems and not a change to one.

Like France and Belgium, these three Commonwealth countries have, to varying degrees, shifted away from the traditional model of constitutionalist legislative supremacy; but unlike them, they have not adopted the alternative of the American model. Instead they have created a new one. Its novelty is to add a third, hybrid form to the two existing models, one that bridges the perceived mutual exclusivity between them. Most importantly, while granting courts the power to enforce fundamental rights, it decouples judicial review from judicial supremacy by empowering legislatures to have the final word. This new model was custom-built to permit greater legal protection of rights within political cultures in which there is substantial attachment to parliamentary sovereignty as having provided a long and largely successful tradition of constitutionalist democracy. But while the impetus for the new model has come from the legislative supremacy pole of the spectrum, it addresses in new ways concerns that have their roots in the opposite pole. As such, it merits close observation and consideration by both new converts to, and founding members of, the American model.