

Parliamentary Bills of Rights: An Alternative Model Perhaps. But how significant are the differences?

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Conventional wisdom suggests that liberal constitutionalism can take one of two rival paths. One path is to codify rights, representing a higher law than ordinary legislation, where the judiciary is empowered to interpret these and grant remedies for their infringement. This is the model influenced by American-style judicial review, and has been emulated and adapted in Western Europe after 1945 and in central and Eastern Europe after 1989.¹ Although significant differences exist in the nature of constitutional adjudication (relating to whether ordinary or constitutional courts are used, differences in the appointment, composition and tenure of judges, and how issues come before courts),² what unites this approach is the judiciary's capacity to nullify legislation that is deemed inconsistent with protected rights. And nullify legislation they have. For example, in the past thirty years, the 'French, German, and Italian courts have, respectively, invalidated more national laws than has the U.S. Supreme Court – in its entire history'.³

The second path emphasizes the supremacy of legislative judgment. This is the approach of Westminster-modelled parliamentary systems that historically have rejected the idea of construing political debates as legal conflicts that require a judicial role in their resolution. Rights are not foreign to this system and are protected through the rule of law and interpretations of the common law. Yet their function is different than in the

previous model. Individual rights do not provide independent checks to determine the validity of legislative judgment. Instead, the legitimacy of a political system is premised on the general right to participate in the political deliberations that characterize representative government. Political systems based on the sovereignty of legislative judgment do not ‘understand political rights in terms of the drawing of boundaries around autonomous individuals’ but celebrate, instead, the ‘right of rights’⁴ in which ‘large numbers of rights-bearers act together to control and govern their common affairs’.⁵

Those who are sceptical about the merits of using bills of rights as the central method to structure and evaluate political decisions are no doubt frustrated by the triumph of the first path of constitutionalism. Despite their persistent and dire warnings of the negative consequences of relying on legally interpreted rights to determine the validity of contested state actions, no indication exists of any intent amongst political communities to reverse prior decisions and discard their bill of rights.⁶ Moreover, decisions to adopt bills of rights where judges determine the validity of impugned legislation have often been made without serious contemplation of what constitutionalizing rights means for the democratic right of participation.⁷

Sceptics have had to resign themselves to the popularity of this juridical form of constitutionalism. They continue to comprise a minority perspective in doubting the prudence of utilizing a bill of rights. And even if their criticisms were to motivate a political movement intent on discarding its nation’s bill of rights, the level of resistance and the political and legal difficulties associated with such a radical change would likely ensure constitutional inertia. But although sceptics may have resigned themselves to their inability to transform constitutional paths already taken, they continue to argue

strenuously against the demise of this second model. Nevertheless, such resistance seems futile as parliamentary jurisdictions such as Canada (1982), New Zealand (1990), and the United Kingdom (1998) have adopted bills of rights. Once commonplace in the Commonwealth world, this second model now exists in an unqualified form in only one common law country – Australia⁸ – and even this exception is qualified by the Australian Capital Territory's adoption of a statutory bill of rights in 2004.

Yet not everyone believes it is appropriate to characterize the adoption of bills of rights in these Commonwealth jurisdictions as the triumph of the first model, with its emphasis on American-style judicial review. Stephen Gardbaum argues instead that these recent conversions represent opting for a new middle ground, which he characterizes as the Commonwealth model of constitutionalism. Gardbaum, like others who recognize the emergence of an alternative or hybrid blend of political and juridical forms of constitutionalism,⁹ emphasizes the ability of parliament to disagree with judicial interpretations of rights as a distinguishing feature of this new model. All of these jurisdictions, but for Canada, formally preserve the principle of parliamentary sovereignty, whereas Canada allows for temporary legislative disagreements with judicial rulings, via a novel constitutional creation (a notwithstanding clause, about which more will be said later).¹⁰ But there is another important aspect that differentiates these more recent bills of rights from those that rely on judicial supremacy. This is reliance on the concept of political rights review,¹¹ which entails the creation of new responsibilities and incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights. This innovation results in multiple sites for non-judicial rights review (the executive, parliament, bureaucracy), which distinguish this

model from the American-inspired approach that relies almost exclusively on judicial review for judgments about rights.

These two features, the ability to disagree with judicial interpretations of protected rights and political rights review, appear to provide a democratic rejoinder to sceptics. This rejoinder arises from this model's potential to generate broader and more reflective judgments on how rights should influence or constrain legislative decisions and its acceptance, in theory, of legitimate political dissent from judicial interpretations. As Gardbaum views this alternative:

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. . . [T]his 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.¹²

This paper addresses the following question. In light of what appears to be a new model for protecting rights (which I have referred to elsewhere as the 'parliamentary rights' model),¹³ what significance can be attached to these attempts to broaden the scope of rights review and the structural capacities of these bills of rights to allow for political

dissent from judicial rulings? Stated another way, does this parliamentary approach differ sufficiently from American-style judicial review, in terms of the primacy given to judicial perspectives on the interpretation of and resolution of rights claims, to address sceptics' reservations? Before addressing these questions the paper revisits some of the sceptics' principal concerns with bills of rights and then discusses the emergence of this alternative model in Canada and the adaptation of its central features in New Zealand, the United Kingdom, and the Australian Capital Territory.

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SCEPTICS' CONCERNS WITH BILLS OF RIGHTS

Many commentators are troubled by the implications for liberal democratic communities of structuring and evaluating political debates through a judicially interpreted bill of rights. For purposes of this paper, discussion will focus on those sceptical positions that accept the legitimacy of the concept of rights yet reject the idea that legalized interpretations of individual rights claims should structure political debates (which I will refer to as the rights sceptics), and those who accept the legitimacy of individual rights but doubt the prudence of giving courts final responsibility for interpreting and resolving political disagreements involving rights, for a range of reasons such as democratic concerns or institutional competence (court sceptics).¹⁴

Rights sceptics worry about how a bill of rights influences notions of citizenship and political community, and on the possible privileging of negative rather than positive freedoms. One notable example is Richard Bellamy who views politics as a constitutive process 'through which citizens struggle to promote their interests by ensuring that the character of the polity is such that it recognizes their evolving ideals and concerns'. For

this reason, citizens' capacity to 'discuss these issues and resolve them through appropriate political mechanisms is itself a mark of a citizen's autonomy'.¹⁵ Bellamy recognizes that political systems entail certain rights, but argues that disagreements about the nature of the polity and the role of the state are 'intimately related not only to different views about the basis, character and extent of rights, but also to disputes over the character of citizenship – both who are citizens and what can be expected to them'.¹⁶

Although liberal democracies contain both juridical and political variants of constitutionalism,¹⁷ Bellamy disagrees with the superiority often equated with constitutional systems that rely on bills of rights and, for this reason, give greater emphasis to a juridical conception of constitutionalism. He favours a more republican notion of citizenship and argues that the importance of citizenship should not be equated with a narrow concept of individuals being rights-holders against the state, but should instead recognize that citizenship comprises a 'continuously reflexive process, with citizens reinterpreting the basis of their collective life in new ways that correspond to their evolving needs and ideals'. This requires 'promoting the civic freedom for such activity to unfold in ways that avoid dominating others', an ideal better achieved by a more political than juridical form of constitutionalism.¹⁸

Court sceptics are also concerned about how a bill of rights affects citizenship and community. Their concerns arise from how a bill of rights constrains and distorts debate about contested issues. The message conveyed by a bill of rights is that appropriate or 'principled' resolutions to contested issues about the role of the state require careful interpretation, rather than being subject to continued political debate. Although a bill of rights implies that certain issues are no longer appropriately the subject of debate (as

implied by the notion that meritorious rights claims reflect prior commitments that should prevail in the value hierarchy over conflicting ‘non-rights’ claims) the very notion that interpretation replaces debate contradicts the democratic imperative of ongoing deliberations about the role of the state, the nature of problems that affect a polity, and the propriety of specific social policies. Persistent disagreement, in the words of Jeremy Waldron (whose scepticism fits in both camps), should be regarded ‘as one of the elementary conditions of modern politics’.¹⁹ But societal and academic discussions of judicial decisions involving rights is a poor substitute for political debate:

The idea that civic republicans and participatory democrats should count [judicial enforcement of constitutional rights] as a gain is a travesty. Civic republicans and participatory democrats are interested in practical political deliberation, which is not just any old debating exercise, but a form of discussion among those who are about to participate in a binding collective decision. A star-struck people may speculate about what the Supreme Court will do next on abortion or some similar issue; they may even amuse each other, as we law professors do, with stories about how we would decide, in the unlikely event that we were elevated to that eminent tribunal. The exercise of power by a few black-robed celebrities can certainly be expected to fascinate an articulate population. But this is hardly the essence of active citizenship.²⁰

Moreover, despite a bill of rights’ pretence of representing fundamental principles from which to coherently distinguish allowable from unacceptable state decisions, many reject that a bill of rights allows for the resolution of contentious issues in a correct or principled manner, even when judged by reasonable people who accept the primacy of

protected rights. The codification of rights, which inevitably takes the form of abstract, non-contextual language, does not represent a crisp, objective template but instead a normative framework against which to evaluate the merits of impugned legislative decisions. Codified rights require interpretations that depend upon value-laden judgments about the appropriate role of the state and societal obligations to its more vulnerable members. Yet the pretence of resolving contested issues in a principled manner makes it difficult to openly acknowledge the subjective nature of these interpretations and casts doubts on the legitimacy of contrary perspectives. As such, the language of rights, and its tendency to treat some claims as having primacy over others, can have debilitating effects on robust political debate. As Rainer Knopff says of Canada's rights culture,

[S]o powerful is the rhetoric of rights – and so high the respect for judges as opposed to politicians – that it has sustained the claim that the courts are enforcing an original and fundamental consensus of the monistic people. . . [T]his simply disguises the oligarchic power of a part of the political class, namely, judges and their promoters. And again, this disguise has the unfortunate consequences of promoting extremism. Disagreements between courts and legislatures are transformed into battles between light and darkness, to the detriment of moderation and comity among citizens.²¹

A different dimension to this concern about privileging judicial interpretation over the outcomes of representative politics is the likely ideological victory of a particular view of the state; one that is not necessarily beneficial to substantive notions of citizenship. Judicial resolutions of political conflicts typically emphasize negative liberty over substantive equality, treat the state as the principal enemy of liberty, and view the

judicial role as that of a neutral arbiter to enforce the 'natural' outcome of the market place while failing to acknowledge that judicially-created rules have led to outcomes that are not neutral in their effects. In short, bills of rights reflect eighteenth and nineteenth-century assumptions of liberalism²² that offer little specific guidance for determining the legitimacy of impugned state actions in the contemporary welfare state. Concerns related to the coercive powers of the state have not their lost resonance. Nevertheless, the almost exclusive focus of a bill of rights on what the state shouldn't do, as distinct from what actions are required to help secure meaningful citizenship in societies where power and resources are not equally shared, provides a partial and skewed notion of the role of the state. Consider, for example, the concerns of K.D. Ewing with respect to bias in the common law. Ewing argues that courts historically have privileged individual freedom to participate in the market economy (without regard for the relative differences in their position and how this affects remuneration) over substantive equality. One of the principal ways of resisting market forces has been organized labour and principles of collective bargaining. Yet these activities have been vulnerable to common law constraints, created out of judicial apprehension that they comprise restraints on liberty of trade.²³ Ewing worries that this emphasis on economic liberty will carry over to the judicial interpretation of a bill of rights.²⁴ As he suggests, not only will a bill of rights undermine parliament's capacity to correct the ideological bias in the common law, many of the rights protected reinforce 'the liberal values of the common law, at the expense of other political values and constitutional principles' and, as a result, give 'formal legal priority to liberty at the expense of equality'.²⁵

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NEW CONSTITUTIONAL IDEAS

As suggested above, the adoptions of bills of rights in Canada, New Zealand, the UK and, most recently, the Australian Capital Territory, have attracted interest because these are viewed as the emergence of a new model to liberal constitutionalism. As Gardbaum describes this alternative approach:

[These jurisdictions] 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 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.²⁶

Although commentators generally treat Canada as conforming to this model, this assessment has to be seriously qualified. This portrayal is problematic because Canada is the only one of these four jurisdictions that has not rejected the American equation of judicial review with judicial supremacy. Yet, the Canadian Charter of Rights and Freedoms has important differences from the American model. Provincial and federal Canadian legislatures can, with some exceptions, give temporary effect to their legislation despite judicial interpretations of inconsistency with protected rights. This

political capacity to disagree with judicial interpretations of the Charter, or pre-empt judicial review entirely, is authorized by the notwithstanding clause of s. 33. It is this possibility that commentators focus on when suggesting that Canada conforms to this new model. Nevertheless, it is important to emphasize that the notwithstanding clause does not actually constrain the scope of judicial review. Moreover, the legislative capacity to set aside the effects of judicial review is limited. Not all sections of the Charter are subject to this power.²⁷ The ability to disagree with a judicial ruling is simply a delaying tactic. Short of amending the constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation. A final reason for questioning how comfortably Canada conforms to this new model is that the notwithstanding clause is extremely unpopular (although less so in Quebec) and governments generally believe that its use will be highly costly in a political sense. For this reason, the power is used infrequently.²⁸

Yet ironically, in light of the difficulty of portraying Canada as conforming to this new model, Canada introduced the very ideas that became central to the emergence of this new parliamentary rights model. As the first of these four jurisdictions to introduce a bill of rights, Canada unwittingly gave birth to the two important constitutional ideas that distinguish this model. These ideas are, once again:

- the concept of political rights review (a two-pronged concept that involves executive-based review of proposed bills from a rights perspective, combined with a requirement of alerting parliament about inconsistencies, thereby creating the stage for broader rights-based political and public scrutiny); and

- the idea that a parliamentary system can recognize a judicial role to review legislation for its consistency with protected rights yet, at the same time, preserve opportunity for legislative disagreement with judicial interpretations

Political Rights Review

Canada's contribution to international constitutional ideas began with the 1960 statutory Canadian Bill of Rights, introducing what at the time seemed a novel (if not naïve) idea: creating a rights culture in governing that did not depend, exclusively, on judicial review. This idea was behind the establishment of a new statutory obligation of the federal Justice Minister (who also serves as Attorney-General) to assess all government bills in terms of their compliance with newly protected rights, and to inform parliament about any inconsistencies.²⁹ The anticipated tension between the government and parliament was central to this new project.

The original intent of political rights review was to strengthen parliament's capacity to hold government (and wayward bureaucrats) accountable. Then Prime Minister John Diefenbaker was anxious to revitalize parliament's role as a protector of Canadians' rights. Diefenbaker did not believe that rights were vulnerable because of inappropriate parliamentary intentions so much as from inappropriate bureaucratic actions that 'sacrificed [freedom] in favour of administrative or other advantages'.³⁰ Thus the importance of the bill of rights was in the protection it offered Canadians from the implementation of legislation, as much as from the legislation itself.³¹ Parliament's role as a custodian of rights also needed to be invigorated to hold the government to account, a judgment influenced by Diefenbaker's concern with the previous Liberal administration's reliance on order-in-council decisions that were inconsistent with rights.

Thus, Diefenbaker's support for a bill of rights was intended not simply to protect citizens' rights but to restore parliament's role as the custodian of these rights.³² As Diefenbaker said of this important parliamentary role:

I believe that a matter of primary importance in parliament is to assure the maximum preservation of civil liberties . . . I am unalterably opposed to any alteration or diminution of the rights of Canadian citizens by order in council independently of parliament; for history shows that if you permit the rights of a citizen to be impugned upon, regardless of who that citizen may be, every other person is a step nearer to the loss of his rights, since the infringements upon democratic rights have no limits except in the limitations imposed by the vigilance of the people'.³³

Although many were disappointed with how the Canadian Bill of Rights evolved, insufficient recognition has been paid to the innovation it represented in conceiving of institutional roles and relationships on judgments about rights. The idea it introduced was that protecting rights is not exclusively dependent on judicial review, but should encompass bureaucratic, governmental and parliamentary involvement. The goal, in other words, was not simply to correct rights abuses after the fact, but to prevent rights abuses from actually occurring.

But this concept of political rights review has not evolved in the manner intended. Absent from Diefenbaker's view was adequate attention to how the limited scope of judicial review and a historically conservative judicial culture would combine to undermine the incentive for the executive to engage in robust political rights review. Also unanticipated was how subsequent changes to the nature and scope of judicial review

would encourage the government to worry less about being accountable to parliament than to the judiciary.

Twenty-two years after the 1960 Bill of Rights was introduced, Canada adopted the Charter of Rights and Freedoms, a constitutional bill of rights that significantly expanded the scope of judicial powers. Within a decade, the systematic review of government bills conducted on behalf of the Minister of Justice became far more rigorous, particularly after a number of Supreme Court decisions exposed the serious fiscal and policy consequences that would arise from judicial invalidation of legislation on Charter grounds. But while new vigour animated the executive vetting process, there were no corresponding increase in parliament's scrutiny role. Parliament remains marginal to the concept of political rights review. A statutory obligation still exists to alert parliament where bills are inconsistent with protected rights but this has been politically interpreted as if it did not exist. There has not been a single report to parliament that a bill is inconsistent with the Charter.³⁴

The explanation for why parliament continues to be marginalized in terms of political rights review has three components. The first arises from the political consequences of the judiciary's power under the Charter to grant remedies when legislation constitutes an unreasonable restriction of a protected right. Remedies have included declaring legislation invalid or altering the scope or intent of legislation to redress the perceived Charter problem. A direct consequence of this powerful judicial role is that the government looks to the judiciary, rather than to parliament, as the institution to whom legislation must be defended in terms of its implications for rights. Second, is the emergence of a political culture in cabinet decision-making that forbids the

introduction of any bill that would require the Minister of Justice to report an inconsistency to parliament. The criterion for determining that a report to parliament is not necessary is whether the Minister of Justice concludes that a credible Charter justification exists. The breadth of this political criterion encompasses a broad range of the policy goals. Where bills may be in danger of failing to satisfy this criterion, they will generally be withdrawn or amended (this culture could change if a different political party formed government).³⁵ Pragmatism is the final part of the explanation for not reporting to parliament that a bill is inconsistent with the Charter. If the government were to pass a bill that prompted the Minister of Justice to alert parliament that rights were violated in a manner that is not consistent with a ‘free and democratic society’ (the standard for determining Charter consistency once a prima facie rights violation has been established), such legislation would be highly susceptible to litigation and judicial invalidation.

Yet despite the Canadian parliament being marginalized in the practice of political rights review, this concept remains remarkably robust. All three parliamentary jurisdictions discussed here have incorporated political rights review as a central element in their bill of rights (discussed later).

Authorizing Judicial Review with the Option for Political Disagreement

The second Canadian innovation that influenced the development of this new parliamentary rights model was the decision in 1982 to authorize more expansive judicial review while establishing an option for political disagreement (via the notwithstanding clause). Although the 1960 statutory Bill of Rights also contained a notwithstanding clause, it has a different role under the Charter. Rather than function to constrain the

scope of judicial review as it did in the earlier Bill of Rights,³⁶ its incarnation in the Charter creates an opportunity and space for political disagreement with judicial review that otherwise could result in the invalidation of legislation. More important, it introduced a new way of looking at institutional relationships with respect to judgments about rights.

Although other parliamentary systems have not explicitly replicated this clause in their bills of rights, the idea it represents has been emulated in different ways (the particular manner in which this has occurred will be discussed in more detail below). This idea is that exposure to judicial review will exert significant, although not binding, influence on subsequent political behaviour with respect to impugned legislation.

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ADAPTATION OF THESE NEW IDEAS ELSEWHERE

New Zealand Bill of Rights Act

New Zealand was the first jurisdiction to borrow the Canadian practice of political rights review. The New Zealand Bill of Rights Act, adopted in 1990, is a statutory bill of rights that does not formally challenge the principle of parliamentary sovereignty. Support for a bill of rights grew out of concerns that parliament was too weak to check executive dominance.³⁷ When substantial controversy arose about empowering courts to invalidate legislation,³⁸ the project was modified. Rights would be expressed in a statutory bill of rights and judges would be given a limited role of review. Judges are instructed that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the bill of rights, this 'meaning shall be preferred to any other meaning'. Judges are not formally empowered to rule that other enactments have been

impliedly repealed or revoked or to decline to apply any provision where judges consider it inconsistent with any provision in the Bill of Rights.

A direct consequence of opting for this more limited form of judicial review was the decision to borrow Canada's concept of political rights review. Then Prime Minister Geoffrey Palmer, who had recently visited Canada and been introduced to the idea of political rights review, thought this practice would be an effective way to enhance the vitality of a statutory bill of rights. He viewed this concept as serving two important functions: 'First, to ensure that the internal mechanisms of government addressed the issues seriously and with full legal analysis and second, that the political consequences of breaching the standards were brought to the force'.³⁹ This idea of political rights review is embodied in s. 7 of the New Zealand Bill of Rights Act, which requires that the Attorney-General advise parliament where bills are not consistent with its provisions.

As for the second Canadian innovation, the idea of allowing for political disagreements with judicial interpretations is not as central to New Zealand because of the limited scope of judicial review. But the idea still has resonance. Bill of Rights jurisprudence provides the context for executive-based evaluation of legislative bills. Moreover, any statement by the Attorney-General, that a bill is being introduced that is not consistent with protected rights, is similar in intent to using the notwithstanding clause in Canada in a pre-emptive fashion. As in Canada, the extent to which these intentions are controversial, and therefore constrain political actions, will depend on how the bill of rights influences political culture.

A recent debate has emerged about the scope of judicial review, which could have a significant effect on political behaviour. Although the judiciary lacks the formal power

to declare that legislation is inconsistent with rights, a 2000 decision of the Court of Appeal indicated that the Court does not feel bound by this constraint. In this decision, the Court suggested that the New Zealand judiciary may not only have the power but ‘on occasions the duty’ to indicate an inconsistency exists between legislation and the Bill of Rights.⁴⁰ In another decision in the same year, one member of the court issued a formal declaration that a legislative provision violated the Bill of Rights in a manner that could not be justified as a reasonable limit. Although the rest of the Court did not express an opinion on whether the judiciary has the power to make such orders, a year later, the court declined to address this issue, despite the fact that the appellant and the Crown provided substantial written submissions addressing the propriety of such an action.⁴¹ This refusal to rule out the judiciary’s power to issue declarations of incompatibility is an important indication that the issue is very much alive.⁴²

The potential significance of this for political behaviour is that if the judiciary is willing to declare that legislation is inconsistent with rights, this could increase the pressure on government to remedy perceived deficiencies. As such, these judicial statements have been interpreted as an indication that ‘New Zealand is progressing at measured pace toward breaking down the idea that Parliament has the last word in settling the content of New Zealand rights and freedoms’, and have led to speculation that ‘the courts will get the power to strike down statutes incompatible with the Bill of Rights Act’.⁴³ It remains to be seen how the scope of judicial review evolves and what effects future judicial developments have for political behaviour.⁴⁴

The United Kingdom’s Human Rights Act

The HRA came into effect in 2000 and incorporates the European Convention of Human Rights into domestic law. This bill of rights draws upon both of these Canadian innovations. Not only is the idea of political rights review an important component of the HRA, the UK has expanded upon this concept. The HRA imposes an affirmative reporting requirement on ministers to alert parliament about whether bills are consistent with protected rights.⁴⁵ This is an improvement over the Canadian practice for the following reasons. This affirmative obligation to speak to the compatibility of every bill, rather than inform parliament only where bills are patently inconsistent with rights, increases the likelihood of parliamentary engagement. Parliament does not have the burden (as it does in Canada) of deducing why and how a bill may be inconsistent with rights. Moreover, the UK has created a specific parliamentary committee (the Joint Committee on Human Rights) with an explicit mandate to examine the rights-dimension of legislative bills. This increases the likelihood that political rights review will systematically occur at the parliamentary as well as executive level. The adversarial nature of parliament, and the incentives a bill of rights provides for more civil liberty-minded parliamentarians to evaluate bills in terms of rights, ensures a healthy degree of scepticism about the merits of a bill, even when a minister presents a bill as compatible with rights. Moreover, if a minister declares the government's intent to proceed with legislation where he or she cannot claim that the legislation is compatible, this statement will almost certainly encourage close scrutiny of proposed legislation.

As for the second Canadian innovation, the idea embodied by the notwithstanding clause – of authorizing judicial review and yet allowing for political disagreement – is also an important element of the HRA. The reason for making this claim may not be

immediately evident, as the formal preservation of parliamentary sovereignty obviates the explicit need for this clause, at least as a reactive mechanism to express political disagreement with judicial decisions. UK judges are obliged to interpret legislation ‘so far as possible so as to be compatible with Convention rights’. Where such interpretations are not possible, the HRA empowers a superior court to make a ‘declaration of incompatibility’ if primary legislation cannot be interpreted in a manner that is consistent with Convention rights. But UK judges cannot invalidate inconsistent legislation, as can judges in Canada.

Yet despite this limit on the scope of judicial power, the idea embodied in the notwithstanding clause is reflected in the HRA, in at least two ways. First, should a minister inform parliament that a bill is not compatible with protected rights, this will be roughly the political equivalent to a Canadian government relying on a pre-emptive use of the notwithstanding clause (as is the situation in New Zealand as discussed above). Second, the political impact of a judicial ruling that legislation is not compatible with rights approximates the political influence of a judicial ruling of unconstitutionality in Canada. As will be discussed below, expectations are that the UK parliament will and should pass remedial legislation when courts make a declaration of incompatibility. These expectations reflect assumptions similar to those explaining why Canadian governments are generally unwilling to invoke the notwithstanding clause: namely, the adoption of a bill of rights changes political culture by creating expectations that legislation should comply with protected rights and that judges are legitimate interpreters of these. Thus although both jurisdictions preserve a legal capacity for parliament to disagree with judicial rulings, this option is constrained by the emergence of a legalized

rights culture. Consistent with this expectation, the HRA incorporates an expedited or fast-track procedure for passing remedial legislation.

Australian Capital Territory's Human Rights Act

The Australian Capital Territory passed the Human Rights Act in March 2004, which incorporates both of these ideas. Political rights review arises from the requirement that for all bills, the Attorney-General make a statement as to whether the proposed legislation is consistent with protected rights and, where unable to declare consistency, to inform parliament how legislation is inconsistent. The Human Rights Act also stipulates that a relevant standing committee is required to report human rights issues that arise in legislative bills to the legislative assembly.⁴⁶

The idea represented by the notwithstanding clause is also replicated in the Australian Capital Territory's Human Rights Act. Ministerial reports of incompatibility have the potential to generate rigorous political scrutiny and ignite controversy, as would a pre-emptive use of the notwithstanding clause in Canada. Moreover, the Human Rights Act reflects the expectation that parliament will and should revisit the merits of legislation in the face of a judicial finding of incompatibility.

In one important sense, this bill of rights envisages an even stronger dialectic tension between parliament and the judiciary than represented by the UK's process for remedial legislation. The judiciary is instructed that an interpretation of legislation that is consistent with rights is preferred but if the Supreme Court concludes that a law is not consistent with rights, it may declare this inconsistency. When such judicial declarations of inconsistency are made, the Attorney-General must immediately notify the legislative assembly of this declaration (within six sitting days of receiving the declaration) and,

within six months, prepare and present the legislative assembly a written response to the declaration of incompatibility. This requirement clearly puts pressure on the Attorney-General to explain what the government intends to do with legislation that has been interpreted in this manner. Will the government revise the offending legislative provision or repeal the legislation in its entirety? Or does the government believe that the legislation is sufficiently important to be pursued, without amendment, and explain why it has reached this judgment? In short, the idea of political accountability to parliament from a rights perspective extends from the introduction of a legislative bill to after judicial review and, unlike any of the other jurisdictions, the Attorney-General must specifically address and respond to negative judicial findings.

Yet this dialogical potential may be constrained by the fact that the Human Rights Act does not allow for an independent cause of action to claim a human rights violation arising from the conduct of public authorities and also does not create a separate right of action in the Supreme Court or authorize a specific remedy. The limited scope of judicial review has contributed to the perception that the HRA is ‘considerably watered down from the already conservative model suggested by the Consultative Committee’.⁴⁷

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TRIGGERING POLITICAL DISAGREEMENTS:

DIFFERENCES IN THE NATURE OF THE POLITICAL IMPERATIVE

All four jurisdictions share an obligation to evaluate proposed legislation in terms of its consistency with protected rights and to have reached judgment about the propriety of legislation from a rights perspective before legislation is introduced. Moreover, all jurisdictions permit political disagreements with judicial interpretations of rights.⁴⁸ But

the ability of the Canadian judiciary to nullify inconsistent legislation, as opposed to merely declaring that it is inconsistent, represents a different dynamic than what occurs elsewhere, should parliament disagree with a judicial interpretation.

In Canada, parliament and the provincial legislatures have to act assertively to disagree with judicial rulings, to ensure that their legislative objective can be realized despite a judicial finding of unconstitutionality. One way to do this is to amend the legislation in an attempt to satisfy judicial concerns. This possibility occurs frequently because courts rarely fault the impugned legislation so completely that there is no opportunity to amend it to satisfy judicial concerns. Legislation is not often found inconsistent with protected rights because of an inappropriate objective, but because it fails judicially interpreted proportionality criteria. If, however, the intent is to protect a legislative objective that the judiciary has ruled invalid, or to ignore the judiciary's proportionality concerns because to comply would significantly undermine or distort the legislative objective, parliament can give temporary primacy to impugned legislation by enacting the notwithstanding clause; a decision that can be renewed. The assertive requirement for political disagreement contrasts with the other jurisdictions, where parliament can disagree by simply maintaining the status quo. In New Zealand, the UK and the Australian Capital Territory, parliament must legislate only if it wishes to give effect to a judicial decision and pass remedial measures.

Although the triggering mechanism for disagreeing or complying with judicial rulings differs, a common idea animates all of these systems (with more limited force in New Zealand, although this could change if the judiciary expands the scope of its powers). This is the idea of exposing legislation to judicial review and yet preserving a

political opportunity to disagree with judicial interpretations. Whether these bills of rights rely on ministerial statements of inconsistency, judicial declarations of incompatibility or on political invocation of a notwithstanding clause, they operate in a political environment that assumes political actors' disagreements with judicial perspectives will be sufficiently profound, and their commitment sufficiently robust, before being prepared to act contrary to judicial judgments. It is this inter-institutional dynamic that explains why many commentators characterize these new rights regimes as embodying dialogical potential. For example, then Home Secretary Jack Straw explicitly used the metaphor of dialogue when speculating about the institutional responsibilities and roles when interpreting the Human Rights Act:

. . . Parliament and the judiciary must engage in a serious dialogue about the operation and development of the rights in the Bill. I am sure that the Bill will develop . . . in ways that we do not fully anticipate. That dialogue is the only way in which we can ensure that the legislation is a living development that assists our citizens.⁴⁹

The Australian Capital Territory's Human Rights Act is similarly conceived of in dialogic terms. The ACT Bill of Rights Consultative Committee stated that the aim of the then proposed bill of rights is 'to promote a dialogue between the legislatures, the executive and the judiciary about the way human rights can be best protected in the Australian Capital Territory. It will ensure that a genuine consideration of human rights is built into all public decision-making'.⁵⁰ Several Canadian legal scholars have emphasized the dialogic potential of the Canadian Charter, but the lack of political legitimacy surrounding the notwithstanding clause and the fact that the Charter allows for judicial

supremacy seriously weaken the descriptive force of this claim (at least as political actors currently interpret their roles).

I can envisage debate about which approach is preferred for giving effect to political disagreement. If a political culture is sceptical about the legitimacy of legislative disagreements with judicial interpretations, this will undermine the political will to disagree with judicial review. Legislative inertia will be of greater significance to Canada precisely because parliament must react to overcome the effects of judicial review. Not only will 'corrective' legislation be highly contentious, by virtue of overturning the effects of a judicial ruling on rights, its supporters will have to incur the label of violating rights. Although the other parliamentary systems may incur significant political pressure to introduce remedial legislation in the face of a judicial declaration of incompatibility, it will likely be less difficult to exercise political disagreement with judicial rulings when this simply requires maintaining the status quo than to actually legislate to negate the effects of a judicial ruling.⁵¹ Thus, views on which method or what incentives are most conducive for reflective and responsible judgment will inevitably reflect perspectives on whether one is more comfortable with the judiciary or parliament having the final word on how to resolve conflicts involving rights.

(v)

DOES THIS NEW MODEL ADDRESS SCEPTICS' CONCERNS?

Sceptics are likely doubtful about the need to revise their assessment of the merits of a bill of rights, merely because these new parliamentary bills of rights allow parliament to disagree with judicial interpretations of rights. This political opportunity may not counter the juridical effects associated with bills of rights, particularly if political culture changes

in a manner that equates rights protection with conformity with judicial rulings.

Important questions sceptics will ask include:

- Are the bills of rights discussed here any less prone to altering the nature of democratic deliberation or notions of community than bills of rights that do not envisage political rights review and allow no political opportunity to disagree with judicial interpretations?
- Can a political community adopt a judicially interpreted bill of rights and resist expectations that the judiciary should have primary responsibility for determining the meaning and scope of rights and the reasonableness of legislation?
- Will mechanisms for political disagreements be meaningful or will these political spaces for political judgements be dominated by a legal focus?

Mark Tushnet is one sceptic who admits to being intrigued by the potential of establishing a model of ‘constrained parliamentarianism’,⁵² by providing ‘an opportunity for judicial oversight of legislation without displacing the ultimate power of legislatures to determine public policy’.⁵³ Nevertheless, he expresses doubts about the sustainability of a middle ground, suggesting that political behaviour may either recede back to unadulterated parliamentary sovereignty or, alternatively, mirror the judicial dominance associated with American-style judicial review. He characterizes this new parliamentary model as comprising weak-form judicial review, defined as a system that acknowledges

‘the power of legislatures to provide constitutional interpretations that differ from—or, in the U.S. Supreme Court’s terms, alter—the constitutional interpretations provided by the courts’.⁵⁴ Strong-form judicial review, by contrast, is what is associated with American-style judicial review.⁵⁵

[W]eak form systems may be unstable in practice. That is, they may well be transformed in either direction – reducing their scope so that weak-form systems are actually systems of parliamentary supremacy (and thereby reproducing the worry about inadequate protection of liberal rights), or expanding their scope so that weak-form systems are actually strong-form systems (and thereby reproducing the worry about interfering with democratic self-governance). The thought here is that, while there may be in theory a continuum of forms of judicial review, in practical operation of institutions in the real world, institutions are likely to cluster near the poles of U.S.-style strong-form review and traditional parliamentary sovereignty, with very little judicial review.⁵⁶

Tushnet gives the following reasons why weak-form judicial review may yield to strong-form review:⁵⁷

- Judicial insistence on increasingly precise requirements to ensure legislation is compliant with protected rights;
- Policy distortion that arises from trying to comply with judicial rulings;
- Political costs associated with relying on constitutionally accepted forms of political disagreement

Two other reasons warrant consideration when speculating about whether these systems could evolve in a manner that resembles American-style judicial review. One,

related to Tushnet's observation that the judiciary may impose more precise requirements for compatibility, is an increase in the judiciary's influence and scope of review, which could significantly alter the balance between political and legal judgment. As discussed above, the New Zealand Court of Appeal has indicated willingness to enlarge the scope of its powers so as to allow for judicial statements of inconsistency with rights. Jim Allan criticizes this judicial action as 'gratuitous' and 'ad hoc',⁵⁸ and rejects arguments that the weak-form judicial review (as represented by the New Zealand Bill of Rights) represents a prudent compromise of rival systems:

This compromise seems to promise all the benefits of moderation, avoiding the danger of creating over-mighty judges of the sort who operate constitutionalized (and justiciable) Bills of Rights. Alas, if the experience of New Zealand is anything to go by, the apparent moderation is illusory. There are few differences between what judges could accomplish (in the way of 'giving life' to 'fundamental rights') when operating a New Zealand-type Bill of Rights Act and what they do accomplish when operating constitutionalized and entrenched models.⁵⁹

Allan also worries that academic support for a more vigorous judicial role will encourage the judiciary to augment its power:

[M]ost legal academics and commentators welcome this upgrading operation. Quite simply, there has been a good deal of encouragement for the judiciary from the academy when the courts give themselves more power under the Act. These cheers quickly turn to jeers if anything, however small, is removed or if the 'piecemeal upgrade' is halted. My guess is that this support is not without effect

in the judges' efforts to transform an enervated, statutory Bill of Rights Act, bit by bit, into one giving them virtually the same role and powers they would have in a full-blooded, constitutionalized Bill of Rights.⁶⁰

Tom Campbell is also sceptical about the significance of formal constraints on judicial power. He argues that the idea of constrained judicial review, as implied by the retention of parliamentary sovereignty in the UK, understates the influence that judicial interpretations of the HRA will have on the entire process of lawmaking and on the political process more generally. From his perspective, the 'scope and power of the interpretive techniques that are licensed by the HRA will make judges the determinate body with respect to a wide range of policy issues which have hitherto been fully within the sphere of parliamentary responsibility'.⁶¹

[T]he HRA gives the [European Convention of Human Rights] a higher status than existing common law. Indeed, the expectation behind the Act as a whole would appear to be that the ECHR should begin to permeate the whole process of lawmaking and law application, to the point that it is not simply a set of side-constraints on law enacted with other objectives in mind but the favoured telos of all legislation and adjudication. Thus it will be expected of any enactment that this is an attempt to instantiate the ECHR and that it is a court's duty to carry this objective forward by reading legislation either narrowly or expansively in the light of the broad purposes of the ECHR itself. This will mean 'interpreting' legislation in a way which sits rather lightly on actual words, particular intentions or the traditional constraints thought to be set in place through deference to the plain and ordinary meanings of the legislation in question. The dynamic picture is

not that of the ECHR as existing law to be modified from time to time by explicit legislation, a legitimate process comparative to clear legislative changes being made to the common law. Rather the ECHR is to be seen as directing, limiting, and augmenting legislation in a much more positive way than existing common law, with no assumption that legislation contrary to and overriding and replacing ECHR provisions is to be routine and intentional.⁶²

Similarly, Alison Young argues that the interpretive role of judges represents a more dramatic constraint on parliament than may be realized, and suggests that the HRA in the UK gives the judiciary ‘carte blanche to determine when it is impossible to interpret statutes in a manner compatible with Convention rights’. Although the HRA allows courts to interpret rights only ‘so far as possible’ to ensure that rights are respected, this limit is so malleable that it has little meaning.⁶³

Another reason for anticipating that these parliamentary bills of rights may eventually approximate strong-form review is the effect of a bill of rights on political culture. Although Tushnet addresses this when he refers to the political costs associated with relying on constitutionally accepted forms of political disagreement (such as invoking the notwithstanding clause in Canada) there is more to the issue of cultural change than political costs. What is significant about parliamentary systems adopting a bill of rights is how the adoption of a bill of rights can affect perceptions of institutional roles when political issues are framed specifically in terms of rights. Even when a bill of rights is structured so as to permit legislative disagreements with judicial decisions, political judgment may succumb to the influence of judicial perspectives because of the

perception that only judges have competence to decide what constitutes a right or an appropriate restriction on a right. The equation of rights with law is difficult to resist, no matter whether a bill of rights allows for explicit disagreements with judicial perspectives. As Campbell explains this tendency to cede judgment to the courts:

[T]he right of judges to interpret the law is as politically entrenched as the right of Parliament to make law. Interpretation is almost universally seen as the prerogative of the courts because it is part of adjudication, and that is taken to be their exclusive function. It is therefore not only politically difficult but also constitutionally questionable for parliaments to reject a court's particular interpretations or even question a court's interpretive methods. Judicial power that is build on the right to interpret is therefore not vulnerable to democratic pressures. . . .⁶⁴

Campbell worries that this presumption that judges alone interpret rights will undermine the significance of retaining the principle of parliamentary sovereignty in the UK.

[I]t may be difficult for governments to ignore declarations of incompatibility or to override through legislation alterations to the common law which have been made by courts with the explicit justification of rendering the common law compatible with the ECHR. At a time when judicially enforced 'human rights' have, in the eyes of the public and the media, greater political legitimacy than the outcome of partisan electoral political processes, governments may not wish to subject themselves to the politically damaging opprobrium which would arise from their ignoring a declaration of incompatibility or legislating to negate a development in the common law that has been presented as necessary to bring

existing law into line with the ECHR. Being mindful of the prospect of an appeal to the European Court of Human Rights, and relieved to hand over responsibility for imposing morally controversial laws to the courts, governments are not, it is argued, likely to challenge changes to the common law or interpretations of Acts of Parliament which are said to derive from the provisions of the ECHR.⁶⁵

Although Campbell acknowledges that democratic pressures could challenge the assumption of judicial hegemony on judgments about rights, this change would require that the 'public becomes aware of the nature of human rights interpretation'.⁶⁶ But is this awareness likely? The following discussion examines the effects of a bill of rights on the political and governing cultures of Canada, the UK and New Zealand.

Canadian Experiences

Of all the jurisdictions discussed here, Canada has had the most experience with judicial rulings that impugn the validity of legislation from a rights perspective. However, what is most relevant for sceptics is the profound change to political culture since the Charter was adopted, and how this has affected political behaviour. The following assessment reflects insights drawn from qualitative analysis of contested policy issues where the Charter figured prominently in their assessments,⁶⁷ a burgeoning literature addressing judicial/parliamentary roles with respect to Charter issues, and general observations about political behaviour on matters that give rise to rights claiming.

A fairly clear picture emerges, revealing that the Charter is evolving in a manner consistent with a highly juridical orientation to constitutionalism. A robust rights culture has arisen, but it is one that privileges courts, as interpreters and defenders of rights, and reflects deep scepticism about whether representative institutions have a valid role to

contribute to constitutional judgment, other than to anticipate judicial decisions and correct offending legislation within the parameters established by courts. Few could have imagined at the time the Charter was adopted that despite Canada's historical reliance on the principle of parliamentary sovereignty (as adapted to a federal system), Canadians would soon no longer tolerate parliament's judgment prevailing on the constitutional merits of legislation, even though the notwithstanding clause permits this (at least on a temporary and renewable basis). This rapid change to political culture is even more puzzling as the idea of a constitutionally entrenched bill of rights arose not because of political clamour to radically transform Canada's constitutional principles,⁶⁸ but because of dedication to pursue the constitutional ideas of the federal government and its then leader, Pierre Elliot Trudeau.

This cultural change is significant because of the Charter's centrality to policy evaluation and political agenda-setting. The Charter influences political decisions at all stages of the policy process. Governments face Charter constraints when determining policy priorities or making decisions about how best to pursue social policies. But political actors have had little influence on the how these constraints are interpreted, as they rarely partake in independent debate about the scope of rights or how rights should influence a particular legislative decision. Instead, these constraints are shaped by the advice and influence of government lawyers who systematically assess bills and advise departments and ministers about the compatibility of proposed legislation, based on their interpretation of relevant jurisprudence.

The extent to which the Charter constrains political behaviour is also influenced by political decisions of how much risk a cabinet is willing to incur when pursuing

legislation that may result in Charter litigation. But as these political decisions generally rule out any possible use of the notwithstanding clause in the event that legislation is declared invalid, the willingness of a government to question the hegemony of legal judgment involving rights is often temporary. These political decisions are revised or abandoned when legislation is nullified.⁶⁹ A telling incident, and perhaps one of the best examples to confirm sceptics' concerns about a bill of rights, was the federal government's response to the invalidation of legislation that restricted tobacco advertising, passed to discourage young people from taking up an addictive and deadly habit. Not only did the government fail to challenge the essence of the rights claim – that freedom of expression should protect a corporation's ability to advertise a deadly product – its response to the judicial invalidation of its legislation was exceedingly timid. The government ruled out invoking the notwithstanding clause, despite the suggestion from its Health Minister that this would represent an appropriate action, and passed legislation that was far less robust or comprehensive than many believed necessary to achieve its purposes. These particular amendments were influenced by the desire to 'Charter-proof' the revised legislation. Policy officials virtually cut and pasted court 'suggestions' revealed in the judicial reasons about how to satisfy the proportionality tests, even though marketing strategies and knowledge of addictive behaviour were far more relevant than any particular expertise judges could possibly have drawn upon.⁷⁰

The juridical orientation of Canadian constitutionalism makes it hardly surprising that politicians are reluctant to make decisions that risk their being branded as insensitive to rights (in an environment where this label does not arise from public repudiation of the actual political arguments made so much as from the very fact that these contradict

judicial interpretations). This particular form of rights culture negates the significance associated with this alternative model: of allowing for political contributions to judgments about rights or, in the language that many constitutional scholars find fashionable, engage in meaningful dialogue.

A cogent example of this reluctance to challenge the primacy of judicial Charter rulings is debate about same-sex marriage. Despite serious differences amongst parliamentarians (reflecting the contentious nature of this issue amongst the general public), the issue has been politically portrayed as not being amenable to any reasonable disagreement about whether same-sex unions must be labelled marriage, if this difference contradicts judicial interpretations. Consider, for example, how the federal government position has evolved. On two occasions (1999 and 2000) the government twice supported opposition motions to state that marriage would remain the lawful union of one man and one woman to the exclusion of all others. Both the sitting and future Prime Ministers (Jean Chrétien and Paul Martin) supported this definition. Yet once a number of provincial appeal courts rejected an exclusively heterosexual definition of marriage, both men subsequently changed their position, and that of their government's, and proposed legislation to recognize same-sex marriage. Although it is not clear whether these changes reflected a philosophical reassessment of their previous positions or instead occurred because of political reluctance to disagree with judicial interpretations of marriage, neither leader was willing to continue supporting a position that, almost certainly, would have required invoking the notwithstanding clause to give primacy to Parliament's earlier preferred definition.

This extreme reluctance to use the notwithstanding clause not only affects political decision-making, a stated aversion to this clause makes for 'smart' politics. This was evident in the 2004 federal election when the incumbent Liberal government scored precious political points by repeatedly criticizing Steven Harper, leader of the Conservative party, for failing to rule out the possibility of using the notwithstanding clause. The message conveyed was that a Conservative government would endanger Canadians' rights because of its tolerance for the notwithstanding clause. In one such example, Paul Martin (Liberal leader and incumbent Prime Minister) stated: '[I]f what you're prepared to do is use the notwithstanding clause, then what you're saying essentially is minority rights can be subjected to the will of the majority. And I've got to tell you that is not the kind of country I believe in, nor do I think it's the kind of country that Canadians believe in'.⁷¹ Martin's statement captures the dominant public, political and academic views on this issue. There is simply no public or political acceptance for the proposition that invoking the notwithstanding clause represents the expression of a reasonable difference on a contested political issue. To most, use of the notwithstanding clause is construed not only as an unjustifiable violation of rights in the particular circumstance at issue, but also as a broader political statement of contempt for the Charter. The Charter means what the Supreme Court says it means. Any contradictory political judgment is not a valid interpretation of democratic or constitutional principles. It is an act of defiance of the Charter project.⁷²

UK Experiences

It is too soon to offer any firm pronouncement on how the HRA will affect political behaviour with respect to judgments about rights. Qualitative research is required to

analyse how bills are evaluated for ministerial statements about compatibility with the HRA. Although some civil liberties' groups have criticized under-reporting of alleged inconsistencies,⁷³ the guidelines ministers utilize have a very legalist orientation.⁷⁴ What is significant about these guidelines, particularly for a political community that wished to maintain parliamentary sovereignty, is that they appear to rule out the validity of ministers' claiming that legislation is compatible with rights if this advice is not consistent with legal assessments. Ministers are instructed that they can only declare a bill as compatible with Convention rights where, 'at a minimum, the balance of [legal] argument supports the view that the provisions are compatible'. This legal advice focuses on whether 'it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court'.⁷⁵ Thus, ministers are directed that even if they believe valid policy or political arguments support a claim that legislation is compatible with Convention rights, these assumptions do not constitute a 'sufficient basis' to claim compatibility if legal advisers do not believe that these arguments would 'ultimately succeed before the courts'.⁷⁶ This emphasis on legal criteria raises the following questions about what effects the HRA is having on legislative decision-making:

- How rigorous is the review of proposed legislation?
- How much pressure do ministers incur to avoid introducing legislation that requires a report of non-compatibility?
- In what ways does the prospect of making such a report affect political priorities or influence the ways policies are conceptualised?

Many will be understandably sceptical about the rigour for the vetting procedures for proposed legislation, particularly in light of a willingness to declare bills compatible, despite apparent breaches of fundamental rights. A good example of this occurred in the declaration that the government's Prevention of Terrorism Bill was compatible with rights, despite widespread criticism that it represented serious rights infringements.

Research is also required to assess the role and effects of the Joint Committee of Human Rights, the parliamentary body established to evaluate the rights dimension of bills. The JCHR considers itself the 'parliamentary guardians' of the HRA and has already established a reputation for its willingness to point out serious rights concerns, ask ministers hard questions about the implications and merits of measures that appear to violate rights, and report in a timely fashion to facilitate broader parliamentary and public deliberation. The best examples of the work of this body occur in its assessment of the government's controversial anti-terrorist measures in 2001, which included strongly worded concerns about indefinite detention for foreign terrorist suspects,⁷⁷ a follow-up report two years later, warning the government and parliament about 'long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights' and urging that public and parliamentary debate about terrorism responses 'take place within a human rights framework',⁷⁸ and two more reports assessing and criticizing the government's response to the ruling of the Law Lords that the indefinite detention provisions are incompatible with the European Convention of Human Rights.⁷⁹ In these latter reports, the JCHR was extremely critical of the government's intent to propose a derogation clause for future possible use, and also expressed serious concerns about other deprivations of liberty that would be authorized

with inadequate judicial safeguards.⁸⁰ Careful research is required to assess whether and how the JCHR's scrutiny and reporting affects parliamentary debate or creates political incentives to change policy priorities and the way policies are assessed.

Finally, qualitative analysis is required to assess changes to political culture. A telling indicator will be how political leaders respond when faced with a judicial decision that either changes the clear intent of legislation or declares that legislation is not compatible with protected rights. Despite the political importance that was attached to retaining the principle of parliamentary sovereignty at the time the HRA was adopted, remarkably little political or academic discussion has focused on how this principle relates to political judgment where claims of rights arise. Political and legal commentaries in the UK appear to equate the task of interpreting rights exclusively with judicial review. Although parliament may be able to act in a manner that is not consistent with judicial interpretation of rights, many view this expression of parliamentary sovereignty as an exception to rights, rather than a valid judgment about them. This was clearly the expectation of Lord Irvine, then Lord Chancellor, as evident in second reading debate about the HRA:

The design of the [HRA] is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with Convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate. If a Minister's prior assessment of compatibility . . .

is subsequent found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action'.⁸¹

This statement clearly envisages parliament's subordination to the judiciary with respect to judgments about rights. It suggests the following three assumptions about how the HRA will operate:

i) Inappropriate restrictions on rights will occur infrequently. The political desire to avoid being or appearing insensitive to rights will ensure robust scrutiny before legislation is passed to ensure compliance with Convention Rights. Alternatively, courts will be able to engage in sufficiently creative interpretive techniques to ensure that legislation is compatible.

ii) The government will accept the authority of judicial interpretations of compatibility, or will be pressured by parliament to accept these, and will make the necessary legislative amendments to remedy defects identified by the judiciary.

iii) Courts alone have legitimacy to determine compatibility. This assumption flows from the suggestion that a judicial declaration of incompatibility automatically impugns the prior political judgment of compatibility.

If the political culture develops in a manner that assumes remedial legislation is required whenever a court rules that legislation is not compatible, the retention of the principle of parliamentary sovereignty may be no more significant, as an opportunity for

political disagreements with judicial interpretations, than is the inclusion of a notwithstanding clause in Canada.

An early indication that the retention of parliamentary sovereignty may be little more than a formality arises in the following incident, which comprised the first instance of the government acknowledging that a bill it was introducing did not allow for a statement of compatibility.⁸² The occasion for this ministerial report of incompatibility was the introduction of the Communications Bill in 2002, which, amongst other things, would have preserved a ban on paid political advertising on television and radio.⁸³ Paid political advertising on television or radio has not been permitted since the BBC came into operation in 1927.⁸⁴ Neither the government nor independent commissions⁸⁵ think it is desirable to remove this ban.⁸⁶ In defending the legislation, the responsible minister emphasized the importance for democracy of maintaining an advertising ban to prevent powerful groups from manipulating political debate.⁸⁷ But this reporting experience conveys mixed messages about how the government conceives of its role under the HRA. One message is that government is not willing to abandon legislation for which it has strong commitment, just because the legislation may not be compatible with protected rights. Thus, Minister Tessa Jowell declared the government's intent to 'mount a robust defence' if the legislation were legally challenged.⁸⁸ Yet, a very different message was conveyed by her indication that if the legislation subsequently fails in the European court, the government will have to 'reconsider' its position and amend the legislation to comply with any judgment of the European Court of Human Rights, because the government takes its 'international obligations extremely seriously'.⁸⁹ What is so significant about this stated willingness to amend the legislation is its obvious inconsistency with an earlier

admission that the government believed the legislation was appropriate, as originally conceived, precisely because a less restrictive option would not be effective.⁹⁰ This intention to revisit the issue if unsuccessful in court reinforces the idea that parliamentary sovereignty will have little effect preserving legislation in the face of a negative judicial ruling, even when the government believes it serves a compelling democratic purpose:

New Zealand Experiences

Of the jurisdictions discussed here (excluding the Australian Capital Territory, whose introduction of a bill of rights is too recent for an assessment of its effects) New Zealand is the jurisdiction least prone to juridical influences. This is not to suggest that legal interpretations of the New Zealand Bill of Rights Act are not having a significant influence on policy development or evaluation. Indeed, the process of evaluating bills from a rights perspective has significantly influenced policy development, as described by Grant Huscroft:

Governments are risk averse, and as a result have considerable incentive to formulate policy in such a manner as to avoid a report from the Attorney-General. Herein lies the main significance of the reporting duty: it has formalized the place of the Bill of Rights in the policy development process, at least where the government's legislative agenda is concerned. The Cabinet Office Manual requires Ministers to confirm compliance with the bill of Rights when bidding for a bill to be included in the government's programme, and to draw attention to any aspects of their proposals that have implications for, or may be affected by, the Bill of Rights. Additionally, Ministers are required to confirm that their proposed bill comply with the Bill of Rights (among other things) prior to receiving

approval for introduction. Thus, Bill of Rights concerns are likely to be identified and addressed long before a bill reaches Parliament.⁹¹

Yet it is not clear to what extent this legal orientation for policy evaluation has penetrated political culture or influenced political behaviour. The Attorney General frequently concludes that government bills violate rights in a manner that is not consistent with a free and democratic society (to date there have been 18 reports with respect to government bills, and 35 reports altogether). But neither the prospect of such a report, nor its eventual release, appears to be a serious disincentive for ministers to introduce and defend the impugned bill. Moreover, parliamentarians often dispute the conclusions of the legal analysis, that limitations on rights are not justified, or ignore the reports altogether.⁹² This perception that legal interpretations of the Bill of Rights are having limited effects on political culture is reinforced by a recent comment by former Prime Minister Sir Geoffrey Palmer in 2004, that the Bill of Rights had not brought about a 'rights culture' in parliament.⁹³

Substantial qualitative research is required to assess the extent to which political agenda-setting and interest group strategies have become more rights-conscious, and what influences legal interpretations of rights are having on political assumptions and values. But the Bill of Rights is not the only important institutional change affecting political behaviour. In 1993 New Zealand adopted a Mixed Member Proportional System (MMP) that has not only ensured governing will be done by coalition, but has increased the number of political parties and dramatically strengthened the influence of parliamentary select committees. To date, these reforms have likely had a greater

transformative impact on political debates than the constraints imposed by a bill of rights where judges cannot nullify legislation.⁹⁴

CONCLUSIONS

Each of the jurisdictions discussed here has a different emphasis on the relative weight of political vs. judicial judgments about rights. But a characteristic they share is the attempt to infuse political decision making with concern for rights, while rejecting judicial monism when determining the merits of legislation from a rights perspective.⁹⁵ The question asked in this paper is what significance can be attached in this new model to its attempts to broaden the scope of rights review and the different structural capacities it offers to recognise political dissent from judicial rulings? Stated another way, does this parliamentary approach differ sufficiently from American-style judicial review, in terms of the primacy given to judicial perspectives on the interpretation of and resolution of rights claims, to address sceptics reservations?

To properly respond requires addressing a number of other questions, such as: can a political community both authorize judicial review and resist the tendency to treat judicial rulings as the only legitimate perspectives on what are often highly contested issues? And how will a bill of rights change the way political representatives conceive of their responsibilities when defining the public interest and evaluating the merit of public policies?

Experiences in Canada do not provide sceptics compelling reasons to withdraw their reservations about a bill of rights. Although Canadian constitutional innovations may have provided the genesis for a new model to emerge, Canadians are remarkably insensitive about alternatives to American-style judicial review. Canada's response to the

Charter has been largely shaped by prevailing assumptions at the time of the Charter's creation, which accepted the logic of judicial supremacy and expressed scepticism about the legitimacy of political disagreements with judicial interpretations, despite the fact that such disagreements are constitutionally permitted. After two decades of living with the Charter, the political culture that has emerged has become increasingly hostile to the idea that political disagreements with judicial interpretations of the Charter represent appropriate constitutional options. Moreover, one of the purported benefits of the new parliamentary rights model – the attempt to broaden the influence judgments about rights – appears to be having the opposite effect of what was intended. Although the intention of political rights review was to augment parliament's capacity to make judgments about rights, what is occurring instead is the introduction of judicial influence at early stages of policy development, long before judicial review occurs, resulting in the further isolation of parliament. This is because the process for vetting bills from a rights perspective relies on lawyers, whose professional training emphasizes interpretation and assessments based on relevant jurisprudence. Moreover, the federal Department of Justice has consciously tried to broaden its influence on policy development by adopting a proactive and not simply reactive role in assessing the implications of proposed legislation from a rights perspective.⁹⁶ Over time what has emerged is a political culture that has tried to 'Charter-proof' proposed legislation, by which is meant the project of anticipating litigation and amending or removing those aspects of a bill that could lead to successful constitutional challenges. But however laudable this idea of ensuring that bills are consistent with fundamental values, it is important to recognize that a consequence of this approach is the incorporation of legal ideas of rights-compliance and reasonableness into the policy

process and the dismissal of political judgement about how rights should constrain legislative choices.

For those who worry about the trend towards more juridical forms of constitutionalism, it is too soon to conclude whether their scepticism in bills of rights should be revised for the remaining jurisdictions discussed here. Early expectations in the UK are that judicial declarations of incompatibility will and should compel the government to redress the identified deficiencies. Moreover, the process for ministers to identify whether bills are compatible with rights and the exercise of parliamentary scrutiny are heavily influenced by legal interpretations of relevant jurisprudence. As such, these provide strong indication of a highly juridical form of constitutionalism emerging, which diminishes the purported difference of this new model. Yet sceptics may wish to reassess their criticism, at least in the context of anti-terrorism measures, where these juridical influences, and the JCHR's rigorous scrutiny in terms of these legal principles, appear as welcome restraints on a government determined to appear 'tough' on terror, without regard for those whose liberty may be adversely affected.

New Zealand is indicating that it could go either of the two paths Tushnet discusses. The process for evaluating bills on behalf of the executive is highly legalistic. Government lawyers base their assessments on interpretation of relevant jurisprudence and on expectations of what courts might say. Yet even though the Attorney-General frequently reports that bills impose restrictions on rights that are not reasonable or justified, such incidents offer little constraint on subsequent government defence of these bills. Perhaps because of the frequency of these reports, along with the government's lack of inhibition to proceed with inconsistent legislation, rights-based scrutiny seems to have

little effect on parliamentary deliberations or evaluations of bills.⁹⁷ This could change. If the judiciary regularly declares that legislation violates rights and that the restrictions imposed are not consistent with a free and democratic society, these decisions could increase the pressure on government to revisit these impugned decisions and, more significantly, place a higher priority on anticipating and avoiding 'risky' legislation in the first place.

It hardly needs mentioning that not everyone shares the sceptics' reservations with bills of rights. A majority of legal scholars welcome the introduction of a more juridical form of constitutionalism in these parliamentary systems. For them, the more pertinent concern is whether the opportunities for political disagreement with judicial rulings will too often be used, thus negating the benefits they associated with judicial review. Canadian experience demonstrates that supporters of judicial review have more reason for confidence in these new bills of rights, than do sceptics whose support is contingent on the possibility that these bills of rights will evolve in a manner that does not result in judicial hegemony for defining and resolving conflicts involving highly contested moral and political claims.

Yet we should bear in mind that although stricter adherence to legal interpretations of rights may be desirable in times of escalated pressures (such as governmental responses to perceived terrorism threats), when governments appear more interested in appearing to be tough on terror than in respecting civil rights, this approach may be less desirable in other circumstances. Although the Canadian experience of a highly juridical form of constitutionalism may not be the same path these other jurisdictions take, the difficulty of establishing judicial review and yet maintaining

political space for legislative disagreement should not be underestimated. For these more day-to-day conflicts, once political debates are transformed into debates about rights, it seems extremely difficult to replace a dialogue that equates protecting rights with respecting judicial interpretations of these, with a more complex discourse that acknowledges the contestability of different interpretations and the possibility of substantive differences in how these statements of principle should constrain or influence specific legislative circumstances. Those who make rights claim often lack the will (or theoretical framework)⁹⁸ to distinguish important from more marginal claims. This attraction to a powerful, yet abbreviated, language for expressing political claims,⁹⁹ in combination with a tendency to assume political judgment is inferior to judicial judgement where rights are concerned, undermine incentives to challenge the hegemony of judicial interpretations of rights, no matter whether or not a bill of rights formally permits political perspectives to prevail.

NOTES

¹ S. Gardbaum 'The New Commonwealth Model of Constitutionalism', 49 *American Journal of Comparative Law*, at 707 (2001); W. Sadurski 'Rights-Based Constitutional Review in Central and Eastern Europe', in T. Campbell, K.D. Ewing, and A. Tomkins, *Sceptical Essays on Human Rights* (eds) (2001).

² For discussion of some of these differences see J. Ferejohn and P. Pasquino 'Constitutional Adjudication: Lessons from Europe' 82:7 *Texas Law Review* 1671-1704 (2004); A. Stone Sweet 'Why Europe Rejected American Judicial Review. And Why It May Not Matter' 101 *Michigan Law Review* 2744-2789 (2003).

³ Stone Sweet 'Why Europe Rejected American Judicial Review', p 2780.

⁴ J. Waldron, *Law and Disagreement* (1999), p. 282 (see generally chs 10-11).

⁵ *Ibid.*, p. 233 (note omitted).

⁶ K.D. Ewing 'The Case for Social Rights' in T. Campbell, J. Goldsworthy, and A. Stone (eds) *Protecting Human Rights. Instruments and Institutions* (2003), p. 323.

⁷ Wojciech Sadurski says that post-communist states of Central and Eastern Europe have embraced 'almost without reservation' the power of constitutional courts to invalidate legislation. He offers two reasons for this uncritical acceptance of this change. One is the comparatively high social prestige of constitutional courts in these societies. Second the strong influence of the constitutional judiciary and legal academy for judicial review, and their deep belief that 'the only means of guaranteeing constitutional rights, especially against the background of the previous regimes which had contempt for both constitutions and rights, is to

entrust a quasi-judicial, unelected body with this task'. Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe', pp. 315-317.

⁸ Ewing, 'Human Rights' p. 288

⁹ See for example J. Goldsworthy 'Homogenizing Constitutions' 23:3 *Oxford Journal of Legal Studies* (2003), 483 at p. 484; M. Tushnet 'New Forms of Judicial Review' 38 *Wake Forest Law Review* (2003); M. J. Perry 'Judicial Review: Blessing or Curse? Or Both?' 38 *Wake Forest Law Review* (2003); J. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' 82:7 *Texas Law Review* (2004).

¹⁰ A large body of literature discusses the reasons for creating a notwithstanding. See for example, H. Leeson 'Section 33, The Notwithstanding Clause: A Paper Tiger?' 6:4 *Choices* (2000), pp. 1-24; T. Kahana 'Understanding the Notwithstanding Mechanism' 52 *University of Toronto Law Journal* (2002); P. Weiler 'The Evolution of the Charter: A View from the Outside' in J. Weiler and R. Elliot (eds) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), pp. 49-62; J. Cameron 'The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?' 23 (2nd series) *The Supreme Court Law Review* (2004), pp. 135-166; J. Hiebert 'Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?' 23 (2nd series) *The Supreme Court Law Review* (2004), pp. 169-189.

¹¹ Elsewhere I have referred to the concepts of legislative rights review (for parliamentary review). The concept of political rights review is broader and includes both executive and parliamentary rights review. J. Hiebert 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' 35:2 *British Journal of Political Science* 235 (2005); J. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?' 82:7 *Texas Law Review* 1963 (2004).

¹² *Ibid.*, p. 710, note omitted.

¹³ J. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' p. 1963.

¹⁴ I want to acknowledge the helpful insights gained in clarifying my discussion of sceptical positions from the responses to an earlier draft of this paper, from Wojciech Sadurski and participants in his Research Seminar in Philosophy of Law and Legal Theory, European University Institute, Florence, 25 January 2005.

¹⁵ R. Bellamy 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in T. Campbell, K.D. Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001), p. 15.

¹⁶ *Ibid.*

¹⁷ He characterizes the distinction as the following: 'Juridical conceptions of constitutionalism concentrate on the legal mechanisms for controlling the abuse of power and protecting individual rights. Their aim is to secure a just framework within which citizens and the government can legitimately act by constraining what may be matters of political dispute and decision. The constitution defines citizenship and regulates citizens' struggles. . . . By contrast, more political conceptions see constitutionalism as the various political practices through which citizens constitute their relations with each other. Instead of aiming at or assuming a just ordering of politics, this approach focuses on the ways citizens continually renegotiate the dimensions of politics in order mutually to determine the rules and institutional processes governing their collective life. This striving for reciprocal recognition guards against groups or individuals being subjected to another's will. A condition of civic freedom rather than a substantive conception of justice provides the primary rationale of politics. For freedom from oppression and domination are best secured through participation in framing the collective arrangements and public goods which provide the context for autonomous choice and development'. Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' p. 22.

¹⁸ *Ibid.*, p. 38.

¹⁹ Waldron, *The Dignity of Legislation*, p. 153.

²⁰ *Ibid.*, p. 291.

²¹ R. Knopff 'Populism and the Politics of Rights: The Dual Attack on Representative Democracy' 31:4 *Canadian Journal of Political Science* (1998), p. 702.

²² Robin West argues that an important shortcoming in American debates about social rights is reliance on Locke rather than Hobbes, and argues that the logic of Hobbesian analysis provides more support for the idea that liberalism allows for positive rights. R. West 'Human Rights, the Rule of Law, and American

Constitutionalism' in T. Campbell, J. Goldsworthy, and A. Stone (eds) *Protecting Human Rights. Instruments and Institutions* (2003), pp. 93-114.

²³ K.D. Ewing 'The Unbalanced Constitution' in T. Campbell, K.D. Ewing and A. Tomkins (eds) *Sceptical Essays on Human Rights* (2001), pp. 104-106 (notes omitted).

²⁴ While he recognizes that not everyone will accept that legislative measures are or have been sufficiently robust, gains in the direction of a more substantive notion of equality have been more likely to emerge from legislation than from the common law, and often in the face of common law restraints. Ewing says of the parliamentary role in overcoming common law constraints: 'It is through legislation that political liberty has been established as a constitutional principle, often in the face of common law restraints. This is true above all of the right to vote, the right to form a political party to represent particular interests, and the right to stand for election on equal terms with others. But it is not only liberty which has been expanded by legislation. So too has equality, both in terms of political equality and social equality . . . So far as political equality is concerned, we can point to the abolition of plural voting, the spending limits on candidates and parties in an election, and the broadly equal size of parliamentary constituencies. So far as social equality is concerned, it is through legislation that social institutions (such as trade unions) have been released (though now only to a limited extent) from the thrall of the common law; and that fundamental social values have been established to modify the principles of liberty to be found in the common law: a minimum wage, fair(er) working conditions, rent control and social housing, universal healthy care, social security, and retirement pensions. . . [N]one of these gains would have been made by the common law, and they were often made to overcome common law restraints'. *Ibid.*, p. 106 (notes omitted).

²⁵ *Ibid.*, p. 108 (notes omitted).

²⁶ Gardbaum, 'The New Commonwealth Model of Constitutionalism', p. 709, note omitted. (Gardbaum's analysis pre-dated the Australian Capital Territory's adoption of a bill of rights).

²⁷ The notwithstanding clause of s. 33 applies to sections 2 and 7-15 of the Charter.

²⁸ For comprehensive discussion of its uses see T. Kahana 'The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter' 44:3 *Canadian Public Administration* (2001), pp. 255-291.

²⁹ This is described by more depth by the author in *Charter Conflicts: What is Parliament's Role?* (2002) and 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' 82:7 *Texas Law Review* (2004).

³⁰ W.R. Jackett, 'Memorandum for the Minister of Justice', 21 April 1958; E.D. Fulton, 'Memorandum for the Prime Minister' 29 April 1958, as referred to by C. MacLennan, *Toward the Charter. Canadians and the Demand for a National Bill of Rights, 1929-1960* (2003), p. 123.

³¹ *Ibid.*

³² *Ibid.*, p. 121.

³³ John Diefenbaker, House of Commons Debates, 7 May 7 1946, 1301, as cited in MacLennan, 121.

³⁴ Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002), ch. 1.

³⁵ This change can be traced to 1991 when, at the insistence of the deputy minister of justice, the clerk of the Privy Council wrote to all deputy ministers stressing that proactive Charter view must be at the earliest stages of policy development. As a result the Tellier Memorandum called for Charter analysis to be incorporated into the Memorandum to Cabinet, and that this analysis 'had to include an assessment of the risk of successful challenge in the courts, the impact of an adverse decision, and possible litigation costs'. M. Dawson 'The Impact of the Charter on the public policy process and the Department of Justice' 3;3 *Osgoode Hall Law Journal* (1992), p. 596. See also J. Kelly 'Bureaucratic activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government' 42 *Canadian Public Administration* (1999), pp. 476-511.

³⁶ The notwithstanding provision in the Canadian Bill of Rights was in s. 2 which stated: '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 applies as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared . . . '

³⁷ For a good discussion of the political evolution of the idea of a bill of rights, see P. Rishworth, 'The Birth and Rebirth of the Bill of Rights' in G.Huscroft and P. Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993* (1996).

³⁸ The Justice and Law Reform Committee reported that the proposed power of the judicial to invalidate legislation ‘was clearly the principal reason’ for the broad rejection of the Bill of Rights proposal. Interim Report of the Justice and Law Reform Committee, *Inquiry into the White Paper – A Bill of Rights for New Zealand* (tabled in Parliament 9 July 1987), p. 8, as referred to by A. Butler ‘Judicial Review, Human Rights and Democracy’ in G.Huscroft and P. Rishworth (eds) *Litigating Rights. Perspectives from Domestic and International Law* (2002), p. 63.

³⁹ Geoffrey Palmer explains his change of reasoning in *Unbridled Power?* (1979), pp 59-60.

⁴⁰ The case was *Moonen v. Film and Literature Board of Review* [2002] 2 NZLR 9, 17..

⁴¹ Butler, ‘Judicial Review, Human Rights and Democracy’, in G.Huscroft and P. Rishworth (eds) *Litigating Rights. Perspectives from Domestic and International Law* (2002), p. 50.

⁴² Paul Rishworth offers a different perspective, suggesting that the idea of judicial declarations of inconsistency under the Bill of Rights Act have now received legislative blessing. The basis for his assumption on this point is parliament’s approval in the Human Rights Amendment Act 2001 of the concept of judicial declarations of inconsistency. But whether or not this acceptance implies acceptance of this judicial role under the Bill of Rights is contentious. P. Rishworth ‘Common law right and navigation lights: Judicial review and the New Zealand Bill of Rights’ 15:2 *Public Law Review* (2004), p. 115

⁴³ G. Palmer and M. Palmer *Bridled Power. New Zealand’s Constitution and Government* 4th ed., (2004), p. 318.

⁴⁴ Paul Rishworth says whether the notion of declarations of inconsistency will become a major feature of litigation is not yet clear but he suspects it will and says the test of the court’s resolve ‘will be its approach to cases in which the entire cause of action is predicated on the proclaimed jurisdiction to declare inconsistency; that is, where the enactment is clear, is claimed to be inconsistent with the *Bill of Rights*, and there is no ambiguity generating plausible alternative meaning. There has not yet been such a case’. Rishworth ‘Common law right and navigation lights: Judicial review and the New Zealand Bill of Rights’ 15:2 *Public Law Review* (2004), p. 114 (note omitted).

⁴⁵ An important distinction is that in New Zealand it is the Attorney-General who must make a report of inconsistency whereas in the UK individual ministers have this responsibility.

⁴⁶ Some are sceptical about whether this parliamentary scrutiny will be effective, particularly in light of the Human Rights Act’s silence on questions of resources for the parliamentary committee, or the reference to retaining a human rights expert(s) to assist with its task. The concern is that this committee’s work may be marginalized, both for failure of resources and adequate time to thoroughly assess proposed legislation. Carolyn Evans ‘Responsibility for Rights: The ACT Human Rights Act’ 32:4 *Federal Law Review* (2004), 291 at p. 295.

⁴⁷ *Ibid.*, p. 294.

⁴⁸ This statement may not have been applicable to New Zealand before the judiciary decided in *Moonen v. Film and Literature Board of Review* [2000] 2 NZLR 9 that it can make a declaration of inconsistency when legislation is ruled to be inconsistent with the Bill of Rights Act.

⁴⁹ Jack Straw, UK House of Commons Debates, column 1141 June 24 1998.

⁵⁰ ACT Bill of Rights Consultative Committee ‘Towards an ACT *Human Rights Act*’ <http://www.jcs.act.gov.au/prd/rights/reports.html> (accessed 24 March 2005)

⁵¹ Michael Perry disagrees with this assessment, arguing that the distinctions are not as significant as might be expected, particularly those between the UK and Canada. This is because it is unlikely that the UK Parliament will not respond to a domestic judicial ruling of incompatibility, because of fear that the European Court of Human Rights might support this conclusion. Thus he argues that ‘[c]ontrary to the appearance that judicial power to protect human rights is weaker in the United Kingdom under the HRA than in Canada under the Charter, judicial power to protect human rights is at least as strong in the United Kingdom as in Canada. If the United Kingdom were not treaty-bound to respect the rulings of the European Court, the situation might be otherwise’. M. Perry ‘Judicial Review: Blessing or Curse? Or Both?’ 38 *Wake Forest Law Review* (2003) pp. 671-72.

⁵² M. Tushnet, ‘New Forms of Judicial Review’, 38 *Wake Forest Law Review* (2003), p. 837.

⁵³ *Ibid.*, p. 831.

⁵⁴ *Ibid.*, p. 818.

⁵⁵ *Ibid.*, p. 814.

⁵⁶ *Ibid.*, p. 824.

⁵⁷ *Ibid.*, pp. 831-837.

⁵⁸ J. Allan 'The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand' in T. Campbell, K.D. Ewing, and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (2001), p. 384.

⁵⁹ *Ibid.*, p. 390 (note omitted). Italics in original.

⁶⁰ *Ibid.*, pp. 384-385 (notes omitted).

⁶¹ T. Campbell 'Incorporation through Interpretation', in T. Campbell, K.D. Ewing, and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (2001), p. 80.

⁶² *Ibid.*, p. 85, note omitted.

⁶³ A. Young 'Judicial Sovereignty and the Human Rights Act 1998', 61:1 *Cambridge Law Journal* (2002), 53 at pp. 64-65

⁶⁴ Campbell 'Incorporation through Interpretation', in T. Campbell, K.D. Ewing, and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (2001) p. 87.

⁶⁵ *Ibid.*, p. 81.

⁶⁶ *Ibid.*, p. 87.

⁶⁷ J. Hiebert, *Charter Conflicts. What is Parliament's Role?* (2002).

⁶⁸ At the time of the Charter's adoption, Canada was in the midst of prolonged debates about amending the constitution, but the primary emphases for the provinces were changes to the division of powers and the requirements for constitutional amendments. These changes on their own would not have radically transformed the constitution but instead would have preserved the principle of 'parliamentary sovereignty' as adapted for the Canadian federal state.

⁶⁹ This does not mean that there have been no instances of a political will to challenge the primacy of judicial interpretations of the Charter. The best example of this occurred in the legislative response to a series of Supreme Court decisions that altered the rules of evidence or what comprises a relevant defence, in the context of sexual assault trials. The government, with parliament's support, disputed the judiciary's interpretation of the Charter. But rather than use the notwithstanding clause, it passed new legislation that imposed a substantively different view on how Charter principles should guide rules of evidence in sexual assault proceedings. In sharp contrast to the majority Supreme Court position, which focused exclusively on the right of the accused to a fair trial, the legislation recast the issue as one requiring a balance between a fair trial and the equality and privacy rights of women because women are disproportionately the victims of sexual assault. What was so interesting about this legislative response is that it was not based on a rejection of the Charter, but a rejection of the idea that the judiciary has exclusive responsibility to interpret the Charter. This issue is discussed at length by Hiebert in *Charter Conflicts*, ch. 5

⁷⁰ *Ibid.*, ch. 4.

⁷¹ 'Harper Threat to Minority Rights', CBC, 7 June 2004,

<http://www.cbc.ca/story/election/national/2004/06/07/elxnmarrights040607.html> (accessed 10 January 2005).

⁷² It is not simply political leaders' judgment about policy that has been affected by this reluctance to invoke the notwithstanding clause. In 2003, the federal opposition Alliance Party tried unsuccessfully to gain parliamentary approval for yet another motion that reaffirmed parliament's acceptance of the traditional heterosexual understanding of marriage. If successful, the motion would not only have affirmed a heterosexual definition of marriage but would have committed parliament to take 'all necessary steps' to preserve this definition. In light of recent judicial decisions that ruled the common law prohibition on same-sex marriage unconstitutional, this reference to 'all necessary steps' clearly implied use of the notwithstanding clause may be required. It was this implication, of likely having to invoke the notwithstanding clause, that best explains parliament's rejection of this motion, albeit by a small margin (137-132).

⁷³ Civil rights organizations Liberty and Justice have criticized the government's pre-legislative review for providing inadequate information for public evaluation of the merits of decisions that are claimed to be compatible with Convention rights, arguing that effective parliamentary scrutiny of human rights compliance should not be 'conducted in the dark, in ignorance of the government's reasons for its certification of human rights compatibility. Neither is it of assistance in ensuring human rights compliance if Parliament is required to engage in a guessing game to extract the government's views piece by piece by asking the right questions'. See Joint Committee on Human Rights, Second Special Report, 2000-01, at Appendix; and J. Cooper and R. Pillay, *Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance* (2001), pp. 78-79.

⁷⁴ Department for Constitutional Affairs 'Guidance. Section 19 Statements: Revised Guidance for Departments'. At <http://www.dca.gov.uk/hract/guidance.htm>. See also 'Section 19 Statements: Revised Guidance for Departments', 2nd edition, <http://www.dca.gov.uk/hract/guidance/guide-updated.htm> (accessed 20 December 2004).

⁷⁵ 'Guidance' at para 36.

⁷⁶ Ibid.

⁷⁷ In its first report on the anti-terrorist measures, the JCHR expressed reservations about the 'novel powers' proposed, indicating that it was not appropriate to introduce measures that 'would not have received parliamentary support but for current concerns about terrorism and fear of attack' and urging parliament to give serious consideration as to whether the threat to the United Kingdom justifies such powers. Joint Committee on Human Rights, Second Report, Session 2001-02, at para. 5.

⁷⁸ Joint Committee on Human Rights, Review of Counter-Terrorism Powers, Eighteenth Report, Session 2003-04, pp. 3-4.

⁷⁹ A (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56.

⁸⁰ Joint Committee on Human Rights, Prevention of Terrorism Bill, Preliminary Report, Ninth Report, Session 2004-05, and Prevention of Terrorism Bill, Tenth Report, Session 2004-05.

⁸¹ House of Lords, Second Reading, 27 November 1997, col. 1227-1228.

⁸² Although this was the first government-introduced bill that required a statement of incompatibility, it wasn't the first occasion that a bill required such a report. The House of Lords decided to amend legislation that would have the effect of denying the government's decision to remove a legislative provision (s. 28 of the Local Government Act) that had forbidden the promotion of homosexuality or banned any teaching that promoted the 'acceptability of homosexuality as a pretended family relationship'. In March 2000 the Government indicated that the amendments made by the House of Lords to the Local Government Bill required a statement that the legislation was not compatible with Convention rights.

⁸³ In second-reading discussion of the bill, the minister indicated that the government concluded that a statement of incompatibility was required based on the interpretation of a European Court of Human Rights case, which involved a refusal to air a political advertisement on television. The case was *Vgt Verein Gegen Tierfabriken v. Switzerland*, (application no. 24699/94), June 28 2001.

⁸⁴ At that time, its first director general interpreted the corporation's responsibilities under the royal charter as preventing the BBC from accepting payment for advertising; a response to Winston Churchill's request to broadcast a message about India in exchange for payment of £100. In 1954 when the Television Act established the Independent Television Authority (subsequently renamed the Independent Broadcasting Authority) to oversee commercial broadcasting, it also accepted this ban on political advertising. M. Pinto-Duschinsky, *British Political Finance 1830-1980* (1981), pp. 252-253.

⁸⁵ The Committee on Standards in Public Life (Neill Committee) conducted an inquiry into the funding of political parties in the UK and recommended in its 1998 report that the ban on paid political advertising on television and radio be maintained, while continuing with the practice of broadcasters providing political parties with free air-time. The Committee suggested that although it is difficult to disentangle the effects that paid advertising might have on an election, a ban is justified to ensure that elections are not extremely costly and to reduce parties' dependence on wealthy donors. In making this recommendation, the Committee recognised that a ban on political advertising constitutes a restriction on free expression, as guaranteed by Article 10 of the European Convention on Human Rights. Nevertheless, it concluded that the ban is appropriate and defensible to protect 'the democratic right of UK citizens not to be subjected to a barrage of political propaganda at prime advertising time from the party with the richest backers'. It speculated that if courts were to rule that this ban is incompatible with rights, this would have 'a dramatic effect on the funding of the political parties' in the UK and would encourage the kind of 'arms race' that occurs in terms of expenditures by the Democrat and Republican parties in the U.S. 'The Funding of Political Parties in the United Kingdom' Fifth Report of the Committee on Standards in Public Life (Neill Committee), R94, pp. 173-175, 1998, cm: 4057-I.

⁸⁶ In January 2003 an independent Electoral Commission also recommended the retention of this ban. It concluded that it is reasonable to believe a UK court would accept the justification of the ban if it were challenged. In its view a ban on political advertising is consistent with the 'public interest' of a democratic society. Moreover, the fact that broadcast regulations permit free broadcasts to qualifying political parties helps mitigate the effect of the ban on paid advertising. The Electoral Party Political Broadcasting

Commission, *Report and Recommendations*, January 2003.

<http://www.electoralcommission.org.uk/about-us/ppb.cfm> (accessed 15 June 2003)

⁸⁷ Tessa Jowell, UK, House of Commons Debates, 3 December 2002, col. 787.

⁸⁸ *Ibid.*, columns 788-789.

⁸⁹ Jowell, House of Commons Debates, 3 December 2002, column 789.

⁹⁰ In explaining why the legislation was conceived as it was, and not in a less restrictive manner, Jowell told parliament: '[W]e looked hard at the current ban to see whether some minor changes would make it more certain that it was human rights compatible. Unfortunately, any such change would still allow substantial political advertising. . . . By denying powerful interests the chance to skew political debate, the current ban safeguards the public and democratic debate, and protects the impartiality of broadcasters'. *Ibid.*, column 788.

⁹¹ Huscroft 'The Attorney-General's Reporting Duty' p. 196 (note omitted).

⁹² J. Hiebert 'Rights-Vetting in New Zealand and Canada. Similar Idea, Different Outcomes', Presented at New Zealand Centre for Public Law, second annual conference on the primary functions of government, Wellington 29-30 October 2004.

⁹³ This comment was made at the above conference.

⁹⁴ Paul Rishworth makes a similar argument when he suggests that the adoption of MMP 'has proved the more direct answer to the sorts of concerns that fuelled the call for a bill of rights in 1984: a unicameral House dominated by government members and thus by Cabinet'. Rishworth, 'Common law right and navigation lights: Judicial review and the New Zealand Bill of Rights' 15:2 *Public Law Review* (2004), p. 119

⁹⁵ This claim is less persuasive in Canada, where courts have the final say when interpreting the constitution. Nevertheless, as has been argued elsewhere, there is no reason why parliament or the provincial legislatures should not play a more assertive and proactive role when shaping constitutional discourse about the meaning and scope of rights. See by the author, *Charter Conflicts: What is Parliament's Role?* (2002).

⁹⁶ J. Kelly 'Bureaucratic activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government' 42 *Canadian Public Administration* (1999), pp. 485-503.

⁹⁷ This issue is explored at some length by the author in 'Rights-Vetting in New Zealand and Canada. Similar Idea, Different Outcomes' Presented at New Zealand Centre for Public Law, second annual conference, Wellington, October 29-30 2004.

⁹⁸ Even courts are guilty of using a rights framework in an uncritical fashion. For example, the Canadian Supreme Court has ceased trying to develop a theoretical understanding of what aspects of free speech should be protected from the coercive powers of the state, and has developed an expansive position that equates constitutionally protected speech with any attempt to convey meaning (short of violence). Although these interpretations may subsequently be subject to restrictions (under the general limitation clause of s. 1 of the Charter) the Court, nevertheless, has contributed to the inflationary tendencies of rights claiming by conferring rights status on claims that bear little resemblance to the philosophical purposes for protecting citizens' expressive activities from the state.

⁹⁹ For discussion of the difficulties of rights discourse see M. Glendon, *Rights Talk. The Impoverishment of Political Discourse* (1991).