REASSESSING THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM

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INTRODUCTION

Nearly nine years ago, shortly after the United Kingdom's Human Rights Act (HRA) came into effect, I published what I believe was one of the first articles to identify and present the case for a new, intermediate model of constitutionalism that in somewhat different versions had been adopted in Canada, New Zealand and the United Kingdom as an alternative to their traditional principle of parliamentary sovereignty.[1] I termed this experiment "the new Commonwealth model of constitutionalism."[2]

Although as an attempted contribution to general constitutional theory, the case that I presented for the new model over the two traditional options of judicial and legislative supremacy was primarily a normative one, parts of it depended on or assumed certain things about how the model would or did operate in practice. Specifically, I argued that the new model is normatively appealing to the extent it effectively protects rights while reallocating power between courts and the political institutions in a way that brings them into greater balance than under the two more

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[1] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

[2] Others have subsequently used different terms. Mark Tushnet prefers "weak-form" judicial review, see Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. (2003); Janet Hiebert, the "parliamentary bill of rights model," see Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006); and "the dialogue model" has also gained currency. For clarification, in using my term I did not intend to suggest any conceptual connection between the new model and Westminster-based parliamentary systems, so that the model is only open to them, any more than I intended such a connection between the contrasting "American model" (which I argued was adopted by most post-1945 constitutions around the world) and countries in the western hemisphere. The labels were selected for the historical facts of where the models were first – and, in the case of the new Commonwealth model, still only -- employed. Although only very lightly wedded to my term, I explain in the course of the article why I think the second term is under- and the third over-inclusive.

lopsided traditional models. In this sense, therefore, some of the benefits that I claimed for the new model were potential or theoretical ones. As a result, I always planned to return to the topic for an assessment of whether practice was living up to theory and, indeed, this is where much of the expressed skepticism towards the new model has been focused. But I resisted doing so until there was sufficient basis to make the project meaningfully based on the evidence. In light of almost a decade of both additional experience under the new model and sustained academic attention to it in each country, as well as its subsequent expansion into Australia at the territorial and state levels[3] (and possibly also soon at the national), I think that point has now arrived. Accordingly, my main goal in revisiting the new model in this article is to try to evaluate its success and distinctiveness in practice.

The article is organized as follows. The first three sections address preliminaries and set up the framework for the evaluation in the fourth and fifth. In Part I, I explain what is new and distinctive about the new model. Here, I also outline the spectrum of possible and actual institutional variations on a theme that it permits. In Part II, I briefly refine and restate what (still) seems to me the basic case for the new Commonwealth model of constitutionalism as an intermediate form in between the two more traditional ones. This basic case also suggests both how we would ideally want the new model to operate (also in Part II) and the criteria for evaluating the success or failure in practice of the versions we actually have, which I set out in Part III. Parts IV and V form the heart of the article. In Part IV, I apply these ideals and criteria to assess existing experience, as well as the academic commentary on it, in Canada, New Zealand, and the UK in order to consider whether on balance the experiment has been a success and which of the versions is working the best. Finally, in Part V, I identify what strikes me as the major practical dilemma that has arisen for the model as a whole and how it might best be resolved. As I explain in this section, one horn of this dilemma is the result of remedial concerns on the part of courts where they do not have the power to disapply rights incompatible statutes. The solution I propose is the presumption of a legislative remedy whenever the legislature agrees with the courts and amends or repeals the relevant statute. I also discuss a few other possible amendments or reforms, including some that have been employed in the two more recent Australian versions, which might further improve the transition from theory to practice.

As this is a scholarly article and not a detective story, I hope readers will not be disappointed that "[i]n my beginning is my end." My general conclusion is that thus far in its short history, the new model has mostly been moderately successful and distinctive in practice -- at least in its New Zealand and UK versions – and that, if the experiment is permitted to continue, a few working adjustments can make it more so in "time future." Accordingly, as a third form of constitutionalism, the new model should be given its rightful place on the menu of options alongside judicial and legislative supremacy.

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[3] These are the ACT Human Rights Act of 2004 and the Victorian Charter of Human Rights and Responsibilities of 2006.

I. WHAT IS NEW ABOUT THE NEW MODEL?

For me, the essential and defining features of the new Commonwealth model as a general, innovative, and distinctive model of constitutionalism are threefold: (1) a legalized bill or charter of rights; (2) some form of enhanced judicial power to enforce these rights by assessing legislation (as well as other governmental acts) for consistency with them that goes beyond traditional presumptions and ordinary modes of statutory interpretation; and (3) most distinctively, notwithstanding this judicial role, a formal legislative power to have the final word on what the law of the land is by ordinary majority vote. In combination, the first two features distinguish the new model from the traditional conception of parliamentary sovereignty; the third one from judicial supremacy.[4] The new model is thus intermediate between these two previously exhaustive polar options. By authorizing some form of constitutional review of legislation by the courts in the name of rights but by giving the legal power of the final word to the legislature, its great novelty is to decouple the power of judicial review from judicial supremacy or finality. I just note here what I will expand on in the next section. This working definition does not mean that the new model is all or even primarily about the relationship of courts and legislatures; to the contrary, it is also about rights consciousness among all three branches of government and the citizenry.

These defining characteristics are quite general and permit a range of different particular instantiations, particularly with respect to the second and third features, some of which have in fact been adopted in various countries. Although the new model has become increasingly synonymous with "parliamentary bills of rights,"[5] they are, as far as I'm concerned, an important sub-set of it as it is perfectly possible for all three features to apply to a constitutional bill of rights. Accordingly, in my original article, I firmly identified Canada along with New Zealand and the United Kingdom as a member of the new model, indeed the founding member. And despite a significant – though hardly uncontested -- strand of thought among commentators on the Charter that Canada effectively now has a constitutional system

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[4] Very briefly, the model of judicial supremacy posits (1) the constitution, including a bill of rights, as the supreme law of the land, (2) entrenchment of the constitution and its bill of rights against ordinary majoritarian amendment, and (3) judicial enforcement via the power to invalidate or disapply legislation and other inconsistent governmental actions, against whose decisions the political branches are powerless to act by ordinary majority vote. This third feature is what Mark Tushnet refers to as "strong-form" judicial review, see Tushnet *supra* note 2. Although to be sure among the many countries to have adopted this model since 1945, the specific institutionalization of such judicial review varies – most notably between centralized and decentralized judicial review – the acceptance of these three fundamental principles does not; rather these are variations on a theme.

Accordingly, a constitutional bill of rights without a legislative override power that may be amended by a legislative supermajority, such as the ones in India and South Africa, does not satisfy the third feature of the new model. That said, the more weakly a constitution is entrenched against ordinary majority vote, the closer it is to the new model on a spectrum. By contrast, amendment of a bill of rights by ordinary majority would satisfy the third feature of the new model.

[5] This term has been particularly championed by Janet Hiebert, see *supra* note 2.

largely indistinguishable from the paradigmatic regime of judicial supremacy of its neighbor, the U.S.,[6] I have not changed my view. I continue to think that the legislative override power contained in section 33 of the Charter[7] is an important and distinctive structural feature of Canadian constitutionalism despite its infrequent use and is what clearly places Canada in the new Commonwealth model camp.[8]

So, on a spectrum in which traditional judicial and legislative supremacy mark the two poles, the new model can and has taken at least four different forms, thereby occupying four slightly different intermediate positions. Starting from the judicial supremacy pole, the first of these is exemplified by the 1982 Canadian Charter of Rights and Freedoms: (1) a constitutional bill of rights (2) granting the judiciary power to invalidate conflicting statutes but (3) with a formal legislative final word in the form of the section 33 override power exercisable by ordinary majority vote. The second is a statutory or parliamentary bill of rights granting the judiciary the same power to invalidate conflicting statutes, with a similar legislative override power. This position is illustrated by the still operative 1960 Canadian Bill of Rights. The third version is exemplified by the HRA, the Australian Capital Territory's Human Rights Act of 2004 (ACT HRA) and the Victorian Charter of Human Rights and Responsibilities of 2006 (VCHRR): a statutory bill of rights without the power of judicial invalidation of legislation but instead one new judicial power to declare statutes incompatible with protected rights that does not affect their continuing validity, and a second new judicial power (and obligation) to give statutes a rights-consistent interpretation wherever possible. Both types of judicial decision – declaratory and interpretive – are subject to the ordinary legal power of the legislature to have the final word. The fourth variation would be a similar statutory bill of rights with the second judicial power -- the interpretive one -- but without the first or declaratory power, as in the original, pre-*Moonen*, version of the New Zealand Bill of Rights Act, 1990 (NZBORA).[9] A statutory bill of rights alone without either the interpretive duty or the declaratory power, while certainly a generally available option, would not be one that satisfies the second requirement of my definition of the new model and thus, whatever its independent merits, does not depart from traditional parliamentary sovereignty.

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[6] Hiebert and Grant Huscroft are among the scholars who have expressed this view.

[7] "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Canadian Charter, section 33 (1).

[8] In fact, Canada was in this camp even before the 1982 Charter as a result of the 1960 Canadian Bill of Rights Act, a statutory bill of rights that is still in force. Indeed, as mentioned in the following paragraph of the text, the CBOR remains as a distinct version of the new model with its (implied) power of judicial invalidation of statutes.

[9] See *infra* text accompanying notes 63-4.

II. THE BASIC CASE FOR THE NEW MODEL

The core argument for the new Commonwealth model as a whole, it seems to me, is one of balance. It provides a better balance between two "constitutional goods"[10] or foundational values of modern liberal democratic polities than the traditional models of constitutionalism by promoting both more equally. These foundational values are: (1) the recognition and effective protection of certain fundamental or human rights and (2) a proper distribution of power between courts and the elected branches of government, including appropriate limits on both. To the extent that judicial supremacy prioritizes the protection of rights, it does so in a way that gives too much power to the judiciary at the expense of democratic decision-making. Parliamentary sovereignty prioritizes the democratic decision-making claims of the political branches at the expense of at least potentially inadequate protection of rights – in Westminster-based systems typically common law liberties as supplemented by certain specific statutory safeguards. The new model promises to recalibrate these two existing, more lopsided options by adequately and effectively protecting rights through a reallocation[11] of power between the judiciary and the political branches (adding to judicial power if starting from parliamentary sovereignty and reducing it if starting from judicial supremacy) that denies too much power to either. As such, it is largely an argument about greater subtlety and balance in constitutional engineering.

A slightly different way of stating this case is by reference to what has, in "the latest round of contributions"[12] to the debate about judicial review, helpfully come to be viewed as the two essential issues: (1) are rights better protected with judicial review; and (2) is judicial review democratically illegitimate?[13] In these terms, the case for the new model is, first, as discussed below, there is a consensus that rights have been better protected in the various jurisdictions since adopting the new model and abandoning traditional parliamentary sovereignty, but this same record also suggests judicial supremacy is not necessary for such protection. Second, the final legislative word maintains the democratic legitimacy of the lesser, but still enhanced, judicial powers of the new model. Moreover, one of the best and most sophisticated recent defenses of the democratic legitimacy of judicial review – that judicial review's point of requiring reasonable justification for acts by public

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[10] I borrow this term from ALAN BRUDNER, CONSTITUTIONAL GOODS (2007).

[11] A "reallocation" does not necessarily mean a "transfer" of power from one institution to the other. Thus, in being given the two new powers of declaring an incompatibility and interpreting statutes in a rights-consistent way wherever possible, UK courts are not exercising powers previously held by Parliament. See AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 277-278 (2009).

[12] Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 E.J.L.S. (2009).

[13] Among those contributing to this recent crystallization of the issues are RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); Kumm, id.; Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 O.J.L.S. 275 (2002); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1348 (2006).

authorities is a pre-condition for the legitimacy of law[14] – can, I think, be adapted as a defense of the new model by asking why this "Socratic dialogue" must end with courts having the final word, rather than permitting the possibility of further deliberation by a now alerted citizenry and political opposition.[15] Indeed, there are suggestions that the new Commonwealth model may be acceptable to *both* those who defend and challenge judicial review. For the former sometimes state that their defense is neutral as to the form judicial review should take (strong or weak)[16] and the latter that their challenge is only to judicial supremacy or strong-form review.[17]

Although this article is not primarily about the theoretical justifications for the new model – which, at least in the relevant countries, are by now fairly well-known -- but an assessment of the normatively relevant parts of its practice, let me put just a little flesh on the bare bones of the previous two paragraphs. My original article largely focused on the potential benefits of the new model *as an alternative to judicial supremacy* that I argued had been adopted (as part of "the American model of constitutionalism") and adapted in much of the world after 1945 and again after 1989, rather than as an alternative to the other traditional pole of legislative supremacy. The main reason for this primary focus was that the pre-enactment debates, such as they were, in Canada, New Zealand and the United Kingdom revolved around the choice between a fully constitutionalized bill of rights and some alternative legalized form. In both Canada and New Zealand, the final bills of rights emerged after rejection of initial proposals for full constitutionalization along the lines of the American model and were seen as watered down versions. In the UK, the HRA was enacted after decades of debate about the merits and, especially, the constitutional possibility of an entrenched bill of rights, although the specific and novel legal form of the HRA came as something of a surprise. To a lesser extent, this focus on the new model versus judicial supremacy was also due to a sense that, in Mark Tushnet's words, the Westminster model of legislative supremacy had been withdrawn from sale.[18]

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[14] See Kumm, id.

[15] Indeed, Mattias Kumm explicitly suggests that the new model is one way that "Socratic contestation" might be institutionalized. See Mattias Kumm, *Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review*, in M. KLATT ED., THE LEGAL PHILOSOPHY OF ROBERT ALEXY (2009) ("What deserves a great deal of thought is how to design the procedures and institutions that institutionalize Socratic contestation….Should judges just have the power to declare a law incompatible with human rights, leaving it to the legislature to abolish or maintain the law? [citing The New Commonwealth Model of Constitutionalism])."

[16] See Kumm id.; Richard Fallon, *The Core of the Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1733-34 (2008) (suggesting that the choice between strong and weak forms of judicial review is a "design question" within the overall institution that he is defending, and that the desirability of one or the other may depend contextually on the "pathological proclivities" of particular societies).

[17] See Waldron, *supra* note 13, at 1354 ("The most important difference [among systems of judicial review] is between what I shall call strong judicial review and weak judicial review. My target is strong judicial review.").

The argument for the new model as against judicial supremacy is essentially that, without a significant sacrifice in terms of rights protection, it produces a better, more democratically-defensible balance of power between courts and legislatures with respect to rights. Judicial supremacy, with its associated tendency towards exclusivity and monologue in rights reasoning, is especially problematic in the inevitable real world context of reasonable disagreement about the meaning, scope, application, and permissible limits on the relatively abstract text of a bill of rights among judges, between courts and legislatures, and among citizens. Moreover, the second-stage of modern rights adjudication, the stage involving means-end analysis to determine whether limits on rights are justified, is largely devoid of specifically legal analysis. The new model permits the rights contained in a legalized charter to be protected in a less court-centric way that provides a greater role in rights deliberation for both the political branches and the citizenry. In so doing, it may also address and help to resolve the well-known problems of (1) the over-legalization or judicialization of principled public discourse[19] and (2) legislative and popular debilitation that has long been identified as a major institutional cost of constitutionalization.[20] Where legislatures never have final responsibility for rights, and even more where (as often happens) courts do not take legislative consideration seriously in their own deliberations, there is an understandable tendency to leave matters of constitutionality to the judiciary and spend their time on things they do decide. By giving legislatures the legal power of the final word, the new model promised to create incentives for such debate. More broadly, the new model radically and directly dissolves the countermajoritarian difficulty.

Interestingly, the current debate in Australia about whether to enact a national human rights act is the first to focus squarely and explicitly on the choice between the status quo of parliamentary sovereignty and some version of the new Commonwealth model. Accordingly, in this context, the case for the new model as an alternative to traditional legislative supremacy must be made.

I think this case is that: (1) basic or fundamental or human rights are an important and valuable way of thinking about collective life in the first place; (2) they both can and should be more effectively recognized and protected than under the pre-existing (Westminster-based) system of residual common law liberties supplemented by certain specific statutory rights within an overall structure of full parliamentary sovereignty; (3) this more effective protection requires a concise, legalized statement of affirmative rights;[21] and (4) courts have an important, indeed

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[18] Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOR. L. REV. 813, 814 (2003).

[19] *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK (199); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

[20] For an early identification, see JAMES BRADLEY THAYER, JOHN MARSHALL (1901).

[21] Here I am contrasting the traditional residual common law conception of rights as whatever the law does not prohibit with an affirmative conception of rights as presumptive claims against the state. In particular, I am *not* referring to the standard distinction between positive and negative constitutional rights.

essential, role to play in this more effective protection; not necessarily an exclusive or final one but rather a role that exists alongside, and is ultimately legally subordinate to, those of the legislative branch of government. The need for greater protection of rights was certainly felt in the UK prior to the HRA, based on both the external fact of the UK's poor record at the European Court of Human Rights (ECtHR) and the domestic fact of the undermining of civil liberties during the Thatcher era.[22]

Part of the reason that rights might be more effectively protected under a charter is that the legalized dimension of rights discourse that inevitably comes with a bill of rights (whether statutory or constitutional) is a valuable way of rendering rights and their limits more concrete and specific, of mooring potentially abstract or hypothetical issues in reality. Moreover, however vague and indeterminate a bill of rights may be -- which is part of the reason for not granting judicial supremacy -- as a form of legalization it is generally far *less* vague and indeterminate than the primarily common law liberties of the Westminster-based parliamentary sovereignty model.

Some form of judicial enforcement power is important to help deal with the standard concern of certain rights-relevant pathologies or "blind spots" that legislatures and executives may be subject to, particularly rights claims of various electoral minorities, legislative inertia based on tradition and convention or resulting from the blocking power of parties and interest groups, and government hyperbole or ideology.[23] In addition, if (for the reasons already given) granting the judiciary the legal final word is problematic, this does not necessarily apply to all judicial input into rights discourse. To the contrary, such input can be helpful as the legally penultimate word in both informing/spurring rights review by the political branches both before and after judicial consideration and raising the political costs of legislative disagreement by alerting the citizenry. In these ways, a judicial role promises to enhance the quality of legislative rights debate compared to the status quo.[24]

Finally, one general advantage of the new model over both of the traditional ones is that it has greater potential to actively involve all three branches of government in rights review and creates a broader rights consciousness among the citizenry: what Grant Huscroft has helpfully referred to as a "ground up" rights culture rather than the typically "top-down" one of judicial supremacy.[25] So in Canada, New Zealand, the UK and Australia, the new model has not only created new powers of judicial involvement in rights enforcement but mandated new forms

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[22] The classic work here is KEITH EWING AND CONOR GEARTY, FREEDOM UNDER THATCHER (1990).

[23] *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); Rosalind Dixon, *The Supreme Court of Canada,* Charter *Dialogue, and Deference*, 47 OSGOODE HALL L. J. 235 (2009); Kumm, *supra* note 15; Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 WAKE FOR. L. REV. 635 (2003).

[24] *See* Gardbaum, *supra* note 1, at 744-48; Perry, *id*.

[25] Grant Huscroft, *Constitutionalism from the Top Down*, 45 OSGOODE HALL L.J. 91 (2007).

of pre-enactment rights review within the legislative process.[26] A second advantage is that the new model transcends the existing either/or choice between a legal and a political conception of rights by providing conceptual and normative space for both.

Of course, the new model is not without its own possible costs and disadvantages compared to parliamentary sovereignty. Like the benefits, these are basically of two kinds: normative and empirical.[27] Very briefly, the normative concern is that there are basic democratic objections to any degree of judicial power over legislation beyond traditional presumptions and techniques of statutory interpretation. The empirical/practical are (1) that there is no need to protect rights more or in a different way, the status quo is fine, (2) that rights are not in fact better protected under the new model and/or (3) that the new model is unstable -- the theoretical balance of the intermediate position does not exist or cannot be maintained in practice but inevitably leads to the excesses of judicial power and rights talk commonly associated with strong systems such as the US. As we will see, these latter two claims but particularly the final one, have been commonly made criticisms of how the new model has worked in practice.

III. THE CRITERIA OF SUCCESS (OR FAILURE)

In order to be in a position to evaluate the new model in practice, it is first necessary to clarify what the relevant criteria of success are. These, I think, follow fairly straightforwardly from the basic case for the new model. First, is there effective, or at least adequate, protection of the rights recognized in the new charters or bill of rights? Second, has the appropriate reallocation of power between courts and the political branches with respect to rights – including limits on both -- taken place not only de jure but also de facto so that they are now in practice in better balance? This second criterion raises related questions about both the stability (is it reverting towards one or other of the two poles?[28]) and the practical distinctiveness (versus the legal or formal) of the new model. Where the intended switch is from parliamentary sovereignty as traditionally conceived – the precise question here is whether (1) the right amount of power, (2) too little, or (3) too much has been given to (or taken by) the courts. Too little power would suggest the continuing dominance

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[26] Indeed, Janet Hiebert has argued that such political rights review (i.e., parliamentary consideration and interpretation of rights before rather than after judicial review) is what "most distinguishes rights practices in Canada and the UK from the US." Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L.REV. 1963 (2004).

[27] These potential costs have recently been well-canvassed in James Allan, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, 30 MELBOURNE UNIV. L. REV. 880 (2006).

[28] See Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislatures*, 23 SUP. CT. L. REV., 213, 224 (2004), and also *supra* note 15, for general or theoretical reasons to fear such instability in either direction. As we will see, this claim of instability has been the basis for many critiques of the actual practices in each country.

of traditional parliamentary sovereignty; too much would suggest a change to something not far removed in practice from judicial supremacy.

These criteria are admittedly rather abstract. To make them more concrete, it might be helpful to outline the ideal working of the new model – in the sense of what we would actually want to see in practice -- in light of the basic normative argument for it.

The deliberate institutional engineering of the new model suggests that there are three stages at which the rights protected under the relevant charter come into play. The first stage is pre-enactment political rights review. I fully concur with Janet Hiebert that such legally mandated review by the government is an important, attractive and distinctive part of the new model and its effective protection of rights, although I don't believe that this is what "most distinguishes" the new model from judicial supremacy and U.S.-style constitutionalism.[29] Rights review and deliberation by all three branches of government (including, importantly, legislative oversight of the executive) and not just by the courts is critical to the success of the model and to ensuring rights consciousness from the "ground up." In the case of legislation, this requires political rights review before enactment and judicial involvement, as well as after. Moreover, this stage should not only be about *when* the political branches engage in review but *what* that review consists in. In other words, executive and legislative review should not be exclusively legal in nature, focused either on reasonable interpretive pluralism within the law or predicting what the courts will ultimately do, but should bring a broader, freer perspective of principle to the issue than is typical of judicial reasoning.

The second stage of the new model is legal rights review by the courts under their respective new powers. Here, two factors should distinguish, at least in part, judicial review under the new model from that under judicial supremacy. First, because of the intended joint, or three-branch, responsibility for rights that is one of the potential advantages of the new model, courts should take seriously the political rights review at stage one and not ignore or treat contemptuously as a usurpation of judicial supremacy the rights deliberations of the political branches, as sometimes occurs in US-style systems.[30] This judicial posture also properly acknowledges the reality and inevitability of reasonable disagreement about both rights and their limits in the bill of rights that is one of the major reasons for the new model (again, at least as compared with judicial supremacy) in the first place. Obviously, to the extent that the political rights review at the first stage approaches the ideal version suggested above, the basis for this judicial posture towards it is further strengthened. Second, and notwithstanding the first, given the legal final word that is bestowed on the political branches, the political community as a whole and its elected representatives will benefit most from the best judgment of the judiciary on the merits; that is, an independent consideration that takes into account but is not foreclosed by the views

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[29] *See* Hiebert, *supra* note 19, at 1985.

[30] For an example of such alleged usurpation, see City of Boerne v. Flores, 521 U.S. 526 (1997). This critique of judicial supremacy, among others, is made in Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV., 7, 39-46 (2004).

of the political branches expressed at stage one. In this way again, the nature and function of "penultimate judicial review" within the new model differentiate it from judicial supremacy[31] – in which the judiciary has full practical responsibility for the final decision and its consequences.

The third stage is the possible exercise of the legislative final word. Here the ideal of the new model, I suggest, is principled and focused legislative debate following a judicial finding of invalidity (Canada[32]) or incompatibility (elsewhere) on whether and how to amend/repeal the statute at issue, in which the legislature -- in a similar but inverse way from the second stage -- takes seriously the judicial view but does not automatically defer to it. A similar process is to be encouraged after exercise of the interpretive duty where the legislature contemplates overruling the court's interpretation of a statute as mistaken. Where this occurs and the result is within the bounds of reasonable disagreement with the courts, legislative exercise of its legal power should generally be considered politically legitimate. I think the process here is the most important thing and not the outcome – so that principled and serious legislative consideration resulting in decisions to comply with the courts manifest what the new model seeks to achieve as much as decisions not to comply, as long as the latter is generally taken to be a realistic political possibility. In other words, compliance per se is not a problem although a "culture of compliance" is.[33]

Now that we have some concrete sense of what we are looking for, we can turn to the main task of this article and apply these criteria to the experience of the countries at issue, each of which has made the move from traditional parliamentary sovereignty.

IV. Assessing the Canadian, New Zealand and UK Experiences

Although a good deal has been written in the last few years on the workings of the new model, most assessments have been country-specific rather than systemic or comparative.[34] Moreover, some of this commentary gives the impression that its authors are locked into initial positions of support or opposition to change – to the Charter, the NZBORA or the HRA – and have a tendency to assess subsequent experience through this lens.

With these two qualifications in mind, I think it is fair to say that overall, academic judgments have not been particularly favorable. Although far from uniform, perhaps the predominant line of criticism is that, whatever the advantages in theory, in practice the new model as a whole – especially in Canada and the UK -- has not proven itself to be as different from US-style judicial review as was claimed

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[31] *See* Perry, *supra* note 16.

[32] Under Section 33, Canadian legislatures may also override rights preemptively; i.e., immunize them against future judicial review.

[33] Hiebert uses this term to describe what she views as the subservience of Canadian and UK legislatures to the courts. See Hiebert, *supra* note 2, at 28.

[34] Hiebert and Tushnet are among the exceptions.

or hoped but has rather evolved into something barely distinguishable from it.[35] In presenting my own comparative evaluation, I consider each country in turn before attempting to make and justify general observations and assessments.

A. *Canada*

Under the Charter, Canada has a constitutionalized and entrenched bill of rights with full judicial review powers. What formally and most obviously distinguishes the Canadian system from the standard model of judicial supremacy is the rejection of its final prong: that judicial decisions enforcing the supreme law bill of rights cannot be overruled by ordinary legislative majority – but only by the supermajority requirement of the formal amendment process. This rejection, of course, takes the form of the "notwithstanding" clause of section 33, permitting federal and provincial legislatures to declare by ordinary majority vote for a renewable period of five years that a statute "shall operate notwithstanding a [rights] provision included in section 2 or sections 7 to 15 of this Charter."[36]

At least among academics, the overall debate on the success of the Charter in practice within Canada has been dominated by (in my terms) the balance of power issue – has too much power, too little, or the right amount been granted to the courts relative to legislatures. It is not seriously questioned that in general terms rights are now better protected than before 1982 although, of course, there is the expected disagreement about both the existence and scope of certain particular rights and how adequately others are protected.

The context in which the balance of power debate has taken place is the uncontested fact that section 33 has largely fallen into non-use, the provincial legislatures and especially the federal parliament have been mostly unwilling to challenge judicial decisions on rights. How much this is due to (1) the particular history of perceived initial illegitimate use of section 33 by Quebec, (2) to the relatively non-controversial and restrained nature of the Supreme Court of Canada's (SCC) exercise of its judicial review powers, (3) to the particular wording of section 33 as seemingly involving "rights-misgivings" rather than "rights disagreements"[37] on the part of legislatures, or (4) the inherent difficulty of (at least, reactive, if not preemptive) use where a legislature is affirmatively required to overrule a court decision, is a matter of disagreement. In any event, the virtual dormancy of section 33 has led some commentators to claim that Canada currently has a system of judicial supremacy that in practice is as strong as and essentially indistinguishable from the paradigmatic example of the United States.[38] In this way, it is argued, the

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[35] See, e.g., Hiebert, *supra* note 19; James Allan, *You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About*, ssrn abstract number 1443626.

[36] Although it is sometimes suggested that legislatures do not have the legal power of the final word under section 33 because when an override expires at the end of five years the original court decision is reinstated at that point, in my view the fact that the override is renewable (every five years) means that the legal power of the final word remains with the legislature.

[37] See Waldron, *supra* note 19.

hoped-for differences and benefits of a distinctive Canadian approach to constitutionalism have not materialized: a cautionary tale about enhancing judicial power generally and granting power to invalidate legislation in particular.

By contrast, other Canadian commentators – including Peter Hogg and his co-authors, and Kent Roach -- have rejected this interpretation of Charter experience and argued that, even absent use of section 33, Canadian judicial review is different from and weaker than that of the US. This is because, due to certain other structural features of the Charter (primarily section 1, the general limitations clause), legislatures in practice usually have the final word in that they can and do re-enact laws invalidated by the courts, so permitting them to achieve their purposes by other means.[39] In this way, the claim is that *there is de facto legislative, not judicial, supremacy*. Hogg et al first referred to this phenomenon of successful legislative sequels as "dialogue" between courts and legislatures – and their initial 1997 article spawned a new cottage industry in Canada under the label "dialogue theory," which has taken on a life of its own and become the predominant theoretical approach to the Charter. It has since spread to the UK and Australia where the new model as a whole is often referred to as "the dialogue model"[40] and/or justified on the basis that it promotes "democratic dialogue."[41]

My own assessment is slightly different than both. As I've already said, contra the "as strong as the US thesis," I think the existence of section 33 is *the* distinctive feature of the Charter by comparison with other systems with constitutional bills of rights and the judicial power to invalidate statutes, and is what makes it an instance of the new model. Apart from a limited borrowing by Israel under some but not all of its constitution-by-installments, the Knesset-enacted Basic Laws, no other country has an equivalent constitutional provision to section 33.[42] Even now, it makes a practical difference because were the SCC to decide a case that triggered the degree of controversy marked by certain judicial decisions in other countries with strong-form judicial review, there is a decent chance that the relevant legislature would seriously consider and perhaps use the override. Indeed, Alberta

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[38] These include Janet Hiebert, *supra* note 2, and Grant Huscroft, *supra* note 18. Of course, there are other Canadian commentators, those who oppose section 33 and support judicial supremacy, who applaud this development. Cites.

[39] See Peter W. Hogg and Alison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. (1997); Peter W. Hogg, Alison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited – Or "Much Ado About Metaphors,"* 45 OSGOODE HALL L.J. 1 (2007); KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001); Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUP. CT. L. REV. 49 (2004); Kent Roach, *Sharpening the Dialogue Debate: The Next Decade of Scholarship*, 45 OSGOODE HALL L.J. 169 (2007).

[40] See the Australian debate; for example, the National Consultation Committee's Report recommending adoption of "the dialogue model" by enacting a national human rights act.

[41] See, e.g., ALISON YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT 115-143 (2009); Tom Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, 2005 PUB. L. 306.

[42] A version of section 33, but importantly with a two-thirds majority requirement, was adopted in Poland between 1986 and 1997 and Romania until 2003, and the VCHRR contains a statutory version in section 31.

came very close to using the override in response to the SCC's decision in *Vriend*[43] -- reading into its provincial human rights statute sexual orientation as a prohibited basis of discrimination when the legislature had expressly decided to omit it – but ultimately did not; although Alberta *did* subsequently use the override preemptively in enacting its 2000 statute banning same-sex marriage: the Marriage Amendment Act. In fact, according to a well-regarded article, section 33 has been used more often than generally appreciated, 16 times from 1982 to 2001.[44] The separate point that the conduct of Canadian courts is impacted by a self-perception as exercising their powers in the shadow of section 33 in a way that constitutional courts in countries with de jure judicial supremacy do not, even if that shadow is smaller than originally expected, may also be true but is difficult to establish counterfactually.[45] For these reasons, I believe that its importance as a legally authorized outlet for popular or legislative disagreement with the court is not "purely" formal, is not simply and totally negated by the current general norm of non-use. Section 33 is *not* (yet) the equivalent of the Royal Assent.

So I think the marginalizing of section 33 as a distinctive structural feature of the Charter by this first group of commentators is slightly overdone. This is certainly not to deny either that the general norm of non-use seriously undermines any potential claim that the Charter version of the new model – placing the burden of inertia on the legislature in exercising the power of the final word – has been the most successful or, as Hiebert among others has argued, that steps might usefully be taken to try to ease its use.[46] If not already too late, these could include attempting to reframe popular conceptions of section 33 from "overriding" or disregarding of rights to permitting reasonable interpretive disagreement about what rights there are – perhaps by amending the wording of section 33 to reflect this, along the lines of the VCHRR version.[47]

On dialogue theory generally, I cannot help but feel that the initial very specific but metaphorical use of the term "dialogue" by Hogg et al (to refer to successful legislative sequels) has unwittingly led much of the academic debate –

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[43] Vriend v. Alberta, [1998] 1 S.C.R. 493.

[44] Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the* Charter, 44 CAN. PUBLIC ADMIN., 255 (2001).

[45] Perhaps R. v. Sharpe, [2001] 1 S.C.R. 45, a case in which, rather than striking down the statute, the SCC read down the scope of the offence of possession of child pornography even when it was clear that Parliament had intended the offence to cover such matters, and found the reduced scope of the statute a permissible limitation on free expression under section 1 – and the somewhat similar case of R. v. Butler, [1992] 1 S.C.R. 452 – provide the best examples of the SCC operating under the "shadow" of section 33. But cf. Sujit Choudhry and Claire Hunter, *Measuring Judicial Activism on the Supreme Court of Canada*, 48 MCGILL L. REV. 3 (2003). On the other hand, it has also been suggested, by me for one (see *infra* TAN 156), that courts exercising the power of penultimate, rather than ultimate, judicial review might be expected to be bolder in their interpretation and application of rights, freed as they are from the full practical responsibility for their rights decisions.

[46] See Janet Hiebert, *Is it Too Late to Rehabilitate Canada's Notwithstanding Clause*, 23 SUP. CT. L. REV. 169 (2004); Waldron, *supra* note 19; Jeff Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOR. L. REV. 451 (2003).

[47] Section 36, VCHRR.

both inside and outside Canada -- up something of a blind alley. Dialogue theory has come to dominate Canadian discussion of the Charter,[48] with dialogue often viewed (1) more literally than Hogg intended, (2) as an end in itself, (3) as the exclusive or predominant criterion for characterizing and evaluating the Charter and, increasingly, the new model as a whole, and/or (4) as constituting a distinct form of judicial review ("dialogic")—rather than one convenient way among others of referring to or specifying the new model's promise of greater institutional balance of power. I think the notion that what distinguishes Canada, and perhaps the new Commonwealth model as a whole, is dialogic judicial review is problematic because on Kent Roach's definition -- any system in which rights in a bill of rights can be limited or overridden by ordinary legislation[49] -- there really is no "*non*-dialogic review" anywhere, given the very many other countries with systems of judicial supremacy and express limits on rights applied via the proportionality test, but not even in the US. In other words, in the sense used by Hogg and Roach in the Canadian context, dialogue is an overinclusive term and insufficiently distinctive of the new model as a whole.

Moreover, in a broader, less technical sense of the term, in various forms and to varying degrees, dialogue between various actors and institutions occurs in all types of legal and political systems, including abstract review by constitutional courts and US-style judicial review,[50] so it is neither equivalent nor exclusive to the new Commonwealth model. Overall I fear that, while general use of the term was originally one among several helpful ways of characterizing and justifying the new model (I employed it this way myself), dialogue theory as it has developed and mushroomed threatens to blur the distinctions between the new Commonwealth model and judicial supremacy. Unless and until there is far greater specificity and precision, in the form of a customized normative theory of when courts and, especially, legislatures should exercise their respective powers under the new model,[51] "dialogue" will remain too generic and amorphous a concept to serve as either (1) the ultimate criterion of institutional balance or (2) the major benefit or justification of the new model, as compared to a claim such as providing the least restriction on democratic-decision-making consistent with an adequate protection of basic rights.

Turning specifically to the Hogg/Roach thesis about de facto legislative supremacy, I generally agree with it that judicial review is weaker in Canada than in the US. I am less certain, however, that this is due primarily to the existence of

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[48] Look in the index of any book on the Canadian Charter and you will find long and multiple entries under "dialogue."

[49] Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUP. CT. L. REV. 49, 55 (2004).

[50] As Barry Friedman has exhaustively charted between the judiciary and public opinion. See BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009).

[51] Recent promising attempts in this direction include ALISON YOUNG, *supra* note 40 (proposing in the UK context a democratic dialogue model of reasonable interpretive disagreement as the normative criterion for use of the declaration of incompatibility) and Rosalind Dixon, see *supra* note 23 (proposing a new theory of dialogue in the Canadian context in which the SCC should defer to reasonable legislative sequels in "second look" cases).

section 1, the general limitations clause, as a structural feature of Canadian constitutionalism. As already discussed, I think section 33 is the critical and distinctive structural feature of the Charter from a general constitutional and democratic theory perspective and not section 1, which (a) has express equivalents in many modern systems of judicial supremacy around the world,[52] and (b) even in the US, courts have long implied limits into almost all seemingly absolute textual and other rights.[53] Apart from section 33, Canadian judicial review is probably weaker than that of the US in practice but arguably less because of the existence of section 1 or limits on rights per se than because of the proportionality test that the SCC subsequently implied into it and, in particular, the relatively deferential way the SCC applies that test[54] – at least as compared with (a) the strict and intermediate scrutiny standards of review for limits on rights in the US and (b) how the proportionality test is applied by most other constitutional courts.[55] The SCC's suspended declaration of invalidity as a remedy creating strong incentives for a legislative response is, as Kent Roach argues, another concrete dialogue-inducing feature of the Charter.[56] However, it is neither one without equivalents in systems of judicial supremacy[57] nor one that permits the legislature an independent choice of final word.

To the extent it has a comparative dimension, Canadian discussion of the Charter tends to be a little fixated on the US, as has perhaps been true of Canadian constitutionalism throughout its history.[58] But from a broader comparative constitutional context whether, using Hogg's criterion of successful legislative sequels (and thus putting section 33 aside), Canada has a weaker system of judicial review not just than the US but than other countries with a judicial invalidation power and the proportionality test for limits is less clear. If not, this is unlikely to rebut the critics' claim that Canada has devolved into de facto judicial supremacy and strong review. If so, it is likely the result not of any structural or formal feature of the Charter – and not any new model feature[59] -- but rather the SCC's current and

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[52] General or special limitations clauses are part of what Lorraine Weinrib has characterized as the "postwar paradigm." Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in SUJIT CHOUDHRY ED., THE MIGRATION OF CONSTITUTIONAL IDEAS (2006).

[53] See Stephen Gardbaum, *Limiting Constitutional Rights*, UCLA L. REV. (2007)

[54] See Sujit Choudhry, *So What is the Real Legacy of* Oakes*? Two Decades of Proportionality Analysis under the Canadian* Charter*'s Section 1*, (2006), 34 S.C.L.R. (2d).

[55] See Gardbaum, *supra* note 45.

[56] See Roach, *supra* note 42.

[57] Abstract judicial review in centralized systems has a generally similar, constrained dialogue-inducing feature of setting constitutional parameters within which legislatures can make their choices. The South African constitution expressly grants the power of suspended invalidity to the courts and the German Constitutional Court has developed a range of equivalent techniques, including finding statutes unconstitutional but not void ("unvereinbar" versus "nichtig") -- meaning they are in force during a transition period pending correction by the legislature -- and upholding statutes but warning they will be invalidated in future if not amended or repealed.

[58] See Jamie Cameron, *The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?*, 23 SUP. CT. L. REV. 135 (2004).

controversial practice, in exercising its judicial review power, of relative deference to the government in applying the three prongs of the proportionality test – a judicial practice that (however much one might independently support it on democratic grounds[60]) a future SCC majority might easily change.

In sum, I view Canada as part of the new model because of section 33, rather than section 1, but as suffering from a serious practical problem due to the apparent near-convention against its use. The problem is less that the override power is rarely exercised per se than that this near convention seems largely to exclude the sort of political discussion about rights that the ideal working of the new model calls for.

B. *New Zealand*

Following rejection of the White Paper proposing a fully constitutionalized bill of rights, New Zealand settled in 1990 for a statutory one, although it is different in one crucial respect from what Paul Rishworth has described as the "anti-precedent" of the 1960 Canadian Bill of Rights.[61] Briefly, the New Zealand Bill of Rights Act (NZBORA) contains a relatively narrow set of civil and political rights by comparative standards derived (selectively) from and explicitly stated to affirm New Zealand's commitment to the ICCPR,[62] together with a general limitations clause borrowed from section 1 of the Canadian Charter.

These statutory rights are protected in two ways. First, executive and legislative pre-enactment rights review is fostered by requiring the Attorney-General to scrutinize all bills introduced into the House of Representatives and to bring to its attention any that appear incompatible with the rights.[63] Second, judicial protection is afforded by requiring courts to interpret statutes so that, according to section 6, "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." Section 4, however, expressly denies the courts power to invalidate or deny operative effect to any statute – previous or subsequent to NZBORA -- that is inconsistent with any protected right.[64] This is the one crucial difference from the CBOR, which the SCC had held to impliedly authorize it to invalidate irredeemably

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[59] Although I suppose it is conceivable that this practice itself owes something to the shadow of section 33.

[60] See, e.g., Gardbaum, *supra* note 45, at 830-852.

[61] Paul Rishworth, *The Inevitability of Judicial Review under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?*, in id.

[62] As Andrew and Petra Butler note, there is a lot on criminal procedure and, for example, nothing on education, privacy, or property rights. See ANDREW S. BUTLER AND PETRA BUTLER, THE NEW ZEALAND BILL OF RIGHTS ACT: A COMMENTARY 4 (2005).

[63] NZBORA, section 7.

[64] "No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in nay way invalid or ineffective; or (b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights." NZBORA, section 4.

inconsistent statutes, although only once did it actually use that power.[65] In this sense, NZBORA creates an interpretive bill of rights rather than an overriding one, and the legislative final word lies in the legal power to enact a statute that cannot be interpreted consistently with the rights or to amend an existing one – whether already interpreted by the courts or not -- to this effect. NZBORA does, however, grant the courts power to invalidate executive action violating the protected rights, unless such action is mandated by legislation—and this has been by far the most active area of NZBORA litigation, especially with regard to police action.[66]

Since 1990, the NZBORA has grown from essentially an afterthought to an instrument of constitutional stature[67] despite its ordinary law status,[68] with a correspondingly growing impact on the workings of all three branches of government. Early on the NZ Court of Appeal declared that a "generous" and "purposive" approach to rights interpretation was appropriate under NZBORA, adopting the language of the SCC under the Charter.[69] More concretely, in perhaps the boldest of all judicial action under NZBORA, it has undergone two outwardly significant changes both remedial in nature. First, despite silence on the subject in NZBORA, the Court of Appeal created the public law remedy of damages for executive violation of a protected right, even in the face of a separate statute seemingly immunizing the relevant government body from liability.[70] Second, in 2000, despite absence of such an express power, the Court of Appeal in dicta strongly suggested, based on inference from statutory text and structure, that it had formal authority to "indicate" or "declare" that statutes are inconsistent with NZBORA, although such statutes remain fully valid and applicable.[71] This authority, however, has not yet clearly been exercised and indeed the courts have "resisted endorsing it in later cases."[72] Paul Rishworth has argued, in general agreement with the Court's rationale, that notwithstanding the express rejection of a judicial power to invalidate statutes in section 4, the power to indicate inconsistency is inherent or embedded in the structure of the NZBORA or, indeed, any statutory bill of rights that requires interpretive solutions where possible but retains the idea that such solutions may not be possible because of irremediable inconsistency. As he puts it: "The very

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[65] This was in the same case as the power was implied: R. v. Drybones, [1970] S.C.R. 282. In most other respects, however, the SCC is generally thought to have underenforced the CBOR

[66] Although not stated in so many words, this power has been taken to follow from the facts that (a) NZBORA applies to the legislative, executive, and judicial branches of government but (b) only legislation inconsistent with the bill of rights is stated still to be valid and effective.

[67] *See* Andrew & Petra Butler, *supra* note 54, at 9.

[68] Indeed, because of the express ouster of the normal doctrine of the implied repeal of an inconsistent earlier statute by NZBORA contained in section 4, NZBORA in this sense has less-than ordinary statute status.

[69] Ministry of Transport v. Noort [1992] 3 NZLR 260 (CA).

[70] Simpson v. Attorney-General [Baigent's Case] [1994] 3 NZLR 667 (CA).

[71] Moonen v. Board of Film and Literature Board [2000] 2 NZLR 9 (CA).

[72] Andrew & Petra Butler, *supra* note 54, at 1026.

process of determining that one is bound, by section 4, to apply an inconsistent enactment is itself a declaration of that enactment's inconsistency."[73] As we will see, in both of these ways, the Court of Appeal brought NZBORA into line with the express provisions of the UK's Human Rights Act, enacted in 1998, thereby ending the most obvious structural differences between the two.[74]

In terms of the Attorney-General's duty to report, there have been approximately 40 instances of reports of apparent inconsistencies,[75] which is very different from the situation in both Canada and the UK where there have been zero and one respectively under equivalent duties.[76] Like Canada, but unlike the UK, there is no specialized parliamentary committee that considers these reports and other evidence of a bill's compatibility with NZBORA. In terms of the judicial power, despite the analytical clarity between sections 4 and 6 – where possible, rights-consistent interpretation of statutes are to be given but where not, courts will apply the inconsistent provision -- in practice there is inevitably a fine line between whether a rights-consistent interpretation "can" or cannot be given, depending in part on what this undefined term is taken to mean, and so an area of subjective judgment as to which section to employ in a give case. Section 4, of course, expresses the core value of legislative decision-making and section 6 the value of rights protection. How have judges drawn this line and, in particular, to what extent have they used the section 6 mandate aggressively or radically to essentially modify rather than interpret statutes? Again, as we will see, this issue has been an important aspect of the British experience under the HRA with a similar power. Indeed, this interplay between the interpretive duty of courts to give statutes rights-consistent readings whenever possible on the one hand and the ban on courts from denying inconsistent statutes operative effect on the other is the most complex and controversial aspect of both NZBORA and the UK HRA in practice – do aggressive or strained exercises of the former violate the latter?

The general sense among New Zealand commentators is that this power/duty has been used overall with reasonable moderation,[77] without the types of "judicial vandalism"[78] or "interpretation on steroids"[79] that (as we will see) have been alleged in the UK. The leading example often given of such restraint is the refusal of the

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[73] Rishworth, *supra* note 53, at 266.

[74] The major remaining difference is the contextual factor that UK courts work within large shadow of the ECtHR, whereas NZ courts have no such equivalently effective international oversight.

[75] Grant Huscroft, *Reconciling Duty and Discretion: The Attorney General in the* Charter *Era*, available at http://ssrn.com/abstract=1326706.

[76] The Communications Act, 2003.

[77] See PAUL RISHWORTH, GRANT HUSCROFT, SCOTT OPTICIAN, RICHARD MAHONEY, THE NEW ZEALAND BILL OF RIGHTS 143-147 (2003); Andrew Butler & Petra Butler, *supra* note 54.

[78] R (on the application of Anderson) v. Secretary of State for the Home Department, [2002] UKHL 46 ("to do so would not be judicial interpretation but judicial vandalism," Lord Bingham at para. [30]).

[79] See Allan, *supra* note 24, at 881.

Court of Appeal in *Quilter* (1998) to interpret the gender-neutral language of the 1955 Marriage Act as embracing same-sex marriage, despite not only section 6 but also section 19 NZBORA, as amended by the 1993 Human Rights Act to prohibit discrimination on grounds of sexual orientation.[80] The fact that six years after *Quilter*, the House of Representatives enacted the Civil Unions Act after serious parliamentary debate has also been posited as evidence that judicial-legislative dialogue is working reasonably well.[81] Moreover, there is at least one pair of cases in which NZ and UK courts came to opposite conclusions in interpreting essentially identical statutory language imposing a reverse onus of proof on criminal drug defendants, with the UK court giving it the more rights-consistent but arguably strained meaning and the New Zealand court refusing to do so and relying instead on section 4.[82] And two years ago, in affirming this original 1991 New Zealand interpretation and rejecting the subsequent British one, the new New Zealand Supreme Court expressly and self-consciously discussed and rejected the "broader" use of the equivalent and textually similar power by UK courts in favor of the narrower requirement of "reasonably possible" meanings (versus what Tipping J. characterized as "*un*reasonably possible" ones in the UK[83]).

On the other hand, although no New Zealand case has gone quite so far as the most "adventurous"[84] of the UK ones in interpreting statutory provisions in ways that Parliament seemingly did not intend, some New Zealand judges have espoused more expansive statements of the judicial power to give merely possible rather than plausibly intended meanings to statutes, and there are dicta to this effect in majority opinions in a few cases.[85] Thus, in *Poumako*, although the case was decided on other grounds, the majority opinion stated: "It is not a matter of what the legislature…might have intended. The direction [in section 6] is that wherever a meaning consistent with the Bill of Rights can be given, it is to be preferred."[86] As one commentator concludes: "There is little consistency of approach or application [to section 6]…One can find support in the case law for almost any view relevant to s6….In this respect, [NZ]BORA case law is no different from the case law that has developed in respect of s3(1) of the HRA (UK)."[87]

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[80] Quilter v. Attorney-General [1998] 1 NZLR 523 (CA).

[81] Petra & Andrew Butler, *16 Years of the New Zealand Bill of Rights* (manuscript on file with author).

[82] R v. Phillips [1991] 3 NZLR 175 (CA), affirmed in R v. Hansen [2007] NZSC 7 (SC); cf R. v. Lambert [2001] UKHL 37.

[83] Hansen, *id.*, at 158.

[84] Andrew & Petra Butler, *supra* note 54, at 345.

[85] Flickinger v. Crown Colony of Hong Kong [1991] 1 NZLR 439 (CA); R v. Poumako [2000] 2 NZLR 695 (CA); R v. Pora [2001] 2 NZLR 37 (CA).

[86] Poumako, id.

[87] Andrew & Petra Butler, *supra* note 54, at 183.

Moreover, according to Paul Rishworth, only a bare handful of cases have involved "considered" reliance on section 4 (i.e., applying the statute after it has first been found to be an unreasonable limit on, and so inconsistent with, the bill of rights),[88] although there are several more cases of "unconsidered" or blanket reliance on section 4[89] -- and there has been no clear use of the implied power to formally declare inconsistency.[90] This compares with the 15 surviving uses of section 4 and the declaratory power in the UK during the same time period of 2000-2009. Overall, there is perhaps only a small difference in general approach and application of the interpretive power between the two countries – a slightly weaker presumption in New Zealand than in the UK that Parliament intends to act consistently with rights.

In sum, there appears to be broad consensus among leading New Zealand commentators that NZBORA is working reasonably well and as anticipated, that criminal procedure and freedom of expression rights have been adequately if not boldly protected while protection of other rights has been more minimal, that New Zealand is better of with NZBORA than without but that there is no need or justification for moving to a fully constitutionalized bill of rights.[91] This consensus includes the perception that the legislature still decides basic issues rather than the courts, and perhaps also that – due to personnel changes -- the courts have recently become more conservative and less "generous" in the application of NZBORA. There is some disagreement, however, about the exact balance between judicial and legislative power, and how it might be improved. Thus, one "section 4 proponent" has expressed concern that the implication of the declaratory power heralds the further erosion of constraints on judicial power that have marked the new model elsewhere.[92] By contrast, two other prominent commentators have argued that the balance needs to be recalibrated in favor of rights protection by repealing section 4 and replacing it with a section 33-type override mechanism, thereby ensuring that legislative inertia works for rather than against rights claimants who otherwise have too little incentive to bring proceedings.[93] This broad academic consensus is a little startling in comparison with its visible absence in Canada and the UK, but I have no good reason to think it does not bear some relationship to the reality.

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[88] Paul Rishworth, *Interpreting Enactments: Sections 4, 5, and 6*, in RISHWORTH ET AL., THE NEW ZEALAND BILL OF RIGHTS, *supra* note 51, at 156-7.

[89] The Butlers record 18 cases in total as of December 2005, supra note 58, at 191. Indeed, contra Rishworth, they claim that "reliance on Section 4 has been substantial."

[90] Rishworth, *supra* note 51, at 156-7.

[91] In addition to the sources cited in *supra* note 51, see also Michael Taggart, *Tugging on Superman's Cape*, in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES 85-97 (1998); Grant Huscroft & Paul Rishworth, *"You Say You Want a Revolution:" Bills of Rights in the Age of Human Rights*, in DAVID DYZENHAUS, MURRAY HUNT, GRANT HUSCROFT EDS, A SIMPLE COMMON LAWYER: ESSAYS IN HONOUR OF MICHAEL TAGGART (2009).

[92] See Grant Huscroft, *Civil Remedies for Breach of the Bill of Rights*, in RISHWORTH ET AL, *supra* note 51, at 837.

[93] Andrew & Petra Butler, *supra* note 54, at 1116.

My own more comparative evaluation is that, as in Canada, there is no serious disagreement that, generally-speaking, rights are more effectively protected under NZBORA than before. The original New Zealand system without a formal declaration of incompatibility arguably provided insufficient signaling to the legislature of a rights violation and thus not high enough political costs for ignoring it, although the somewhat belated and partial legislative remedy following *Quilter* may be seen as evidence both for and against this claim. On the other hand, without the outlet – or buck-passing possibility – of the declaratory power at all, courts might well feel greater pressure to employ the interpretive power in a strained or aggressive way – and this may help to explain both the pre-*Moonen* more expansive line of cases and the post-*Moonen* retreat from it, as exemplified by *Hansen*. With the (implied) formal declaratory power, the somewhat narrower conception of the interpretive duty makes sense to balance things out– but only if the power is used, and so far the New Zealand courts have been reluctant to do so. Nonetheless, the general assessment of NZBORA by its major commentators suggests something of a corrective to the "no different than US-style judicial review" verdict on the new model.

C. *The United Kingdom*

The central features of the HRA, which came into effect on October 2, 2000, are well-known. They are: (1) a statutory bill of rights incorporating by reference most, but not all, of the rights in the European Convention on Human Rights (ECHR); (2) a duty on the responsible minister to make a statement as to whether or not a proposed bill is compatible with the protected rights; (3) a requirement that courts take the jurisprudence of the European Court of Human Rights (ECtHR) into account in HRA cases; (4) a statement in section 6 that the rights binds courts and the executive but not Parliament, which is also understood to mean that the courts can directly invalidate executive action violating rights (unless that action is required by statute) and are themselves bound to act in accordance with the rights, raising complex and unresolved issues of the common law and horizontal effect; (5) an obligation on the courts to interpret primary and secondary legislation consistently with protected rights "so far as it is possible to do so" (section 3); (6) where not possible, higher courts are empowered to issue a declaration of incompatibility (DI), but this does not affect the continuing validity of the statute in the case itself or generally (section 4); and (7) in response to a DI, the relevant minister may use a special fast track legislative procedure to amend or repeal the statute--and, of course, Parliament may do so through its normal legislative process.

The assessments of the HRA in practice by UK commentators do not exhibit the broad consensus seen in New Zealand, but literally span the spectrum of possible evaluations. Again, to the seemingly significant extent that they track pre-existing attitudes towards HRA around the time of enactment, it is not clear how much of a post hoc, evidence-based, assessment is being made. Here is the spectrum:

1. The "futility thesis" of Professor Keith Ewing. This contends that the HRA has not had significant impact on or changed much in the UK's legal and political system and, in particular, has resulted in no better protection of rights.[94] According to Ewing, HRA has failed to prevent the enactment of rights-violating legislation and judges have failed to oppose it. Only one piece of post-HRA Labour government legislation has been the subject of a DI – section 23 of the Anti-Terrorism, Crime and Security Act 2001 -- which is thus the exception not the rule. Otherwise, the judiciary has exhibited traditional deference to the government and the pull of parliamentary sovereignty remains strong.[95] Ewing aside, there have been quite general complaints of disappointing "judicial minimalism" in the interpretation and application of the protected rights by the courts, especially in the criminal context, as compared with the requirement of "generous" and "purposive" judicial rights interpretation in Canada and New Zealand.[96] Part of this criticism reflects a widespread sense that UK courts are acting less independently in developing HRA jurisprudence than expected and are too mechanically applying the jurisprudence of ECtHR, even though they are not bound by it under HRA but only required to take it into account.[97] Adam Tomkins has argued that the courts' poor record in protecting rights should not be attributed solely or mainly to deference and the pull of parliamentary sovereignty because judges have boldly asserted their new powers, particularly over the executive, just not in a way that has protected civil liberties very much.[98]

2. HRA is too weak. This is not because judges are failing to respect rights (as mostly in the futility thesis), but because the *government* is – and the courts lack the power to force it to.[99] So, despite the judicial declaration in the *Belmarsh Prisoners Case* that section 23 of the Anti-Terrorism, Crime and Security Act of 2001 -- authorizing indefinite detention of only foreign terror suspects -- was incompatible with the defendants' incorporated rights to liberty under Article 5 of the ECHR and to non-discrimination on the ground of nationality under Article 14, the government

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[94] Keith Ewing, *The Futility of the Human Rights Act*, [2004] PUB. L. 829; Keith Ewing & J. Tham, *The Continuing Futility of the Human Rights Act*, [2008] PUB.L. 668.

[95] Not, however, that Ewing supports a stronger bill of rights or judicial review, as a well-known opponent of both.

[96] For example, Ian Leigh, *Concluding Remarks*, in Helen Fenwick, Gavin Phillipson, and Roger Masterman, eds., JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT 443 (2007) ("Minimalism is the dominant mode of (judicial) reasoning. An interim term report [of the judiciary's performance] would be along the lines of 'tries hard, could do better.')". "Minimalism" was described in an important judgment by Lord Bingham as the proper mode of interpretation, under which UK courts should not expand the Convention rights beyond their interpretation by the ECtHR. See R. (on the Application of Ullah) v. Special Administrator [2004] UKHL 26.

[97] See Roger Masterman, *Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law*, in id.

[98] Adam Tomkins, *The Rule of Law in Blair's Britain*, 26 U. QUEENSLAND L.J. 255 (2007).

[99] Robert Wintermute, *The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right?*, 17 KING'S COLL. L.J. 209 (2006).

did not choose to release the prisoners but waited several months until the new control order legislation was enacted to "free" and immediately re-arrest them. According to Robert Wintermute, the HRA record proves that the UK needs a constitutionalized bill of rights and judicial power to invalidate conflicting legislation, along the lines of the Canadian Charter.

3. HRA is too strong. It has in practice created de facto judicial supremacy so that the difference between it and US-style judicial review is far less than anticipated or hoped for. The evidence cited for this thesis is as follows:
(1) there has been no separate or independent *political* rights review to speak of, as the pre-enactment review that has occurred has been dominated by legal discourse and predictions of what the courts will ultimately do.[100]
(2) all but two surviving DIs have been dutifully complied with by the Labour Government and in neither remaining case has it or Parliament announced plans to exercise the legal power to ignore a declaration;[101]
(3) the courts have treated the section 3 interpretive duty as a very strong one and as the primary technique of rights protection and remedy under the HRA. As a result, courts have (a) not relied on section 4 – the main structural vehicle for legislative voice—as much as expected or hoped, (b) effectively subjected Parliament to the Convention rights despite the express wording of section 6; and (c) been rewriting statutes at will. From this perspective, the future success of HRA depends on whether there are effective ways to weaken judicial power, bolster political rights review, and strengthen the willingness of parliament to challenge the courts.

4. A fourth view in essence agrees with this factual evaluation of the HRA but not the normative. That is, the strength of the HRA, and in particular of the interpretive obligation under section 3, is proper and justified, inherent not deviant, and creates an alternative technique to judicial invalidation for protecting rights that is not only its truly distinctive feature but also gives UK courts "powers of constitutional review that are not hugely dissimilar from those possessed by the U.S. Supreme Court." [102] Indeed, this view is skeptical that the HRA embodies "a distinctive form of constitutionalism which can be contrasted so easily and so favourably with the U.S. Constitution."[103]

5. HRA is about right. A final group of academic commentators takes the view that the HRA is working more or less successfully and as anticipated, with the courts doing a satisfactory job of protecting rights and taking a reasonably balanced

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[100] Hiebert, *supra* note 2; Danny Nicol, *The Human Rights Act and the Politicians*, 24 LEG. STUD. 451 (2004).

[101] See Hiebert, id; IAN LEIGH & ROGER MASTERMAN, MAKING RIGHTS REAL: THE HUMAN RIGHTS ACT IN ITS FIRST DECADE 118 (2008).; Aileen Kavanagh, *supra* note 11, at 282-83.

[102] Kavanagh, *supra* note 11, at 418

[103] Id.

approach to their interpretive and declaratory powers.[104] This general position is also the official one of the government, as expressed in a report published by the Department of Constitutional Affairs in 2006.[105] Less officially, however, several government ministers and former ministers have disagreed with this claim, arguing that HRA was a major mistake, unexpectedly handcuffing the government in the-then unforeseen post 9/11 world.[106]

My own assessment falls somewhere between the third and fifth; that is, between the view that HRA is too strong and that it is about right in practice.

On the futility thesis, I think this seriously underestimates the extent to which courts have protected rights. Although it is true that only one DI has been made with respect to post-HRA Labour legislation, (1) that one, the *Belmarsh Prisoners' Case*,[107] was of the highest importance and compares favorably with the fact that the United States Supreme Court has not yet clearly and unequivocally held that anyone's constitutional rights have been violated by post 9/11 government action – executive or legislative,[108] and (2) 14 other DIs have been made and survived appeal. Apart from the inevitable time-lag in the appeals process, some judicial caution in choosing those cases in which to exercise a contentious new power is hardly unprecedented or unexpected. Moreover, several other important cases have resulted in judicial invalidation of executive action for violation of the HRA, including one of the three House of Lords' control order decisions.[109] Finally, the section 3 interpretive power has also been an important judicial tool for the protection of rights – particularly in such areas of sexual orientation discrimination[110] and reverse onus

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[104] This group includes Alison Young, Conor Gearty and David Feldman.

[105] Department of Constitutional Affairs, Review of the Implementation of the Human Rights Act (2006).

[106] The political future of HRA is currently highly uncertain. Absent any sort of public consultation, it has never been particularly popular – many of the most visible cases have been perceived as protecting terrorists and asylum seekers. The opposition Conservative Party has said it will repeal HRA and replace it with a "British" bill of rights, but the content, status, and political will for this remain unclear. Indeed, as at the time of writing, all three major political parties have indicated that they would make changes to the HRA if elected at the upcoming general election. More generally, the immediate political futures of both Canada's section 33 and the NZBORA look a little more stable. Despite the positive recommendation of the National Consultation Committee in Australia, it is highly questionable whether the political will exists within the current Labor government to introduce a national human rights act.

[107] A and others v. Secretary of State for the Home Department [2004] UKHL 56.

[108] Boumedienne v. Bush, 553 U.S. 723 (2008), and Hamdi v. Rumsfeld, 542 U.S. 507 (2004), have come the closest. In *Boumedienne*, the Supreme Court held that aliens at Guantanamo Bay are protected by the constitutional right to habeas corpus and so can raise constitutional claims challenging their detention by the U.S. government. Cases raising the merits of those claims are now making their way through the U.S. federal court system, with several detainees ordered released by the lower courts. Although in *Hamdi* the Supreme Court held that in the case of a U.S. citizen, the due process clause requires some opportunity to rebut the factual basis for the government's determination of enemy combatant status, only the *dissenting* justices clearly found a constitutional violation in the case.

[109] Secretary of State for the Home Department v. JJ and others [2007] UKHL 45.

of criminal proof provisions[111] -- and as already canvassed, it is hard to make the case that this protective power has been meekly used.

On the general criticism of judicial minimalism, the large shadow of the ECtHR over the UK system – disappointed litigants can still go to Strasbourg after exhausting domestic remedies – has perhaps hampered the independence of *both* courts and Parliament in their approaches to the protected rights. In this way, the HRA is arguably a skewed example of the new model in practice. On the other hand, given that UK courts are legally obligated only to take the ECtHR's jurisprudence into account, binding themselves to interpret Convention rights "no less" expansively (even if also no more) than the international human rights court commonly regarded as the most powerful and successful in the world is not to be sniffed at.

On the too weak thesis, to my mind, the major example cited of the *Belmarsh Prisoners' Case illustrates* the distinctive feature of the new model and how it is meant to work rather than constituting a departure from expectation and a failure in practice. At least under the HRA version of the new model as compared with the Canadian, it was never intended that the judiciary would have the power to disapply the incompatible legislation under which the government is acting and grant the claimants redress – the legislature is legally free to express its disagreement with the courts and do nothing.[112] But in fact, the government and legislature *did* affirmatively respond to the DI by subsequently amending the statute to create the control order regime in place of executive detention in prison after prolonged and very extensive parliamentary debate – and subject the prisoners to it. Indeed, in counting this DI among all the others that have triggered such responses, it is part of the evidence of those who argue that the HRA has proven too strong in practice. Again, this failure of a *judicial* remedy under the DI mechanism was always part of the distinctive HRA package. So while one might legitimately argue that, all things considered, it is a flawed provision, it is not the case that practice under the HRA has disclosed a problem that had not been initially identified or discussed. This is just an intrinsic difference between the HRA and the Canadian versions of the new model.

On the too strong thesis, I think the critics have some reasonable grounds for disappointment on this score given how the HRA has operated during its first decade, but I think as an overall assessment it is significantly overstated and premature,

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[110] Ghaidan v. Godin-Mendoza [2004] UKHL 30.

[111] R v. Lambert, *supra* note 54.

[112] A section 3 interpretation of the statutory provision consistent with the Article 14 prohibition of discrimination on grounds of national origin was not possible because the statutory provision expressly applied only to foreign terror suspects. Moreover, given the DI, judicial invalidation of the executive orders for indefinite detention was not possible, under section 6 (2) (b) of the HRA. This provision states:

6 (1). It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

… (b) In the case of one or more provisions of…primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

especially to the extent it argues there is little difference in practice between the HRA and de jure judicial supremacy.

Those hoping for specifically *political* pre-enactment rights review, as a way of bringing a different type of rights-consciousness to bear on the issues, have perhaps been most disappointed in that there has been far too much focus on legal argument and predicting what courts (both UK and ECtHR) will do. On the other hand, the work of the Joint Committee on Human Rights (JCHR) as a high-quality, cross-party parliamentary committee has been quite successful in alerting Parliament to rights concerns.[113] Indeed, the JCHR has criticized the courts for not protecting rights aggressively enough, so as a parliamentary body it seems not to think there is de facto judicial supremacy. Also, the fact that under HRA, the responsible minister must make an HRA statement *whether or not* she deems the bill incompatible is preferable to the situation in Canada and NZ where such statements are only required if the bill is deemed incompatible. Despite only one incompatibility statement so far, a significant amount of HRA-conscious work is undertaken by the government and its civil servants prior to a bill's introduction, even if too much of this is currently legal and predictive in nature. Overall, and contrary to the general thrust of this source of criticism, there is good evidence that the HRA is making some difference in the legislative process – although there is undoubtedly room for more.[114]

On the over-compliance with DIs, the political branches are between a rock and a hard place. So on the one hand, to the extent that the greatest substantive concern with the new model as a whole is inadequate protection of rights without a constitutionalized charter and a non-overridable judicial invalidation power, routine ignoring of DIs would undoubtedly be taken by some as clear evidence that HRA is too weak and that the model is unstable, reverting to traditional parliamentary sovereignty.[115] Yet, on the other hand, the record of compliance then prompts the claim that the legislature and executive are just kowtowing to courts, afraid to exercise an independent voice, so that the model is unstable in the other direction, rolling towards judicial supremacy.

As I outlined earlier under "ideals," I think the best understanding and operation of legislative final words in general is a presumption that legislatures will abide by court decisions and not routinely ignore them – but on matters of principle where there is reasonable disagreement after serious debate, it should be considered legitimate for legislatures to exercise their independent legal power of the final word. The deliberative process is, however, more important than the outcome per se. As perhaps also in Canada, it is not entirely clear that such issues have really arisen yet. Even the *Belmarsh Prisoners' Case* was decided on, and limited to, the largely

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[113] Andrew & Petra Butler, *supra* note 54, at 198 n3; Janet Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights*, 4 ICON 1 (2006).

[114] See, e.g., Hiebert, id; Francesca Klug & H. Wildbore, *Breaking New Ground: the Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance*, EUROPEAN HUMAN RIGHTS LAW REVIEW 231 (2007).

[115] Of course, Ewing makes this argument about reversion as part of his futility thesis even though Parliament has complied, or is in the process of complying, with all surviving declarations of incompatibility.

indefensible issue of arbitrary (i.e., unreasonable) discrimination against non-UK citizens rather than the more difficult and contestable underlying issue of the permissibility of indefinite detention itself. Although Parliament did not ignore the DI but responded to it after several months, and in that response fully accepted the discrimination point by making the new control order regime applicable regardless of nationality, this new regime, adopted after one of the longest Parliamentary debates in British history, reflected something of a pre-emptive compromise on the underlying issue – a compromise that was subsequently litigated in the "second look" control order cases.[116] In addition, there is evidence of significant legislative consideration and debate in response to several of the other DIs.[117] Overall, perhaps this is as it should be.

On the alleged judicial overreliance on section 3, I think at the outset it is a mistake categorically to view every use of section 3 rather than section 4 as a failure of institutional balance or to conceive of section 4 as the exclusive basis for legislative voice. First, as enacted, section 3 is undoubtedly a central part of the overall balance between rights protection and democratic decision-making under the HRA, part of its complex institutional design and distribution of powers, and not merely an afterthought or stepping stone to section 4. It is always the first step in any case and by the logic of the section 3/section 4 divide, always likely to be used in many cases – where it is at least "reasonably possible" to give the statute a meaning consistent with the relevant right. Certainly, although hardly conclusive, the Government argued during enactment of HRA that most rights claims would be resolved by section 3 and resort to section 4 would rarely be necessary.

Second, use of section 3 does not deprive Parliament of the final word, at least not to the extent the critics seem to suggest. As Lord Steyn properly made clear in *Ghaidan*, Parliament can always respond to a section 3 decision by amending the legislation to overrule the judicial interpretation and make clear its view that the courts have mistaken its meaning or overstepped their authority – subject of course to the possibility of a subsequent DI and/or a likely losing case at the ECtHR.[118] As someone who teaches U.S. constitutional law, it is strange to hear that the use of section 3 deprives Parliament of the final word, when the traditional distinction between statutory and constitutional interpretation under judicial supremacy is precisely that under the former but not the latter, legislatures remain free to – and sometimes do in practice -- overrule the court's interpretation by amending the legislation.[119] It is, of course, true (a) that section 3, unlike section 4, places the

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[116] See *supra* note 79. These cases perhaps suggest a more valid criticism of the courts as being more comfortable reviewing executive action rather than the underlying legislation for HRA compatibility, see Ewing, *The Continuing Futility of the Human Rights Act*, *supra* note 90. Again, this may be due not to parliamentary sovereignty but to the fact that this way, unlike under Section 4, they can grant a remedy to the complainant.

[117] See Alison L. Young, *The Practicalities of Dialogue: Is Dialogue Working under the Human Rights Act 1998?* (manuscript on file with author).

[118] "If Parliament disagrees with an interpretation by the courts under Section 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility." Ghaidan, *supra* note 106, at para. 63.

default position in favor of the courts and (b) that it does not involve "ordinary" statutory interpretation. I do not believe, however, that the change from ordinary to presumptively rights-consistent statutory interpretation is either so novel/distinctive a technique comparatively,[120] or that it so transforms the courts' task as to make a legislative response practically impossible in all political contexts. Would it necessarily be politically impossible, say, for a newly elected Conservative Government to change its mind about repealing the HRA but to amend the Rent Act to overrule *Ghaidan* instead, if it believed that popular sentiment supported it?

Finally on the way section 3 has been used, I think it also overstates the case to claim that the practice of the courts have been so aggressive and radical as to amount to rewriting legislation at will, making rather than interpreting statutory law– thereby violating sections 3(b)(2),[121] 4 and 6 by failing to give effect to incompatible statutes. It is certainly true that, overall, the UK courts have treated the interpretive obligation as a strong one, a little stronger than New Zealand courts, and have advanced beyond pre-existing domestic modes of statutory interpretation – even the most advanced common law fundamental rights protective ones developed in the years immediately before the HRA. On this latter point, it is only necessary to compare *Fitzpatrick*, a 2001 pre-HRA case, with *Ghaidan*, a 2003 post-HRA case, interpreting the very same provision of the 1988 Rent Act Amendment in opposite ways.[122] Indeed, it is probably accurate and candid to describe the judicial function under section 3 as including limited modifications of statutes to protect rights rather than merely interpretation.[123] At the same time, however, (1) as in New Zealand, different judges take different views of the appropriate strength of the interpretive obligation so, as one recent commentator puts it, "[t]o distil or elicit any working principles or rules of guidance from the cases is not easy"[124]; (2) there are still undoubtedly limits – including inherent ones -- beyond which a Convention-

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[119] For example, Congress has over the last couple of years been in the process of overriding several restrictive, pro-employer interpretations of the 1964 Civil Rights Act and other anti-discrimination statutes.

[120] See *infra* note 130.

[121] "This section [Section 3] does not affect the validity, continuing operation or enforcement of any incompatible primary legislation." HRA section 3(2)(b). On this textual constraint on the scope of the interpretive obligation under section 3, see Conor Gearty, *Reconciling Parliamentary Democracy and Human Rights*, 118 L.Q.R. 249 (2002).

[122] Fitzpatrick v. Sterling Housing Association Ltd [2001] 1 A.C. 27. For a detailed discussion of the differences between the two cases, see Kavanagh, *supra* note 11, at 108-114. More generally, however, Kavanagh argues that the courts do not have radically new interpretive powers under the HRA; the difference is primarily that they have used their powers more frequently and with a greater sense of legitimacy.

[123] See Kavanagh, *supra* note 11, at 99.

[124] Alec Samuels, *Human Rights Act 1998 Section 3: A New Dimension to Statutory Interpretation?*, 29 STATUTE L. REV. 130, 138 (2008).

compatible interpretation is not possible,[125] and (3) in total, the courts have only used section 3 to "rectify statutory language in a small number of cases."[126]

Moreover, a good argument can be made that the general principles for applying section 3 have slightly weakened over time from the 2002 high point of interpretive power in *R v. A*.[127] Whereas in that case, the leading opinion of Lord Steyn stated that a rights-consistent meaning is not "possible" if -- and perhaps only if -- Parliament has clearly and expressly limited a convention right,[128] in *Ghaidan*, decided in 2004, several of their Lordships clarified that a rights-consistent interpretation is not possible where it would be incompatible with "the underlying thrust of the legislation" (Lord Nicholls),[129] or "the fundamental features of the legislative scheme" (Lord Millett),[130] or would not "go with the grain" of the legislation (Lord Rodger).[131] And arguably, *Wilkinson*, decided the following year, rolled back the standard of impossibility a little further still.[132] Here, Lord Hoffman's leading opinion rejected the notion, arguably implied in *R v A*, that section 3 required courts to give the language of statutes "acontextual meanings,"[133] and stated that "the question is still one of *interpretation*, i.e., the ascertainment of what, taking into account the presumption [that Parliament did not intend a statute to mean something which would be incompatible with those rights] created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute."[134]

Indeed, if one looks at the *application* of the stated section 3 principles in all three cases, the impression of a slight weakening over time is further confirmed. Thus, it seems hard to conclude that the section 3 interpretation of the rape shield law at issue in *R. v. A* – reading in a fair trial limitation -- did not fly in the face of Parliament's specific intent or the "underlying thrust" of the statute as manifested in its unambiguous blanket exclusion of evidence of prior sexual history between the defendant and complainant. By contrast, in *Ghaidan*, it does not seem an unreasonable contextual reading of a statute extending tenure protection, absent other clear language to the contrary, to interpret the words "living together as his or her wife or husband" to refer to a general relationship of sexual intimacy exemplified by but not limited to the heterosexual relationship of husband and wife. Indeed, Lord

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[125] On limits, see infra text accompanying notes 122-127.

[126] Kavanagh, *supra* note 11, at 117.

[127] R. v. A (No 2) [2002] 1 AC 45.

[128] *Id*.. at para. 44 (Steyn LJ).

[129] Ghaidan, *supra* note 104,at para 33.

[130] *Id.*, at 67.

[131] *Id.*, at paras. 110, 111, 116.

[132] R. v. Her Majesty's Commissioners of Inland Revenue ex parte Wilkinson [2005] UKHL 30.

[133] *Id*., at para. 17.

[134] *Id* (emphasis in original).

Nicholls argued that the "social policy" underlying the statutory extension of tenure to the survivor of couples living together as husband and wife "is equally applicable" to the survivor of homosexual couple living together in a close and stable relationship.[135] And in *Wilkinson*, because there were such clear contrary indications elsewhere in the statute, the House of Lords found that no "reasonable reader could understand the word 'widow' to refer to the more general concept of a surviving spouse,"[136] so that a compatible, non-discriminatory interpretation of a tax provision granting a bereavement allowance only to widows was not possible.

What about the fourth view, that the strength of the HRA is not only factually established but normatively justified, that section 3 is the truly distinctive judicial technique, and that overall UK courts have powers not "hugely dissimilar" from those in the U.S., thereby challenging the claim that the HRA embodies a new or distinctive model of constitutionalism at all? I will say more about the issue of the general distinctiveness of the new model in the next section. But specifically on the HRA, and bracketing the normative claim for the moment to focus on the descriptive, I believe – as just argued – that this overstates the strength of judicial power under the HRA and also understates its distinctiveness. On the latter, I continue to think that section 4 (and its subsequent equivalents in Australia and New Zealand) is the novel and distinctive – indeed unique -- judicial rights-protecting technique, which gives defining shape to the HRA overall,[137] more so than section 3, which has fairly common pre-existing equivalents among various types of contemporary legal regimes, including the EU, NZBORA, and the German Basic Law.[138] The fact that Parliament has not so far used its legal power of the final word is not (yet) compelling evidence that it is practically irrelevant; it is far too early to draw this conclusion.

Moreover, in conceptualizing the HRA (and the new Commonwealth model of constitutionalism) as an intermediate or hybrid form of constitutionalism, it is far from clear that "hugely dissimilar powers" are claimed or to be expected. As a matter of general comparative constitutional methodology, it perhaps smoothes over

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[135] Ghaidan, *supra* note 104, at para 35.

[136] Wilkinson, *supra* note 132.

[137] At the time of HRA's enactment, no other system of constitutional review of legislation in the world – domestic or international, past or present, contained the same or a similar judicial power. As we've seen, this power was subsequently been implied by the New Zealand Court of Appeal, although so far not clearly used. It was also enacted as part of both the ACT HRA and the VCHRR. The SCC's suspended declaration of invalidity is quite different in that the legislature acts in the shadow of a legally authoritative reversion to a judicial order invalidating the relevant statute.

[138] In the EU, the Marleasing case imposed a duty on all national courts to interpret domestic law in line with untransposed directives wherever possible to do so; Marleasing SA v. La Comercial Internacionale de Alimentacion SA, Case C-106/89 [1990]. In New Zealand, section 6 of the New Zealand Bill of Rights Act, 1990 states that: "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." In Germany, the famous Lüth decision of 1958 stated that: "Constitutional rights form an objective order of values….This value system…must be looked upon as a fundamental constitutional decision affecting the entire legal system….It naturally influences private law as well; no rule of law may conflict with it, and *all such rules must be construed in accordance with its spirit*." Lüth, BverfGE 7, 198 (1958) (emphases added).

too much -- or is too "similarity-oriented"[139] -- to deny that lesser differences are significant or relevant. Indeed, the three models of constitutionalism are most essentially about different allocations of legal powers among institutions, so while it is of course appropriate and valuable to ask how they interact with other factors in practice, such as legal culture and political reality, this is a perennial and distinct issue. Even before the HRA, of course, it was sometimes claimed that protection of rights in the UK was in practice not that much different from the US despite the clear – and, in a non-trivial sense, irreducibly important -- legal differences in respective constitutional systems.

Focusing briefly on the other side of the equation, it seems hard to believe that replacement of judicial supremacy by an HRA-style regime would make no practical difference in countries such as the United States and Germany. Who would wager that if subject only to a declaration of incompatibility or a modifying, rights-consistent interpretation, statutes such as the one at issue in *Roe v. Wade*[140] would not have been saved by exercise of a legislative final word, or the Bavarian school law litigated in the FCC's second crucifix case?[141] Would citizens likely be persuaded that the change in rights regime is purely formal only? Moreover, Ireland did enact an HRA-like statute for its domestic incorporation of the ECHR in 2003, even though it has long had a constitutional bill of rights and a judicial power of invalidation to enforce it.[142] Why would Ireland do this unless it was thought to make some practical difference? The answer cannot simply be that it was easier politically to enact a statute than a constitutional amendment because Ireland could still have incorporated a judicial power to invalidate legislation inconsistent with the ECHR into the statute.

Overall, with respect to the first criterion of success, it is I think hard to establish that there is not now more effective rights protection than before HRA. Admittedly, the radical change in political context and national security exigencies brought about by 9/11 has complicated the direct comparison of pre-and post-HRA regimes. Moreover, it is very difficult to assess the complex counterfactual of what purely legislative rights protection absent the HRA would now look like. Nonetheless, it seems to me hard to deny that rights are better protected under the HRA in the following specific ways. There is now greater rights consciousness than before -- among citizens, courts, Parliament and government -- and the rights that exist are generally better and more widely known and understood than under the pre-HRA regime of common law rights supplemented by various specific statutory protections. There are also *more* legally recognized rights. Pre-HRA, there would likely have been no plausible legal claim for the UK courts to consider in the *Belmarsh Prison* case as there was no obvious relevant domestic right against

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[139] Pierre Legrand, *The Same and the Different*, in PIERRE LEGRAND AND RODNEY MAUNDAY EDS, COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (2003).

[140] 410 U.S. 113 (1973).

[141] German Classroom Crucifix Case II, 93 BverfGE 1 (1995).

[142] European Convention on Human Rights Act, 2003 (Ireland).

statutory discrimination on the basis of citizenship, any more than there was on the basis of sexual orientation in the pre-HRA case of *Fitzpatrick*.[143] Finally, even though for reasons discussed in the next section, the current system of remedies for rights violations under the HRA is somewhat partial, unsatisfactory and in need of reform, it is at the very least the same as – and so no worse than – the pre-HRA regime, and arguably stronger.

On the second criterion, the balance of power has I think at most gone a little too far in the judicial direction, taking into account the pre-enactment focus on what the courts will do as well, and somewhat greater use of section 4 should certainly be encouraged – perhaps by instituting the norm of a legislative remedy that I discuss in the following section -- as should greater political rights review both before and after the judicial stage. But only a little. Moreover, to the extent that the two criteria themselves must be balanced, I think a thumb on the scale of adequate rights protection is justified. All in all, my view is that HRA is working reasonably well and that there is no clear and obvious practical problem with this version of the new model, as there is for example in Canada.

V. FUTURE DIRECTIONS FOR THE NEW COMMONWEALTH MODEL

As we have seen, academic commentators in the individual countries have provided mixed reviews of the various versions of the new model in practice, especially in Canada and the UK. On the two general criteria of (1) are rights adequately protected and (2) are there appropriate limits on, and a better balance between, legislative and judicial power, it is fair to say that (with obvious exceptions) most of the expressed concerns have been less with (1) than (2).[144] And here, probably the main criticism is that developments in practice such as a culture of legislative compliance with courts and overreliance on interpretive techniques for protecting rights have caused the balance to veer too much in favor of judicial power – so diminishing or undermining the distinctiveness of the new model.

In theory and form, it seems clear that the new Commonwealth model is a distinctive, intermediate model of constitutionalism. In granting the final legal word to the legislature, both Canada's section 33 and the UK's declaration of incompatibility were novel provisions when enacted and are alien to and inconsistent with the standard modern system of constitutional review. The legal requirement of pre-enactment rights review by the political branches is also an important and attractive part of what makes the model new. But even now, as practiced, while acknowledging that some of the critics' concerns are justified, the new model remains more distinctive than this predominant line of criticism claims.

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[143] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 A.C. 27.

[144] Indeed, Ian Leigh and Roger Masterman have argued that in the UK context there has been "neglect" of the first ("and most important") criterion of success in favor of the second. IAN LEIGH AND ROGER MASTERMAN, MAKING RIGHTS REAL: THE HUMAN RIGHTS ACT IN ITS FIRST DECADE 235 (2008).

Generalizing from what I have said above and attempting to place an overall assessment in proper comparative constitutional perspective, it is necessary to bear in mind three key features of the new model. First, as long as it is not truly politically unusable, bestowing the final legal word on the legislature is still the critical difference between the new model and de jure judicial supremacy. This is because it is still the case that a truly controversial, unpopular court decision may very likely be overridden, even in Canada, and this in turn may help to explain why so few, if any, such court decisions have been rendered. There is as a result a more specific, immediate, and direct public opinion constraint on courts than in such paradigmatic strong jurisdictions as the US and Germany, where the only options are passing a constitutional amendment, attempting to secure future judicial appointees with different views, or taking to the streets. Second, as institutionalized in previously Westminster-based systems, the new model obviously does and is intended to increase judicial power compared with traditional parliamentary sovereignty and should be candidly acknowledged as such. The relevant question, accordingly, is not whether there has been an increase in judicial power but whether the right amount, too much, or too little. Third, as important a criterion of success as institutional balance is, it is not the sole one and may itself have to be balanced against the other: greater and effective protection of fundamental rights. Assessments that do not take this into account and focus only on legislative-judicial power are, I believe, overlooking an essential factor.

Nonetheless, at least for those who find the new model normatively appealing *as* an intermediate model of constitutionalism, the question arises of how might its distinctive, intermediate features be bolstered in practice? One principal practical dilemma has emerged from experience under the new model as a whole. If courts are granted the power to invalidate rights-incompatible statutes (as under the Canadian Charter), there is a serious risk that the political costs will generally be too high for the legislature to exercise its override power – leading to more effective rights protection at the cost of a de facto judicial final word. If, on the other hand, courts are not granted the power to invalidate rights-incompatible statutes (as in the UK, New Zealand and under the ACT HRA and the VCHRR), then the risk that the individual whose rights they adjudicate to have been violated will not receive a remedy creates strong pressure on the courts to rely too much on their interpretive power/duty, again at the potential cost of ousting legislative judgment and creating a de facto judicial final word. In each case, the risk is that the legal final word is in practice made too hard to exercise where the default rests with the court decision, as under both the invalidation and interpretive powers.

Although New Zealand courts have seemed better able than those of the UK to resist the pressure under the second horn of this dilemma to overly rely on the interpretive duty, and so as a result may be the more representative standard-bearer of the model than the ECtHR-skewed HRA, the general solution I believe lies in reducing the pressure. Returning to the section 3 versus section 4 issue under the HRA, it is generally true, as commentators have suggested, that – rather than necessarily the result of a bare desire to aggrandize themselves at the expense of Parliament -- the remedial structure of section 3 and 4 creates strong pressure on

courts to use the interpretive power under which they can grant a remedy to the aggrieved individual versus section 4, under which they cannot.[145] Slightly less noted is the fact that the same remedial pressures also push the courts into assessing specific executive action, which they generally have the power to invalidate,[146] rather than the underlying statutes—as, for example, in the control order cases. Although as I have said, I do not think use of section 3 is quite as much of a problem from the perspective of legislative voice as critics suggest, the political branches have not done all they can to alleviate the problem and so reduce this pressure on the courts.

Under the "fast-track" procedure of HRA section 10, there is express provision for the amending order to have retrospective effect and therefore to grant a legislative remedy to the individual whose rights the court has declared have been violated.[147] However, this power has not been used,[148] primarily because all but one of the surviving DIs have been responded to by amending legislation through the ordinary parliamentary process rather than section 10 (a procedural record perhaps otherwise to be approved of). So where the government intends to comply with a DI, it could and should either (1) use the express section 10 power to make orders retroactive, or (2) ensure that, wherever possible, along with the amending legislation – whether or not it is given retroactive effect -- provision is made to afford a remedy to the individuals affected by the incompatibility.[149] Indeed, Ireland has expressly included a discretionary governmental power to award an *ex gratia* payment of compensation to the successful litigant following a DI under its statute incorporating the ECHR into domestic law.[150] Moreover, the duty to repair the damage caused to individuals and to return them to their *ex ante* position is already a legal obligation of the UK under the ECHR whenever the ECtHR finds a

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[145] Aileen Kavanagh, *Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after Ghaidan v, Mendoza*, in HELEN FENWICK, GAVIN PHILLIPSON, ROGER MASTERMAN EDS., JUDICIAL REASONING UNDER THE HUMAN RIGHTS ACT (2007) (remedial concerns have been central to the courts' use of Section 3 versus Section 4). Rosalind Dixon, *A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?* 37 FEDERAL L. REV. 335 (2009).

[146] For the exception under HRA, see *supra* note 108.

[147] HRA, Schedule 2, Section 10, para. 1(1) (b): "A remedial order may be made so as to have effect from a date earlier than that on which it is made."

[148] So far, "no amendments [to legislation in response to a DI] have been given retrospective effect so as to afford rights to the individual at whose suit the declaration was obtained." See JACK BEATSON, STEPHEN GROSZ, TOM HICKMAN, RABINDER SINGH, HUMAN RIGHTS: JUDICIAL PROTECTION IN THE UNITED KINGDOM 37 (2008).

[149] This has also been proposed by the JCHR as the last of five recommended steps the Government should take to try and persuade the ECtHR that the DI is or has become an effective remedy. See JCHR, Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL 128, HC 728, para. 119 ("[These steps should include] ensuring that any legislative solution makes the necessary provision to afford a remedy to the applicants affected by the identified incompatibility.")

[150] European Convention on Human Rights Act 2003 (Ireland), §5(4) (c). In addition, Canadian legislatures have occasionally given legislation responding to Supreme Court of Canada decisions retroactive effect. For an article discussing this phenomenon in Canada and advocating that the courts adopt a general interpretive presumption that such legislation have retroactive effect, see Sujit Choudhry and Kent Roach, "*Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies*," 21 SUPREME COURT LAW REVIEW (2d) 205 (2003).

violation.[151] It is also the typical remedy, in the form of "just satisfaction," afforded by the ECtHR itself against the member-state to the injured party where national law permits only partial reparation to be made, under Article 41 of the ECHR.

Not only would the development of such a rule or norm potentially solve this practical dilemma but it would also be fair. From the perspective of the new model as a whole, I don't think the absence of a *judicial* remedy after exercise of the declaratory power is inherently unjust or problematic.[152] If a court's view of the constitutionality of a statute is not the final word, I don't think a remedy needs to be granted at this point – but it does need to be granted after the final decision if that decision is in favor of the party. Accordingly, where the legislature responds to a declaration of incompatibility by amending or repealing the relevant statutory provision and so acknowledges the problem, it should also, as part of that new legislation, provide as much of a legislative remedy as it can, including either or both monetary compensation and retroactive effect.

I do not see any basis for thinking there might be a legal problem for a legislative remedy of compensating individuals affected by a law following a DI. As for the separate issue of retroactive remedial orders or amending legislation, neither do I believe there is likely to be any general bar to this second or supplementary type of legislative remedy under section 4.[153] First, the traditional common law presumption of the non-retroactivity of statutes in the name of rule of law principles is just that: a presumption that has always been deemed rebuttable by clear legislative wording. Second, there is nothing in the HRA itself to suggest that retroactive remedial legislation would violate any of the convention rights; to the contrary, as just mentioned, it grants express power to the minister to introduce remedial orders with retroactive effect under section 10.[154] Third, the identical issue of retroactivity arises under sections 3 and 4. If common law rule of law principles (or any others) do not prevent changed and retroactive statutory interpretation altering "vested" private rights under section 3 – as, for example, in *Ghaidan* – it is unclear how or why they could prevent precisely the same thing via retroactive legislative amendment. The section 3 decision in *Ghaidan* meant, of course, that in 2004 the landlord was bound by an interpretation of the 1977 Rent Act that differed

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[151] See JCHR Sixteenth Report of Session 2006-07, *supra* note 105 at 10, citing the relevant ECtHR judgments to this effect. Indeed, such legislative compensation may thus also be a way of pre-empting a subsequent successful appeal to the ECtHR following a DI.

[152] Whether in the HRA context it is problematic from the perspective of the ECHR right to an effective remedy, left unincorporated by the HRA, is a different issue and one the ECtHR may soon answer and so preempt.

[153] For a different view, see Rosalind Dixon, *supra* note 141. Neither of two recent works focusing specifically on retroactivity addresses this precise point (as distinct from the issue of to which events and causes of action pre-dating October 2, 2000 does the HRA apply): BEN JURATOWITCH, RETROACTIVITY AND THE COMMON LAW (2008); David Mead, *Rights, Relationships and Retrospectivity: The Impact of Convention Rights on Pre-Existing Private Relationships Following Wilson and Ghaidan*, [2005] PUB. L. 459.

[154] There is some language in HRA relevant to the entirely different issue of whether and when HRA applies to events occurring or causes of action brought before it came into effect on October 1, 2009. On this issue, and not without a good deal of controversy, the courts have so far generally held that HRA does not apply.

from the one on which he could reasonably have relied when entering into the lease with Godin-Mendoza's same-sex partner in 1983. Fourth, the ECtHR has held that a declaration of incompatibility under section 4 does not constitute an "effective remedy" for the purposes of the ECHR procedural requirement of exhausting domestic remedies[155] – and so might also find that it does not satisfy the ECHR right to an effective remedy before a national authority under Article 13, a right deliberately omitted from those incorporated under the HRA. Accordingly, action to strengthen this "weak remedy" along either of the suggested lines is, I think, unlikely to face general obstacles from this source.[156] Finally, another member of the House of Lords Judicial Committee has opined that there is no such bar. In the course of his dissenting speech in *Ghaidan* arguing that section 4 should have been used because the non-discriminatory interpretation of the Rent Act was not "possible," Lord Millett stated that: "It [incompatible legislation] continues in full force and effect unless and until it is repealed or amended by Parliament, which can decide whether to change the law and if so from what date and whether retrospectively or not."[157]

As far as practical problems are concerned, one or other – or some combination -- of the two legislative remedies would seem possible and reasonably effective in all types of cases. In criminal law, compensation can be paid for costs suffered in the time between the judicial finding of incompatibility and the legislative response. Even in a case like *Ghaidan*, although practically the losing tenant would either have been evicted from the flat or paid more rent under a section 4 treatment of the case, there is no reason why the government could and should not compensate such tenants for their pecuniary loss resulting from the existence of a law on the statute books that both it and the courts agree violates their rights.[158] As mentioned above, this is the approach that Ireland has taken in its statute domesticating the ECHR. Moreover, the possibility of ultimately obtaining legislative or executive compensation may help to counter any "plaintiff-disincentivising"[159] effects of the declaratory mechanism, although the facts that (1) there is generally ex ante uncertainty as to whether judges will currently rely on it or the interpretive power in any given case and (2) plaintiffs can seek both remedies in the alternative suggest that these effects are small. Accordingly, the development of such a norm (or legal rule) should significantly reduce any artificial distortion in the interplay between the interpretive duty and the declaratory power and bring them into better balance.

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[155] Burden and Burden v. United Kingdom, 44 EHRR 51 (2007).

[156] Even if, contrary to what I have argued above, the ECtHR were to hold that the ECHR prohibits such legislative or executive remedies, this obviously wouldn't apply to New Zealand or Australia, or to the model generally.

[157] Ghaidan, *supra* note 104, at para. 64.

[158] This would have been the remedy afforded by the ECtHR in Karner v. Austria, an essentially identical case to Ghaidan decided a year earlier, had the complainant survived or left beneficiaries of his estate. (2003) 2. F.L.R. 623.

[159] Andrew & Petra Butler, *supra* note 58, at 1116.

To return to the ideal working of new model – or, rather, how we would actually want it to work – discussed in Part III, what other changes in practice or law does experience suggest might push the model further in this direction?

To enhance the first stage of pre-enactment rights review, experience suggests that the relevant minister (and so in practice the department's civil servants) should always be required to make a statement about the compatibility of any proposed statute with the bill of rights and not only when the minister deems the bill incompatible (as currently in Canada and New Zealand). Moreover, the expectation should be of serious ministerial consideration, not merely formulaic or conclusory. Second, there must be focused parliamentary consideration of this statement and the material on which it was based, as well as of the bill's general compatibility with the protected rights. Again, the UK experience of a specialized, non-partisan, and well-staffed parliamentary committee issuing a report on each bill, while not perfect, suggests the best way to achieve this part of pre-enactment rights review. The more this is conducted by political actors themselves rather than government and parliamentary lawyers, the more likely that a specifically political rights review will emerge – which in turn helps to justify a greater role for the elected branches relative to the legal expertise of the courts.

Recall the two suggested ideal features of the model's judicial stage as compared with the typical workings of traditional strong review: (1) serious and respectful consideration of the rights review undertaken at stage one by the elected branches but, at the same time, (2) the duty to provide the political community with an independent and high-quality legal judgment on the merits that *not* having responsibility for the final word both requires and makes more possible. On the first, obviously the relatively disappointing nature of political rights review thus far as predicting what the courts will do has not created much space for such consideration. On the second, again to the extent that the remedy dilemma has artificially distorted the courts' judgments, resolving it should result in less constrained, more independent judicial decisions on using the declaratory versus interpretive powers. To the extent one has faith in textual constraints, statutory provisions such as the two Australian ones – enacted several years after the HRA -- requiring courts to exercise their new interpretive duties "consistently with their [i.e., the legislative] purpose"[160] may also have some impact.

At the third stage of legislative reconsideration of statutes deemed rights-incompatible by the courts (or given strained, rights-compatible interpretations), experience under the various versions of the new model suggests two things are of potential importance. The first is the development of a norm of legislative remedy discussed above. The second is that the conception or framing of the legislative power of the final word should generally have the connotation of overriding a judicial *interpretation* or decision on rights and not overriding the rights themselves – it should in Waldron's terms be understood to be about "rights disagreements" and not "rights misgivings."[161] This is clearly not the case currently with section 33 in

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[160] ACT HRA, section 30; VCHRR, section 31(1).

[161] See Waldron, *supra* note 19; Hiebert, *supra* note 22.

Canada, and is also likely not so with legislative responses to declarations of incompatibility in the UK. Such a conception would reduce the current high political cost of exercising the legislative final word. If understandings cannot now be easily changed, then textual amendments (or modified judicial statements in New Zealand) may be necessary. Here, as the Evanses and Roger Masterman have suggested, the Victorian Charter's formula of a judicial declaration of "inconsistent interpretation" may well be an improvement.[162]

A more radical alteration to the existing statutory versions of the new model at the judicial stage, one that clearly weakens judicial power, would be to omit the interpretive duty altogether (or seriously reduce it), and so authorize only "ordinary" modes of statutory interpretation to protect the rights. This should result in greater reliance on judicial declarations of incompatibility, which may in turn reduce the political costs associated with ignoring them. On the other hand, of course, it may result in perceived or actual underprotection of rights, depending in part on how legislatures respond to declarations. This more radical change could be used either instead of or in addition to the legislative remedy reform just discussed --- thereby reducing both the power and the incentives of the judiciary to rely on it.

An even more radical alteration would be abolition of *both* the interpretive duty and the judicial declaratory power (which, as Rishworth has shown, are inherently connected) and to have simply a statutory bill of rights – at least as far as legislation is concerned. Judicial power could be maintained for executive action. Although certainly a possible option within a system of parliamentary sovereignty, such a "pure" statutory bill of rights, however, would not be an example of the new model, seemingly lacking as it does the second requirement of enhanced formal judicial power concerning rights. A less radical alternative, at least formally, than either of these two would be to revert to the original New Zealand model of a purely interpretive bill of rights with (1) the current interpretive duty but (2) without the power (perhaps expressly prohibited) to declare statutes incompatible with protected rights. In practice, however, this might lead to even greater pressure on the courts to distort parliamentary intent than with the current outlet of the declaratory power.

Finally, there is the issue of judicial appointments. One wonders how much longer highest court judges in countries adopting the new model can continue to be appointed in the traditional, comparatively non-political, common law manner -- by the government alone based primarily on professional reputation, peer review, and seniority -- before calls for the types of greater indirect political accountability and legislative input, perhaps even the relevance of political affiliation, typical of constitutional courts exercising de jure supremacy around the world become unanswerable. Indeed, the UK has recently moved even further in the direction of greater insulation from political factors (but also greater transparency) by instituting a new, fully independent Judicial Appointments Committee to replace the opaque method of selection by the Lord Chancellor. Predictably, given the Charter's greater age and grant of judicial power, Canada has already come under the most pressure on

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[162] CAROLINE EVANS AND SIMON EVANS, AUSTRALIAN BILLS OF RIGHTS (2008); Roger Masterman, *Interpretations, Declarations and Dialogue: Righrs Protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities*, 2009 PUB. L. 112.

this front and in 2006 held its first ever – albeit brief and entirely non-partisan -- public hearing for a nominee to the Supreme Court.[163] In any event, increasing the political – and perhaps especially legislative -- role in judicial appointments to the highest courts exercising weak-form judicial review, as well as possibly also adjusting tenure (perhaps renewable fixed terms in the highest courts), may also be a means of recalibrating judicial and legislative power under the new model in favor of the latter – if thought necessary, appropriate, and not counterproductive.

CONCLUSION

In reassessing the new model in light of practice, this article has advanced three theses. First, the UK and New Zealand versions are working reasonably well with respect to both protecting rights and balancing judicial and legislative power. Second, from the perspective of the new model as a whole, the Canadian version suffers from a serious practical problem due to the near dormancy of section 33 and, however section 1 does or might operate, it is not a functional substitute. Third, one principal dilemma has emerged from experience under the new model, to which I suggest the practical solution of the legislative remedy.

In thus concluding that, overall, the new model has so far been moderately successful and distinctive in operation, this article has engaged and challenged the major expressed skeptical claims to the effect that practice is not living up to theory. This theory, again, is that the new model promotes two constitutional goods or foundational values of liberal democratic polities – adequate rights protection and an appropriately balanced allocation of governmental powers, including limits on both courts and legislatures. This article is *not* claiming, however, that the new model is the best or universally appropriate model of constitutionalism.[164] Rather, it is claiming that the new model should be afforded its rightful place on the menu of options as a third, intermediate alternative to judicial and legislative supremacy. No doubt, as with both of the existing options, certain contextual factors –including the presence or absence of cataclysmic change of regime and viewing one or other model as more relevant for aspirational or historical reasons—will continue to play a major role in the ultimate selection, but the choice may as a result be a more informed one.

Finally, it should also be clear that the case for the new model is not simply *that* it is intermediate. Obviously the fact of being in the middle, of being situated in between two normatively supported options, does not itself provide a normative argument for that position – except perhaps for unreconstructed Aristotelians. That said, the normative claims that I have briefly restated and assessed in practice for fulfillability in this article are not entirely independent of the new model's

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[163] Although the process was not repeated when the next vacancy arose, in 2008.

[164] Although premised on the traditional two choices only, I am generally persuaded by Wojciech Sadurski's argument that context is important on the issue of which type of legal regime best protects rights. See Sadurski, *supra* note 13.

intermediate status in important ways. For, at bottom, much of its appeal is that it transcends two either/or options – judicial or legislative supremacy, and a legal or political conception of rights -- previously thought to exhaust the institutional forms of constitutionalism.