RETHINKING CONSTITUTIONAL REVIEW IN AMERICA AND THE COMMONWEALTH: JUDICIAL PROTECTION OF HUMAN RIGHTS IN THE COMMON LAW WORLD

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I. INTRODUCTION

The Americans may have been the first to grapple with the concept of constitutional review, but they were certainly not the last. The common law world has observed the legacies of *Marbury v. Madison*\(^1\) with a mixture of trepidation and envy. Its discomfort with the judiciary’s power to nullify the legislative commands of an elected majority eventually prompted various Commonwealth legislatures to initiate their own unique constitutional responses to the intricate conundrum of balancing legislative supremacy with the judicial protection of human rights.

These Commonwealth legislative developments have in turn peaked the interests of constitutional scholars within the United States, who have become increasingly wary of unelected judges trumping the legislative command of elected officials. Of this burgeoning field within academic circles, two recent articles are particularly insightful in their discussions on the Commonwealth model of constitutionalism. In one, Professor Stephen Gardbaum examines the constitutional models of the United Kingdom, Canada, and New Zealand and makes a measured defense of the U.K.’s Human Rights Act as the optimal response to the counter-majoritarian difficulty of constitutional review in the realm of human rights protection.\(^2\) In the other, Professor Mark Tushnet is more skeptical of the various Commonwealth responses and argues that these various models of “weak-form judicial review”\(^3\) are unstable versions of “constrained parliamentarianism”\(^4\) and may easily escalate into strong-form review of the American variety.\(^5\) While both scholars differ in the conclusions they draw from their comparative endeavor, they appear to make the same assumption that of all the common law jurisdictions, the United States’ mode of judicial review lies on the extreme end of the continuum measuring the strength of the judiciary vis-à-vis the legislature.\(^6\)

This Article puts forward two main claims. First, the Canadian model of constitutional review is the optimal constitutional model available among the common law jurisdictions in balancing legislative finality with judicial

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1. *5 U.S. (1 Cranch) 137 (1803).*
protection of human rights. Pursuant to the Canadian Charter of Human Rights and Freedoms (Charter), while the judiciary has the power to invalidate legislation passed by Parliament, the legislature has the power to suspend this invalidation for a period of five years, subject to renewal. In defending this claim, I evaluate prominent common law models of constitutional review, including that of the United States, Canada, the United Kingdom, and New Zealand and address the concerns that Gardbaum and Tushnet have expressed regarding the Canadian model.

In my evaluation of the models of judicial review present in other common law jurisdictions, I also dispute the scholars’ assumption that America lies on the extreme end of the continuum measuring the level of finality of a judicial determination of unconstitutionality by offering India as a fifth common law jurisdiction for discussion. I argue that the Supreme Court of India remains the most powerful common law court in the world in so far as it has the power to invalidate constitutional amendments, a power even the Supreme Court of the United States has definitively rejected.

The second main claim is that if the structural status quo were to remain in the United Kingdom, New Zealand, and the United States, the onus would be on the respective national courts to make doctrinal adjustments to their jurisprudence so as to ameliorate the deficiencies in their respective constitutional systems.

For the United States, as a constitutional decision may only be overturned by a supermajority in Congress and the state legislatures, the American judiciary, when nullifying legislation, should rest its decisions on the barest minimum basis to resolve the particular dispute, rather than formulate a constitutional rule that is broader than the facts to which it is applied requires. Admittedly, this proposition is not new, as this theory of “decisional

9 Schneiderman v. United States, 320 U.S. 118, 137 (1943). Justice Murphy, in rejecting the application of a general doctrine of implied limitations, held that

"[t]he constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead they wrote Article V . . . .

[which] contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent."

Id. (emphasis added). Thus, aside from one caveat, so long as the procedural requisites are satisfied, the United States Constitution does not impose any other substantive limits on future generations to amend the provisions in the text.
However, I argue in favor of a modified version of Sunstein’s theory, which I term “dialogic minimalism,” whereby the judiciary, when formulating narrow constitutional rules by way of non-decisive dicta, should, at the same time, initiate a constitutional dialogue with the political branches about the theoretical underpinnings and mandates of the Constitution.

As for the United Kingdom and New Zealand, I argue that the courts should be more aggressive in the deployment of their interpretive mandates bestowed under their respective human rights instruments. Under Section 3 of the U.K.’s Human Rights Act, British courts must interpret and give effect to legislation in a way which is compatible with the European Convention on Human Rights “so far as it is possible to do so.” In the same vein, Section 6 of the New Zealand Bill of Rights contains an interpretive mandate requiring that “[w]herever an enactment can be given a meaning that is consistent with . . . this Bill of Rights, that meaning shall be preferred to any other meaning.” Rather than issuing advisory declarations when a particular statute is incompatible with human rights norms, the British and New Zealand courts should be more activist in using their interpretive mandates to “read in” words or “read down” statutes that are in violation of enshrined civil liberties rather than waiting passively for Parliament to amend the infringing statutes of its own accord. So long as such a statutory construction is linguistically possible and does not mandate drastic legislative reforms that would affect related statutory regimes, the possibility that such a reading is contrary to Parliament’s actual intentions is immaterial. In both Commonwealth jurisdictions, the legislatures can return and harness a simple majority to reinstate their original views in clearer terms.

Part II of this Article begins with an overview of the current state of constitutional review in the United States. Part III continues with a descriptive summary of how the constitutional systems of the other common law jurisdictions (India, Canada, the United Kingdom, and New Zealand) have

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11 Human Rights Act, 1998, c. 42, § 3(1) (U.K.) (“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”).
13 In New Zealand and the United Kingdom, human rights instruments are treated as any other statutory instruments, and as such can be overridden by a Parliamentary majority. Gardbaum, supra note 2, at 735.
sought to reconcile legislative supremacy with judicial protection of fundamental rights. Essentially, each jurisdiction is placed at a different point on a continuum measuring the strength of judicial power in relation to legislative supremacy. Next, Part IV evaluates the four models and argues that Canada has the optimal system of reconciling the traditional notions of legislative finality with our modern aspirations for a judicially-enforced Bill of Rights. Part V proceeds with a defense of my theory of "dialogic minimalism," as I argue that, in the absence of a structural change to the U.S. Constitution, American courts should pronounce "narrow" rules when engaging in constitutional adjudication while providing some certainty to the law by using deeply reasoned, non-decisive dicta to initiate a dialogue with the political branches about the theoretical underpinnings of the constitutional provisions, so as to trigger a process of legislative self-reflection about the constitutionality of related legislative action not presented before the Court. This part also examines recent Supreme Court case law and uses the theory to analyze these decisions. Finally, in Part VI, I propose that the New Zealand and British courts should be more "creative" in their use of the interpretive mandates, and as such, issue declarations of inconsistency only when (1) a statutory reinterpretation would be textually impossible; (2) the "reading in" of words would be tantamount to the enactment of a specific and detailed quasi-legislative code; or (3) a linguistic construction would affect the coherence of other related statutory regimes not at issue.

II. THE UNITED STATES AND SUPERMAJORITARIAN LEGISLATIVE FINALITY

In the classic decision of Marbury v. Madison, Chief Justice Marshall, on behalf of the United States Supreme Court, asserted the judicial power to nullify statutes that were deemed incompatible with the mandate of the Constitution. Yet, to assume that the Court is therefore the supreme expositor of the law of the land would be a gross exaggeration. Article V of the United States Constitution provides a mechanism for Congress and the states to respond to unpopular decisions; a constitutional amendment may be effected when it is proposed by 2/3 of both Houses of Congress (or 2/3 of the

14 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
15 See Cooper v. Aaron, 358 U.S. 1 (1958). "No state legislator or executive or judicial officer can war against the constitution without violating his undertaking to support it." Id. at 18.
states) and ratified by 3/4 of the states. Thus, the Constitution of the United States imposes a procedural requirement of supermajoritarian legislative consensus before a constitutional decision may be reversed.

Admittedly this procedural threshold is not easy to overcome, which explains why Congress has only successfully used constitutional amendments to reverse Supreme Court precedents on four occasions. The Eleventh Amendment was a legislative response to the decision in *Chisholm v. Georgia*, in which the Court held that a state may be sued in federal court by a plaintiff from another state. The Eleventh Amendment now provides states with a considerable form of immunity against costly citizen suits as states are subject to such suits only if the state consents, with suits also permitted against state officers. The Thirteenth Amendment was passed in 1865 to reverse the infamous *Dred Scott* decision, which held that African-Americans were not citizens, and thus not subject to constitutional protection. Next, the Sixteenth Amendment reversed *Pollock v. Farmers' Loans*, thereby securing the right of Congress to collect federal income tax without the need to apportion among the states and without regard to any census. Finally, in 1971, the Twenty-sixth Amendment reversed *Oregon v. Mitchell*, holding that citizens of eighteen years of age and older may not be denied the right to vote on account of age.

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16 Article V of the United States Constitution provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

17 See infra notes 18-22.

18 *Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793).

19 *Louis Fisher, Constitutional Dialogues: Interpretation as Political Process* 202 (1988); U.S. CONST. amend. XI.

20 *Dred Scott v. Sandford*, 60 U.S. 393 (1857); U.S. CONST. amend. XIII.

21 *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); U.S. CONST. amend. XVI.

22 *Oregon v. Mitchell*, 400 U.S. 112 (1970); U.S. CONST. amend. XXVI.
Other attempts to overrule unpopular Supreme Court decisions have all fallen by the wayside. Congressional proposals to overturn the school prayer cases,23 the abortion decision,24 and the flag desecration controversy25 never garnered sufficient votes in both houses to pave the way for state ratification.26 At other times, even where the proposed legislation attained the requisite level of approval by Congress, the states were not forthcoming in endorsing the changes. One such instance was the congressional proposal to prohibit child labor in 1924, following the Supreme Court decision of *Hammer v. Dagenhart*.27 The proposed amendment was never passed as there was an insufficient number of states willing to ratify it.28

The concern over the power accorded to the federal judiciary in the United States is not its de jure supremacy. The foregoing Part has argued against this common misconception. Congress and the state legislatures are able to act in tandem and reverse an unpopular precedent.29 Neither should there be anxiety over the fact that the Supreme Court’s interpretation of the law has the propensity to be final. After all, a *common law* decision handed down by the Supreme Court may equally be final and irrevocable if Congress cannot attract a *simple* majority to enact a statute to override a non-constitutional decision. What is worrisome about constitutional review in the United States is that the legislature only has the final word if there is *supermajoritarian* consensus among the lawmakers that a constitutional amendment is necessary to reverse an erroneous Supreme Court decision.30 This constitutional requirement of *supermajoritarian* legislative consensus confers de facto finality on a judicial decision even if more than half of Congress and the people’s elected state representatives disagree with the result. It is thus this procedural requirement of legislative supermajoritarian consensus that raises constitutional concerns because it allows a Supreme Court precedent to become the default legal rule, even when there is *overwhelming* legislative disapproval.

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26 For further discussion, see FISHER, supra note 19.
27 247 U.S. 251 (1918); FISHER, supra note 19.
28 As late as 1937, only twenty-eight states had ratified this proposed amendment. The proposal eventually became moot in 1938 when Congress passed the Fair Labor Standards Act to regulate child labor. The Act was later upheld by a new panel of Supreme Court justices in *United States v. Darby*, 312 U.S. 100 (1941). See FISHER, supra note 19 for a fuller discussion.
29 See U.S. CONST. art. V.
30 Id.
Since *Marbury*, defenders and deriders of constitutional review in the United States seem to have been engaged in a zero-sum game. Proponents like Erwin Chemerinsky favor the empowering of the judiciary to enforce human rights norms as the life tenure of the judges insulates them from the lobbying of special interest groups and the pressures exerted by an electorate indifferent to the plight of disadvantaged minorities.\(^3\) Seen in this light, the existence of an independent and unelected judiciary, with the power to invalidate popular, but unconstitutional legislation, is necessary to vindicate the rights of minority groups marginalized by the political process. Judicial skeptics like Jeremy Waldron perceive the American courts as an undemocratic institution unaccountable to the public for their actions, constantly thwarting the will of the popularly elected representative institutions.\(^2\) The displacement of the citizenry’s voice as the nation’s principal engine of moral change would in turn discourage the people from engaging in the process of political deliberation and make the courts the final arbiter of the community’s values.\(^3\) Government by judiciary never seemed more foreboding.

Yet, this countermajoritarian conundrum need not be resolved by awarding total victory to either camp. The panacea to mitigate the undemocratic nature of judicial review is not to abolish it altogether.\(^4\) There are different ways of structuring the power dynamics between the legislature and the judiciary. In balancing the need to accord legislative finality to the political branches and provide a meaningful avenue for independent judges to vindicate human rights norms, common law constitutional systems like those of India, Canada, New Zealand, and the United Kingdom have all developed their own unique models of constitutional review.

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III. ALTERNATIVE MODELS OF CONSTITUTIONAL REVIEW

A. India and the Basic Features Doctrine

In India, the fundamental liberties accorded to its citizens are enshrined in Part III of the Indian Constitution. The Indian courts are also expressly empowered to invalidate acts of legislation that are incompatible with the Constitution. In the event that the legislature disagrees with the Supreme Court’s interpretation of the Constitution, a constitutional amendment may be effected by a supermajority vote of approval in each house of Parliament. These features are not unique to India; many other Asian common law jurisdictions have similar provisions that were written into their Constitutions when they gained independence from British colonial rule after World War II.

What is extraordinary about the Indian Constitution is that in 1973, a majority of the judges on the Supreme Court declared that there was an implied “basic features doctrine” governing the entire constitutional framework. Thereafter, the judges had the power and duty to invalidate a constitutional amendment if it violates this unwritten fundamental features code.

In 1971, the Congress Party headed by Indira Gandhi swept into power in a landslide victory, and in its zest to pursue agrarian reforms, passed the Twenty-fifth Constitutional Amendment, which denied the courts jurisdiction over any disputes relating to governmental acquisition and requisition of property, and provided that any legislation passed to give effect to this policy could not be questioned in a court of law. Subsequently, in Kesavananda, a Kerala religious leader challenged the application of this land reform legislation to the estate belonging to his religious community. The Twenty-fifth Amendment had immunized Kerala agrarian reforms from judicial review,

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35 INDIA CONST. arts. 12-35.
36 INDIA CONST. art. 13, § 2 (providing that “[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void”).
37 INDIA CONST. art. 368, § 2.
38 See, e.g., SING. CONST. arts. 4, 5, § 2; MALAY. CONST. art. 159, § 3.
41 Id.
and the Supreme Court thus had to decide whether Parliament had the power to amend the Constitution so as to derogate from a citizen’s right to religious liberty and property.42 While the Kesavananda court unanimously held that Parliament had the power to amend the Constitution so as to limit the scope of fundamental liberties enshrined within, the Court in a 7–6 split held that Parliament may not pass a constitutional amendment to insulate from judicial review all legislation designed to implement the Constitution’s directive principles.43 The majority argued that this would violate the basic structure of the Constitution by eliminating the Court’s role as the guardian of the citizenry’s fundamental liberties.44 To effect such a drastic change to the Constitution, the majority held that a new Constituent Assembly had to be convened to ratify the changes.45

While conceding the amenability of the fundamental rights, the Court asserted the power to determine whether such a constitutional amendment would abrogate the basic features of the Constitution as understood by the judges.46 The exact boundaries of the basic structure doctrine have, however, never been definitively delineated by the Supreme Court. In Kesavananda, the majority of seven judges issued five separate opinions, making it difficult to distill a single holding.47 Nonetheless, some political ideals suggested by individual justices as beyond Parliament’s constitutional amendment authority include the following: the supremacy of the Constitution,48 the secular nature of the state,49 separation of powers,50 federalism,51 national sovereignty,52 dignity of the individual,53 parliamentary democracy,54 and judicial review.55

After Kesavananda, the Supreme Court of India invoked the basic structure doctrine four other times to invalidate amendments made to the Constitution. In Indira Gandhi, the Supreme Court invalidated Article 329A(4) of the

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43 Id. at 216, 292, 555.
44 Id.
45 Id. at 214, 288, 289.
46 Id. at 216, 292, 555.
47 Id.
49 Id.
50 Id.
51 Id.
52 Id. at 454 (Shelat, J. & Grover, J.).
53 Id.
55 Id. at 767 (Khanna, J.).
Constitution as inserted by the Thirty-ninth Amendment, which insulated the election of a prime minister from judicial inquiry, on the ground that it was inconsistent with the fundamental doctrine of separation of powers.\textsuperscript{56} Next, in Minerva Mills, the Court voided Article 31C as inserted by the Forty-second Amendment, which had subverted constitutional rights to the Constitution’s directive principles and insulated from judicial review legislative enactments designed to implement the directives.\textsuperscript{57} Subsequently, the Court in Sambamurthy voided Article 371D(5) as inserted by the Thirty-second Amendment, which had given state governments the power to model or annul orders issued by the administrative tribunals.\textsuperscript{58} Finally, in Chandra Kumar, the Court invalidated Article 323A as inserted by the Forty-second Amendment, which had removed the jurisdiction of the High Courts in instances when the administrative tribunals had jurisdiction and directed that the decisions of the tribunals be subject to the writ jurisdiction of the High Courts.\textsuperscript{59}

Essentially, pursuant to the Kesavananda doctrine, the Indian Supreme Court has the power to invalidate constitutional amendments that violate \textit{unwritten} basic features of the Indian Constitution as discerned by the judges.\textsuperscript{60} According to the Court, such drastic amendments may only be introduced by a Constituent Assembly, not through piecemeal individual constitutional reforms by Parliament.\textsuperscript{61}

\textbf{B. Canada and the Legislative Override}

The Canadian Charter of Rights and Freedoms was enacted and entrenched within the Constitution Act in 1982 after a prolonged legislative debate to enshrine the judicial protection of human rights within the folds of Canada’s supreme law.\textsuperscript{62} The judiciary is imbued with the power to invalidate statutes it finds incompatible with the Charter, as Section 52 of the Constitution Act provides that such enactments would be “of no force or effect.”\textsuperscript{63} Express
amendments to provisions of the Charter require extraordinary consensus among lawmakers. The Charter may only be amended with the agreement of the Federal Parliament and 2/3 of the provincial legislatures, as long as the legislatures represent at least 50% of the Canadian population.

Despite the cumbersome amendment process, the inclusion of Section 1 and Section 33 in the Charter was intended to prevent the Supreme Court of Canada from transitioning into the American paradigm where the judiciary is the default final adjudicator of constitutional norms. Section 1 of the Charter subjects the rights it guarantees to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Supreme Court of Canada held in R. v. Oakes that pursuant to this provision, the onus is on the government to prove that such a legislative impairment of fundamental liberties serves a pressing and substantial objective that cannot be achieved by other less invasive means. In the event that the impugned law fails to meet the rigor of the Oakes test, the Canadian judiciary has the power to invalidate the legislation as null and void.

In spite of the judicial nullification, Section 33 of the Canadian Charter provides the Federal Parliament or provincial legislatures the power to override the court’s decision. The legislature may expressly declare that an enactment shall operate "notwithstanding" a Charter violation and re-enact the original law in the face of judicial objection. The effect of this "notwithstanding" clause expires at the end of five years but may be re-enacted indefinitely every five years for the suspension to remain in force. Nevertheless, Section 33 does not operate against all the rights and freedoms contained in the Canadian Charter. Specifically, Charter provisions protecting language rights, mobility rights, and the right to an election every five years are not subject to legislative suspension.

As an act of protest against the Charter that it did not assent to, the Quebec provincial government passed a legislative amendment in 1982, shortly after

64 Id. § 38(1).
65 Id.
67 Canadian Charter § 1.
69 Canadian Charter § 33(1).
70 Id. § 33(3).
71 See id. § 16 (protecting language rights), §§ 3–5 (protecting voting rights), § 6 (protecting mobility rights). None of these rights is subject to the Section 33(1) override.
the enactment of the Charter, which added the Section 33 “notwithstanding” clause to all the provincial enactments in force, thereby insulating the province from Charter review. This blanket override was, however, not renewed five years later. Similarly, when the Supreme Court of Canada invalidated a Quebec law that permitted only the use of the French language on outdoor signs, the province once again responded with an override, but allowed the suspension to lapse again five years later.

In 1986, the Saskatchewan provincial government passed a labor statute ordering government employees on strike to return to work. To prevent a successful Charter challenge on the ground that this enactment would be in violation of the workers’ freedom of association, the government used the Section 33 override prospectively to preempt any adverse judicial ruling. In the most recent use of the legislative override, the Alberta provincial government in 1999 passed a statute limiting marriage to a union between a man and a woman and employed the “notwithstanding” clause to insulate the enactment from Charter review. This override was renewed in 2006.

C. The United Kingdom and the Declaration of Incompatibility

The Human Rights Act was passed in 1998 to incorporate the European Convention of Human Rights (ECHR) domestically within the United

72 See Act Respecting the Constitution Act, 1982, R.S.Q., ch. L-4.2 (1982). This Act repealed all of Quebec’s legislation and then re-enacted it with newly affixed “notwithstanding” declarations.

73 Ford v. Quebec, [1988] 2 S.C.R. 712. In 1993, the Quebec National Assembly enacted a new legislation permitting other languages to be used on outdoor signs so long as French was the predominant language. See Act to Amend the Charter of the French Language, R.S.Q., Ch. C-11, amended by 1993 S.Q., ch. 40, s. 18 (Can.).

74 See Gardbaum, supra note 2, at 726.

75 Saskatchewan Bill 144 of January 1986 contained a Section 33 override as the Saskatchewan Court of Appeal had earlier struck down similar legislation on the basis that it infringed freedom of association as guaranteed in the Charter, but that decision was later reversed by the Supreme Court in RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460.

76 Marriage Amendment Act, S.A. 2000 ch. 3. For a fuller discussion, see Kent Roach, Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States, 4 INT’L J. CONST. L. 347, 367 (2006). The use of the override, and its renewal, by the Alberta government was, in all probability, unconstitutional. The recognition and registration of marriage is a federal concern, and only the Federal Parliament may legislate such matters. This position was confirmed by the Supreme Court of Canada, in Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698.
Kingdom, and the legislation came into effect on October 2, 2000. Unlike the United States Bill of Rights or the Canadian Charter of Human Rights and Freedoms, amending this Act requires only a simple majority vote in Parliament. Furthermore, there is a unique statutory obligation under the Human Rights Act for the minister sponsoring a new Bill to inform Parliament whether the new legislation is compatible with Convention rights. The executive evaluation for ECHR compatibility is also complemented with a process of legislative review, which takes the form of the Joint Committee on Human Rights, a parliamentary committee tasked with advising Parliament on the compatibility of a legislative bill with established human rights norms.

The linchpin of the Human Rights Act that distinguishes the United Kingdom's model of human rights enforcement from the other constitutional systems lies in the intricate statutory interrelationship between Section 3 and Section 4. According to Section 3, courts must interpret and give effect to legislation in a way that is compatible with Convention rights "[s]o far as it is possible to do so. . ." In the event that a compatible reading may not be achieved, pursuant to Section 4, British courts may issue a formal declaration of incompatibility. Notwithstanding this declaration, the impugned legislative provision is not nullified and continues to have full effect and validity. Furthermore, despite the issuance of such a declaration, Parliament is under no legal duty to amend the legislation; but if he/she so chooses, the relevant minister is empowered under Section 10 to make a remedial order that could be "fast tracked" through both houses of Parliament. The traditional

78 Id.
79 Human Rights Act § 19.
81 Human Rights Act § 3(1).
82 Id. § 4(2) reads, "[i]f the court is satisfied that the [legislative] provision is incompatible with a Convention right, it may make a declaration of that incompatibility."
83 Id. § 4(6).
84 See id. § 10(2), sched. 2. Essentially Schedule 2 provides that ordinarily, a remedial order drafted by the minister must be approved by resolution by each house of Parliament. If the minister deems the matter an emergency, the minister need only present the order to Parliament after it has been made. The remedial order will cease to have effect after 120 days if it is not subsequently approved by parliamentary resolution. In any case, all acts pursued under the remedial order will remain valid even if the remedial action is not approved by both houses of Parliament. Id.
concept of parliamentary sovereignty is preserved as the decision to amend impugned legislation remains a prerogative of Parliament.

There were early indications that the courts would be aggressive in reading statutes in a way that would make them compatible with the ECHR. In *R. v. A (No. 2)*, a majority in the House of Lords, against parliamentary intent, used its Section 3 interpretive powers to subject a penal provision that restricted the admissibility of evidence about a complainant's sexual history to an additional "implied provision" that evidence necessary to ensure a fair trial was nonetheless still admissible. However, the House of Lords did not take long to retreat from this zealous interpretive mode. In *Anderson*, the House of Lords refused to use Section 3 to read into a sentencing provision a new rule that the Home Secretary may not impose a prison tariff that exceeds a judicial recommendation on the ground that this would conflict directly with Parliament's intentions. Instead, the Law Lords declared that the Home Secretary's role in deciding the length of imprisonment terms was incompatible with the ECHR.

The initial hesitation over the judicial use of a declaration of incompatibility could be attributed to the fact that paradoxically, Section 4 was perceived to be a more activist interpretive tool. Section 4 requires courts to sit in judgment over the propriety of Parliament's actions. In contrast, Section 3 was a more discreet legal tool that allows courts to "read in" words or "read down" a statute to achieve a Convention compatible reading of a legislative provision. It is thus not surprising that the Lord Chancellor, when ushering the Human Rights Bill through Parliament, exhorted the courts to "strive to find an interpretation of legislation which is consistent with [C]onvention rights so far as the language of the legislation allows and only in the last resort to conclude that the legislation is simply incompatible with them." His Lordship was confident that "in 99 [percent] of the cases . . . there will be no need for judicial declarations of incompatibility." As it turns out, Section 3

86 This trend first took root in *In re S.* [2002] UKHL 10 (appeal taken from Eng.). In that case, the English Court of Appeal decided to read into the Children Act a range of new powers and procedures by which courts could superintend the implementation of care orders by local authorities, a result the legislation was clearly drafted to avoid. This decision was unanimously overturned by the House of Lords.
88 *Id.*
has become the stronger provision, whereby judges can amend the statute for themselves instead of waiting passively for the legislature to do so following a Section 4 declaration. In observance of the constitutional mantra that Parliament is supreme, the British judges are now readier to use Section 4 to note their discomfort with any legislative violations of human rights than apply a Section 3 re-interpretation.

D. New Zealand and the Interpretive Mandate

The Bill of Rights (NZBOR) was passed in 1990 to herald a new age of human rights protection in New Zealand. Section 6 of NZBOR contains an interpretive mandate that inspired the current section 3 of the United Kingdom Human Rights Act: "[w]herever an enactment can be given a meaning that is consistent with... [the] Bill of Rights, that meaning shall be preferred to any other meaning." Similar to Section 1 of the Canadian Charter, Section 5 of the NZBOR contains a general limitations clause which allows for the enshrined rights to be limited by legislation that can be demonstrably justified in a free and democratic society.

In Moonen, the Court of Appeal, in obiter held that Section 5 of the NZBOR “necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights...,” although to date it has never issued such a formal declaration. Although the NZBOR was silent on whether the judiciary can issue a judicial indication of
inconsistency, the Court has taken the bold step of reading in such powers.\footnote{After \textit{Moonen}, the New Zealand Parliament passed the Human Rights Amendment Act 2001, which expressly permits courts to issue a formal declaration of inconsistency when a statute infringes against a person’s right against discrimination enshrined under section 19 of the NZBOR. \textit{See} Human Rights Act 1993, \textit{amended by} Human Rights Amendment Act 2001, § 92J.} As declared by the \textit{Moonen} Court, “[s]uch judicial indication will be of value should the matter come to be examined by the [United Nations] Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.”\footnote{\textit{Moonen}, [2000] 2 N.Z.L.R. at 23–24.} Even though the Court of Appeal had read in the power to issue a declaration of inconsistency in the absence of express statutory authorization, it is still bound by Section 4 of NZBOR, which provides that courts do not have the power to hold legislative provisions impliedly invalid or decline to apply such a provision of the enactment.\footnote{Section 4 of the NZBOR provides that “[n]o court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) [h]old any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective.” N.Z. Bill of Rights Act, \textit{supra} note 12, § 4.} Thus, like the United Kingdom’s courts, New Zealand’s judiciary is not vested with the power to nullify legislation, nor is it allowed to assume that the passage of the Bill of Rights renders older enactments invalid.

Like its British counterpart, the New Zealand judiciary has also been “creative” in its use of the Section 6 interpretive mandate, to the chagrin of some commentators.\footnote{See James Allan, \textit{Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990}, 9 OTAGO L. REV. 613 (2000); John A. Smillie, \textit{The Allure of “Rights Talk”: Baigent’s Case in the Court of Appeal}, 8 OTAGO L. REV. 188, 191 (1994).} In \textit{Baigent’s Case}, the New Zealand Court of Appeal created a public law compensating aggrieved applicants under the NZBOR and confining statutory immunities for the Crown to damages sought in private law.\footnote{Simpson v. Attorney-General [Baigent’s Case], [1994] 3 N.Z.L.R. 667, 1994 N.Z.L.R. LEXIS 654 (C.A.).} While this decision marked a brave and laudable leap taken by the judiciary to advance human rights enforcement in New Zealand, the critique that the judicial creation of a remedy absent in the Bill of Rights ran against statutory directions remains unanswerable.\footnote{Smillie, \textit{supra} note 100, at 191.} But like the United Kingdom judiciary, the New Zealand courts have not been consistently adventurous in the use of their interpretive mandate. In \textit{R. v. Phillips}, the judiciary was confronted with a penal provision that stated that an accused found in possession of restricted drugs should, “until the contrary was proved,” be
deemed to be in possession of the drugs for illegal purposes. In a very terse judgment, the Court of Appeal refused to "read down" the legal burden imposed on an accused to an evidential burden of production, on the ground that such an interpretation would be "strained and unnatural."

IV. EVALUATING THE ALTERNATIVE MODELS

A. India and the Basic Features Doctrine

The intentions of the majority on the Kesavananda court in reading implied limitations on the constitutional amending powers of Parliament were undoubtedly benevolent. These judges were convinced that the creation of the Kesavananda doctrine was necessary to protect the fundamental core of the Constitution from the tyranny of a transient supermajority in Parliament, and their concerns were not unfounded.

In 1975, the most egregious display of Parliament’s abuse of its constitutional amending powers surfaced. The Allahabad High Court had set aside Prime Minister Indira Gandhi’s election in her constituency for electoral misconduct. Pending appeal, Parliament, composed of Gandhi’s Congress Party members, passed the Thirty-ninth Amendment, which inserted Article 329(A) into the Constitution, thereby canceling the judgment of the Allahabad High Court and insulating all electoral disputes vis-à-vis the Prime Minister from any form of judicial inquiry. In a subsequent challenge that this constitutional amendment violated the Kesavananda doctrine, the Supreme Court responded by invalidating the Thirty-ninth Amendment on the basis that the basic structure of the Constitution precluded the legislature from placing any individual above the law, but reversed the Prime Minister’s criminal conviction on the merits.

However well-founded the fears of legislative excesses and benign the intentions of the Kesavananda judges, the existence and development of the basic features doctrine have their perils. The power to annul constitutional amendments approved by a supermajority in Parliament marks the zenith of judicial activism; ultimately it falls on the Court’s own sense of self-restraint.

104 Id. at 182.
105 See Ramachandran, supra note 40.
107 Id.
that prevents the judiciary from running amok with this doctrine. Given that the basic features are unwritten in the Constitution, it falls to the judges’ discretion to determine the scope of this doctrine. As illustrated in *Kesavananda*, even the judges have difficulty reaching a consensus on its parameters. While admittedly the judges have been restrained in the use of the doctrine to invalidate constitutional amendments, there is no guarantee that a future court would share such judicial modesty. Given that this doctrine is judge-made, there is nothing that can stop a future Court from expanding the breadth of the Constitution’s basic structure to cover the entire Constitution such that this living document, which is to govern the future affairs of men, is held hostage to the nostalgic whims of a few judges. Furthermore, the theoretical possibility that such fundamental changes may nonetheless be effected at a new Constitutional Assembly is mythical at best. It is ludicrous to suggest that India, or any nation-state, must ratify a whole new Constitution whenever Parliament decides to make changes to the Constitution that the judges deem fundamental.

This basic structure thus stands in the way of future constitutional reform. With the instability brought about by constant short stints of minority governments, there have been calls within the political circles for India to switch over to a presidential form of government. Even if this suggestion is effected into practice by a constitutional amendment, the *Kesavananda* doctrine may still pose an insurmountable obstacle. Justice Reddy in *Kesavananda* had accepted the premise that a parliamentary form of government was a basic feature in India. If a majority on the bench accepts his view, any such constitutional amendment would be doomed at conception. Similar concerns would surface if India decides to dismantle its federal system in favor of a unitary state. Furthermore, one can imagine that India may accede to treaties in the future that require the submission of certain human rights or economic disputes to the jurisdiction of supernational bodies. It is not inconceivable that a reactionary panel of the Supreme Court may consider such amendments a violation of the state’s national sovereignty, a basic feature of the Constitution.

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111 *Id.* at 366 (Sikir, C.J.).
112 *Id.* at 454 (Shelat, J. & Grover, J.).
Admittedly, with the abandonment of the basic features doctrine, concerns that a transient supermajority in Parliament may once again abuse its constitutional amending powers remain. However, Parliament must at least regularly face the consequences of its decisions at the ballot box, and unpopular constitutional amendments may be reversed by a new government pursuant to a regime change. Following the legislative excesses of the Congress Party in the mid-1970s, the people quickly rebuffed the Gandhi government in the 1977 elections, and the new Janata government immediately repealed various drastic constitutional amendments passed by its predecessor that truncated fundamental liberties. However, the judges on India’s highest court are not electorally accountable to the public; with the persistence of the basic features doctrine, there is nothing the citizenry or its elected representatives can do to reverse an egregious decision save convening a new Constituent Assembly. Repealing a constitutional amendment is not easy, but at least it is simpler than convening a new Constituent Assembly. The choice of rejecting the basic features doctrine is not about endorsing supermajoritarian tyranny, nor is it just about living with the “lesser evil” of temporary legislative excesses. Given that both the judiciary and the legislature are capable of making constitutional blunders, the proposal to abandon the Kesavananda doctrine is ultimately about choosing one formula for initiating constitutional change over another.

B. Canada and the Legislative Override

The beauty of the Canadian Charter of Rights and Freedoms lies in its structural design, which permits the legislature to engage in a dialogue with the judiciary about human rights protection in Canada. Adjudication permits an aggrieved applicant to take an “appeal from the rough-and-tumble of politics to a ‘forum of principle,’ but [S]ection 33 confers a right of final appeal back to a consequently more informed and conscientious legislature.” Professor Kent Roach explains that, during the course of constitutional adjudication, “courts remind legislatures of values that otherwise might be neglected and

114 Peter W. Hogg & Allison 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. 75 (1997).
legislatures respond (via Section 1 and 33) by expanding or refining the terms of the debate by making clear why rights have to be limited in particular contexts." Judicial invalidation of a legislative enactment is thus an occasion for the legislature to have a "sober second thought" about whether it is absolutely necessary to pursue its stipulated goals by the current means. However, F.L. Morton has questioned whether the legislature can always reinstate the old law after judicial nullification. According to him, certain issues like abortion and gay rights cut across normal lines of partisan cleavage and are so divisive that their invalidation would only create a new "judicially-created policy status quo." Elaborating on this point, Morton argues that these issues often involve a tussle between two minority camps and an apathetic majority; in such instances the legislature’s preferred choice is to do nothing, as legislative activity on behalf of either camp would trigger the wrath of the other. Thus, when the Supreme Court of Canada invalidated the abortion laws or when it held that Alberta’s failure to prohibit sexual orientation discrimination is a Charter violation, the judiciary inevitably imposed a new status quo on the government by tipping the legislative balance in favor of one minority group interest over another. While I would agree with Morton that the judiciary indeed changes the policy status quo when it invalidates controversial legislations, I consider this power transfer a virtue rather than a vice. The bureaucratic inertia that must be overcome before a ruling government can be provoked to act on human rights issues is often foreboding. In instances where the rights of politically marginalized minorities conflict with the wishes of a sizable segment of society, the vested interest of the administration is to preserve the status quo until the pressure for

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116 ROACH, supra note 66, at 250.
119 Id. at 26.
120 In R. v. Morgentaler, [1988] 1 S.C.R. 30, the Supreme Court of Canada struck down restrictions on abortion in the Criminal Code as unduly depriving pregnant women of their liberty and security as protected under Section 7 of the Charter. In 1990, a bill introducing a less restrictive abortion law was introduced in Parliament, but it was defeated by a tie vote in the Senate. Since then, the divisive issue of abortion has not been revisited by the legislature.
initiating reforms is greater than the convenience of leaving things unchanged. By allowing judges to invalidate legislative enactments on the basis that the statutes violate human rights norms, the benefit of legislative inertia is bestowed upon the aggrieved political minority, as it is given a tangible remedy while Parliament is forced to deliberate and decide whether to use the Section 33 override. If Parliament is unable to garner a simple majority vote to overturn a judicial decision, it only goes to show that the court’s decision is not egregious enough for such a legislative consensus to be reached. So far as the judiciary has imposed a new policy status quo on the legislature, it is just an inevitable trade-off for this system of human rights enforcement. As long as the ordinary legislative process can correct judicial errors, any concern about an overzealous judiciary is largely misplaced.

In the same vein, Professor Tushnet expresses concern that political “veto points” in the Canadian parliamentary system can allow a minority in Parliament to estop a majority in the legislature from using the Section 33 override; in this sense, weak-form review can escalate into strong-form review easily. Nonetheless, the concern over veto points is not one exclusive to judicial review. Veto points are present when Parliament seeks to pass any legislation, not just the legislative override. Building coalitions and consensus among lawmakers to obtain an ordinary majority in Parliament is part and parcel of the legislative process. As long as the legislative override does not pose a greater obstacle to Parliament than the ordinary legislative processes, any concern that popular whims have been thwarted has to be accepted as a necessary quid pro quo for a constitutional system where Parliament can be forced to address contentious social issues and take political responsibility for its actions.

On the other hand, some might argue that the inclusion of a “notwithstanding” clause when compared to the United States constitutional framework is regressive so far as it allows a simple legislative majority to interpret judicially interpreted constitutional norms, thus making the Bill of Rights vulnerable to majoritarian excesses. However, this argument might take us too far as it would also rule out the use of constitutional amendments, since they can equally be abused by a supermajority to the detriment of

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123 Tushnet, supra note 3, at 834.
individuals. Given that both the judicial and legislative branches are susceptible to making constitutional blunders, "[o]ne cannot choose . . . between formal amendment and legislative override as the preferred method for revising judge-made constitutional policy simply by a priori reasoning about rights and democracy." One can only make a practical judgment about the relative competence of these imperfect institutions in safeguarding rights while preserving democracy. The brilliance of the Section 33 override lies in the fact that the suspension is temporal. Its automatic lapse after five years allows a newly elected government to decide afresh whether to renew the legislative override. The duration of the override is also in accordance with the temporary electoral mandate of the current government to invoke this power in furtherance of the public good, and it allows the judicial decree to be reinstated by default if a subsequent legislature lacks the popular mandate to extend the override. This system of constitutional review thus marks the best of both worlds: it provides the means by which an independent branch of government can address a difficult and possibly divisive human rights issue, yet permits popularly elected officials to respond to the judicial action in the course of ordinary politics.

In response to the charge that judicial invalidation of legislative enactments would fetter the range of options the legislature may have to rectify the unconstitutionality of the status quo, the Canadian judiciary has been receptive to issuing delayed, general declarations of invalidity against impugned enactments. In *Eldridge v. British Columbia*, the Supreme Court of Canada held that British Columbia’s failure to provide sign language interpreters to the deaf, when necessary for effective communication in the provision of essential medical services, constituted an unreasonable violation of a person’s right to equality. Nevertheless, the Court issued a general declaration of invalidity that would take effect after six months so that the

128 Tushnet, *supra* note 33.
129 The suspended declaration was first introduced in Canada by the Supreme Court in the Manitoba Reference, *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, to overcome the emergency created by the Manitoba legislature’s failure over ninety years to fulfill its constitutional duty of enacting bilingual statutes, thereby avoiding the legal chaos that would accompany the creation of a “legal vacuum.” See Bruce Ryder, *Suspending the Charter*, 21 SUP. CT. L. REV. 267 (2003).
government had time to coordinate the activities of various institutions in order to explore its options and formulate an appropriate response. General declarations give the political branches the flexibility to fashion a response that would take into account their oft limited resources, while suspended or delayed declarations would give them time to select the optimum means to comply with Charter requirements. In this way, dialogue between the legislature and the judiciary is enhanced, and while the former is compelled to confront a social issue at a time not of its choosing, Parliament is nonetheless provided with the flexibility to consider and execute the precise means by which compliance shall take effect.

Section 33 is, however, not without its structural weakness. First, it permits legislatures to use the override prospectively even before the courts have issued an adverse ruling. So far as Section 33 is used to make legislative enactments "bulletproof," courts are excluded from the Charter dialogue at the outset and do not have the opportunity to provide the legislative branches with independent insight as to how a more Charter-compliant legislation may be crafted. Second, provincial legislatures may abuse the override. It is not inconceivable that the state of Mississippi would have rapidly overturned the decision in Brown v. Board of Education, had a "notwithstanding" clause been available. Thus, if a legislative override is introduced into a country's bill of rights, as an alternative safeguard, another clause should be inserted to allow the federal government via a supermajority vote to overturn a provincial exercise of the override. This would allay any concerns that an errant province would get away with any flagrant violation of human rights within its own borders.

C. The United Kingdom and the Declaration of Incompatibility

Unlike the contemporary American model of constitutional review, the United Kingdom's model of human rights protection disperses the duty of superintending rights more widely by establishing opportunities and obligations for the executive and legislative branches to evaluate the compatibility of impending legislation with constitutional norms. This

131 Id.
133 See Canadian Charter § 33.
135 See discussion supra Part III.C.
alleviates the concern, associated with the American paradigm, that judicial
review debilitates decision-making by leading the political branches to enact
laws without regard to constitutional considerations.\textsuperscript{136} Thus, this intra- and
inter-institutional reflection of rights allows for a critical examination of the
relative merits of a piece of legislation by injecting a broader spectrum of
perspectives into the constitutional calculus.\textsuperscript{137}

Professor Gardbaum has also made a measured defense of the Human
Rights Act as the optimal constitutional response to the countermajoritarian
feature of judicial review.\textsuperscript{138} Unlike the Canadian Charter, the United
Kingdom's Human Rights Act does not permit the legislature to override a
Convention right before a judicial ruling has been issued;\textsuperscript{139} in this sense, the
absence of a preemptive legislative strike would "ensure both that the political
costs of an override are not too low and that the legislative debate is informed
by the judicial view."\textsuperscript{140}

Notwithstanding the merits of the Human Rights Act, the British model of
constitutional review is less than ideal. First, there is an unsatisfactory tension
between the interplay of Sections 3 and 4.\textsuperscript{141} An aggressive use of Section 3
would render Section 4 otiose; a habitual use of judicial declaration that has
no actual legal bite would reduce the Bill of Rights to a mere "paper tiger."\textsuperscript{142}
The current compromise seems to be that the British courts will not use
Section 3 to contradict the clear words or necessary implication of the
legislation,\textsuperscript{143} nor will they engage in legal reform that would have spillover
effects in other fields that require legislative coordination and policy
coherence.\textsuperscript{144} While this interpretation is a reasonable reconciliation of
Sections 3 and 4, it is not the only possible reading. A regressive court could
return the United Kingdom to a model of pure legislative supremacy.

\textsuperscript{136} Tushnet, supra note 33.
\textsuperscript{138} See Gardbaum, supra note 2.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 759.
\textsuperscript{141} See Conor Gearty, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION (2004); Conor A.
Gearty, Reconciling Parliamentary Democracy and Human Rights, 118 L.Q. Rev. 248 (2002);
\textsuperscript{142} Howard Leeson, Section 33, The Notwithstanding Clause: A Paper Tiger?, in JUDICIAL
Second, the declaration of incompatibility is unsatisfactory to a victorious complainant; the law remains effective and enforceable against him, and he may seek no compensatory redress.\textsuperscript{145} Under the Human Rights Act, Parliament retains the legal right to legislate in a manner that the courts deem incompatible with human rights norms, as the issuance of a Section 4 declaration does not affect the continued validity, operation, or enforcement of the impugned provision.\textsuperscript{146} Although the Section 10 remedial provision allows a minister to make swift changes to the Act in question, there is no legal duty for him to do so. The judicial issuance of a Section 4 declaration does provide some form of political impetus for the executive to make legislative amends; however, this pressure would only translate into legislative action if popular opinion were aligned with that of the Court. Returning to my earlier example of \textit{Brown} in American jurisprudence,\textsuperscript{147} if that case had been decided in an environment where the Supreme Court's decree was merely advisory, de jure racial segregation would have probably remained part of the U.S. legal landscape for at least another decade after the judgment was issued. In the end, the complainant who has been vindicated in court would have to bear the burden of legislative inertia until the political branches review the status quo.

Third, a declaration of incompatibility may have more "bite" in the United Kingdom than it would have in other common law jurisdictions such as the United States. In the United Kingdom, a complainant who is confronted with a ministerial refusal to remedy contested legislation may bring his grievances before the European Court of Human Rights in Strasbourg.\textsuperscript{148} To avoid the political embarrassment from an adverse ruling issued by the ECHR, which the United Kingdom is by treaty bound to heed, the British government may prefer to resolve the matter domestically and make changes to the law before its hand is forced by the supernational tribunal. On the other hand, in countries such as the United States where the government is not treaty-bound to respect the rulings of another supernational human rights tribunal, it is conceivable that the legislature would flagrantly ignore any advisory recommendations issued by the courts. Judicial chiding from the bench would become mere hollow voices lost in the political wilderness.

\textsuperscript{145} See Human Rights Act § 4(6) (providing that "[a] declaration under this section ('a declaration of incompatibility')—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made").
\textsuperscript{146} Id.
\textsuperscript{147} See supra note 134 and accompanying text.
\textsuperscript{148} See Harrington, supra note 77.
D. New Zealand and the Interpretive Mandate

Like the British model of human rights protection, parliamentary supremacy is preserved in New Zealand as the judiciary has neither the authority to invalidate legislation nor to refuse to apply an enactment it deems unconstitutional.\textsuperscript{149} Even if the Court of Appeal decides to issue regular declarations of inconsistency, these declarations in no way affect the legislature's prerogative to decide whether to abide by the Court's recommendation.\textsuperscript{150} Professor Jock Brookfield was the first to suggest the idea of a declaration of inconsistency in New Zealand.\textsuperscript{151} Given that Section 4 of NZBOR only prohibits the courts from declining to apply a legislative provision or holding that a legislative enactment has been impliedly repealed, revoked, or rendered invalid or ineffective, it is open to the judiciary to read in any powers not expressly excluded. Not only should this judicial input not be perceived as gratuitous criticism, the courts should be lauded for enhancing the deliberative decision-making process of the legislature by providing non-binding independent insight to a separate branch of government.

Unfortunately, NZBOR shares structural flaws similar to the British Human Rights Act. Given the limitations of New Zealand courts, Parliament ultimately enjoys the benefit of legislative inertia; it can choose not to respond to judicial exhortations. The successful litigant is not provided with a tangible remedy upon the conclusion of his suit, and his grievance is once again left to the vagaries of the political process.

Moreover, recent court decisions raise the inherent dilemma that the New Zealand judiciary faces over the application of Sections 4 and 6.\textsuperscript{152} While Section 6 seems to be a qualified parliamentary mandate to uphold human rights norms more aggressively, Section 4 serves as a leash to restrain any judicial zeal. As argued by Andrew Butler, "[S]ection 6 operates on the principle of the malleability of language and encourages the courts to exploit that feature," while Section 4 works on the understanding that statutes have static meanings which may not be circumvented by the Bill of Rights.\textsuperscript{153} It is

\textsuperscript{149} See N.Z. Bill of Rights Act, \textit{supra} note 12.
\textsuperscript{152} Andrew S. Butler, \textit{The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain}, 17 OXFORD J. LEGAL STUD. 323 (1997).
\textsuperscript{153} Andrew S. Butler, \textit{Strengthening the Bill of Rights}, 31 VICTORIA U. WELLINGTON L. REV. 129, 133 (2000); Butler, \textit{supra} note 152.
thus inevitable that the coexistence of these conflicting statutory principles would lead to the haphazard application of the Bill of Rights. Furthermore, since Section 4 of the NZBOR saves any legislative enactment from invalidation or implied repeal, the general limitations clause enshrined in Section 5 would easily fall into disuse. Crown counsels who prefer not to prolong litigation would quickly concede that a legislative provision is incompatible with the Bill of Rights since it would be upheld in any case. Judges, in turn, would not be explicit about whether they were upholding the impugned enactment because of the Section 4 decree or because it survived a Section 5 scrutiny and is deemed a reasonable limit on a protected human right. Even where a Section 5 analysis is employed, some judges have only given it cursory attention. For example, Reille v. Police concerned a dispute where Parliament removed an accused’s right to a jury trial for summary convictions, prima facie in violation of Section 24(e) of the Bill of Rights, which granted the right to jury trials for offenses with the possibility of imprisonment terms extending beyond three months.  

By way of justification for this legislative encroachment of the protected right, Chief Justice Eichelbaum only tersely mentioned that “no doubt behind the legislative policy was the view that the Court system could not accommodate the luxury of jury trials for the very common type of prosecution for assault suitably brought under the Summary Offences Act.”  

While I agree with the Court’s decision, I take issue with the scant attention paid by the Chief Justice to a Section 5 analysis. In justifying this limit as reasonable, the Court could have canvassed arguments that the empaneling of juries for minor offences may incur undue delay both for the Crown and the accused, a concern not to be quickly dismissed since the right to trial without undue delay is equally guaranteed under the NZBOR.

Similarly, in In re Bennett, a prisoner’s right to vote was unequivocally jettisoned by the Electoral Act of 1956, and his NZBOR claim was summarily dismissed under Section 4, without any judicial inquiry into whether such a rights limitation was reasonable under Section 5.  

Professor Kent Roach has argued that the “reasonable limits” clause is actually the true engine of dialogue between the legislature and the judiciary as it is the means by which the legislature demonstrates to the court that its limitations on rights advance

155 Id. at 591.
156 N.Z. Bill of Rights Act, supra note 12, § 25(b).
important objectives that cannot be achieved by less drastic means.\textsuperscript{158} So far as the New Zealand judiciary has downplayed the importance of a Section 5 analysis, the political branches have been unnecessarily spared the opportunity to justify and demonstrate to the court and the public at large how important and necessary these limits are in a free and democratic society.

\textbf{V. DIALOGIC MINIMALISM IN THE UNITED STATES}

Despite the attractive features found in the Canadian constitutional arrangements, it is unlikely that the United States would, in the near future, restructure its Bill of Rights to be like that of its neighbor. American legal scholars, past and present, have thus foisted the onus to make changes on their Supreme Court.\textsuperscript{159} Judges are thus urged to make doctrinal changes to their jurisprudence so as to cabin the sweeping scope of judicial review. These doctrinal alternatives include Thayerism,\textsuperscript{160} Ely’s theory of democracy reinforcement,\textsuperscript{161} and originalism.\textsuperscript{162} It is beyond the scope of this Article to explore and evaluate all the various theories. Suffice to say that the problems with these theories have been explored exhaustively by other writers.\textsuperscript{163}

My purpose is to focus on Cass Sunstein’s model of judicial minimalism. Professor Sunstein has argued in favor of a doctrine of “decisional minimalism,” whereby judges would say “no more than [what is] necessary to justify an outcome, and leaving as much as possible undecided. . . .”\textsuperscript{164} According to Sunstein, judges should issue decisions that are both “narrow” and “shallow”: narrow in the sense that courts should resolve the case at hand and not formulate broad rules that govern related cases,\textsuperscript{165} and “shallow” in the sense that courts should attempt to reach “incompletely theorized agreements” and avoid enunciations of basic principles.\textsuperscript{166} For Sunstein, wide and deep decisions should only be issued to cement a preexisting social consensus; in

\begin{itemize}
  \item \textsuperscript{158} ROACH, \textit{supra} note 66, at 156.
  \item \textsuperscript{159} See infra notes 161–63.
  \item \textsuperscript{160} James B. Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law,} 7 \textsc{Harv. L. Rev.} 129, 144 (1893).
  \item \textsuperscript{161} \textsc{John Ely, Democracy and Distrust} (1980).
  \item \textsuperscript{162} Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems,} 47 \textsc{Ind. L.J.} 1 (1971).
  \item \textsuperscript{163} See Michael C. Dorf, \textit{Legal Indeterminacy and Institutional Design,} \textsc{78 N.Y.U. L. Rev.} 875 (2003); Harry H. Wellington, \textit{The Nature of Judicial Review,} \textsc{91 Yale L.J.} 486 (1982).
  \item \textsuperscript{164} SUNSTEIN, \textit{supra} note 10, at 3–4.
  \item \textsuperscript{165} Id. at 10.
  \item \textsuperscript{166} Id. at 11.
\end{itemize}
the interim, judicial deliberation is best conducted in the shadows of legal uncertainty.\textsuperscript{167} Therefore, Sunstein’s brand of minimalism is credited for making judicial errors less frequent and less damaging.\textsuperscript{168} In a society as diverse as the United States, decisional minimalism also serves as a strategy of social inclusion, whereby courts minimize the alienating effects of adjudication by only affirming the social vision of the winning party to the extent it is necessary to decide the case, thereby preserving shades of legal ambiguity for the losing party to take his grievances to another forum.\textsuperscript{169}

Despite its virtues, the use of narrow holdings nevertheless threatens predictability, stability, and other rule of law values. Given that Sunstein has deftly explained how the merits of gradualist decision-making outweigh its vices when courts are not confident about the substantive content of wide rules, I shall not further belabor the point as I am in full agreement on this issue.\textsuperscript{170} Notwithstanding this, I do not share Sunstein’s enthusiasm for “shallow” rules. Sunstein’s primary reservation with “deep” legal reasoning lies in the possibility of judicial errors. As he argues, “[j]udges are not . . . trained as philosophers, and judges who make theoretically ambitious arguments may well make mistakes that are quite costly, especially in constitutional cases, where their arguments are (at least theoretically!) final.”\textsuperscript{171} Sunstein’s discomfort with deep legal reasoning lies in his assumption that the judges’ theoretical muses are final and binding. While “wide” rules may foreclose democratic deliberation and reduce congressional latitude in responding to unpopular decisions, “deep” rules do not necessarily suffer from the same vice. There is nothing antidemocratic about judges tracing their decisions to deeper legal values so long as these principles are not fleshed out as broad rules that foreclose democratic participation by the elected branches. The primary concern in the United States over judicial review is the legislative difficulty in overturning constitutional decisions.\textsuperscript{172} So far as judges do not bind the hands of the elected representatives, courts should be permitted to use theoretical principles to urge the legislature by way of dicta toward a certain course of action that avoids constitutional infamy. Moreover, the use of dicta premised on legal principles avoids the vices of incompletely theorized

\textsuperscript{167} \textit{Id.} at 57.
\textsuperscript{168} \textit{Id.} at 49–50.
\textsuperscript{170} SUNSTEIN, supra note 10, at 243.
\textsuperscript{171} \textit{Id.} at 256.
\textsuperscript{172} See discussion supra Part II.
agreements which, as conceded by Sunstein, may often lead to unfairness and inconsistency as they are by their very nature unprincipled.173

Pursuant to my model of judicial restraint, which I have termed “dialogic minimalism,” the Supreme Court of the United States can sidestep accusations of democratic debilitation by pronouncing “narrow” rules while at the same time providing some certainty to the law by using “deeply” reasoned, non-decisive dicta to initiate a dialogue with the political branches about the theoretical principles underpinning the Constitution. In announcing “narrow” and “deep” holdings, jurists can avoid excessive interference with legislative power while having the opportunity to fully explain the rationale and assumptions behind their decisions. As these judicial recommendations are by way of dicta, they are not binding on the legislature or the executive; but the political branches are nonetheless provided with some judicial input, which they can use to consider and respond in their own time to the constitutionality of other related legislative or executive action not presented before the Court.

In Part IV of this Article, I argued that the Canadian model of judicial review is the optimal constitutional model available in balancing legislative finality with judicial protection of human rights, as it permits the legislature and the courts to enter into a two-way human rights discourse. In the United States, given that a constitutional decision cannot be reversed by ordinary political processes, a dialogue between the two branches of government, as opposed to either a judicial or legislative monologue, can only take place if the courts make aggressive use of nondecisive dicta to trigger a conversation about the fundamental public values that should shape the social polity. While the courts should not be the situs of the nation’s constitutional dialogue, their independent stature permits them to be the trigger in stimulating and nudging the elected branches into a political deliberation on human rights.

This mode of constitutional reasoning is also not foreign to the Supreme Court’s jurisprudence. In fact, as illustrated in recent case law, it is often employed when the Court is confronted with the most divisive issues facing American society: gay rights, presidential war powers, and the separation of church and state.

In Lawrence v. Texas, a majority of the Court invalidated a Texas statute prohibiting same-sex sodomy on the ground that it violated a person’s constitutional right to privacy, as enshrined in the Due Process Clause.174 What is interesting about this case is that the majority avoided addressing the

173 Sunstein, supra note 10, at 245.
case on the basis of the Equal Protection Clause, an alternative argument put forward by the petitioners.\(^{175}\) While the ostensible reason for avoiding the Equal Protection argument is that the Court wanted to dodge any question of whether such a criminal prohibition would be upheld if opposite-sex sodomy were equally prohibited,\(^ {176}\) a more credible reason for this reservation is that the Court wanted to avoid answering definitively whether the disallowance of same-sex marriage would be unconstitutional. After all, if the moral disapprobation of homosexual conduct is not a legitimate state interest under the Equal Protection Clause, taken to its logical conclusion, the denial of marriage to same-sex couples would also fall afoul of its constitutional mandate. The Court’s narrow pronouncement under the Due Process limb thus allows the democratic debate on gay marriage to continue. But to assume that the Court was silent on same-sex marriage would be an understatement. By way of nondecisive dicta, Justice Kennedy went on to expound a vision of the principles underlying the Fourteenth Amendment: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”\(^ {177}\) While the Court was careful to bracket its decision by holding that this case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,”\(^ {178}\) the Court had, albeit opaquely, noted its inclination by declaring that constitutional protections were afforded to “personal decisions relating to marriage, procreation, contraception, [and] family relationships . . .”\(^ {179}\) and subsequently held that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”\(^ {180}\) Thus, without forcing the hand of state legislators, the Supreme Court has gently hinted where its proclivities lie.

In *Hamdi v. Rumsfeld*, a Supreme Court plurality held that the federal government had the *statutory* authority to detain an American citizen captured on foreign soil during active military operations as an enemy combatant, but a majority agreed that the constitutional guarantee of due process granted him the right to contest the factual basis of his detention before a neutral decision-

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\(^{175}\) *Id.* at 575.

\(^{176}\) *Id.*

\(^{177}\) *Id.*

\(^{178}\) *Id.* at 578.

\(^{179}\) *Id.* at 574.

\(^{180}\) *Id.*
The Court left many key constitutional issues undecided, preferring instead to rest its decision on the narrowest ground possible. First, the plurality did not decide whether the president has plenary authority to detain American citizens as enemy combatants pursuant to Article II of the Constitution, choosing instead to find statutory authority for the detention. Second, while the majority explicitly declared that Hamdi must be given a meaningful factual hearing, it did not specify the exact trial procedures that must be followed, save the preservation of certain fundamental liberties such as the right to notice of the charges, the right to respond, and the right to an attorney. Notwithstanding this limited holding, the majority was emphatic about the constitutional principles that have to be observed by the government in times of war:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

In essence, the Court was refuting the government’s incredible claim that in times of war, the Court must forgo any individual examination of a detainee’s petition and is restricted to scrutinizing the legality of the broader detention scheme. In articulating this principle, the Justices were in essence signaling to the government that the judicial branch was aware that cases of a similar nature would come before the Court in the coming years, and it would not abdicate its constitutional duty during this trying moment in American history. The Court would intervene where necessary to safeguard at home the same values of freedom and democracy that the country was fighting for abroad. Absent the suspension of the writ of habeas corpus by Congress, the Court emphasized that the judiciary would play the “necessary role in maintaining

\[182\] Id. at 517.
\[183\] Id. at 533–34.
\[184\] Id. at 536 (citation omitted).
\[185\] Id. at 528.
this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."

Finally, in *McCreary County v. American Civil Liberties Union*, the Supreme Court in another 5–4 decision held that the Establishment Clause prohibited the posting of the Ten Commandments at courthouses. Justice Souter, for the majority, held that if the government acts with the predominant purpose of advancing religion, the First Amendment would be violated. Notwithstanding this holding, the majority limited the potential breadth of this legal test by conceding, albeit in a footnote, that "Establishment Clause doctrine lacks the comfort of categorical absolutes. In the special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious." Arguably, this concession allowed the Court to avoid the hostility it would face if it has to exorcise the invocations of God in public speeches by public officials, "the public references to God on coins, decrees, and buildings, [and] the attention paid to the religious objectives of certain holidays, such as Thanksgiving." Also, by not expressly clarifying what these "special instances" or "good reasons" were, the Court did not have to provide a preemptive constitutional shelter for these forms of religion-motivated state action, thus allowing the Establishment Clause jurisprudence to develop on a case-by-case, fact-driven basis. Despite laying down a legal rule that was circumscribed by a vague exception, the Court went on to explore the principle underpinning the Establishment Clause so as to provide guidance to litigants in future cases: "the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion...."

The essence of the Court's doctrine on separation of church and state was thus to guard against the civic divisiveness that follows when the government weighs in on one side of the religious debate. The Court seems to suggest that where

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186 Id. at 536.
188 Id. at 2732–33. In the companion decision of *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854 (2005), the Supreme Court in a 5–4 decision upheld the display of monuments inscribed with the Ten Commandments on the grounds of the Texas State Capitol. Justice Breyer dissented from the *McCreary* majority as he believed that the monuments in question did not have a predominately religious message, but were intended to convey a moral message that reflected Texas's historical heritage.
189 *McCreary County*, 125 S. Ct. at 2735 n.10.
190 See *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring).
191 *McCreary Co.*, 125 S. Ct. at 2742.
192 Id.
civic divisiveness would not arise as a result of a de minimis religion-motivated state action, the Court would not preempt the democratic process and prohibit its expression in public space.

Pursuant to my model of dialogic minimalism, American courts can use “narrow” and “deep” holdings to engage the legislatures over the constitutionality of divisive issues facing American society. “Narrow” holdings do not interfere excessively with legislative power, while “deep” reasoning affords an independent branch of government the opportunity to fully explain the rationale behind its decisions and to recommend, by way of dicta, a constitutionally responsible course of action that the legislature and executive can observe in related issues not presented before the Court.

VI. INTERPRETIVE OBLIGATIONS IN THE UNITED KINGDOM AND NEW ZEALAND COURTS

The constitutional arrangements in the United Kingdom and New Zealand have been evolving, and it is not unforeseeable that the highest courts in both states could some day have the power to invalidate statutory instruments, subject to a parliamentary override. Until that fateful day dawns, the onus is on these Commonwealth courts to make doctrinal adjustments to their jurisprudence and ameliorate the structural deficiencies in their statutory bills of rights. Essentially, these adjustments would involve the judges taking their interpretive mandate under the respective human rights instruments more seriously and avoiding the austerity of tabulated legalism.193

In this part of the Article, I evaluate the key human rights decisions handed down by the British House of Lords and the New Zealand Court of Appeal. I also argue that the judiciary should be more “creative” in the use of its interpretive mandates and as such, issue declarations of inconsistency only when (1) a statutory reinterpretation would be textually impossible; (2) the “reading in” of words would be tantamount to the enactment of a specific and detailed quasi-legislative code; and (3) a linguistic construction would affect the coherence of other related statutory regimes not at issue. These elements are elaborated on in turn.

In R. v. A. (No. 2), the House of Lords held that a statutory scheme, which limited the admissibility of evidence of a complainant’s sexual history in a rape trial to instances when a trial judge in his discretion believed that the

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similarity between the sexual history of the complainant and the sexual behavior at issue could not be coincidental, were in violation of an accused’s right to a fair trial. The majority, contrary to Parliament’s intentions of limiting admissibility of evidence to three narrowly prescribed legislative gateways, held instead that the Court’s interpretive obligation under Section 3 required it to read the statute subject to an “implied provision” that evidence necessary to ensure a fair trial was nonetheless still admissible. To the chagrin of some commentators, Lord Steyn boldly suggested that “it will sometimes be necessary to adopt an interpretation which linguistically may appear strained,” and a declaration of incompatibility should not be issued unless a “clear limitation on Convention Rights is stated in terms.”

The Steynian interpretive mode is also visible in some of the New Zealand jurisprudence. In R. v. Poumako, the New Zealand Court of Appeal, albeit in obiter, favored the use of the Section 6 interpretive mandate to “read down” the retrospective effect of a criminal statute. In that case, a majority on the Court of Appeal had proposed that the retrospectivity of a “home invasion” statute be confined to the two-week time gap between the coming into force of the statute and another companion penal legislation. More significantly, the majority held that “[i]t is not a matter of what the legislature (or an individual member) might have intended. The direction is that wherever a meaning consistent with the Bill of Rights can be given, it is to be preferred.”

Richard Ekins decries this mode of interpretation as it “authorise[s] the de facto entrenchment of judicial moral views in the face of clear legislative judgment.” He would instead prefer courts to resolve ambiguity in favor of a rights-consistent interpretation when such a competing and (equally convincing) interpretation is available. First, it is a gross exaggeration to suggest that the Steynian interpretation of Section 3 would necessarily lead to a de facto entrenchment of judicial moral views; it was open to the Parliament

195 Id. at 68.
198 Id. at 69.
201 Id. at 703.
202 Id. at 702 (emphasis added).
203 Ekins, supra note 196, at 648.
to harness a mere simple majority to reinstate its original views in clearer
terms via a statutory amendment but it chose not to. Any displeasure Ekins
feels toward the end result should be targeted at Parliament and not the courts.
Second, Ekins' interpretive theory, while tenable, is no different from judicial
modus operandi prior to the enactment of the Human Rights Act; it would be
a strange state of affairs if Parliament's grant of a new interpretive license to
the courts to adopt a "possible" interpretation under Section 3 rather than a
"reasonable" interpretation, were read as a mere preservation of the status quo.

Unfortunately, neither the British nor New Zealand courts have been
consistent in applying the Steynian interpretive model. The House of Lords
in R. (Anderson) v. Secretary of State refused to use its Section 3 powers to
read into Section 29 of the Criminal (Sentences) Act of 1997 a new rule that
the Home Secretary may not impose a prison tariff that exceeded a judicial
recommendation. Particularly striking is Lord Steyn's ostensible turnabout
in R. (Anderson) v. Secretary of State, where he held that "Section 3(1) is not
available where the suggested interpretation is contrary to express statutory
words or is implication necessarily contradicted by the statute." This
statement of law is an unfortunate concession, as on the facts, such an
interpretation is expressly contradicted by the statutory text: Section 29 of the
impugned Act expressly states that the Parole Board shall not make a
recommendation for release of a life prisoner "unless the Secretary of State has
referred the particular case . . . to the Board . . .," and even on such a
recommendation, the Secretary of State "may," and not "shall," release the
prisoner. Since the legislation leaves it to the home secretary to decide
whether or when to refer a case to the parole board, and he is free to ignore its
recommendation, the decision on how long the convicted murderer should
remain in prison remains at the discretion of the home secretary. Thus, to read
Section 29 to preclude the participation of the home secretary would be
contrary to the text of the statute, and the Law Lords need not have conceded
the interpretive ground they gained in R. v. A. (No. 2). Similarly, the New
Zealand Court of Appeal in R. v. Phillips, refused to "read down" a legal
burden imposed on an accused found with restricted drugs to prove he did not
have them for the purpose of sale, to an evidential burden of production on the

has since passed the Criminal Justice Act 2003, which allows the courts and not the Home
Secretary to determine the minimum term to be served in prison by a person convicted of murder.
205 Id. at 894.
206 Id. at 843.
basis that this interpretation would be "strained and unnatural." An opposite conclusion was rightly reached by the House of Lords in *Lambert*, a case with a similar reverse onus provision.

In *In re S.*, the House of Lords overturned the Court of Appeal's reliance on Section 3 to read into the Children Act of 1989 a new procedure by which courts could supervise and monitor care orders by local authorities so as to protect children and their families against the violation of their rights. More significantly, Lord Nicholls, who wrote the lead judgment concluded that "a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment." This concession, taken at face value, would also seem to overturn Lord Steyn's dicta in *R. v. A.* (No. 2). After all, a fundamental feature of the impugned legislative provision in *R. v. A.* (No. 2) was to confine trial judges' discretion in admitting prior sexual history evidence; so far as the statutory scheme is now subject to a more generic implied provision, a cardinal principle of the original scheme has been breached. While I would agree with the House of Lords that Section 3 should not have been employed by the Court in this instance, I would concur with the decision on a separate ground. On the facts, the Court of Appeal read in a laundry list of procedural guidelines by which courts could supervise the local authorities: the trial judge could identify the crucial elements of a care plan at an early stage and elevate them to "starred status," and if the "starred" milestones were not achieved within a reasonable time, the local authority had the duty to inform the child's guardian *ad litem* who could then return the case to court. Although such a construction does not conflict with the express words in the statute, Section 3 should not have been employed by the courts here because it entails the courts enacting lengthy and detailed changes to the law that were more suited for Parliament to make. The essence of judicial law-making under the common law has been the crafting of legal principles that guide the course of future case law development; it is not the drafting of a technical quasi-legislative code.

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208 R. v. Lambert [2001] UKHL 37, [2002] 2 A.C. 545. The House of Lords held that it was possible to use Section 3 of the Human Rights Act to read down a legal burden imposed on an accused to a mere evidential burden of production. *Id.*
210 *Id.* at 313.
211 *Id.* at 309.
that spells out a series of extensive procedures by which parties can exercise their new rights and duties, which was exactly what the Court of Appeal in In re S. purported to do. Only the government has the expertise to craft extensive technical details into a statutory framework. Section 3 should not have been employed in In re S. because the type of legal reform it entailed was beyond the traditional competence of the courts and should remain a prerogative of Parliament.

In Bellinger v. Bellinger, the House of Lords declined to interpret "female" under a matrimonial statute to include a transsexual female and preferred to issue a Section 4 declaration that the legislative restriction of marriage to opposite-sex couples, as determined at birth, was incompatible with the ECHR. In my view, this case was rightly decided not because the re-definition of marriage was a contentious political thicket that the courts may not venture into, nor that it would be against Parliamentary intent, but because the recognition of gender assignment for the purpose of marriage would affect many other aspects of human activity such as education, child care, gender-specific criminal offenses, and prison regulations; and it would be more prudent for these issues to be "considered as a whole and not dealt with in a piecemeal fashion."

In a similar case, the New Zealand Court of Appeal held by a majority of 3–2 that legislative prohibition of gay marriage was not discriminatory, but it unanimously agreed that the Marriage Act confined marital unions to opposite sex couples, and a drastic re-interpretation to include same-sex couples was foreclosed by Section 4 of the NZBOR. Although marriage was not expressly confined to male-female partnerships, the Court was right to have avoided using the interpretive mandate to confer the right to marry on homosexual couples. However, unlike the judges of the majority, I believe that this institutional lacuna is discriminatory, and that the Court should have issued a proclamation of inconsistency instead, as Judge Thomas seemingly

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did.\textsuperscript{218} However, while Judge Thomas rested his decision on the basis that a linguistic interpretation to permit gay marriage would be against parliamentary intent,\textsuperscript{219} I would argue against such a statutory construction of the Marriage Act because the recognition of same-sex marriage affects other areas of law concerning child care, family, housing, inheritance, and tax; and it would be more appropriate for Parliament to consider these issues as a whole rather than have the judiciary make piecemeal reforms in an interlocking regime that requires coherence. Given that courts are limited to resolving legal disputes that are brought before them, where piecemeal judicial rectification would affect statutory coherence in many related fields, Parliament is the only branch of government that is competent to usher in such comprehensive reforms. A declaration of incompatibility was thus the appropriate mechanism to signal to the ruling government that change was due.

In Ghaidan v. Godin-Mendoza, a majority of the House of Lords upheld the decision of the Court of Appeal to use its Section 3 interpretive power and accord same sex couples in a stable relationship the same status “as if they were” husband and wife when succeeding to a tenancy left behind by the deceased partner.\textsuperscript{220} The statute did not contain any express words excluding protection for same sex partners.\textsuperscript{221} Furthermore, unlike Bellinger, incremental gap filling in this instance also did not affect the coherence of other statutory regimes not at issue, nor did it amount to the drafting of a lengthy, extensive, quasi-legislative code as contemplated in In re S.\textsuperscript{222}

\section*{VII. Conclusion}

In the foregoing discussion, I have argued for the American courts to issue “narrow” rules with “deep” reasoning during constitutional adjudication and for the British and New Zealand courts to be more aggressive in their use of the interpretive mandate. This naturally opens me to the charge that I am essentially seeking to replicate in these “deficient” constitutional systems the Canadian model of constitutional review so far as it is jurisprudentially


\textsuperscript{219} Id. at 541–42.

\textsuperscript{220} Ghaidan v. Godin-Mendoza [2004] UKHL 30, [2004] 3 W.L.R. 113. Paragraph 2(2) of Schedule 1 of the Rent Act 1977 confers the right to succeed to a statutory tenancy on a person who was “living with the original tenant as his or her wife or husband.” Rent Act, 1977, c.42 sched. 1, para. 2(2).

\textsuperscript{221} Rent Act, para. 2(2).

possible. This point is well taken and I hereby conclude by explaining why I defend this vision of constitutional democracy.

The dialogic structure of judicial review as espoused by the Canadian system allows for both the courts and the legislature to be partners and fellow interlocutors in upholding the rule of law. Neither the judiciary nor the legislature is a perfect institution. The former is composed of unelected officials unaccountable to the public, and the latter is vulnerable to the whims of a hostile majority. Judicial apologists may argue that the courts have a "democratic mandate" either conferred by their Constitution or their human rights instrument to interpret rights. However, this argument, while true, in no way answers the critique that courts are less accountable to the public than elected legislators for the decisions they make and are capable of making egregious blunders of moral judgment. On the other hand, judicial skeptics pay scant attention to the fact that because legislators are responsible to the electorate, they generally focus on majoritarian needs and are open to neglecting the politically vulnerable. Given that both institutions are equally fallible, an ideal vision of constitutional democracy must accommodate the role of both institutions in providing binding and independent contributions to societal discourse on rights and freedoms. While neither institution can be relied upon exclusively to further the demands of a rights-based democracy, the risks of constitutional blunders are reduced when both institutions are allowed to act in tandem to defend the rights for all.

As a United States Supreme Court constitutional decision can only be overturned by a constitutional amendment enacted by supermajoritarian legislative consensus, the Court's issuance of "narrow" rules reduces the foreclosing effect of such a decision, thus providing Congress or the states with the legislative space to respond to those contentious issues raised but not decided by the judiciary, thereby allowing the democratic debate on these decisions to continue.

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224 See A. v. Sec'y of State [2004] UKHL 56, [2005] 2 A.C. 68, para. 42 (Lord Bingham holding that "I do not in particular accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament . . . . But the function of independent judges charged to interpret and apply the law is universally recogniz[ed] as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.").
226 See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Dred Scott v. Sandford, 60 U.S. 393 (1856).
227 See Tushnet, supra note 3.
issues to continue in the political arena. The provision of “deep” reasoning adds independent judicial insight to this discourse but in no way settles the discussion. On the other hand, for the Commonwealth courts that do not have the power to invalidate statutory instruments, an aggressive use of their interpretive mandate would allow an independent branch of government to provide a binding remedy to aggrieved applicants sidelined by the ordinary legislative process. Even if the judicial decision is later reversed by an ordinary legislative enactment, the fuller debate on the legislative floor that aggressive use of the interpretive mandate would entail ensures that the result was reached after political deliberation and not legislative inadvertence. The gamble, though not an unreasonable one, is that legislatures tend to take the path of least resistance and will usually not disturb the status quo imposed by the Court unless they deem it egregious, thus allowing the courts to enforce a bill of rights with a tangible but not lethal bite.  

Judicial apologists might argue that this dialogic model of judicial review, where Parliament can prevail by reinstating its original view with a simple majority, may cure human rights violations that occur as a result of parliamentary neglect or inadvertence but does not prevent an errant Parliament from intentionally contravening fundamental rights, especially against the interests of political minorities, with the majority’s blessings.

This concern is what Lord Bingham was driving at when he defended the House of Lords’ landmark declaration that the indefinite detention without trial of suspected foreign terrorists was unlawful. Perhaps a more extreme example of Parliament’s misuse of its popular mandate would be one where the legislature, with the support of an electoral majority, uses its override to suspend elections indefinitely, ostensibly in the name of national security. This concern was recently considered by the House of Lords in R. (Jackson) v. Attorney General. The main issue in that case was whether the passage of the 1911 Parliament Act was valid. Enacted against the objections of the second legislative chamber, this statute permitted subsequent bills, other than a Money Bill and a bill extending the maximum duration of Parliament beyond

229 A. v. Sec’y of State [2004] UXHL 56, [2005] 2 A.C. 68 (holding that indefinite detention of foreign terrorist suspects was both a disproportionate interference with a person’s right to liberty and a discriminatory measure in breach of his right to equal protection under Article 5 of the ECHR).
231 Id. at 271.
five years, to come into effect without the approval of the House of Lords. 232 While the Law Lords in R. (Jackson) v. Attorney General unanimously agreed that the 1911 Act was validly enacted, the individual members expressed profound discomfort with the constitutional implications of the decision. 233 Taken to its logical conclusion, the House of Commons with the support of the electoral majority could use the bypassing procedure provided in the 1911 Act to suspend all U.K. elections indefinitely by using a two-stage process, first by removing the prohibition against term limit extensions in the 1911 Act, and then by passing legislation extending the duration of Parliament indefinitely. 234 Faced with the possibility of such an egregious use of its popular mandate by Parliament, it is understandable if one has sympathies for Lord Steyn’s claim of judicial supremacy in R. (Jackson) v. Attorney Gen.: [T]he supremacy of Parliament is still the general principle of our constitution ... In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is [sic] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. 235

Lord Steyn’s views are consonant with Professor Ronald Dworkin’s claim that judges should have “final interpretive authority” as they have been more principled and reliable at making good decisions about democracy and any version of democracy that requires “deference to temporary majorities on matters of individual right ... is brutal and alien.” 236 To allow the judiciary to withdraw wholly, on its own accord, certain issues from democratic

232 Id. at 272.
233 Id. at 286–87, 302.
234 Lords Nicholls, Hope, Carswell and Baroness Hale opined that such an alteration would not be allowed as it would be against the parliamentary intentions of the 1911 Act. As pointed out by Michael C. Plaxton in The Concept of Legislation: Jackson and Others v. Her Majesty’s Attorney General, 69 MOD. L. REV. 249, 257 (2006), such an argument is legally dubious since there is no reason to privilege the intentions of the Parliament in 1911 over subsequent Parliaments’ intentions.
235 R. (Jackson), [2006] 1 A.C. at 302–03.
decision-making and to permit these irreversible and electorally unaccountable views to govern exclusively, we would ultimately only be exchanging the risk of one form of abuse over another.\textsuperscript{237} Dworkin and Lord Steyn's optimism assumes that the judiciary would always be staffed by a "bevy of Platonic Guardians"\textsuperscript{238} who would labor tirelessly to defend the demands of democracy. Given that the language of any bill of rights is malleable, counter-examples where a reactionary judiciary can frustrate a democratic state's transition toward proportional representation in Parliament is equally conceivable. Where unwritten constitutional fundamentals are defined by the courts alone, there is no guarantee that the result reached would always be morally palatable. Furthermore, even if the judiciary is allowed to have the de jure final voice in constitutional adjudication, where its views go against the common opinion of both the legislature and the electorate, it is highly unlikely that the court's judgment would be enforced in any case. The sad reality is that while the courts can perhaps save the people from their legislature, with neither purse nor sword, there is no way the judiciary can save the people from themselves. If Parliament, with the overwhelming support of the people, decides to dismantle every vestige of democracy in a modern state, it would be futile for the judiciary to stand as a bulwark and resist an electorate gone mad.

The resources and expertise of the judiciary would thus be better utilized if they were harnessed to structure a constitutional dialogue with the legislators. The replication of a dialogic model of judicial review in the United States, the United Kingdom, and New Zealand would require a paradigm shift in critical thinking; that is, neither legislative nor judicial supremacy is the only viable constitutional alternative. This halfway house allows the judiciary, while enforcing the bill of rights, to bind the legislature and executive to a certain constitutional standard; at the same time, it does not displace the legislature's prerogative to revise or reject the judicial views if they so choose, without resorting to an onerous constitutional amendment. In the absence of structural changes to each respective bill of rights, for the Americans this would require judges to exercise more self-restraint and relinquish some of the rule-making powers they have come to accept they possess.\textsuperscript{239} Conversely, British and New Zealand judges have to be more receptive to "reading" legislation in a way that they deem compatible with human rights and not

\textsuperscript{237} Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (remarking "[w]e are not final because we are infallible, but we are infallible only because we are final").

\textsuperscript{238} LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

always relying on the legislative chambers to make the necessary statutory amendments, for the latter may not do so.

As Justice Iacobucci rightly remarked in the Supreme Court of Canada’s Vriend decision:

[A] great value of judicial review and this dialogue among the branches is that each of the branches is made . . . accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation . . . . This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.\(^{240}\)
