Protecting Human Rights in a Democracy: What Role for the Courts?

Michael J. Perry
University Professor of Law, Wake Forest University
PROTECTING HUMAN RIGHTS IN A DEMOCRACY:
WHAT ROLE FOR THE COURTS?

Michael J. Perry

Contents

Three Assumptions ...

The Fact of Indeterminacy, the Need for Specification ...

The Case for Empowering Courts to Protect Human Rights ...

The Case against Empowering Courts to Protect Human Rights: The Twofold Argument from Democracy ...

Splitting the Difference ...

Judicial Power in Canada and the United Kingdom ...

An Argument for Judicial "Penultimacy" ...

The Thayerian Plea for Judicial Deference ...

Concluding--but Inconclusive--Postscript:
What Role for the Courts in the United States? ...
PROTECTING HUMAN RIGHTS IN A DEMOCRACY:
WHAT ROLE FOR THE COURTS?\(^1\)

Michael J. Perry\(^2\)

The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge [Learned] Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.\(^3\)

In the period since the end of World War II, a growing number of democracies have empowered their judiciaries to enforce constitutional norms, many of the most important of which are human rights norms that, as articulated, serve principally to limit the power of government.\(^4\) The Constitution of the Republic of South Africa (1996) provides an important

\(^1\) c 2002, Michael J. Perry. For helpful comments on an earlier draft, I am grateful to several friends and colleagues at Wake Forest and elsewhere, including the participants in three events where this essay was discussed: the Marbury Symposium at the Wake Forest University School of Law on October 4-5, 2002; a faculty workshop at the University of Illinois College of Law on December 3, 2002; and a faculty workshop at the Emory University School of Law on January 9, 2003. I owe a special debt of gratitude to Stephen Gardbaum and Rick Kay.

\(^2\) University Distinguished Chair in Law, Wake Forest University.

\(^3\) Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 24 (1962).

recent example of such judicial empowerment.\textsuperscript{5} This "global expansion of judicial power"\textsuperscript{6}--which has been called "one of the most significant trends in late-twentieth and early-twenty-first-century government"\textsuperscript{7}--has led, in the view of some commentators, to "the judicialization of politics".\textsuperscript{8} Some prominent legal scholars--most notably, Mark Tushnet and Jeremy Waldron--

\begin{itemize}

    In March 1997, about seven million copies of the new constitution in pocket book size were distributed in South Africa. Four million went to high schools, two million were made available at post offices and another million were distributed to the police, army, prisons, and through civil organizations. These copies of the constitution were available in all eleven official languages and were accompanied by an illustrated guide, \textit{You and the Constitution}, which, in thirty cheerfully illustrated pages, provided an introduction to the constitution.

    Murray, supra, at 837.


    \textsuperscript{8} Id. To say that there has been a "judicialization of politics" is not to say that there has been a "judicial usurpation of politics". There has not been a usurpation, because in Canada, South Africa, the United Kingdom, etc., it is not the courts themselves that have been the agents of judicialization but the political representatives of the people. Elsewhere, I have addressed the argument that in the modern period of American constitutional law, many important US Supreme
have recently argued that such government by judiciary, especially American-style judicial review, subverts the democratic ideal of government by the people and is therefore deeply problematic. Less prosaically, the claim is that government by a politically independent judiciary subverts the democratic ideal of government by the politically dependent, because electorally accountable, representatives of the people.

The question is more broadly relevant than ever, therefore, whether it is appropriate for the citizens of a liberal democracy to cede to their courts the power to oppose, in the name of one or more entrenched human rights norms, choices made by, or actions of, electorally accountable government officials. In pursuing this inquiry, two other, related questions inevitably emerge:

Court decisions about constitutional rights involve "the judicial usurpation of politics". See Michael J. Perry, We the People: The Fourteenth Amendment and the Supreme Court (1999).


10 On "electoral accountability"--which can be direct or indirect--see n. #.

11 One could ask the same question about entrenched norms that are not human rights norms; in the United States, for example, one could ask the same question about "separation of powers" norms, or about "federalism" norms. See, e.g., Jesse Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Supreme Court (1980). In this essay, however, I am interested only in human rights norms.

What about states that are not democracies: What role should their courts play in protecting human rights? The question is naive.

Where governments are authoritarian and repressive, where violations are serious, systemic, and brutal, courts are least relevant. Relative to Western democracies, the judiciary's competence to review executive or legislative action may be sharply reduced or eliminated, its jurisdiction limited, its judges subjected to threat or worse, No human rights revolution was ever achieved by court decree. The struggle for human rights becomes fully political, even fully military. In many states, then, courts will be at best marginal actors on human rights issues.
If some power to protect entrenched human rights should be ceded to the courts, how great ought the power to be in relation to the power of the other, electorally accountable parts of government? And in exercising the power ceded to them—a power to pass judgment on the choices and actions of electorally accountable government officials—should the courts defer as much as possible to those officials, or to some of them; or, instead, should the courts abjure such deference?

**Three Assumptions**

Three assumptions serve as the principal points of departure for my analysis in this essay. The first and most foundational assumption is there are human rights (i.e., human rights understood as a category of moral, as distinct from legal, rights). More precisely, the first assumption is twofold: that each and every human being is inviolable and that therefore some things ought not to be done to any human being and some things ought to be done for every human being. This is not a controversial assumption in the context of a liberal

---


13 To say that one is inviolable is to say that one is "not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault." 8 Oxford English Dictionary 51 (2d ed. 1989).

14 Or, at least, there are some things that presumptively ought not to be done to any human being and some things that presumptively ought to be done for every human being. See
democracy, because, as I have noted elsewhere, the foundational moral commitment of liberal democracy is to the true and full humanity of every human being--and, therefore, to the inviolability of every human being--without regard to race, sex, religion, etc. This commitment is axiomatic for liberal democracy.

Perhaps the litmus test of whether the reader is in any sense a liberal or not is Gladstone's foreign-policy speeches. In [one such speech,] taken from the late 1870s, around the time of the Midlothian campaign, [Gladstone] reminded his listeners that "the sanctity of life in the hill villages of Afghanistan among the winter snows, is as inviolable in the eye of almighty God as can be your own . . . that the law of mutual love is not limited by the shores of this island, is not limited by the boundaries of Christian civilization; that it passes over the whole surface of the earth, and embraces the meanest along with the greatest in its unmeasured scope." By all means smile at the oratory. But anyone who sneers at the underlying message is not a liberal in any sense of that word worth preserving.

Moreover, this foundational commitment to the inviolability of every human being is a principal ground of liberal democracy's further commitment to certain basic rights, understood as human


16 Samuel Brittan, "Making Common Cause: How Liberals Differ, and What They Ought To Agree On," Times Lit. Supp., Sept. 20, 1996, at 3, 4. Listen, too, to Herman Melville: "But this august dignity I treat of, is not the dignity of kings and robes, but that abounding dignity that has no robed investiture. Thou shalt see it shining in the arm that wields a pick or drives a spike; that democratic dignity which, on all hands, radiates without end from God Himself! The great God absolute! The centre and circumference of all democracy! His omnipresence, our divine equality!" Herman Melville, Moby Dick 126 (Penguin Classics ed. 0000). Cf. Charles Larmore, "The Moral Basis of Political Liberalism," 96 J. Philosophy 599, 624-25 (1999) (arguing that "our commitment to [liberal] democracy . . . cannot be understood except by appeal to a higher moral authority, which is the obligation to respect one another as persons").
Rights. Indeed, these two allied commitments--to the humanity/inviolability of every human being and to certain basic rights--are constitutive of liberal democracy; they are what make a democracy a "liberal" democracy.

The second assumption has two aspects, the first of which is that liberal democracies should protect human rights--and, for the most part, do protect them--in part by means of laws (legal texts) that articulate and thereby make explicit just what those things are, in the judgment of the citizens, that ought not to be done to any human being or that ought to be done for every human being (because each and every human being is inviolable). (Some of the laws may be national laws; some may be international laws to which a state has bound itself by treaty.) In particular, liberal democracies should and do articulate, in laws, what government ought not to do to any human being and what it ought to do for every human being (i.e., every human being within its jurisdiction). It scarcely seems controversial that a liberal democracy is better off if it articulates--and thereby makes explicit and clear, rather than implicit and unclear--the citizens' judgments about what human rights there are--their judgments, that is, both about what ought not to be done to any human being and about what ought to be done for every human being. One important benefit of doing so: By articulating a set of shared moral commitments, the citizenry constitutes itself as a moral community. A moral community is also, necessarily, a community of judgment: the shared moral commitments are a shared basis of moral judgment. By

---

17 As Charles Larmore has put the point: "The familiar constitutional rights of free-expression, property, and political participation, though no doubt serving to promote the goal of democratic self-rule, also have an independent rationale. They draw upon that most fundamental of individual rights, which is the right [of every person] to equal respect." Id. at 621.

18 I agree with Jeremy Waldron that "there is no necessary inference from the idea of rights or from the premises of a right-based moral theory to the desirability of judicially-enforced constitutional rights as a concrete political arrangement." Waldron, Law and Disagreement, n. #, at 214. Nonetheless, one may be committed both to the idea of human rights and to "judicially-enforced [human] rights as a concrete political arrangement." Whether or not the first commitment offers some support for (even though it does not entail) the second commitment, it seems clear that the second commitment makes little sense without the first.
articulating a shared basis of moral judgment--of political-moral judgment, to be precise--the citizenry constitutes itself as a community of political-moral judgment.\textsuperscript{19}

The second aspect of the second assumption is that some of the laws that articulate human rights should be and are--either as a formal, legal matter or, at least, as a practical, political matter--entrenched: laws that can be disestablished only by an extraordinary political act.\textsuperscript{20} Such entrenchment makes sense because a liberal democracy's commitment to (what it takes to be) human rights should not be up for grabs in its ordinary politics, but is one of the principal political-moral foundations of its ordinary politics. (As a commentator on the transition in South Africa has observed: "[An entrenched ] bill of rights was crucial . . . to the whole question of legitimacy of a post-apartheid regime. For its powerful symbolism would establish an arena not just for law, but would also be a definition of what is, and is not, legitimate in politics."\textsuperscript{21}) This is not to deny that in liberal democracies, ordinary legislation, as distinct from entrenched law, has an important role to play in protecting, and even in articulating, human rights--not least, human rights of the "welfare" sort.\textsuperscript{22}

\textsuperscript{19} For a discussion of the idea of a community of political-moral judgment, see Michael J. Perry, Morality, Politics, and Law 154 et seq. (1988).

\textsuperscript{20} An example of a law that is entrenched as a formal, legal matter: In the United States, the Constitution of the United States, which by its own terms cannot be amended by an ordinary political act. An example of a law that is entrenched as a practical, political matter: In the United Kingdom, the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is virtually inconceivable, as a practical, political matter, that in any foreseeable future the UK Parliament could (even if it wanted to, which is unlikely) renounce the United Kingdom's status as a signatory to the European Convention, which has come to have a quasi-constitutional status in the United Kingdom and throughout the rest of Europe.

\textsuperscript{21} Chanock, n. #, at 000.

\textsuperscript{22} On human rights of the "welfare" sort, see n. #.
The twofold second assumption--first, that liberal democracies should and do protect human rights in part by means of laws that articulate the citizens' judgment about what human rights there are and, second, that some of those laws should be and are entrenched--is not controversial in the context of most liberal democracies: Most liberal democracies do both things--most by means of constitutional law, some by means of a treaty that binds the government to an international human rights convention, and some by both means.


24 For example, the nations of Europe. See n. #.

25 It bears emphasis that the second assumption is that a liberal democracy should protect some human rights by means of entrenched laws whether or not the citizenry then chooses to empower courts to enforce those laws.

Does Jeremy Waldron disagree with the second assumption--that a liberal democracy should protect some human rights by means of entrenched laws? "[Philosophers] have reason--grounded in professional humility--to be more than usually hesitant about enactment of any canonical list of rights, particularly if the aim is to put that canon beyond the scope of ordinary political debate and revision." Waldron, Law and Disagreement, n. #, at 212. Does Waldron oppose, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms as a canonical list of rights for the European signatories to the Convention? Hostility to American-style judicial review need not involve hostility to the establishment of an entrenched bill of rights. See Thomas Christiano, "Waldron on Law and Disagreement," 19 Law & Philosophy 513, 537 (2000):

[A] bill of rights that is entrenched against quick democratic change is compatible with the democratic assembly being the ultimate interpreter of the rights. Waldron is right to say that some democratic control over the precise contours of the rights in question is desirable in light of serious disagreement on these matters. But such control is compatible with having a bill of rights, and versions of this control exist in some societies. To be sure, we must proceed on the basis of a trust in the assembly (and in the last analysis, the electorate) not to interpret the rights
Frank Michelman has inquired, in correspondence, whether the regime I mean to defend in this essay is one in which courts protect the human rights that, as a moral-realist matter, there are—or, instead, one in which courts protect the human rights that the citizens of a liberal democracy, probably through their elected representatives, have concluded that there are and have articulated in their fundamental law. This question seems to me to pose a false choice. The true choice, for a liberal democracy that wants its courts to protect entrenched human rights, is between a regime in which courts protect the human rights that the citizens have concluded that there are and have articulated in their fundamental law and a regime in which courts protect the human rights that the courts (judges) themselves believe that there are, whether or not those rights have been articulated in the fundamental law. My argument in this essay is for a regime of the former sort. I am skeptical that there is any persuasive argument for a regime of the latter sort. I concur in the judgment of William J. Brennan, Jr., that if in a liberal democracy courts are to wield the power to protect entrenched human rights, it is especially important that the human rights that the courts are empowered to protect be articulated in legal texts. In his H.L.A. Hart Lecture in Jurisprudence and Moral Philosophy, delivered on May 24, 1989 at University College, Oxford, Justice Brennan explained:

But if America's experience demonstrates that paper protections are not a sufficient guarantor of liberty, it also suggests that they are a necessary one, particularly in times of crisis. Without a textual anchor for their decisions, judges would have to rely on some theory of natural right, or some allegedly shared standard of the ends and limits of government, to strike down invasive legislation. But an appeal to normative ideals that lack any mooring in the written law . . . would in societies like ours be suspect, because it would represent so profound an aberration from majoritarian principles. . . . A text, moreover, is necessary not only to make judges' decisions efficacious: it also helps tether their discretion. I would be the last to cabin judges' power to keep the law vital, to ensure that it remains abreast of the progress in man's intellect and sensibilities.

out of existence. The written bill of rights on this account serves as a constraint only if the legislature can be trusted not to misinterpret those rights completely. Still, the fact of disagreement need not undermine the usefulness of a bill of rights nor need the presence of a bill of rights preclude discretion on the part of the democratic assembly to define the exact character of the rights.
Unbounded freedom, however, is another matter. One can imagine a system of governance that accorded judges almost unlimited discretion, but it would be one reminiscent of the rule by Platonic Guardians that Judge Learned Hand so feared. It is not one, I think, that would gain allegiance in either of our countries.26

One might be tempted to say, at this point, that if (a) the human rights that the citizens of a liberal democracy--Canada, say--have concluded that there are and have articulated in Canada's fundamental law bear little if any relation to (b) the human rights that there really are, then the courts, in protecting the articulated, putative human rights, wouldn't be protecting the human rights there really are. The opposition between (a) and (b), however, is misconceived. One should say, instead, that if (a) the human rights that most citizens of Canada have concluded that there are and have articulated in their fundamental law bear little if any relation to (b) the human rights that other, dissenting citizens believe that there really are, then the Canadian courts, in protecting the articulated, putative human rights, wouldn't be protecting the human rights that the dissenting citizens believe that there really are. True enough. But there is little if any reason to doubt that most of the basic human rights articulated in virtually every post-World War II liberal-democratic constitution as well as in the basic international human rights documents bear not a remote but a close relation to human rights that most of us--most of us who believe that there really are human rights--believe that there really are. (Of course, this is not to say that all the human rights that we believe that there are, are articulated in each such constitution or document, or that every right articulated in each such constitution or document is one we believe to be a true human right.) There is little reason to doubt, too, therefore, that if courts protect the rights articulated in those constitutions and documents, they will be protecting many of the human rights that we--most of us--believe that there really are.

Now, back to my assumptions, the third/final one of which is that the judges of the courts about which we are speaking should be and are--by law, culture, or both--politically

independent, in this sense: As a general matter, the judges could reasonably be expected to
decide human rights cases without regard to the preferences of the government, of one or another
political party, or of anyone else. The Constitution of the Republic of South Africa (1996) is
explicit about this. Section 165 ("Judicial Authority") provides in relevant part: "The courts are
independent and subject only to the Constitution and law, which they must apply impartially and
without fear, favour or prejudice. . . . No person or organ of the state may interfere with the
functioning of the courts. . . . Organs of state, through legislative and other measures, must
assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and
effectiveness of the courts." That a judge is politically independent in this sense does not mean
that her decisions would not be animated in part by her political-moral values. Moreover, that
we should want judges to be politically independent does not mean that we should want them, in
deciding cases, to ignore their political-moral values altogether; at least, it does not mean that we
believe that they will or even can ignore their values altogether.

Hereafter, when I refer to human rights, I mean entrenched human rights: human rights
articulated in entrenched legal texts. Moreover, I mean the main sort of human rights that
national constitutions and the international law of human rights protect: human rights i.
Articulated human rights of this sort are statements either of what government ought not to do to
any human being or of what it ought to do for every human being (because each and every
human being is inviolable). 27

This, then, is a fuller statement of the first question that engages me in this essay: Is it a
good idea, all things considered, for the citizens of a liberal democracy to empower politically

27 One of the things that government ought to do for every human being within its
jurisdiction, according to some articulated human rights, is take steps to prevent
nongovernmental ("private") actors from violating certain human rights. (One need not be a
governmental actor in order to be able to violate some human rights--for example, the right to
life.) So, to say that an articulated human right is, by its terms, a right "against government" is
not to deny that articulation of the right may be an indirect effort to protect human beings from
nongovernmental violations of those human rights that nongovernmental actors are capable of
violating.
independent courts to protect, against government, entrenched human rights--human rights articulated in entrenched legal texts?28 Or is it a bad idea, all things considered? As I said, two other, closely related questions quickly follow: If it is a good idea to give to politically independent courts some power to protect entrenched human rights, how great ought the power to be? And in exercising their power to protect human rights, what stance should the courts take up in relation to the electorally accountable government officials on whose work they are passing judgment: deferential or nondeferential?

The Fact of Indeterminacy, the Need for Specification

As articulated in a legal text, a human right is determinate in the context of a case in which the right is invoked--a case in which, let's assume, the relevant facts are clear and beyond controversy--if there is no room for a reasonable difference of judgment about what the right forbids or requires in the case.29 Some articulated human rights are highly determinate, in the sense that it is difficult to imagine any case (in which the relevant facts are clear and beyond controversy) in which there is room for a reasonable difference of judgment about what the right forbids (or requires)--that is, it is difficult to imagine any real as distinct from hypothetical case. Let's look at the European Convention for the Protection of Human Rights and Fundamental

---

28 Notice how different this question is from the question whether the citizens of a liberal democracy ever did give courts such a power. In the United States, it is famously controversial whether "We the People" ever did give the Supreme Court of the United States the power of judicial review, much less the power of judicial supremacy. I comment briefly on American-style judicial review in the final section of this essay.

29 See Kent Greenawalt, "How Law Can be Determinate," 31 UCLA L. Rev. 1, 29 (1990): "Few, if any, writers have asserted the most extreme thesis about indeterminacy--that no legal questions have determinate answers--in clear terms, and almost no one may actually believe that thesis . . ." See also Benjamin N. Cardozo, The Nature of the Judicial Process 129 (1921): "In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful."
Freedoms ("European Convention"), a legal text whose provisions articulating rights and freedoms have been incorporated into the domestic law of several European democracies, including, most recently, the United Kingdom. (The vehicle of incorporation in the United Kingdom was the UK Human Rights Act of 1998, which I discuss later in this essay.) Consider, for example, Article 1 of Protocol No. 6 to the European Convention: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Some other examples from the European Convention include Article 4 ("Prohibition of slavery and forced labour"), Article 1 of Protocol No. 4 ("Prohibition of imprisonment for debt"), and Article 3 of Protocol No. 4 ("Prohibition of expulsion of nationals"). It is relatively unproblematic to empower courts to protect provisions such as these, because there is little if any room for a reasonable difference of judgment about what such a provision forbids in any imaginable case. At the same time, it is not likely that judicial enforcement of provisions such as these will be necessary, at least in a contemporary, well functioning liberal democracy, because it is not likely that such a democracy will violate such provisions: Again, there is little if any room for a reasonable difference of judgment about what such a provision forbids in any imaginable case. In any event, the serious question is not whether it is a good idea or a bad idea (all things considered) for the citizens of a liberal democracy to give to politically independent courts the power to protect human rights that, as articulated in entrenched legal texts, are highly determinate. The serious question concerns human rights that are indeterminate.

As articulated in a legal text, a human right is indeterminate in the context of a case in which it is invoked--a case in which the relevant facts are clear and beyond controversy--if there is room for a reasonable difference of judgment about what the human right forbids (or requires) in the case. As it happens, most articulated human rights are indeterminate in the context of

---

30 See Janis, Kay, & Bradley, n. #, at 467-68 & 488-503. Even if a signatory to the European Convention has not incorporated the Convention into its domestic law, so that the Convention is not enforceable against the signatory by its own courts, the Convention is enforceable against the signatory by the European Court of Human Rights.

many of the cases, and many are indeterminate in the context of most of the cases, in which they are likely to be invoked. Consider, for example, Article 9 of the European Convention:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Similarly indeterminate provisions include Article 8 ("Right to respect for private and family life"), Article 10 ("Freedom of expression"), and Article 11 ("Freedom of assembly and association"). Some other provisions, though less indeterminate, are nonetheless indeterminate. (The indeterminacy of an articulated human right is a matter of degree.) Consider, for example, Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment." (Precisely when does "treatment" cross the line and become "inhuman or degrading"?) Consider, too, Article 5(3), which provides, in part: "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge of other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial. . . ." (Given the complexities and exigencies of a particular case, what is a "reasonable" time?) I could give many other examples, but there is no need to do so because the point is clear and undeniable: Most articulated human rights are indeterminate in the context of many of the cases in which they are likely to be invoked; with respect to most articulated human rights, there is room for a reasonable difference of judgment, in many if not most cases, about what the human right at issue forbids, even if the relevant facts are clear and beyond controversy. Indeed, in Canada, all the rights and freedoms articulated in

32 Articulating some human rights—articulating some of the things that ought not to be done (or that presumptively ought not to be done) to any human being, and some of the things
the Charter of Rights and Freedoms (which is a part of the Canadian Constitution) are

that ought to be done for every human being--in terms that are relatively indeterminate makes
good sense. See Brennan, n. #, at 426. See also Perry, We the People, n. #, at 29-30 (footnote
material in brackets):

The fact of legal indeterminacy--and the need, therefore, for specification--is one thing,
its value another: Why might a political community, or its representatives, want to establish an
indeterminate norm (a norm indeterminate in a significant number of the contexts that implicate it)? Why not issue only determinate norms? Discussing the matter of rules--in particular, legal
rules--H.L.A. Hart emphasized that "a feature of the human predicament . . . that we labour
under . . . whenever we seek to regulate, unambiguously and in advance, some sphere of conduct
by means of general standards to be used without further official directions on particular
predicament", it makes sense that many legal (and other) norms are relatively indeterminate. "If
the world in which we live were characterized only by a finite number of features, and these
together with all the modes in which they could combine were known to us, then provision could
be made in advance for every possibility. We could make rules, the application of which to
particular cases never called for a further choice. Everything could be known, and for
everything, since it could be known, something could be done and specified in advance by rule. .
. . Plainly this world is not our world . . . This inability to anticipate brings with it a relative
indeterminacy of aim." [Id.] The point is not that (relatively) determinate norms cannot be
achieved. [They can. One way to do so, writes Hart, "is to freeze the meaning of the rule so that
its general terms must have the same meaning in every case where its application is in question.
To secure this we may fasten on certain features present in the plain case and insist that these are
both necessary and sufficient to bring anything which has them within the scope of the rule,
whatever other features it may have or lack, and whatever may be the social consequences of
applying the rule in this way." Id. at 129.] The point, rather, is that determinacy ought not
always to be a goal. [This is not to say that determinacy ought never to be a goal: "To escape
this oscillation between extremes we need to remind ourselves that human inability to anticipate
the future, which is at the root of this indeterminacy, varies in degree in different fields of
conduct . . ." Id. at 130-31. See id. at 130 et seq.] To achieve determinacy is sometimes "to
secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done
in a range of future cases, about whose composition we are ignorant. We shall thus succeed in
settling in advance, but also in the dark, issues which can only reasonably be settled when they
arise and are identified." [Id. at 129-30.] We who "do ordain and establish this Constitution for
the United States of America" have long understood Hart's point. Some norms comprised by the
Constitution are "not rules for the passing hour," as Cardozo put it, "but principles for an
expanding future. Insofar as it deviates from that standard, and descends into details and
particulars, [a constitution] loses its flexibility, the scope of interpretation contracts, the meaning
hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its
play." [Benjamin N. Cardozo, The Nature of the Judicial Process 83-84 (1921).]
indeterminate in many if not most cases, because all the rights and freedoms are defined (in section 1 of the Charter) as subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Similarly, in South Africa, all the rights articulated in the Bill of Rights (Chapter 2) of the South African Constitution are indeterminate in many if not most cases, because all the rights are defined as subject to the limits articulated in section 36 of the Bill of Rights:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including:
   a. the nature of the right;
   b. the importance of the purpose of the limitation;
   c. the nature and extent of the limitation;
   d. the relation between the limitation and its purpose; and
   e. less restrictive means to achieve the purpose.

The serious question, then, is this: Is it a good idea or a bad idea for the citizens of a liberal democracy to give to politically independent courts the power to protect indeterminate human rights--human rights that, as articulated in entrenched legal texts, are indeterminate (i.e., in many if not most of the cases in which they are likely to be invoked)? Hereafter, when I refer to human rights, I mean indeterminate human rights. The serious question is whether it is a good idea for the citizens of a liberal democracy to give to politically independent courts the power to protect entrenched, indeterminate human rights. This is the serious question, because to empower courts to protect indeterminate human rights norms is necessarily to empower them to "specify" the concrete meaning of the norms in the various contexts in which the norms are invoked.

To protect an indeterminate human rights norm in a particular context in which it is invoked, the person or persons doing the protecting must reach a judgment about what the indeterminate norm means--about, that is, what it forbids (or requires)--in that context, all things
considered. In that sense, the person(s) doing the protecting must specify the concrete, contextual meaning of the norm. For example, to protect, in a particular case, the right to freedom of religion articulated by Article 9 of the European Convention, the European Court of Human Rights must reach a judgment about whether, all things considered, the challenged limitation on the right is "prescribed by law" and, if so, is "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." With respect to the rights and freedoms articulated in the Charter of Rights and Freedoms, the Canadian Supreme Court must decide whether challenged limitations "can be demonstrably justified in a free and democratic society" (Charter, section 1). With respect to the rights in articulated in the South African Bill of Rights, the South African Supreme Court must decide whether challenged limitations are "reasonable and justifiable in an open and democratic society . . . taking into account all the relevant factors . . ." (section 36).

This need for specification—the need to specify the concrete meaning of an indeterminate legal norm in the particular context in which it is invoked—is familiar. In *The Federalist Papers*, James Madison commented on the need, in adjudication, for such specification: "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."33 Whereas

33 The Federalist Papers 229 (Clinton Rossiter ed. 1961). See Kim Lane Scheppele, Legal Secrets 94-95 (1988): "Generally in the literature on interpretation the question being posed is, What does a particular text (or social practice) mean? Posed this way, the interpretive question gives rise to an embarrassing multitude of possible answers, a cacophony of theories of interpretation. . . . [The] question that (in practice) is the one actually asked in the course of lawyering and judging [is]: what . . . does a particular text mean for the specific case at hand?"

In *Truth and Method*, Hans-Georg Gadamer commented on the process of specification both in law and in theology:

In both legal and theological hermeneutics there is the essential tension between the text set down—of the law or of the proclamation—on the one hand and, on the other, the sense arrived at by its application in the particular moment of interpretation, either in judgment or in preaching. A law is not there to be understood historically, but to be made concretely valid through being interpreted. Similarly, a religious proclamation is not there to be understood as a
the process of applying a determinate norm is essentially deductive, the process of specifying an
indeterminate norm is essentially nondeductive.\textsuperscript{34} A specification "of a principle for a specific
class of cases is not a deduction from it, nor a discovery of some implicit meaning; it is the act of
setting a more concrete and categorical requirement in the spirit of the principle, and guided both
by a sense of what is practically realizable (or enforceable), and by a recognition of the risk of
conflict with other principles or values. . . ."\textsuperscript{35} The challenge of specifying an indeterminate
human rights norm, then, is the challenge of deciding how best to achieve, how best to
"instantiate", in a particular context that implicates the norm, the political-moral value (or
values) at the heart of the norm;\textsuperscript{36} it is the challenge of discerning what way of achieving that

merely historical document, but to be taken in a way in which it exercises its saving effect. This
includes the fact that the text, whether law or gospel, if it is to be understood properly, i.e.,
according to the claim it makes, must be understood at every moment, in every particular
situation, in a new and different way. Understanding here is always application.


\textsuperscript{34} "Applying", in a particular context, a norm determinate in that context should not be
confused with "specifying", in a particular context, a norm indeterminate in that context. To rule
that a munipal ordinance that by its terms governs "automobiles", governs "Toyota Camrys" is,
as I am using the terms, to "apply" the ordinance, not to "specify" it. By contrast, to construe a
constitutional provision that forbids government to prohibit any religious practice absent a
compelling justification, to forbid North Carolina to prohibit the sacramental use of wine at Mass
is to "specify" the (concrete, contextual meaning of the) provision. Of course, there can be cases
in which it is difficult to administer the application/specification distinction.

\textsuperscript{35} Neil MacCormick, "Reconstruction after Deconstruction: A Response to CLS," 10
Oxford J. Legal Studies 539, 548 (1990). Where I have used the term "specification",
MacCormick uses the Latin term "determinatio", borrowing it from John Finnis: "John Finnis
has to good effect re-deployed St Thomas' concept of \textit{determinatio}; Hans Kelsen's translators
used the term 'concretization' to much the same effect." Id. (citing John Finnis, "On the Critical
Legal Studies Movement," 30 American J. Jurisprudence 21, 23-25 (1985), and Hans Kelsen,
The Pure Theory of Law 230 (Eng. trans. 1967)).

\textsuperscript{36} Put another way, it is the challenge of deciding how best to avoid the political-moral
\textit{disvalue} at the heart of the norm.
value, what way of embodying it, best reconciles all the various and sometimes competing interests at stake in the context at hand.

Hereafter, in asking whether it is a good idea for the citizens of a liberal democracy to empower politically independent courts to protect human rights, I am asking whether it is a good idea, all things considered, to empower courts to specify the concrete meaning of entrenched, indeterminate human rights norms in the various contexts in which they are invoked. In a democracy, should courts have such power--the power, as Richard Posner once put it, to make "a creative decision, involving discretion, the weighing of consequences, and, in short, a kind of legislative judgment. . . ."37


Good judgment, and its opposite, are in fact most clearly revealed in just those situations where the method of deduction is least applicable, where the ambiguities are greatest and the demand for proof most obviously misplaced. To show good judgment in such situations is to do something more than merely apply a general rule with special care and thoroughness, or follow out its consequences to a greater level of detail. Judgment often requires such analytic refinement but does not consist in it alone. That this is so is to be explained by the fact that we are most dependent on our judgment, most in need of good judgment, in just those situations that pose genuine dilemmas by forcing us to choose between, or otherwise accommodate, conflicting interests and obligations whose conflict is not itself amenable to resolution by the application of some higher-order rule. It is here that the quality of a person's judgment comes most clearly into view and here, too, that his or her deductive powers alone are least likely to prove adequate to the task.


The process of specifying a norm that is, in a particular context, indeterminate should not be confused with the different process of decoding a text that is obscure. Although both processes may be said to be processes of "interpretation", interpreting a norm, in the sense of specifying the norm, is not the same as interpreting a text, in the sense of decoding the text. Interpretation-as-specification is a different activity from interpretation-as-decoding. For a further comment on the distinction, see n. #.
The Case for Empowering Courts to Protect Human Rights

I now want to sketch the principal argument for empowering politically independent courts to protect (entrenched, indeterminate) human rights—which entails, as I said, the power to specify the concrete, contextual meaning of those rights.\(^38\) (A sketch will do; the argument is familiar.) It is perilous to generalize across different liberal democracies, with their different histories, cultures, and trajectories,\(^39\) but the particular generalizations on which the argument relies are not, I think, controversial. It bears emphasis that the argument I am about to sketch denies neither the possibility nor the importance—the obvious, undeniable importance—of nonjudicial protections of human rights.\(^40\) (Nor does the argument deny that sometimes legislators or other government officials are more more protective than judges of some human rights—perhaps because more generous than judges in their understanding of some human rights.\(^41\)) The choice liberal democracies face is not either-or.\(^42\) The argument for empowering

\(^{38}\) Sometimes I say, as in the text accompanying this note, "human rights"; sometimes I say, as in the preceding section (on "the need for specification"), human rights "norms". For the most part, I use the terms interchangeably. By "human right", I usually mean a human rights "norm", in this sense: a statement, in a legal text, of what government should not do to any human being or of what it should do for every human being (within its jurisdiction).


\(^{40}\) See Darrow & Alston, n. #, at 521-23; Saras Jagwanth, "The South African Experience of Judicial Rights Discourse: A Critical Appraisal," in Campbell, Ewing, & Tomkins, n. #, at 297 (arguing that as important as judicial review undeniably is in the new South Africa, it is not enough).


The Supreme Court has competed with nonjudicial institutions for two hundred years, sometimes leading the charge for minority rights, but more often pulling up the rear. Interest groups mobilize to apply pressure to whatever branch is the most responsive to their needs. At
courts to protect human rights is not a case against empowering nonjudicial governmental institutions and officials to protect human rights too—though it is an argument against empowering only nonjudicial governmental institutions and officials to protect human rights. Beware the beguiling either-or. They are everywhere. At a conference at Harvard Law School on the occasion of the bicentennial of the birth of John Marshall, Henry Hart commented on Learned Hand's famous statement that "[a] society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes no court need save."43 Hart said: "[T]he statement is an example--a rather clear example--of the fallacy of the undistributed middle."44 He explained:

What the sentence assumes is that there are two kinds of societies—one kind, over here, in which the spirit of moderation flourishes, and another kind, over here, which is riven by dissension. Neither kind, Judge Hand says, can be helped very much by the courts. But, of course, that isn't what societies are like. In particular, it isn't what American society is like. A society is a [sic] something in process—in the process of becoming. It has always within it, as ours does, seeds of dissension. And it also has within it forces making for moderation and mutual times the courts satisfy interest group claims, and on other occasions it is the elected branches. No single branch, including the judiciary, can lay claim to having the last word, especially not in the volatile world of religious politics.

Cf. Stephen M. Griffin, "Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review," 17 Constitutional Commentary 683, 685-86 (2000): "Any fair description of the institutional environment of judicial review has to account . . . for the phenomenon of Congress on at least occasion having greater solicitude for individual rights than the supposedly rights-conscious judiciary."

42 I know that this is not Mark Tushnet's position—that the choice is either-or—but I sometimes get the feeling that it is. See Mark Tushnet, "Non-Judicial Constitutional Review" (forthcoming 2003).


44 Id.
The argument for empowering courts to protect human rights begins with the premise that incumbency is a cardinal value—not the only value, but nonetheless a cardinal one—for electorally accountable government officials: Such officials typically want to preserve their own incumbency and/or the incumbency of as many other members of their party as possible. Therefore, such officials want to make popular decisions; at a minimum, they want to avoid making unpopular decisions. But the best (optimal) resolution of a human rights controversy—a controversy about what an indeterminate human right means (i.e., should be understood to mean) in a particular context in which it is invoked—may well be unpopular. They also want to make decisions that will please their most powerful constituencies; at a minimum, they want to avoid

45 Id. at 140-41. I'm grateful to Ken Karst for calling this passage to my attention.

46 See Robert Dahl, Pluralist Democracy in the United States: Conflict and Consent 131 (1967) ("[C]ongressional leaders rely mainly on persuasion, party loyalty, expectations of reciprocal treatment, and, occasionally, special inducements such as patronage or public works. But none of these is likely to be adequate if a member is persuaded that a vote to support his party will cost him votes among his constituents. . . . Fortunately, for him, the mores of Congress, accepted by the leaders themselves, are perfectly clear on this point: His own election comes first."); David Mayhew, Congress: The Electoral Connection 101-02 (1974) ("[L]eaders in both houses [of the Congress] have a habit of counselling their members to 'vote their constituencies.'"); "The World of Congress," Newsweek, Apr. 24, 1989, at 28 ("Congressmen are obsessed with . . . losing an election. . . . 'Everybody here checks their spines in the cloakroom,' says Rep. Patricia Schroeder. Shorn of significant party connections, each member is his own political and policy operator. But these legislators are the world's only entrepreneurs devoted to shunning risk. Among the favorite words in everyday Capitol Hill conversation is 'cover'; it's a noun meaning a position on an issue that is structured so as to avoid any political cost."); "Congress: It Doesn't Work. Let's Fix It," Business Week, Apr. 16, 1990, at 54, 56 ("Nothing motivates members of Congress like the fear of doing something that might be criticized. So all too often they do nothing.").
making decisions that will displease those constituencies. But the best resolution of a human rights controversy may well displease some of their most powerful constituencies. Moreover, such officials want to be identified with--and therefore want to spend time dealing with--high profile issues, issues that concern the well-being of a large number of citizens. But a human rights issue may well be low profile; it may well concern the well-being only of a relatively few, marginal--and perhaps marginalized--citizens; indeed, it may well concern the well-being only of noncitizens. Therefore, many articulated human rights are not likely to be optimally protected in a democracy unless politically independent courts play a significant role in protecting them. The nonjudicial, electorally accountable branches of government--the legislative and executive branches--frequently have insufficient political or institutional (bureaucratic) incentives to attend to a claim--or, if they do attend to it, to take seriously the claim--that government has violated, or is violating, an articulated human right. Indeed, they sometimes have powerful incentives--above all, incumbency--to ignore or at least to discount such a claim.

The observations rehearsed in the preceding paragraph are grounded in the shared historical experience of liberal democracies and are widely endorsed in liberal democracies.

47 Consider what Walter Lippman wrote a half century ago:

With exceptions so rare that they are regarded as miracles and freaks of nature, successful democratic politicians are insecure and intimidated men. They advance politically only as they placate, appease, bribe, seduce, bamboozle, or otherwise manage to manipulate the demanding and threatening elements of their constituencies. The decisive consideration is not whether the proposition is good but whether it is popular--not whether it will work well and prove itself but whether the active talking constituents like it immediately.


49 See Darrow & Alston, n. #, at 487 et seq. See also Whittington, n. #, at 699.
Speaking from a British perspective, Lord Scarman, in 1984, wrote: "[I]f you are going to protect people who will never have political power, at any rate in the foreseeable future (not only individuals but minority groups with their own treasured and properly treasured social customs, religion and ways of life), if they are going to be protected it won't be done in Parliament--they will never muster a majority. It's got to be done by the Courts and the Courts can do it only if they've got the proper guidelines." More recently, and drawing on a broader range of experience, Mac Darrow and Philip Alston have written that "there are ample grounds, based on experience in countries with constitutional human rights protections, to suggest that entrenchment of bills of rights can contribute significantly to the empowerment of disadvantaged groups, providing a judicial forum in which they can be heard and seek redress, in circumstances where the political process could not have been successfully mobilized to assist them." Statements to this effect are quite common. For example, in a case in which the eleven justices of the Constitutional Court of the Republic of South Africa ruled unanimously that imposition of the death penalty was unconstitutional under the transitional 1993 constitution, the President of the Court wrote:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest among us, that all of us can be secure that our own rights will be protected.

---


51 Darrow & Alston, n. #, at 493.

52 Quoted in Steiner & Alston, n. #, at 48. Ken Karst has emphasized this point in his work. See Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution 222 et seq. (1989).
The American experience is relevant here too, in particular the American experience with the federal judiciary in the post-World War II era, which is, of course, the era in which human rights discourse has emerged and flourished. This experience confirms that politically independent judges—precisely because they are politically independent—are often more likely than electorally accountable officials to address a human rights controversy in a way that is both impartial and (relatively) detached: impartial between (or among) the parties to, and detached as to proper the outcome of, the controversy. This is especially true when the controversy pits, as many human rights controversies do, a political majority against an unpopular political minority—or a large, insensitive if not hostile bureaucracy against marginalized persons. Even in the pre-World War II era many Americans understood the importance of entrusting the protection of basic rights to a politically independent judiciary. "As a writer in the Jesuit publication America observed in November 1924, 'Any citizen whose life, liberty and property were in jeopardy would rather have his case tried before nine lawyer-judges whom he could look in the eye, than before that vast, miscellaneous, political throng at Congress, responding or not to the roll call as they saw fit.'"

53 William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890-1937 203 (1994) (quoting Robert A. Shortall, "The Supreme Court and Congress," America, Nov. 8, 1924, at 95). However realistic or not this view was in 1924, is the view realistic today? Or is the view too cynical about Congress and insufficiently cynical about the Supreme Court? If the view were extended to state legislatures and to courts generally—or at least to federal courts—would the view be too cynical about legislatures and insufficiently cynical about (federal) courts? Listen to Judge Posner:

Waldron is not sufficiently realistic about the legislative process. He has too starry-eyed a view of it. . . . [We should recognize] that federal judges are insulated from most of the political pressures that beset elected legislatures; that these pressures sometimes reflect selfish, parochial interests, ugly emotion, ignorance, irrational fears, and prejudice; and that the judges' insulation, together with the tradition and usages of the bench and the fact that the higher federal judges are screened for competence and integrity, may confer on the judiciary a power of detached and intelligent reflection on policy issues that is a valuable complement to the consideration of these issues by ordinary lawmakers. It is even possible that an appointive judiciary such as the federal may give representation to interests that the electoral process ignores because they are not in coalition with any politically effective group.

Posner, "Review of Jeremy Waldron," n. #, at 591. See also Bickel, n. #, at 24-25:
Many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government—if any single one in particular—should be the pronouncer and guardian of such values.

Men in all walks of public life are able occasionally to perceive this second aspect of public questions. Sometimes they are also able to base their decisions on it; that is one of the things we like to call acting on principle. Often they do not do so, however, particularly when they sit in legislative assemblies. There, when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view. Possibly legislators—everything else being equal—are as capable as other men of following the path of principle, where the path is clear or at any rate discernible. Our system, however, like all secular systems, calls for the evolution of principle in novel circumstances, rather than only for its mechanical application. Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules—that is what our legislatures have proven themselves ill equipped to give us.

The question whether to empower courts to protect human rights is in part a question about comparative institutional competence. It is worth noting, therefore, that along a number of dimensions, courts in a liberal democracy may be better suited than either the legislative or executive branch of government to engage in the careful, systematic development of coherent, concrete human rights doctrines over time. With respect to the issue of coherence of doctrine over time, and in the context of the United States, Henry Hart and Herbert Wechsler observed:

Both Congress and the President can obviously contribute to the sound interpretation of the Constitution. But are they, or can they be, so organized and manned as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that these principles are being observed? In respect of experience and temperament of personnel? Of procedure for decision? Of means of recording grounds of decision? Of opportunity for close examination of particular questions?


[An] advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an
The basic argument for empowering courts to protect human rights—the argument I have just sketched—is both familiar and, as the emergence of constitutional courts in the second half of the twentieth century attests, powerful.\footnote{This is certainly not to say that no one is skeptical about the argument. Robert Nagel and Mark Tushnet, for example, are prominent skeptics. In commenting on a draft of this essay, Nagel wrote that "[t]he fact that courts do not have certain deficiencies common to democratic processes does not necessarily demonstrate anything about the appropriateness of the kind of decision making that courts do engage in. . . . [S]uppose judges are not influenced by powerful electoral constituencies but instead are influenced by powerful professional reference groups whose methodologies and values also produce suboptimal results?" E-mail from Robert Nagel to Michael Perry, Apr. 9, 2002. Cf. Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989).} As Rick Pildes has observed, "all new democratic extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates.

Bickel, n. #, at 26. So, the goal of a sensible division of political labor—a division sensitive to different institutions' relative strengths and weaknesses—offers additional support for empowering courts to protect entrenched, indeterminate human rights.

In Mark Tushnet's view, the question whether judicial protection of human rights is, on balance, a good idea or a bad one "is ultimately empirical. . . . [Y]ou have to compare the number and importance of the occasions on which legislatures get the right and wrong answers to the number and importance of the occasions on which courts get the right and wrong answers." E-mail from Mark Tushnet to Michael Perry, Apr. 5, 2002. (In support and elaboration of this point, Tushnet, in his e-mail, called my attention to an unpublished essay that has since been published: Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights," 22 Oxford J. Legal Studies 275 (2002).) According to Tushnet, the argument for empowering courts to protect human rights does not pay sufficient heed to the number and importance of occasions on which legislatures get the right answers and the number and importance of occasions on which courts get the wrong answers.

In addressing Tushnet's "ultimately empirical" question, however, we must be wary about generalizing across different countries. The United States is not Canada is not the United Kingdom is not South Africa is not India—and so on. Similarly, we must be wary about generalizing across different historical periods. Notice, moreover, that the question is at least partly counterfactual: "What would the legislature have done, in [specify country], during [specify historical period], if there had been no judicial review?" Or: "What would the courts have done . . . if there had been judicial review?" I don't know how one can hope to answer such questions with anything approaching confidence. And if one can't, then one must decide—
systems are being formed as constitutional democracies, with courts operating under fairly indeterminate constitutional texts" and "embracing constitutional courts as means of settling controversial and profound moral questions." Consider, for example, that when South Africa adopted its new constitution, in 1996, it specifically provided for a judicial power to protect the human rights articulated in the constitution. (If you, dear reader, had been a citizen of South Africa in the 1990s, would you have opposed this development?) Even more recently, no less a champion of parliamentary supremacy than the United Kingdom adopted the Human Rights Act of 1998, which empowers courts to protect the human rights articulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, most of which are indeterminate in the context of many if not most of the cases in which they are invoked. (I discuss the UK Human Rights Act below.) These developments have led Mark Tushnet to conclude that "[f]or all practical purposes the debate among constitution designers over parliamentary supremacy versus judicial review is over. Proponents of judicial review have carried the day ..." (Actually, the matter is more complicated than Tushnet suggests: As I explain below, in both Canada and the United Kingdom, the choice has not been for judicial review rather than parliamentary supremacy, but for judicial review within a system of parliamentary supremacy.)

that is, a liberal democracy must decide--how to resolve the doubt: in favor of judicial protection of human rights, or against it.


56 See Constitution of the Republic of South Africa, Chapter 2 ("Bill of Rights"); Chapter 8 ("Courts and Administration of Justice").

The Case against Empowering Courts to Protect Human Rights:
The Twofold Argument from Democracy

That the argument for empowering courts to protect human rights is both familiar and powerful--that it has even "carried the day"--does not mean that there are no arguments against doing so. There are several such arguments, which are well rehearsed elsewhere. There is one big argument, however, and it is that argument I want to sketch here. The fundamental argument against empowering courts to protect human rights, which we may call the argument from democracy, is twofold: It is undemocratic for courts to protect human rights--that is, entrenched, indeterminate human rights; moreover, it is hostile to the practice of democratic deliberation, and therefore subversive of the citizens as a community of political-moral judgment, for courts to do so.

Recall that some articulated human rights are highly determinate, in the sense that it is difficult to imagine any (real v. hypothetical) case in which there is room for a reasonable difference of judgment about what the right forbids. The serious argument is not that it is undemocratic for courts to protect human rights that, as articulated in entrenched legal texts, are highly determinate. It's easy to bat that argument away. ("Democracy is not the same as unrestrained majoritarianism. We're talking about liberal democracy, and no democracy is truly liberal if it violates certain human rights.") Rather, the serious argument is that it is undemocratic for courts to protect human rights that, as articulated, are indeterminate. More precisely, the serious argument is that it is undemocratic for a court to impose on government the court's own judgment about what an indeterminate human right (indeterminate in the case at

---

58 Darrow and Alston rehearse, and respond to, several arguments about why empowering courts to protect human rights is problematic: it leads to the judicialization of politics; it also leads--indeed, it therefore leads--to the politicization of the judiciary; it contributes to an exaggerated "rights-consciousness", which is a bad thing; judges are, in general, too conservative to protect human rights; litigation is too costly a vehicle for protecting human rights. See Darrow & Alston, n. #, at 511 et seq.

59 For discussion of such an argument, see Darrow & Alston, n. #, at 498 et seq.
hand) forbids--a judgment according to which government is violating the right--when according to a different but nonetheless reasonable judgment about what the right forbids, government is not violating the right. Democracy requires that the reasonable judgment of electorally accountable government officials, about what an indeterminate human right forbids, trump the competing reasonable judgment of politically independent judges. Democracy means, after all, government not by judiciary but by electorally accountable government officials.

The electoral accountability of government officials can be indirect as well as direct:

As a general matter, a person is accountable to the electorate *directly* if he holds elective office for a designated, temporary period and can remain in office beyond that period only by winning reelection; accountability is *indirect* if he holds appointive office and can remain in office only at the discretion of his appointer (who in turn is electorally accountable) or, if his office is for a designated, temporary period, by securing reappointment after that period has expired.


One might be tempted to assimilate this part of the argument from democracy to what Alexander Bickel famously called "the counter-majoritarian difficulty". See Bickel, n. #, at 16-23. The idea of "democracy" that animates the argument at this point, however, is perhaps less majoritarian than Schumpeterian. According to Andrew Koppelman, "[Joseph] Shumpeter is entirely free of . . . mushy sentimentalism about majoritarianism . . ." Andrew Koppelman, "Talking to the Boss: On Robert Bennett and the Counter-Majoritarian Difficulty," 95 Northwestern U.L. Rev. 955, 956 (2001).

Shumpeter . . . proposes the following, more modest definition of democracy: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." The people influence political decisions by voting in elections and "do not control their political leaders in any way except by refusing to reelect them or the parliamentary majorities that support them." . . .

The politician is vulnerable to losing his office unless he continuously manages to attract votes. This creates an incentive for him to pay attention to what voters want. And this incentive guarantees that, in a democracy, the government will not act in a way that attracts the wrath of an electoral majority--or, if it does, that it won't keep it up for long.

Id. at 956-57 (quoting Joseph A. Shumpeter, Capitalism, Socialism, and Democracy (3d ed. 1950)).
How is it not only undemocratic, but hostile to the practice of democratic deliberation and therefore subversive of the citizens as a community of political-moral judgment, for courts to protect human rights? Because by imposing on government their own judgments about what indeterminate human rights forbid (or require) government to do, politically independent courts necessarily discourage citizens and their electorally accountable representatives from themselves deliberating about what the rights forbid; they necessarily discourage citizens and their representatives from themselves deliberating about what specification of indeterminate human rights norms to adopt, what shape to give the norms, in particular contexts in which the norms are invoked. In a democracy, such judgments, like other reasonably contestable political-moral judgments, should be the yield not of judicial self-assertion but of democratic deliberation. I said earlier that by serving as a shared basis of political-moral judgment, a legal text's articulation of the citizens' judgments about what human rights there are can help constitute the citizens as a community of judgment. However, by displacing citizens and their representatives as the principal agents of political-moral judgment about the concrete meaning of indeterminate human rights norms in particular contexts in which they are invoked, courts subvert citizens and their representatives as a community of judgment. The courts themselves, and ultimately the highest court, become the true community of judgment with respect to such controversies. With respect to this profoundly important subject matter--the concrete, contextual meaning of indeterminate human rights norms--it is government "by judiciary" rather than by the people (citizens) themselves.

---


63 Jeremy Waldron has argued that "once it becomes unclear or controversial what the people have committed themselves to, there is no longer any basis in the idea of precommitment for defending a particular interpretation against democratic objections." Waldron, Law and Disagreement, n. #, at 266; see id. at 255-81. Waldron's argument seems to me irrefutable.

64 This passage by Jeremy Waldron dramatizes the point well:

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should try and think what we might say to some
Splitting the Difference

The argument against empowering courts to protect entrenched, indeterminate human rights is undeniably strong. But so is the argument for doing so: To choose not to empower courts to protect human rights is unattractive, because, again, human rights are not likely to be optimally protected in a democracy unless politically independent courts are empowered to protect them. (Or, if that generalization is too broad, let us say that human rights are not likely to be optimally protected in most democracies unless politically independent courts are empowered to protect them.\(^\text{65}\) This, at any rate, is the position widely accepted in most liberal democracies, because in most liberal democracies, some human rights are both constitutionally entrenched and judicially protected.\(^\text{66}\) If the citizens of a liberal democracy had to choose between (a) giving public-spirited citizen who wishes to launch a campaign or lobby her [representative] on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view. She is not asking to be a dictator; she perfectly accepts that her voice should have no more power than that of anyone else who is prepared to participate in politics. But--like her suffragette forbears--she wants a vote; she wants her voice and her activity to count on matters of high political importance.

In defending a Bill of Rights, we have to imagine ourselves saying to her: "You may write to the newspaper and get up a petition and organize a pressure group to lobby [the legislature]. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' view. When their votes differ from yours, theirs are the votes that will prevail." It is my submission that saying this does not comport with the respect and honor normally accorded to ordinary men and women in the context of a theory of rights.


\(^{65}\) For an argument that the Australian experience belies the generalization that human rights are not likely to be optimally protected in a democracy unless politically independent courts are empowered to protect them, see Allan, "A Defense of the Status Quo," n. #.

\(^{66}\) Again, Australia, New Zealand, and the United Kingdom are exceptions.
What Role for the Courts?  page 35

courts no power to protect (entrenched, indeterminate) human rights and (b) giving them the
kind of power exercised by the Supreme Court of the United States--"judicial supremacy"--they
would be in a bind. Choice (a) is extreme, because it in effect denies the truth of the case for
empowering politically independent courts to protect human rights. But choice (b) is extreme
too--it is at the other extreme from choice (a)--because it in effect denies the truth of the case
against empowering politically independent courts to protect human rights. Happily, (a) and (b)
are not the only choices; there are other, more moderate choices.

Assume that, persuaded by the argument for doing so, the citizens of a liberal democracy
have decided to empower politically independent courts to protect human rights. It is an entirely
distinct question I to give to the courts. For example, should the judiciary's opinion about what
an indeterminate human right means in the context of a case in which it is invoked be
inulnerable to overruling by ordinary political means; should it be subject to overruling only by
an extraordinary political act, like the act of amending the constitution? Or, instead, should the
judiciary's opinion be subject to overruling by ordinary political means? Or should the
judiciary's opinion not be binding at all but only hortatory? There are different ways of
structuring the relationship between the power of the judiciary to protect human rights and the
power of the legislative and/or executive branches to respond to the exercise of judicial power to
protect human rights.

In the United States, the US Supreme Court exercises the power of judicial review: the
power to determine, in an appropriate case, in an opinion binding not just on the parties to the
case but also on all the other branches and agencies of government, whether--and, therefore,
that--a particular law, policy, or other governmental act (or failure to act) violates the US
Constitution.67 How great is this power of judicial review? According to the doctrine of
"judicial supremacy", a decision by the Supreme Court that a law (policy, act) is unconstitutional
may be overruled bot by ordinary political means but only by extraordinary political means, like

constitutional amendment; Congress, for example, may not overrule the opinion by enacting legislation rejecting the opinion. As I said, ceding to the judiciary this degree of power to protect human rights is extreme, because doing so in effect denies the truth of the argument against empowering politically independent courts to protect human rights; it denies the truth of the twofold argument from democracy.

But not every choice to empower the courts to protect human rights is so extreme; as I said, there are other, more moderate choices--choices that accept the truth of the argument for empowering courts to protect human rights without denying the truth of the argument from democracy. I want to look at two such choices. The first is illustrated by the Canadian system of judicial protection of human rights, in which the Canadian Supreme Court's opinion is subject to overruling by ordinary political means. The second is illustrated by the United Kingdom's

68 By contrast, a decision by the Supreme Court that a law (policy, act) is constitutional is subject to a different rule: If legislators believe that a law would be unconstitutional, they may decline to enact the law on that basis even if in the judgment of the Supreme Court the law would not be unconstitutional. Similarly, if the President of the United States or a governor of a state believes that a law is unconstitutional, he may decline to enforce the law on that basis even if in the Court's judgment the law is not unconstitutional. Or am I reading the doctrine of judicial supremacy too narrowly? For a broader reading, see Mark Tushnet, "Marbury v. Madison and the Theory of Judicial Supremacy," in Robert P. George, ed., Great Cases in Constitutional Law 17 (2000).

An official who refuses to act on constitutional grounds--who vetoes a bill rather than signs it, who refuses to prosecute for violating the antisediton act--is defying the courts just as much as a person who acts pursuant to a statute the courts have held unconstitutional.

In short, the fact that our constitutional system does not have a way to get the courts to review some official decisions that conflict with the courts' constitutional interpretations does not really counter the theory of judicial supremacy. It identified an awkward procedural "defect" in our constitutional system without rejecting the theory directly.

Id. at 28. In any event, the doctrine of judicial supremacy, however broad or narrow it may be, should not be confused with the different and extremely problematic doctrine of judicial exclusivity that the present Supreme Court seems, implicitly, to have embraced. The Court has been acting as if it is not only the supreme but also the exclusive expositor of constitutional meanings. See generally Larry D. Kramer, "Foreword: We the Court," 115 Harvard L. Rev. 4 (2001).
Human Rights Act of 1998, according to which the judiciary's opinion is only hortatory; it is up to Parliament to decide whether to accept the judiciary's position.

**Judicial Power in Canada and the United Kingdom**

The Canadian Charter of Rights and Freedoms is Part 1 of the Canada's Constitution Act of 1982. As its name suggests, the Charter articulates several fundamental rights and freedoms, which it organizes into seven categories. The rights and freedoms in four categories ("Democratic Rights", "Mobility Rights", "Official Languages of Canada", and "Minority Language Educational Rights") are highly determinate. By contrast, the rights and freedoms in the other three categories ("Fundamental Freedoms", "Legal Rights", and "Equality Rights") are relatively indeterminate. Assume that the Supreme Court of Canada rules that a law enacted by the Canadian Parliament, or by a provincial legislature, violates one of the indeterminate rights or freedoms--the right to "freedom of association" (section 2(d)), for example, or "the right to the equal protection and equal benefit of the law . . . without discrimination based on . . . sex" (section 15(1)). According to section 33 of the Charter, the Parliament, or the provincial legislature, may override that ruling by reenacting the law with an express declaration that the law "shall operate notwithstanding" the right or freedom the law is claimed to violate:

1. Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 ["Fundamental Freedoms"] or sections 7 to 15 ["Legal Rights" and "Equality Rights"] of this Charter.

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

3. A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

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

Because of section 33, the Canadian Supreme Court's judgment that a particular law violates one of the indeterminate human rights articulated in section 2 or sections 7 to 15 of the Charter is subject to overruling by ordinary political means.69

The contrast between the degree of judicial power to protect human rights represented by American doctrine of judicial supremacy and the degree represented by section 33 of the Charter is striking. Like the American practice of judicial review, section 33 acknowledges the importance of empowering courts to protect human rights, but unlike the American doctrine of judicial supremacy, section 33 also acknowledges the power of the argument from democracy. Section 33 represents an imaginative way of accommodating both the argument for empowering courts to protect human rights and the argument from democracy; as Walter Murphy put it, section 33 represents an "elegant compromise".70 Listen to Paul Weiler, who was an architect of section 33:71

69 But what if the Canadian Supreme Court ruled against, not a law, but, say, some practice engaged in by Royal Mounted Police? Even then the Court does not have the last word: If the Parliament disagrees with the Court's opinion that the practice is unconstitutional, the Parliament can enact a law authorizing, or even requiring, the practice, and expressly declaring that the law shall operate notwithstanding the Charter provision on which the Court relied. In that indirect sense, section 33 covers not only laws enacted by the Parliament or provincial legislatures, but all governmental acts.

70 Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy," in Greenberg et al., Constitutionalism & Democracy, n. #, at 3, 17.

One cannot choose . . . between formal [constitutional] amendment and legislative override as the preferred method for revising judge-made constitutional policy simply by a priori reasoning about rights and democracy. One must make a practical judgment about the relative competence of two imperfect institutions in the context of a particular nation. The premise of the Charter is that the optimal arrangement for Canada is a new partnership between court and legislature. Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle "rights" issues as they arise. At the same time, however, the Charter reserves for the legislature the final say to be used sparingly in the exceptional case where the judiciary has gone awry. This institutional division of labor rests on the assumption that the chief threat to rights in Canada comes from legislative thoughtlessness about particular intrusions, a fault that can be cured by thoroughly airing the issues of principle in a judicial forum. The Charter contemplates no serious danger of outright legislative oppression; certainly none sufficient to concede ultimate authority to Canadian judges and lawyers.72

Now, let's travel east across the North Atlantic. The Human Rights Act of 1998, which entered into force in October 2000, is an attempt by the United Kingdom to take human rights more seriously--by protecting them judicially--but without compromising the cherished ideal of "parliamentary supremacy". Like Canada's section 33, the HRA represents an imaginative way of accommodating both the argument for empowering courts to protect human rights and the argument from democracy. The HRA makes the principal human rights provisions of the European Convention (to which the United Kingdom is a signatory) a part of the domestic law of the United Kingdom.73 Before the HRA went into force, these human rights provisions were not a part of the domestic law of the United Kingdom; therefore, no such provision could serve as a

72 Id. at 83-84.

73 "In this Act 'the Convention rights' means the rights and fundamental freedoms set out in (a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention." HRA, Article 1(1). "Those Articles are to have effect for the purposes of this Act subject to any derogation or reservation . . ." HRA, Article 1(2).
basis of decision by a court of the United Kingdom. Nonetheless, even before the HRA went into force, the provisions the HRA makes a part of the domestic law of the United Kingdom were entrenched in the United Kingdom--though, unlike constitutional rights in the United States, they were not entrenched as a formal, legal matter. (In the United States, constitutional rights may be disestablished not by an ordinary political act but only by constitutional amendment.) Rather, they were--and are--entrenched as a practical, political matter: It is virtually inconceivable, as a practical, political matter, that in any foreseeable future the UK Parliament could (even if it wanted to, which is unlikely) renounce the United Kingdom's status as a signatory to the European Convention, which has come to have a quasi-constitutional status in the United Kingdom and throughout the rest of Europe.

How great a power to protect human rights does the HRA grant to the courts of the United Kingdom? Under the HRA, a court is to interpret challenged legislation, "[s]o far as it is possible to do so, . . . in a way which is compatible with the Convention rights." (HRA, section 3(1).) What if a court concludes that such an interpretation is not possible? If a court is persuaded, in a case before it, that (what the HRA calls) "primary legislation" (parliamentary legislation) "is incompatible with a Convention right, it may make a declaration of that

74 It has recently been argued that the judiciary's power under section 3(1) is so large that in effect "[p]arliamentary sovereignty has given way to judicial sovereignty." Alison L. Young, "Judicial Sovereignty and the Human Rights Act 1998," 61 Cambridge L. J. 53, 65 (2002).

[W]hen is it impossible to interpret statutes in a manner compatible with Convention rights? . . . Section 3(1) reaches a limit when protecting Convention rights requires implied repeal [of a challenged statute]. Yet, when we investigate this boundary more thoroughly, we discover that it is so malleable as to amount to no limit at all. Control over the extent to which Convention rights are protected through statutory interpretation rests firmly in the hands of the judiciary.

Id. at 53. This conclusion, if correct, reinforces my conclusion below that judicial power to protect human rights is much stronger in the United Kingdom, under the Human Rights Act, than first appearances might have led one to believe. I am grateful to Jeff Goldsworthy for pointing this out to me.
What Role for the Courts?  page 41

incompatibility." (HRA, section 4(2).) If a court is persuaded that "secondary legislation" (legislation by a lawmaking body inferior to Parliament) is incompatible with a Convention right, the court may fashion relief that removes the incompatibility unless primary legislation somehow prevents the court from doing so, in which case the court can only make a declaration of incompatibility. (Section 4(3) & 4(4).) If a court is persuaded that an "act of public authority" (defined to include the courts) is incompatible with a Convention right, the court may so rule in a decision binding on the parties unless "(a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way that is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions." (Section 6(2). If the court concludes that section 6(2)(a) or 6(2)(b) is applicable, presumably the challenge to the act of public authority should be understood as a challenge to the "one or more provisions of, or made under, primary legislation" to which 6(2) refers, in which case the court, under section 4, should decide whether to make a declaration of incompatibility.) Thus, under the HRA, a court does not have power to overturn parliamentary legislation or even any secondary legislation or act of public authority that bears the requisite relationship to parliamentary legislation. All a court can do is make a declaration of incompatibility, which, as the HRA specifically states, "(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which [the declaration] is given; and (b) is not binding on the parties to the proceedings in which it is made." (Section 4(6).) If a court makes a declaration of incompatibility that is not overturned on appeal by a higher court, it is up to Parliament to decide whether to remove the incompatibility.75

75 This statement oversimplifies a complex procedural scheme. See HRA, Article 10 & Schedule 2 ("Remedial Orders"). See also Gardbaum, n. #, at 733-34:

Once a declaration [of incompatibility] has been made, HRA creates no legal duty on either Parliament or the government to respond in any way, but it does empower the relevant minister to make a "remedial order" under section 10 and Schedule 2. This "fast track" procedure permits a minister to amend incompatible legislation by order laid before and approved by both Houses of Parliament. [Gardbaum adds, in a footnote at this point, that "[t]he detailed procedures for a remedial order are extremely complex. See Section 10 and Schedule 2. They were also among the most controversial aspects of the bill and the Government was forced to amend its original scheme, which permitted less parliamentary supervision of remedial orders."] HRA obviously did not need to empower Parliament to amend or repeal such
In both Canada and the United Kingdom, the courts have the penultimate say, but whereas in Canada the Supreme Court's penultimate say is legally authoritative unless/until rejected by Parliament or a provincial legislature, in the United Kingdom the judiciary's penultimate say--its declaration of incompatibility--is not legally authoritative; it is up to Parliament to decide whether to fix the law to remove the incompatibility. On paper, judicial power to protect human rights appears to be much weaker in the United Kingdom than in Canada. (At least, domestic judicial power appears to be much weaker in the United Kingdom than in Canada. But domestic judicial power is not all the judicial power there is in the United Kingdom; there is also transnational judicial power. More about this in a moment.) In Canada, those who want to override a Supreme Court ruling that a parliamentary or provincial law is unconstitutional bear the burden of legislative inertia, often not an easy burden to bear: The Supreme Court ruling stands unless/until the requisite majority can be mobilized in the Canadian Parliament, or in a provincial legislature, to invoke section 33 and override the Court's decision. In the United Kingdom, by contrast, those who want Parliament to accept a judicial declaration of incompatibility bear the burden of legislative interia: The primary legislation stands unless/until Parliament amends the legislation to remove the incompatibility.

But appearances, we know, can be deceiving. In the United Kingdom, Parliament has a powerful incentive to take very seriously a judicial declaration of incompatibility (assuming the declaration has been affirmed on appeal): If the courts of the United Kingdom have concluded that parliamentary legislation is incompatible with a Convention right, there is a serious possibility that a powerful court outside the United Kingdom whose rulings the United Kingdom is treaty-bound to respect--the European Court of Human Rights--would reach the same conclusion. So, unless Parliament wants to risk the considerable political embarassment of

---

legislation since the power clearly already exists. . . . Under Section 19, whenever a new piece of legislation is being considered in Parliament, the relevant Minister must make a statement in writing before its Second Reading either that in his or her view the Bill is compatible with the Convention rights or that although he or she is unable to make such a statement, the government nevertheless wishes to proceed with the Bill.
having the United Kingdom lose a case before the European Court of Human Rights, Parliament will amend the legislation in question to remove the incompatibility. It was in part to avoid such embarrassment—the United Kingdom had lost a number of high profile cases before the European Court—\textsuperscript{76} that Parliament adopted the HRA in the first place. (The thought was that if the UK’s own courts could protect "Convention rights", it would lessen the number of occasions the United Kingdom would be brought before the European Court and make it less likely, when the United Kingdom was brought before the European Court, that the United Kingdom would lose.) Indeed, in the period leading up to passage of the Human Rights Act, Prime Minister Blair's Labor Government "repeatedly stated its belief that the normal course of action would be that [a declaration of incompatibility] 'will almost certainly prompt Government [whichever party is in power] and Parliament to change the law.'\textsuperscript{77} Therefore, those who bear the burden of legislative inertia under the Human Rights Act do not bear such a heavy burden after all; their position is greatly strengthened by the serious possibility that in the end the European Court of Human Rights would support their cause in the unlikely event the UK Parliament did not. Contrary to

\textsuperscript{76} Several such cases (and many others that are less high profile) are included in the materials compiled by Janis, Kay, & Bradley, n. #.

\textsuperscript{77} Gardbaum, n. #, at 733-34. Gardbaum reports that the quoted "language is taken from the Government's White Paper of October 24, 1997. Section 2.10." Id. at n. 105.

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

Id.
the appearance that judicial power to protect human rights is weaker in the United Kingdom under the HRA than in Canada under the Charter, judicial power to protect human rights is at least as strong in the United Kingdom as in Canada. If the United Kingdom were not treaty-bound to respect the rulings of the European Court, the situation might be otherwise.\footnote{In an earlier draft, I said not "might be otherwise" but "would likely be otherwise". In correspondence, Richard Kay has suggested to me that "internal political factors will be just as important [as the prospect of an adverse decision by the European Court of Human Rights]. The UK lacks a constitutional protection of rights but nonetheless still has a strong 'rights culture.' I suspect that alone would put strong pressure on the government to respond. This is especially true when the declaration comes from domestic judgments and not from a bench of 'foreigners.' Consequently I disagree with your statement that the situation 'would likely be otherwise' if the UK were not bound by treaty to the ECHR." Letter from Richard Kay to Michael Perry, Feb. 26, 2002.}

Furthermore, it is misleading to describe the judicial protection of Convention rights in the United Kingdom in terms of judicial penultimacy without noting the following complication. Although the domestic legal system of the United Kingdom is, with respect to Convention rights, a system of judicial penultimacy, the United Kingdom participates in a transnational legal system--the European Human Rights System--that is a system of judicial ultimacy. The United Kingdom is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in that system, a judgment by the European Court of Human Rights that the United Kingdom has violated, or is violating, one or another Convention right is final. The United Kingdom is treaty-bound to respect--the UK Parliament may not overrule--such a judgment.\footnote{On the European Human Rights System, see Janis, Kay, & Bradley, n. #.} (One might be tempted to reply at this point that Convention rights are not entrenched in the United Kingdom. Though in the United Kingdom Convention rights are not entrenched as a formal, legal matter, they are entrenched as a practical, political matter. As I noted earlier, it is virtually inconceivable, as a practical, political matter, that in any foreseeable future the UK Parliament could--even if it wanted to, which is unlikely--renounce the United Kingdom's status as a signatory to the European Convention, which has come to have a quasi-constitutional status in the United Kingdom and throughout the rest of Europe.) Moreover,
because the right of individual petition exists in the European Human Rights System--because, in particular, citizens of the United Kingdom and others subject to its jurisdiction may, after exhausting domestic remedies, sue the United Kingdom before the European Court of Human Rights--the distinction between the domestic legal system of the United Kingdom and the transnational legal system in which the United Kingdom participates is, with respect to Convention rights, much less consequential than it would be if there were no right of individual petition. It seems clear, therefore, that with respect to Convention rights, there is a dual legal system operative in the United Kingdom--a domestic system and a transnational system--and that unlike the domestic system, the transnational system is one of judicial ultimacy. Because in cases of conflict the transnational system trumps the domestic system--because, that is, a judgment by the European Court of Human Rights that the United Kingdom has violated, or is violating, a Convention right, which judgment Parliament is treaty-bound to respect, takes precedence over a judgment to the contrary by a UK court--perhaps we should say that the overall legal system in the United Kingdom is, with respect to Convention rights, one of judicial ultimacy.

At first, it appeared that judicial power to protect human rights was weaker in the United Kingdom than in Canada. This is because in looking at the United Kingdom, we were focusing just on domestic judicial power. In broadening our focus to include transnational judicial power, it now seems that judicial power to protect human rights is not only stronger in the United Kingdom than in Canada, but that it may well be virtually as strong as it is in the United States. Let us concentrate, then, on the sharp contrast between the United States and Canada.

**An Argument for Judicial "Penultimacy"

One issue a liberal democracy faces is whether to cede any power to politically independent courts to protect (entrenched, indeterminate) human rights. (If, as in many liberal democracies,
politically independent courts already have this power, the issue is whether they should have it.) If a liberal democracy decides to empower courts to protect human rights, it must next decide what degree of power to give to the courts. (Or it must decide whether the courts should have the degree of power they already have.) Should they be given, as in the United States, the power of "judicial supremacy"--the power to have the ultimate say when the judiciary concludes that government has violated a human right? (The ultimate say, that is, short of overruling by an extraordinary political act, such as constitutional amendment.) Or, instead, should they be given, as in Canada, the power to have only the penultimate say? Which choice makes more sense--which is more appropriate--for a liberal democracy: judicial ultimacy or judicial penultimacy?  

---

81 For discussion of yet another option, see Gardbaum, n. #, at 727-32 (discussing New Zealand). Speaking of Canada, the United Kingdom, and New Zealand, Gardbaum writes:

Rather than a mutually exclusive choice between two incompatible poles, the Commonwealth model suggests the novel possibility of a continuum stretching from absolute legislative supremacy to the American model of a fully constitutionalized bill of rights with various intermediate positions in between that achieve something of both. Moreover, although all three of the Commonwealth bills of rights reject the American model in that they seek to render the protection of a bill of rights consistent with their traditional conceptions of democracy and parliamentary supremacy, each does so in a different way and thus occupies a different position on the continuum between the two poles.

. . .

Analytically and institutionally, the major impact and contribution of the new model is to open up a range of intermediate possibilities where none were previously thought to exist. The new question might become, not which of the two polar positions shall we occupy, but where on the spectrum should we be.

Id. at 710, 744-45. Gardbaum adds: "Almost certainly, there can be no global answer to this question, for ultimately the choice will likely depend, at least in part, on normative preferences among the values that are likely to be culturally and historically specific." Id. at 745.

82 My question here is about the domestic legal system of a liberal democracy. A liberal democracy's participation, by treaty, in a transnational legal system for the protection of human rights--for example, the United Kingdom's participation in the European Human Rights System--poses different issues, issues beyond the scope of this essay. See n. #.
According to the first part of the argument from democracy:

It is undemocratic for a court to impose on government the court's own judgment about what an indeterminate human right (indeterminate in the case at hand) forbids--a judgment according to which government is violating the right--when according to a different but nonetheless reasonable judgment about what the right forbids, government is not violating the right. Democracy requires that the reasonable judgment of electorally accountable government officials, about what an indeterminate human right forbids, trump the competing reasonable judgment of politically independent judges.

As the Canadian model illustrates, judicial penultimacy is consistent with the proposition that even with respect to the concrete, contextual meaning of entrenched, indeterminate human rights, electorally accountable legislators have the last word (even if their last word is to accept the court's judgment). The Canadian Charter is "premised on the idea that it is possible to have . . . judicial protection of fundamental rights and the legislature retaining the right to have the last word on what is the law of the land." The Charter thus provides for the judicial protection of human rights without compromising the ideal of parliamentary supremacy.

83 Gardbaum, n. #, at 000.

84 The ideal, we might say, of parliamentary or legislative ultimacy. It is not surprising, as an historical matter, that Canada and the United Kingdom take the argument from democracy--which is, in effect, an argument for parliamentary sovereignty and against judicial supremacy/ultimacy--more seriously than does the United States. As Gardbaum explains:

[T]here is . . . an important aspect of the real tension between [American-style] judicial review and popular sovereignty that--for historical reasons--is not fully appreciated in the United States and has resulted in a failure to comprehend fully why the claims of legislative supremacy were, and continue to be, so powerful and compelling to so many other countries. In Europe and elsewhere, legislative supremacy is often understood as the institutional manifestation of popular sovereignty, the notion that all political power derives from and remains with the people. Moreover, popular sovereignty is not generally viewed as an empty political truism for it was typically the concrete and hard-fought result of centuries of struggle between the people on the one hand, and the monarch (usually supported by church and aristocracy) over where ultimate power lay. During the course of this struggle, popular sovereignty was generally institutionalized in the legislature and monarchical power in the executive and judiciary. Legislative supremacy thus reflected the historical triumph of the people against rival claims to supremacy of the Crown and a narrow political elite.
Recall now the second part of the argument from democracy--that it is not only undemocratic, but hostile to the practice of democratic deliberation and therefore subversive of the citizens as a community of political-moral judgment, for courts to protect human rights. As I explained:

By imposing on government their own judgments about what indeterminate human rights forbid (or require) government to do, politically independent courts necessarily discourage citizens and their electorally accountable representatives from themselves deliberating about what the rights forbid; they necessarily discourage citizens and their representatives from themselves deliberating about what specification of indeterminate human rights norms to adopt, what shape to give the norms, in particular contexts in which the norms are invoked. In a democracy, such judgments, like other reasonably contestable political-moral judgments, should be the yield not of judicial self-assertion but of democratic deliberation. By serving as a shared basis of political-moral judgment, a legal text's articulation of the citizens' judgments about what human rights there are can help constitute the citizens as a community of judgment. However, by displacing citizens and their representatives as the principal agents of political-moral judgment about the concrete meaning of indeterminate human rights norms in particular contexts in which they are invoked, courts subvert citizens and their representatives as a community of

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

Id. at 740-41.
judgment. The courts themselves, and ultimately the highest court, become the true community of judgment with respect to such controversies. With respect to this profoundly important subject matter—the concrete, contextual meaning of indeterminate human rights norms—it is government "by judiciary" rather than by the people (citizens) themselves.

By leaving the last word with the electorally accountable representatives of the people, judicial penultiimacy is not hostile but congenial to the practice of democratic deliberation; judicial penultiimacy does not subvert but maintains the citizens and their representatives as a community of political-moral judgment—though the courts, too, have a crucial role to play in the ongoing process of deliberation. Something I said many years ago about American-style judicial review now seems to me substantially false, given that such review is part and parcel of a system of judicial supremacy/ultimacy. Applied to a liberal democracy with a well functioning system of judicial penultiimacy, however, what I said portrays a realistic ideal: In the dialogue between the politically independent courts and the other, electorally accountable parts of government, a dialogue about the concrete meaning of indeterminate human rights in particular contexts in which they are invoked, "what emerges is a far more self-critical political morality than would otherwise appear, and therefore likely a moral mature political morality as well--a morality that is moving . . . toward, even though it has not always and everywhere arrived at, right answers, rather than a stagnant or even regressive morality."85

Let me be clear: I am not making the obviously silly suggestion that such inter-institutional dialogue is the only path to a more self-critical and mature political morality. It can be, however, one important path. Cf. Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter," 44 Canadian Public Administration 255, 281 (2001): "Nothing prevents the public from engaging in rigorous public debate, even in areas where the court has said nothing; nothing guarantees that the public will engage in such deliberation even if the court does rule on an issue. The argument that I am making is that while not absolutely necesssary and sufficient on its own, a Supreme

85 Perry, The Constitution, the Courts, and Human Rights, n. #, at 113. See also Gardbaum, n. #, at 000: "By attempting to create joint responsibility and genuine dialogue between courts and legislatures with respect to fundamental rights, the new [Commonwealth] model [of constitutionalism] promises both to reinject important matters of principle back into legislative and popular debate and to provide a radically direct resolution of the countermajoritarian difficulty associated with judicial review."

Court decision prior to the [legislature's invocation of section 33] increases the chances of an informed public discussion."

The Canadian Charter of Rights and Freedoms has been in force since 1982. How well, or how poorly, has the system of judicial penultimacy—that is, section 33—been functioning in Canadian politics? Has the ideal articulated in the text accompanying this note been realized, to some extent at least, in Canada? There is no consensus. Stephen Gardbaum has argued that section 33 has done little to create a genuine dialogue between the Canadian judiciary on the one hand, in particular the Supreme Court of Canada, and Parliament and provincial legislatures on the other. In Gardbaum's view, the Canadian Supreme Court's voice and will are virtually as dominant in Canada as the United States Supreme Court's voice and will are in the United States. See Gardbaum, n. #, at 719-27 & 000-000. Mark Tushnet seems to concur: "To an outsider, effective legislative responses to the Canadian Supreme Court's most controversial decisions seem as rare as effective responses to equally controversial decisions by the U.S. Supreme Court." Tushnet, Book Review, n. #, at 000; see also Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illustration of the Contermajoritarian Difficulty," 94 Michigan L. Rev. 245, 000-000 (1995).

By contrast, Peter Hogg, Dean of the Osgoode Hall Law School, York University, Toronto, has argued in a recent essay that section 33 is functioning very well indeed. Hogg refers to "a study published in 1997 [that] found 65 cases in which the courts had struck down or directly amended a federal or provincial law under the Charter of Rights since its adoption in 1982 . . ." Peter W. Hogg, "The Charter Revolution: Is It Undemocratic?" 12 Forum Constitutionnel 1, 2 (2001/2002) (referring to Peter W. Hogg and Allison A. Bushel (now Thornton), "The Charter Dialogue Between Courts and Legislatures," 35 Osgoode Hall L. J. 75, 81 (1997)). Based on this study, and on judicial events after 1997, Dean Hogg concludes:

[T]he intervention of courts does not close down the marketplace of ideas, and a public debate usually follows any important Charter decision. That debate often increases public awareness of minority perspectives (consider for example the strong support that now exists for same-sex rights), which in turn influences the form that any legislative response takes. [Under the Charter,] the legislature usually has a good deal of discretion as to the appropriate response to a Charter decision, and, bearing in mind public opinion, will normally want to replace a law that has been struck down with one that accomplishes the policy objective but is more inclusive of minorities and less intrusive of guaranteed rights. . . . In those rare cases where government simply cannot abide the Court's interpretation of the Charter, reversal is usually legally possible, and can be accomplished politically where public opinion is particularly strong . . . Where public opinion is less strong or is divided, government may choose to leave the decision in place . . . This kind of interaction between . . . the decisions of the Court, the debate in the public media and the ultimate response by the legislature is by no means undemocratic. The claim that judicial review under the Charter of Rights and Freedoms is "undemocratic" cannot be sustained.

Hogg, "The Charter Revolution," n. #, at 7-8 (passages rearranged). In a recent book, Kent Roach, Professor of Law at the University of Toronto, joins Dean Hogg and others who
The Thayerian Plea for Judicial Deferece

We have discussed two fundamental issues that the citizens of a liberal democracy face in deciding whether to empower politically independent courts to protect entrenched, indeterminate human rights: whether to empower them at all and, if so, what degree of power to give them. (In the context of a liberal democracy is which courts already have power to protect entrenched, indeterminate human rights, the two issues are: whether the courts should have this power, and, if so, whether they should have the degree of power they do.) There is a third fundamental issue that the citizens of a liberal democracy--in particular, the judges themselves--face: In exercising conclude that section 33 is functioning well. See Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (2001).

We need not resolve this disagreement between Professors Gardbaum et al. and Dean Hogg et al. As Jeffrey Goldsworthy has recently argued, even if section 33 has not functioned well in Canadian politics--even if it has not operated in a dialogue-enhancing, democratizing way--the principal reasons for this are not inherent; rather, they are peculiar to Canadian politics and do not indicate that a similar provision could not or would not operate in a dialogue-enhancing, democratizing way elsewhere. See Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy," Wake Forest L. Rev. (forthcoming 2003).

Gardbaum predicts that judicial penultimacy will function better in the United Kingdom under the HRA than (in his judgment) it has in Canada under the Charter. See Gardbaum, n. #, at 000-000. Gardbaum's prediction is puzzling, given his report that Prime Minister Blair's Labor Government

has repeatedly stated its belief that the normal course of action would be that [a declaration of incompatibility] "will almost certainly prompt Government [whichever party is in power] and Parliament to change the law." . . . In parliamentary debate, government ministers acknowledged that only with respect to highly controversial matters of principle, such as abortion, could it foresee not amending or repealing legislation in response to a court declaration of incompatibility. See Hansard for October 21, 1998, debate involving Jack Straw, the Home Secretary: "In the overwhelming majority of cases, regardless of which party was in government, I think that Ministers would examine the matter and say, 'a declaration of incompatibility has been made, and we shall have to accept it. We shall have to remedy the defect in the law spotted by the Judicial Committee of the House of Lords.'"

Id. at 733-34 & n. 105.
their power to protect human rights (assuming they have the power), should courts assume an aggressive stance vis à vis the other, electorally accountable branches of government—the legislative and executive branches—or, instead, should they assume a passive stance? That is, should the judiciary decide a human rights case on the basis of its own specification of the norm--its own judgment about what an indeterminate human rights norm forbids (or requires) government to do in the case at hand—even if (a) according to that specification, government has violated the right in question, but (b) according to a different, not unreasonable specification, it has not? Or, instead, should the judiciary defer to any not unreasonable specification according to which government has not violated the right in question; in particular, should the judiciary defer to the legislature's or executive's specification—the legislature's or executive's judgment about what the indeterminate norm permits in the context at hand—so long as that judgment is, in the judiciary's view, not unreasonable?

The choice here is best understood as a choice between two different judicial attitudes or orientations. For a judge to adopt a deferential attitude—for her to be oriented deferentially—is for her to be prepared to rule that a challenged law or other governmental action does not violate a human rights norm if there is a "not unreasonable" specification of the norm according to which the challenged law/action does not violate the norm. For a judge to adopt a nondeferential attitude is for her to be prepared to rule that a challenged law/action violates a human rights norm if according to the judge's own specification of the norm, the law/action violates the norm (whether or not there is another, "not unreasonable" specification according to which the law/action does not violate the norm). The difference between these two attitudes, or orientations, is a matter of degree: A judge can be more or less deferential, or more or less nondeferential. Moreover, not every judge will draw the boundaries of the "not unreasonable" in the same place. An arrogant judge will not draw them at all. ("Be reasonable, think like I do."86) Still, the difference between the two attitudes is recognizable and not inconsequential: It is easy to imagine human rights cases in which the difference will make a difference to the outcome of the case.

---

86 Thus reads the sign my wife has posted over the entrance to my home office.
Consider the principal context in which this question arises--the question whether, in protecting entrenched, indeterminate human rights, courts should adopt a deferential or nondeferential attitude, whether they should proceed deferentially or nondeferentially. Assume that, as in the United States, a system of judicial ultimacy (supremacy) is in place. According to the second part of the argument from democracy, such a system is not only undemocratic, but hostile to the practice of democratic deliberation and therefore subversive of the citizens as a community of political-moral judgment. In a system of judicial ultimacy, the courts can mitigate this defect, to a little extent, by proceeding deferentially. \(^{87}\) From the standpoint of the argument from democracy, and crediting the argument for empowering courts to protect human rights, a system of judicial penultimacy is best; a system of judicial ultimacy in which courts exercise their power nondeferentially is worst; and a system of judicial ultimacy in which courts exercise their power deferentially is somewhere in between.

In the United States, a system of judicial ultimacy has long been in place; it is not surprising, therefore, that arguments for judicial deference have long been made in the United States. The most famous and influential such argument was made by James Bradley Thayer in an essay published in the October 1893 issue of the *Harvard Law Review*: "The Origin and Scope of the American Doctrine of Constitutional Law". \(^{88}\) Even now, over a hundred years later,\(^{87}\) Cf. Tushnet, Book Review, n. #, at 000: "The concerns articulated by proponents of parliamentary sovereignty can be rearticulated as grounds for urging constitutional courts in strong-form systems [of judicial review] to be restrained rather than activist."


Felix Frankfurter described [Thayer], his teacher, as "our great master of constitutional law." Thayer, said Frankfurter, "influenced Holmes, Brandeis, the Hands (Learned and Augustus) . . . and so forth. I am of the view that if I were to name one piece of writing on American Constitutional Law--a silly test maybe--I would pick an essay by James Bradley Thayer in the *Harvard Law Review*, consisting of 26 pages, published in October, 1893, called 'The Origin and Scope of the American Doctrine of Constitutional Law'. . . . Why would I do that? Because from my point of view it's a great guide for judges and therefore, the great guide
Thayer's essay remains the locus classicus of the argument that in enforcing constitutional norms, the courts--including the Supreme Court--should proceed deferentially:

[The court] can only disregard the [challenged] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one--so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply--not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.

[A] court cannot always . . . say that there is but one right and permissible way of construing the constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible,
then this is not true. In the class of cases which we have been considering, the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.  

89 Thayer, n. #, at 54, 59. Thayer's most prominent judicial disciple was Felix Frankfurter, who wrote in his dissenting opinion in *West Virginia State Board of Education v. Barnette* (in which the Court struck down a public school regulation, challenged by a Jehovah's Witness, that compelled students to salute the flag and recite the Pledge of Allegiance): "Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours. . . . I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 661-62, 666-67 (1943). As Justice Frankfurter understood, a Thayerian approach to the specification of indeterminate constitutional norms affords relatively little opportunity for a judge's own values to influence her resolution of the conflict at hand.

To afford relatively little opportunity is not to afford no opportunity.

. . . Thayer's rule, like all guideposts, is not self-applying. Even limited by the rule of administration, judges, like criminal juries, might differ over what constitutes a reasonable doubt; the possibilities, the stuff of which reasonable doubts are made, do not always strike all men, however reasonable, alike. Even under Thayer's rule of administration, then, the freedom and the burden of decisionmaking remain. But that freedom is narrowed, and that was Thayer's aim. He sought to reduce the scope of judicial freedom without diminishing the judicial duty and burden of judging.


According to Thayer, the deferential approach is fitting when a federal court reviews, for federal constitutionality, federal action or when a state court reviews, either for federal constitutionality or for state constitutionality, state action, but not when a federal court reviews, for federal constitutionality, state action, in which case (according to Thayer) a nondeferential approach is fitting. See Thayer, n. #, at 62-63. Limiting the deferential approach in the way Thayer did makes little sense, however, and most commentators who discuss Thayer's conception of proper judicial role fail even to note the limitation. See, e.g., Bickel, n. #, at 35-46; Wallace Mendelson, "The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter," 31 Vanderbilt L. Rev. 71 (1978); but see Charles Black, *Decision According to Law* 34-35 (1981). (Even Felix Frankfurter failed to note, much less to heed, the limitation—as his dissent in *Barnette* makes clear.) Sanford Gabin has explicitly argued that "the reasonable doubt test should be applied not just to all national legislation but, contrary to Thayer's prescription, to all state legislation as well." Gabin, supra this n., at 5.
Thayer's plea for judicial deference--his plea for "the rule of the clear mistake", as Alexander Bickel called it--was not rooted in a faith in the capacity of the other, nonjudicial departments of government--the legislative and executive departments--to resolve constitutional questions responsibly; nor was it rooted in a belief that the legislative and executive departments are truly representative of the people. Thayer's argument was rooted, instead, in a conviction that the citizens of a democracy, as the ultimate political sovereign in a democracy, ought themselves, through their elected representatives, to take final responsibility for resolving constitutional questions. Thayer believed that a nondeferential judicial approach to the specification of constitutional indeterminacy--an aggressive approach rather than a passive one--would weaken the capacity of the people and their representatives to do so. Thayer elaborated the point in a book on John Marshall:

[T]he exercise of judicial review, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . .

---

90 See Bickel, n. #, at 34-46.

91 See Kahn, n. #, at 85-87.
For that course--the true course of judicial duty always--will powerfully help to bring the people and their representatives to a sense of their own responsibility.  

Many modern students of American judicial review have shared Thayer's concern. In the passage I have used as the epigraph for this essay, for example, Alexander Bickel said that "[t]he search must be for a [judicial] function . . . whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility."  

There is little doubt that the Thayerian argument for judicial deference has great power in the context of a system of judicial ultimacy. The argument therefore has great power in the context of a system of judicial ultimacy.

---

92 James Bradley Thayer, John Marshall 106-07, 109-10 (1901). In his 1893 essay, Thayer wrote:

No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. . . . [N]ot being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, [the people] lose much of what is best in the political experience of any nation.

Thayer, n. #, quoted in Kahn, n. #, at 87. [The original cite?] Kahn has encapsulated Thayer's point: "[T]he more the Court tries to represent the people, the more the people cease to function as the popular sovereign." Kahn, n. #, at 87. (For a commentary on Thayer's position, see id. at 85-89.) Cf. Allan C. Hutchinson, "Waiting for Coraf (or the Beatification of the Charter)," 41 U. Toronto L. J. 332, 358 (1991): "By endlessly waiting for CORAF, we place ourselves in waiting; it inculcates a servile and sycophantic attitude in people. Such a practised posture of dependence is anathema to the democratic spirit. It is infinitely better to run the unfamiliar risks of genuinely popular rule than to succumb to the commonplace security of distant authority." For a more recent, but none the less critical, statement by Hutchinson, see Allan C. Hutchinson, "Supreme Court Inc: The Business of Democracy and Rights," in Gavin W. Anderson, ed., Rights & Democracy: Essays in UK-Canadian Constitutionalism 29 (1999).

93 Emphasis added. See n. # and accompanying text.

94 The European Human Rights System is a system of judicial ultimacy. See n. #. The "margin of appreciation" doctrine deployed by the European Court of Human Rights is, at least
United States. Indeed, in the United States, in one or another version, the argument is always being mounted anew. But does the Thayerian argument for judicial deference have much power—does it make much sense—in the context of a system of judicial penultimate? Does the argument make much sense, for example, in Canada or the United Kingdom?

The Thayerian argument derives its power from the fact that the deference for which Thayer contended is a way of mitigating, to some extent, the principal defect of the American system of judicial ultimacy: The courts have the final say with respect to the concrete, contextual meaning of indeterminate human rights. (By the "final" say, I mean, of course, the final say short of overruling by an extraordinary, and extraordinarily improbable, political act.) This state of affairs—"judicial supremacy"—is not only undemocratic, but hostile to the practice of democratic deliberation and therefore subversive of the citizens as a community of political-moral judgment. A system of judicial penultimate, however, avoids that difficulty (and is attractive for just that reason): The courts do not have the final say.

in part, a doctrine of judicial deference appropriate for a system of judicial ultimacy. On the margin of appreciation doctrine, see Janis, Kay, & Bradley, n. #, at 146-48; Steiner & Alston, n. #, at 854-57.

95 Jeremy Waldron's and Mark Tushnet's cases against American-style judicial review are each at least partly Thayerian in character. Or so it seems to me. See Tushnet, Taking the Constitution Away from the Courts, n. #, chs. 6-7; Waldron, Law and Disagreement, n. #, chs. 10-13.

96 See Vicki C. Jackson & Mark Tushnet, Comparative Constitutional Law 414 (1999):

In the [United States, a constitutional] amendment is permitted only upon completion of supermajority requirements both in Congress and in the states: an amendment must be proposed, either by 2/3 of each House of Congress or by a convention called at the request of the legislatures of 2/3 of the states, and then the proposed amendment must be approved by the legislatures of or conventions in 3/4 of the states. This makes the U.S. Constitution one of the most deeply entrenched [in the world].
At least, as a formal matter they do not have the final say. Recall that in a system of judicial penultimacy like Canada's, the burden of legislative inertia falls on those who would negate a judicial decision, with the consequence that, as Mark Tushnet has observed, "even majorities may find themselves unable to displace the Court's decision, at least if what the Court has done has the support of a substantial minority." In a system of judicial penultimacy that is not well functioning--a system in which determined political majorities are rarely if ever able to overcome the burden of legislative inertia--one might want to say, with Tushnet, that "the invention of weak-form judicial review [i.e., judicial penultimacy] may not displace the longstanding controversy in strong-form systems over judicial activism and restraint." But a system of judicial penultimacy need not be one in which determined political majorities are almost always unable to overcome the burden of legislative inertia. (Of course, even in a well functioning system of judicial penultimacy a determined political majority will sometimes be unable to overcome the burden of legislative inertia, especially "if what the Court has done has the support of a substantial minority.") Moreover, one should not confuse a system of judicial penultimacy in which political majorities rarely even want to override their supreme court's human rights decisions with a system in which they want to do so but are almost always unable to overcome the burden of legislative inertia. Jeffrey Goldsworthy argues that in Canada "the most likely reason for legislators [habitually declining to use the override provision] is that the electorate is unlikely to trust their judgment about constitutional rights more than the judge's judgment. And surely that is the electorate's democratic prerogative . . ." Goldsworthy adds: "There is clearly a difference between relinquishing or disabling one's power to make certain kinds of decisions, and declining--even routinely--to exercise it. For example, in constitutional law there is a crucial difference between, on the one hand, a legislature irrevocably transferring its powers to another body, and, on the other, its delegating those powers while retaining its

97 Tushnet, Book Review, n. #, at 000.

98 Id. at 000.

99 Goldsworthy, n. #, at 000.
ability at any time to override its delegate or even cancel the delegation.” In any event, in a system of judicial penultimate that is (like Canada's?) well functioning, there is little if any need for Thayerian deference.

Indeed, in such a system, there is a need for courts to avoid such deference: Thayerian deference would deprive the political community of the court's own best judgment about the optimal specification of an indeterminate human rights norm in a particular context. There is a good reason for bearing this cost in a system of judicial ultimacy, namely, to mitigate—albeit only to a little extent—the principal defect of such a system. But there is no good reason for bearing this cost in a well functioning system of judicial penultimate, because, again, that defect does not exist in such a system. To the contrary, there is a good reason for avoiding this cost in a system of judicial penultimate. The argument for empowering courts to protect human rights, presented above, gives the citizens of a liberal democracy ample reason to place a high value on hearing the politically independent judiciary's own best judgment about the optimal specification of a human rights norm. (And that they have only the power of penultimate gives courts reason to offer their own best judgment.) Earlier I suggested that the citizens of a liberal democracy with a well functioning system of judicial penultimate can realistically hope that in "the dialogue between the politically independent courts and the other, electorally accountable parts of government, a dialogue about the concrete meaning of indeterminate human rights in particular contexts in which they are invoked, 'what emerges is a far more self-critical political morality than would otherwise appear, and therefore likely a moral mature political morality as

100 Id.


The fact that the British courts are not empowered to strike down primary legislation might actually encourage them to issues declarations of incompatibility. The non-pure judicial review power might make the British courts more robust in exercising their powers than their counterparts in pure judicial review systems. In doing so, the courts might contribute to a stronger protection of civil liberties.
well--a morality that is moving . . . toward, even though it has not always and everywhere arrived at, right answers, rather than a stagnant or even regressive morality." For courts to exercise Thayerian deference in a system of judicial penultimacy would be for them to make impossible this inter-institutional dialogue, thereby impeding the emergence of a more self-critical and mature political morality.

102 See n. # and accompanying text.

103 As I have already noted, there are two basic kinds of human rights against government: "Negative" human rights state what government ought not to do to any human being (because every human being is sacred); "positive" human rights state what government ought to do for every human being (within its jurisdiction). Most human rights documents, national (constitutional) and international, articulate rights of both kinds. The International Covenant on Civil and Political Rights, for example, which entered into force in 1976 and to which (as of March 2000) 144 state parties subscribe, contains many negative human rights--e.g., the right to be free from torture--but it also contains some positive ones--e.g., the right to a well functioning criminal justice system when one is charged with a crime. ("It is wrong . . . to contrast the kinds of demands made in the name of political rights and the kinds of demands made in the name of economic and social rights. . . . [R]ights of both sorts require the institution and operation of administrative systems; both involve manpower and resources; both presuppose a relatively stable and well-organized society; and both require governments and government officials to do certain things under certain conditions, not merely to refrain from doing certain things." Waldron, Law and Disagreement, n. #, at 234.) A few human rights documents--the International Covenant on Economic, Social, and Cultural Rights, for example, which entered into force in 1976 and to which (as of March 2000) 142 state parties subscribe--focus mainly on positive human rights of a certain sort: "welfare" rights--rights, against government, to the satisfaction of certain material needs, "amongst which the most important are the right to a minimum income, the right to housing, the right to health care, and the right to education." Cécile Fabre, Social Rights under The Constitution: Government and the Decent Life 3 (2000). For a fuller articulation of these rights, see id. at 107-08. See also Isfahan Merali & Valerie Oosterveld, eds., Giving Meaning to Economic, Social, and Cultural Rights (2001).

Although one may reject the moral position that human rights include some welfare rights, according to many important human rights documents human rights do include some welfare rights. One may insist that even if human rights include some welfare rights, such rights should not be articulated in entrenched legal texts; the fact of the matter, however, is that some welfare rights are articulated, as human rights, in many entrenched legal texts. Moreover, entrenchment of human rights of the welfare sort makes sense for the same reason that entrenchment of other human rights makes sense--because a liberal democracy's commitment to certain basic human rights, including human rights of the welfare sort, should not be up for grabs in its ordinary politics, but is one of the principal political-moral foundations of its ordinary
politics. As Cécile Fabre has explained, because welfare rights "to adequate minimum income, housing, and health care are not part of the concept of democracy, . . . constitutionalizing them amounts to upholding rights at the expense of democracy;" nonetheless, such rights "are, in a limited number of cases, necessary conditions for a democracy's functioning and survival, and [therefore] in those cases constitutionalizing them is true to the value of democracy even though it constrains the democratic majority;" moreover, "the right to adequate education is a defining feature of the concept of democracy and a necessary condition for its functioning and survival, and . . . constitutionalizing it therefore does not conflict with democracy." Fabre, n. #, at 4-5. See id. at 110-51.

Have I said anything in this essay, about the proper role of courts in protecting entrenched, indeterminate human rights, that needs to be modified if the human rights at issue are human rights of the welfare sort? (As articulated in entrenched legal texts, welfare rights are typically quite indeterminate. See, e.g., Constitution of the Republic of South Africa, Section 26 ("Housing"); Section 27 ("Health care, food, water, and social security").) The conventional wisdom is that even if we should want politically independent courts to protect negative human rights and some positive human rights, we should not want them to protect positive human rights of the welfare sort. Michael Walzer is one of many who have articulated this conventional wisdom:

[T]he judicial enforcement of [entrenched] welfare rights would radically reduce the reach of democratic decision. Henceforth, the judges would decide, and as cases accumulated, they would decide in increasing detail, what the scope and character of the welfare system should be and what sorts of redistribution it required. Such decisions would clearly involve significant judicial control of the state budget and, indirectly at least, of the level of taxation--the very issues over which the democratic revolution was originally fought.


Mark Tushnet informs us that although welfare rights are constitutionally entrenched in the Republic of Ireland and in India, the Irish and Indian constitutions specifically rule out judicial enforcement of the rights. See Mark Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations" (forthcoming) [ms. at 32-33 & n. 66]. For a powerful, illuminating argument that in a liberal democracy, courts should be empowered to protect even (entrenched, indeterminate) human rights norms of the welfare sort, see Fabre, n. #,
Concluding—but Inconclusive—Postscript:
What Role for the Courts in the United States?

It is emphatically the province and duty of the judicial department to say what the law is.\textsuperscript{104}

In the United States, politically independent courts have power to protect entrenched, indeterminate human rights. Indeed, and as I have already explained, one might conclude that in the United States the courts have too much power to protect such human rights: They have the power of judicial ultimacy (or, as it is usually put, "judicial supremacy"). It is extremely unlikely that the citizens of the United States, through their political representatives, will alter this state of affairs any time soon. The question is nonetheless interesting whether it would be a good idea, all things considered, for the citizens of the United States to disestablish the power of judicial ultimacy and to establish in its place the power of judicial penultimacy. Perhaps one or

\textsuperscript{104} Marbury v. Madison, 1 Cranch (5 U.S.) 137, 000 (1803).
another version of the Canada's "override" provision would be, for the United States, "an intrinsically sound solution to the dilemma of rights and courts".  Paul Weiler has raised this possibility:

I suspect that this arrangement would not be unthinkable in the United States . . . if it were translated into a congressional override of the Supreme Court. Any measure that could be navigated through all the branches of the national legislative process, each reflecting a variety of constituencies and points of view, might well be considered a more sensible approach to the problem than would a verdict from a bare majority of five on the Supreme Court. But almost all American scholars would have grave qualms about conferring any such power on the state legislatures, both from general disenchantment with the deliberative capacities of state governments and because of the fear that certain state legislatures would respond to majorities that do not necessarily adhere to the values spelled out in the national constitution. For many people, reflection on what might have happened after Brown v. Board of Education had Mississippi had a legislative override on fourteenth amendment issues is sobering enough to discredit the entire notion.

---

105 Weiler, n. #, at 80.

106 Id. at 84-85. For Weiler's argument, see id. at 79-86. Senator Robert M. La Follette presumably would have been sympathetic to Professor Weiler's suggestion. Speaking to a convention of the American Federation of Labor in 1922, Senator La Follette's proposed "a constitutional amendment to permit Congress to reenact any federal statute that the Court had declared unconstitutional . . ." Ross, n. #, at 194. "Although La Follette's proposal presumably would have permitted Congress to reenact the law by a majority vote, La Follette eventually came to advocate the [American Federation of Labor's] proposal to permit reenactment only by a two-thirds vote of both houses." Id. at 194 n. 3.

Even though La Follette never introduced a measure to permit Congress to override judicial nullification of legislation, a measure that embodied part of the plan advocated by La Follette and the AFL was introduced in the House by Republican James A. Frear of Wisconsin in February 1923. Frear proposed [a constitutional] amendment that would have permitted Congress to enact a law to set aside by a two-thirds vote any Supreme Court decision that invalidated a federal statute.

Id. at 199-200.
Alexander Bickel once suggested that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs."\(^{107}\) A system of judicial penultimacy, like Canada's, has this great advantage over the American system of judicial supremacy: A system of judicial penultimacy preserves an active, vigorous judicial role--a role that, at its best, is special, and perhaps even indispensable, in just the way Bickel suggested--in contentious discourse about the concrete, contextual meaning of indeterminate human rights norms; at the same time, however, a system of judicial penultimacy does not so privilege the judicial voice in that discourse that there is, realistically, no opportunity for effective political response. A system of judicial penultimacy represents an effort to have the best of two worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive human rights issue and an opportunity for electorally accountable officials to respond, in the course of ordinary politics, in an effective way.\(^{108}\)

\(^{107}\) Bickel, n. #, at 25-26.

\(^{108}\) Section 33 of the Canadian Charter represents such an effort on the assumption that Canada's "notwithstanding clause should only be employed in a remedial way, after legislation has already been considered by the courts and struck down; it should not be used preemptively, to block anticipated judicial review altogether. . . . [S]ection 33 is intended to allow a further stage in the dialogue between courts and legislatures as to the meaning of Charter rights, not to prevent such dialogue altogether." Brian Slattery, "A Theory of the Charter," 25 Osgoode Hall L. J. 701, 742 (1987). (The quoted language is Slattery's characterization of the position argued by Donna Greschner and Ken Norman in their article: "The Courts and Section 33," 12 Queen's L. J. 155, 190 et seq. (1987).) For another argument that section 33 should be invoked only reactively, not preemptively, see Kahana, n. #. See Guido Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)," 105 Harvard L. Rev. 80, 124 (1991) (calling the Canadian Constitution, in consequence of section 33 of the Charter, "a wonderful example of an essentially Bickellian constitution").
Recall James Bradley Thayer's claim that "the exercise of judicial review, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Establishing a system of judicial penultimate would significantly enhance, not diminish, the "political capacity" and "moral responsibility" of the people--it would encourage greater citizen participation in what Sandy Levinson has called "the conversation about constitutional meaning"--and should therefore be an attractive goal for those who, like Jeremy Waldron, Mark Tushnet, Levinson, and others, want to deprivilege the judicial voice in constitutional discourse.

But, as I said, it is exceedingly unlikely that the citizens of the United States will disestablish the system of judicial ultimacy any time soon, if ever. (In the United States, during the period from the 1890s to the 1930s, there were many proposals to curb judicial power to strike down legislation as unconstitutional, including proposals of regimes in which unpopular

---

109 See n. # and accompanying text.

110 See n. #.

111 See Sanford Levinson, "The Audience for Constitutional Meta-Theory (or, Why, and to Whom, Do I Write the Things I Do?)," 63 U. Colorado L. Rev. 389, 406-07 (1992): "[T]he United States Constitution can meaningfully structure our polity if and only if every public official--and ultimately every citizen--becomes a participant in the conversation about constitutional meaning, as opposed to the pernicious practice of identifying the Constitution with the decisions of the United States Supreme Court or even of courts and judges more generally." See also, e.g., Cass Sunstein, The Partial Constitution 354 (1993) (expressing "hope for newly reinvigorated deliberation about constitutional commitments--deliberation that will occasionally take place in the courtroom, but more often, and far more fundamentally, through democratic channels").
judicial decisions could be overridden. None of the proposals, however, was adopted.\footnote{For one such proposal, see n. \#. For the definitive discussion of the various proposals, see Ross, n. \#. See also Gerald Gunther, Learned Hand: The Man and the Judge 213 et seq. (1994) (discussing Theodore Roosevelt's proposal for popular control of judicial power and Learned Hand's response). Cf. William G. Ross, "The Resilience of \textit{Marbury v. Madison}: Why Judicial Review Has Survived So Many Attacks," Wake Forest L. Rev. (forthcoming 2003).}

Therefore, another question about the American system of judicial review comes into view. Because the Thayerian argument for judicial deference has great power in the context of a system of judicial ultimacy, it has great power in the United States. Should we who are citizens of the United States want our courts to exercise Thayerian deference in the course of exercising their power to protect (entrenched, indeterminate) human rights? If one is inclined to concur in Tushnet's or Waldron's judgment that American-style judicial review (judicial review cum judicial supremacy) is a bad idea--indeed, that it is, in the United States, worse than no judicial review at all--one should be no less inclined to concur in the view that because American-style judicial review is a fact of life, judges, in the exercise of judicial review, should proceed in the deferential way that Thayer recommended; they should adopt a deferential attitude.

But some of us--even some of us who believe that a system of judicial penultimacy is better than a system of judicial ultimacy--are not so confident that the American system of judicial ultimacy is worse than no judicial review at all. Is the American system of judicial ultimacy always worse than no judicial review at all? Are particularities of historical context irrelevant? Was the American system of judicial ultimacy worse than no judicial review at all in 1954, when \textit{Brown v. Board of Education}\footnote{347 U.S. 483 (1954).} was decided? Is it worse than no judicial review now? Will it be ten years from now? Thirty years? Is the subject matter of the particular human rights norm (or norms) at issue also irrelevant? Is the American system of judicial ultimacy worse than no judicial review if the norm at issue forbids racial discrimination? If it protects
freedom of expression? Religious liberty? If it protects prisoners, detainees, and others from torture or other inhumane and degrading treatment? Is all this irrelevant? For some of us, it is not so clear that the American system of judicial ultimacy is worse than no judicial review at all; for us, therefore, the question of judicial deference vel non is more complicated. We are wary about generalizations. (Including this one, which Jeremy Waldron attributes to Mark Tushnet and then himself seems to affirm: "[P]opulist constitutional politics, freed from court-centered legalism, tends to project a progressive and liberating vision (rather than a tight-fisted libertarian one) on to the founding commitments of the American republic." We believe that particularities of historical context matter—and that the subject matter of the human rights norm(s) at issue matters too. In particular, we worry that if courts in the United States were invariably to exercise their power to protect entrenched, indeterminate human rights in a Thayerian fashion, they would end up deferring to many--to too many--suboptimal specifications of human rights norms.

114 Cf. Douglas Laycock, "The Benefits of the Establishment Clause," 42 DePaul L. Rev. 373, 376 (1992): "Some of the time, judicial review will do some good. Judges did nothing for the Mormons, but they may have saved the Jehovah's Witnesses and the Amish. If judges can save one religious minority a century, I consider that ample justification for judicial review in religious liberty cases."


116 For a depressing example of the kind of suboptimal specification the Thayerian approach might well affirm, consider the political judgment to which Thayer's most prominent judicial disciple, Felix Frankfurter, deferred in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), in which he dissented from the Supreme Court's decision striking down a public school regulation that compelled students, including Jehovah's Witnesses who conscientiously objected on religious grounds, to salute the American flag and recite the Pledge of Allegiance. It was, Frankfurter insisted, a judgment "upon which men might reasonably differ. . . . And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia." Id. at 666-67. (Only three years earlier, eight members of the Supreme Court, including Frankfurter, were on Frankfurter's side of the issue; only Justice Harlan Fisk Stone was not. See Minersville School District v. Gobitis, 310 U.S. 586 (1940).) As Frankfurter's Thayerian performance in
If we assume that, as I have argued, a system of judicial penultimacy is, all things considered, best--better than no judicial review at all and better, too, than a system of judicial ultimacy--this question remains: In the United States, which arrangement is second best: A system of judicial ultimacy in which the power to protect human rights is exercised in a deferential (Thayerian) fashion? Or one in which it is exercised nondeferentially? Let us put aside, for now, any wariness about generalizations and simply note that both answers to the question are embedded in speculative and therefore highly contestable judgments about the likely consequences of alternative ways of allocating political power in the United States. We must, in answering the question, speculate about the future--about how a proposed allocation of power will likely play out. But we must do so in part on the basis of our evaluation of the past--of how a particular allocation of power did in fact play out. (There is at least some truth, therefore, in Richard Posner's characteristically anti-philosophical suggestion: "So far as the scene of American judicial review is concerned, the question whether judicial review has been on balance a good thing for America may be the only question worth asking once the detritus of

*Barnette* illustrates, because legislatures so rarely make political choices about whose constitutionality men and women may *not* reasonably differ, the Thayerian approach to the specification of any constitutional norm effectively marginalizes the norm--virtually to the point of eliminating it--insofar as constitutional adjudication is concerned.

---

117 The qualifier "in the United States" is important. "There is no reason to suppose that the issue [whether American-style judicial review is a good idea] should be resolved the same way in two different countries, even countries that share the same language and the same basic legal and political heritage. That depends on all sorts of empirical questions and judgmental imponderables involving the political and legal cultures of the two countries and the career path of judges and legislators in them." Posner, "Review of Jeremy Waldron," n. #, at 592.

118 In commenting on a draft of this essay, Bob Nagel usefully suggested, with reference to my discussion of Canada and the United Kingdom, that in addition to "min[ing] the practices and laws of other countries," we consider "the extent to which our own history indicates [some] distinctively American methods of sharing interpretive power . . ." E-mail from Robert Nagel to Michael Perry, Apr. 9, 2002. See, in that regard, Keith E. Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," 80 North Carolina L. Rev. 000 (2002).
philosophers’ arguments is swept off the table." I suspect that sophisticated proponents of each answer—by which I mean, I suppose, proponents who understand that reality is too messy, too unruly and unpredictable, to warrant much confidence in either answer—would want to conclude their argument by rehearsing, in a form modified slightly to fit the present context, something Alexander Bickel once said about judicial review. (We began with Bickel; now, we end with him.) "It will not be possible fully to meet all that is said against [our answer]. Such is not the way with questions of government. We can only fill the other side of the scales with countervailing judgments on the real needs and the actual workings of our society and, of course, with our own portions of faith and hope. Then we may estimate how far the needle has moved." 120

---


120 Bickel, n. #, at 24.

Let me highlight an issue I have not addressed in this essay (because it would take us too far afield): Several provisions of the United States Constitution protect (what we today call) human rights. The language of the most important such provisions typically requires some decoding before we can see precisely what norms the provisions establish. A good example is the second sentence of section one of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is famously controversial precisely what norms this sentence establishes. For my own view of the matter, see Perry, We the People, n. #, ch. 3 ("The Fourteenth Amendment: What Norms Did 'We the People' Establish?"). (By contrast, the most important provisions of the principal international human rights documents, like the European Convention for the Protection of Human Rights and Fundamental Freedoms, require no such decoding. It is clear what norms the texts of those documents establish.) As I have explained elsewhere, if it is not clear what norm a legal text establishes, one must decode the text—one must, in that sense, "interpret" it—before one can get to the business of specifying the norm the text establishes (assuming such specification is needed). Interpreting a legal text, in the sense of decoding it to see what norm it establishes, should not be confused with the different process of specifying a norm established by a legal text. See Michael J. Perry, The Constitution in the Courts: Law or Politics? 70-71 (1994); see also id. at 34-35. What approach to the decoding/interpretation of one or another piece of the constitutional text should the United States Supreme Court pursue: Originalist? Nonoriginalist? Something else? I have addressed this much disputed question a number of times over the years—and, for better or worse, I have changed my mind a number of times over the years. See Perry, The Constitution, the Courts, and Human Rights, n. #; Perry, The Constitution in the Courts,
supra this note; Perry, We the People, n. #.