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978-1-107-03853-0 - Bills of Rights in the Common Law
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Introduction

In fields such as law, political science, and political theory, scholars have addressed at length *what* judges do under a bill of rights: they scrutinize legislation and, if they conclude that it violates rights, they strike it down. By comparison, scholars have neglected the *how* of judicial review: matters of procedure and technique and influential elements of judgments that accompany an outcome on rights. From an empirically grounded perspective that is internal to legal practice, this book contributes to remedying that neglect. Engaging with legal procedure as a contestable site of potentially expanding judicial power, it shows that matters of judging which scholars often dismiss as technicalities have substantial implications for the judicial role, for the judiciary's relation with other branches of government, and for the legitimacy of rights adjudication.

This book reports and analyses how judges of the highest courts of Canada, South Africa, and the United Kingdom have applied their respective country's relatively new bill of rights to legislation. Its detailed account of judicial activity, set against the historical record of judging before bills of rights, advances the understanding of the effects of rights instruments that empower judges to invalidate legislation and of those that do not. In doing so, it enriches the resources for assessing judicial review from all theoretical or political positions. Speaking to domestic and comparative public lawyers, to philosophers of law who analyse judicial review and human rights, and to political scientists who study courts, the book challenges prevailing characterizations of rights instruments and courts as well as significant ideas current in comparative constitutional research. It also speaks to those debating the appropriateness of adopting a bill of rights or of amending an existing instrument.

Four substantive claims unfold across the book. First, mistakes regarding what is novel about judicial review of legislation under bills of rights weaken the scholarship on recently adopted bills of rights. Before the arrival of rights instruments in countries such as Canada and the United Kingdom, judges were already used to reviewing legislation for its

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compliance with higher norms. Moreover, they were accustomed to declaring non-compliant legislation invalid. Consequently, accounts of recent bills of rights that emphasize the novelty of reviewing legislation and declaring its invalidity are erroneous. This misapprehension has detracted attention from the activity in rights cases that genuinely is novel. Novelty inheres in altering the barriers to adjudication; in the detailed, legislative character of remedies; in the exercise of discretion in fashioning them; and in the advice to legislative drafters specified during proportionality reasoning. The analysis within characterizes such changes to judges' activity beyond what a bill of rights requires as *judicial agency*. Delineating the extent of judicial agency will significantly enhance understandings of the effect of bills of rights. In addition, as the conclusion to the volume hints, exercises of judicial agency may raise especial legitimacy concerns.

Second, relatedly, scholars have exaggerated the importance of the judicial power to declare legislation invalid: the *strike-down power*. Underestimating this power would be wrong, but debates about judicial review unsubtly make it central. Attending closely to judicial practice under differently structured rights instruments, this argument highlights the range of activities, some of them novel, surrounding the exercise of the strike-down power in judicial review under a bill of rights. It derives further support from the judges' use of less than their full powers in Canada and South Africa, set against the practical strength of other means of giving effect to a rights claim, as in the UK.

Third, the book reads the rich record from Canada, the UK, and South Africa as revealing significant tendencies about the extent of rights judgments and the judges' place in the constitutional order, ones that the bills of rights did not necessarily portend. One tendency is a focus or scope, on the judges' part, that foregrounds, not the individual claimant and her facts, but the system of government regulation as it affects many people. Another is a judicial attitude or posture – evident in Canada and South Africa – of involving the democratically accountable branches of government in the rights project, even at the expense of giving effect to constitutional supremacy. Together, the second and third arguments complicate, if they do not wholly undermine, the comparative enterprise of characterizing judicial review under a bill of rights as 'strong form' or 'weak form'.

Fourth, swimming against a tide that praises inventive remedial techniques in rights cases as judicial restraint, and as valuable efforts to engage in dialogue with elected lawmakers, the book contends that the under-use of remedial powers in rights cases is problematic. The use of remedial discretion depicted within can produce injustice for litigants. It also threatens

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to have negative systemic effects, changing the legislative incentives for respecting rights and emboldening judges to make broader rulings. Moreover, the use of remedial discretion by Canadian and South African judges undermines the prevailing understanding of constitutional supremacy. A word on terminology is appropriate. The term *under-use* evokes both the use of less than the full extent of powers and criticism of such practice. Would it be analytically clearer to speak of an *abuse* of remedial discretion? A virtue of the term *under-use* is that it captures, better than *abuse*, the judges' presentation – and many scholars' acceptance – of their orders as restrained and deferential in virtue of doing less than they might.

In addition to advancing these four arguments, the book enacts a free-standing methodological claim about the approach necessary for grasping judicial power in rights cases. Errors and gaps with which the substantive arguments engage reflect what this book calls *bill-of-rights exceptionalism*, the unfounded view of adjudication under a bill of rights as a novel enterprise distinct from judging prior to its adoption and in other areas of law. Isolating judges' application of a bill of rights from its legal and historical context in this way is tantamount to examining a new Consumer Protection Act without regard for its relationship with the courts' prior pursuit of similar aims using the general private law – something no credible lawyer would contemplate. Instead, studying judicial power under bills of rights requires also studying judging before the rights instrument and in other kinds of activities, such as interpreting statutes and construing private instruments such as contracts.

Furthermore, what this book defines as its *internal, legal approach* leads to three research activities. One is reading judgments in detail, without which it is impossible – for example – to appreciate the exercise of power in the form of guidance to legislative drafters and to track how judges extend or under-use their powers based on unwritten considerations. Another is prioritizing procedural and technical matters – often relegated by theorists to the margins as technicalities – through which judicial power operates controversially. The third, relatedly, is integrating sources developed for legal practice into theory. In other words, the present method transgresses the boundaries that explicitly or implicitly structure much research on bills of rights and define the sources relevant to it. Ultimately, the value of this book's approach depends on the insights that it enables throughout the following eight chapters.

Chapter 1 grounds the book in relation to scholarship on bills of rights and the methodology of comparative constitutionalism. It identifies philosophers' and political scientists' external view of rights adjudication,

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defines bill-of-rights exceptionalism, and sets out the book's internal, legal approach. Underlining the potential for continuity in judicial practice before and under a bill of rights, the chapter establishes a baseline of practice prior to that instrument's adoption and defines the key analytic concept of judicial agency. It also stakes out a middle ground between opposing tendencies in comparative constitutional research, expressing a scepticism about universalism and its focus on convergence. Last, Chapter 1 specifies the project's scope, justifying the choice to sustain a monograph-length comparison of courts' records in applying three relatively new bills of rights: the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the UK's Human Rights Act 1998.

Chapter 2 defines two further foundations. The first relates to the common law and the role of judges within that tradition. The chapter distinguishes the book's alertness to the common law's robustly procedural character from common-law constitutionalism's focus on fundamental substantive values. It sketches the role of the judge at common law, emphasizing the task of developing the law while applying it to resolve live disputes and purposive practices such as statutory interpretation and the construction of contracts. The second foundation consists of overviews of the three bills of rights.

Chapter 3 confronts the assumption that bills of rights represent a radical change by giving judges the power to review legislation and – depending on the rights instrument – to strike it down. This chapter demonstrates that judges have been reviewing legislation and declaring it invalid since long before the recent adoption of the three bills of rights. Three contexts and bases for judicial review of legislation substantiate the point: colonial legislation, legislation under a federal constitution, and secondary legislation. In short, the judicial function of reviewing legislation and declaring that it succumbs to a higher norm is centuries old. Moreover, substantial consensus regarding remedies had coalesced around these forms of review: judges generally declared legislation invalid immediately and retrospectively. This historical baseline will enable later chapters to identify what precisely is novel, and potentially questionable, about the judicial function in applying a bill of rights.

Chapter 4 describes judicial practices that condition access to adjudication under the bills of rights. It explores the doctrine of standing, regarding who may bring a claim, and mootness, the doctrine that precludes adjudication of a question that is no longer the object of a live dispute between parties. In varying degrees, the practices in Canada, South Africa, and the UK show that the judges have come some distance from the traditionally

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restrictive approaches at common law. Yet, from the perspective of those concerned with the exercise of judicial power and with judicial creativity under a bill of rights, the chapter's story is a nuanced one. Namely, in two of the three jurisdictions, judges liberalized the approach to standing before the arrival of a bill of rights. Departing from bill-of-rights exceptionalism, portraits of judicial power need to acknowledge the extent to which transformations of the judicial role in public law preceded the rights instruments.

Chapter 5 provides a concrete overview of judicial activities in resolving challenges to legislation under the bill of rights. The wealth of possibilities, including the questions that confront judges in each case, relativizes the focus on upholding and striking down legislation. Applying a bill of rights involves much more. This chapter details the actions taken in interpreting legislation to find that it complies with rights, the forms of remedies available on the conclusion that legislation infringes rights, and the ways in which courts may alter a remedy's temporal effects. Adding to the literature's focus on the outcomes in rights cases, this chapter identifies the judicial activity of offering guidance to legislative drafters as an exercise of power. In any event, the effects of striking down legislation are less than many suppose, and judges with this power often do not use it fully. Overall, this chapter demonstrates that changes to the judicial role have followed the bills of rights but that – contrary to prevailing assumptions – the power to strike down legislation does not merit pride of place.

Chapter 6 presents the results of a study of judges' discussion of their remedial discretion. It traces the factors that judges invoke as shaping their discretionary decisions regarding the appropriateness of deploying one or another of the remedial possibilities set out in Chapter 5. These factors are diverse: some are in the bill of rights, others are not; some relate to the traditional judicial role and technique, others to institutional concerns such as relative competence and the separation of powers. These discussions of remedies' appropriate use, especially the weight given to factors unmentioned by the bill of rights, reveal the gap between the powers formally granted to judges and those they see as legitimately theirs. For example, judges with the power to strike down legislation immediately may use less than that power – for instance, delaying a declaration of invalidity – with a view to fostering democratic debate.

Chapter 7 draws on the preceding chapters, introducing conceptual tools for identifying tendencies in judicial practice in the three countries. It defines contrasting scopes for the judicial activity in rights cases. A narrower scope is that of dispute resolution, whereas a broader scope is that

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of systemic improvement. The chapter also sketches judicial postures of constitutional enforcement and legislative engagement. While identifying differences from country to country, it charts the increased prominence of systemic improvement and legislative engagement. This chapter articulates its implications for research on bills of rights: possible influences on judges, a connection between remedial creativity in enforcing socio-economic rights and civil and political rights, the unreliability of classifying forms of judicial review as 'weak' or 'strong', and the potential for its conceptual tools to advance scholarly debate.

Chapter 8 makes out the book's fourth argument, disputing favourable assessments of remedial discretion and contending that such discretion fundamentally alters what it means for constitutional supremacy to enfold a bill of rights.

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Against bill-of-rights exceptionalism

This chapter situates the book relative to literatures on bills of rights and serves as its methodology chapter. Because scholars who research comparative constitutionalism are often unselfconscious about method, as are legal scholars generally, including a methodology chapter makes a statement. Doing so signals a response to the observation that law professors and political scientists 'rarely attempt to confront or engage with the methods and insights of the opposed discipline'.[1] It reflects the conviction that leaving assumptions and choices undeclared stands to diminish scholarship's value. This chapter is integral to the four arguments that build across the book and explicates the underpinning methodological claim. Indeed, it is a manifesto of sorts, a plea for the importance of legal technique to constitutional and legal theory and a call for greater interaction amongst legal scholars and political scientists.

The first part of the chapter identifies the external orientation of much research on bills of rights as well as the tendency to isolate rights adjudication from 'ordinary' judicial activity. It calls this tendency *bill-of-rights exceptionalism*. The second part sets out this book's *internal, legal approach*, which conditions the way of reading judgments, the decision to address procedural and technical matters, and the selection of sources. It grounds that approach in three literatures. The third part explains the book's emphasis on continuity in judicial practice and introduces the analytic concept of *judicial agency*. The fourth part positions the book in relation to scholarship on comparative method, declaring scepticism towards presumptions of convergence and universalism, and outlining comparison's utility for this project. Finally, the fifth part specifies and justifies the scope of the book's comparative endeavour, explaining the selection of jurisdictions and the choices that shaped its data set.

[1] Stephen M. Feldman, 'The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making', *Law and Social Inquiry* 30, no. 1 (2005): 124.

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An external approach and bill-of-rights exceptionalism

The legal, political, and social importance of bills of rights, combined with the controversy surrounding the powers they give judges, makes it crucial for scholars and policy makers to have theoretically and empirically grounded research about how those instruments interact with the legal system. Yet two prominent orientations have diverted the efforts of researchers from such study, be it national or comparative. One is associated with comparative constitutional lawyers and legal theorists. They often approach judgments applying a bill of rights as philosophical propositions about rights or the rule of law. In this way, legal and political theorists have studied how judges have conceptualized the terms of a bill of rights such as *equality*, *expression*, and *dignity*. Similarly, legal philosophers have conducted much of their debate about the appropriateness of judicial review at a high level. Waldron exemplifies this approach when he takes pains to engage with the 'general understanding' of judicial review, 'uncontaminated' by any society's cultural, historical, and political preoccupations.[2] It is a fair charge that much of today's constitutional theory is abstract, 'largely bereft of concrete examples or attempts to ground the abstract discussions in the real world'.[3]

The other orientation comes from political science. The attitudinal approach prevailing within that discipline regards judges as political actors who advance their policy preferences using the judicial means available to them.[4] The focus on adjudication's 'essentially political nature' guides the design and undertaking of empirical or positive research.[5] Methodological rigour impels empirical researchers towards studying that which they can count. At times, scholars of this stripe reduce cases under a bill of rights to 'wins' or 'losses' for government or for a rights claimant.[6] Some researchers code a rights defeat for the government

[2] Jeremy Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal* 115, no. 6 (2006): 1352.

[3] Tom Hickman, 'Negotiable Rights, What Rights?', *Modern Law Review* 75, no. 3 (2012): 441.

[4] See, e.g., Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

[5] Christopher P. Manfredi, 'The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003', in *Constitutionalism in the Charter Era*, ed. Grant Huscroft and Ian Brodie (Markham, ON: LexisNexis Butterworths, 2004), 130.

[6] For critical discussion, see Sujit Choudhry and Claire E. Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*', *McGill Law Journal* 48, no. 3 (2003).

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as judicial activism and a rights victory for the government as judicial restraint.[7]

Although empirical research on courts has generated rich insights, it has limits. For instance, quantitative methods typically treat all decisions as equally important, obscuring that some rights cases matter much more than do others.[8] A focus on rates of 'success' will not do justice to the non-random character of the cases that reach appellate courts. In addition, setting baseline rates of allowance and dismissal of rights claims against which to compare the data is difficult. One source of difficulty is that advocacy groups bring cases that they have already selected as relatively winnable. Another is that judges do not grant leave to appeal on a random basis. More broadly, critics – reprising the hoary theme of the distance between political scientists and legal scholars – have charged that an 'almost pathological skepticism' regarding the importance of law and of legal institutions' substance and process has limited the 'promise and utility' of empirical research on courts.[9] On a legal scholar's assessment, many political scientists 'tend to suppress the role law plays in judicial decisions while overstating the role politics plays'.[10]

Despite their substantial differences, both the abstract/philosophical and the empirical/political science orientations share a common feature. Both analyse adjudication under a bill of rights from the outside. They do not generally examine bills of rights in the larger context of the legal system or profession. Nor do they try to read judgments in the way of practicing lawyers. Their differing disciplinary locations and methods notwithstanding, work within the two orientations often represents a viewpoint of *bill-of-rights exceptionalism*. On this view, adjudication under a bill of rights is a bounded, novel practice that emerges after a rights instrument enters into force. In this way, many authors regard judges' interpretation and enforcement of entrenched rights as an enterprise autonomous from their work in private law, the body of rules regulating relationships between individuals and between individuals and property. For many legal philosophers and political scientists who study judicial review, judging

[7] For controversy on this approach, see, e.g., Daved M. Muttart, 'Dodging the Issue: Activism in the Supreme Court of Canada', *University of New Brunswick Law Journal* 54, no. 1 (2005).
[8] Sangeeta Shah and Thomas Poole, 'The Impact of the Human Rights Act on the House of Lords', *Public Law*, no. 2 (2009): 352.
[9] Barry Friedman, 'Taking Law Seriously', *Perspectives on Politics* 4, no. 2 (2006): 262.
[10] Brian Z. Tamanaha, *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010), 7.

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under a bill of rights raises legitimacy issues distinct from those arising when judges interpret ordinary statutes, modify the common law, or construe private instruments such as contracts, trust deeds, and wills. Thus, one of the 'typical errors' committed by law-and-politics students specializing in the study of courts is to regard themselves as specialists in public law and courts rather than in courts more broadly.[11]

It is natural that researchers should study the aftermath of a bill of rights's adoption. Yet bill-of-rights exceptionalism risks overstating the novelty of what a rights instrument requires of judges and detracting attention from judicial practices that genuinely are novel. This tendency has at least three consequences. First, the view of a bill of rights as a watershed detracts attention from changes that judges made to their role before that instrument's arrival or apart from it. Such initiatives are critical for those concerned with courts and judicial power. For example, in Canada, without relying on Charter cases, one might shape the jurisprudence on unwritten constitutional sources into a story of a major refashioning of constitutional law. Think, too, of British judges' reconfiguration of administrative law in the second half of the twentieth century, including the ever-shrinking zone of unreviewable executive power – an important development preceding the Human Rights Act. Second, the focus on the novelty and distinctiveness of judicial review under a bill of rights obscures the potential for continuity with the judiciary's role prior to the rights instrument (on which more later). Third, emphasizing the judicial capacity to declare legislation invalid – celebrating it or denouncing it – has led scholars attuned to legitimacy and power to neglect the myriad other exercises of judicial power during rights litigation.

Building on these critical observations, this book aims to adopt a nuanced perspective. Its premise is that a focus on the *what* of judicial review under a bill of rights – testing government action and legislation against abstract notions such as freedom of expression and equality – has

[11] Martin Shapiro, 'Law and Politics: The Problem of Boundaries', in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford: Oxford University Press, 2008), 774; on the imperative of connecting 'a politics of courts, their roles, and power' to 'a broader politics of the legal complex', see Terence C. Halliday, 'Why the Legal Complex Is Integral to Theories of Consequential Courts', in *Consequential Courts: Judicial Roles in Global Perspective*, ed. Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (Cambridge: Cambridge University Press, 2013), 346; on the 'public nature of much of what goes on in so-called "private law"', see Steve Hedley, 'Courts as Public Authorities, Private Law as Instrument of Government', in *Private Law: Key Encounters with Public Law*, ed. Kit Barker and Darryn Jensen (Cambridge: Cambridge University Press, 2013), 93.

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