



The Charter's Influence Around the World

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*Rights Constitutionalism and the Canadian Charter of
Rights and Freedoms*

Article 3

Guest Editors: Benjamin L. Berger & Jamie Cameron

The Charter's Influence Around the World

Mark Tushnet

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The *Charter's* Influence Around the World

MARK TUSHNET *

Over the past several decades, the influence of the United States *Constitution* and Supreme Court around the world has waned while that of the Canadian *Charter* and Supreme Court has increased. This article examines several reasons for these changes, including: the relative ages of the constitutions; the US Supreme Court's recent conservatism; the Canadian Supreme Court's role in developing the doctrine of proportionality; the US Supreme Court's interest in originalism; differing structures of constitutional review and judicial supremacy; and the two Courts' relative openness to transnational influences.

Au cours des dernières décennies, l'influence partout au monde de la *Constitution* américaine et de la Cour suprême des États-Unis a décliné, tandis que celle de la *Charte* canadienne et de la Cour suprême du Canada a augmenté. Cet article examine les diverses raisons à l'origine de ces changements, notamment l'âge relatif de ces constitutions, le récent conservatisme de la Cour suprême des États-Unis, le rôle de la Cour suprême du Canada dans l'élaboration de la doctrine de la proportionnalité, l'intérêt de la Cour suprême des États-Unis pour l'originalisme, les structures différentes de la revue de la constitution et de la suprématie de l'appareil judiciaire, ainsi que l'ouverture relative des deux cours aux influences transnationales.

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EVALUATING THE WORLDWIDE INFLUENCE of a nation's constitution or a supreme court lies somewhere between a parlour game and an analysis of the deployment of "soft power" in international relations.¹ The exercise is like a parlour game in that we do not have good metrics for evaluating influence. Recent efforts to quantify the international influence of national constitutions are intriguing² but rely on the creation of indices of similarity and the like, the content of which can be readily challenged by skeptics. And, notably, the quantification involves only constitutions and the provisions found within them, not the interpretations of those provisions. Yet, my sense is that conversations about influence deal much more with the spread of judicial interpretations than with the diffusion of constitutional provisions.³ The evidence invoked in such conversations is impressionistic and anecdotal.

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1. Originating the term, Joseph Nye defined "soft power" as the ability to get people to do what the body exercising power wants by co-optation rather than coercion. In explaining the term, Nye referred specifically to offering "values" and other examples, including institutions, which are attractive enough to emulate. Joseph S Nye Jr, *Soft Power: The Means to Success in World Politics* (New York: PublicAffairs, 2004).
 2. See David S Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYUL Rev 762 [Law & Versteeg, "Declining Influence"]. For responses to Law & Versteeg, see Sujit Choudhry, "Method in Comparative Constitutional Law: A Comment on Law and Versteeg" (2012) 87:6 NYUL Rev 2078; Zachary Elkins, Tom Ginsburg & James Melton, "Comments on Law and Versteeg's *The Declining Influence of the United States Constitution*" (2012) 87:6 NYUL Rev 2088; and Vicki C Jackson, "Comment on Law and Versteeg" (2012) 87:6 NYUL Rev 2102 [Jackson, "Comment"]. For a reply to these responses, see David S Law & Mila Versteeg, "Debating The Declining Influence of the United States Constitution: A Response to Professors Choudhry, Jackson and Melkinsburg" (2012) 87:6 NYUL Rev Online 41.
 3. Anne-Marie Slaughter's influential discussion of transnational networks, for example, deals with networks of judges, not constitution makers. See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) at 65-103. To the extent that there is a scholarly literature on the mechanisms by which constitutional provisions are diffused, it deals with the role of non-national advisers in drafting national constitutions. See *e.g.* the papers presented at the William & Mary Law Review Symposium on Constitution Drafting in Post-Conflict States (16-17 February 2007), published in (2008) 49:4 Wm & Mary L Rev 1043 at 1043-541.

Even more, the very idea of influence is vague. Sometimes what might look like influence—a direct citation of a Canadian constitutional provision or a US Supreme Court decision, for example—might be nothing more than a reference to a source that provides a useful framework for articulating already existing intuitions. Or, the phenomenon might be one of convergence proceeding at slightly different paces in different nations, giving the illusion of influence but actually reflecting some underlying cause operating everywhere.

Yet, with all the qualifications implied by the preceding paragraphs, it seems to me that over the past few decades we have seen a shift in the relative influence of two important constitutions and constitutional courts—those of the United States and Canada. Some quantitative analysis indicates that over that period the Canadian *Charter*⁴ has been more influential than the US *Constitution*,⁵ where influence is measured by how similar the text of a nation's constitution is to the *Charter* and the US *Constitution*.⁶ It is certainly my impression that, while decisions by the US Supreme Court had substantial influence on the development of constitutional jurisprudence elsewhere in the last quarter of the twentieth century, the Canadian Supreme Court's constitutional jurisprudence has been more influential since then.⁷

In any event, I am going to proceed in this article on the assumption, which I believe is borne out by such evidence as there is, that the *Charter* and the Canadian Supreme Court have been relatively more influential on other nations than the US *Constitution* and the US Supreme Court since roughly the turn of the century. This article offers some speculations about why that might have happened. In alphabetical order they are: age; conservatism versus liberalism; doctrine; originalism; scholarship and legal training; structure; and openness to transnational influence.⁸

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

5. US Const.

6. See Law & Versteeg, "Declining Influence," *supra* note 2. For a criticism of the methodology used in this study, see Choudhry, *supra* note 2.

7. There is an obvious timing question that complicates this analysis. Until 1950 the US Supreme Court had essentially no competitors in developing a constitutional jurisprudence, so it was bound to be more influential elsewhere than any other court. Once the German Constitutional Court came into its own, sometime in the late 1950s, a real competitor was available, particularly because many jurists from other nations received post-graduate education in Germany (as well as in the United States). The Canadian Supreme Court was a latecomer, attracting attention only with its *Charter*-based jurisprudence but—to use a racing metaphor—it came up quickly on the outside.

8. My analysis builds upon, and to some degree updates, arguments made in The Honourable Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International

I use this order because I do not think that any one factor is more important than another; indeed, as I will argue, many of them are tied—sometimes loosely, sometimes more tightly—to others.

At the start, though, I emphasize that I am making several comparisons and that my principal comparator jurisdiction is the United States. Sometimes I discuss the relative influence of the US *Constitution* and other constitutions, including the Canadian *Charter*; at other times I discuss the relative influence of US Supreme Court decisions and those of other constitutional courts, including Canada's.

I. AGE

Writing in 1816, Thomas Jefferson described a number of revisions he thought appropriate in the US *Constitution*. Then, addressing those who “look at constitutions with sanctimonious reverence,” he observed of the framing era, “I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading”⁹ The US *Constitution* is an old one; the Canadian *Charter*—and every other written constitution in the world—is newer. The experience accumulated in the many years since the US *Constitution*'s adoption almost inevitably means that it will have lost influence relative to newer constitutions.

First, between then and now there have been innovations in the mechanics of governance. Examples include the invention of the specialized constitutional court and of the single transferable vote; the creation of a fourth branch composed of administrative bureaucracies; and the formation of a fifth branch consisting of various transparency institutions such as anticorruption agencies and boundary commissions for districting. The US *Constitution* can be amended or creatively interpreted to accommodate the innovations that seem appropriate to US citizens today. But, after the innovations have come about, those designing constitutions can simply build the desirable innovations into the constitutions they are proposing. Innovation alone would account for some reduction in the influence of the US *Constitution* relative to newer ones, though it would not account for *which* more recent constitutions have become more influential.

Impact of the Rehnquist Court” (1998) 34:1 Tulsa LJ 15. See also Adam M Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007) 36 Sup Ct L Rev 2d 309.

9. Thomas Jefferson to Samuel Kercheval (12 June 1816), online: <<http://teachingamericanhistory.org/library/index.asp?document=459>>.

The *Charter* implements one innovation in the technology of governance through the Canadian version of what I have called “weak-form review.”¹⁰ I discuss this in more detail below in Part VI, and for now I note only that weak-form review was truly an innovation in 1982. Like all good inventions, weak-form review has been tweaked and perhaps improved elsewhere. These developments are follow-ons to the Canadian innovation and so they are properly considered examples of Canadian influence on other constitutions.

Second, and more relevant to this article’s theme, time has revealed that governments can overreach in more ways than the authors of the US *Constitution* anticipated, often as a result of technological developments, and also that the deployment of government power may sometimes be more desirable than those authors believed. The rights inscribed in the US *Constitution* and the powers available to the national government in the United States might be thought too limited today. Again, in the United States these matters have been dealt with by occasional constitutional amendments and, more frequently, creative interpretations. Yet, once again, the experience of more than two hundred years allows today’s constitution drafters to address these new problems of rights and powers more directly.

Here the *Charter* offers some examples. First, section 2(b) guarantees “freedom ... of other media of communication,”¹¹ which provides a firmer textual base for protecting expression on the Internet and in social media than does the US First Amendment.¹² Second, the *Charter* takes a more detailed approach to equality rights than does the US *Constitution*. In the United States, equality under state laws is guaranteed by a general equality clause in the Fourteenth Amendment.¹³ This clause creates textual awkwardness in connection with guarantees of equality under national law, there being no similar general equality clause applicable to the national government. And, perhaps more important, experience has shown that particular classes can be special targets of discrimination, and that it takes more effort to deal with those classes through the interpretation of a general

10. “Weak-form review” refers to a practice in which a high court’s decision finding a statute unconstitutional can be revised by a legislature through some mechanism other than constitutional amendment. For a recent discussion, see Mark Tushnet, “The rise of weak-form judicial review” in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011) 321.

11. *Charter*, *supra* note 4, s 2(b).

12. US Const amend I (stating that “Congress shall make no law ... abridging the freedom of speech, or of the press...”).

13. US Const amend XIV (stating that no state shall “deny to any person within its jurisdiction the equal protection of the laws”).

equality clause than when those classes (or at least some of them) are specifically listed in the constitution, as in section 15 of the *Charter*. Augmenting a general equality clause with a list of protected classes and a catch-all statement allowing extensions by analogy, as section 15's "in particular" does (albeit somewhat indirectly), provides more guidance than a general equality clause alone.¹⁴

Third, equality clauses, whether general or with lists of protected classes, typically create problems in connection with affirmative action programs because the classes are described in general terms such as "race" or "gender." The solution, widely adopted, lies in stating in the constitution that equality guarantees do not "preclude any law ... that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged" by their membership in the specially protected classes, as section 15(2) puts it.¹⁵ This is not to say that the same result could not be reached under a general equality clause, but only that experience showed the value of specifically identifying affirmative action as permissible no matter what the general or enumerated equality clauses said.

A more limited but probably important effect of the relative ages of the US and Canadian constitutions is that the latter is temporally closer to modern international human rights documents such as the *Universal Declaration of Human Rights*.¹⁶ Judges seeking to participate in the worldwide network of constitutional court judges find it natural to use the terms of those documents in their interactions, and those terms more readily fit within the contours of the *Charter* than within those of the US *Bill of Rights*.¹⁷ So, when looking for sources that seem similar to those animating the international human rights documents, those judges will discover more value in Canadian than in US doctrine.

Drafters of modern constitutions can take account of experience in a way that the drafters of the US *Constitution* could not. The age of the US *Constitution* therefore limits its influence—though again I emphasize that this point does not single out the Canadian *Charter* as particularly influential among modern constitutions.

14. However, identifying the specially protected classes in the constitution does not solve the problems that experience can reveal, as has become clear in connection with discrimination against gay, lesbian, and transgendered people.

15. *Charter*, *supra* note 4, s 15(2).

16. *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (10 December 1948) 71 [*Universal Declaration*].

17. US Const amends I-X.

II. CONSERVATISM AND LIBERALISM

Drafted in the 1780s and with no large-scale amendments after the 1860s, the US *Constitution* reflects the presuppositions of classical liberalism. Though it does not rule out choices reflecting modern ideas of social democracy, neither does it enshrine them as matters of deep constitutional value.¹⁸ Constitutions adopted in the twentieth century, in contrast, have been deeply influenced by ideas of social solidarity, Christian democracy, and social democracy. Parties seeking large-scale transformations in property distribution typically led the national independence movements that resulted in colonial independence. A classically liberal constitution did not provide an acceptable model, at least not immediately. Constitution makers in the nations of the former Soviet empire clearly rejected socialism as a constitutional model, but even those most committed to classical liberalism understood that their nations' peoples had come to accept some degree of social democracy as a foundation for their specific form of constitutionalism. The US *Constitution* could not be a model for them, either. Yet, it is worth noting that neither could the *Charter*. Though adopted in 1982 and in a nation where social solidarity is far more deeply embedded than in the United States, the *Charter* reflects no social democratic commitments, as *Gosselin* confirms.¹⁹

The situation with the US and Canadian Supreme Courts is different. The great waves of constitutionalization that occurred in the 1970s, mostly in Latin America, and the 1980s and 1990s, mostly in central and eastern Europe, were waves of liberalization after the demise of authoritarianism. When those waves occurred, the Warren Court dominated the world's image of the US Supreme Court,²⁰ which then became characterized as a liberal court, where "liberal" is a term describing not a deep political theory but the ordinary politics of the day.²¹

18. The US *Constitution* was not formally amended to accommodate the expansion of national power, and the increasing role of social democracy, after the New Deal. That in turn eased the path to constitutional challenges to *The Patient Protection and Affordable Care Act*, which would have been more difficult had there been a formal constitutional amendment embodying the New Deal "settlement." See *The Patient Protection and Affordable Care Act*, Pub L No 111-148, 124 Stat 119 (2010).

19. *Gosselin v Québec (Attorney General)*, 2002 SCC 84, 4 SCR 429. In this context I mean only that *Gosselin* provides no model for nations *with* social democratic constitutional commitments to emulate and do not mean to take a position on the decision's correctness as a matter of Canadian constitutional law.

20. As discussed in Mary L Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000).

21. See e.g. Lucas A Powe, Jr, *The Warren Court and American Politics* (Cambridge: The Belknap Press of Harvard University Press, 2000).

Constitutional courts in these nations could, if they chose, use the Warren Court's decisions as a model for their own. This was particularly true with respect to some issues central to the transition from authoritarianism to liberal constitutionalism: for example, the regulation of speech critical of the government in power and the regulation of the criminal process to avoid politically motivated abuses. The Warren Court had a well-developed jurisprudence that courts elsewhere could follow or even adopt wholesale. During these periods the influence of the US Supreme Court outside the United States was at its peak.

Yet even when the Warren Court dominated understanding of the US Supreme Court, the Court's liberal image had become inaccurate, and the inaccuracies became more apparent from the 1990s through the present. The Warren Court ended formally in 1969, with Earl Warren's replacement by Warren Burger, though the Warren Court's liberal jurisprudence staggered on for about two decades more. But by no later than the turn of the century the illusion that the US Supreme Court was a liberal court could not be sustained. And yet, with the transition from authoritarianism still incomplete in many places, judges on constitutional courts who hoped to advance the liberalization project still needed models. With the US Supreme Court no longer helpful, they turned elsewhere—namely, to the German Constitutional Court and the Canadian Supreme Court.

At least tangentially related to the issue of conservatism versus liberalism is a complex of political economy issues.²² One aspect of the contemporary US Supreme Court's decisions is a tendency to restrict the scope of constitutional adjudication, for example, by imposing stringent standing requirements or by adopting doctrines that expressly incorporate a standard of deference to legislatures. Although that tendency is in fact highly qualified, with the Court endorsing what remains a rather generous approach to standing and being deferential only on occasion,²³ I believe that the relevant non-US audiences would describe the Court's current jurisprudence as restrictive. Now consider a nation with a new constitution after an authoritarian era. The constitution will of course include a constitutional court. Yet, if that court entertains constitutional challenges only rarely or is quite deferential to the political branches, citizens

22. I owe this paragraph to comments from Vicki Jackson.

23. On standing, see *e.g. Massachusetts v Environmental Protection Agency*, 549 US 497, 127 S Ct 1438 (2007) (holding that a state, as an owner of shorefront property, had standing to challenge the Environmental Protection Agency's refusal to regulate carbon dioxide emissions, because the failure to regulate might lead to global warming that would raise sea levels and so deprive the state of some of its property). The Court's free speech jurisprudence is notably non-deferential. For an exception, see *Holder v Humanitarian Law Project*, 130 S Ct 2705, 177 L Ed 2d 355 (2010).

might wonder what value they were getting from the court.²⁴ And, from the court's point of view, ruling in favour of constitutional claims presented to it can demonstrate its value and thereby create some legitimacy for a novel institution.

Here, too, a note of caution is appropriate. The method by which the judges on the German Constitutional Court are selected guarantees a balanced jurisprudence that will always contain important liberal elements in both the political theory and quotidian senses. The deep commitments of the German Basic Law as a response to the National Socialist era further guarantees the presence of these liberal elements. Lacking that historical experience, the *Charter's* commitments to quotidian liberalism are, I think, weaker. And, perhaps more important, the methods of judicial selection in Canada can produce a succession of courts, with liberal ones being replaced, as in the United States, by more conservative ones. For the moment, the Canadian Supreme Court may be more influential around the world than the US Supreme Court, but that could change.

On a more mundane level, some of the US Supreme Court's decisions are puzzling (or worse) to those from different constitutional traditions. That people in the United States have a constitutional right, of whatever uncertain scope, to possess handguns for self-protection is, I think, quite surprising to people elsewhere. In the area of free expression, decisions sharply restricting the regulation of hate speech and campaign financing—characterized as conservative decisions—conflict with the constitutional jurisprudence of most other nations.²⁵ Their conservatism tarnishes the image of the US *Constitution*, or at least the image of the US Supreme Court.²⁶ And, the defense of the US decisions as part of a coherent overall

24. See Stephen Holmes & Cass R Sunstein, "The Politics of Constitutional Amendment in Eastern Europe" in Sanford Levinson, ed, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) 275 at 284-85 (stating that "the very creation of a constitutional culture in post-Communist societies depends upon a willingness to mix constitutional politics and ordinary politics"). Stephen Holmes and Cass Sunstein argue, with many qualifications, that these nations might be getting an experience of self-governance that the authoritarian regime had denied them. I note that recent revisions to the Hungarian *Constitution* sharply limiting the Constitutional Court's role and altering its composition are widely viewed as opening up the possibility of a return to authoritarian rule.

25. For overviews of these topics, see Michel Rosenfeld, "Regulation of Hate Speech" in Vikram David Amar & Mark V Tushnet, eds, *Global Perspectives on Constitutional Law* (New York: Oxford University Press, 2009) 181; Richard L Hasen, "Regulation of Campaign Finance" in *ibid*, 198.

26. As Benjamin Berger suggested in his comments on an earlier version of this article, the death penalty cases may not only make reference to the US Supreme Court unattractive but sometimes perhaps affirmatively harmful if the taint associated with that Court would spread to the citing court.

structure of constitutional doctrine actually makes things worse. It might remove the “taint” associated with the label “conservative,” but it does so at the cost of making the US *Constitution* less attractive as a whole.

III. DOCTRINE

The core of the story about constitutional doctrine is simple, though its details are rather complex. Proportionality may not be the ultimate rule of law, as David Beatty would have it,²⁷ but it is an approach to constitutional interpretation that many judges around the world find attractive. Proportionality as a doctrine is not unknown in US constitutional history, where it—or something that could have been recast as proportionality—was known under the label “balancing.”²⁸ As constitutions and constitutional courts were created in the late twentieth century, the US Supreme Court abandoned balancing as a doctrine in favour of a more rules-oriented approach largely because of the sequence of cases it faced, dealing first with classic sedition cases and then cases arising out of the US movement for civil rights for African Americans. In legal theory, Robert Alexy set out a structured framework for conducting a proportionality analysis; in constitutional doctrine, the Canadian Supreme Court did the same in *Oakes*.²⁹ So, Canada offered the world’s constitutional courts a doctrinal formulation compatible with judges’ deepest instincts, and the US Supreme Court did not. Under the circumstances, the decline in the influence of the US Supreme Court relative to the Canadian Supreme Court is entirely understandable.

Now for some of the details. The US Supreme Court turned against balancing in large part because the Court became more conservative. Scholars have shown in enormous detail that there is no necessary connection between legal ideology and interpretive approaches: There can be conservative balancing and liberal rules, for example.³⁰ But, in the late twentieth century, the association between the Court’s conservative turn and its abandonment of balancing was forged by conservatives

27. David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

28. On the differences between proportionality and balancing, see Moshe Cohen-Eliya & Iddo Porat, “American balancing and German proportionality: The historical origins” (2010) 8:2 *Int’l J Const L* 263; Jacco Bomhoff, “Balancing, the Global and the Local: Judicial Balancing as a Problematic Turn in Comparative (Constitutional) Law” (2008) 31:2 *Hastings Int’l & Comp L Rev* 555.

29. Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002); *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

30. See e.g. Kathleen M Sullivan, “The Supreme Court, 1991 Term: Foreword: The Justices of Rules and Standards” (1992) 106:1 *Harv L Rev* 22.

in their critique of the Warren Court. To condense what is again a complicated story: Conservatives criticized the Warren Court for doing no more than enacting the liberal justices' policy preferences into constitutional law, pretending that the law contained those preferences all along. They were, as conservatives put it, simply making things up. The way to avoid making things up was to adopt originalism as an interpretive theory. But with originalism in hand, conservatives came to think that, except in the rare situations where the original understandings licensed the judges to balance interests, balancing amounted to making things up, too.³¹

While proportionality analysis remains an important part of US constitutional doctrine, it plays a role that can be teased out only by careful examination of specific constitutional doctrines, rather than a role that appears on the doctrinal surface. As Alexy and others have discussed, judges and analysts can treat proportionality as an approach that operates *within* specific doctrines or as something that determines the boundaries within and outside of which different rules prevail.³² In the United States proportionality operates as a boundary-determining doctrine. In the area of free speech, it operates under the name of "categorical balancing."³³ When used to determine doctrinal boundaries, though, the approach, at least as developed by the US Supreme Court, does not bring all the relevant considerations to the surface. In contrast, *Oakes* offers a much more perspicuous account of proportionality, with a structured approach readily adoptable by other courts.³⁴

This analysis offers a perspective on Frederick Schauer's argument that constitutional courts outside the United States are attracted to proportionality and the open discussion of the steps involved because they are developing doctrine from a low baseline.³⁵ Schauer argues that judges feeling their way into a new

31. For a general account of the rise of originalism in response to Warren Court decisions, with some passing comments on balancing, see Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: The Johns Hopkins University Press, 2005), ch 3.

32. Alexy, *supra* note 29. Notably, Alexy argues that viewing proportionality as internal makes the most sense of German constitutional doctrine, but not that such an understanding is required by the very idea of proportionality.

33. Its originalist commitments led the US Supreme Court to reject, though with inadequate reasons, the use of categorical balancing to identify subjects of regulation not otherwise identified in the relevant historical materials. See *United States v Stevens*, 130 S Ct 1577, 176 L Ed 2d 435 (2010).

34. And, in my view, the approach in *Oakes* is easier to understand than Alexy's—especially with respect to Alexy's effort to mathematize his approach.

35. Frederick Schauer, "The Convergence of Rules and Standards" [2003] NZL Rev 303 at 326-27; Frederick Schauer, "Freedom of expression adjudication in Europe and the United States:

doctrinal field will be attracted to proportionality tests to ensure that they do not ignore features of the problem that a well-designed legal system would take into account. As they gain experience, though, judges learn that some things that were seemingly relevant in the past almost never play a dispositive role and can be ignored thereafter. Rules then emerge when courts formulate doctrines that, as rules necessarily do, screen from judicial consideration features of the problem that are too often mistakenly thought relevant. Note, though, that this is, or at least is very close to, a description of the way in which proportionality operates as a boundary-defining approach. If Schauer is right, we can imagine that the relative influence of the US and Canadian Supreme Courts on other courts might reverse itself as those courts gain experience and the need for the structure made available by *Oakes* weakens.

IV. ORIGINALISM

Thomas Jefferson referred to the “reverence” that US citizens gave to the *Constitution’s* authors just before 1820.³⁶ If anything, that reverence has increased with time. It has made originalism a distinctively US form of constitutional interpretation, followed almost nowhere else,³⁷ or at least without anything like the rigour with which it is used in the United States. I hasten to add that originalism is only one mode of constitutional interpretation in the United States and perhaps not even the dominant one. Yet, it is probably the interpretive approach that has attracted the most attention in the United States and elsewhere. In another example of how the reasons for changes in relative influence are interconnected, the rise of originalism is associated with the increasing conservatism of the US Supreme Court. As discussed above in Part III, originalism developed as the conservative interpretive theory challenging the Warren Court’s liberalism.

Originalism lacks a hold in other constitutional systems for several reasons. First, with a few notable exceptions such as Germany and India, modern constitutions are *new*. Their authors are still alive or have only recently died. I suspect that in the first generation or two after a constitution is adopted, people do not think that they are engaged in a process of *interpreting* the constitution.

a case study in comparative constitutional architecture” in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge, UK: Cambridge University Press, 2005) 49 at 49-56.

36. Jefferson, *supra* note 9.

37. Australia comes closest, I think, and even there the justification for the prevailing interpretive approach is called “formalist” rather than originalist. For a discussion of Australian formalism (or legalism), see Jeffrey Goldsworthy, “Australia: Devotion to Legalism” in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (2006) 106.

Rather, they understand themselves to be simply *reading* it. And reading does not have to be deeply theorized.

Second, knowledgeable interpreters of relatively new constitutions know that these documents are messy combinations of deep principle and the political deals needed to secure the constitution's proposal and adoption. They know who the deal makers were, they know their quirks, and they know that it is a mistake to interpret the constitution as a wholly integrated and principled document whose parts fit smoothly together. Some of those responsible for bringing a constitutional project to fruition, like B.R. Ambedkar, are indeed revered today; others, such as Eamon de Valera, less so.³⁸ With the passage of time, perhaps these deals will fade into the background and originalism will seem more attractive. But, for now and to many, originalism seems at odds with the political reality from which recently created constitutions emerged.³⁹

Perhaps as a result of these contingent facts, the US theory of originalism lacks a good foothold elsewhere. This lack is exacerbated by some of the arguments made in support of originalism. So, for example, the argument that originalism is validated by a written text cannot be taken seriously by people who already find originalism odd, because reliance on the text itself is a form of originalism. Moreover, originalism as an express theory of interpretation is relatively new in the United States, emerging in the late 1970s as a basis for conservative criticism of the Warren Court and its liberal rulings.⁴⁰ For those not embedded in US controversies, originalism could be seen as something added on to existing interpretive methods, not as something that cast doubt on their validity. Therefore, outside the United States, other interpretive methods could survive without much difficulty.

38. BR Ambedkar was the principal drafter of the Indian Constitution; Eamon de Valera was the political leader of Irish independence who shepherded the Irish *Constitution* of 1937 to adoption.

39. Consider here the contested origins of the notwithstanding clause and its emergence as a way of getting First Ministers from several provinces to accept the *Charter* as a whole despite their misgivings about its departure from parliamentary supremacy—close to a raw political deal—and the way the clause functions in the principled defense of weak-form constitutional review. For a brief description of the political background underlying the notwithstanding clause, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) at 52-53 [Tushnet, *Weak Courts, Strong Rights*]. Outsiders like me, and Canadians (as memory of the negotiations over framing the *Charter* fade), can offer a principled defence of the notwithstanding clause, a defence that will undoubtedly seem rather too fancy for those who still remember how it came into being.

40. See O'Neill, *supra* note 31.

Notably, Canada supplies the most powerful metaphorical counter to originalism: the “living tree” metaphor from the *Persons Case*.⁴¹ In the United States, the idea of a living constitution is juxtaposed to originalism. Essentially everywhere else, the “living tree” metaphor describes the alternative and preferred approach to constitutional interpretation.⁴² The Canadian Supreme Court’s commitment to the “living tree” metaphor casts a benevolent light over its decisions, or at least casts a better light on its decisions than the US Supreme Court’s commitment (such as it is) to originalism casts on its own decisions.

V. SCHOLARSHIP AND LEGAL TRAINING

In the 1960s and 1970s, US constitutional scholarship defined the terms of the debate about the legitimacy and scope of review. Alexander Bickel’s identification of the so-called countermajoritarian difficulty seemed particularly important in nations with newly established or newly empowered constitutional courts, most dramatically in nations with long traditions of parliamentary supremacy.⁴³ John Hart Ely’s work on representation-reinforcing review offered a response to Bickel that scholars of constitutional law outside the United States found attractive.⁴⁴ These intellectual influences were reinforced by patterns of postgraduate legal education. Many scholars from around the world found opportunities for graduate study in the United States, where they absorbed the terminology and the substance of discussions within US constitutional law and theory.

As newer constitutional courts gained experience and power, the concerns emerging from US theory weakened. The countermajoritarian anxiety, which continues to define important contours of US constitutional theory, faded as scholars and courts turned their attention to actually implementing the constitutions they had. The countermajoritarian difficulty morphed into concern over defining

41. *Edwards v Attorney-General for Canada*, [1930] AC 124 at 136, [1929] All ER Rep 571 PC (Eng).

42. I hazard a guess that the main competitor to the “living tree” metaphor is the German idea that a constitution embodies an “objective order of values.” See *Lüth Case*, 7 BVerfGE 198, 1958 NJW 257 (Fed Const Ct) (Germany), translated in Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3d ed, (Durham: Duke University Press, 2012) at 442-48.

43. Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

44. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) (rejecting constitutional interpretations that rely solely on either the text or underlying moral values; instead arguing that the *Constitution* should be interpreted in a way that reinforces representative democracy).

how proportionality review could be conducted and defended. Furthermore, patterns of postgraduate legal training changed—or, at least, existing patterns of postgraduate training in private law were modified to include postgraduate training in public law. To oversimplify: Scholars-in-training from Australia and other Commonwealth nations had always received postgraduate instruction in Great Britain; those from East Asia had received instruction in Germany. Now, their successors received instruction in the same locations, but in public as well as private law. The specific concerns of US constitutional law and theory no longer play as central a role in postgraduate training as they used to. And, unsurprisingly, the influence of US concerns has diminished.

Canada plays only a small part in that story, but a larger one in a related account. Relying heavily on the arguments for federalism and separation of powers in *The Federalist Papers*,⁴⁵ US constitutional scholarship treats those institutional arrangements as locations for conflict and struggle, with the end of protecting liberty by limiting government power. In contrast, Canada's legal culture, reflecting its culture more generally, treats those institutional arrangements as locations for cooperation and for the production of freedom-enhancing government policies. The Canadian way of thinking resonates more substantially with nations whose constitutions and politics embody principles of subsidiarity and social solidarity—roughly speaking, social democratic nations, which make up a large set of nations embracing the post-World War II model of constitutionalism. Canadian ways of thinking may be more congenial than US ones in such nations.

VI. STRUCTURE AND STRONG JUDICIAL SUPREMACY

Consider the situation of many constitution drafters in the second half of the twentieth century. Some—perhaps most—were in nations with a tradition of either parliamentary supremacy or presidential domination, and of these many were dealing with transitions from authoritarianism to liberal democracy. Some form of constitutional review by independent courts was enormously attractive as a defense against a reversion to authoritarianism. But, what form of constitutional review?

The United States offered one model: a system of strong judicial supremacy (strong-form review) backed up by an amendment rule that makes overturning judicial decisions by constitutional amendment difficult. That system raised a number of problems. First, and probably least important, staffing the courts with

45. Alexander Hamilton, James Madison & John Jay, *The Federalist*, ed by Jacob E Cooke (Middletown, CT: Wesleyan University Press, 1961).

judges committed to liberal democracy was going to be quite difficult. Most of the judges in place had been reliable servants of the prior regime, and the new regime's leaders were inevitably suspicious of them.⁴⁶ Second, strong judicial supremacy threatened to replace one group of unaccountable rulers, the authoritarians, with another, the judges. The spectre of *gouvernement des juges*⁴⁷ continued to haunt. Finally, as Stephen Holmes and Cass Sunstein argued, albeit somewhat too strongly, the newly empowered citizens in these nations had been politically infantilized and needed to act politically in ways that embodied their new responsibilities as citizens.⁴⁸ Strong judicial supremacy might impede the required maturation by communicating to citizens that they could continue to be irresponsible because someone else would bail them out of whatever difficulties they created.

The *Charter* offered an interesting alternative to strong judicial supremacy (through what I have called weak-form review),⁴⁹ by way of section 1's general limitations clause and section 33's notwithstanding clause. The *Charter's* precise contours, and even the justifications offered by Canadian scholars for the *Charter's* version of constitutional review,⁵⁰ mattered less than the simple fact that it opened the way to creative thinking about the structure of constitutional review. To many constitution drafters, this weak-form constitutional review was a more attractive reconciliation of the requirements implicit in liberal democracy—roughly, rights-protection and self-government—than US-style strong-form review. And, finally, Canada provided the first real model for weak-form review.⁵¹ Notably, as a model, the Canadian provisions might be followed or developed despite the practically non-existent use of section 33 to override parliamentary legislation.

46. This was true, I think, even where the judges asserted, with some plausibility, that they were strong positivists committed to fair enforcement of the law given to them, whatever its content. They had been reliable servants of the authoritarian regime because they were positivists, and would be equally reliable servants of liberal democracy for the same reason.

47. Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation social aux États-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: Marcel Giard & Cie, 1921).

48. Holmes & Sunstein, *supra* note 24 at 306.

49. Tushnet, *Weak Courts, Strong Rights*, *supra* note 39.

50. I have in mind here the different characterizations offered by those scholars of "dialogue" as a distinctive and important feature of the *Charter* regime. For a collection of essays on the concept of dialogue, see the special issue of the Osgoode Hall Law Journal entitled "*Charter* Dialogue: Ten Years Later," (2007) 45:1 Osgoode Hall LJ.

51. It may be worth noting that even in the United States defenders of constitutional review have become increasingly agnostic about whether the reasons for constitutional review support only strong-form review or, instead, can be satisfied by weak-form review. See, e.g. Richard H Fallon, Jr, "The Core of an Uneasy Case for Judicial Review" (2008) 121:7 Harv L Rev 1693.

Note as well that, to the extent that the general limitations clause plays a part in the defense of weak-form review, the reason for the greater relative influence of Canada compared to the United States converges with the doctrinal developments sketched in the preceding Part. Here, then, we can see how the *Charter* and the Canadian Supreme Court have contributed to the shift in “soft power” towards Canada.

VII. TRANSNATIONAL INFLUENCE

I begin this Part with the mundane observation that the US Supreme Court issues its decisions in one of the world’s dominant legal languages, and the Canadian Supreme Court does so in two. Even as English becomes the world’s *lingua franca*, the Canadian Supreme Court’s decisions are overall more accessible to interested audiences than are the US Court’s decisions. Though done for wholly domestic reasons, the Canadian Supreme Court’s practice enhances its reputation abroad.⁵²

As Vicki Jackson has shown, the US Supreme Court has a long tradition of referring to non-US law in interpreting the US *Constitution*. These references are predominantly, but not exclusively, to the law of countries in the common law tradition.⁵³ Sometimes these references could be understood as attempts to determine the meaning of terms in the US *Constitution* that are derived from the common law, even when the references were to post-1789 common law. More often, the references were embedded in an eclectic approach to constitutional interpretation. For example, the Court might refer to experience with particular forms of criminal procedure in other nations to show that interpreting the US *Constitution* to require those forms would have good or bad consequences.⁵⁴

More recently, although the practice of referring to non-US law continues, it has become controversial. The reason, in part, is the rise of originalism in constitutional interpretation. Referring to sources from the present day, whether those sources are from outside or within the United States, is thought to be inconsistent with originalism’s exclusive focus on events and understandings at the time that the relevant constitutional provisions were adopted.

52. An antic thought: Perhaps the Canadian Supreme Court should consider offering official translations of selected decisions into German (the world’s third legal language).

53. Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (New York: Oxford University Press, 2010) at ch 4 [Jackson, *Constitutional Engagement*].

54. Or to refute claims that such an interpretation would have bad consequences. See *e.g.* *Miranda v Arizona*, 384 US 436, 86 S Ct 1602 at 1652-53 (1966).

More important, though, has been the association of this practice with litigation challenging the death penalty (and, more recently, litigation challenging life imprisonment without the possibility of parole and challenging the conditions of confinement at “supermax”—super-maximum security—prisons). On many issues, US constitutional law is reasonably “good” from the perspective of the transnational NGOs that have become involved in this litigation, so referring to non-US law adds nothing to the arguments available from the US legal materials alone. And, on many other issues, the United States occupies a position on a spectrum of possibilities, many of which have been realized elsewhere. So, to overstate, with respect to these issues, every citation to a non-US source favouring one position could be countered by a citation to another non-US source favouring the position already in place in the United States. Consider, for example, the question of gay marriage. Those who believe that gay marriage is inherent in principles of equality can certainly point to statutes and constitutional holdings in other nations, including Canada. But, of course, those who believe that gay marriage is at most a matter of legislative policy choice can point to statutes and constitutional holdings in a different group of nations. Again, the reference to non-US materials would be largely pointless.⁵⁵

Death penalty and, more generally, Eighth Amendment jurisprudence is different. First, as a matter of stated doctrine, the US Supreme Court has held that the Eighth Amendment should be interpreted with reference to the “evolving standards of decency that mark the progress of a maturing society.”⁵⁶ That doctrine invites (though it does not compel) reference to the standards as they have evolved in other maturing societies. In addition, capital punishment and related issues are ones about which there really is a transnational consensus against the US position. In consequence, referring to non-US law points in a single direction.⁵⁷

The association between references to non-US law and the campaign against the death penalty and related issues created the controversy over such references.⁵⁸

55. I can imagine an argument identifying an international trend toward a consensus position, even though that position is not yet the consensus. I think that casting this argument in terms that fit well with US constitutional doctrine would likely be quite difficult.

56. *Trop v Dulles*, 356 US 86 at 101, 78 S Ct 590 (1958).

57. Or, at worst, it puts the advocates of the contrary position at a rhetorical disadvantage: “Do you want the United States to be like Somalia?”

58. I should note, as Professor Jackson has pointed out, that justices opposed to the US Supreme Court’s jurisprudence dealing with the right to choose with respect to abortion sometimes argue that US jurisprudence on this issue is as much an international outlier as the US position on the death penalty. She argues, though, that the gap between stated jurisprudence and actual practice is substantial (on both sides), making the US practice and the non-US jurisprudence and practice roughly compatible with each other. (I should note that this is my

Once it existed, though, critics of the practice in death penalty cases created a general theoretical case against such references, not confined to observations about originalism. As a result, there is now a general controversy over references to non-US law in US constitutional interpretation.

The implications of that controversy for the influence of US Supreme Court decisions elsewhere are reasonably clear. Informally, the thought by judges outside the United States is, “If you are not going to listen to us, why should we listen to you?” Somewhat more formally, exercising soft power—influence—requires a certain kind of gentle reciprocity short of equal exchange. The controversy over references to non-US law shows that there is a real possibility that being influenced by US constitutional law will not be reciprocated.

The Canadian Supreme Court is entirely comfortable with referring to non-Canadian law in interpreting the *Charter*. Of course, so are many other nations with respect to their own constitutions. This factor too helps explain the declining influence of the US Supreme Court’s decisions without explaining why the Canadian Supreme Court has become distinctively more influential. Here I can only hazard the guess that openness to non-Canadian sources is one of several factors, including liberalism and the accessibility of its opinions that, taken together, give the Canadian Supreme Court a “boost” elsewhere.

VIII. CONCLUSION

As I suggested at the outset, the reasons one might have for attempting to determine the influence of a specific constitution or constitutional court’s decisions are somewhat obscure. National pride plays a part, of course, which can be characterized alternatively as preening (pejoratively) or kvelling (approvingly).⁵⁹

A scholar’s perspective complicates the view. Probably most important, sorting out the influences of a host of factors is likely to be quite difficult. Take proportionality: I have discussed Alexy and *Oakes*, but the phrasing that licenses proportionality review in Canada, “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,”⁶⁰ finds a parallel in section 29(2) of the *Universal Declaration of Human Rights*, “such limitations as are determined by law solely for the purpose of securing due recognition and

characterization of her position, not hers.) See Jackson, *Constitutional Engagement*, *supra* note 53.

59. “To kvell” (from the Yiddish) means “to express pride in the accomplishments of someone to whom one is related, usually a son or daughter.”

60. *Charter*, *supra* note 4, s 1.

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁶¹ When other constitutions adopt (in their own languages) phrases that are used in the *Charter*, are we observing the influence of the *Charter*, the influence of the *Universal Declaration*, or the influence of more general ideas about the proper relation between government power and protection of rights?⁶² When other nations’ constitutional courts cite *Oakes* as they perform proportionality review, might not the citation be “decoration” rather than an example of influence? Similar arguments could be made about section 33 and the override power. It has conceptual antecedents in emergency powers provisions common in constitutions since the early twentieth century (if not Roman times): Emergency powers could override constitutional protections when imperatively required by national conditions. Should emergency powers be taken as the true origin of weak-form judicial review rather than section 33 and the general limitations clause?

Finally, a thought about example-setting as a way of exercising soft power: With the caveat that I am not familiar with the literature on soft power and may be making a point addressed in that literature, I wonder whether a nation can exercise soft power once the means of doing so is identified and labelled in those very terms. That is, I wonder about the effects of an open acknowledgement along the following lines: “The United States (or Canada) knows that it lacks the coercive force to compel you to follow its lead, but is trying to induce you to do so by offering the examples of the *Constitution* (or *Charter*) and the Supreme Court to demonstrate that the US (or Canadian) system overall is so attractive that you ought to follow the United States (or Canada) as a leader in some relevant domain.” My sense, but it is only that, is that acknowledging that some practice is an exercise of soft power deprives the practice of its effectiveness as such an exercise.

In the end, then, discussing the relative influence of the US *Constitution* and the Canadian *Charter* may only be a parlour game. But, I confess, I find it engaging at least for some few moments.

61. *Universal Declaration*, *supra* note 16, art 29(2) (at 76-77).

62. Commenting on Law & Versteeg, “Declining Influence,” *supra* note 2, Vicki Jackson suggests that some of the most important ways in which the US *Constitution* has been influential is in putting on the table the very idea that constitutions ought to be written and in offering an example of institutionalizing the separation of powers. Yet, one might respond that the ultimate sources of influence here would be Aristotle, John Locke, and Montesquieu, and determining whether their ideas were influential through the mediating effects of the US *Constitution* would be quite difficult. See Jackson, “Comment,” *supra* note 2.