



# After the Rights Revolution: Bills of Rights in the Postconflict State

Sujit Choudhry

Faculty of Law, University of Toronto, Toronto, Ontario M5S 2C5, Canada;  
email: [sujit.choudhry@utoronto.ca](mailto:sujit.choudhry@utoronto.ca)

Annu. Rev. Law Soc. Sci. 2010. 6:18.1–18.22

The *Annual Review of Law and Social Science* is  
online at [lawsocsci.annualreviews.org](http://lawsocsci.annualreviews.org)

This article's doi:  
[10.1146/annurev.lawsocsci.093008.131445](https://doi.org/10.1146/annurev.lawsocsci.093008.131445)

Copyright © 2010 by Annual Reviews.  
All rights reserved

1550-3585/10/1201-0001\$20.00

## Key Words

constitutional design, comparative constitutional law, comparative politics, civil wars

## Abstract

Bills of rights are now central components of liberal democratic constitutions. But debates over the character and content of bills of rights are no longer at the center of more recent rounds of postconflict constitutional politics. This review puzzles through the rise and decline, but persistence, of rights-based constitutionalism. Neither comparative constitutional law nor constitutional politics offers the answer. The literature on civil war settlement suggests that bills of rights serve two functions in postconflict constitutions: a regulative role to check the abuse of public power and a constitutive role to serve as the basis of a new constitutional identity. Bills of rights cannot do the work that is expected of them. Politicized judiciaries, constitutional underenforcement, and the ex post nature of judicial review undermine the ability of the bill of rights to serve as a credible commitment against future abuses of human rights. Moreover, the idea of a bill of rights as a source of shared political identity abstracted from a contingent political and historical context is unlikely to succeed in practice.

## THE PARADOX OF BILLS OF RIGHTS

At a public lecture in January 2009, Peter Galbraith—most recently the UN Secretary-General’s Deputy Special Representative for Afghanistan and a long-time advisor to the Kurdish regional government in Iraq’s north—suggested that the prospects of Iraq surviving as a single state remained dim. According to Galbraith’s argument, the very design of the Iraqi constitution—its highly decentralized federalism, the potential for governorates (provinces) to combine into larger regional authorities, the extensive provincial control over oil reserves—provided a road map to Iraq’s eventual partition (Galbraith 2008). In passing, Galbraith shared his firsthand account of the negotiations surrounding Iraq’s 2005 Constitution. The issues that had generated the most controversy were the character and scope of Iraq’s federal structure and the organization of executive and legislative power at the center. By contrast, the negotiating parties agreed to the text of Iraq’s bill of rights with a minimum of debate. Although this is an oversimplification—the precise role of Islam and religious personal law in the Iraqi constitutional order, for example, intersected in complex ways with the bill of rights, producing lengthy negotiations over how the relationship between these different parts of the constitution would operate (Deeks & Burton 2007)—it appears to be an accurate account of one of the most recent and closely observed instances of postconflict constitutional design (see also Bouillon et al. 2007, Dawisha 2009, O’Leary et al. 2005, O’Leary 2009). Indeed, the July 2009 report of the Iraq Constitutional Review Commission, which consists entirely of draft amendments to the 2005 Constitution, continues this pattern, addressing thorny issues such as the allocation of oil revenues and the status of Kirkuk while proposing hardly any changes to the Bill of Rights (Iraq Constitutional Review Commission 2009).

Now compare South Africa. In the early 1990s, as South Africa underwent its negotiated

transition from apartheid to liberal democracy, the constitutional agenda was broad. But the design of South Africa’s bill of rights was an issue at the very center of the country’s constitutional politics (Spitz & Chaskalson 2000). Although it was accepted that, given South Africa’s backdrop of racial injustice, a bill of rights was unavoidable, there was considerable disagreement over its details. These issues included, *inter alia*, the application of the bill of rights to private action (horizontality), a general limitations clause and proportionality analysis, the inclusion of socioeconomic rights, the exact nature of the property rights clause, the scope of freedom of association to encompass rights for organized labor, and the choice of a specialist constitutional court to wield ultimate authority to enforce the constitution. This process was learned and highly comparative, drawing on the experience of rights-based constitutionalism from a standard set of cases that serve as comparative models of lessons learned and dangers to be avoided: Canada, Israel, Germany, India, and the United States. Indeed, in many ways, the South African debate shaped the academic agenda of comparative constitutional law and politics in the years to come.

The jarring contrast between South Africa and Iraq—constitutional transitions separated by a little over a decade—illustrates a paradox at the heart of postconflict constitutional design. On the one hand, bills of rights are now central components of liberal democratic constitutions. This reflects a fundamental shift in the design of democracy. As Huntington (1991) has argued, democratization has occurred in three waves: The first commenced in the 1820s in the United States and ended in 1926; the second ran between 1943 just prior to the Allied Victory in Europe and proceeded through the postwar period with decolonization in 1964; the third wave began in 1974 with the overthrow of Portugal’s dictatorship, continued with the end of military dictatorships in Spain, Greece, and Latin America, reached the communist countries of Eastern and Central Europe in the 1990s as well as South Africa, and may or may not be over. Huntington does not describe the

important changes in the constitutional package associated with democratization from wave to wave. In the first wave, this package would have consisted of competitive, multiparty elections for a legislature, a politically accountable head of the executive that is either directly or indirectly elected, an independent bureaucracy, independent courts, a separation of the party and the state, etc. In the second and, decisively, in the third wave, this constitutional package came to include rights-based constitutionalism. A bill of rights that is entrenched and supreme over legislative and executive action, backed up by judicial review by independent courts, is now what we associate with a normal state, and the onus of justification has shifted to those wishing to omit these arrangements from any new constitution. This is the “Rights Revolution” (Ignatieff 2000). In the postconflict state, the adoption of constitutions that entrench civil and political rights has become part of the standard script of peacebuilding, along with the development of competitive politics and open markets (Paris 2004).

But on the other hand, Iraq demonstrates that debates over the character and content of bills of rights are no longer at the center of more recent rounds of postconflict constitutional politics. Bell’s (2008) overview of peace agreements—which often provide the substantive framework for postconflict constitutional settlements—confirms this view. In examples as wide-ranging as Afghanistan, Northern Ireland, Bosnia Herzegovina, Kosovo, Cyprus, Iraq, and Sri Lanka, actual and proposed peace agreements tend to combine two strategies: the disaggregation and the dislocation of power. Disaggregation involves the fragmentation of power at the center through power-sharing devices associated with the consociational model championed by Lijphart (1977), whereas dislocation encompasses significant territorial devolution and an acknowledgment of the multinational character of the polity, and may even open up the notion of sovereignty itself, constitutionalizing a role for kin states of national minorities, as has occurred in Northern Ireland. It is these issues, not bills of rights, that are at

the heart of contemporary postconflict constitutional politics.

I want to puzzle through the rise and decline (but persistence) of rights-based constitutionalism—hence my title, “After the Rights Revolution.” Methodologically, I do so through an engagement with various distinct bodies of literature: comparative constitutional law, comparative constitutional politics, civil war studies, political theory, and ultimately, constitutional design for divided societies. My tentative conclusion is that constitutional actors have come to understand that rights-based constitutionalism cannot do all the work it has been expected to do.

## THE CRITICAL LITERATURE

What changed between the South African and Iraqi transitions? The Rights Revolution has been the central preoccupation of the closely allied fields of comparative constitutional law and comparative constitutional politics, so it is to them that we should first turn for insight. Explaining this apparent shift in the practice of contemporary constitutionalism poses a challenge for both fields because they do not address it.

### Comparative Constitutional Law

The literature on comparative constitutional law is large, growing, and increasingly intellectually ambitious. The bulk of the literature on comparative constitutional law has been preoccupied with a set of discrete questions that have also figured centrally in the constitutional politics of rights-based constitutionalism:

- Should constitutions contain a justiciable bill of rights, or does a bill of rights transfer too much power to the judiciary and judicialize politics? Although this debate first emerged in the United States (Bickel 1962), it is now thoroughly comparative in character. Dworkin’s (1996) defenses of rights-based constitutionalism, for example, are both a theory of constitutional

interpretation applicable to the American Bill of Rights and a general theory of liberal constitutionalism that supports a bill of rights combined with judicial review as the best instrument to institutionalize the liberal commitment to treating persons with equal concern and respect in any jurisdiction. In the legal literature, Waldron (1999) has offered the most fulsome response to Dworkin, challenging the instrumental argument that rights are better protected by rights-based constitutionalism than by democratic legislatures and that judicial review, regardless of its consequences, is democratically illegitimate because it undermines the right to equal democratic participation.

- What should the institutional arrangements surrounding the enforcement of a bill of rights be? Debates surrounding the entrenchment of rights-based constitutionalism often suppose that there is no middle ground between legislative and judicial supremacy. However, the options on the table are actually broader. For example, there may be a distinct “Commonwealth model of constitutionalism” that combines legislative supremacy with weak judicial review, an arrangement that enjoys advantages over both legislative and judicial supremacy because it vests final decisions with elected legislatures while improving their decisions by injecting matters of principle into legislative debates (Gardbaum 2001). But does weak-form judicial review tend to degenerate either into strong-form judicial review because political majorities will rarely reverse a court judgment or into legislative supremacy because they will routinely do so (Tushnet 2008)? Do weak systems of judicial review create an interinstitutional dialogue between courts, executives, and legislatures over questions of rights protection, which operates differently than the monologue of judicial supremacy, and make rights review a joint responsibility of these institutions (Hiebert 2005, 2006a,b; Roach 2001)?
- Should ultimate responsibility for constitutional adjudication be diffused throughout the judicial system, with appeals to a generalist Supreme Court (as in the United States and other common law jurisdictions), or should it be centralized within a specialist constitutional court, which has emerged as the model of choice (Comella 2004, Garlicki 2007)? The claimed virtues of the centralized model are legal certainty, the facilitation of constitutional transitions in contexts where the previous judiciary was complicit in the abuses of the old regime, democracy (because it acknowledges the special political character of judicial review), and efficacy (in civil law systems where conceptions of the judicial role inhibit the second-guessing of legislatures). There is now a serious debate, however, over how centralized a constitutional court system can remain in practice, because, for example, ordinary courts must engage in constitutional interpretation in order to decide when a constitutional issue arises.
- Should a bill of rights contain merely the traditional, first-generation civil and political rights? Or should second-generation social and economic rights to housing, health care, and social assistance be included as well? What are the justifications for entrenching social and economic rights? Are socioeconomic rights instrumentally valuable because they are integral to ensuring the equal enjoyment of civil and political rights, or are they valuable in their own right because of the important interests that they protect (Bilchitz 2007, Fredman 2008, Tushnet 2008)? Does the entrenchment of social and economic rights pose the twin dangers of political demobilization and regressive judicial interpretation, making politics a more secure basis for the protection of these interests (Bakan 1997)?

Other scholars raise questions of institutional competence, arguing that social and economic rights pose challenges for judicial enforcement because they involve questions of resource allocation and require ongoing judicial oversight, unlike negative rights that are allegedly cost free and immediately satisfiable, and suggest that an administrative law approach to socioeconomic rights meets those concerns (Sunstein 2001).

- Should a bill of rights be drafted to accommodate the activities of the regulatory, redistributive state, and if so, how? Should a bill of rights contain constitutional reminders to positive state action such as the Directive Principles of State Policy in the Indian constitution, and perhaps instruct courts to defer to constitutional challenges to public policies that implement these principles? Should a bill of rights protect property rights, and if so, how should it balance the obligation to compensate expropriations against the need to provide constitutional space for extensive schemes of land redistribution (Alexander 2006, Allen 2000)? Should a constitutional guarantee of equality permit preferential programs on the basis of personal characteristics that are otherwise prohibited grounds of discrimination, and if so, should it impose any constitutional discipline on these constraints (Galanter 1984)?
- To what institutions and relationships should a bill of rights apply? Should a bill of rights merely apply vertically—that is, to government institutions and hence to the relationship between citizens and the state? Or should a bill of rights be drafted to apply horizontally to private actors and private relationships as well, as is the case in South Africa (Barak 1996, Gardbaum 2003)? Is this textual choice really determinative (Tushnet 2003)?
- How should a bill of rights be interpreted? Should courts have recourse to comparative materials, as positive models

that set out the contours of a shared, universal model of rights protection, or as interpretive foils to further constitutional self-understanding, including serving as negative antimodels of comparative constitutional experience—through dialogical interpretation or constitutional engagement (Choudhry 1999, 2004, 2006; Jackson 2005)? Are there general principles that should govern the interpretation of a bill of rights? Here, a debate has been joined between Antonin Scalia (1998) and Aharon Barak (2006), between a textualist and purposive interpretation of a bill of rights.

This is a vast and rich literature. However, it does not answer the question at hand. The fundamental reason is its prescriptive orientation, providing arguments for and against certain choices in the design and interpretation of bills of rights. The principal audience outside the academy consists of constitutional negotiators and courts. As Hirschl (2006) has noted, this body of work does not attempt to explain the rise of rights-based constitutionalism. Indeed, scholars are very much part of this phenomenon, not only through their research, but also as academic consultants in foreign constitution-drafting processes. The literature is therefore doubly ill-equipped to respond to the eclipsing of rights-based constitutionalism in postconflict situations. First, it lacks the analytical resources to explain this development. Second, on its own terms, it contains prescriptions that do not always respond to the interests and constitutional claims of political actors, who increasingly do not debate the finer details of bills of rights.

### Comparative Constitutional Politics

A more promising source of insight is the large body of work on comparative constitutional politics that has accompanied the Rights Revolution, which is self-consciously explanatory in character. The focus has been on the expansion of judicial power and, indeed, extends

far beyond rights adjudication to encompass the broader question of the “judicialization of mega-politics,” which often does not involve bills of rights at all (Hirschl 2008). Nonetheless, the narrower question of the spread of judicial review attached to a bill of rights has attracted sustained attention and has generated several possible explanations. The most insightful explanations have been offered in Ginsburg’s (2003) *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* and Hirschl’s (2004) *Juristocracy*. Their principal contribution was to reframe the question away from Bickel’s (1962) inquiry into why courts can and would usurp power from democratically elected officials and toward an inquiry into why powerful political actors would bind themselves through the adoption of bills of rights backed up by judicial review. Ginsburg’s “insurance model” and Hirschl’s “hegemonic preservation thesis,” although differing in important respects, share the central argument that political elites have adopted bills of rights to constitutionally entrench their narrow policy preferences and, more generally, to provide themselves with the legal resources to challenge future policy decisions in the event that they lost power, for example, through the electoral process. Thus, rather than fettering power, the goal of adopting right-based constitutionalism is to preserve it.

Although they do not narrowly address post-conflict constitutional design, both accounts—especially Ginsburg’s—suggest that bills of rights should be standard components of post-conflict constitutional settlements. The reason is that fundamentally, postconflict constitutional design involves the redistribution of political power through strategies of disaggregation and dislocation. Parties who anticipate losing power in the future—whether preexisting elites or not—should accordingly demand bills of rights because they offer an additional set of political resources that are not tied to control of executives and legislatures. Conversely, if other parties anticipate controlling political institutions, they will resist rights-based constitutionalism. Ginsburg, for example, explains

the precise design of constitutional courts as the outcome of these kinds of political calculations. But it also follows that these conflicting interests should be reflected in competing proposals for the substantive provisions of a bill of rights. The apparent lack of friction over the content of Iraq’s bill of rights therefore poses a challenge to this line of analysis.

Recent scholarship in comparative constitutional politics offers a potential explanation of the diminished controversy over bills of rights in constitution-drafting processes and of their persistence in constitutional design. This is the phenomenon of constitutional convergence. In this account, the texts of bills of rights cluster in a narrow band because of the relatively limited number of different textual models available for various constitutional provisions. This convergence occurs with respect to both the range of rights included and their specific language. There are only so many ways to draft a provision on the right to equality, freedom of expression, socioeconomic rights, and limitations, and most bills of rights contain a similar set of rights. For this reason, there is an off-the-shelf quality to recent bills of rights. It follows that given the limited scope for constitutional choice, there should be accordingly less controversy over the terms of a bill of rights.

There are two possible mechanisms for this asserted constitutional convergence. One is rooted in international law and theories of precommitment (Ginsburg 2006). It has been argued, in the European context, that one of the principal drivers for accession to the *European Convention on Human Rights* in the postwar period came from fragile democracies that had not yet fully consolidated and that were eager to precommit themselves to respect human rights and guard against the risk of a return to non-democratic rule through a mechanism of enforcement beyond the control of any one state (Moravcsik 2000). This argument can be extended to the design of contemporary constitutions. Thus, constitutions are framed to ensure compliance with international legal obligations, not only by providing efficient mechanisms for accession to those obligations, but also by

incorporating international legal obligations into constitutions themselves. The goal of constitutional entrenchment is to place certain policies beyond the reach of domestic political actors. Applied to bills of rights, theories of precommitment would link domestic schemes of rights protection with the terms of international human rights treaties. The most direct method of constitutional precommitment would be the incorporation and constitutional entrenchment of international human rights treaties, as occurred in Bosnia. Another would be a bill of rights that closely tracked international human rights obligations. The relative decline in the controversy of rights-based constitutionalism in postconflict constitutional settlement might simply reflect the availability of an international legal script. Conversely, the ongoing debates over questions of constitutional structure (federalism, executives, legislatures) may be a function of the absence of international legal norms that govern many critical issues of constitutional design.

Another explanation for the decline in the relative centrality of rights-based constitutionalism to constitutional politics, but their persistence in constitutional design, might draw on the literature on policy diffusion (Elkins & Simmons 2005, Goodman & Jinks 2010). Numerous studies across a variety of policy arenas (e.g., educational policy, environmental policy) have demonstrated that states are converging on public policies, even in the absence of binding international obligations that direct them to do so. Indeed, it has been argued that convergence is an accelerating process, with each decision by a state to converge on a policy increasing the probability of future convergence by other states. The argument here is that convergence is not a function of precommitment to international law, but rather is a function of processes of policy learning or acculturation. Policy learning arises in conditions where domestic constitutional drafters operate under severe cognitive restraints, because of a lack of experience with liberal democracy, for example, and negotiation occurs under tight time frames and under the threat of a return to violence.

Foreign constitutional models that are readily available from jurisdictions with consolidated liberal democracies are particularly attractive in these situations. Policy acculturation occurs when states adopt public policies through a process of socialization and assimilation into the norms of international society on how states are expected to behave. The normative value of a bill of rights and “variations in national resources, social histories, and economic development within states” (Goodman & Jinks 2010) matter less than the fact that rights-based constitutionalism has become an integral part of what is expected of a normal state.

A recent study, however, complicates considerably the simple narrative of constitutional convergence in the realm of bills of rights (Z. Elkins & T. Ginsburg, unpublished). First, a relatively limited set of rights have become nearly universal, such as the rights to freedom of expression, freedom of religion, freedom of assembly, freedom of association, and freedom of movement, as well as the right to life, the right against torture, and the right against cruel, inhuman and degrading treatment. Beyond that core, however, there remains considerable variation, with many bills of rights not extending much further and others containing over 45 rights. Moreover, the variation in the number of rights contained in bills of rights is increasing, not diminishing, over time. Second, although the number of constitutions containing civil and political rights has grown steeply, relatively few guarantee socioeconomic rights. Third, there remains a gap between international human rights law and domestic bills of rights. The core of universal rights in domestic bills of rights is far smaller than the approximately 30 rights found in the leading international human rights treaties [the gap is smallest between the International Covenant on Civil and Political Rights (ICCPR) and domestic constitutions].

Thus, constitutional convergence cannot explain the declining salience of debates over rights in postconflict constitutional design. Indeed, a simple comparison of the Iraqi and South African constitutions confirms this view.

Thus, whereas the South African bill of rights provides for horizontal application and has two sets of provisions on socioeconomic rights, a multipronged provision on equality, a right to just administrative action, labor (i.e., trade union) rights, and education rights, the Iraqi bill of rights lacks most if not all of these. The fact that Iraq's bill of rights was drafted after South Africa's further underscores how the scope for domestic constitutional choice and political controversy over a bill of rights remains considerable.

### Civil Wars

Instead of proceeding from the bodies of scholarship most focused on bills of rights to see what insights they offer on bills of rights as elements of postconflict constitutional design, I start at the other end—from the research on civil wars—to see what insights they offer on the role of bills of rights in post-civil war (i.e., postconflict) constitutions. As I discuss, this literature does not address bills of rights explicitly, although it is highly suggestive.

Civil wars have generated an enormous body of research, especially in the last two decades. In no small part, this is because of their massive human toll. By one count, between 1945 and 1999, there were 146 civil wars with a total death toll of more than 20 million, which took place in approximately one-third of the countries in the world. By contrast, over the same period there were 25 interstate wars in which approximately 3 million died. Not only did civil wars produce far more casualties, they are in general longer, end more often in decisive victories, and recur in a higher proportion of cases than wars between states (Fearon & Laitin 2003). In addition, the costs of civil war cannot be measured through deaths alone. Civil wars have produced human and economic devastation through mass refugee flows, famines, economic collapse, and, underlying all of these, the destruction of the ability of the state to protect its citizens and provide a stable and peaceful framework for economic, social, and political life.

This research has focused on the determinants of civil war onset and duration. Methodologically, it consists of the construction and analysis of large data sets that combine information about civil wars (onset, termination, casualties, and number and identity of combatants) and various characteristics of states (per capita income, ethnic heterogeneity, religious diversity, population, presence of mountainous terrain, oil production, instability, level of respect for democracy and civil liberties, discrimination, new states, natural resources, and commodity exports). These studies appear to suggest that civil war is associated with “poverty, large populations, a low level of economic development, a prior history of civil war, and political instability” as well as the existence of diasporas and presence of natural resources, among other factors (Walter 2009, p. 244). However, there remains enormous debate over how to interpret these results, which in turn has generated a vast literature and numerous schools of analysis. Roughly put, the principal theories of civil war onset are those that emphasize grievance, greed, and fear (Collier & Hoeffler 2004, Kalyvas 2007, Toft 2010). Grievance-based theories attribute civil wars to inequalities in access to natural resources, land, income, and/or political representation, denials of civil liberties, and discrimination. Greed-based theories link civil war to struggles over natural resources between governments and rebel groups. Fear-based theories posit a link between civil war and state collapse, which leads to a security dilemma whereby the absence of the state leads ethnic groups to arm for reasons of self-defense, which is misinterpreted as an aggressive measure and fuels a spiral of armament, leading to conflict. Moreover, although grievance, greed, and fear might provide the motivation for civil war, they are “too common to distinguish the cases where civil war breaks out” and must be supplemented by an account that explains the vulnerability of a state to insurgency (Fearon & Laitin 2003).

What is striking is that constitutions are largely missing from the dominant strand of research on civil wars. Yet in a fundamental sense,

civil wars can be understood as constitutional phenomena. Above all, the mission of constitutionalism is to channel political conflict, disagreements that would otherwise spill into the streets and be settled according to violence, into institutions that operate peacefully according to law and reach decisions that members of a political community accept as authoritative. In situations of civil war, constitutions do not perform this basic function. So it would seem that to fully understand civil war onset and duration, we should understand the role that constitutions play. Are constitutions the causes of the breakdown of politics? Are they casualties of broader forces that engulf the constitutional system and lead to civil war? Or is the role of constitutions a complex combination of the two? These are important questions that scholars of civil war have yet to ask directly.

However, another line of research points the way to bridging this gap. The focus here is not on the factors associated with the risk of civil war onset, but rather on the explanation of civil war settlement. Whereas some authors see the onset, duration, and settlement of civil wars as interrelated phenomena that are due to the same factors, others view the success and failure of civil war settlement as distinct issues. As Toft (2010) explains, the literature on the failure of settlement has three strands. One posits that settlements fail when they do not share power between former combatants adequately, whereas a second lays the blame at the feet of spoilers who see more gain from renewed civil war than from peace. But a third strand of research has focused on the difficulty that states have in making credible commitments to rebel groups, which in turn makes negotiated settlements to civil wars difficult to reach or difficult to implement (Walter 2009). Walter describes two kinds of restraints on the ability of states to credibly commit: weak legal and political institutions and highly politicized, fixed cleavages. Both factors point to problems in constitutional design, although Walter does not develop the constitutional implications of her analysis, perhaps because her own research places great emphasis on the role of third-party

enforcement to overcome commitment problems (Walter 2002). Nonetheless, it is possible to suggest what these constitutional implications could be. Weak legal and political institutions serve as barriers to credible commitment because they undermine the certainty that governments will adhere to civil war settlements. As Walter (2009, p. 251) puts it:

Governments and potential rebel groups would have little to fear from a negotiated settlement if they were certain that the terms would be implemented and enforced over time. . . . Groups worry, however, that governments will renege on their promises, exploit the peace, and use an agreement to their long-term advantage. This fear is especially strong in countries where political and legal institutions are not strong enough to check executive control.

Walter does not identify the kind of institutions that would have to exist to control the executive for commitments to be credible. But it is clear that independent and impartial courts would be central to this constitutional strategy. Moreover, courts would potentially work alongside other institutions with complementary but narrower mandates that would supplement the role of the courts and that the courts in turn would support.

Walter (2009, p. 252) describes the second factor—“cemented cleavages”—as raising the following problem:

Credible commitments are also particularly difficult to make to minority groups in countries with fixed political cleavages. This is because the majority almost always has the numbers to override promises made to a weaker rival, and the minority can do little to prevent this.

This is a rather different point that bundles together two different concerns. One is the well-known fact about the character of political cleavage in ethnically divided societies (Choudhry 2008). In societies that are not

ethnically divided, political and ethnic cleavages are cross-cutting, which promotes political moderation and blunts partisan divisions. In addition, this account of political cleavages is closely tied to the case for a competitive model of democratic politics. It assumes that politics is characterized by shifting coalitions and majorities and that political parties will compete for median voters at the center of the spectrum and, hence, that political competition creates pressures toward moderation. In addition, there is no permanent exclusion of any segment of society from political power, encouraging political losers to accept their loss in the hopes that they will win another day. In ethnically divided societies, none of these assumptions holds. Cleavages are mutually reinforcing, not cross-cutting, with ethnic division mapping onto political division and political competition not producing moderation, but immoderation. The danger is of a majority dictatorship in democratic form that will not have the same incentives to check the abuse of public power produced by political competition. Ethnic minorities, who are persistent losers with no prospect of wielding political power, would have the incentive to exit politics and turn to violence.

A second concern is majoritarian tyranny on the part of an ethnic majority. Walter's (2009) point appears to be that even if effective legal institutions exist, the terms of the agreement themselves could be undone through normal legal processes. This implies several claims about legal form and entrenchment: that an agreement would take legal form, that an agreement implemented through statute could be undone by a simple legislative majority, and perhaps even that constitutional entrenchment is ultimately ineffective in the face of determined majorities.

Walter cites these factors as lowering the possibility of settlement to civil war because they undermine the ability of the state to credibly commit. But alternatively, these factors could have an effect on the character of a constitutional settlement to civil war. Credible commitment is a lens through which to assess the variety of constitutional options. Consider a bill of

rights. In the postconflict context, the salience of a bill of rights would appear to be very high. The breakdown of the previous constitutional order, leading to a downward spiral of violence and civil war, is almost always accompanied by gross abuses of human rights at the hands of the previous regime, the failure of the regime to protect members of minorities, and the ineffectiveness or unwillingness of institutions to hold perpetrators accountable. Indeed, these various forms of failure in human rights protection are often cited as a reason to impugn the legitimacy of, and to withdraw support from, the previous constitutional order. A postconflict settlement would by necessity include a bill of rights as a political acknowledgment of past wrongs and, more concretely, as an effort to prevent future abuses from ever occurring again. The function of a bill of rights is to serve as a hard check on political power by enabling minorities to invoke the machinery of the courts to set binding constraints on political decision making. Thus, a bill of rights is meant to serve as a credible commitment to minorities that they should set aside violence and acquiesce to and participate in the new constitutional legal order. Other related policy instruments that are not typically understood as linked to constitutionalized rights protection should be understood as important counterparts of this postconflict constitutional strategy. For example, the reform of the security sector—among other things the professionalization of the military, the separation of roles of the military (focused on external defense) from the police (confined to domestic law enforcement), and the establishment of civilian oversight—should be understood as closely aligned with this role for a bill of rights (Toft 2010). I call this function of a bill of rights the “regulative conception” (Choudhry 2008, 2009). The question raised is how bills of rights fare in terms of their regulative ability to serve as instruments of credible commitment.

However, this is not the only conception of a bill of rights that is suggested by the civil war literature. Roeder & Rothchild (2005) have recently advocated “nation-state stewardship” as

a model for constitutional design to end civil wars. Their presentation of this model has two different limbs, one focused on political institutions and the other on political identities. The institutional dimensions of this model are based explicitly on the U.S. Constitution, having three elements: civil liberties (protected by a bill of rights), a separation of powers that creates multiple majorities, and a system of checks and balances across these different institutions. Moreover, the task of government is limited. Political identity must stem from the fact that the people of a state “share a common sense of nationhood” (Roeder & Rothchild 2005, p. 337). This sense of shared identity need not be particularly deep; it “may only be a consensus that they should remain together in a single state that maintains domestic law and order and defends them against foreign enemies” (Roeder & Rothchild 2005, p. 338).

The authors do not develop the link between institutions and political identity. On one reading, the sense of nationhood is a given that exists independent of and prior to political institutions and shapes their design. Thus, whether a state should exist or be partitioned depends on whether “the ethnic groups share a commitment to a common state.” In addition, the scope of limited government is determined by the range of political disagreement—that is, shared political institutions may only make decisions regarding issues on which there are no fundamental disagreements among former combatants. But on another reading, these institutions create a shared sense of identity. In particular, consider Roeder & Rothchild’s (2005, p. 342) explanation of the function of a bill of rights:

The rights possessed by ethnic minorities must also be identical to the rights enjoyed by other types of majorities and minorities in civil society . . . so that ethnicity is not privileged as a basis of political participation. In the context of ethnically divided societies a major purpose of homogeneous individual civil rights is to encourage the proliferation of interests and, particularly, interests that cross ethnic groups in defense of civil rights. In these conditions,

subgroups within the ethnic majority are more likely to jump to the defense of the rights of ethnic minorities to defend the rights they share in common.

Roeder & Rothchild could mean no more than the following: If rights are insecure for some, they are insecure for all. The bond is one of self-interest. But this politics of rights grounded in shared self-interest could thicken into a politics of rights grounded in common national identity. This is what I have termed the constitutive conception of a bill of rights (Choudhry 2009). A bill of rights calls upon citizens to abstract away from race, religion, ethnicity, and language, which have previously served as the grounds of political identity and political division, and instead to view themselves as citizens who are equal bearers of constitutional rights. To serve as an instrument of nation building, a bill of rights must transform the political self-understanding of citizens.

## THE LIMITATIONS OF BILLS OF RIGHTS

So there are two conceptions for bills of rights in postconflict constitutional design: the regulative and the constitutive. In this section, I argue that the diminished salience of bills of rights in postconflict constitutional negotiations reflects the fact that they cannot fully fulfill these aims.

### The Regulative Conception of Bills of Rights

First consider the regulative conception of bills of rights. There are three factors that undermine the ability of bills of rights to serve as credible commitments against future abuses of human rights in postconflict settings: (a) politicized judiciaries, (b) constitutional underenforcement, and (c) the ex post nature of judicial review.

**Politicized judiciaries.** Bills of rights depend on the independence and impartiality of the

judiciary for their enforcement. This poses a problem in many postconflict societies because of the close identification of the judicial system with the previous constitutional regime. One of the most important lessons of the comparative study of authoritarian regimes has been that courts have served as central instruments of state control. This has been well documented in the central cases of “wicked” legal systems of Nazi Germany and apartheid South Africa (Dyzenhaus 2009). However, the insight extends well beyond those cases to a broader spectrum of nondemocratic regimes (Ginsburg & Moustafa 2008, Helmke 2005, Hilbank 2007, Moustafa 2007). The enforcement of security laws against political opponents is perhaps the central role of courts in these contexts. However, the body of law that courts enforce against political opposition to protect existing constitutional regimes is much broader. These include laws restricting participation in political institutions (e.g., laws governing political parties and elections) and freedom of expression (e.g., the laws on libel). More generally, these courts are integral components of the very framework of preconflict constitutional regime, which has often been the source of the political grievances giving rise to civil war.

The allegation that a judiciary is politicized entails two distinct claims, both of which pose challenges for bills of rights as part of postconflict constitutional settlements. First, individual judges may be partisans of the previous political regime, closely allied at a personal and professional level with executive and legislative officeholders or, more generally, part of the ruling party. These judges acted as agents for, rather than as checks on, the wielders of power within the previous constitutional order. The question is whether they can be trusted to adjudicate impartially under a new constitutional scheme that includes a bill of rights that renders unconstitutional precisely the conduct that was previously legal. Second, distinct from the personal political affiliations of judges, the judiciary as an institution might have an ideological commitment to the preexisting constitutional regime, which is reflected in its jurisprudence. In

particular, the preexisting constitutional doctrine might be built around robust notions of deference to executives and legislatures. The issue is how these judges, and the doctrinal framework that they have constructed and within which they operate, will respond to a new constitutional dispensation that includes a bill of rights that fundamentally reshapes the character of the constitutional order.

Sri Lanka illustrates both dimensions of politicization (International Crisis Group 2009). The principal vehicle for executive manipulation of the judiciary has been the president’s power to appoint the chief justice of the Supreme Court, who sits atop the Sri Lankan judicial hierarchy, as well as other high court judges. High court judges are increasingly drawn from the ranks of the attorney general’s department, which itself has become more politicized. These judges tend to rule in favor of the executive in security cases. Moreover, the recently retired chief justice has used his extensive powers to favor the Sri Lankan government. He excluded Supreme Court judges critical of the government from panels that heard constitutional cases. In addition, through his power to appoint the members of the Judicial Service Commission, which is vested with responsibility for promotions, discipline, and transfers, the former chief justice interfered with proceedings against the government with regard to human rights abuses. In addition, the Supreme Court has found unconstitutional Sri Lanka’s access to the Optional Protocol to ICCPR (allowing for individual rights of complaint) and issued an implausible advisory opinion on Sri Lanka’s compliance with the ICCPR, which is allegedly motivated by the desire to prevent Sri Lanka from losing trade concessions tied to compliance with international human rights standards. Outside the area of rights adjudication, the Supreme Court has struck down interim power-sharing arrangements in the Northeast and the merger of the North and Eastern provinces (a key Tamil demand). Writing before the cessation of hostilities in 2009, the International Crisis Group (2009, p. 1) explicitly links the

politicization of the Sri Lankan judiciary with the problem of credible commitment:

Without addressing this corrosion [i.e., of judicial independence], Sri Lanka is unlikely to force the stable political compromises that might now be available . . . Courts presently provide no guarantee of personal security or redress against arbitrary state violence, let alone the possibility of transitional justice, necessary for a transition from violence. They are more likely to destabilize political compromises that could help mitigate Sri Lanka's enduring social fissures.

Politicized judiciaries raise acute dilemmas of transitional justice that can be recast as problems of credible commitment. On the one hand, the wholesale replacement of the existing judiciary is not an option. It would contradict the logic of a negotiated settlement whereby all parties participate in the exercise of public power. Ironically, it might also subvert respect for the rule of law because it would suggest that the particular occupants of judicial office matter more to adjudication than impersonal legal materials. On the other hand, simply vesting the existing judiciary with the responsibility for interpreting a new bill of rights is not an option either, because it might undermine the enforcement of a new bill of rights. In several transitional democracies, the solution has been to leave the preexisting judiciary in place and to create a specialist constitutional court with supreme and potentially exclusive authority to interpret the bill of rights, with members appointed by the new regime. But this institutional innovation may be of limited applicability. The central examples of the creation of new constitutional courts—in South Africa and in Eastern and Central Europe—have been in democratic transitions that restored or established majority rule. The constitutional court becomes a vehicle by which a newly empowered political majority asserts its authority over the discredited courts of the prior regime, kept in place as a matter of necessity. By contrast, in many civil wars, the rebel group

represents a political minority that turned to violence because of persistent losses in majoritarian politics. On a new constitutional court, they would at best continue to be a minority. A supermajority decision rule on the new constitutional court would only partially address this concern because it would create a minority veto but would not encompass a positive power of decision on cases involving bills of rights.

**Constitutional underenforcement.** Even if these concerns regarding the politicization of the judiciary could be met, another barrier to credible commitment is the phenomenon of constitutional underenforcement. Debates over the legitimacy of judicial review presuppose an account of the nature of rights adjudication in which constitutional reasoning consists of highly abstract, moral argument rooted in principles of political morality—i.e., Dworkin's (1996) forum of principle. The provisions of bills of rights themselves, which incorporate principles of political morality by reference, fuel this portrayal of constitutional interpretation. However, in recent years, constitutional scholars have observed that there is a wide gap between this picture and the actual practice of judicial review. Courts deliberately and systematically engage in the underenforcement of constitutional provisions (Sager 1978). There are four distinct strategies of constitutional underenforcement: decisional avoidance, decisional minimalism, decisional deference, and remedial deference.

Decisional avoidance refers to a set of techniques whereby courts decline to rule on constitutional issues that are brought before them. These techniques may consist of rules governing standing (i.e., that a litigant has sufficient interest in a case to launch it), ripeness (i.e., that a dispute is not premature), mootness (i.e., that a dispute is still alive), political questions doctrines or doctrines of nonjusticiability (i.e., that the issues are political, not legal, and that they are not amenable to judicial review), and the doctrine of constitutional avoidance (i.e., that cases should be resolved on nonconstitutional

grounds if possible). Bickel (1962) termed these various techniques the “passive virtues.”

Decisional minimalism, by contrast, refers to the manner in which courts reason about their judgments (Sunstein 1999). Maximalist judgments are broad and deep—that is, they lay down constitutional principles with potentially far-reaching implications in a broad variety of future cases and ground those judgments in deeply theorized accounts of a bill of rights. Minimalist judgments, by contrast, are narrow and/or shallow—that is, they are limited in scope to the case before the court, by design do not set out principles applicable to a broad set of future cases, and are based on reasoning that is not theoretically sophisticated. Judicial minimalism is often a product of the doctrinal tests developed by courts to interpret and implement broadly worded guarantees in bills of rights (Fallon 2001, 2006).

Next, there is decisional deference. In most jurisdictions, rights adjudication consists of a two-stage process that determines first whether a right is violated and second whether that violation is justified according to a proportionality analysis. In these systems, rights are generally given a broad interpretation, and countervailing interests are addressed exclusively under proportionality. This contrasts with the one-stage approach—so-called definitional balancing—that is prevalent in American constitutional doctrine, which conflates the scope of a right with its strength. At a superficial level, the broader reading of a right might suggest the eschewal of constitutional underenforcement, which is often evident in definitional balancing. However, underenforcement occurs at the proportionality stage, through a deferential approach to proportionality analysis that protects rights very weakly.

Finally, there is remedial deference. Violations of bills of rights can spawn a broad variety of remedies that vary considerably in their stringency. At one end of the spectrum, constitutional remedies consist of declarations of constitutional invalidity, damages, and various forms of mandatory relief (e.g.,

injunctions) that end unconstitutional state action and directly order governments to comply with their constitutional obligations. At the other end of the spectrum are much more deferential forms of relief, such as suspended declarations of invalidity and declaratory relief that preserve unconstitutional states of affairs, give governments time to come to terms with their constitutional obligations, and rely on the good faith of government to act constitutionally.

Although many of these practices of constitutional underenforcement have been identified in the practice of American courts, identical or similar techniques are a widespread feature of constitutional adjudication. They are motivated by legitimate concerns regarding comparative institutional competence and democratic legitimacy, which raise fears of judicial overenforcement. But separately and in combination, they also have the effect of seriously limiting the ability of bills of rights to discipline all forms of unconstitutional conduct, by deliberate design. As a consequence, even a system of depoliticized courts cannot provide a credible commitment against future abuses of rights.

Among the principal casualties—directly relevant to postconflict constitutional settlements—are constitutional guarantees of equality. A principal grievance leveled at a particular previous regime may be that it distributed primary social goods in the Rawlsian sense—liberty and opportunity, income and wealth, and the bases of self-respect—on a discriminatory basis. So a constitutional guarantee of equality would be a *sine qua non* to a bill of rights. This kind of provision would encounter two kinds of discrimination claims: that the state has engaged in direct discrimination against members of certain groups or that the state has engaged in indirect discrimination through the adoption of facially neutral criteria that are unequal in their effects on different groups. The former sort of discrimination would be easy to identify and constitutionally condemn. But the latter has proved much more difficult to discipline, even under bills of rights that prohibit indirect discrimination. The reason is the real

possibility of judicial error. The proof of indirect discrimination turns on complex questions of evidence and raises the additional question of whether policies with discriminatory effects are nonetheless justified. Given that indirect discrimination is far more pervasive than direct discrimination, this means that a principal source of state-created inequality will remain beyond judicial oversight.

**Ex post judicial review.** Institutions to promote public accountability can operate either *ex ante* or *ex post*. *Ex ante* institutions operate before a decision is undertaken; *ex post* institutions operate afterward. Judicial review under a bill of rights is, in most cases, a process of *ex post* review. To be sure, there are exceptions, such as preenactment legislative scrutiny that is engaged in by the French *Conseil Constitutionnel* and other courts with such limited jurisdiction. Moreover, forms of parliamentary rights review can similarly monitor legislation for compliance with a bill of rights during the legislative process. But *ex post* review is the norm.

*Ex post* review can operate in different ways. In systems of diffuse review, it is accompanied by a series of rules on standing, mootness, and ripeness. Although the precise details vary across jurisdictions, the net effect of these rules is to limit access to *ex post* review to situations in which a litigant has a sufficiently strong interest in a constitutional claim; the claim refers to an actual dispute, not a hypothetical scenario; and the dispute remains live. Although it is often argued that systems of centralized judicial review are different because review is abstract and is not tied to the resolution of a particular dispute, this is a caricature. Cases in centralized systems still arise from claims brought by individuals or political actors and through the ordinary courts or directly to a constitutional court. In the case of individual claims, a live legal dispute gives rise to the case, and the referring judge applies the ruling once it is received to resolve the case at hand. There is no material difference in challenges to executive conduct. The distinction is whether rulings on statutes find the statute as a whole unconstitutional (centralized and

diffused systems) or in addition can find a statute unconstitutional in how it is applied (diffused systems) (Comella 2004).

*Ex post* judicial review is pervasive. The principal reason for this is informational. To interpret and apply bills of rights, courts require information regarding the impact of those rights. The persons who possess that information are those whose rights have been infringed. The principal advantage of *ex post* over *ex ante* review is that it creates the incentive for those most affected to bring the relevant information to the courts. Indeed, the link between the efficacy of bills of rights and *ex post* judicial review is so widely accepted that a recent set of constitutional amendments granted the *Conseil Constitutionnel* powers of *ex post* review.

However, *ex post* review suffers from serious weaknesses. The first problem is conceptual—i.e., the conception of constitutional wrongs on which it relies. If violations are conceptualized as discrete wrongs that occur at a fixed point in time, a finding of unconstitutionality necessarily occurs after a right has been violated, and a remedy is provided after the fact. This analytic structure—which analogizes between violations of bills of rights and violations of rights under private law—has been aptly termed the model of “transactional harm” (Levinson 2002). The model has several failings: that harms are not discrete events in the past but are often continuing, that harms are not experienced merely by individuals but by groups, and that remedies can rarely compensate for the rights violation. Accordingly, a tradition of American public law scholarship has developed a distinct model of public law adjudication. Although diverse in its substantive focus and prescriptions, the shared commitment has been on preventing future unconstitutional conduct (Chayes 1976, Fiss 1988). This has also led to a redescription of constitutional practice.

The unstated assumption in this reconceptualization and redescription of public law practice in consolidated constitutional systems is that there is not ongoing, systematic noncompliance with bills of rights. Discrete violations of bills of rights, even if serious, are not

synonymous with the breakdown of the constitutional order. Thus, the confined scope of rights violations and the existence of mechanisms to prevent their reoccurrence offset the fact that those harms cannot be compensated. Together, they provide a credible incentive for parties whose rights are violated to adhere to the constitutional order. Such a commitment is frequently lacking in situations of conflict. Abuses of human rights are not isolated but, when undertaken at the hands of the state, are deliberate, wanton, and systematic. Unlawful arrest, illegal detention, internment, torture, rape, murder, and mass expulsions are widespread. These circumstances magnify the inadequacy of ex post forms of judicial review, especially because they often occur in the face of constitutional and other legal prohibitions on such conduct. Thus, in postconflict constitutional negotiations, ex post mechanisms of accountability are far less attractive than ex ante controls that prevent such abuses from occurring in the first place. And so constitutional negotiations focus less on rights-based constitutionalism and more on power sharing and vetoes in executive and legislative institutions.

### The Constitutive Conception of Bills of Rights

According to the constitutive conception, a bill of rights constitutes the *demos* that it also constrains. It encodes and projects a certain vision of political community—in particular, the idea of a political community as consisting of rights-bearing citizens of equal status. To serve as an instrument of nation building, a bill of rights must alter the very self-understanding of citizens. Can a bill of rights serve this constitutive purpose?

We first need to unearth the genealogy of this idea. The idea that a bill of rights can serve as an instrument of shared national identity has recently been championed by Habermas (1996), contributing to a long-standing debate over the nature and character of nationalism. Habermas distinguishes between *Shickalsgemeinschaft* (ethnic nationalism) and

*Verfassungspatriotismus* (constitution patriotism or civic nationalism). According to the ethnic conception, political communities are imagined as emerging from peoples or nations united by a common bond that exists independently of and prior to the creation of a political community and that is the object of loyalty, belonging, or identification. Citizenship in a political community tracks membership in the underlying nation. In its extreme versions, the ethnic conception defines nations in terms of descent and precludes the acquisition of membership by outsiders. More moderate formulations define the nation in terms of a shared language, history, religion, and/or cultural traditions, allowing for persons who lack these characteristics to embrace them and become members of a political community. According to constitutional patriotism, a political community is based not on a prepolitical bond but, rather, on an allegiance to shared principles of political justice flowing from a liberal political morality and to a common set of political institutions through which those principles are realized. A political community is imagined as a voluntary association of citizens considered free and equal, who constitute a political community because of a shared belief that they should associate for political ends. Citizenship can be held by any person willing to affirm and uphold the principles of political justice that lie at the foundation of the political community.

The most recent discussions of constitutional patriotism have revolved around, first, the normative question of its ability to serve as the basis for political legitimacy in societies that aspire to be liberal democracies and, second, the sociological question of whether it can provide sufficient social unity for a liberal state to realize many of its most important objectives. The ambition of liberal constitutionalism is that a constitutional order must be legitimate and must enjoy the allegiance of a sufficient number of its citizens to work. In the liberal conception, the conditions for the legitimate exercise of public power are the rights and institutions of representative government that one finds in a typical

liberal-democratic constitution, such as a bill of rights. The ambition of constitutional patriotism is that these same conditions also supply the necessary motivational element for those institutions to work. Additionally, the connection between legitimacy (normative) and stability (sociological) is not contingent. Rather, it is conceptual—it is the ambition of constitutional patriotism that citizens view themselves as part of the same constitutional-legal order, precisely because that order is legitimate.

Contemporary discussions of constitutional patriotism originated with the reunification of Germany. The question was how Germans should make sense of reunification. There were two options on the table. One was ethnic nationalism, according to which German reunification brought ethnic nation and state back into alignment, after a four-decade interruption. The other was constitutional patriotism. For Habermas, the core of the German political identity was the Basic Law, Germany's postwar constitution. Reunification was justified as the restoration of democracy and the *rechstaat* in a territory that had lacked both since the rise of Hitler.

However, the notion of constitutional patriotism was soon applied to postconflict constitutional contexts such as Afghanistan, Rwanda, Bosnia, and Northern Ireland, in which the cleavages between groups were ethnic (Barber 1996, Müller 2007). Canovan (2000, p. 422) argues that the goal of constitutional patriots in these states was to move beyond “more pragmatic schemes for coping democratically with the tensions between potentially hostile groups” where it was taken as a given that ethnic identity would be the principal basis for political mobilization. The goal of constitutional patriotism was “to lift individuals above their ascriptive identities into a shared public sphere where all are equal citizens with a shared loyalty to an impartial state” (Canovan 2000, p. 422). Thus, for Northern Ireland, “[r]ecognising a common set of rights in a document that all can commit to, at least in part, is seen as an important element in building a new political society, providing the possibility at least of common

identification with the basic document” (McCrudden 2001, p. 378; Kavanagh 2004).

Can a bill of rights constitute a national identity? Comparative experience from Germany and Canada—two consolidated democracies with highly developed systems of rights adjudication that serve as important comparative models—counsels skepticism. Consider Germany. The best answer to Habermas came from Yack (1996). Yack argued that a purely abstract constitutional patriotism could not explain the defense of German reunification over the simple restoration of liberal democracy in East Germany or why Germany did not unify with the former communist dictatorship of Czechoslovakia, with which it shared a border. Constitutional patriotism in Germany was accordingly best understood as an appeal to a certain audience, united by a shared historical memory and common historical experiences that gave the rules and institutions of liberal democracy a particular salience. The more general point is that even in nations that claim to define citizenship in civic terms, those principles are nested in a contingent context—a constitutional narrative drawing on a web of political memory forged by shared experiences, challenges, failures, and triumphs, which is often but not necessarily tied to a particular set of institutions.

Now consider Canada. Canada adopted a constitutionally entrenched bill of rights, the *Canadian Charter of Rights and Freedoms*, in 1982. The principal political objective behind the adoption of the *Charter* was not to insure against the potential loss of political power by threatened political elites, but rather to combat substate nationalism in the province of Quebec through the creation of a pan-Canadian constitutional patriotism that would compete with and eventually overwhelm Quebec nationalism. In a federal state such as Canada, because citizens share these rights irrespective of language or province of residence, a bill of rights was meant to serve as a transcendent form of political identification—the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed

polity across the country as a whole. As the Government of Canada stated, the constitutional entrenchment of “individual human rights for all Canadians . . . is a fundamental condition of nationhood” and is “fundamental to the will of the nation to survive” (Government of Canada 1968, p. 18).

The *Charter* has not met its constitutive goal. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism. However, within Quebec, the *Charter* has not served to bind francophone Quebecers to the Canadian constitutional order. The differential effect of the *Charter* on Canadian political identity has been evident in a series of constitutional episodes over the past two decades (Choudhry 2009). The conflicting reactions to the Meech Lake Accord within and outside Quebec illustrate this point (Cairns 1988). Quebec had opposed the adoption of the *Charter*, and the Accord was a series of constitutional amendments that together were an attempt to bring Quebec into the constitutional fold. Outside of Quebec, the Meech Lake Accord was criticized because (a) the intergovernmental process that produced it was inconsistent with the notion that citizens were the constituent actors in the constitutional process, and (b) there was fear that a provision recognizing that Quebec constituted a distinct society within Canada (the Distinct Society Clause) would undermine equal citizenship by authorizing Quebec to limit the *Charter* in a manner not open to other provincial governments. Within Quebec, the reaction was exactly the opposite, on the theory that (a) the constituent actors in the constitutional process were Canada’s nations, of which Quebec was one, and (b) the Distinct Society expressly recognized this fact.

The broader lesson is that it is very difficult for bills of rights, on their own, to serve a constituting role in defining a new political identity. The German example suggests that for a bill of rights to serve as the basis of a common political identity, it must be situated in a contingent historical and political context—i.e., it depends on “supplements of particularity” (Markell 2000, p. 40). This history is often the topic of intense

disagreement, as it is bound up in competing accounts of the sources and character of the conflict that led to violence in the first place. The Canadian example suggests that the task is even more challenging where the existence of competing nationalisms within the same state makes the dominant question of constitutional politics the conflict between competing national narratives. This is the multinational or plurinational state, a pervasive form of postconflict polity (Kymlicka 1995, Keating 2001). Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. The difficulties may be greater still for countries emerging from violent conflict.

### CONCLUSION: LESSONS FOR CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES

In his case against bills of rights backed up by judicial review, Waldron (2006) makes a “conditional case,” based on a series of assumptions about the institutional and political features of modern liberal democracies. These assumptions delineate the circumstance in which he makes the core case against judicial review. Societies in which one or more assumptions do not hold are noncore cases. Societies emerging from violent conflict fail to meet one or more of Waldron’s assumptions. They do not have democratic institutions in reasonably good working order, they do not have a set of judicial institutions in reasonably good order, many individuals and officials are not committed to rights, and disagreements about rights are not nearly always in good faith. It is precisely in this context that the case for rights-based constitutionalism is strong.

Indeed, bills of rights are expected to do a great deal of work in postconflict constitutions. Advocates of rights-based constitutionalism look to bills of rights to constrain abuses of public power and to constitute a new polity founded on constitutional patriotism. But the declining intensity of debates over bills of rights in postconflict constitutions suggests that bills

of rights cannot do the work that is expected of them. Politicized judiciaries, constitutional underenforcement, and the ex post nature of judicial review undermines the ability of the bill of rights to serve as a credible commitment against future abuses of human rights. Moreover, the idea of a bill of rights as a source of shared political identity abstracted from a contingent political and historical context is unlikely to succeed in practice.

And so it should not be surprising that bills of rights have attracted minimal attention in the copious literature on constitutional design in divided societies. For the past three decades, a major question in comparative politics has been that of constitutional design in ethnically divided societies, which overlap with many of the most recent examples of postconflict design.

There is no shortage of constitutional prescriptions for managing ethnic divisions of these sorts, such as electoral system design, the structure of and relationship between the executive and the legislature, federalism, and legal pluralism. Nonetheless, bills of rights have attracted no sustained analysis. Indeed, Lijphart's (1977) *Democracy in Plural Societies* and Horowitz's (1985) *Ethnic Groups in Conflict*—the two classic texts in the field, which have set the parameters of the debate for over two decades—barely mention it. By contrast, Lijphart, Horowitz, and a legion of scholars have spilled a vast amount of ink on comparatively narrow issues, such as the choice between the alternative vote and proportional representation. This may have been an oversight. Or it may have been prescient.

## DISCLOSURE STATEMENT

The author is not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

## ACKNOWLEDGMENTS

An earlier version of this paper was presented as a keynote address at the 21st Anniversary Conference of the Center for Comparative Constitutional Studies at the University Melbourne School of Law in November 2009. I thank Carolyn Evans, Theunis Roux, Wojciech Sadurski, Adrienne Stone, and Alison Young for their helpful comments. Nicolas Businger, Nathan Hume, and Michael Sabet provided excellent research assistance.

## LITERATURE CITED

- Alexander GS. 2006. *The Global Debate over Constitutional Property: Lessons from the American Takings Jurisprudence*. Chicago: Univ. Chicago Press
- Allen T. 2000. *The Right to Property in Commonwealth Constitutions*. Cambridge, UK: Cambridge Univ. Press
- Bakan J. 1997. *Just Words: Constitutional Rights and Social Wrongs*. Toronto: Univ. Toronto Press
- Barak A. 1996. Constitutional human rights and private law justice. *Rev. Const. Stud.* 3(2):218–81
- Barak A. 2006. *The Judge in a Democracy*. Princeton, NJ: Princeton Univ. Press
- Barber BR. 1996. Constitutional faith. In *For Love of Country: Debating the Limits of Patriotism*, ed. MC Nussbaum, pp. 30–37. Boston: Beacon
- Bell C. 2008. *On the Law of Peace*. New York: Oxford Univ. Press
- Bickel AM. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill
- Bilchitz D. 2007. *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*. New York: Oxford Univ. Press
- Bouillon ME, Malone DM, Rowsell B, eds. 2007. *Iraq: Preventing a New Generation of Conflict*. Boulder, CO: Lynne Rienner

- Cairns A. 1988. Citizens (outsiders) and governments (insiders) in constitution-making: the case of Meech Lake. *Can. Public Policy*. 14(Suppl.: The Meech Lake Accord):S121–45
- Canovan M. 2000. Patriotism is not enough. *Br. J. Polit. Sci.* 30(3):413–32
- Chayes A. 1976. The role of a judge in public law litigation. *Harvard Law Rev.* 89(7):1218–316
- Choudhry S. 1999. Globalization in search of justification: toward a theory of comparative constitutional interpretation. *Ind. Law J.* 74:819–92
- Choudhry S. 2004. The *Lochner* era and comparative constitutionalism. *Int. J. Const. Law* 2(1):1–55
- Choudhry S, ed. 2006. *The Migration of Constitutional Ideas*. Cambridge, UK: Cambridge Univ. Press
- Choudhry S, ed. 2008. *Constitutional Design for Divided Societies: Integration or Accommodation*. New York: Oxford Univ. Press
- Choudhry S. 2009. Bills of rights as instruments of national building in multinational states: the Canadian *Charter* and Quebec nationalism. In *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*, ed. JB Kelly, CP Manfredi, pp. 233–50. Vancouver: Univ. B. C. Press
- Collier P, Hoeffler A. 2004. Greed and grievance in civil war. *Oxford Econ. Pap.* 56(4):563–95
- Comella VF. 2004. The European model of constitutional review of legislation: toward decentralization? *Int. J. Const. Law*. 2(3):461–91
- Dawisha A. 2009. *Iraq: A Political History from Independence to Occupation*. Princeton, NJ: Princeton Univ. Press
- Deeks AS, Burton MD. 2007. Iraq's constitution: a drafting history. *Cornell Int. Law J.* 40(1):1–87
- Dworkin R. 1996. *Freedom's Law: The Moral Reading of the American Constitution*. New York: Oxford Univ. Press
- Dyzenhaus D. 2009. *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*. Oxford: Clarendon. 2nd ed.
- Elkins Z, Simmons B. 2005. On waves, clusters, and diffusion: a conceptual framework. *Ann. Am. Acad. Polit. Soc. Sci.* 598:33–51
- Fallon RH. 2001. *Implementing the Constitution*. Cambridge, MA: Harvard Univ. Press
- Fallon RH. 2006. Judicially manageable standards and constitutional meaning. *Harvard Law Rev.* 119:1274–332
- Fearon JD, Laitin DD. 2003. Ethnicity, insurgency, and civil war. *Am. Polit. Sci. Rev.* 97(1):75–89
- Fiss OM. 1988. Coda. *Univ. Toronto Law J.* 38:229–44
- Fredman S. 2008. *Human Rights Transformed*. New York: Oxford Univ. Press
- Galanter M. 1984. *Competing Equalities: Law and the Backward Classes in India*. New York: Oxford Univ. Press
- Galbraith PW. 2008. *Unintended Consequences: How War in Iraq Strengthened America's Enemies*. New York: Simon & Schuster
- Gardbaum S. 2001. The new commonwealth model of constitutionalism. *Am. J. Comp. Law* 49:707–60
- Gardbaum S. 2003. The “horizontal effect” of constitutional rights. *Mich. Law Rev.* 102(3):387–459
- Garlicki L. 2007. Constitutional courts versus supreme courts. *Int. J. Const. Law*. 5(1):44–68
- Ginsburg T. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge, UK: Cambridge Univ. Press
- Ginsburg T. 2006. Locking in democracy: constitutions, commitment, and international law. *N.Y. Univ. J. Int. Law Polit.* 38(4):707–59
- Ginsburg T, Moustafa T. 2008. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge, UK: Cambridge Univ. Press
- Goodman R, Jinks D. 2010. *Socializing States: Promoting Human Rights through International Law*. New York: Oxford Univ. Press. In press
- Government of Canada. 1968. *Federalism for the Future*. Ottawa: The Queen's Printer
- Habermas J. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Transl. R Rehg. Cambridge, MA: MIT Press
- Helmke G. 2005. *Courts Under Constraint: Judges, Generals, and Presidents in Argentina*. Cambridge, UK: Cambridge Univ. Press
- Hiebert JL. 2005. Interpreting a bill of rights: the importance of legislative rights review. *Br. J. Polit. Sci.* 35(2):235–55
- Hiebert JL. 2006a. Parliamentary bill of rights: an alternative model? *Mod. Law Rev.* 69(1):7–28

- Hiebert JL. 2006b. Parliament and the Human Rights Act: can the JCHR help facilitate a culture of rights? *Int. J. Const. Law* 4(1):1–38
- Hilbank L. 2007. *Judges Beyond Politics in Democracy and Dictatorship*. Cambridge, UK: Cambridge Univ. Press
- Hirschl R. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard Univ. Press
- Hirschl R. 2006. On the blurred methodological matrix of comparative constitutional law. In *The Migration of Constitutional Ideas*, ed. S Choudhry, pp. 39–67. Cambridge, UK: Cambridge Univ. Press
- Hirschl R. 2008. The judicialization of mega-politics and the rise of political courts. *Annu. Rev. Polit. Sci.* 11:93–118
- Horowitz DL. 1985. *Ethnic Groups in Conflict*. Berkeley: Univ. Calif. Press
- Huntington S. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: Univ. Oklahoma Press
- Ignatieff M. 2000. *The Rights Revolution*. Toronto: House of Anansi Press
- International Crisis Group. 2009. Sri Lanka's judiciary: politicised courts, compromised rights. *Asia Report No. 172*, Brussels
- Iraq Constitutional Review Commission. 2009. *Proposed Amendments to Constitution of Iraq*
- Jackson VC. 2005. Constitutional comparisons: convergence, resistance, engagement. *Harvard Law Rev.* 119(1):109–28
- Kalyvas S. 2007. Civil wars. In *The Oxford Handbook of Comparative Politics*, ed. C Boix, SC Stokes, pp. 416–34. Oxford: Oxford Univ. Press
- Kavanagh A. 2004. The role of a bill of rights in reconstructing Northern Ireland. *Hum. Rights Q.* 26(4):956–82
- Keating M. 2001. *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*. New York: Oxford Univ. Press
- Kymlicka W. 1995. *Multicultural Citizenship: A Liberal Theory of Minority Right*. New York: Oxford Univ. Press
- Levinson DJ. 2002. Framing transactions in constitutional law. *Yale Law J.* 111(6):1311–90
- Lijphart A. 1977. *Democracy in Plural Societies: A Comparative Exploration*. New Haven: Yale Univ. Press
- Markell P. 2000. Making affect safe for democracy?: On “constitutional patriotism.” *Polit. Theory* 28(1):38–63
- McCrudden C. 2001. Not the way forward: some comments on the Northern Ireland Human Rights Commission's consultation document on a bill of rights for Northern Ireland. *North. Irel. Legal Q.* 52(4):372–84
- Moravcsik A. 2000. The origins of human rights regimes: democratic delegation in postwar Europe. *Int. Organ.* 54(2):217–52
- Moustafa T. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge, UK: Cambridge Univ. Press
- Müller JW. 2007. *Constitutional Patriotism*. Princeton, NJ: Princeton Univ. Press
- O'Leary B. 2009. *How to Get Out of Iraq with Integrity*. Philadelphia: Univ. Pa. Press
- O'Leary B, McGarry J, Salih K, eds. 2005. *The Future of Kurdistan in Iraq*. Philadelphia: Univ. Pa. Press
- Paris B. 2004. *At War's End*. Cambridge, UK: Cambridge Univ. Press
- Roach K. 2001. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law
- Roeder P, Rothchild D, eds. 2005. *Sustainable Peace: Power and Democracy after Civil Wars*. Ithaca, NY: Cornell Univ. Press
- Sager LG. 1978. Fair measure: the legal status of underenforced constitutional norms. *Harvard Law Rev.* 91:1212–64
- Scalia A. 1998. *A Matter of Interpretation: Federal Courts and the Law*. Princeton, NJ: Princeton Univ. Press
- Spitz R, Chaskalson M. 2000. *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement*. Oxford, UK: Hart
- Sunstein CR. 1999. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge, MA: Harvard Univ. Press
- Sunstein CR. 2001. *Designing Democracy: What Constitutions Do*. New York: Oxford Univ. Press
- Toft MD. 2010. *Securing the Peace: The Durable Settlement of Civil Wars*. Princeton, NJ: Princeton Univ. Press
- Tushnet M. 2003. The issue of state action/horizontal effect in comparative constitutional law. *Int. J. Const. Law* 1(1):79–98
- Tushnet M. 2008. *Weak Courts, Strong Rights*. Princeton, NJ: Princeton Univ. Press

- Waldron J. 1999. *Law and Disagreement*. New York: Oxford Univ. Press
- Waldron J. 2006. The core of the case against judicial review. *Yale Law J.* 115(6):1346–406
- Walter BF. 2002. *Committing to Peace: The Successful Settlement of Civil Wars*. Princeton, NJ: Princeton Univ. Press
- Walter BF. 2009. Bargaining failures and civil war. *Annu. Rev. Polit. Sci.* 12:243–61
- Yack B. 1996. The myth of the civic nation. *Crit. Rev.* 10(2):193–211