



## Comparative Bills of Rights

POLI432

Department of Political Science, McGill University

Winter 2020

Mon and Wed. 4:05-5:25pm

BIRKS 203

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This syllabus is subject to changes at the instructor's discretion.

### *Course overview*

This course will offer a comparative analysis of bills of rights in common law jurisdictions, with a special focus on the Canadian, U.K., New Zealand, and U.S. models of rights protection. We will also review both historical and contemporary evaluative debates about bills of rights.

### *Course objectives*

This course seeks to introduce students to evaluative and empirical debates about bills of rights, and to understand their origins in Anglo-American constitutional history. The primary aim of this course is for students to develop their understanding of bills of rights in different constitutional contexts, but also to learn to think comparatively about what differences exist between them and why they matter. Students with a background in Canadian constitutional law will learn to think critically about the Canadian model of rights protection as it relates to other contexts.

### *Course materials*

TBD

### *Evaluation (Provisional Outline of Criteria)*

The course is evaluated by the following two components:

- ✓ Participation (15%). Seminar participation will be evaluated qualitatively, including by reference to the seriousness of preparation for discussion, participation in discussion, and the quality of the interventions.
- ✓ Mid-Term Paper: (35%) The mid-term paper should be between 3,000 and 4,000 words, inclusive of footnotes. Details TBD
- ✓ Term paper (50%). The term paper should be between 6,000 and 8,000 words, inclusive of footnotes. Economy of expression is encouraged. Details TBD.

*Office hours:* Tuesdays from 1:00-3:00pm in Ferrier 498

Policy Statements on Academic Integrity and Language McGill University values academic integrity. Therefore, all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures (see [www.mcgill.ca/integrity](http://www.mcgill.ca/integrity) for more information). In accord with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. L'université McGill attache une haute importance à l'honnêteté académique. Il incombe par conséquent à tous les étudiants de comprendre ce que l'on entend par tricherie, plagiat et autres infractions académiques, ainsi que les conséquences que peuvent avoir de tels actions, selon le Code de conduite de l'étudiant et des procédures disciplinaires (pour de plus amples renseignements, veuillez consulter le site <http://www.mcgill.ca/integrity>). Conformément à la Charte des droits de l'étudiant de l'Université McGill, chaque étudiant a le droit de soumettre en français ou en anglais tout travail écrit devant être noté (sauf dans le cas des cours dont l'un des objets est la maîtrise d'une langue)

## Outline of the Readings

### Part I: Introduction

#### A. *The English Origins of Bills of Rights* (Jan 6-8<sup>th</sup>)

*Prohibitions del Roy* (1607) 77 Eng. Rep. 1352 (K.B.) 1352; 12 Co. Rep. 74

The English Bill of Rights 1689 in *English Historical Documents: Volume VIII 1660-1714* 122-128

William Blackstone (selection on freedom of the press) *Commentaries on the Laws of England* (1756) 151-153

#### B. *The U.S. Bills of Rights* (Jan 13<sup>th</sup>)

1780 Massachusetts Constitution: Part the First. A Declaration of the Rights of the Inhabitants of Massachusetts (read it twice).

1776 Constitution of Pennsylvania: Declaration of Rights (read it twice)

The Constitution of the United States (read it twice, with special attention to amendments 1-10 and 13-15).

Alexander Hamilton "No.78" and "No.84" in *The Federalist Papers* G. Carey and J. McClellan eds. (Liberty Fund, 2001) pp.401-408 and 442-451

Brutus 2, 11 and 15 in *The Anti-Federalist* H. Storing ed. (University of Chicago Press, 1985) 117-122, 162-167, 182-187

#### C. *Democratic Theory, Bills of Rights, and Judicial Review* (Jan 15-20<sup>th</sup>)

Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale Law Journal* 1346

Samuel Freeman “Constitutional Democracy and the Legitimacy of Judicial Review”  
*Law and Philosophy* 9:4 (1990) pp. 327-370

D. *Commonwealth Bills of Rights* (Jan 22<sup>th</sup>)

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* Cambridge:  
(Cambridge UP, 2013) Chapter 2 “What is the new Commonwealth model and what is  
new about it?” pp. 21-46

Recommended:

Robert Lecky *Bills of Rights in the Common Law* (Cambridge UP, 2015) Chapter 1  
“Against bill of rights exceptionalism” and Chapter 2 “The common law, judging, and  
three bills of rights” pp.7-51

## **Part II: The Canadian Charter of Rights and Freedoms**

A. *Structure and History* (Jan 27<sup>th</sup>)

[Canadian Charter of Rights and Freedoms](#)

[Re B.C. Motor Vehicle Act \[1985\] 2 SCR 486](#)

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* Cambridge:  
(Cambridge UP, 2013) Chapter 5 “Canada” pp. 97-128

B. *Section 1 “Limitations Clause”* (Jan 29 and Feb 3<sup>rd</sup>)

[R v Oakes](#) [1986] 1 SCR 103

Grégoire Webber ‘Rights and Persons’ in Grégoire Webber, Paul Yowell, Richard Ekins,  
Maris Köpcke, Bradley Miller, and Francisco Urbina, *Legislated Rights* (Cambridge UP,  
2018)

Kai Möller, ‘Proportionality and Rights Inflation’ in Grant Huscroft, Bradley Miller, and  
Grégoire Webber (eds) *Proportionality and the Rule of Law* (Cambridge UP, 2014)

Recommended Reading:

Janet Hiebert *Limiting Rights* (McGill-Queens UP, 1996) Chapter 4 “The Supreme Court  
on Section 1” pp. 52-88

A. *Fundamental Freedoms I* (religion and expression) (Feb 5<sup>th</sup>)

[Canada \(Attorney General\) v. JTI-Macdonald Corp.](#)

[R. v. Big M Drug Mart Ltd. \[1985\] 1 SCR 295](#)

B. *Equality and Voting Rights* (Feb 10<sup>th</sup>)

[Andrews v. Law Society of British Columbia \[1989\] 1 SCR 143](#)

[Sauvé v. Canada \(Chief Electoral Officer\) \[2002\] 3 SCR 519](#)

John Finnis “Prisoners’ Voting and Judges’ Power” in G. Sigalet, G. Webber, R. Dixon (eds) *Constitutional Dialogue: Rights, Democracy, Institutions*

C. *Life, Liberty and Security of Person* (Feb 12<sup>th</sup>)

[Carter v. Canada \[2015\] 1 SCR 331](#)

Paul Yowell *Constitutional Rights and Constitutional Design* (Hart 2018) (selections 80-88)

D. *Section 33 “Notwithstanding Clause”* (Feb 17<sup>th</sup>)

[Ford v. Quebec \(Attorney General\) \[1988\] 2 SCR 712](#)

Dwight Newman “Canada’s Notwithstanding Clause, Constitutional Identities” in *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge UP, 2019) pp. 209-234

D. *Dialogue Theory and the Charter* (Feb 19<sup>th</sup>)

Dennis Baker “Judicial Supremacy, Dialogue Theory, and Coordinate Interpretation” in *Not Quite Supreme* (McGill-Queen’s UP, 2010) pp. 17-38

Kent Roach “Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism” in *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge UP, 2019) pp.267-307

### **Part III: The U.K. *Human Rights Act 1998***

A. *Structure and History* (Feb 24)

[Human Rights Act, 1998](#)

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* Cambridge: (Cambridge UP, 2013) Chapter 7 “The United Kingdom” pp. 157-179

Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) Chapter 10 “Challenging Parliamentary Sovereignty” pp.267-318

Recommended:

T.R.S. Allan, ‘Constitutional dialogue and the justification of judicial review’ (2003) 23 *Oxford Journal of Legal Studies* 563

B. Section 3 (Feb 26th)

[Ghaidan v Godin-Mendoza \[2004\] 2 AC 557](#)

James Allan, ‘Portia, Bassano or Dick the Butcher? Constraining judges in the Twenty-First Century’ (2006) 17 *King’s College Law Journal* 1

C. Section 4 and Parliament’s Joint Committee on Human Rights (March 9th)

Janet Hiebert and James Kelly *Parliamentary Bills of Rights* (Cambridge UP, 2016) Chapter 7 “Pre-Legislative Compatibility Assessments Under the HRA” pp.262-303

Recommended:

Scott Stephenson *From Dialogue to Disagreement* (The Federation Press, 2016) Chapter 8 “The United Kingdom” pp.144-147

D. Evaluating the HRA (March 11<sup>th</sup>)

R. Ekins “Human Rights and the Separation of Powers” *University of Queensland Law Journal* 42:2 (2015) pp.217-238

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* Cambridge: (Cambridge UP, 2013) Chapter 7 “The United Kingdom” pp.179-203

#### **Part IV: The New Zealand Bill of Rights Act 1990**

A. Structure and History (March 16<sup>th</sup>)

[New Zealand Bill of Rights Act 1990](#)

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* Cambridge: (Cambridge UP, 2013) Chapter 6 “New Zealand” pp.129-144

B. Sections 4 and 6 (March 18-23<sup>rd</sup>)

[Hansen v. R. \[2007\] NZSC 7](#)

Claudia Geiringer, 'On a road to nowhere: implied declarations of inconsistency and the New Zealand Bill of Rights Act' (2009) 40 *Virginia University of Wellington Law Review* 613

James Allan, 'Speaking with the tongues of angels: the Bill of Rights, Simpson and the Court of Appeal' (1994) *Bill of Rights Bulletin* 2 (issue no. 1, September)

C. *Political Rights Review and the Attorney General* (March 25<sup>th</sup>)

Scott Stephenson *From Dialogue to Disagreement* (The Federation Press, 2016) Chapter 10 "New Zealand" pp.180-195

Janet Hiebert and James Kelly *Parliamentary Bills of Rights* (Cambridge UP, 2016) Chapter 5 "The Attorney General, Select Committees, and Penal Populism" pp.174-232

D. *Dialogue and Evaluating the NZBORA* (March 30<sup>th</sup>)

[Taylor v. A.G. \[2017\] NZCA 215](#) (see paras.147-162)

Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* Cambridge: (Cambridge UP, 2013) Chapter 6 "New Zealand" pp.144-155

## **Part V: The U.S. Bill of Rights**

A. *American Proportionality?* (April 1<sup>st</sup> and TBD)

Jamal Greene *The Supreme Court, 2017 Term –Forward: Rights as Trumps?*,132 *Harvard Law Review* 28 (2018)

Paul Yowell *Constitutional Rights and Constitutional Design* (Hart, 2018) (selections 73-79)

B. *Comparing the U.S. to the Commonwealth* (TBD)

Jeremy Waldron, 'Some models of dialogue between judges and legislators' (2004) 23 *The Supreme Court Law Review* 7

Barry Friedman 'Dialogue and Judicial Review' (1993) 91 *Michigan Law Review* 557

Recommended:

James Allan *Democracy in Decline* (McGill-Queen's UP, 2014) "The United States" pp.9-19 and "Concluding Remarks" pp.160-166

J. M. Pickerill *Constitutional Deliberation in Congress: The Impact of Judicial review in a Separated System* (Duke UP, 2004)