

INCOMPATIBILISTS, CRITICS, AND LIVING TREES:  
THE COMPATIBILITY OF INTERNATIONAL LAW AND CONSTITUTIONAL  
DEMOCRACY

By SARAH G. KANKO, B.Arts Sc. (Honours)

A Thesis Submitted to the School of Graduate Studies in Partial Fulfilment of the  
Requirements for the Degree Master of Arts

McMaster University © Copyright by Sarah G. Kanko, July 2017

McMaster University MASTER OF ARTS (2017) Hamilton, Ontario (Philosophy)

TITLE: *Incompatibilists, Critics, and Living Trees*: the compatibility of international law and constitutional democracy

AUTHOR: Sarah G. Kanko, B.Arts Sc. (McMaster University)

SUPERVISOR: Professor W. J. Waluchow

NUMBER OF PAGES: v, 163

## ABSTRACT

In this thesis, I address two issues. First, I reject the supposed conflict between international law and constitutional democracy. And second, I explore the role of international law in domestic constitutional law, particularly in Canada. In order to address both of these issues, I draw an analogy between the “Incompatibilist” critiques of international law and constitutional democracy, and the arguments against judicial review made by “the Critics” that Waluchow responds to in his book, *A Common Law Theory of Judicial Review: the Living Tree*. I argue that both the Incompatibilists and the Critics describe in-principle problems, structural problems, and decision-making problems in their respective critiques. The Incompatibilists are describing these problems in the context of the interaction between international law and constitutional democracies, while the Critics are focusing on constitutional judicial review, but I argue that the theory Waluchow presents as an answer to the Critics can also be directly applied to the Incompatibilists. Waluchow’s theory of common law judicial review and the community’s constitutional morality gives support and democratic legitimacy to judicial review in a domestic constitutional context. By applying his reasoning to cases involving international norms, I address problems in domestic courts’ application of international law and the democratic challenges they face.

## ACKNOWLEDGEMENTS

I would like to thank my supervisor, Dr Wil Waluchow, for his patience and untiring support. He continued to believe in my abilities despite delays and shenanigans, and was a constant source of academic and personal inspiration. I would also like to thank Dr. Violetta Ignieski, in whose seminar the idea for this thesis was born. She provided helpful comments about my thesis and helpful stories and pictures of her puppy.

I am eternally grateful to my parents, who put up with years of uncertainty and never wavered in their support. Thank you, also, for the steady supply of coffee from Chez Kanko.

The people in the philosophy department at McMaster have been the saving grace of my life in these past few years. Thank you to Kim and Rabia, who both work tirelessly to make our lives run smoothly and to fix any problems we present to them. Thank you to Regina, Christina, and Paul for some crazy library evenings, and to Kat and Kara for the adventures and fun beyond the school walls. A special thanks to Matt for the use of his copy of Hart's *Concept of Law* in the final hour.

## TABLE OF CONTENTS

Acknowledgements	iv
<b>INTRODUCTION</b>	<b>1</b>
<b>CHAPTER 1</b>	
<b>The Problem of International Law in Constitutional Democracies</b>	<b>6</b>
1.1 A Survey: Constitutional Democracy and the Rule of International Law	6
1.2 An Argument Worth Making	18
1.3 International Law in Domestic Systems	19
1.4 Kinds of International Law	20
1.5 The Canadian Experience of International Law	28
1.6 Problems in the Courts	37
1.7 Returning to the Incompatibilists	40
<b>CHAPTER 2</b>	
<b>Building the Analogy</b>	<b>44</b>
2.1 The Critics' Case	45
2.2 A Critical Analogy	53
2.3 The Common Law Theory	62
2.4 A Community's Constitutional Morality	63
2.5 Common Law Method of Judicial Review	65
2.6 CCM and the Common Law Method	69
2.7 Responding to the Critics	72
<b>CHAPTER 3</b>	
<b>An Argument by Analogy: Answering the Incompatibilists</b>	<b>79</b>
3.1 Applying the Analogy	80
3.2 Context: Different Kinds of International Law	80
3.3 Applying the Common Law Theory	82
3.4 Problems of Implementation and Custom	94
3.5 Returning to the Incompatibilists	99
3.6 Answering the Incompatibilists	101
<b>CHAPTER 4</b>	
<b>The Defensive Round: Responding to Potential Critics</b>	<b>122</b>
4.1 The Guiding Power of a CCM	123
4.2 The Moral Status of the CCM	128
4.3 Problems with the Common Law	139
4.4 Problems for Democracy	146
<b>CONCLUSION</b>	<b>156</b>
<b>BIBLIOGRAPHY</b>	<b>161</b>

## INTRODUCTION

Only a few decades ago, the scope of international law only included the basic governance of interactions between states. There were rules about issues like territory disputes, trade, and war, but the sovereign authority of states over domestic matters was not challenged at an international level. With the dramatic increase in the scope of international law since the world wars, the role of the state within and beyond its own borders has changed. The United Nations seems to provide an international system of governance that invites states to participate as independent sovereignties and yet also claims authority over them. Whether the international legal system can actually be classified as a “legal system” is a debated issue. The influence of international law over domestic issues is also hotly contested. A number of arguments have been made against the role of international law over the domestic sovereignty of constitutional democracies. It is these kinds of arguments that motivate my research and serve as the foundation of this thesis.

The aim of this project is to address two issues. The first issue is the supposed conflict between international law and constitutional democracy. I will explore the arguments that claim there is somehow an incompatibility between international law and constitutional democracies and defend a position against them. In a survey article by Allen Buchanan and Russell Powell, five general but distinct “incompatibilist arguments” are presented against international law. These arguments range from worries about in principle incompatibilities between international law and constitutional democracies to the democratic deficits of international institutions, the risk that international law poses to constitutional

structures, and the improper creation and application of law by judges. Buchanan and Powell raise two different possible ways of addressing these arguments that act as a starting point for a defence against the Incompatibilists but are incomplete. My aim is to build upon their initial arguments to dispute the incompatibilist claims.

The second issue that my project will address is the role of international law in domestic constitutional law (particularly in Canada). I want to expand Wil Waluchow's idea of a community's constitutional morality to international commitments so as to understand the role of international law in domestic judicial decisions. Lower courts might have to grapple with international norms, but the most relevant kinds of cases to the Incompatibilists' arguments are about the higher courts, especially supreme courts, that have to adjudicate constitutional questions. Cases in which the constitutionality of a domestic application of international law is questioned or cases in which domestic law seems to conflict with international commitments are some of the most relevant cases to the Incompatibilists' worries. These kinds of cases, as I will argue, can be addressed by Waluchow's theory despite the fact that he does not explicitly speak to international law. Waluchow's theory plays an important role in my argument as the framework within which I will argue my case. The Incompatibilist arguments, and the early attempts to address them, are strikingly similar to the kinds of arguments against judicial review that Waluchow addresses in his book, *A Common Law Theory of Judicial Review*. The Critics' Case, as Waluchow describes it, expresses concerns about issues like the in principle conflict between judicial constitutional review and democratic values, the denial of self-

government, and the unprincipled creation of laws by unelected judges.<sup>1</sup> By illustrating the similarities between the arguments about constitutional democracy, international law, and judicial review, I will use Waluchow's argumentation structure and solution to his critics to make a case for the use of international law in constitutional democracies. To answer the question as to whether or not international law is compatible with constitutional democracies, I will be looking at the role of international law in the development of a community's constitutional morality through my research into particular practices to support an argument by analogy.

The first chapter will focus on introducing the problem that might exist in the interactions between international law and constitutional democracies. I will introduce the problem and explain the current state of international law. In the first part of the chapter, I will give an account of the Incompatibilist problem that highlights conflicts between international law and constitutional democracies. I will then explain the initial responses that Buchanan and Powell give against the Incompatibilists. The second part of the chapter will look to the current state of international law. I will begin by examining the different sources of international norms, and then look at international law as it is applied in Canada. The ways in which international law interacts with domestic governments varies between states, so for the purposes of this paper I will be limiting my analysis to the Canadian context.

The second chapter will set up the structure of the argument that I will make in the third chapter. I aim to show that Waluchow's theory of common law

---

<sup>1</sup> W. J. Waluchow, *A Common Law Theory of Judicial Review: the Living Tree* (New York: Cambridge University Press, 2009) 123-179 (chapter 4, "The Critics' Case").



constitutional review can provide a way of responding to the Incompatibilists' critiques. I will begin the chapter with an account of the "Critics Case" against domestic judicial review as Waluchow presents it. I will then lay out the analogy on which my argument relies. The argument by analogy is based on a comparison between the Incomaptibilists' critiques and the Critics' case. I have described the analogy by grouping the critiques into categories based on arguments about principles, about political structures, and about decision-making methods. Once I describe the analogy between the two critical cases, I will give Waluchow's response to the Critics' case. After arguing for two sides of the analogy between the critical cases and one corresponding solution, this chapter will have prepared the structure of my argument by analogy. All that is needed to finish the argument is to explore the second corresponding solution.

The third chapter provides the corresponding solution. In this chapter, I will take the analogy made in the second chapter and use it to apply Waluchow's solution (to the Critics') to the Incompatibilists' arguments. I will begin by arguing that it is possible to apply Waluchow's theory of common law review and the idea of the community's constitutional morality (CCM) to the context of the Incompatibilist arguments. Not only can Waluchow's theory be applied to international law in a domestic context, but it is also appropriate to do so. Having established that we can apply the theory, I will use the analogy to actually apply Waluchow's theory. The details of the application of the theory to the domestic relationship with international law will be explored through the way in which it actually responds to the arguments about principles, structures, and methods. The theory can be applied directly to international law in the domestic context, despite seemingly important differences between international and domestic law.

Moreover, I will use Waluchow's argument and my analogy to argue that judges ought to be using the common law method and the CCM in cases related to international law. The current state of international norm application is not consistent, and the courts would benefit from following Waluchow's method.

The fourth chapter is a pre-emptive attempt to respond to potential criticism of the arguments being made here. Many of Waluchow's critics have expressed concerns with Waluchow's theory that, if the concern proves to be warranted, would cause trouble for my arguments. So in this final chapter, my aim is to address the arguments made against Waluchow by his various critics. Many of these arguments are general enough that they encompass the international context despite the fact that neither Waluchow nor his critics were particularly focused on it. I have taken a number of critiques that are representative of four general categories of critiques against Waluchow's theory. First, I will address worries about the guiding power of the CCM. Second, I will address questions about the moral status of the CCM. Third, I will consider problems with the common law and how these problems affect Waluchow's theory. And fourth, I will respond to continuing worries about democracy and the undemocratic nature of judicial review. Through my responses to these four kinds of criticisms, I hope to clarify Waluchow's position and, in doing so, provide further support for the argument by analogy. The stronger Waluchow's theory is, the stronger the argument against the Incompatibilists will be.

## CHAPTER 1

### **The Problem of International Law in Constitutional Democracies**

Before addressing the ways in which constitutional democracies interact with, or ought to interact with, international law, the question of whether or not they *can* legitimately interact with international law must be addressed. It seems odd to argue that it is a conceptual impossibility for sovereign democratic states to be involved with international law when there is historical evidence of states doing so. But there are incompatibilist arguments that claim such interactions are problematic. When international law amounted to the regulation of interactions between states at war or trading with each other, each state could be considered a sovereign actor whose decisions might still represent the will of the people in a constitutional democracy. But with the emergence of what Buchanan and Powell call “Robust International Law,” (RIL) the possibility of states maintaining such sovereignty in the face of international commitments is being questioned. My aim in this chapter is to address these kinds of conflicts between international law and constitutional democracies. I will present each of the main incompatibilist worries and the initial solutions. The solutions that Buchanan and Powell begin to sketch are a combination of cosmopolitan and self-regarding arguments that establish a foundation for defending a democratic connection to international law, but that leave a number of issues unaddressed.

#### *1.1 A Survey Constitutional Democracy and the Rule of International Law*

The article by Allen Buchanan and Russell Powell entitled “Survey Article: Constitutional Democracy and the Rule of International Law: Are They

Compatible?” addresses questions about the claims of authority that “Robust International Law (RIL)” makes over issues once viewed solely as concerns of the state.<sup>1</sup> The kinds of international law that are considered robust are international norms that make claims of authority over states about matters that were (and are) considered the exclusive concerns of the state.<sup>2</sup> Human rights law, international criminal law, environmental law, and trade law are areas of international law that now make claims of authority in domestic contexts. This relationship between international law and domestic law is contentious. It might seem like international laws, particularly human rights laws, would enhance the domestic regimes of liberal constitutional democracies. But there are also a “substantial” body of thought that alleges an incompatibility between RIL and constitutional democracies.<sup>3</sup> Buchanan and Powell introduce five “Incompatibilist” worries about the relationship between international law and constitutional democracy. I will explain each argument in greater depth, but the five Incompatibilist arguments, in brief, are:

- 1) **Exclusive Accountability argument:** the in-principle incompatibility that exists whereby a state is not democratic if its citizens are subject to any political authority that is not exclusively accountable to them;
- 2) **Constitutional Derangement argument:** the worry that RIL undermines constitutional democracy by (i) shifting power from the legislative to the executive and judicial branches, thereby damaging the system of checks and balances, and (ii) by encroaching on the prerogatives of federal units to regulate matters that were in their jurisdiction;

---

<sup>1</sup> Allen Buchanan and Russell Powell, “Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?” *the Journal of Political Philosophy* 16 no.3 (2008): 326.

<sup>2</sup> Ibid., 326.

<sup>3</sup> Ibid., 326.

- 3) **Loss of Self-Determination (the democratic deficit):** the worry about the democratic deficit of global governance institutions;
- 4) **Unprincipled Judicial Borrowing argument:** The tendency of judges in domestic courts to draw on underdeveloped or incoherent international law with potentially conflicting values while interpreting domestic law;
- 5) **Loss of Self-Determination (diminished self-governance):** the transfer of power from constitutional democracies to global governance institutions without appropriate democratic authorization.<sup>4</sup>

After describing each of these worries, Buchanan and Powell argue that there are “cosmopolitan” and “self-regarding” reasons for citizens of constitutional democracies to recognize international law. Self-regarding reasons include the idea that RIL allows for better protection of the rights of citizens, helps to constrain special interests that domestic institutions cannot do sufficiently, and enhances democratic deliberation through access to the best epistemic, moral, and legal practices.<sup>5</sup> The self-regarding reasons are based on claims that the Incompatibilists already accept about the justification of domestic constitutional democracies. Cosmopolitan commitments, on the other hand, are about concerns for the rights and interests of people beyond state borders. The premise on which these kinds of arguments are based is the idea that the same concern for human rights that motivates a commitment to domestic constitutional democracies also ought to motivate support for RIL to ensure the human rights of individuals around the world.<sup>6</sup> Buchanan and Powell argue that, while the self-regarding arguments meet the incompatibilist concerns on their own terms, the

---

<sup>4</sup> Buchanan and Powell, “Constitutional Democracy and the Rule of International Law: Are They Compatible?” 327.

<sup>5</sup> Ibid., 330-331.

<sup>6</sup> Ibid., 328.

cosmopolitan argument is also important. Arguments that appear to be self-regarding are based in cosmopolitan values, and to restrict the debate to self-regarding reasons is to accept a problematic assumption that, if there is in fact a conflict between constitutional democracy and RIL, then constitutional democracy ought to prevail over international law.<sup>7</sup> The principles involved in the cosmopolitan argument are about protecting the human rights and moral equality of all people. RIL is aimed at correcting for the inherent bias of democracy that results in political leaders being accountable only to citizens, ignoring the interests and rights of foreigners. It also promotes the rule of law through considerations similar to domestic rule of law arguments like the fact that it prevents the rule by sheer power, protects the vulnerable, and guarantees equal treatment.<sup>8</sup> These arguments are designed to show that there are reasons to acknowledge the authority of RIL that advocates of constitutional democracy can appreciate, but they do not directly answer the Incompatibilists' arguments. It is an important line of argumentation for the support of international law as a whole, but it is not one that I will pursue in my argument here. Buchanan and Powell recognize the importance of responding to the Incompatibilists on shared terms, and so attempt to rebut the five worries with the self-regarding reasoning that speak to the Incompatibilists' arguments directly.

One of the prominent proponents of the exclusive accountability argument (number 1, above), Jeremy Rabkin, argues that the supposedly desirable features of "global governance" were to be found in the assumption that

---

<sup>7</sup> Buchanan and Powell, "Constitutional Democracy and the Rule of International Law: Are They Compatible?" 332.

<sup>8</sup> Ibid., 332-334.

there could be global coordination of states without compulsion so that there might be international governance without requiring nations to surrender sovereignty.<sup>9</sup> Rabkin rejects the claim made by a growing number of scholars that sees sovereignty claims as “an untenable anachronism in a globalizing world.”<sup>10</sup> He argues that there is nothing in the concept of sovereignty that prohibits international cooperation, but that an important part of international practice is the recognition of a key feature of sovereignty that “the government in actual control of the territory is the government held accountable by foreign states and generally the government recognized by foreign states.”<sup>11</sup> Within this recognition of the government is the idea of constituted authority; the system need not be perfectly democratic, but it must establish a constitutional structure that has a reliable mechanism of securing citizen acquiescence to coercion.<sup>12</sup> Rabkin, citing John Locke’s account of legislative authority, claims that it is the “consent of the society over whom no body can have a power to make laws but by their own consent...” and that when global governance is not based on this kind of exclusive accountability, it undermines and constraints the authority of the legislature to determine a state’s own law.<sup>13</sup> If the legislature is not directly accountable to the citizens, from whom the coercive power to make law derives, then it does not have the authority that arises from the acquiescence to sovereign authority. In response to Rabkin’s arguments, Buchanan and Powell argue that the Incompatibilists who support this position are begging the question. It is true

---

<sup>9</sup> Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton, NJ: Princeton University Press, 2005): 19-20.

<sup>10</sup> Ibid., 32.

<sup>11</sup> Ibid., 35-39.

<sup>12</sup> Ibid., 40.

<sup>13</sup> Ibid., 41.

that robust international law can involve national governments' delegation of power to entities that are not exclusively accountable to citizens, but to argue that this lack of exclusive accountability poses a problem assumes that a constitutional government must be accountable to its citizens alone.<sup>14</sup>

The constitutional derangement argument (number 2, above) expresses two kinds of damage that robust international law can do to constitutional structures. The argument claims that RIL can undermine the constitutional allocation of power among branches of government, and can undermine federalism by robbing federal units of some of their proper authority.<sup>15</sup> Curtis A. Bradley and Jack L. Goldsmith are strong supporters of the constitutional derangement argument. They argue against the "Modern Position" that holds customary international law to be part of the federal common law.<sup>16</sup> But while the U.S. Constitution states that treaties are part of the "Supreme Law of the Land," there is no mention of customary international law.<sup>17</sup> If international law is part of the federal common law, then it is superior law to state law; a practice of a US state that may appear to be consistent with the state and federal constitutions could be rendered illegal if it conflicts with international customary law.<sup>18</sup> Furthermore, there are debates about whether the president can act in violation of the customary law and judicial decisions about it, and about how conflicting

---

<sup>14</sup> Buchanan and Powell, "Constitutional Democracy and the Rule of International Law: Are They Compatible?" 336-337.

<sup>15</sup> Ibid., 341.

<sup>16</sup> Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," *Harvard Law Review* 110 no.4 (1997): 822.

<sup>17</sup> Curtis A. Bradley and Jack L. Goldsmith, "Current Illegitimacy of International Human Rights Litigation," *Fordham Law Review* 66 no.2 (1997): 321.

<sup>18</sup> Bradley and Goldsmith, "Customary International Law as Federal Common Law," 846.



legislation passed by congress is treated.<sup>19</sup> Bradley and Goldsmith argue that the Modern Position should not be adopted since there is no canonical account of customary law as federal common law and since it has negative implications for the political structure of the country. Without the Modern Position, customary law would not be binding on federal political branches or on the states.<sup>20</sup> In particular, they worry that the Modern Position's claim of treating customary law as common law is a way of allowing federal courts "to accomplish through the back door of [customary international law] what the political branches have prohibited through the front door..."<sup>21</sup> The courts are usurping the power of domestic law-making that belonged to the state and federal governments.

Buchanan and Powell note that, while it is true that the United States Constitution gives supremacy to international treaty law above federal and state law, enabling the relocation of power away from federal or state units, and that it is possible that RIL might damage federal units or change the balance of power, this does not mean the proper conclusion is that RIL is incompatible with constitutional democracy. Instead, all that can be concluded is that "the acceptance of RIL is incompatible with the optimal functioning of *the particular form of constitutional democracy that includes those constitutional structures,*" that might be altered by RIL.<sup>22</sup> It could be that the price of the impact on the constitutional structure might be worth the successful application of international law. Buchanan and Powell do not go beyond this possibility, but I

---

<sup>19</sup> Bradley and Goldsmith, "Customary International Law as Federal Common Law," 842-844.

<sup>20</sup> Ibid., 870.

<sup>21</sup> Bradley and Goldsmith, "Current Illegitimacy of International Human Rights Litigation," 330-331.

<sup>22</sup> Buchanan and Powell, "Constitutional Democracy and the Rule of International Law: Are They Compatible?" 343.

think this worry is one of the major concerns of the proponents of incompatibilist arguments. I will return to this argument when I address the domestic application of international law. It is also an issue that will be addressed in the fourth chapter.

The unprincipled judicial borrowing argument (number 4, above) voices the concern that domestic judges will abuse their offices by choosing the international law that best suits their own purposes if international law is allowed as a resource in domestic legal interpretation. This worry includes the possibility that judges will undermine the rule of law by deciding in accordance with their own preferences, rather than according to principle; the possibility that the cultural values undergirding the system of domestic law may be at odds with those of RIL; and the possibility that judges will use RIL in a way that encroaches on legislative branches.<sup>23</sup> This worry about encroaching on other branches of government is tied to the previous arguments about constitutional derangement. But the ethos of the first two worries about unprincipled judicial borrowing are captured by Justice Antonin Scalia when he argued that judges ought to be using

the standards of decency of American society—not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views.<sup>24</sup>

The idea is that, if judges are allowed to choose international norms to apply in domestic courts that have not been produced domestically, then their decisions

---

<sup>23</sup> Buchanan and Powell, "Constitutional Democracy and the Rule of International Law: Are They Compatible?" 338.

<sup>24</sup> Antonin Scalia, J., "Transcript of discussion between US Supreme Court Justices Antonin Scalia and Stephen Breyer on "The constitutional relevance of foreign court decisions," American University, January 13, 2005. <http://augcluster.american.edu/AU/media/mediareel.nsf/608575dac58ec4a785256869007c9cba/1f2f7dc4757fdo1e85256f890068e6eo?OpenDocument&Click=>

will not properly reflect the political morality of the community. Justice Scalia officially declared this sentiment in his dissenting opinion in *Atkins v. Virginia*, a case that questioned whether it violated the Eighth Amendment against cruel and unusual punishment to execute individuals with intellectual disabilities.<sup>25</sup> He begins his dissent by claiming that the opinion of the court rested “so obviously upon nothing but the personal views of its Members,” and continues on to state that “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ [on the death penalty issue] must go to its appeal... to the members of the so-called ‘world community’...”<sup>26</sup> He emphasizes the point that the ideas about justice that belong to the world community are not those of the United States, and should thus not be part of a decision about United States law. Any judge who makes a decision based on international norms, then, is guilty of cherry-picking.

Buchanan and Powell respond to this worry first by noting that there is a difference between incompatibility in practice and in theory.<sup>27</sup> The fact that some judges might cherry pick international laws to suit their own purposes does not indicate an in-principle conflict. Moreover, they argue, the continuity and coherence of international law in a domestic system will depend on particular states. It might be the case that domestic law ought to be brought in line with international law, rather than assuming the conflict requires a rejection of RIL. Furthermore, conflicts between domestic values do not extend to all international law, and it is possible that some difference between cultural values will diminish over time. The point is that none of these arguments about judicial borrowing are

---

<sup>25</sup> *Atkins v. Virginia* 536 U.S. 304 (2002).

<sup>26</sup> *Ibid.*, Scalia, J., dissenting.

<sup>27</sup> Buchanan and Powell, “Constitutional Democracy and the Rule of International Law: Are They Compatible?” 341.

“in principle” arguments against RIL.<sup>28</sup> What is needed to respond to the judicial borrowing argument is a coherent story about how judges make decisions in a democratically acceptable way. I will return to this issue in Chapter 3. For now, I am focusing on the preliminary arguments given by Powell and Buchanan.

The loss of self-determination (numbers 3 and 5, above) is another major concern of the incompatibilists. There is a democratic deficit of international governance institutions that goes against the principles of self-determination on which constitutional democracies are based. There are two parts to the argument. First, the democratic deficit properly speaking is the worry that international institutions that create and enforce RIL are not democratic. In a paper that sets out an idealized framework for a global democratic assembly, Richard Falk and Andrew Strauss argue that the international system faces a “democratic deficit.”<sup>29</sup> Current international decision-making processes are “tainted by a disregard for democratic principles,” and “the lack of direct democratic accountability to citizens has also significantly affected policy outcomes.”<sup>30</sup> International institutions are increasingly involved in transnational regulations. The democratic deficit is undermining the legitimacy of international institutions so that, Falk and Strauss argue, it will be increasingly difficult for institutions that deny citizen participation to effectively create and implement regulating norms.<sup>31</sup>

The second part of the argument is about the problem of diminished self-governance. It argues that, if global legislatures creating RIL reach into domains

---

<sup>28</sup> Buchanan and Powell, “Constitutional Democracy and the Rule of International Law: Are They Compatible?” 339-341.

<sup>29</sup> Richard Falk and Andres Strauss, “On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty,” *Stanford Journal of International Law* 36 no.191 (2000): 212.

<sup>30</sup> Ibid., 211.

<sup>31</sup> Ibid., 213.

that used to be controlled by constitutional democracies, then citizens of those democracies will experience a diminishing of self-governance.<sup>32</sup> Modern treaties are multilateral instruments that govern the relationships between states, but that also aim to regulate the relationships between states and their own citizens.<sup>33</sup> Some balk at the loss of control citizens might experience as international law expands. Some segments of the population in the United States, for example, try to resist “international entanglements” with global institutions and treaties grounded on a fundamental belief in self-government.<sup>34</sup> This belief is grounded on the preference for local decision-making and the worry that citizens will no longer have any say in the decisions of their government. Proponents of this diminished self-governance argument reject international law because it represents a threat to the domestic constitutional law-making processes that are the expression of citizens’ right to self-governance.<sup>35</sup> As Rabkin argues, “the real threat [from international law]... is that international commitments will distort or derange the normal workings of our own system, leaving it less able to resolve policy disputes in ways acceptable to the American people.”<sup>36</sup> International law may purport to respond to political questions, but the Incompatibilists argue that it does so in a way that takes the power to make political change away from citizens. Both this part of the argument, about citizens’ diminished capacity for self-government, and the first part, about the democratic deficit of international

---

<sup>32</sup> Buchanan and Powell, “Constitutional Democracy and the Rule of International Law: Are They Compatible?” 344.

<sup>33</sup> Curtis A. Bradley and Jack L. Goldsmith, “Treaties, Human Rights, and Conditional Consent,” *University of Pennsylvania Law Review* 149 no.2 (2000): 400.

<sup>34</sup> *Ibid.*, 458

<sup>35</sup> *Ibid.*, 467.

<sup>36</sup> Jeremy Rabkin, *Why Sovereignty Matters* (Washington, D.C.: the AEI Press, 1998), 34.

institutions, involve citizens experiencing a reduction of political self-determination.

In response to these arguments, Buchanan and Powell point to the fact that there are different degrees of self-determination and different forms of its exercise within constitutional democracies; there is no in-principle argument against RIL. Giving power to other institutions to make rules is not necessarily a relinquishing of self-government. But if international institutions are to have power or authority, domestically, they argue self-determination ought to be expressed by allowing citizens of constitutional democracies the chance to say how much self-determination they are willing to “relinquish” to global institutions.<sup>37</sup> This decision might be made through public deliberation, popular choice, or some form of direct democracy like a referendum. As the authors write, “where the acceptance of international law by a constitutional democracy can be reasonably expected to result in *constitutional changes*—significant alterations in constitutional structures or significant diminutions in political self-determination... there is a strong presumption that public constitutional deliberation and popular choice are required.”<sup>38</sup> The idea is that there are some political changes so momentous that the ordinary decision-making procedures in politics are inadequate, and the decision should be made by the people as the ultimate source of authority.<sup>39</sup> This meta-constitutional principle regarding decision-making procedures about RIL does help address the worry about self-determination. However, it is not plausible to expect all constitutional democratic

---

<sup>37</sup> Buchanan and Powell, “Constitutional Democracy and the Rule of International Law: Are They Compatible?” 345

<sup>38</sup> Ibid., 347.

<sup>39</sup> Ibid., 347.

systems to resort to direct democracy in each instance where RIL and domestic law come into contact. Some other argument is needed to respond to this incompatibilist worry that can address it within the framework of the regular decision-making structures of constitutional democracies.

Buchanan and Powell conclude that it does not follow that those committed to constitutional democracy should reject the project of establishing robust international law.<sup>40</sup> The problem is, instead, the issue of the kinds of trade-offs and tensions that exist between RIL and constitutional democracy and the reframing of the debate about compatibility. The authors say “we should begin with a thorough understanding of the various tensions between the commitment to constitutional democracy and the commitment to RIL and then ask how we can best honour both commitments.”<sup>41</sup> It is from exactly this point that my argument will emerge.

### *1.2 An Argument Worth Making*

Buchanan and Powell have set up the incompatibilist worries in a way that will allow me to highlight the tensions between commitments to constitutional democracy and RIL in a way that points to a potential solution. The authors claim that a comprehensive political philosophy might be necessary to understand the best way to honour commitments to both RIL and constitutional democracy. I hope to show that there is a more straightforward way of addressing these commitments and the concerns of the Incompatibilists.

---

<sup>40</sup> Buchanan and Powell, “Constitutional Democracy and the Rule of International Law: Are They Compatible?” 348.

<sup>41</sup> Ibid., 348.

What we know from the analysis by Buchanan and Powell is that there are no Incompatibilist worries that make a connection between RIL and constitutional democracies theoretically impossible. But the responses that they provided in support of this claim do not, as I noted in the previous section, respond fully to the Incompatibilists' worries. It is one thing to argue that relationship between constitutional democracies and RIL is not theoretically impossible and another to argue that such a relationship is possible and can be achieved in a way that responds to the Incompatibilists' concerns. One of my aims in this paper is to give an account of the relationship between RIL and constitutional democracies that supplements the denial of a theoretical incompatibility that Buchanan and Powell present. Before I can fill in the gaps in the authors' arguments, I will give an overview of international law and its incorporation into domestic law. Using the Canadian experience as my primary focus in the examples and details of the argument, I will consider the supposed conflicts between international law and domestic law, and whether the incorporation of international law, domestically, causes the problems that the Incompatibilists accuse of it.

### *1.3 International Law in Domestic Systems*

The discussion of international law is dependent on the kind of international law being discussed. Because there are different kinds of international law, and different ways that law can be applied in a domestic context, the relevance of the arguments about conflicts and incompatibility varies wildly. In this section, I will briefly address the different kinds of international law and ways of adopting it in a domestic context. Doing so will set the stage for



my argument by trimming away the kinds of laws and decision-making processes that are not as contentious. For the sake of brevity and scope, I will be exploring this issue through the Canadian experience. The particular ways in which Canada ratifies, accepts, or otherwise interacts with international law are in many ways different from those of other constitutional democracies. I am using Canadian law as an illustrating example, but the kinds of arguments I will be making about it can be applied to other states as well.

#### *1.4 Kinds of International Law*

The most authoritative statement of the sources of international law is Article 38 (1) of the Statute of the International Court of Justice. Article 38 (1) states that the International Court of Justice, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>42</sup>

These four sources fulfill the roles of law-creating and law-determining processes, but the functions overlap in various ways.<sup>43</sup> A law-creating process is one in which a new legal norm is established by, for example, a new treaty. A law-determining process is employed when the initial search for a particular law does

---

<sup>42</sup> Malcolm N. Shaw, "Chapter 3. Sources," in *International Law*, ed. Malcolm N. Shaw (New York: Cambridge University Press, 2003), 66.

<sup>43</sup> *Ibid.*, 67.

not yield a definitive answer. For example, when the International Court of Justice is trying to figure out exactly what the law says on a particular issue, they will use the sources mentioned in Article 38 to identify which international norms have legal status and are relevant to the particular case. I will begin by explaining each of the sources of international law, and then explain their particular roles in the Canadian legal system.

International conventions, or treaties, establish rules that are expressly recognized by the contracting states; the transaction is one in which the creation of a written agreement legally binds the participating states to act in a certain way or to set up particular relations between themselves.<sup>44</sup> There are law-making treaties, which tend to be universal, between most states, and treaty-contracts between a small number of states. Treaties, like the Charter of the United Nations or the Geneva Conventions, are “a form of substitute legislation,” for participating states.<sup>45</sup> According to the *Vienna Convention on the Law of Treaties*, a treaty is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>46</sup> A treaty is a legal agreement written and accepted by participating states that is binding between the parties and is recognized as such under international law. The *Vienna Convention* sets out rules about the criteria for valid treaties,

---

<sup>44</sup> Shaw, *International Law*, 88.

<sup>45</sup> *Ibid.*, 89.

<sup>46</sup> Article 2(a), United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, <http://www.refworld.org/docid/3ae6b3a10.html>.

amendments, interpretation, and application.<sup>47</sup> How each particular state ratifies treaties domestically varies, but only the states that have signed on to treaties are bound by their provisions. A treaty is not like a piece of domestic legislation that is binding on the domestic territory once passed. It is more like a contract between participating states that is recognized in the International sphere. If a party to a treaty breaks their agreement, the other parties can seek remedies in the international courts, but if a state is not a participating member of the treaty, they are not bound by its provisions. It could be the case that the act of signing a treaty commits a state to simply not doing anything to defeat the objects of the treaty without creating any specific obligations for the state unless the treaty is ratified according to its own constitution.<sup>48</sup> The process by which a treaty becomes binding, domestically, varies between states. I will describe the particular implementation method that Canada follows in the next section. And while treaties are explicitly written pieces of international law that particular states agree to and that are often ratified by domestic governments, there are other kinds of international law that are not as directly created and that are more widely binding than the particular agreements found in treaties.

The most common form of international law that is not created through specific written agreements, and which is more controversial than conventions or treaties, is international customary law. International custom, or customary law, is deduced from the practice and behaviour of states.<sup>49</sup> Despite disagreements

---

<sup>47</sup> Preamble, Introduction, and Articles 1-85. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>48</sup> Jutta Brunneée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts," in the Canadian Yearbook of International Law, vol. 40, (2002): 14.

<sup>49</sup> Shaw, *International Law*, 69.

about it, courts still look to customary law when deciding cases and have distinct methods of identifying customary law. In the *Libya/Malta Continental Shelf* case, in which the International Court of Justice (ICJ) identified a customary law that granted states an entitlement to 200 nautical miles of continental shelf, the court stated that “the substance of customary international law must be ‘looked for primarily in the actual practice and *opinio juris* of states.’”<sup>50</sup> The first element of this account of customary law uses the performance of state activity to inform the content. The second element, *opinio juris sive necessitatis*, is a psychological factor about the belief of a state that behaved in a way that it was under a legal obligation to act in that way.<sup>51</sup> Whether or not a particular custom is binding depends on the nature of the rule and the opposition it faces. There are elements of the strength and repetition of the rule within the international context that create a customary rule.<sup>52</sup> Generally, a custom must have the support of “the concurrence of the major powers in th[e] particular field,” that the custom functions in.<sup>53</sup>

One of the main issues involved in customary law is about the role of state practice in determining the law. Participation in resolutions of the general assembly, comments on drafts and decisions by the International Law Commission, decisions of national courts, treaties, and general practice are all

---

<sup>50</sup> *Continental Shelf, Libya v Malta*, Merits, Judgment, [1985] ICJ Rep 13, ICGJ 118 (ICJ 1985), 3rd June 1985, International Court of Justice [ICJ], and Shaw, “Chapter 3. Sources,” 70.

<sup>51</sup> Shaw, *International Law*, 71.

<sup>52</sup> *Ibid.*, 74. There are different ways in which countries can support or reject a custom. However, my argument in this paper does not turn on the acceptance or rejection of customary law as such. If a country rejects customary law explicitly, then it is a clear rejection of the law both on and in the country. These rejected laws have no place in my argument, so I will not explore the ways in which countries can reject customary law once it has been established as customary law.

<sup>53</sup> Shaw, *International Law*, 76.

taken into account in determining state practice.<sup>54</sup> Other sources of information include domestic newspapers, historical records, the statements of government authorities, and statements by national legal advisors. The relationship between customary law and state action, however, is not one-directional. Sometimes municipal state law can form on the basis of customary rules. For example, in the 1871 *Scotia* case decided by the US Supreme Court about an incident in which a British ship had sunk an American vessel on the high seas, the court found that British navigational procedures established by an Act of parliament formed the bases of an international customary law since many other states had created legislation in virtually identical terms.<sup>55</sup> In this case, the court found that the British law was also an international custom insofar as other countries had adopted it into their own legal practices.

A general statement, that “state practice covers any act or statements by a state from which views about customary law may be inferred,” gives a correct but broad understanding of state action.<sup>56</sup> The other aspect of customary law is the *opinio juris*, or the belief that an activity is legally obligatory. This aspect of customary law addresses that which states believe to be legally binding upon themselves. States’ belief about the binding nature of their actions turns their settled general practice into custom and renders it part of the rules of international law.<sup>57</sup> There is a high threshold that has been set by the international community in determining what counts as customary law based on

---

<sup>54</sup> Shaw, *International Law*, 78.

<sup>55</sup> *Ibid.*, 79.

<sup>56</sup> *Ibid.*, 80.

<sup>57</sup> *Ibid.*, 80.

state action and *opinio juris*. The International Court of Justice noted in the *Nicaragua* Case, 1986, that:

for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice,’ but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.’<sup>58</sup>

While this statement by the ICJ expresses a high threshold for the determination of customary law, it does leave open to interpretation the actual content of the law based on states actions, beliefs, and the reactions of other states. In general, customary law is established through a process of a claim, the absence of protests by interested parties, and the acquiescence by other states; the conduct or abstinence from conduct creates a framework from which legal norms emerge and are applicable to states.<sup>59</sup> To understand how the behaviour of states can give rise to binding rules, it is helpful to draw upon H. L. A. Hart’s work in *The Concept of Law*. When describing the obligation or sense of social pressure behind a rule of behaviour, Hart distinguishes between the internal and the external aspects of the rule. From the position of an external observer, we can observe the regularities in behaviour and note that the people involved conform to particular rules about how to behave.<sup>60</sup> Deviation from the observed pattern might be correlated with an observed punishment, but to the external observer,

---

<sup>58</sup> ICJ Reports, 1986, pp. 108-109; 76 ILR, pp. 442-443, in Shaw, *International Law*, 82.

<sup>59</sup> Shaw, *International Law*, 84.

<sup>60</sup> H. L. A. Hart, *The Concept of Law* (Oxford University Press: Oxford, 1997): 89.

these regularities in conduct are only a *sign that* people behave in a certain way.<sup>61</sup> An observer from the external perspective will note the patterns of behaviour but not understand the significance of the rules that govern that behaviour to the people who are bound to act according to the rules. These people, who have the internal perspective, understand and accept rules as the basis for claims and expectations about behaviour; the rules are not merely a way of predicting future behaviour, but a *reason* for acting in a certain way and for deviation from the rule to be met with hostility.<sup>62</sup> In the sphere of international law, customary law develops through the recognition of the actions of states, which can be done from an external perspective by noting the regularity of legal behaviour, but also by recognizing the internal perspective of the states who, in acting in a certain way, believe that action to be guided by some binding rule.

There are times when the Courts come across an issue that is not directly addressed by treaties or customary law. In these cases, judges will turn to a third source of law that includes the use of arguments by analogy from already-existing rules or general principles that guide the legal system.<sup>63</sup> Since it is impossible for any method of legislation to provide rules for all situations, the provision of the “general principles of law recognized by civilised nations” was put into Article 38 as a source of law to close any gaps in the system.<sup>64</sup> The general principles do count as a separate source of international law, but they have a limited scope of application. An important example of a binding principle of international law is that of *pacta sunt servanda*, the idea that international agreements are binding

---

<sup>61</sup> Hart, *The Concept of Law*, 90.

<sup>62</sup> Ibid., 90-91.

<sup>63</sup> Shaw, *International Law*, 93.

<sup>64</sup> Ibid., 93.

upon those involved.<sup>65</sup> The use of general principles by the ICJ has happened in cases related to injuries and reparations, private rights, and other such issues. There are principles that guide the application of international law. These principles, including the idea that the rule later in time will have priority and the more specific rule will take precedence over a more general rule, help address and mitigate possible conflicts in the application of the rules that are involved in any particular case.<sup>66</sup> The general principles are used only when there is nothing more specific to address the case at hand. Moreover, general principles can only count as binding legal norms if they have been accepted as legal norms by the international community “through the mechanisms and techniques of international law creation.”<sup>67</sup> The use of such principles must be accompanied by evidence of their existence as principles.

One further source of international law, though “a subsidiary means for the determination of rules of law rather than as an actual source of law,” are the results and arguments of judicial decisions.<sup>68</sup> The description “judicial decisions” found in Article 38 (1) d) include decisions by the Permanent Court of Arbitration (PCA), the International Court of Justice (ICJ), international arbitral awards, and the rulings of national courts.<sup>69</sup> As subsidiary means of determining international laws, these decisions can be used to serve as evidence of states’ positions, customary laws, and the details of legal provisions. For example, the decisions of municipal courts can provide evidence of the existence of a customary rule. Aside

---

<sup>65</sup> Shaw, *International Law*, 97.

<sup>66</sup> *Ibid.*, 116.

<sup>67</sup> *Ibid.*, 103.

<sup>68</sup> *Ibid.*, 103.

<sup>69</sup> *Ibid.*, 104.



from such judicial decisions, there are other minor sources that provide evidence to help identify what counts as international law, like the writings of experts in certain fields. However, as minor sources that guide the identification and interpretation of the law when nothing else is available, these do not constitute the bulk of the rules that comprise the rules of Robust International Law that Buchanan and Powell are concerned with. As a result, I will not address this last category of rules directly.

### *1.5 The Canadian Experience of International Law*

The Canadian relationship to international law is far from straightforward. Parliament, the courts, and the executive all claim to follow certain approaches to international law and then make decisions that seem to contradict those claims. The primary problem is in identifying when international law is directly applicable in Canada, what counts as domestic implementation, and under what circumstances the international norms that are binding *on* Canada are also binding *in* Canada. In this section, I will attempt to explain the current state of Canada's approach to international law while highlighting some of the problems.

In order for international laws to take effect in domestic law, they must somehow be translated or incorporated into the domestic law. And theories about how this incorporation happens varies among states. There are different ways theorists have approached the domestic reception of law; the monist theory claims that international law is adopted or incorporated automatically within the internal legal system of the state, while the dualist theory involves some act of transformation, typically legislative, by the state to translate international law

into domestic law.<sup>70</sup> Canadian practice generally follows that of British common law in its reception of international law by treating the two primary sources, custom and treaty, in different ways.<sup>71</sup>

There is a history of the practice of automatic incorporation of customary law into English law. This practice has been observed in Canada, but it was only in 2007 that it was explicitly affirmed as the “Doctrine of Adoption” by the Supreme Court of Canada in the *R v Hape* decision.<sup>72</sup> The court stated that “customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation,” and this doctrine of adoption has never been rejected in Canada.<sup>73</sup> The doctrine of adoption allows for prohibitive rules of customary law to become part of domestic law if there is no conflicting legislation. It has been accepted as doctrine in Canadian legal history and, prior to that, in English legal history.<sup>74</sup> As a custom among Canadian courts, judges accept that the law of nations, as international custom, is also the law of Canada unless there is a valid exercise of sovereignty in which Canada declares its law is contrary to international law. In judicial decision-making, the courts treat customary law as Canadian law, but they must apply parliamentary enactments even if they conflict with international law, because parliament and provincial legislatures have sovereignty over international rules in Canada.

---

<sup>70</sup> Hugh M. Kindred, Phillip M. Saunders, and Robert J. Currie, “Chapter 3—National Application of International Law,” in *International Law, Chiefly as Interpreted and Applied in Canada, 8th Edition*, (Toronto: Emond Montgomery Publications, 2014): 150.

<sup>71</sup> *Ibid.*, 150.

<sup>72</sup> *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292, in Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 151.

<sup>73</sup> *Ibid.*, 152.

<sup>74</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 151.153.

However, international law can also influence the interpretation and application of domestic law. It is a source upon which courts can draw, and the process of importing customary law into domestic contexts has a more nuanced than the doctrine of adoption would suggest.<sup>75</sup> Sometimes, a special manifestation of customary law is found in *jus cogens* norms that require obedience by all levels of government. A *jus cogens* norm is a peremptory norm of international law from which no derogation is permissible, whether by treaty or customary law.<sup>76</sup> Examples of *jus cogens* norms include principles against things like slavery, genocide, and crimes against humanity. The courts are not concerned with these norms as binding international obligations qua obligations, but rather as reflections of the principles of fundamental justice to be used in deciding cases.<sup>77</sup> One example of the kinds of norms recognized as peremptory *jus cogen* norms from which no derogation is allowed is the rejection of torture found in international conventions to which Canada is a party. Both the domestic and international perspectives inform the relevant constitutional norms.<sup>78</sup>

While the history of the Canadian courts' approach to international law is one of automatic incorporation, an important question arises about how judges determine what, exactly, the international law applies to cases at hand. Customary law is part of Canadian law, which means that it ought to be part of the courts' judgements. Most courts sort through international law in the same way they approach the common law. They listen to arguments about the claims under particular laws or provisions being made in court, they sometimes accept

---

<sup>75</sup> Kindred, Saunders, and Currie, "Chapter 3—National Application of International Law," 154.

<sup>76</sup> Ibid., 154.

<sup>77</sup> Ibid., 154.

<sup>78</sup> Ibid., 157.

expert evidence about the relevant international law, and they use detailed submissions on the content of that law.<sup>79</sup> The process of identifying customary law is not as straightforward as that of identifying treaty law. As such, the role of customary international law presents a particular challenge to the use of international law in domestic context that treaty law does not. I will return to this challenge, but will first address the role of treaty law in Canada.

There are two components to treaty law: the making and the implementing of treaties. In terms of treaty-making power, the constitutional authority to enter into international agreements is exercised in the name of Canada by the Governor-General.<sup>80</sup> Each stage of the treaty-making process is undertaken by the executive branch in an undemocratic process that results in Canada potentially being bound by international law with no involvement or knowledge of the relevant elected representatives.<sup>81</sup> There is a practice of putting before Parliament some treaties to be scrutinized by members of the House of Commons and there is a policy that establishes notification and acceptance procedures for treaties, the “Policy on Tabling Treaties in Parliament,” introduced in 2008.<sup>82</sup> While the process of treaty-making does not necessarily involve the legislature in the creation aspect, it does generally require legislation for implementation. Treaty law does not have the direct implementation that the automatic incorporation of customary law does. In places like the European Union and The United States of America, there are practices of “self-executing

---

<sup>79</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 159.

<sup>80</sup> *Ibid.*, 163.

<sup>81</sup> *Ibid.*, 168.

<sup>82</sup> *Ibid.*, 169.

treaties,” in which treaties signed automatically become law.<sup>83</sup> In Canada, the constitutional principle of parliamentary supremacy requires that a “dualist approach to treaty implementation” is taken, which involves an act of legislative transformation that converts international law into domestic law.<sup>84</sup> This approach was verified in the Labour Conventions Reference Case, *Canada (AG) v Ontario (AG)*, when the court argued that “... the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.”<sup>85</sup> A treaty created by the State does bind the State against the other contracting parties, but Parliament can refuse to follow the directives in the treaty. The federal government can make treaties that bind Canada as a country in the international sphere but that have no effect internally until they have been implemented by legislation or unless appropriate legislation exists at the time of ratification that ensures the commitments of the treaty are carried out under domestic law.<sup>86</sup> There are various different ways the state can incorporate treaty law into its domestic law. The actual text of the treaty could be imported into domestic law; the substance of the treaty could be incorporated without using the actual words of the treaty; legislation could be extended to a whole class of treaties; or a treaty could be incorporated over time as it is amended, requiring reference to its current status in the law to determine the scope of its provisions.<sup>87</sup> Treaties must either be implemented explicitly by new legislation or must be

---

<sup>83</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 171.

<sup>84</sup> *Ibid.*, 171, 150.

<sup>85</sup> *Attorney General for Canada v Attorney General for Ontario*, 1937, AC 326, 1DLR 673 (PC).

<sup>86</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 172.

<sup>87</sup> *Ibid.*, 180.

considered already implemented based on existing legislation that covers the treaties' contents.

This kind of treaty, considered to be covered by existing legislation, does not require any statutory implementation. These treaties, like the International Human Rights Conventions, can—theoretically and practically—be carried out under the existing law without enacting or modifying specific legislation.<sup>88</sup> The reason why no implementing legislation would be required to give the treaty domestic force is that there already exists some Canadian law that covers the provisions of the treaty. But whether or not a treaty can be fulfilled by pre-existing provisions is a debated question, particularly in judicial arguments. In the 1970's and 1980's, Chief Justice Laskin argued that the implementation of a treaty must be manifest, not inferred, so that courts must look explicitly for statements of the intention to implement the treaty before they give it effect in Canadian law.<sup>89</sup> As a result, in the absence of any clear indication of implementation, the courts have treated many treaties as unimplemented even though they do not (theoretically) require special implementing legislation and could be covered by existing law.

There are also instances when international laws binding on Canada can conflict, or appear to conflict, with existing Canadian laws. In the *R v Hape* decision, the Supreme Court of Canada tried to address the issue of conflict between international and domestic law. Customary international law can modify Canadian common law, but it has no effect when faced with clearly contrary

---

<sup>88</sup> Kindred, Saunders, and Currie, "Chapter 3—National Application of International Law," 174.

<sup>89</sup> *Ibid.*, 175.

legislation.<sup>90</sup> The picture is more complicated with regard to treaties and statutes. When a statute conflicts with a treaty that is not implemented by another enactment, the domestic statute prevails. In principle, if a treaty is incorporated into Canadian law then there should be no conflicts. However, implemented treaties and legislation can appear to conflict, resulting in the need for judicial interpretation to go beyond a simple hierarchy of legal status and a straightforward textual reading. The Supreme Court has used a general interpretive principle about the “Conformity with International Law as an Interpretive Principle of Domestic Law” that says

[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law... based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result.<sup>91</sup>

Not only is legislation presumed to conform to treaties, it is also presumed to comply with the values and principles of customary and conventional international law that form “part of the context in which the statutes are enacted,” and so dispose the courts to prefer a construction that reflects them.<sup>92</sup> For example, the court uses international law as a tool for interpreting the *Charter*, aiming for consistency between the interpretation of the *Charter* and Canada’s international obligations.

The question of interpretation extends from Charter interpretation to statutory interpretation in general. If some of Canada’s international obligations are given legal effect domestically, then it is not initially clear whether such

---

<sup>90</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 182.

<sup>91</sup> *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292.

<sup>92</sup> *Ibid.*

legislation should be construed according to international principles from which the legislation is derived or according to domestic rules of interpretation.<sup>93</sup> The current approach that the Supreme Court takes is to interpret the language of legislation in its entire context by combining textualist, intentional, and teleological approaches.<sup>94</sup> The Supreme Court of Canada has decided that it is sensible to apply international principles of interpretation to international provisions and therefore follow the rules of interpretation found in the Vienna Convention.<sup>95</sup> Even for decisions that are not directly connected to international law cases, the court now refers to various international instruments of decision-making. In *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, the Court questioned the scope of international law as an interpretive aid for the contextual approach of statutory interpretation in Canada.<sup>96</sup> The decision of the case demonstrates the importance of international treaties and other materials to the contextual debate and indicates that the courts are ready to refer to international treaties to which Canada is a party, whether or not they have been incorporated into Canadian law.<sup>97</sup> So even though the Court highlights the importance of treaties being implemented by Parliament, unimplemented treaties also have an impact in legal decisions. The federal government has tried to avoid any unwanted impacts caused by unimplemented

---

93 Kindred, Saunders, and Currie, "Chapter 3—National Application of International Law," 185.

94 Ibid., 185.

95 Ibid., 186. and United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

96 *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4. See, in particular, sections 9, 31, 38, and 186.

97 Kindred, Saunders, and Currie, "Chapter 3—National Application of International Law," 190.



treaties by refraining from ratifying a treaty until legislation can be passed to reduce the risk that these sorts of issues appear before the courts.<sup>98</sup>

The more difficult cases are those in which treaties' contents are apparently already embodied in Canadian law. These treaties are binding on Canada as a state in the international sphere insofar as Canada has signed onto the treaties, but they have not been addressed by specific legislation because the existing law has been deemed sufficient to fulfill them. In particular, the role of the human rights conventions to which Canada is a party has been questioned in various cases. The courts often do not consider the fact that Canadian law already encompasses these conventions and treats them as though they are unimplemented. For example, in *Baker v Canada*, the Supreme Court of Canada said of Canada's ratification of the *Convention on the Rights of a Child* that "...the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law," explicitly rejecting the possibility of automatic incorporation and the approach of the past.<sup>99</sup> The concurring opinion argued that "the primacy accorded to the rights of children in the Convention... is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament... the [decision] result may well have been different had [the court] concluded that the appellant's claims fell within the ambit of rights protected by the Canadian Charter of Rights and Freedoms."<sup>100</sup> Yet even though the Court found no direct application of the convention, they nevertheless allowed its principles and values to inform the case. The courts

---

<sup>98</sup> Kindred, Saunders, and Currie, "Chapter 3—National Application of International Law," 192.

<sup>99</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [69], 1999 CanLII 699, [1999] 2 SCR 817, in Kindred, Saunders, and Currie, "Chapter 3—National Application of International Law," 193-195.

<sup>100</sup> *Ibid.*, [81].

follow a presumption of legislative conformity with international law, one that encompasses a presumption of legislative compliance with binding international obligations and an expectation of legislative respect for values and principles of international law. But despite this allowance by the court, this case represents an “unresolved misunderstanding between the courts and the government about the circumstances in which treaties are to be treated as part of Canadian law.”<sup>101</sup> In cases of unincorporated treaties, the state of the law is not clear. There are apparently inconsistent positions being taken by the Canadian political system. In court, parties can use human rights treaties binding on Canada as an interpretive aid for the *Charter*, but they cannot demand direct application of the international provisions. This move is problematic in particular because there is no way to challenge the original assessments by the Department of Justice that no new legislation is necessary in the case.<sup>102</sup>

### 1.6 Problems in the Courts

The interpretation of international law by the Supreme Court (and lower courts) has varied in recent history. In an account of the “hesitant embrace” of international law by Canadian judges, Jutta Brunnée and Stephen J. Toope say that even when courts invoke international law in their arguments, they “generally do not give international norms concrete legal effect in individual cases.”<sup>103</sup> The courts do rely on the principle that “Parliament is not presumed to legislate in breach of a treaty or in a manner inconsistent with the comity of

---

<sup>101</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 195.

<sup>102</sup> *Ibid.*, 197.

<sup>103</sup> Jutta Brunnée and Stephen J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts,” in *The Canadian Yearbook of International Law*, vol. 40, (2002): 5.

nations and the established rules of international law.”<sup>104</sup> But it is sometimes unclear where this interpretive principle fits into Canadian case law. Some international treaties require transformation (implementation) to be applicable in Canadian law.<sup>105</sup> What counts as a transformed or implemented treaty, and which treaties actually need transformation, is not always clear. Recall that there are different ways of transforming a treaty, including the direct reproduction of its text in legislation, an inferred implementation through new legislation or amending existing legislation, and as the result of already-existing law that conforms with the treaty obligations.<sup>106</sup> Parliament has left the status of many treaties unclear. And given the common law presumption of legislative intent to act in conformity with international obligations, treaties that are covered by existing legislation are considered to be implemented. Even in such cases, however, “it remains open to Parliament or provincial legislatures to deviate from treaty provisions through explicit statutory action.”<sup>107</sup> Brunée and Toope note that it is absurd to insist on explicit statutory implementation in instances where no legislative action is required to bring domestic law in line with Canada’s treaty commitments, particularly because Canada already claims that it has implemented its treaty commitments (e.g. in human rights contexts) in international forums.<sup>108</sup> For example, Canada routinely argues that it is in compliance with commitments to the International Covenant on Civil and Political Rights (ICCPR) because of the Canadian Charter but, absurdly, in cases

---

<sup>104</sup> Brunnée and Toope, “A Hesitant Embrace,” 21.

<sup>105</sup> *Ibid.*, 20.

<sup>106</sup> *Ibid.*, 23.

<sup>107</sup> *Ibid.*, 28.

<sup>108</sup> *Ibid.*, 28.

like *Ahani v Canada (A.G.)* the SCC argued that “Canada has never incorporated either the Covenant or the Protocol into Canadian law by implementing legislation. Absent implementing legislation, neither has any legal effect in Canada.”<sup>109</sup> In what appears to be a weaker version of the presumption of conformity, the SCC draws on international human rights law to inform its interpretation of the Charter without acting as though the interpretation of the Charter must be consistent with international norms.<sup>110</sup> This weak version is in response to a worry that the ordinary presumption of conformity would eliminate domestic democratic controls over the legal system and entrench international obligations.<sup>111</sup> I will return to the issue of the democratic deficit in a later section. For now, I will briefly address the courts’ use of customary law (which also happens to be subject to the same democratic worry).

Customary law, like treaty law, is subject to a presumption of conformity. Some court decisions have treated customary law as a part of Canadian law (and thus directly applicable) while others have been more ambiguous. Based on common law precedent, “customary law should be presumed to apply unless altered, explicitly or implicitly, [by the elected government of Canada].”<sup>112</sup> Since customary law is determined from state action and *opinio juris*, it plausible to argue that the law has been derived from the law of Canada, and thus would not be in conflict with it. This claim is only the briefest of attempts at an argument, but it is important to remember that even if customary law is in effect

---

<sup>109</sup> Brunnée and Toope, “A Hesitant Embrace,” 30.

<sup>110</sup> *Ibid.*, 33.

<sup>111</sup> *Ibid.*, 34.

<sup>112</sup> *Ibid.*, 44.

domestically, the domestic legislatures can legislate against it.<sup>113</sup> In questions of both customary law and treaty law, all forms of international obligation give rise to the principle of conformity, but in each case, the Canadian legislatures maintain full control over domestic law.<sup>114</sup>

### *1.7 Returning to the Incompatibilists*

As we turn back to the incompatibilists' worries after this review of the Canadian experience of international law, there is an important distinction to make. Because of the difference in application between kinds of international law, the strength of the incompatibilists' critiques varies between cases. The most straightforward transformation of a ratified international treaty through explicit implementation, as discussed above, does not fall prey to the incompatibilist challenges. In this case, the legislature has the opportunity to express its full democratic mandate to create a domestic law that implements the international law. Having created the domestic law through the proper legislative procedures, there is no worry that there has been an undermining of the constitutional democracy or that there is an in-principle incompatibility between democracy and RIL. Whether or not the international law was made by a non-democratic international body is irrelevant because the House of Commons has, in their capacity as the democratically elected body of law-makers, decided to use the international law as the subject of domestic legislation. As a result, any reliance on the domestic law, particularly by the courts, is not an unlicensed drawing upon international norms, but the proper application of a bona fide Canadian

---

<sup>113</sup> Brunnée and Toope, "A Hesitant Embrace," 44.

<sup>114</sup> Ibid., 52.

law. One could question whether or not the legislature ought to have made such a law out of the international agreement, but one cannot deny that, if made according to the proper constitutional law-making procedures, it is law.

While ratified and transformed treaties can be easily accounted for, the arguments about unimplemented treaties and customary law are more complicated. There are some unimplemented treaties that, based on accepted standards of transformation, ought to be considered Canadian law. As mentioned above, for example, many international human rights agreements are claimed to be subsumed under Charter provisions, and should thus be considered implemented. But to discover whether or not a particular international law is implicitly implemented by existing legislation requires an interpretation process that is not necessary in the case of explicitly implemented treaties. Judges, in dealing with implicitly implemented law, must first determine whether the international law in question is, in fact, somehow covered by Canadian law and thus binding on their decision. In this extra step required of judges, the incompatibility arguments do pose a threat. One could argue that it should not be the role of judges to decide whether or not an international norm is a Canadian law in this way, but that such a task should be left to the legislature to make explicit. Furthermore, the worry that judges might have a tendency to draw on international law in order to achieve results otherwise not sanctioned by Canadian law is validated by the very real possibility that judges could use a wide range of international norms when it suits their purposes to argue that any particular international norm is somehow covered by Canadian law. There is, of course, the common law conformity principle that “parliament is not presumed to legislate in breach of a treaty or in a manner inconsistent with the comity of

nations and the established rules of international law.”<sup>115</sup> Under this principle, courts are guided in their interpretation of domestic law away from any readings that conflict with international agreements to which Canada is a party. But the principle does not give the courts the freedom to decide that a domestic law incorporates an international law. It simply prevents them from interpreting a domestic law in a way that directly conflicts with international law. There is a possibility that this principle could be abused to align Canadian law with international law in a way that the legislature has not condoned.

This worry about implicit implementation of treaties extends to customary law. Like the interpretation of the common law, judges are guided in their examination of customary law by fairly stringent guidelines. The International Court of Justice provides a framework for the determination of customary law through state practice and *opinio juris*. Just as judges look to various sources of information to determine the state of the common law on some matter or other, they can look to a number of sources, like treaties and court decisions, to provide evidence that a norm is, in fact, a customary law. There are guided and principled ways of determining common law. However, the incompatibilist worries still apply here. The worry about the unauthorized transfer of power to global institutions is significant. If customary law is created through state relations in the international sphere, whether with other states or international institutions, and judges use this law in a domestic context, then the law that is being applied has not been created, modified, or endorsed by the democratic legislature. The elected representatives were not necessarily part of the initial actions that established the customary law, nor were they involved in

---

<sup>115</sup> Supra note 103 (Chapter 1).

the process of adopting it into Canadian law. It is possible that the custom was developed from an executive action that the courts then used as precedent in a domestic case. Incompatibilists would argue that this sort of law-making has undermined the democratic nature of the legal system in an unauthorized and unprincipled way. Even though the legislature retains the right to legislate explicitly against a customary law, the undemocratic nature of customary law remains a serious issue. Arguably, it should not be left to judges to be implementing law in the first place.

It is clear that the more specific our discussion of the kinds of international law gets, the more potential there is for an incompatibilist critique. Many of the challenges that international law presents to the integrity of a constitutional democracy are worth considering. And while Buchanan and Powell began to address these challenges, they did not fully mitigate the incompatibilist worries. My aim in the next chapter is to supplement their arguments against the incompatibilists in a way that recognizes the distinctions between different kinds of international law and that is more systematic. The framework of my argument is an analogy between international law and the common law theory of judicial review. There are direct comparisons to be made between the Incompatibilists' worries about international law and the Critics of domestic judicial review. Certain features and problems of international law and its application in Canada that I have sketched in this chapter are very similar to the use of (and problems with) common law theory. Through this comparison, I aim to extend Wil Waluchow's theory of common law reasoning and the idea of a community's constitutional morality to the application of international law in domestic courts.



## CHAPTER 2

### Building the Analogy

In the previous chapter, we examined the Incompatibilist case against international law and the current state of international law in the domestic Canadian context. There were five particular arguments against international law: 1) the exclusive accountability argument; 2) the constitutional derangement argument; 3) the democratic deficit/loss of self-determination worry; 4) the unprincipled borrowing argument; and 5) the diminished self-governance/democratic deficit argument. Each of these worries is motivated by the idea that the commitment to international law would somehow threaten the democratic status of a domestic constitutional democracy. Whether through unauthorized judicial action or the lack of elected representation, the international legal regime lacks the democratic legitimacy needed for it to have a defensible and authoritative legal role. The aim of this chapter is to show how these worries map directly onto the worries presented against judicial review in a domestic context.

The arguments against judicial review in the domestic context, hereafter referred to as “the Critics’ Case,” are motivated by similar kinds of democratic worries. Focusing on issues like the denial of self-governance, the abandonment of democracy, and the threats of judges or past figures usurping democratic power, the Critics argue against judicial constitutional review. Wil Waluchow, in his book *A Common Law Theory of Judicial Review—The Living Tree*, maps out the Critics’ case and then provides a compelling response to it. His account of judicial review relies on common law theory and the idea of a community’s

constitutional morality (CCM) to counter the democratic challenges that the Critics pose. In this chapter, I will give an account of the Critics' case as Waluchow presents it, and then argue that the Incompatibilist case is analogous to the Critics' case. Once I have made the comparison between the two cases, I will present Waluchow's response to the Critics' case. This chapter will set up the structure of my argument, which I will make in Chapter 3. I aim to show that Waluchow's theory can provide a way of responding to the Incompatibilists. His theory is a strong and compelling response to the Critics' Case against judicial review, and I will set the stage in this chapter for its application to the Incompatibilists.

### *2.1 The Critics' Case*

Waluchow addresses ten different arguments in his survey of the Critics' Case.<sup>1</sup> His portrayal of the Critics' positions is extensive, and my brief account here only gives a sketch of the full set of arguments. What follows are the main points of the Critics' arguments and one side of the analogy I will construct.

#### *i) Denial of Self-Government*

This objection claims that charters<sup>2</sup> seriously compromise the ideals of democratic self-rule through the entrenchment of charters and the judicial enforcement of their principles.<sup>3</sup> Critics claim that these two features (entrenchment and judicial review) cannot be reconciled with the ideals of self-

---

<sup>1</sup> W. J. Waluchow, *A Common Law Theory of Judicial Review: the Living Tree* (New York: Cambridge University Press, 2009) 133-179.

<sup>2</sup> I will use the word "charter" to refer to any entrenched constitutional rights document, whether it is called a charter (as in Canada), a bill of rights (as in the USA) or any other similar document.

<sup>3</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 133.

rule on which democracy is based, and that people are prevented from making their own decisions by historical restrictions that are then enforced by unelected and elite judges.<sup>4</sup> As Jeremy Waldron argues in *Law and Disagreement*, these two features are an insult to citizens' sense of justice and to the right to participation in interests concerning their rights and duties.<sup>5</sup>

ii) Entrenchment: the Dead Hand of the Past

The second objection picks up on the worries about historical restrictions from the first objection. The claim is that the pre-commitment of charters allows the “dead hand of the past” to constrain choices in current affairs.<sup>6</sup> The people who create or vote upon charters are rarely the same people being bound by the charter provisions. This kind of binding of citizens, particularly if the charter is enforced by judicial review, is an infringement upon their right to self-determination.<sup>7</sup> It is problematic to assume that a constitutional commitment made in the past is still relevant in the present political society. In response to this worry about commitment over time, Jed Rubenfeld argued that

To be a person takes time. A person... does not exist at any given time. This means that freedom is possible only over time. To be free in the human sense, it is not sufficient to act on one's will at each successive moment... Human freedom requires a relationship of self-making to one's life as a whole. It requires individuals to give their temporally extended being a shape or purpose of their own determination.<sup>8</sup>

Just as individuals have an identity over time as Rubenfeld argues, Waluchow

---

4 Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 134.

5 Jeremy Waldron, *Law and Disagreement*, (New York: Oxford University Press, 2004) 239.

6 Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 135.

7 Ibid., 136.

8 Jed Rubenfeld, “Legitimacy and Interpretation,” *Constitutionalism*, ed. L. Alexander (Cambridge: Cambridge University Press, 1998) 213-214, in Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 137.

says that an analogy can be drawn between personal identity and community identity.<sup>9</sup> This analogy is one I will return to in a later section of this paper. But in this objection, a critic might respond to Waluchow and Rubinfeld by claiming that self-government, whether for individuals or communities, requires the ability to change one's mind. And entrenchment does not allow for the changing of one's mind.<sup>10</sup> There is also the question of the authority of the original authors, and whether the people making the original commitments were authorized to do so for the community.<sup>11</sup>

iii) Abandonment of Democracy: Charter Review

According to this third objection, “relying on unelected, unaccountable judges for Charter enforcement is a travesty: it is to abandon democracy entirely. The will of the people has been replaced by the will of a small band of judges... [who] pronounce on the wisdom, or lack thereof, of the views and actions of others.”<sup>12</sup> As Michael Mandel argues, “if we are not allowed to make up our own minds about what [a particular] freedom entails, but instead must hand the question over to a few of our betters to decide the matter for us under the pretext of interpretation,” then we do not have a democracy.<sup>13</sup> Of particular worry to the critics is the strong form of judicial review where judges have the final say in constitutional matters and their decisions cannot be overturned by the legislature. The worry is that judges, especially in cases of strong judicial review,

---

<sup>9</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 137.

<sup>10</sup> Ibid., 138.

<sup>11</sup> Ibid., 140.

<sup>12</sup> Michael Mandel, *The Charter of Rights and the Legalization of Politics*, 548, in Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 144.

<sup>13</sup> Ibid., 145.

have unbridled *de facto* freedom and are not accountable to anyone.<sup>14</sup> Not only are there unelected judges making decisions in these cases, but they are also putting constraints on the sorts of decisions that the legislature can make because they have the ultimate constitutional authority.

iv) Inconsistency: Hobbesian Predators and Respect

This objection to charters is based on a particular attitude towards the democratic public. Waldron describes this attitude as a combination of self-assurance and mistrust; the self-assurance comes from believing that one's own conviction is a matter of fundamental right and has been properly captured, and the mistrust from the implication that any attempt to modify the proposed conviction in the future will be so ill-motivated that the right must be elevated beyond the reach of legislative review.<sup>15</sup> Such mistrust seems to be incompatible with the respect for autonomy that rights convey, based on the idea of an individual citizen as a thinking agent with the moral capacity to participate in democratic society.<sup>16</sup> As such, the entrenchment of convictions about rights is based on a predatory conception of human nature that assumes individuals are self-serving and cannot be trusted with the task of deciding about the rights and interests of others.<sup>17</sup> On the one hand, we have an unflattering picture of a democratic society that has overzealous, prejudiced, or irrational majorities making poor decisions about others, while on the other hand a constitutional charter presupposes individual citizens to be worthy of exercising the

---

<sup>14</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 149.

<sup>15</sup> Waldron, *Law and Disagreement*, 221-222.

<sup>16</sup> *Ibid.*, 222.

<sup>17</sup> Waldron, *Law and Disagreement*, 222.

fundamental rights and responsibilities recognized in that charter.<sup>18</sup> The idea of judicial review under charters seems to be inconsistent in the way it combines mistrust and respect in a way that cannot reconcile the two.

v) Threat of Radical Dissensus

The fifth objection of the Critic's case is based on the fact of radical dissensus in the circumstances of politics. There is pervasive disagreement about the matters of political morality that Charters are meant to address. Waldron argues that "even if there is an objectively right answer to the question of what rights we have, still people disagree implacably about what that right answer is," and people also disagree about the mechanisms by which we might address disagreement.<sup>19</sup> The worry is that, even if there are some objective truths to questions of rights, we cannot agree on what those truths are or how to address them in law.<sup>20</sup> The idea that a charter, or the principles drawn upon by judges in their reasoning under it, can establish a point of the community's moral agreement is dubious, according to the critics.

vi) Threat of Moral Nihilism

The sixth objection follows from the thought process of the fifth objection. The worry is that the appealing features of charters are based on a naïve understanding of morality and rationality about the possibility of objectively right answers to moral questions.<sup>21</sup> There are two parts to this objection. The first, the "argument from disagreement," questions the reasonability of the belief that judges can discover some kind of objective moral truth about rights in the face of

---

<sup>18</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 151.

<sup>19</sup> Waldron, *Law and Disagreement*, 244-246.

<sup>20</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 154.

<sup>21</sup> *Ibid.*, 155.

widespread disagreement.<sup>22</sup> At some point, there will be disagreement about the limits of rights for which there is no single objective solution for judges to arrive at. The second part, the “demonstrability argument,” claims that it is seldom possible for judges to demonstrate the correctness of the moral judgements they make in interpreting and applying a constitutional charter because there are no agreed-upon procedure of moral reasoning in terms of which right answers could be demonstrated.<sup>23</sup> If judges cannot find any moral truth and cannot even prove the correctness of their decision-making process to arrive at a supposed-truth, then how can we rely on them to reason about Charter morality in the face of disagreement?

vii) Philosopher Kings and Queens

This worry trades on the Platonic image of the philosopher king. The idea is that a small group of (often unelected) judges are no more competent in making decisions on rights issues and constitutional matters than legislators or citizens.<sup>24</sup> Judges are not moral authorities; they are not Plato’s philosopher kings and queens. There is therefore no reason, according to critics, for people to rely on what judges have to say about the contentious questions of political morality raised by charter cases, as opposed to the corresponding views of elected legislators and the people they supposedly represent. This is especially so considering the threat of moral nihilism and the fact that judges themselves disagree on controversial cases.

viii) Judges as Elites of Society

---

<sup>22</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 157.

<sup>23</sup> Ibid., 158.

<sup>24</sup> Ibid., 162.

The eighth criticism extends the theme of judges' special suitability to decide controversial issues of political morality to the worry that judges are a small, non-representative, and elite group of people. They do not represent minorities in society and they tend to share with each other perspectives of financial, political, and social power.<sup>25</sup> As an elite group that enjoys various social privileges, judges may be biased in particular ways and make decisions according to their biases. This bias is particularly troubling in light of the fifth and sixth critiques mentioned above. If there is radical disagreement and no chance of demonstrating an objective right answer to rights questions, then how can judges be trusted to make decisions according to the interests and rights of the democratic community?

ix) Futility of “Results-Driven” Arguments

Waldron further draws out the implications of radical dissensus in this critique. He reminds us that “in constitutional case[s] we are almost always dealing with a society whose members disagree in principle and in detail, even in their ‘calm’ or ‘lucid’ moments, about what rights they have, how those rights are to be conceived, and what weight they are to be given in relation to other values.”<sup>26</sup> This radical dissensus has three key implications. First, it rules out defences of judicial review based on any sort of “results-driven standard”; second, it reveals the “deeply problematic nature” of the constitutional conception of democracy; and third, it drives us towards the rival procedural conception and its majoritarian-decision procedures that are “unbridled by substantive

---

<sup>25</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 164-165.

<sup>26</sup> Waldron, *Law and Disagreement*, 268.



constraints.”<sup>27</sup> There is no standard of result that we can use to judge judicial review because, if we cannot agree on what the right sort of result ought to be, then we cannot judge whether or not a system can generate the right results. As Waldron argues,

It looks as though it is disagreement all the way down... On the one hand, we cannot use a results-driven test, because we disagree about which results should count in favour of and which against a decision-procedure. On the other hand, it seems we cannot appeal to any procedural criterion either, since procedural questions are at the very nub of the disagreements we are talking about.<sup>28</sup>

We cannot find a way of addressing concerns with results-driven methods because they are subject to the argument that Waldron raises. The only course of action, it seems initially, is to embrace the sort of majoritarian procedure that Waldron endorses and to reject judicial review.

#### x) Level of Public Debate

The tenth and final argument in the Critic’s Case is about the level of public debate that Charters apparently raise. Against the original claims of advocates that charters raise the level of public debate, Waldron argues that charters and judicial review do not actually succeed in doing so. One claim is that, by transforming debates of political morality into specific constitutional issues, it is just as likely to reduce the level of debate.<sup>29</sup> Debates about general moral principles become hindered by a fixation on language.<sup>30</sup> Moreover, the language with which the debate is being conducted is particular legal terminology that excludes the majority of the population despite the fact that they may be

---

<sup>27</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 167.

<sup>28</sup> Waldron, *Law and Disagreement*, 295.

<sup>29</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 171.

<sup>30</sup> Ibid., 172.

intimately affected by the results of the debate. The Charter also takes issues of political morality and turns them into “us-against-them” battles.<sup>31</sup> Instead of focusing on the moral content of the debate, there is an inflation of rhetoric, a pre-occupation with promoting individual interests as matters of rights, and inevitable conflict and violence.<sup>32</sup> Instead of increasing the level and accessibility of public debates about political morality, the charter apparently leads to damaging consequences and a legal rigidity that narrows the range of debate and the participation of citizens.

Faced with these ten arguments against charters and judicial review, it might seem like the arguments against international law made by the Incompatibilists could be strengthened by the Critics’ arguments here. But as I will argue in the next sections, the Critics’ arguments and their apparent support of the Incompatibilists, will actually help to justify rejecting the Incompatibilists arguments in favour of judicial review of international laws in constitutional democracies. The argument begins with an analogy.

## *2.2 A Critical Analogy*

I will begin the explanation of the analogy between the Critics’ case against judicial review and the Incompatibilist claims against international law, by establishing the parameters of the critiques. There are three broad kinds of critiques being made in both cases; the kinds of arguments being made are about the principles at stake, about the structures of governance, or those about the methods of decision-making. Each of the arguments made by the Critics and by

---

<sup>31</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 173.

<sup>32</sup> *Ibid.*, 174.

the Incompatibilists maps onto one of these categories. Furthermore, within each of these categories that constitute the structure of the critiques in the analogy, I will also describe the similarities between specific critiques made by both sides. For each argument of the Critics' case, there is a corresponding argument in the Incomaptibilists' case. The main force of the analogy, however, does not come from comparing these specific connections, but from the comparison between the three general critiques to which each case can be reduced. Moreover, it is by addressing the three categories of critiques that Waluchow's theory can be applied. So I will address the specific connections, but I will begin by exploring the general categories.

i) Principles

The general claim being made by the critiques in the Principles category is that the proposed legal structure, whether international law or judicial review, somehow violates principles at the heart of democracy. In particular, the principles that are most often flouted are those relating to self-determination and self-governance. Both the Incompatibilists and the Critics argue that international law and judicial review, respectively, represent a denial of the principles upon which the democratic state is founded. Powell and Buchanan explore this category of critique through the "in-principle" incompatibility between RIL and constitutional democracy. Recall from Chapter 1 that the Incompatibilists claim that a state is not democratic if its citizens are subject to any political authority that is not exclusively accountable to them. The emphasis is placed heavily on the principles of self-determination and democratic accountability. If international laws bind the citizens of a state, created by governing bodies to which they did not contribute or grant authority, then the

citizens have lost the self governance that is foundational to democracy. If they lose these features, they lose the status of people as free and equal.

Similarly, the Critics argue that judicial review threatens these same principles.<sup>33</sup> As with international law, charters of rights directly compromise the ideals of democratic self-rule. Citizens are bound to a document that thwarts the will of the people by limiting the kinds of choices that they can make. There is no longer self-determination. If lawmakers of history made the binding document, then the self-rule of citizens is further thwarted by the dead hand of the past. The entrenchment of a document that puts limits on the kinds of laws the people or their representatives can enact, whether it was done now or in the past, is a violation of the principles of self-rule and self-determination that are fundamental to the understanding of citizens as free and equal people.

This disrespect for the moral standing of citizens that grounds the arguments about self-determination is also present in a more basic form. The Critics present the problem through the contrast between the picture of a democratic society that has overzealous, prejudice, or irrational majorities making poor decisions about others, and the idea of individual citizens as moral beings capable and worthy of exercising the fundamental rights and responsibilities of the charter.<sup>34</sup> The inconsistency between these two versions of citizens is the core concept of the critiques about the principles that both the Critics and the Incompatibilists give. A democratic society is theoretically premised on the equal rights and participation of citizens thought to be capable of exercising their moral duties and self-rule. For any source external to the citizen

---

<sup>33</sup> Supra notes 1, 3-11, (Chapter 2).

<sup>34</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 151.

body to take control of the affairs of the citizens represents a claim against the citizens' capacities to properly govern themselves. Whether it is an international body that makes decisions that the state must follow because a judge declares it binding, or a judge who decides a case that binds the citizens under domestic law, both cases feature some violation of the principles that a democratic state are based upon.

ii) Structures of Governance

This category of critique has to do with the political structures of a democratic society and the fear of the derangement or destruction of those structures. In both the Critics' case and the Incompatibilists' arguments, this fear is expressed as the abandonment or the undermining of majoritarian decision-making processes. If there is an institution, whether a domestic judiciary or an international body, that can pass judgement on the legality of democratic government actions or alter the way actions are taken, then the structure of the democracy is at risk. The claims about structure can be broken down further into three different kinds: the change of power balance, the loss of democratic methods, and disagreement about the structure itself.

The change of power balance is one of the main claims that the Incompatibilists make against international law. The argument about constitutional derangement highlights the worries that RIL will change the structure of constitutional democracies by shifting power away from the legislature to the executive and judicial branches and by encroaching on the jurisdiction of federal units.<sup>35</sup> International agreements are generally within the scope of the executive branch's powers, which means that they are responsible for

---

<sup>35</sup> Supra note 5, (Chapter 1).

making decisions that affect Canadians (though not always directly) without necessarily consulting federal or provincial legislatures. And if international agreements, which the executive branch enters into or rejects, address subject matter that is within the jurisdiction of provinces, then it becomes unclear as to who has authority over the matters in question. Moreover, the role of the courts in adjudicating customary law also gives a lot of power to the judicial branch to make decisions about law *within Canada* that the legislature has not necessarily addressed. Even though each branch is technically working within their proper constitutional roles, the substance of the actions being taken in the roles shifts the power away from the legislatures. This power transfer also features in the Incompatibilists' worry about the unauthorized transfer of power to global institutions via judicial decisions about international law.<sup>36</sup> The elected branch essentially no longer has direct power over the laws that govern their elected representatives.

This argument also has a prominent role in the Critics' case against judicial review. The Critics call judicial review under charters an "abandonment of democracy" because of the way it threatens the balance of power and the role of the legislature.<sup>37</sup> When (unelected) judges are given the task of reviewing and deciding upon the constitutional validity of legislation, they are in a position to replace the will of the people with their own decisions. Once again, the legislature is no longer in a position to determine the laws that will govern their electorate. Instead, an unelected branch of the government has the power to determine what counts as law, and possibly even to do so in defiance of the legislature's opinions.

---

<sup>36</sup> Supra note 5, (Chapter 1).

<sup>37</sup> Supra notes 13-14, (Chapter 2).

Strong form judicial review is a particularly galling version of this problem, according to the Critics, because it gives the ultimate power of the final say to the judiciary. The final say on constitutional questions is not in the hands of the people or their elected representatives. That power is given to the judiciary, thereby jeopardizing the balance in the political structure of the democracy.<sup>38</sup>

The second aspect of the structure-based critiques is about the lack of democratic institutions. International law has a number of non-democratically elected and non-representative bodies. Even in the rare cases where states have representatives (like the general assembly of the United Nations), those representatives are not elected and are not directly responsible to their states' citizens. Instead, they represent the government of the state.<sup>39</sup> Most international law comes from sources that are not democratic in structure. As a result, laws are created and given authority in the domestic context despite their lack of democratic pedigree. The international institutions do not represent the people for whom they are making laws. Critics of judicial review make a similar claim against the judiciary. Judges are (usually) an unelected group of elite legal professionals. They are not representative of society by any political or

---

<sup>38</sup> In a system of Strong Judicial Review, the power of the final say on the law is given to a supreme court. Once the highest court makes a decision in a case, that decision is legally binding. An alternative to strong review is known as Weak Judicial Review. In systems of weak review, constitutional courts can make declarations or conclusions about the law, but their decisions are either not legally binding or can be overturned by the legislature (the details of such a system vary between jurisdictions).

<sup>39</sup> Of course, these representatives might come from a chain of authorization. Citizens elect domestic representatives, who could in turn appoint members of the international body in the same way that judges are chosen in some jurisdictions. This chain might confer democratic legitimacy on the members of international bodies. But the Incompatibilists who argue about the democratic insufficiencies of international bodies could point to the courts and organizations, aside from the UN General Assembly, that are not chosen by elected representatives of states. The longer the chain between voting citizens and the international bodies becomes, the weaker the argument about the democratic authorization becomes.

socioeconomic standard. They are also not elected by members of society.<sup>40</sup> The judiciary has the same democratic deficit that international bodies suffer from. It is, according to the Critics, an undemocratic establishment that essentially usurps the democratic authority of the legislature. And when judges decide cases, particularly in constitutional or charter review, they are making laws, binding on citizens, that seemingly lack a democratic pedigree.

The final point in the structural critique comes from the Critics' case against judicial review. Waldron argues that, with disagreement all the way down, we cannot use results-driven tests to assess the strength of one institutional form over another because we disagree about the kinds of results that should emerge. But it turns out that the procedural criteria are at the basis of the original disagreement about judicial review.<sup>41</sup> There is no way, in the face of disagreement, to determine the stronger system of governance or constitutional review. Waldron's solution is to embrace the majoritarian procedures and to reject judicial review. Though this particular argument was not directly addressed by the Incompatibilists, it can be found within issues of international law interpretation that emerge in the Canadian experience of international law as described in Chapter 1. There has been a "hesitant embrace" of international law by Canadian judges, such that when courts invoke international law, they do not give those laws any concrete legal effect in particular cases by only relying on international law as a set of guiding principles instead of including particular

---

<sup>40</sup> Again, there might be a chain of democratic authorization if judges are appointed by elected representatives. But that chain would not be enough to satisfy all of the Critics of judicial review.

<sup>41</sup> *Supra* notes 26-28, (Chapter 2).



norms in the decision to be binding precedent.<sup>42</sup> Because there is disagreement about what counts as customary law, and about which kinds of international laws are already expressed by existing Canadian law, judges are faced with a problem similar to Waldron's. There is no results-driven test to determine whether or not a judge has made the correct decision in a particular case because of the disagreement about the outcome of the case itself. Canadian judges have, in this example, already taken Waldron's way out by refraining from deciding upon the issues in question and leaving them to the legislature. But in doing so, judges are failing to differentiate between the international norms that are supposed to be binding in Canada and the non-binding guiding principles. By hesitating in trying to determine if a norm is binding or not, judges are making all norms into non-binding optional norms.

### iii) Methods of Decision-Making

The last category of the critiques concerns the ways in which decisions about laws are actually made and the role of judges in that process. This is an extension of the structural critiques, but focuses more on the actions of the judiciary in both the international and domestic law contexts. The Incompatibilists make a clear statement about this worry in their argument about the tendency of judges to draw on international law. The claim is that judges will pick and choose among the international norms that suit their own purposes in deciding cases if international law is a legitimate resource for domestic interpretation. International law is fragmented and wide in scope. If judges are allowed to choose from this body of norms, they will be able to find norms to apply that fit their own preferences, rather than deciding according to legal

---

<sup>42</sup> Supra note 102, (Chapter 1).

principle and in so doing will, as a result, threaten the rule of law.<sup>43</sup> A similar worry is expressed by the Critics of judicial review. Their critique comes through in the discussion of the threat of radical dissensus and the threat of moral nihilism.<sup>44</sup> In a society that faces radical disagreement about the kinds of issues at stake in a constitutional court case, it is difficult to know if there is a right answer or if we can agree about what the right answer is and how to arrive at it. To claim that judges can use the community's agreed-upon principles in their reasoning is dubious. It is more likely that they are deciding according to personal principles. There will also be disagreement about the boundaries of rights themselves and about the demonstrability of the correctness of judicial reasoning. All of these worries, from the Critics' fifth and sixth objections (above), point to a problem with judicial decision making. It seems unlikely that judges would be able to make the kinds of unbiased or objective decisions that judicial review requires. Instead, judges would be left to base their decisions on whatever form of reasoning seems best to them. This subjectivity is the same kind of problem that the Incompatibilists face. It is exacerbated by the worries that judges are an elite group of society and do not represent the majority of citizens. Individual judges with specific biases and life experiences are making important decisions in constitutional cases. Even if they claim to be following some objective set of principles or community agreements, they are really just making decisions according to their own preferences. Just like the Incompatibilists argue about judges in decisions regarding international law, this kind of decision-making process threatens the rule of law in constitutional cases.

---

<sup>43</sup> Supra note 23, (Chapter 1).

<sup>44</sup> Supra notes 19-23, (Chapter 2).

These three categories—principles, structure, and methods—encompass all of the critiques given by the Incompatibilists and the Critics. While I put each critique under one category, there are ways in which many of the critiques might fit in the other categories as well. The categories are just a way of clearly connecting the two cases. These groupings will also prove useful in the application of Waluchow's solutions to the Critics' objections to the Incompatibilist arguments. It is to this solution that I will now turn.

### *2.3 The Common Law Theory*

In response to the Critics of charter review, Waluchow proposes a new way of understanding charters and judicial review. He argues that this alternative understanding of a charter's legitimacy is based on its role "in helping overcome difficulties we inevitably encounter whenever we seek to govern ourselves by law, difficulties that are only exacerbated by the circumstances of politics."<sup>45</sup> By reframing the role of charter review in a constitutional democracy, Waluchow protects charter review from the worries about legitimacy and coherence that the Critics raise. The alternative picture that Waluchow presents produces a series of results:

- a) That the rights to which a Charter refers are best viewed as rights of political morality established within what we'll call the "community's constitutional morality" [CCM];
- b) That the community can be wrong about what its own constitutional morality requires;
- c) That a judge's views about what that morality requires in a particular case might...be correct, or at least better;
- d) That judges can be required by the Charter—by law—to enforce their own views of the [CCM] against the erroneous beliefs of the community and its legislative representatives;

---

<sup>45</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 182.

- e) That when judges fulfill this duty, it is almost always misleading to view them as imposing *their own* subjective moral views;
- f) That in enforcing their views about the rights of their [CCM] recognized in a Charter, judges are in fact respecting, not violating, democratic principles.<sup>46</sup>

How, exactly, these results are produced is based on Waluchow's ideas of the community's constitutional morality (CCM) and the common law method of judicial reasoning.

#### *2.4 A Community's Constitutional Morality*

The idea of the community's constitutional morality relies on the distinction between moral opinions and true moral commitments.<sup>47</sup> Moral opinions are held beliefs that do not involve the kind of critical examination that results in a reflective equilibrium of true moral commitments that represents an adjustment of personal beliefs to avoid errors or deficiencies.<sup>48</sup> In the context of the charter and judicial reasoning, Waluchow argues that there is a kind of Rawlsian overlapping consensus within relevant communities on norms or judgements about things like justice or equality that emerges upon careful reflection.<sup>49</sup> Apparent disagreement might only be the result of clashing moral opinions. In a constitutional context, there is enough moral overlap to identify a community's constitutional morality. Moreover, Waluchow argues that in the context of judicial reasoning, there is nothing wrong with asking judges to enforce true moral commitments against the mere opinions of a possibly misguided

---

<sup>46</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 219-220.

<sup>47</sup> Ibid., 223.

<sup>48</sup> Ibid., 223.

<sup>49</sup> Ibid., 222.

public gripped by evaluative dissonance.<sup>50</sup> But the kinds of moral norms to which judges make reference are important. The norms to which a Charter refers are those of the community's constitutional morality, not a judge's personal morality or the general community morality.<sup>51</sup> They are a particular and high-level set of norms. More specifically, the CCM is defined as:

the set of moral norms and considered judgements properly attributable to the community as a whole as representing its true commitments, but with the following additional property: They are in some way tied to its constitutional law and practices.<sup>52</sup>

The CCM is made up of principles that are embedded in social and political practices, but with the specific added criterion that they have some form of legal recognition in the constitutional context. Waluchow further clarifies the definition of the CCM by saying that it:

consists of the moral norms and convictions to which the community, via its various social forms and practices, has committed itself and that have in some way or other been drawn into the law via the rule of recognition and the law it validates.<sup>53</sup>

This kind of overlap of legally expressed moral norms exists with respect to some of the issues addressed by the charter. When judges use the CCM to make decisions in court cases, their decision-making is being guided by principles that derive from democratically chosen commitments. As Waluchow argues, quoting Hogg and Bushell, “the role of Canadian courts in enforcing the Charter is best viewed not as an imposition that thwarts the democratic will but as one stage in

---

<sup>50</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 226. The evaluative dissonance arises when individuals hold moral opinions about particular issues that would, upon further reflection, contradict the fundamental beliefs, principles, considered judgments, and values of those individuals. The moral opinions are also in conflict with the constitution, charter, and commitments of the individuals as citizens.

<sup>51</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 227.

<sup>52</sup> *Ibid.*, 227.

<sup>53</sup> *Ibid.*, 227.

the democratic process.”<sup>54</sup> Exactly how judicial review and the CCM are *democratic* parts of the process will become clear through Waluchow’s response to the Critics. But before I can address his responses, I must first explain how the CCM provides judges guidance in Waluchow’s common law method of judicial review.

### 2.5 Common Law Method of Judicial Review

Waluchow introduces the common law system by describing it as a “highly disciplined system of practical reasoning that, if not as fully rule-like in nature as statutory regimes aspire to be, constrains judicial reasoning in significant ways.”<sup>55</sup> The principles that judges apply as part of the common law are found in the written justifications of past cases. There are rules, principles, and opinions that develop as part of the common law over time. The common law is both prescriptive to and constraining upon judges.<sup>56</sup> There is no canonical rulebook, so while there are common law rules, these rules are revisable at the point of application.<sup>57</sup> In general, as Joseph Raz describes, the courts follow the doctrine of precedent that says, “a precedent must either be followed or distinguished,” but “since ‘distinguishing’ means changing the rule which is being distinguished, the power to distinguish is a power to develop the law even when deciding regulated cases.”<sup>58</sup> A precedent-setting case establishes a rule, the “*ratio*

---

<sup>54</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 270.

<sup>55</sup> Ibid., 198.

<sup>56</sup> Schauer, *Playing by the Rules*, 175, in Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 198.

<sup>57</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 199.

<sup>58</sup> Raz, *The Authority of Law*, 185, in Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 199.

*decidendi*,” which is open to modification by later courts.<sup>59</sup> There are different theories about the proper application of precedent, with different corresponding levels of power attributed to the courts and controversy about their roles. But it is generally accepted that, if the facts and circumstances of a particular case fit with an existing precedent, then judges are bound to apply that precedent. If, however, the judge can distinguish features of the case from past cases and add them as conditions of the precedent’s application, then the judge can essentially narrow the precedent, thereby refining it and affecting its future application.<sup>60</sup> The power of distinguishing cases is a limited one that does not allow judges to create wholly new rules or expand existing ones to cover cases not captured by the precedent. Rather, it allows then to further specify conditions of application for already-existing rules. This process of distinguishing between cases and making more specific the rules of common law allows for the common law to develop slowly in an incremental fashion.

A much greater power lies in the courts’ abilities to overrule a prior decision. When a court overrules a past decision, they can substitute new rules for old ones. However, in the context of overruling past cases, judges are bound by a good-faith requirement, a relevance requirement, and the condition that their decision to make changes is justified by reasons of very great significance.<sup>61</sup> Where precedent and the common law process generally proceed in an incremental fashion, changing slowly as rules are narrowed and developed through individual cases, the act of overruling a past precedent is an abrupt and

---

<sup>59</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 199.

<sup>60</sup> *Ibid.*, 200.

<sup>61</sup> *Ibid.*, 202.

disrupting change. Courts often avoid overruling for this very reason.<sup>62</sup> There are circumstances under which courts will overrule their past decisions, but these cases are generally ones in which the precedent is “clearly wrong and productive of injustice.”<sup>63</sup> The aim of the common law is to maintain a controlled and stable set of rules that are also able to adapt to changing circumstances. Waluchow, drawing on the work of H. L. A. Hart, describes the benefits of the common law by saying:

[it] strikes a balance between Hart’s two fundamental needs: the need for clear, antecedent guidance by relatively fixed rules, and the need to leave open, for later settlement by an informed official choice, issues that can be properly appreciated and settled only when they arise in a concrete case.<sup>64</sup>

The common law has a history of combining these needs and blending fixity with flexibility. With this relatively successful history as a method of legal decision-making that can slowly clarify terms, narrow concepts, and make specific the application of general principles, the common law method seems to lend itself well to the requirements of charter review. As Waluchow says, there are abstract moral terms in the charter like “equality” that can be understood and developed in a way analogous to the development of concepts like “negligent” or “reasonable” in tort law.<sup>65</sup> Unlike the common law, constitutional law generally involves written documents, but there are still principles and words in the documents that require some kind of interpretation or application by the courts. Charters are in written form, and judges are not in a position to modify the

---

<sup>62</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 202.

<sup>63</sup> Viscount Dilhorne, *Fitzleet Estates v. Cherry*, cited in Waluchow, *A Common Law Theory of Judicial Review*, 203.

<sup>64</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 203.

<sup>65</sup> *Ibid.*, 204.



written words of a charter, but the abstract terms used in charters that appeal to principles of political morality cannot be further defined or codified in written law for every particular case. As such, there is reason to believe that the development of the understanding of those terms can and should happen through the common law method.<sup>66</sup>

The development of our understanding of these abstract terms must take into account Hart's two needs and the acknowledgement that we do not have all of the answers to moral questions and the rights that they bear on in the constitution. We need a way of maintaining the rule of law through a stable constitutional commitment, but one that can adapt to changes of understanding. In response to the disagreement about controversial issues of political morality, Waluchow argues that the common law method comes from

a recognition that we do not have all the answers, and that we are well advised to design our political and legal institutions deliberately in ways that are sensitive to this feature of our predicament... Charters do not, of necessity, embody a naïve overconfidence in our judgements of political morality... On the contrary, a Charter can be seen as embodying a *concession* to our inability fully to understand the nature of fundamental rights and how these might be infringed by government action.<sup>67</sup>

This shift in the understanding of charters and of judges' roles in the interpretation of the charter rights they contain is an important part of the case that Waluchow makes in support of the democratic pedigree of judicial review of Charters. The other crucial part of the case is in distinguishing between the moral opinions of a community and their true moral commitments that I described above. The success of Waluchow's case against the Critics relies on the

---

<sup>66</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 214-215.

<sup>67</sup> *Ibid.*, 213.

combination of the guiding principles of the CMM with the fixity and flexibility of the common law method.

## *2.6 CCM and the Common Law Method*

When interpreting the law in any case, courts are bound to consider the text of the law and any relevant binding common law precedent. In some cases, it might be easy to know exactly what the law requires if the content is explicitly determined. For example, the Canadian Constitution states that no House of Commons “shall continue for longer than five years,” thereby setting a clear and determinate rule that can be directly applied.<sup>68</sup> A court faced with this particular rule would be limited to determining how long the House continued for and whether or not it was no longer than five years. But the more abstract or underdetermined rules of law, especially the rights-based provisions of the Constitution, require more work from the courts in their interpretation. When deciding what is entailed by, for example, “freedom of conscience” or the “right to life, liberty, and security of the person,” in a particular case, the courts must use resources beyond the text.<sup>69</sup> In the common law method, courts are bound by the past precedent of decisions made about the right or law in question. If a previous court decided that a particular government action infringed the right to security of the person, for example, then that decision is binding on courts facing cases of the same sort of action. And just as the common law develops slowly by distinguishing between the facts of the case, so too do the parameters of the

---

<sup>68</sup> Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 44, s. 4(1). See also Constitution Act, 1867, R.S.C. 1985, Appendix II, No. 5, c. 50.

<sup>69</sup> s.2 and s.7 of the Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <http://canlii.ca/t/ldsx>

constitutional rights and freedoms that the courts decide upon. Each time a case is heard and each time a decision is made, some precedent is further specified. And within this process of distinguishing cases and applying precedents, courts need to make principled judgements about the cases at hand. The CCM, Waluchow argues, is invoked by judges to ground their arguments.

The CCM is composed of political and legal decisions that make the political morality more determinate by expressing some of the community's moral principles in the law. The CCM is not autonomous from the legal system or acts of Parliament. Legislation provides substance for the CCM and precedent-setting legal decisions also have a role in the reflective equilibrium of the CCM.<sup>70</sup> The test of reflective equilibrium to find the common ground of the CCM on a particular issue is similar to the traditional common law decision-making process in other areas of law like torts or contract cases.<sup>71</sup> In cases of charter review, precedents under the Charter's abstract moral provisions are judgements about what the CCM requires.<sup>72</sup> When a court must make a judgement about a principle of political morality to make a decision in a particular Charter case, they try to make it using the guidance of the CCM. So if past cases, legislative bills, or government rules point to a particular principle, then judges are bound by that as a principle of the CCM. Waluchow argues that it is possible for judges to identify the true constitutional moral commitments of the community; he says that "discovering, or being made to acknowledge, one's true commitments in reflective equilibrium is... no less possible when it comes to a community's morality than it

---

<sup>70</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 234.

<sup>71</sup> Ibid., 231.

<sup>72</sup> Ibid., 232.

is when the morality in question is personal.”<sup>73</sup> An example he gives of the process of identifying the principles of a community’s constitutional morality is the case of same-sex marriage in Canada. Most reasonable Canadians, Waluchow argues, condemn racial bigotry and sexism. The same principles extend to same-sex marriage, since both the public commitments and the jurisprudence around the issue condemn prejudice about same-sex marriage.<sup>74</sup> A number of cases preceding the Supreme Court ruling on same-sex marriage feature decisions in which the Attorney General of Canada argued that the common law definition of marriage was inconsistent with s. 15(1) of the Charter and was not a justifiable infringement under s.1.<sup>75</sup> This combination of the public acceptance of equality and rejection of bigotry, and the legal action around the issue indicates a point in the CCM.<sup>76</sup> The CCM is, drawing upon the ideas of Ronald Dworkin, “the political morality presupposed by the laws and the institutions of the community.”<sup>77</sup> However, unlike Dworkin’s particular theory of interpretation, the CCM is an “indirectly evaluative” theory that evokes moral norms to explain why the law is the way it is, not to justify the law.<sup>78</sup> When judges invoke the principles of the CCM, they are using the principles to ground their decisions in an existing political and legal framework of the community. They use the CCM to figure out what the community has legally committed to, and therefore what interpretation of the law in question will preserve the continuity and consistency of the

---

<sup>73</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 225.

<sup>74</sup> Ibid., 225.

<sup>75</sup> Ibid., 225. Also see footnote 15.

<sup>76</sup> In this particular instance, the court did not make a ruling on the issue of same-sex. In the *Reference re Same-sex Marriage* (2004) SCC 79, the court declined to rule on the constitutionality of the definition of marriage. Instead, they left it to parliament, who passed Bill C-38 in 2005. See the Civil Marriage Act (S.C. 2005, c. 33).

<sup>77</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 227.

<sup>78</sup> Ibid., 227.

community's legal commitments. The CCM is not used to justify the decision itself.

### *2.7 Responding to the Critics*

Now that I have explained the theory of common law review and the idea of the CCM, I will briefly explain how Waluchow's theory responds to the various arguments of the Critics. The responses to the questions about judges as moral experts and their use of personal morality are built right in to the common law theory and the CCM itself. Judges are not expected to be moral experts and are not using their own moral preferences in Charter cases. As Waluchow points out, there is a difference between saying a question hinges on a judge's personal morality and saying that the question hinges on the judge's views about what the community's constitutional morality requires.<sup>79</sup> Judges are tasked with figuring out what the community's commitments are, not about what is best in a particular case. This response also addresses the problem with judges as moral experts, philosopher kings, and the like. Since we must rely on *somebody's* judgement in a wide variety of fields and cases, it makes sense to rely on a judge's judgement in the case of legal decisions. If we accept Waluchow's argument that the constitutional morality develops through common law methods, then judges, who have studied and trained to work within the common law system for their entire careers, are experts at the kind of legal reasoning and discovery of the relevant legal principles, and are well placed to make the kinds of decisions required.

---

<sup>79</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 231.

With respect to worries about the protection of minorities, Waluchow's answer comes once again from the basic account of his theory. Since the role of the judges is to decide in accordance with the true moral commitments of the CCM, and the CCMs of all modern constitutional democracies reject any opinions that oppress minorities, then judges will always be bound to decide in accordance with minority protection.<sup>80</sup> As Waluchow argues, the community's constitutional morality is

the product of much moral and legal experience, longstanding traditions, and social consensus... it is the product of sustained efforts on the part of a great many people, each pursuing a form of largely bottom-up, case-by-case reasoning about issues of political morality for which the common law is applauded.<sup>81</sup>

Because of the nature of the CCM and its development, judges are likely to provide a better guarantee of minority rights than any populist institutions. They do not face the kinds of political pressures of elections, interest groups, constituents, and other political forces that might influence the decisions of elected representative legislators.

The last, and arguably most important, problem that Waluchow's theory addresses is the worry that judicial review is undemocratic. There are a number of different aspects to this worry, but the basic idea is that it is disrespectful to a democratic community and its representatives to assume that their judgements about issues related to their own CCM are not as good or trustworthy as those

---

<sup>80</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 237. It is important to note that this kind of minority protection is not a necessary feature of a CCM. The CCM of Nazi Germany, for example, did not include any such protections. A CCM, per se, does not have any content requirements. Each particular nation's CCM is composed of the principles that the nation has committed to specifically. It happens to be the case that most Western constitutional democracies have enshrined some kind of minority protection, and so many CCMs involve these kinds of protection principles.

<sup>81</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 237. 238.

made by judges about the same issues.<sup>82</sup> One part of the democratic worry is that a constitution with a written charter embedded in it fixes moral points that constrain the present population. Waluchow responds to this worry by reminding the critics of the conceptual shift that his theory presents. This worry only exists if one thinks that charters are meant to produce fixed points of moral agreement.<sup>83</sup> The common law theory allows that the principles enshrined in the charter remain with some measure of fixity provided by the abstract terms, but that there is also fluidity through the guidance of the CCM.<sup>84</sup> Representative of Waluchow's response to this worry, and his theory in general, is the "humble message" that he delivers:

We do not know, with certainty, which moral rights count, why they count, and in what ways and to what degree they count in the myriad circumstances of politics. What we do know, however, is the following... [our Charter] constitutes, at least for the time being, a reasonable answer to the question of which moral rights deserve constitutional protection... [we do not now know] the many concrete questions of rights which will inevitably, and in unforeseen ways, come to the fore when government power is exercised...<sup>85</sup>

Charter review using the CCM provides a way of respecting rights without constraining the democratic population by being too prescriptive in legislating moral provisions. But even after addressing the democratic worries about constraints on self-government, critics like Waldron continue to press the worry about judicial review's democratic legitimacy.

Waldron argues that there is "disagreement all the way down" on issues of political morality, and that as a result, we cannot agree on any kind of points of

---

<sup>82</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 237, 239.

<sup>83</sup> Ibid., 243.

<sup>84</sup> Ibid., 244.

<sup>85</sup> Ibid., 246.

pre-commitment in charters; the only way to approach this disagreement in public life is to give those with a stake in the decision the “right of rights,” i.e. the right to participate in the decision-making process.<sup>86</sup> There can be no results-based criteria for decision-making procedures if there is disagreement about what the results ought to be. However, if disagreement indeed goes all the way down, then there can be no agreement on the kinds of procedural criteria either. If disagreement is as deep as Waldron claims it is, then there is no decision-making solution in politics that is not challenged by the claim of reasonable disagreement. Waluchow calls this problem that Waldron faces the “Cartesian Dilemma” because, like Descartes and his radical doubt, Waldron subjects everything in politics to a “no reasonable doubt” criterion, and as a result, he is unable to use the problem of reasonable disagreement to reject any arguments in favour of charters.<sup>87</sup>

The Cartesian Dilemma responds to Waldron’s procedural critiques against judicial review, but Waluchow also gives a positive argument in support of judicial review that speak to its role in a democracy. The circumstances in which rules are made and enforced provides a dilemma that all democratic societies (and all legal societies more generally) must face. There is need for general rules that can be applied without judgements about background considerations, but there is also a need for room at the point of application for further considerations due to unforeseen circumstances.<sup>88</sup> Waluchow highlights Hart’s ideas of the open texture of the law in general legislation that allows for

---

<sup>86</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 250.

<sup>87</sup> Ibid., 237, 254.

<sup>88</sup> Ibid., 259.



judicial discretion in penumbral cases.<sup>89</sup> The common law provides the kind of case-by-case reasoning in the penumbral cases that require more sensitive treatment of particular details than the blunt instrument of legislation can address.<sup>90</sup> Judges provide the bottom-up approach that allows for particular decisions to be made in specific cases. The kinds of norms that are involved in constitutional charter cases must be addressed as particular cases of general rules, and since the norms of constitutional cases that are part of the CCM are similar in structure (in terms of abstract words or principles with a penumbra of meaning) to the norms of other legal cases, then it makes sense for judges to deal with the particulars instances of these kinds of cases.<sup>91</sup> Courts also benefit from their structures of adjudication that deal with specific arguments about narrow questions that can result in definite answers when needed. Legislatures are more suited to addressing more general issues that can be resolved through the broader tool of legislation.<sup>92</sup> But in this specific case-by-case approach that can provide answers to particular cases, the “practical reality suggests that we do well to assign courts a prominent role in shaping, through the process of case-by-case, common law development, the norms of the community’s constitutional morality that figure in its Charter.”<sup>93</sup> And as a final punctuation note for the argument in favour of judicial review, Waluchow reminds the critics and advocates alike that there is nothing in the argument for judicial review that requires judicial

---

<sup>89</sup> Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 259.

<sup>90</sup> *Ibid.*, 261.

<sup>91</sup> *Ibid.*, 263.

<sup>92</sup> *Ibid.*, 268.

<sup>93</sup> *Ibid.*, 269.

supremacy.<sup>94</sup> The final say in constitutional matters can be given to the legislature. The review of Charter provisions by the courts is not a process that upsets the democratic structure of a political society; it is just one more part of the democratic process that includes, but is not limited to, an elected assembly of representatives.

By reframing charter review as a more humble process that supplements the democratic nature of a constitutional system, Waluchow answers all of the worries that the Critics have about charter review. His account of judicial review does not thwart the democratic will of the people because it is an expression of the public's commitments. The entrenchment of the Charter is not as troublesome as the Critics make it seem because of the possibility of incremental change through the common law format. And the fact that judges are applying principles of the community through the structure of the common law method minimizes the worries about the respect for persons, the role that judges have in the process, and the elite status of the courts. If judges are using the precedent set in the past and principles of the CCM to make decisions, then they are not acting as elites or disrespecting citizens. In fact, quite the opposite is happening. Judges are respecting the commitments that citizens themselves have actually made as expressed by their public legal actions, by voting, by their representatives choices, by legislation, and the like. The fact that there is disagreement about the issues in question does not pose a problem for the theory. Waluchow's theory recognizes the disagreement and the tendentious issues at stake and aims to provide a solution to cases that arise that is based only in principles that can be established from the legal expression of the political society. If there is genuinely no

---

94 Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*, 269.

overlapping consensus on an issue, then judges have no guidance from the CCM and should leave decisions of these sorts to the legislature to make.

Armed with Waluchow's response to the Critics' case, I will now return to the Incompatibilists' arguments. In this chapter, I set out the Critics' case and established the analogy between the Critics and the Incompatibilists. I then explained Waluchow's common law theory, especially the role of the community's constitutional morality, and how this theory responds to the Critics. The next chapter will explore how Waluchow's solution to the Critics' case can also be a solution to the analogous Incompatibilists' arguments.

### **CHAPTER 3**

#### **An Argument by Analogy: Answering the Incompatibilists**

In the previous chapter, I set out Waluchow's response to the Critics in the form of his Common Law theory of judicial review featuring the concept of the Community's Constitutional Morality. I began with the Critics of judicial review and drew an analogy between the Critics' case and the Incompatibilists case against international law. The analogy is based on the categories of critiques about principles, structure, and methods. After explaining the analogy between the two arguments, I gave an account of Waluchow's theory and the way it responds to the Critics of judicial review.

My goal in this chapter is to argue that Waluchow's solution can, and ought to, apply in the international context in a way that responds to the Incompatibilists concerns. I will begin by arguing that the common law theory, as Waluchow presents it, is an appropriate response to the problems about international law in a constitutional democracy. Using the analogy between the Critics' case against judicial review and the Incompatibilists' case against international law described in the previous chapter, I will argue that Waluchow's theory can be used as an argument in support of international law. Recall from the first chapter that not all kinds of international law are subject to the critiques of the Incompatibilists. It is customary law and treaties that are not explicitly implemented that the critiques focus on and that can be helped by the common law theory. I will argue that Waluchow's theory can extend to judicial actions related to international law. After establishing the possibility of Waluchow's theory as a solution to the Incompatibilists, I will then explain in more detail how

his theory actually provides this response, focusing on the arguments about the principles, the structure, and the methods that I outlined in Chapter 2. I will conclude the chapter by discussing the implications that my argument has on how judges ought to be addressing customary law issues in domestic courts in order to remain true to the principles of the CCM.

### *3.1 Applying the Analogy*

We have established three out of the four puzzle pieces needed for my general argument. The idea is that, if the Critics' case is answered by Waluchow's theory, and if the Incompatibilists case is analogous to the Critics' case, such that they pose the same kinds of challenges, then a solution like Waluchow's theory, or one that offers the same kinds of responses to the challenges, will provide an analogous solution. I have established the analogy between the two critiques, and a response to the Critics' case. Now is the time to take that response and explore the analogous response to the Incompatibilists case. The first step in this process is to understand how Waluchow's theory of common law review and the CCM could be applied to the Incompatibilist critiques in question. In order to show that the theory can be used as a response to the problem, I must show that it is a solution compatible with the parameters of the problem.

### *3.2 Context: Different Kinds of International Law*

The argument about compatibility begins with the distinction between different kinds of international law that was made in the first chapter. Treaties, the international agreements made explicitly by states, have fairly straightforward applications domestically. While it varies from state to state, it is

often the case that treaties require some form of implementation by the elected representatives of the domestic government. Canada, for example, requires some form of implementation for a signed treaty to have effect within domestic law.<sup>1</sup> As a result of this separation of powers between what the executive can agree to in the international sphere and what the legislative bodies accept as law domestically, many of the democratic worries of the Incompatibilists do not apply. As I argued in Chapter 1, in the case of the implementation of ratified treaties, the legislature is able to directly address the international law in question and, as a result, are fully expressing their democratic mandate. The domestic law-making process follows the same basic steps as it would in any other case; the difference is that the subject matter relates to an international agreement. There is no worry that there has been an undermining of the constitutional democracy or that an in-principle incompatibility exists. The international law itself may have been created in a non-democratic process, but by directly addressing and implementing it, the legislature makes it into a constitutionally legitimate and democratically made law domestically.

These kinds of international laws are not the ones that threaten constitutional democracy in the way the Incompatibilists claim because they do not suffer from any democratic deficiencies. Consequently, these kinds of laws do not need to be defended against the Incompatibilists. They do fit within the solution that I am proposing here in the same way that any other domestic law does, but I will not focus on them. The more interesting (and arguably more problematic) cases of international law include customary law and the unimplemented treaties that are theoretically automatically incorporated through

---

<sup>1</sup> Supra notes 83-84, (Chapter 1).

existing legislation. Both unimplemented treaties and customary law are subject to the critique of the Incompatibilists. Neither of these kinds of law have the democratic pedigree that an implemented treaty boasts, given that one kind involves treaties that the executive branch signs onto with the understanding or intention that the contents of the treaty are covered by existing Canadian law, or treaties that have been ratified internationally but not addressed by the legislature, and the other requires significant judicial discretion. Both face the full force of the Incompatibilist critiques. But they are also key candidates for the successful application of the common law theory.

In both cases, the critiques of the Incompatibilists only properly emerge in court cases. The issue of whether or not an international custom or an unimplemented treaty counts as a Canadian law is an abstract issue of minor legal significance until some act is committed either under the supposed law or in breach of it. When this kind of act occurs, the courts must then determine the role of the international norm in the domestic legal case.<sup>2</sup> The Incompatibilist arguments apply most strongly at the moment of judicial decision-making. Both the theoretical and practical critiques the Incompatibilists make are most troublesome when directed towards judicial review. As such, I will focus my response on the critiques at the point of judicial review.

### *3.3 Applying the Common Law Theory*

Before I describe the application of Waluchow's theory, I will first address the fact that the domestic case he deals with involves constitutional laws, while

---

<sup>2</sup> This scenario raises concerns about the rule of law and expectations that the law can be known ahead of time, but these questions are beyond the scope of this project.

the international cases that the Incompatibilists are critiquing involve a combination of international and domestic (but not necessarily constitutional) laws. Oftentimes, international cases are directly related to constitutional laws. Cases about international rights or federal powers, for example, are constitutional cases and thus involve the CCM. The subject matter of international laws that are applied domestically is often directly related to constitutional issues about jurisdiction, land disputes, and, in particular, human rights. Any of these cases would require judges to draw from the CCM since the domestic laws relevant to the international laws in question are constitutional.

In the cases that do not involve constitutional norms, the principles that judges use are less specific; instead of relying upon the community's *constitutional* morality, they just have to look at the relevant political morality. Instead of using Waluchow's idea of the Community's *Constitutional* Morality, the CCM, we can call the relevant morality the "Community's *Legal* Morality," or the CLM. The CLM is very similar to the CCM and differs only in terms of the source of the norms involved and the level at which it is applied. The level of the relevant jurisdiction dictates the content of the CLM. So, for example, at a provincial level, the principles that are relevant to the CCM of the province are those expressed through the law of the province. The constitutional still limits what counts as law, but the relevant precedent and legal-political decisions on which judges rely will vary. A case related to international law and a province's claims might look to the CLM of that province as expressed in its laws. The level at which the CLM is measured (locally, provincially, or constitutionally) does not change the way in which decisions are made. It only changes the scope of the set of principles that are relevant to the decision. The CCM represents the highest



standard of a community's morality because it necessarily involves commitments related to the constitution. The legal commitments of the CLM might be part of the CCM, but represent lower level legal commitments.

With the addition of the CLM to Waluchow's theory, the basic application of the common law theory to the international case is straightforward. Like in domestic constitutional cases, a case involving international law is presented to the courts. The first step is to determine what the relevant laws require and whether there is a directly applicable precedent. Sometimes there are clear answers to these questions. These are the easy cases. It might be that Parliament has passed a law that covers the international norm, thereby leaving the judges with a clear indication of the correct decision. But it is always the hard cases that gain the most attention and are more difficult to address. As in purely domestic cases, the cases involving international law might have abstract language that does not provide a clear answer or is underdetermined in some way. If domestic and international laws cannot directly answer the question the courts face, they look beyond the text of specific laws to other sources. The most direct way to answer a hard question is to look to the precedent of prior cases. Just as the common law theory of constitutional review describes, and as I described in the first chapter, there is a continuous and gradual adaptation of the relationship between domestic law and international law through common law court cases. Each time a particular decision is made domestically, it sets a precedent. In the domestic context, each decision becomes part of the CLM or the CCM (depending on the level of domestic law involved), which changes as decisions are made by the courts and other legal or political entities. When the courts are dealing with international cases, the decisions they make are related to international law but

also set precedents domestically. As such, they become a small part of the CLM or CCM as they become legally binding precedent that will, in the future, inform the ways that related cases are decided. Judges making decisions in domestic courts about international issues are bound by domestic precedent. And as Waluchow argues in his theory, the precedents that the judges follow in these cases are dictated by the CLM or the CMM, but also becomes part of the relevant community's morality.<sup>3</sup>

The CCM plays the same role in decisions about international law as it does about any other judicial decision. But instead of looking to find the reflective equilibrium on a particular issue of political morality under the Charter alone, the courts are looking for a reflective equilibrium on the sometimes-controversial provisions of international law. If the legislature has made a decision or declaration about a particular international issue, then that forms part of the CCM that the judges use to inform their decision. And decisions made by the executive branch and legislature also form part of the CCM. Recall that judges rely on the principle of conformity that says "parliament is not presumed to legislate in breach of a treaty or in a manner inconsistent with the comity of nations and the established rules of international law," when deciding cases.<sup>4</sup> This principle reveals an assumption about the role of executive decisions on international matters in the domestic legislature, and therefore in the community's morality. Judges are expected to look to decisions by the other domestic political entities as an indication of any potential overlapping

---

<sup>3</sup> Supra Note 73, (Chapter 2).

<sup>4</sup> Brunnée and Toope, "A Hesitant Embrace," 21. (Supra note 64, Chapter 1).

consensus. The basic setup of the common law theory and its reliance on the CCM does not change when the cases in question involve international law.

While the basic setup does not change, there do seem to be a couple of *prima facie* differences that might cause problems for my argument. The first difference, about the constitutional nature of the CCM that is lacking in some international cases, was addressed at the beginning of this section by introducing the less specific version of the CCM, the CLM. The other difference is the source of the legal materials involved in the case. In domestic constitutional cases, the relevant laws are those that have been passed by domestic institutions, laws developed through common law, and the constitution itself. In cases involving international law, the relevant legal materials may include domestic or common laws and the constitution, but also include international laws that are either treaties or customary law. International laws, as their name suggests, are created beyond the borders of the state. Treaties that have been incorporated by Parliament have corresponding domestic law, and so do not bear on this discussion. But treaties that have been signed but have not been implemented and customary law both count as sources of law that are separate from domestic sovereign power. This fact could make the source of law a problem for the use of the CCM. It warrants a more in depth response.

I will first address those laws that have been made as signed treaties or international accords, but have not been explicitly implemented by parliament. These unimplemented treaties are problematic for judges. For example, in *Ahani v Canadian (A. G.)*, the court argued that

Canada has never incorporated either the Covenant or the Protocol [related to access to human rights] into Canadian law by

implementing legislation. Absent implementing legislation, neither has any legal effect in Canada.<sup>5</sup>

This view expresses only a narrow understanding of the way international treaties might relate to domestic law. It is problematic in its approach because, as Brunée and Toupe argue, “where no legislative action is required to bring domestic law in line with Canada’s treaty commitments, it seems absurd to insist on explicit statutory implementation.”<sup>6</sup> Their argument is particularly important because Canada frequently argues that it is in compliance with the ICCPR because the Canadian Charter of Rights and Freedoms addresses the relevant norms.<sup>7</sup> It is a rejection of the rules of incorporation to require specific explicit implementation. The courts are supposed to be looking to Canadian legislation to see if international laws are *already covered* by existing legislation. This kind of requirement is an explicit recognition that the CCM has a role in the judicial decision. If the court finds that there exists legislation that covers the international principles at stake, then that international law could be considered implicitly implemented. Even if a court feels as though it should not be allowed to accept international law, alone, as a binding source of law in the domestic context, the existence of domestic law that covers the norms of the international law provides judges with a legally binding source of those norms, even if it is not a direct recognition of the international claims. Such domestic laws, as valid expressions of the democratic law-making process, are not subject to the Incompatibilists’ worries. The use of the CCM in this context gives judges the means to seek out and identify existing legal norms that are directly relevant to

---

5 Ahani v. Canada (Attorney General), 2002 ONCA 58 O.R. (3d).

6 Brunnée and Tooze, “A Hesitant Embrace,” 28.

7 Ibid., 30.

the international question at hand. When doing this, they are not “picking and choosing” between international norms if they are only using the international law that is at stake in the case and are rigorously considering all of the potentially relevant domestic law.

Of course, if the international law is not covered by existing legislation, then judges cannot accord it legal status. This scenario is akin to the moments in the domestic context when the CCM simply does not speak on a particular issue. If there is no clear and legally defensible answer to a particular question, about the principles of the CCM or the status of the international law, then judges should be cautious. It is in these moments that judges ought to refer the issue back to the legislature. Exactly how judges make such a referral depends on the situation. In a reference case, the court might refrain from speaking on the constitutionality of an issue as they did in the same-sex marriage case, allowing parliament to make a final decision.<sup>8</sup> The courts can also make a suspended declaration of invalidity. In the *Schachter v Canada* case, which addressed the remedies available for laws impugned under the Charter, the court held that there was “the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations.”<sup>9</sup> This kind of suspended declaration of invalidity allows the court to pass judgement on a law but also allows parliament to redress the issue and to have the final legal say. These kinds of abstentions by the courts are not a failure in the system. They represent recognition of the fact that the issues being addressed are complex and that we cannot always agree on the answers. They

---

<sup>8</sup> Supra notes 75-76, (chapter 2)

<sup>9</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679.

also represent the idea that, in the cases where there is genuinely no way of determining the legal status of an international law in Canada, the decision could be left up to the legislature. Nothing about the common law theory or the CCM requires judicial supremacy, so there is always room to bring the legislature in. This question of judicial supremacy, or of which government branch ought to have the final say in legal matters, is important. I will return to it later and question the assumption, made by the Incompatibilists and by theorists like Waldron, that it ought to be parliament or “the people” who have the final say in controversial cases like these.

The other source of legal norms in question is from customary international law. Recall from the discussion of customary law in chapter 1 that there is a doctrine of adoption that claims “customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation,” as the court declared in *R v Hape*.<sup>10</sup> Parliament can create laws contrary to customary law in a valid act of its domestic sovereignty. If such a law is created and comes in conflict with an international customary law, then the courts must apply the enactments of parliament.<sup>11</sup> This framework sets up a seemingly straightforward process in which the courts take the relevant customary international norm and apply it as law in cases unless it directly conflicts with domestic law. However, both the identification of international customary law and the process of judicial application of customary law seem to be

---

<sup>10</sup> *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292, in Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 182.

<sup>11</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 153.

difficult or contested.<sup>12</sup> Despite the seemingly difficult nature of the identification and application of customary law in domestic courts, I will argue that it is, in fact, within the scope of judges abilities to satisfactorily do both. This argument relies on the analogy that I drew earlier, and focuses on a particular aspect of that analogy. The methods of determining international customary law are strikingly similar to those methods that Waluchow argues judges use to identify common law principles, and in particular, the principles of the community's constitutional morality.

According to reports by the International Law Commission (ILC), the use of “state practice” combined with “*opinio juris*” sets out the scope of customary international law as the rules that are derived from a general practice accepted as law.<sup>13</sup> The first part of this combination amounts to the actual state activity, while the second element is about the belief of a state that it was under a legal obligation to behave a certain way.<sup>14</sup> What counts as evidence of a general practice of law might vary between circumstances, but the evidence (for either the practice or the *opinio juris*) can include statements by state officials, diplomatic correspondence, national court jurisprudence, official publications, the opinions of legal advisors, and actions connected to resolutions of international legal organizations or conferences.<sup>15</sup> The general scope of customary law (practice and *opinio juris*) is analogous to the overall framework of Waluchow's theory of the CCM, and the guidelines for determining the specific details of customary law

---

<sup>12</sup> See Chapter 1, “*Returning to the Incompatibilists*.”

<sup>13</sup> Michael Wood, Special Rapporteur, “Second report on Identification of Customary International Law,” International Law Commission, 66th session, UN General Assembly, A/CN.4/672, (2014): 6-7.

<sup>14</sup> Supra notes 55-59, (Chapter 1).

<sup>15</sup> Wood, “Second report on Identification of Customary International Law,” International Law Commission, 66th session, UN General Assembly, A/CN.4/672, (2014): 74.

according to the ILC are very similar to the way judges determine precedent and principles of common law. Recall that a community's constitutional morality is

the set of moral norms and considered judgements properly attributable to the community as a whole as representing its true commitments, but with the following additional property: They are in some way tied to its constitutional law and practices.<sup>16</sup>

The CCM is made up of actions related to the constitution, including judicial decisions, legislation, official reports and expert opinions, plus the principles and beliefs of the relevant community behind the considered judgements being made. For judges to make decisions based on the CCM, using the common law procedure that Waluchow outlines, they look to the same kinds of sources that the ILC describes as source material for customary law.<sup>17</sup> Judges must find the same content, namely actions and principles or beliefs about legal obligations, in international law as they do in domestic law using the same kinds of sources. The skills that judges must use and the processes they must follow are the same in both instances of law. Waluchow argues that judges are well placed to practice these kinds of skills and functions because of their history with the common law. And if the scale can shift from a local common law court to provincial, federal, or constitutional courts, then it is feasible for the skills to apply in a broader international context as well. For example, the decisions of international courts are just as accessible to domestic judges as the decisions of provincial courts, and the resolutions passed by the UN General Assembly are just as publically proclaimed as those by the Canadian legislature. Just as Waluchow argued that judges can make constrained and principled decisions about the CCM using the common law theory, I argue that judges can make constrained and principled

---

<sup>16</sup> Supra note 53, (Chapter 2).

<sup>17</sup> See section 2.6, "*CCM and the Common Law Method*."



decisions about international customary laws. The arguments that Waluchow makes in favour of the common law theory can thus be applied to customary law.

While it is true that in the international context, unlike in a constitutional democracy, judges are making decisions about law that is not directly produced by an elected body of representatives, it does not mean that the process is wrong or even undemocratic. I will return to the issue of democracy when I respond to the Incompatibilists. The point to highlight here is that judges are not unconstrained in their decision-making. They must give evidence of the principles, actions, or *opinio juris* on which they rely, and the evidence of these features develops over time. Just as the common law builds and specifies precedent about particular kinds of cases, so too does customary law. As states interact with each other, making political and legal decisions as bilateral or group treaties, and as courts make decisions about particular cases, the customary international law evolves to reflect current precedent. And domestic practices through legislation or court cases also serve as evidence of states beliefs and commitments to customary law. For example, in *R v Hape*, the Supreme Court confirmed an international custom about the automatic incorporation of international customary law, thereby reflecting Canada's acceptance of the custom and providing support for its existence as binding law.<sup>18</sup> Canada is not isolated from the creation of customary law. International and Canadian norms influence each other. For example, there is evidence that Canada has rejected torture as reflected in international conventions to which Canada is a party, and these international norms to which Canada is bound help inform the

---

<sup>18</sup> *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292.

constitutional norms against torture domestically.<sup>19</sup> Just like the common law, international customary law develops over time. When courts make decisions about it, they are not “picking and choosing,” as the Incompatibilists fear, but are finding the most relevant sources of information to inform the decision about the current state of the customary norm in a particular question.

Regardless of the argument that customary law need not present a threat to democracy, there is a procedural democratic safeguard against customary law that exists within the theory I am describing. It is the practice of most common law jurisdictions to accord statutory law priority over common law in cases of conflict. Moreover, it is also generally accepted that statutory law can supplant an entire line of common law procedures. The legislature has the opportunity to pass laws that are specifically contrary to a customary law, or that directly rules against the courts. Recall that there is nothing in Waluchow’s account (or mine) that requires judicial supremacy. For any particular issue that the courts have ruled on in relation to international law—or domestic law, for that matter—the legislature has the freedom to redress the issue. Even if the legislature does not want to directly speak to a particular international issue, the principle employed by the courts saying that “parliament is not presumed to legislate in breach of a treaty or in a manner inconsistent with the comity of nations and the established rules of international law,” allows them to avoid taking a stand on a particular issue while still allowing for their legislation to be, as far as possible, in alignment with Canada’s international commitments.<sup>20</sup> This sort of implied acceptance of international principles is an important way of ensuring that none of Canada’s

---

<sup>19</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 157.

<sup>20</sup> Brunnée and Toope, “A Hesitant Embrace,” 21.

domestic laws accidentally conflict with international laws. However, while it helps with interpretation, it also points to a problem in the process of adopting international laws that I mentioned before and now have the tools to address.

### *3.4 Problems of Implementation and Custom*

There is a sense of uncertainty and disagreement about how the more ambiguous cases of international law ought to be handled domestically. Courts do not always agree on the ways in which different international norms are used in decisions or on the ways that count as a ratified international law becoming domestic law in Canada. As Brunée and Toope have argued, there is only a hesitant embrace of international law by the courts. They see a trend—which they argue against—towards international law being considered relevant, and even persuasive, but not determinative or obligatory in judicial decisions.<sup>21</sup> Part of the courts' hesitation in applying customary law might be related to the fluidity of the customary law and the challenges in determining its contents.<sup>22</sup> In theory, customary law is law in Canada. In fact, the Supreme Court confirmed this idea in *R v Hape* when they said

the doctrine of adoption [of customary international law] has never been rejected in Canada... following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary... Absent an express derogation, the courts may look to prohibitive rules of customary

---

<sup>21</sup> Brunnée and Toope, "A Hesitant Embrace," 5.

<sup>22</sup> Ibid., 16.

international law to aid in the interpretation of Canadian law and the development of the common law.<sup>23</sup>

Despite this clear declaration of doctrine by the courts to accept customary law as Canadian law, judges are sometimes reticent to invoke customary norms. Instead, they often characterize international norms as general principles of international law (and therefore not legally binding) instead of as binding customary law.<sup>24</sup>

A similar kind of uncertainty exists with respect to unimplemented ratified treaties. An unimplemented treaty, if covered by existing implementation, is technically considered implemented.<sup>25</sup> Yet despite this legitimate expression of implicit incorporation, some courts claim that, absent implementing legislation, an international law has no legal effect in Canada.<sup>26</sup> C.J. Laskin held the view, in the 1970s and 1980s, that implementation of a treaty must be manifest, not inferred, so that courts tend to look for explicit statement of the intention to implement the treaty before they give it effect in Canadian Law.<sup>27</sup> In the absence of clear indication, the courts have treated many treaties as unimplemented. Though the presumption of conformity with international obligations is invoked in most Charter cases, and the Charter is clearly inspired by international law, there is no explicit legislative statement that it is a transformation of international law.<sup>28</sup> Where some see the Charter as a direct expression of international rights commitments, others see international rights as mere

---

<sup>23</sup> *R. v. Hape* [2007] S.C.C. 26, s.39.

<sup>24</sup> René Provost, “Judging in Splendid Isolation,” in *The American Journal of Comparative Law* 56 no.1 (2008): 137.

<sup>25</sup> Brunnée and Toope, “A Hesitant Embrace,” 26-27.

<sup>26</sup> *Ibid.*, 30.

<sup>27</sup> Kindred, Saunders, and Currie, “Chapter 3—National Application of International Law,” 175.

<sup>28</sup> Brunnée and Toope, “A Hesitant Embrace,” 26.

guidance for Charter interpretation.<sup>29</sup> Even more confusing is the fact that Canadian courts cite both binding and non-binding sources while giving them equivalent interpretive weight.<sup>30</sup> There are presumptions about the obligations that Canada has made by signing and ratifying treaties, but there are also presumptions being made about values and principles found in international law. Justice LeBel once described international law, as used by the SCC, as comparative law, thereby allowing them to avoid ruling on the binding status of international law.<sup>31</sup> This avoidance gives the courts a kind of legal “loophole” when approaching international law.<sup>32</sup> Rene Provost argues that this loophole also frames the state’s conduct in different normative spheres, which leads to

an inward looking stance and the institutional ‘blindness’ that block the consideration of an international dimension make it possible to construct a narrow conception of the judicial function...[and] leads to a rigidly dualistic stance and to a denial of any direct application of international law in national law.<sup>33</sup>

The idea is that there are doctrines and principles dictating the ways in which international law has effect in Canada, and that by ignoring these methods of engaging with international law, we will be ignoring norms that are legally binding in Canada.

These common law principles and doctrine involved in the arguments about international law provide a good way of introducing Waluchow’s common law theory as a means of responding to the uncertainty and disagreement about international law in Canada. If judges follow the process of the common law

---

<sup>29</sup> Brunnée and Toope, “A Hesitant Embrace,” 26, and *supra* notes 7 & 8, Chapter 3.

<sup>30</sup> *Ibid.*, 35.

<sup>31</sup> Provost, “Judging in Splendid Isolation,” 145. Comparative law only has persuasive force in a court’s argument, and as such is not a source of binding norms.

<sup>32</sup> *Ibid.*, 146.

<sup>33</sup> *Ibid.*, 147-148.

theory of judicial review, relying on the precedent of past constitutional and international cases and using the CCM to guide their decisions, then the problems with both the customary law and the unimplemented treaties can be addressed. The doctrine of adoption explicitly stated in *R. v. Hape* provides a strong precedent for judges to follow with respect to customary law. They are legally bound by precedent to follow the doctrine of adoption and recognize customary law as binding law in Canada and not merely as general principle. Furthermore, the recognition of the history of this doctrine confirms that the principle of adoption has been held in the past and is still currently held. The CCM and common law reasoning also prove useful in this case by providing the judges with a way of establishing the relevant norms at stake and determining the details of the customary norms. Judges are well practiced at common law reasoning, and as I described in the previous section, the identification of customary law is not significantly different in method or difficulty.

The application of the common law method and the principles of the CCM or the CLM to the unimplemented treaties case is not quite as straightforward as that of customary law, but it is equally applicable. Based on the country's approach to human rights legislation described above, the presumption of conformity, and the explicit recognition that ratified treaties can be legally covered by existing legislation (see Chapter 1), a case could be made that the CLM of Canada with respect to international law includes the principle that existing domestic legislation can cover treaty obligations, and can therefore act as a means of incorporating treaty provisions without explicit confirmation by the legislature. If there is an international legal norm, binding on Canada that is directly covered by a Canadian legal norm then it is within the scope of common law reasoning for

judges to accept that international norm as binding. The CLM or CCM, including the relevant Canadian laws, the principles related to international law, and the actions of the government in assuming obligations like human rights are already fulfilled by the Charter, gives direct and clear guidance to the nature of the international law. If one looks only at a single judge's opinion about unimplemented treaties, one might argue that the court requires a legislative mandate. But the broader picture of Canada's democratic commitments indicate the possibility of an unimplemented ratified international treaty being covered by domestic law. Of course, not all ratified treaties will count as being implemented by existing legislation. In these cases, the CLM or the CCM may not speak on the matter, and the courts are right to require a decision by the legislature. But the common law method and the principles of the CLM/CCM allow judges to consider each case of an unimplemented treaty as being a possible source of binding law in Canada.

By using the common law method and the CCM as guidance for judges, we can now avoid some of the implementation and interpretation problems that the courts face. Waluchow's theory can accommodate the legal status of customary law through judicial precedent and at the same time engage with unimplemented treaties in a meaningful way that does not usurp the power of the democratic legislature, but that also does not ignore the binding nature of certain international laws. As I have illustrated so far in this chapter, not only can Waluchow's argument be applied as a way of approaching international law in the courts, but it also can help address many of the worries that the courts themselves have about using international law. The final step in my argument is

to take this domestic approach to international law and show that it can answer the critiques of the Incompatibilists.

### *3.5 Returning to the Incompatibilists*

As they lay out the Incompatibilist arguments, Buchanan and Powell briefly point out possible responses to each problem. Their essential argument, the details of which I will review momentarily, is that there is no theoretical incompatibility between international law and constitutional democracy, and that it does not follow from the Incompatibilists' claims that those committed to a constitutional democracy should reject the project of establishing robust international law (RIL).<sup>34</sup>

Recall from the first chapter that Buchanan and Powell sketch the outline of this argument with a point against each of the Incompatibilists' concerns. In response to questions about the need for exclusive accountability to domestic citizens, they argue that this problem assumes that a constitutional government must be accountable to the people alone, and are thus begging the question.<sup>35</sup> The worries about unprincipled judicial borrowing and cherry-picking are answered by pointing to the question of theory versus practice. There will be issues of coherence of international law and domestic law, the authors say, but there is no in-principle reason to assume that there will necessarily be irreconcilable conflicts between international and domestic law that judges will manipulate in

---

<sup>34</sup> Buchanan and Powell, "Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?" 348.

<sup>35</sup> Ibid., 337.



unprincipled ways.<sup>36</sup> The response that the authors give to critiques that focus on constitutional derangement is somewhat indirect. They argue that, while it is true that states might be changed or damaged by introducing international legal norms, the proper conclusion is not that RIL and constitutions are incompatible; rather, one ought to conclude that “the acceptance of RIL is incompatible with the optimal functioning of *the particular form of constitutional democracy that includes those constitutional structures.*”<sup>37</sup> Anyway, they argue, the price of this sort of impact on a constitutional democracy might be worth it as a trade-off to achieve the benefits of RIL. The final set of critiques they address are related to the lack of self-determination and the democratic deficit of international institutions. The worry is that not only are international institutions not democratic, properly speaking, but also that if RIL reaches into domains that have previously been under the control of constitutional democracies (and their citizens) then there is a general loss of self-determination.<sup>38</sup> Buchanan and Powell point out that there are many different forms and degrees of political self-determination, even among modern constitutional democracies. Instead of worrying that citizens might lose some of their power of self-determination, it might be valuable to allow citizens to say how much self-determination domestically they are willing to relinquish to more global institutions.<sup>39</sup>

The conclusion that Buchanan and Powell arrive at after briefly responding to the Incompatibilists is that there is a need to think about the

---

<sup>36</sup> Buchanan and Powell, “Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?” 338-340.

<sup>37</sup> Ibid., 343.

<sup>38</sup> Ibid., 344.

<sup>39</sup> Ibid., 345.

tension between international law and the commitments found within the idea of a constitutional democracy, but that there are no practical conclusions to be drawn in the absence of a more comprehensive political philosophy.<sup>40</sup> After reviewing the cosmopolitan and self-regarding reasons in favour of RIL, Buchanan and Powell state that

mainstream liberal cosmopolitan political theory does not propose a world state; it advocates RIL while assuming the persistence of states. Yet it fails to provide an account of how constitutional democracy and RIL can be harmonized. Such an account, we will argue, would require both a constitutional theory and a theory of political self-determination.<sup>41</sup>

To provide support for their position, and to address the issues they leave unanswered, I will argue that the Common Law theory, with the guidance of the CCM, is the kind of constitutional theory that can help to harmonize RIL and constitutional democracies. It is not a full political theory, but its foundations in existing political and legal theory might prove to be useful. Buchanan and Powell have made the concession here that they need a more specific constitutional theory. I have shown so far that the common law theory can help the courts navigate between international and domestic constitutional laws. I will now argue that the common law theory also provides a more direct response to the Incompatibilists, proving that it can play a harmonizing role between RIL and constitutional democracies.

### *3.6 Answering the Incompatibilists*

---

<sup>40</sup> Buchanan and Powell, "Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?" 349.

<sup>41</sup> Ibid., 330.

I will begin my response to the Incompatibilist worries with the three categories that I described in Chapter Two: i) Principles, ii) Structures of Governance, and iii) Methods of Decision-Making. For each category, I will describe how Waluchow's solutions to the Critics can be applied to the Incompatibilists.

i) Principles

Recall that the critiques in the principles category claim that the proposed legal structure, as it pertains to either international law or judicial review, somehow violates principles at the heart of democracy. In particular, the principles that are most often flouted are those relating to self-determination and self-governance.<sup>42</sup> The specific Incompatibilist arguments that are included in this category are the arguments about the democratic deficit of international institutions, diminished self-governance, and exclusive accountability.<sup>43</sup> They are grounded in a worry about the loss of respect for citizens. Not only does Waluchow's theory answer to each of the worries specifically, it also speaks to the issue of respect.

The response to the issue of the democratic deficit of global institutions is similar to the one sketched by Buchanan and Powell. This worry is founded in the fear of a loss of self-determination, but to assume that institutions that are not representative of a voting population cannot help achieve democratic aims is to assume an especially narrow procedural view of democracy. Waluchow emphasizes this point in his book, stating that the alternative constitutional conception of democracy

---

<sup>42</sup> See Chapter 2, *A Critical Analogy*, "i) Principles"

<sup>43</sup> *Supra* Note 4, (Chapter 1).

views democracy as fundamentally not about which decision-making procedures are followed but about whether, and to what extent, the particular procedures chosen, and the particular decision made using them, respect what Ronald Dworkin calls “the democratic conditions”.<sup>44</sup>

These democratic conditions are subject to disagreement, but they stem from one of democracy’s animating ideals, the principle of equal status.<sup>45</sup> Insofar as an institution aims to (and successfully does) achieve these conditions, it could theoretically be considered an institution of democracy. Waluchow applies this argument to judicial review, arguing that it does not matter that judges are unelected. And just as there are democratic benefits to having an unelected judiciary, so too can there be democratic benefits of unelected international institutions and the norms of international law their decisions attempt to implement and enforce. International institutions, whether elected, appointed, or otherwise mandated, aim to protect the equality of people around the world. There are unelected bodies, committees, and similar organizations that have the power to make law in all modern democracies. These bodies, like the Canadian Radio-television and Telecommunications (the CRTC) or the Food and Drug Administration (FDA) of the United States, are not elected and yet have the power to pass legally binding norms and guidelines under their particular scope of administrative power. These bodies function to regulate particular areas of the law that the legislature or congress cannot address. Their existence and continued role in constitutional democracies shows that it is possible for unelected bodies to perform a legal role in furthering democratic goals.

---

<sup>44</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 107.

<sup>45</sup> *Ibid.*, 108.

Like the democratic deficit issue, the worry about self-governance is based on a fear of the loss of self-determination. The worry is that there will be a loss of self-determination if institutions that citizens do not choose are in control of areas that used to be the domain of elected domestic government. But this worry is unwarranted. While it is true that the executive branch of a state might make decisions about the international laws that bear *on* a country, these laws do not necessarily have any force *in* the country. This chapter has demonstrated that there are no instances in which international law can usurp the power of domestic law. When dealing with treaties, they either must be implemented directly by the legislature, giving the elected representatives the opportunity to explicitly discuss and choose what parts of the law are accepted domestically, or they are indirectly implemented and are addressed in particular court cases. In every case, if the common law theory and the CCM are used, the determination about the legal status of the treaty in question is directly determined by the already-existing commitments of the political community. The CCM represents these commitments as they are expressed through actual legal acts, declarations, writings, and decisions. As such, when a treaty is evaluated to determine whether any existing laws already cover its content, it is evaluated in terms of the commitments of the domestic population. As the genuine political commitments that citizens have made over the course of time, the principles of the CCM allow judges to make decisions according to the determinations of the citizens. While citizens are not making the decisions directly, the decision-making process is guided by the principles to which they are committed. Similar to the unimplemented treaty decisions, the decisions about customary law are also subject to the principles of the CCM. But more importantly, customary law is

made up of actions and beliefs that the domestic government has already expressed. It is a particular part of the CCM, insofar as it is made up of the principles and actions related to international issues, but it must still be evaluated as part of the whole CCM in court cases.

The guidance of the CCM helps courts make decisions about international law according to the commitments of domestic citizens. However, if something goes wrong in the process and there is disagreement about any particular law or decision, the legislature always has the power to overrule the courts or to clarify the domestic law on any particular issue.<sup>46</sup> The legislature can also legislate directly against a particular international law before it reaches the state of judicial review if they decide that it goes against the desires of the citizens. Beyond the law-making power of the legislature, there are more direct ways for citizens to express their desires about particular laws or government actions. Democratic options like elections or referendums can give citizens another way of changing the course of their country's approach to international law. There are many different ways in which the principle of self-governance is embodied. The variability in modern constitutional democracies shows that different forms of government can be an expression of self-governance. Some places, like Canada and the United Kingdom, have unelected senates and elected lower houses. The United States of America chooses its president directly and elects both chambers of congress. And each of these nations has unelected people in positions on

---

<sup>46</sup> The legislature has this power in Canada. In places where there is strong judicial review, this response would not apply. It may seem that a system of strong judicial review poses a greater risk of incompatibility since judges would be able to bind the legislature through decisions about international laws. However, this apparent risk of incompatibility is no greater in a system of strong review than one of weak review. I will address this issue of strong review shortly.

committees that are authorized to make law. Self-government comes in many different forms. The self-governance of citizens through the decisions of elected representatives can be preserved in the courts through the guidance of the CCM. It is not a direct form of democracy, but it represents citizens' commitments nonetheless.

The question of exclusive accountability is motivated by the same concern about the respect of citizens that grounded the previous two issues. But instead of being about the kind of control that citizens have, it is about the accountability of global institutions. Buchanan and Powell respond to this worry by arguing that in worrying about whether international institutions are accountable to people or entities other than domestic citizens, the Incompatibilists are begging the question by assuming that a constitutional government must be accountable to citizens alone.<sup>47</sup> This response is one point where my argument diverges from that of Buchanan and Powell. I am not sure that they are correct in saying that the incompatibilists are begging the question. The issue of to whom a government is accountable is a relevant one, and is becoming more pressing in a world of pluralist claims to power, non-government institutions playing roles that states used to play, and the international interactions among states and citizens. Faced with these complicating factors, I am not going to try and support the claim of question begging that Buchanan and Powell make. My response to the exclusive accountability argument does not rely on determining to whom states are accountable.

---

<sup>47</sup> Buchanan and Powell, "Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?" 337.

Instead, my argument focuses on the idea that Waluchow's theory keeps open the possibility that the domestic legal body that makes, institutes, or enforces the law (domestic or international) can still be exclusively accountable to citizens. It is true that the international bodies that pass laws or make treaties are not exclusively accountable to domestic citizens. They might not be accountable to citizens at all. But domestic citizens are not directly subject to the laws passed by these unaccountable bodies. As I previously argued, all international law is "filtered" through domestic institutions. In Canada, the law must go through the legislature, the courts, or both before it is applied to citizens. The law is also evaluated through the CCM and must cohere with the constitution and all of the relevant legal commitments. Before this process of screening through domestic legal and political bodies and principles, the international law is not applicable *in* Canada. And once the law has been implemented, it is no longer a law that has been made by an unaccountable body, but a law that the Canadian government has put into action in a constitutional way. At this point, the government is as accountable to its citizens with respect to the international law as it is for any domestic law processed by the legislature or the courts. As long as the courts follow the principles of the CCM and the precedent set by past decisions, and as long as the legislature responds to concerns about international issues with debate and revisions in the course of their legislative duties, then there will be the same kind of accountability to citizens with respect to international law as there is for domestic law.

## ii) Structures of Governance

Recall from chapter two that the critiques that fall in the "Structures of Governance" category feature worries that the reliance or use of international law



in a domestic context will somehow destabilize domestic constitutional arrangements. Broadly speaking, the critiques are about changes in the balance of power. The first one, about constitutional derangement, worries that the use of international law by the courts might encroach upon the areas traditionally under provincial power or might give more power to the judiciary. The second critique points to the transfer of power from constitutional democracies to global governance institutions without appropriate democratic authorization.

The main point to be made in response to the first critique about the structures of governance is that laws binding *on* a country internationally do not necessarily or automatically become law *in* that country. If an international law is specifically addressed and implemented by the democratic domestic law-makers, then it has been made into law through official means, following constitutional guidelines that maintain the proper balance of powers. For example, if the Canadian legislature chooses to make a new law to implement a treaty signed by the executive, they are still bound to make that law in accordance with the constitution. The federal government cannot use international law to pass legislation on issues within the provinces' constitutionally mandated jurisdiction. If the international law in question featured content that was within the scope of provincial power, then any laws made by the federal legislature about it would be unconstitutional and open to judges to be declared as such if the issue came up in court. The implementation of any international law in this way is bound by the same rules about law making that any other domestic legislation is bound by. Consider, for example, the 1967 reference case *Re: Offshore Mineral Rights*, in which the court addressed a dispute between Canada and British Columbia over

the rights to explore and mine off the western coast.<sup>48</sup> While international law about the boundaries of territorial waters played an important role in deciding the case, the decision ultimately rested on domestic legislation and case law about land ownership and sovereignty.

The constitutional protection afforded by the courts to domestic legislation applies to treaties being implemented by the legislature and to any laws that purport to be at play domestically. When any case comes before the courts, whether it is based on claims about domestic law related to customary law, unimplemented treaties, or treaties covered by existing legislation, the courts must always address the constitutionality of the claimed domestic law. If judges follow the common law method of interpretation, using the CCM to guide their decisions, then they are in a position to determine whether or not the law in question meets the requirements of the constitution. This process does not give judges more power than the constitution grants them generally; they are participating in the review of laws for their constitutionality as they would for any domestic law, and the fact that the laws in question involve international norms does not change the process. Any international norm that judges rule stands in conflict with the constitution or specifically undermines the federal and provincial balance of power can be declared unconstitutional and addressed accordingly. Some jurisdictions might give courts the final power to declare these kinds of laws unconstitutional, and therefore no law at all. Others, like Canada, give courts a conditional power of a similar sort, allowing them to declare such laws unconstitutional but leaving open the possibility for the legislature to make

---

48 Reference Re: Offshore Mineral Rights, [1967] S.C.R. 792.

alternative decisions.<sup>49</sup> Any international law that contradicts the constitution or puts in jeopardy the balance of powers that the constitution establishes could not have the power to cause the damage that the Incompatibilists fear. An international norm of this sort will not gain the constitutional status of domestic law, thereby avoiding the kind of derangement that the critics fear. And if it were to happen, it would have been a failure of domestic constitutional processes, not an in-theory incompatibility problem.

It is important to remember, in discussing the worries about the derangement of the constitution, that one of the key principles of Waluchow's theory is that the constitution is meant to combine fixity with flexibility.

Constitutions, as Waluchow states, are

living trees whose roots are fixed (by precedent and the terms chosen to express the Charter's moral commitments) but whose branches can develop over time through a developing common law jurisprudence of moral rights...<sup>50</sup>

This ability of constitutions to remain fixed in certain principles and precedents but to also adapt to changes in society over time satisfies Hart's fundamental needs of fixity and flexibility.<sup>51</sup> One of the worries expressed by the Critics of charter review was that people now should not be bound by the people of the past. Without some kind of flexibility, a constitution could tie the hands of a nation in an undemocratic way. The flexibility of a constitution allows it to adapt to changes in the world and in society. And if judges follow the common law method and use the CCM in their decision-making, then the changes that may

---

<sup>49</sup> s.33 of the Canadian Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <http://canlii.ca/t/ldsx>

<sup>50</sup> Wilfrid Waluchow, "Constitutions as Living Trees: An Idiot Defends," in *the Canadian Journal of Law and Jurisprudence* 18 (2005): 230.

<sup>51</sup> *Ibid.*, 230.

occur in constitutional law will not be undemocratic. In the case of international law, it could be that a nation wants to take an isolationist position and ignore or deny any power of international law. The constitutional decisions about international law would eventually reflect this position. But it might also be that a nation wants to embrace a more globalized world in which international law has an important role domestically. In this case, constitutional decisions about international law would reflect this more global perspective. The idea that the international law might have an impact on a country's constitution is only a worry if the change that occurs happens in a way that is not allowed democratically. If the changes to the constitution represent the authentic desires of the citizens of the particular constitutional democracy, then the impact of RIL is not a problem with international law itself, but simply the results of choices made by citizens about their own constitution. Furthermore, with this perspective in mind, the initial response that Buchanan and Powell gave to the Incompatibilists becomes more plausible and palatable. They argued that perceived conflicts between RIL and constitutional democracy would only be instances of particular conflicts between RIL and particular elements of a particular constitutional democracy, and that the price of these conflicts paid through the impact on those particular constitutional elements or structures might be worth the benefits provided by RIL.<sup>52</sup> As an isolated response to the Incompatibilists' worry, this claim of trade-offs does not address the specific fear that democracies will lose something in adopting international law. But in the context of the common law theory, the changes that are happening to constitutional democracies are either chosen by

---

<sup>52</sup> Buchanan and Powell, "Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?" 343.

citizens and their representatives, or based on political principles and commitments that citizens have made (represented by the CCM). And the idea of citizens being able to make decisions about the governance of their own country is part of the foundation of any constitutional democracy. Changes can be chosen according to democratic commitments and will only relinquish something to the RIL if it fits in with the commitments of the people.

The general response to the second critique is similar to these ideas about citizens making decisions about possible changes to be made. The second critique was focused on the worry that there might be an unauthorized transfer of power to international institutions through executive decisions. The first point to make is that the transfer of power need not be unauthorized. There is no in-principle reason, as Buchanan and Powell also pointed out, that a state could not decide to have a referendum or election of some sort if there was ever a case where the domestic acceptance of international law might represent a significant transfer of power. If people decide that they want to allow for such a transfer of power, and it does not represent an unconstitutional relinquishing of democratic domestic sovereignty, then it should be up to citizens to choose how their governments and laws respond to international norms. Whether the democratic worries of the Incompatibilists can be answered by simply giving citizens the chance to vote on the relinquishing of their domestic sovereignty is questionable. Under Buchanan and Powell's solution here, it could be the case that a democracy willingly votes away the full power of its domestic constitutional democracy to an international regime over which they then have no control. So while it may be true that a country could have a referendum about international law to avoid the democratic challenges RIL presents, it is not clear that such a move would be democratic.

Regardless of whether or not a referendum is a democratic solution, it is not the only way of addressing the democratic worries. There need never be a stage in domestic law making or legal application at which international laws are applied that have not somehow been accepted as domestic laws.

Consider the example of Canada's relationship with international law. Some treaties are implemented through legislation. The elected representatives have decided, in these cases, exactly what kinds of international norms are accepted, and no international body has power over Canadian citizens that the legislature did not authorize. Some treaties are considered implemented through existing legislation. Again, these treaties are represented in Canadian law only through the domestic legislation. The normative force of the law comes from the legislature, not from international bodies. In instances where a court is called upon to decide whether or not a treaty is actually implemented through existing law, and if the court relies on the CCM and uses the common law theory, then there is no part of the decision-making process about domestic Canadian law that is not controlled by the legislature, domestic precedent, or Canadian constitutional principles. If a treaty is considered implemented by existing law, it means that Canadian principles, precedent, and legislation give normative and legal force to the international law in question. The international body responsible for the particular norm is not given power over Canadian citizens; the legislature and the courts confer domestic legal status on the international norm. Customary law is addressed through the same process. Judges decide whether or not a customary norm exists as an international norm that is binding on Canada. The process of making such a determination is familiar to judges. Customary law is essentially an international expression of a CCM. A norm is only customary law

if there is evidence of states' actually practicing its contents and states' belief in its bindingness. The CCM is the domestic version of this kind of norm, expressed through the actual legal and political practices of the community and the principles that are evident through these practices. In a case involving an international customary law that Canada is bound by, Canada will have already somehow expressed a commitment to it through official actions and through beliefs about the law and those actions. This commitment can be determined by judges in the same way they determine the CCM principles about any other issue. So if Canada is bound by a customary law, then there will evidence in the domestic CCM to reflect that. If a proposed international norm is not an actual customary law, or if Canada is not bound by it, then judges will be able to show the lack of action and principles as proof that the norm is not binding domestically.

### iii) Methods of Decision-Making

The final category of critique focuses on concerns that international law in domestic contexts will lead to unprincipled judicial borrowing. Since international law is so underdeveloped, incoherent, and wide-ranging, the argument goes, judges in domestic courts will not use it in a principled way. There will apparently be values of international norms that conflict with domestic values. And judges will be able to pick the international law that best suits their own purposes of judicial activism or subjective decision-making. There are many similarities between these worries that the Incompatibilists have and the worries of the Critics of (domestic) judicial review. Indeed, this worry hits upon some of the primary motivating issues of Waluchow's work. He rebuts claims like the idea that judges make decisions using their own personal moralities and the idea that

there is no principled or guided way of finding the answer to difficult constitutional questions in the face of seemingly conflicting options.<sup>53</sup> The Incompatibilist worries (as I discussed earlier in the description of the Analogy) are international versions of Waluchow's constitutional issues.

The common law method and the CCM are designed to speak directly to these issues. Using the common law method, judges have a well-tested way of sifting through the legal details of cases to differentiate particular issues and to find the most fitting precedent. The CCM provides an indication of the proper sources of commitments to rely upon. When judges make a decision in the common law, they are not making personal decisions. Rather, they use the legal precedent and principles of the CCM to construct an argument to determine the decision to make and to support the arguments for that decision. There are many different sources of international norms, and it is possible that judges may have to make a choice about which norms are relevant to a case. When making these choices, judges are using discretion, guided by the commitments of the political community. They are not just "cherry picking" their favourite norms. The legislature can have a say in the choices being made by judges about international laws by implementing or denying the implementation of treaties. If there are international norms that the legislature wants to specify as domestic law or to explicitly reject, then they can do so. When the legislature exercises that power, they give judges another piece of information as part of the CCM that helps to specify exactly what the law says on a particular topic. Moreover, if the court makes a decision about an international law that the legislature does not like, then the legislature can revisit the treaty or rule specifically about the particular

---

<sup>53</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 231.



norm in question. The judicial review process that involves international law is not one in which individual judges can make decisions that best suit their own political ambitions or desires. It is a guided, principled, legal decision-making process that is embedded within a legal system that provides further checks on the results.

Of course, these guidelines do not always point to a single answer, but the fact that the method does not point to a single answer every time does not mean it does not provide guidance in the decision-making process. These difficult cases, where there does not seem to be a clear answer in the law or the CCM, pose a democratic challenge: why is it that unelected judges have the power to review the decisions of the elected legislature, particularly when we disagree about the demands of the law and of the CCM?<sup>54</sup> Why should judges be the ones making the decisions?

Waluchow describes a number of ways to respond to this challenge.<sup>55</sup> First, he says, one could reject constitutional review as Waldron does. A second option would be to support a weak form of judicial review in which parliament can declare legislation notwithstanding the courts' decisions or can ignore judgements of incompatibility by the courts. The third option would be to accept that constitutional review is undemocratic, but can be justified on other grounds.

The fourth option, which is the one that Waluchow pursues, is to argue that strong review is consistent with democratic principles, even in these hard cases. He first draws on the constructive interpretation of what Dworkin calls "*the*

---

<sup>54</sup> Wil Waluchow, "Constitutional rights and the Possibility of Detached Constructive Interpretation," *Problema: Anuario de Filosofía y Teoría del Derecho* no.9 (2015): 31-34.

<sup>55</sup> The four options presented here are all found in Wil Waluchow, "Normative Reasoning from a Point of View," manuscript, (2017): 2-3.

*positive constitution.*”<sup>56</sup> When there is disagreement, controversy, or uncertainty about finding the correct answer in a constitutional case, Dworkin argues that interpreters must exercise a kind of normative judgement to discern the best theory or interpretation.<sup>57</sup> In the case of a judge deciding a constitutional issue, the aim is to provide an interpretation of the issue that puts the community’s constitutional practices in their best moral light.<sup>58</sup> Judges are not, in these instances of constructive interpretation, simply drawing upon their own first-order moral beliefs. Waluchow argues that judges are drawing upon the CCM as a separate normative source. He argues that the CCM,

owing to its social origin in the democratic community, is a source of entrenched, moral norms and convictions upon which judges can justifiably draw in constitutional review without compromising democratic legitimacy.<sup>59</sup>

Even if people disagree about the content of the CCM in particular cases, judges can still draw upon these commitments without inviting the democratic challenge.<sup>60</sup> They do so by reasoning from *the perspective of the democratic community and its first-order moral judgements*.<sup>61</sup> By drawing on the work of Joseph Raz, Waluchow argues that it is possible to approach normative statements from a detached point of view and to express detached normative statements from that perspective.<sup>62</sup> This point of view, in the context of the CCM, requires judges (or anyone reasoning from this point of view) to reason from the moral perspective of the democratic community. When a judge reasons from this

---

<sup>56</sup> Waluchow, “Constitutional rights and the Possibility of Detached Constructive Interpretation,” 28.

<sup>57</sup> Ibid., 28-29.

<sup>58</sup> Ibid., 36.

<sup>59</sup> Waluchow, “Normative Reasoning from a Point of View,” 4.

<sup>60</sup> Ibid., 6.

<sup>61</sup> Ibid., 6.

<sup>62</sup> Ibid., 8.

point of view, she is declaring what ought to be done *according to the law and the constitutional commitments of the community*. Importantly, judges need not believe or accept the view expressed by the law on any particular issue at stake.

As Waluchow argues,

[a judge] may feel compelled to adopt an interpretation that accords with CCM commitments but that fails, from her own personal moral perspective, to put the relevant law in its ideally best moral light... it is, nevertheless, an interpretation that puts that law in its best moral light, *as judged from the perspective of the democratic community and its own particular history of moral decisions and commitments*.<sup>63</sup>

The kind of constructive interpretation that the judge is doing must fit within the point of view of the community, including its history of decisions and commitments of political morality.<sup>64</sup> So when a judge makes a decision about a particular case, it is “the best that it can be *as judged from the perspective of the democratic community and its own particular history of CCM commitments*.”<sup>65</sup> By reasoning from the point of view of the democratic community, the courts can decide cases by drawing on the commitments of the community and the orientation of its political morality.

Waluchow’s theory about reasoning from a point of view responds to the problem of having judges reasoning about constitutional cases by relying on personal beliefs, but it does explain why the courts are a better option for constitutional adjudication than the legislature. To argue in favour of the courts, Waluchow highlights H. L. A. Hart’s circumstances of rule-making.<sup>66</sup> It is difficult to make rules that are general enough to guide conduct, specific enough to apply

---

<sup>63</sup> Waluchow, “Constitutional rights and the Possibility of Detached Constructive Interpretation,” 48-49.

<sup>64</sup> Waluchow, “Normative Reasoning from a Point of View,” 14.

<sup>65</sup> Ibid., 20.

<sup>66</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 194.

in particular circumstances, and that take into account changes in context. Yet the nature of the law requires someone to decide whether certain laws and words cover a particular case; Hart argues that the “open texture” of natural language provides the leeway that allows decision-makers to apply the law in the correct contexts and to avoid absurd results.<sup>67</sup> Legislators deliberately craft laws to have open-textured rules as a way of dealing with the circumstances of rule making.<sup>68</sup> But the courts, using the common law method described earlier, are in an excellent position to respond to individual cases. Reasoning from the community’s point of view, judges can interpret the general phrases of the law to determine the best application of the law in accordance with the CCM. There are other benefits of having courts as the final say in constitutional issues. When judges have the power to enforce charter rights, then they can protect minority rights against the tyranny of the majority that might result from legislative decisions.<sup>69</sup> Giving the final say about constitutional infringements to the legislature itself privileges the original decision of the legislature. Moreover, the fact that judges are not elected means they are not subject to the political or financial pressures that can bias legislators towards majoritarian opinions or towards the opinions of the wealthy.<sup>70</sup> As decision-makers separate from the pressures of the legislature and charged with enforcing a constitution by reasoning from the democratic community’s point of view, judges are in a position to respond to particular legal cases in the best possible way according to the community’s constitutional commitments.

---

<sup>67</sup> Waluchow, *A Common Law Theory of Judicial Review: the Living Tree*, 194-195.

<sup>68</sup> Ibid., 197.

<sup>69</sup> Ibid., 116.

<sup>70</sup> Waluchow, “Constitutions as Living Trees: An Idiot Defends,” s.45.

This case in favour of judicial review relies on the use of the common law method and on judges reasoning from the point of view of the political community. In the “Applying the Common Law Theory” and the “Problems of Implementation” sections of this chapter, I argued that the common law method might be used to help Canadian judges in their approach to international law. The history of customary law, in particular, in Canadian has been inconsistent and has not always followed the precedent describing how the courts interpret international law. I have moved a step beyond the description of how courts interpret laws given in the first chapter to argue that the courts ought to follow the common law process and use the CCM/CLM as guidance in making decisions about international law. Waluchow gives a number of examples of Canadian courts that use his common law method and the CCM in order to make decisions and argues why they ought to be doing so. The cases that address international law (see Chapter 1 for a few examples) also use this method; it is clear that the judges are using precedent and calling on principles of a CCM/CLM to make their decisions. But the courts are not always consistent in their application of the process in cases of international law. This inconsistency is not a necessary feature of interpreting international law in domestic contexts. In fact, the inconsistency might actually hurt the case in favour of international law because it gives the Incompatibilists evidence against the effectiveness of judges. But, as I mentioned in those earlier sections, if the courts fully adhered to the common law method, using precedent and the CCM to guide their decisions and provide them with legally binding material for their arguments, then there would be no inconsistency. The common law method would allow judges to make decisions involving international norms by using the CLM/CCM such that the use of

international norms in their decisions does not fall to the Incompatibilist critiques. It would also help Canadian courts to make decisions about international laws in Canada in a more principled way and in a way that is (arguably) more democratic than what has happened in the recent past. If judges decide cases according to the precedent and following the principles of the CLM and CCM, then they will be making decisions according to the constitutional, legal, and political commitments of the nation, thereby respecting the principles to which citizens have committed. The fact that a norm is introduced to the case as an international law does not put the structure or principles of the constitutional democracy in jeopardy. If the courts follow the common law process, relying on the CCM or CLM to interpret the laws and decide the case, then that international norm will only have an effect domestically if it has been democratically accepted as law.

## **CHAPTER 4**

### **The Defensive Round: Responding to Potential Critics**

The previous chapter represents the positive element of this project. I took Waluchow's theory of common law judicial review and the community's constitutional morality and used it to defend the connection between international law and constitutional democracies. The analogy between the Critics' arguments that Waluchow rebuts and the Incompatibilist arguments that Buchanan, Powell, and I argue against connects Waluchow's solution to the Critics' case and the analogous solution to the Incompatibilists. In all aspects, the analogy allowed me to respond to the Incompatibilists and present a strong case in favour of the role of international law in constitutional democracies.

While this analogy proves to be effective in responding to the Incompatibilists, there are critics of Waluchow's position whose critiques of his theory also apply to my arguments. The aim of this chapter is to review some of the most common and troubling critiques of Waluchow's position that extend to my international contribution, and to respond to the critiques. Many of the critiques follow similar patterns, and can be answered in similar ways. Surveying seven or eight of some of Waluchow's main critics, I have come up with four general categories of critiques: doubt about the guiding power of the CCM; questions about the moral status of the CCM; problems related to the common law; and democratic issues. For each category, I will describe the particular claims that each critic makes and then argue why those claims do not actually pose a problem for this project or for Waluchow's theory more generally.

#### *4.1 The Guiding Power of a CCM*

At the core of this first kind of critique is doubt about the guidance that judges receive from a CCM. Some of the main critiques question the guiding power of the CCM as a result of its moral status. Those critiques related to the moral status of the CCM I will address in the next section. In this section, I want to first focus on the doubt that something like the CCM cannot provide guidance to judges regardless of whether or not any moral consensus is possible. This doubt is captured by Bradley W. Miller when he argues that

community standards cannot guide judges to determinate conclusions and that there are no resources within community constitutional morality that will tell us how to prioritize values or tell us when a reason given by some moral norm is defeated by a reason provided by a competing norm.<sup>1</sup>

Miller claims that a judge, when analyzing the CCM in reflective equilibrium, will simply reach the individual judge's own critical assessment of what is best.<sup>2</sup> There are different principles involved and it is possible that many of those principles will point in different directions. Judges might describe their reasoning in terms of the CCM, but it is unlikely that the community's constitutional standards actually direct the outcomes with the kind of determinacy that Waluchow needs for his argument about democracy.<sup>3</sup> Miller concludes that the CCM is not a social fact used for guidance so much as "a concept employed for rhetorical advantage," and that the supposed constraints that the CCM put on judges are "overstated by Waluchow, and highly manipulable."<sup>4</sup>

---

<sup>1</sup> Bradley W. Miller, "Review Essay: A Common Law Theory of Judicial Review by W.J. Waluchow," in the *American Journal of Jurisprudence*, vol. 52 (2007): 12.

<sup>2</sup> *Ibid.*, 9.

<sup>3</sup> *Ibid.*, 11.

<sup>4</sup> *Ibid.*, 12.



The other key problem, according to Miller, is that judges will not have any resources to make a decision on in instances of radical disagreement when the CCM runs out and there is nothing the courts could plausibly call the community's shared morality.<sup>5</sup> Miller argues that the conclusions about the constitutional morality that Waluchow comes to on certain social issues are not drawn from a CCM but from his reasoning about what is just.<sup>6</sup> In cases where the constitutional morality does not address the radical dissensus, Miller claims that Waluchow requires judges to draw on other resources to "fill the gaps" in the law to the constitutional morality where previously there was dissensus.<sup>7</sup>

The way that Miller frames the CCM as a rhetorical device rather than something that can provide guidance misses out on a key aspect of Waluchow's theory. Miller does not believe that there is a way of finding the kind of consensus of principles necessary for guiding decisions. He argues that there may be consensus on some general moral principles embodied in the law, but that recourse to these more general principles gives judges a lot of discretion.<sup>8</sup> Miller claims that the common law and institutional legal sources will not lead to a determinate conclusion.<sup>9</sup> This claim is true in some cases. There are points at which the CCM does not provide an answer. In cases of the most radical of disagreements about issues, there might not be any clear indication of the community's constitutional morality. At these points, the role of the judiciary is contentious. When this kind of radical disagreement happens, some argue that it

---

5 Miller, "Review Essay: A Common Law Theory of Judicial Review by W.J. Waluchow," 13.

6 Ibid., 13.

7 Ibid., 14.

8 Ibid., 9.

9 Ibid., 9.

is not the role of the judges to “fill the gaps” of the community’s constitutional morality. However, as discussed in the previous chapter, Waluchow has argued that there are strong reasons to support the role of the judiciary in answering difficult questions even if the guidance of the CCM seems to run out. There may be gaps in a CCM, but these gaps do not necessarily require the courts to refrain from making decisions in hard cases.

While Miller is right about the possibility of gaps in the CCM that do not provide guidance to judges in particular cases, he misconstrues the kind of reasoning about the CCM that judges use in order to figure out how to decide cases. Judges might be looking for principles, as Miller suggests, but they are not looking for a community consensus on general moral principles. Rather, judges are looking for documented expressions of principles in legal and political decisions. When they rely on the CCM to make a decision, judges are looking to find principles expressed through law that the constitutional community has actually committed to. The promulgation of principles through legislation, government statements, election results, and the results of other democratic processes provides judges with a body of evidence that can support an argument that the principle supported by the evidence is part of the community’s constitutional morality. To then use the principles supported by such evidence in a decision about a constitutional issue is not merely using the CCM as a rhetorical device; the CCM has provided substantive evidence for the current political morality of the constitutional community through actual commitments expressed in law.

The fact that the guiding principles of the CCM are supported by evidence from actual legal and political decisions also speaks to Miller’s initial worry about

the way judges make decisions. His argument was based on the claim that judges, in deciding between the different principles available, would simply have to rely on their personal judgement to make a decision; because the CCM cannot possibly point to a single particular outcome in constitutional cases. While it may be true that judges have to use a certain amount of discretion in deciding cases, this discretion is not based on personal moral judgement that the critics are afraid of. When presented with the facts of a case and the relevant constitutional provision, judges must use some kind of judgement. But rather than using their own morals to guide the interpretation process, judges rely on the principles expressed by the constitutional community itself. Judges are reasoning as a representative of the community, rather than as an individual making a moral judgement. As Waluchow argues, it is possible for judges to reason from the point of view of the democratic community without the intrusion of their own moral beliefs.<sup>10</sup> The constitutional community's morality is an expression of the commitments of the community that have been drawn into the law. If the community has made decisions about the particular issue in the past, whether through legislation, precedent, or other political means, there will be indications of how the community has committed to the issue. This commitment might not point exactly to an answer in any particular case, but it can be used as a means of arguing that a decision is consistent with the other commitments of the community, while the alternative decision would represent a denial of those commitments. If both options are consistent with prior commitments, then a decision will be more difficult. But this difficulty, and the "presence of disagreement, controversy and uncertainty... does not entail that there are no

---

<sup>10</sup> Supra notes 54-65, (chapter 3).

right answers to the questions posed in any given constitutional case.”<sup>11</sup> If a judge makes a choice between two difficult options, that decision can retain its status as a legitimate expression of the constitution and the democratic community’s commitments if the judge reasons from the point of view of the democratic community and its CCM.

It is also important to remember that the CCM can change over time. If, for example, a liberal government passes laws that express a more left-leaning commitment of the community over the course of a decade, the CCM will reflect those kinds of commitments. But if, a decade later, a conservative government is elected and changes the old liberal laws while making sweeping conservative reform, then the CCM will reflect those changes as well. The CCM is not directly influenced by the changing moral opinions of citizens, but the citizens’ commitments are expressed through government they vote for and the legislation they support over the long term.<sup>12</sup>

In the particular case of decisions related to international law, the approach of the courts should be no different. The ways that principles of the CCM are identified still involve looking to the evidence of political and legal decisions. If precedent and the principles reflected by legislation and other political sources show an acceptance of an international norm as domestic law, then there are legal arguments to accept the international law as binding. Conversely, if precedent, legislation, and other principles of the CCM do not support the idea that an international norm has any kind of status within Canada,

---

<sup>11</sup> Waluchow, “Constitutional rights and the Possibility of Detached Constructive Interpretation,” 28.

<sup>12</sup> Whether there is any role for widespread shifts in moral views within the community that have not yet been expressed in official decisions or actions is an interesting and relevant question for which I do not yet have an answer.

then judges have arguments that support the rejection of that norm as binding. It is actually easier, in some instances, for judges to identify the constitutional community's international norms because they are a subset of the full CCM. All of the constitutional norms apply in any constitutional case, of course, but there are specific ways of identifying international norms that are involved in a case about international law. Recall from Chapter 1 that there are official statements about the criteria for international customary law (including domestic laws and official government actions) and treaties that provide interpretive guidance to courts. There are instances in which the domestic status of an international norm is unclear, but these cases are usually the ones where judges can rely on a CCM for guidance by calling on the principles supported by other legal and political decisions. As I argued in the previous chapter, the use of a CCM and the common law method might actually help judges in making decisions about international norms. As it currently stands, judges sometimes struggle to identify what laws the legislature has accepted as binding domestically.

#### *4.2 The Moral Status of the CCM*

Most of the other arguments about the guiding power of the CCM have to do with the possibility of the moral agreement that is involved. Miller's argument about the guiding power of the CCM continues from the previous section when he critiques Waluchow's use of the concept of *determinatio* in the argument from necessity.<sup>13</sup> Miller's claim is that the concept of *determinatio* is about the motivation of practical reason to adopt a particular rule that was not morally required prior to its adoption; it is "a concretization of a moral norm by a choice

---

<sup>13</sup> Miller, "Review Essay: A Common Law Theory of Judicial Review by W.J. Waluchow," 14.

that is rational, but rationally underdetermined.”<sup>14</sup> Miller argues that the kinds of choices that are a matter of *determinatio* do not map on to the kinds of choices by judges that Waluchow is trying to justify. Waluchow is arguing about matters of radical disagreement and the moral commitments of a nation. In the context of these fundamental matters of political morality, the appeal to *determinatio* is not open to judges faced with radical dissensus.<sup>15</sup> The choice is not a matter of rational underdetermination, but of moral dissensus. According to Miller, it is not possible, when faced with this radical disagreement regarding legal issues, for there to be the kind of community morality that Waluchow claims. When conventional morality is exhausted, there is nothing to do but reason according to the moral norms that the reasoner accepts.<sup>16</sup> As such, in cases of radical disagreement, judges will be left to reason with only their own personal moral norms.

In Waluchow’s use of the concept of *determinatio*, the comparison between decisions that judges make in cases of radical dissensus about constitutional issues and the kinds of underdetermined cases involving morally neutral choices that have no “best” or “most reasonable” answer but that need *an* answer is not meant to claim that judges in constitutional cases are making a call between two morally neutral choices. The point is that the decisions made in hard cases are between moral positions for which there is no way of determining the “best” position, objectively speaking. It may be that moral opinion is divided, and that both sides of the debate have seemingly reasonable and morally sound

---

<sup>14</sup> Miller, “Review Essay: A Common Law Theory of Judicial Review by W.J. Waluchow,” 14.

<sup>15</sup> Ibid., 15.

<sup>16</sup> Ibid., 15.

arguments for their respective positions. Or it may be that there is no way of comparing the two sides, and no way of reasonably determining which position is objectively better or more reasonable. But, as I mentioned earlier, the difficulty of the decision-making process does not mean that the decision made is not an expression of the democratic community's commitments. By reasoning from the point of view of the community and drawing upon the CCM, even if the decision seems to have no reason to point to one outcome or another, the outcome that the judge does choose comes directly from the perspective of the community and is a democratic result.

This response to Miller's worry about the concept of *determinatio* also directly responds to the Incompatibilists' worries about judges picking and choosing international laws to match their personal opinions. There can be cases of domestic law in which different norms from different sources, like international treaties, customary law, and domestic law, seem to compete with each other. There may not be a clear indication of the binding nature of any particular norm in the case based only on the facts of the case. But with the CCM providing guidance for the common law reasoning about the case, there is a framework for evaluating the binding nature of international norms and domestic norms that can be applied to the case while remaining anchored in a principled and democratic system. Judges can use the principles of the CCM to determine the status and domestic approach to different international laws, even if there is no explicit connection to the particular provisions at stake. Judges are not making decisions about the international norms based on their own personal agendas. They are using the principles that have already been expressed by the democratic government of their country.

Noel Struchiner and Fábio Perin Shecaira run a similar critique about the moral status of the CCM, rooted in the worry that Waluchow is too confident about the guiding capacity of the community's constitutional morality.<sup>17</sup> Their claim focuses on the moral disagreement that Waluchow's theory is meant to address and the possibility of the CCM existing as an overlapping consensus. They argue that Waluchow has overestimated the amount of agreement within communities, particularly on matters of radical disagreement about Charter issues; there is no reason to believe that the agreement is significant enough in the relevant moral domains to provide a basis on which the community's true morality can be built.<sup>18</sup> The critics say that Waluchow's theory begins with a test of internal coherence for all of the diverging moral opinions, aiming at an overlapping consensus or uniform position, but that Waluchow moves from a test of coherence to the concept of a "reasonable" position.<sup>19</sup> As Struchiner and Perin Shecaira note, "coherence is not a morally loaded concept, but reasonableness is."<sup>20</sup> Even if Waluchow was using the term "reasonable" in a modest sense, there will still be disagreement between moral positions, the legality of particular norms, and the morality of individual acts.<sup>21</sup> The authors give the same sex marriage debate as an example, saying that there is no reason to think that one cannot reasonably and coherently accept moral principles that reject discrimination but take the view that same-sex marriage should not be legally

---

<sup>17</sup> Noel Struchiner and Fábio Perin Shecaira, "Trying to Fix Roots in Quicksand: Some difficulties with Waluchow's conception of the True Community Morality," in *Problema. Anuario de Filosofía y Teoría del Derecho*, no. 3 (2009): 136.

<sup>18</sup> Ibid., 138.

<sup>19</sup> Ibid., 138-140.

<sup>20</sup> Ibid., 140.

<sup>21</sup> Ibid., 141.



valid.<sup>22</sup> Many people would reject the arguments behind such a commitment, but it could nonetheless be a reasonable one. Even taking Waluchow's suggestion that the community's commitments should be assessed through a narrow reflective equilibrium, it is unclear why some issues (and which issues) would be the locus of equilibrium while others would never be the object of a consensus under the CCM.<sup>23</sup> And without providing genuine action guidance by giving precise prescriptions to judges in their decision-making, the community's morality cannot help fix the roots of the constitutional tree as Waluchow argues it does.<sup>24</sup>

To respond to Struchiner and Perin Shecaira, I will rely on an idea I have hinted at in previous sections. One of the key ideas of Waluchow's CCM, which many of his critics seem to ignore, is that the CCM does not represent a consensus of the moral opinions of every individual citizen on tough questions of political morality. The CCM is the legal expression of commitments that have already been made in political society. It is basically the agreement, or loose consensus, of the democratic community's current official positions on political and moral issues. It does not purport to express a complete set of fundamental principles. The CCM is made up of the changing expression of social and political moral issues through the law by legislation, legal decisions, and other sources of law. On some issues, there will be no expressed position because either the official expression of any relevant principle will be lacking, or the principles expressed will conflict. But recall that Waluchow argues that courts can make these kinds of decisions from the point of view of the political community and, in

---

<sup>22</sup> Struchiner and Perin Shecaira, "Trying to Fix Roots in Quicksand: Some difficulties with Waluchow's conception of the True Community Morality," 141.

<sup>23</sup> Ibid., 144.

<sup>24</sup> Ibid., 136.

doing so, maintain democratic principles.<sup>25</sup> On other issues, there will be a series of political or legal events like parliamentary bills, legislation, court cases, common law precedent, votes, or government actions that share or outline particular principles. Each individual piece of political evidence might not be enough to point to a principle, but the set of legal events taken over time can outline the orientation of the constitutional community at that point in time. The pieces of political and legal evidence that reveal the orientation are the kinds of things that allow judges to understand the point of view of the democratic community. Even if there is no overlapping consensus of the moral positions of individual citizens, there can be a distinct trend in the positions passed into law that represent the democratically arrived-at commitment. And if it turns out that the citizens disagree strongly with the commitments that their officials are expressing, then something has already gone wrong in the system of representation; at any rate, the citizens can always remove unrepresentative representatives from power in the next election. But until that point, the government represents the choices of the citizens (made in the previous election) and has the democratic mandate to make the kinds of commitments in law that eventually constitute the CCM on an ongoing basis.

In the wake of this understanding of the CCM, the issue about reasonableness that Struchiner and Perin Shecaira raise does not have quite as much bite. The standard of “reasonable” is not about reasonable views, per se, but about accurately identifying the views that already exist within the constitutional community. Here, the “reasonable” label need not imply the rich moral

---

<sup>25</sup> Waluchow, “Constitutional Rights and the Possibility of Detached Constructive Interpretation,” and “Normative Reasoning from a Point of View.”

requirement attributed to the word by people like Rawls.<sup>26</sup> The standard of reasonableness implies only the ability to identify principles and compare them. For example, in the context of the quotation of Waluchow's in which the authors identify the "reasonable" criterion, the reasonable Canadian is someone who recognizes certain principles *are actually contained* in the Charter and have been used to condemn racial bigotry and sexism. The excerpt from which Struchiner and Perin Shecaira lift the "reasonable" criterion begins with Waluchow saying that "the principles and considered judgements *upon which most reasonable Canadians*, of whatever political and moral stripe, *are keen to condemn racial bigotry and sexism and that virtually all would agree are embodied in the Charter...*" [emphasis added].<sup>27</sup> Waluchow gives no requirement for the label of the "reasonable" Canadian. He is just saying that it is reasonable to point out the principle of equality that people use to condemn racism is expressed in the Charter and in related cases. It is also reasonable to point out that the same principle of equality has explicitly been used in legislation and court cases about equality for same-sex couples. The attribution of "reasonableness" is related to the ability to identify the fact that principles have been explicitly used in legislation and in the Charter, and to understand if and when those principles exist elsewhere. The label of "reasonable" is not given to a person because of the content of their views, or because their views meet some internal criteria, but because they are able to identify a view and then recognize where it has elsewhere been consistently applied. There might be instances of conflict in which

---

<sup>26</sup> See the discussion of the reasonable citizen by John Rawls in *Political Liberalism*, expanded ed. New York: Columbia University Press, 2005: 48-54.

<sup>27</sup> Struchiner and Perin Shecaira, "Trying to Fix Roots in Quicksand: Some difficulties with Waluchow's conception of the True Community Morality," 139.

incompatible positions seem to be grounded in the CCM. When a judge has to decide between these options, they are doing so by reasoning from the point of view of the community. Judges need not draw upon their own commitments. Even if they need to draw on normative criteria to choose between options, they can do so from the perspective of the democratic community. The reasonable criterion is very thin. It is necessarily only insofar as it captures the basic ability to recognize that a principle used in one argument is the same principle that is being applied elsewhere.

Andrei Marmor's critique about the moral status of the CCM is also related to radical dissensus, but it approaches the issue from a different direction. He argues that Waluchow fails to address the argument from pluralism that motivates the issue of deep dissensus.<sup>28</sup> Critics like Marmor and Waldron reject Constitutionalism because of the deep divisions in society about issues of the just and the good that produce moral controversies between reasonable positions worthy of respect.<sup>29</sup> Marmor argues that Waluchow's position rejects pluralism in some way. Either the disagreement is not as deep as the pluralists claim or that the positions involved are not worthy of respect because they are not "sufficiently authentic."<sup>30</sup> Marmor's point is that the assumption that a consensus on issues of political morality can exist ignores the authentic, reasonable, and deeply held beliefs that people actually have. In many controversial cases—Marmor relies heavily on the issue of abortion—there are people who hold reasonable positions that cannot be reconciled with each other. In these instances, there is no way the

---

<sup>28</sup> Andrei Marmor, "Are Constitutions Legitimate?" in *the Canadian Journal of Law and Jurisprudence*, 20 (2007): 89.

<sup>29</sup> Ibid., 89.

<sup>30</sup> Ibid., 90.

community could be said to have a moral consensus without claiming that one of the positions is not the manifestation of the true moral values of the people who hold that position.<sup>31</sup> The problem is that there are many issues of moral conviction that we disagree about, and that the issues that tend to reach the courts are about exactly those values and morals about which we are divided.

For Marmor to claim that Waluchow either rejects pluralism or disrespects the authentic views of some involved in a dispute is a misrepresentation of Waluchow's theory. There is nothing in Waluchow's theory that amounts to a rejection of pluralism. It is, in fact, fully open to the possibility of pluralism. In Waluchow's theory, it is quite possible that the disagreement in any case goes "all the way down" in moral terms. Issues like abortion, in which one side claims that abortion is murder while the other side addresses the freedom of the mother, represent incommensurable claims about morality in which neither side is willing or able to concede. Other issues, like debates about balancing citizens' freedom with security feature similarly incommensurable values. The theory does not purport to solve or avoid these incommensurable moral issues. And the decisions made, if they are made in hard cases, are not based on the claim that one side has a less authentic moral position. What Waluchow's theory aims to do is to choose the views that have *already been expressed* somehow in law, rather than the temporary views that have not already passed the test of some kind of democratic or political review. When judges decide hard cases, they are not looking to the moral opinions or commitments of any individual citizens. Instead, they look to the constitutional commitments made by the community as a whole. A view that cannot be passed into law and is

---

<sup>31</sup> Marmor, "Are Constitutions Legitimate?" 90-91.

never supported politically cannot be part of the community's constitutional view. This statement does not imply that these views, which are not politically supported or passed into law, are not authentic or are not worthy of respect. It is to say that they have never been expressed through political and legal norms.

There are going to be cases of conflicting views. In the abortion case, both sides of the debate are arguably expressed by Canadian legal norms.<sup>32</sup> As such, in debates like these, the CCM does not a definite answer. But consider a case like *Charkaoui v Canada*.<sup>33</sup> The court recognized that “the protection of Canada’s national security... undoubtedly constitutes a pressing and substantial objective,” and that “the realities that confront modern governments faced with the challenge of terrorism are stark,” but that “Canada has already devised processes that go further [than security certificates] in preserving s.7 rights while protecting sensitive information.”<sup>34</sup> They balanced the problem of security with the importance of individual rights and, calling on already-existing legislation elsewhere in Canada, decided that the Charkaoui case did involve rights violations. There are people in Canada who hold reasonable views that say either

---

<sup>32</sup> For example, some might say that abortion is murder, and that murder is prohibited by the Canadian Criminal Code, while others could argue that the choice to have an abortion is a medical decision intimately related to a woman's right to life, liberty, and security of the person from the Charter. Both principles have been expressed in law, and so are part of the CCM, but the fact that they are part of the CCM does not provide an answer for a judge faced with a case about abortion rights.

<sup>33</sup> *Charkaoui v. Canada (Citizenship and Immigration)*. SCC 9, [2007] 1 S.C.R. 350. In the aftermath of the 9/11 terror attacks, fears of threats to national security led to the issuing of “security certificates” by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. These security certificates were issued to people considered threats to Canada's national security. People named in these certificates were subject to deportation if sufficient evidence of their threat to the nation was found, presented in trials that the named person was often not allowed to be present at. The court, in a unanimous decision by C.J. Beverley McLachlin, found two *Charter* breaches by the security certificates. The system violated the appellants' right to a fair hearing (s.7 of the Charter) and the protection against arbitrary detention and the right to have the validity of one's detention confirmed by way of *habeas corpus* (s.9 and 10(c) respectively).

<sup>34</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, s. 68-69.

that individual rights are more important or that security is more important. In the *Charkaoui* case, the court's decision does not disrespect those who believe that security is more important than individual rights. It has been arrived at through the perspective of the democratic community's commitments, which is determined through principles expressed in the law. A decision against a particular position does not represent a lack of respect for that position. It represents a choice guided by legal principles beyond the respect or opinions of any one individual.

In the context of a decision about international law, this kind of disagreement sometimes exists about the kinds of norms that are binding domestically. The legislature does have a chance to legislate about ratified treaties and in doing so, making it explicit that certain norms are binding in Canada. But in other cases of international law, like customary law or treaties that have not been specifically implemented, there is often disagreement about the status of a norm. In these cases, the status of the norm is not related to what people at the time believe, regardless of whether or not their beliefs about the norms are “authentic” or not. Instead, it is about what has actually happened in the common law precedent, the legislative decisions, and other expressions of domestic law. The idea of radical disagreement does not mean that there is no choice to be made in any particular case. Often the kinds of cases that are at stake constitutionally and regarding international norms require an immediate decision. And radical dissensus about the principles involved make the decision difficult. But disagreement about an issue does not mean there has not been a commitment made by the government as an expression of genuine democratic commitment. If the CLM/CCM speaks on the issue, then it can point to a

particular decision even in the face of moral disagreement. Even if it is unclear exactly what the CLM/CCM requires, judges can still reason from the democratic community's point of view.

#### *4.3 Problems with the Common Law*

The first two kinds of critiques identify potential problems with the content of the CCM and its guiding capacities. The third critique looks to the process and structure of common law reasoning that Waluchow uses as the basis of his theory of judicial review. The critics of the common law aspect of Waluchow's theory identify particular issues like precedent and also a more general critique of the common law system as a whole.

Precedent plays a particularly important role in Waluchow's theory of common law reasoning. Struchiner and Perin Shecaira identify problems with precedent that put the theory's guiding ability into jeopardy again. They present two reasons why the appeal to precedent in Waluchow's theory is not helpful. First, they argue that in judicial decision-making, precedent can be overridden, just like any other moral belief.<sup>35</sup> If the implications of any precedent do not cohere with a particular conviction, that precedent can be overridden. And second, the authors claim that it is "seriously misleading to suggest that precedent can be a part of the morality *of the community* when controversial moral issues are concerned."<sup>36</sup> If the community's morality is an outline that is filled in by precedents from particular legal decisions, and there is a morally

---

<sup>35</sup> Struchiner and Perin Shecaira, "Trying to Fix Roots in Quicksand: Some difficulties with Waluchow's conception of the True Community Morality," 142.

<sup>36</sup> Ibid., 142-143.



indeterminate issue at stake within that outline, then it might make sense for legal judgements to dictate the answer to a problem one way or another. But on issues where the community is not indifferent, and is in fact deeply divided, then it is controversial for a judicial decision to play the role of a gap-filler.<sup>37</sup> Judges are, apparently, not filling in the legal gaps so much as taking a side and validating particular commitments of the community in spite of other conflicting commitments.<sup>38</sup>

In response to Struchiner and Perin Shecaira, I would argue that the fact that precedent can be overridden is actually an important and desirable feature of the common law system. In straightforward cases, judges either apply precedent or distinguish the case at hand from precedent to avoid the result of the precedent and to further delineate the scope of the case for future rulings. But sometimes it becomes clear that the precedent cannot be avoided and yet is disconnected from the moral or legal commitments of the country. Overturning precedent can be a drastic means of re-orienting the direction of the common law so that it better matches the CCM. Take, for example, the case of *Brown v. Board of Education of Topeka*.<sup>39</sup> In this case, judges overturned the separate-but-equal doctrine established in *Plessy v. Ferguson* that accepted segregation as legal in the United States. By overturning the precedent and ruling that the separate-but-equal doctrine violated the equality protections of the fourteenth amendment, the court helped re-orient the common law to match the movement away from segregation and racism towards equality that much of the rest of the country had

---

<sup>37</sup> Struchiner and Perin Shecaira, "Trying to Fix Roots in Quicksand: Some difficulties with Waluchow's conception of the True Community Morality," 143.

<sup>38</sup> Ibid., 143.

<sup>39</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

already embraced.<sup>40</sup> The ability of judges to overturn precedent leaves open an avenue of rapid change that might be necessary in extreme circumstances.

It is important to remember a few things. First, courts rarely overturn precedent. And second, precedent is only a part of the CCM. There are other aspects of the law and the political morality of a country that guide judges in their approach to a case. The written constitution, for example, forms an important part of the constitutional morality, providing guidance to judges, but it is also a major constraint and consideration. In cases involving international law, judges are bound by precedent and by the international guidelines in the *Vienna Convention on the Law of Treaties*.<sup>41</sup> The advantage of the CCM is that it guides the search through different sources. Precedent is not the only determining factor in a case.

The issue of gap filling is more worrisome than that of overturning precedent. If the gap filling that is being done in controversial moral cases is done with a mandate from the CCM—if precedent presents a gap but legislation or other political and legal sources give a clear answer—then there is not a particular problem with the courts filling the gaps. If there is a “true” gap in the precedent and in the common law, such that the CCM does not speak on an issue and the country’s moral opinions are radically divided, then there are a couple of options. In some cases, it might be prudent for the courts to refer the decision back to the legislature. It might also be the case that courts might need to engage in

---

40 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

41 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, <http://www.refworld.org/docid/3ae6b3a10.html>. The third section of the *Vienna Convention*, “Observance, Application, and Interpretation of Treaties,” gives explicit rules about how judges ought to understand and apply international treaties.

constructive interpretation.<sup>42</sup> But whether the courts refer a question to the legislature or engage in constructive interpretation does not matter for the argument here because, as I argued in the previous chapter, both options can be reconciled with democratic principles.

Marmor also offers a more direct critique of the common law as a whole system. He focuses on three particular problems inherent to the common law. He argues that the common law is insular, self-perpetuating, and lacks adequate feedback mechanisms.<sup>43</sup> First, the common law is insular insofar as it is a decision-making process that focuses on particular cases that prevents the courts from looking at the bigger social or moral picture.<sup>44</sup> Instead of being able to reason about the larger issue, judges are bound to look at the arguments and facts that are presented in the particular case. Second, the self-perpetuating nature of the common law comes from the fact that adjudication is based on the binding force of precedent.<sup>45</sup> Judges decisions are based on the decisions made by courts in the past, and the principles are only (it at all) extended in a piecemeal fashion. This self-perpetuating mechanism is dangerous, Marmor argues, because while it allows for the expansion of truthful insights into the law, it also expands and perpetuates the effects of errors.<sup>46</sup> Finally, and most importantly according to Marmor, the constitutional common law system is a closed system, and so does not have the proper feedback mechanisms that would allow it to correct itself.<sup>47</sup> The only real feedback is the future cases that come before the judges, giving

---

<sup>42</sup> Waluchow, "Constitutional rights and the Possibility of Detached Constructive Interpretation," 49.

<sup>43</sup> Marmor, "Are Constitutions Legitimate?" 91.

<sup>44</sup> Ibid., 91.

<sup>45</sup> Ibid., 91.

<sup>46</sup> Ibid., 91.

<sup>47</sup> Ibid., 91.

them a chance to reflect on past decisions. Because of the binding force of precedent, this reflection does not provide much opportunity for correction or feedback. It also determines the kinds of cases that will reach the supreme courts in the first place.<sup>48</sup> Marmor contrasts this lack of feedback with legislatures that receive feedback and correction through elections, government agencies, interest groups, and other courts.<sup>49</sup> He argues that non-constitutional common law is an advantageous system because it is not closed, and the legislature can intervene and correct its course at any point; in constitutional cases, the only way to correct the course of the law is through constitutional amendment.<sup>50</sup> Marmor argues that, because the courts have the final say in constitutional cases, the system is a closed one in which it is very difficult to change the results of the court's decision, and their decisions have a long-lasting effect because of how difficult it is to amend the constitution.<sup>51</sup> When issues before the courts are particularly controversial, the democratic legislature has the advantage in being able to change its decisions by the democratic process if the opinions of society change.

These problems that Marmor identifies might be applicable to the particular constitutional context of the United States of America, but they are not worries for the common law theory in general. Regarding the insular nature of the common law, it is true that the common law method of constitutional interpretation channels the source materials so that judges are only focused on particular legal questions. But the role of the CCM in the process allows judges to simultaneously look to “large” pictures if they need to. When there is a clear legal

---

48 Marmor, “Are Constitutions Legitimate?” 91.

49 Ibid., 91.

50 Ibid., 91

51 Ibid., 92.

answer to a particular legal question, we would expect judges to simply apply the law. But when a question before the courts addresses broader political values through more ambiguous terminology, then the courts must look to the relevant principles that the democratic community has expressed to interpret the abstract terms. The common law method, coupled with the CCM, does provide an insular approach to those legal issues that requires narrow and insular answers as the law demands. But it also allows judges to address wider principles in answering legal questions if that is required. Furthermore, the insular nature of the common law approach helps protect judges from the critique that they are delving into the realm of policy. When judges focus on specific legal questions and use the CCM to determine only the principles that relate to answering the questions and interpreting the law, they are not at risk of having to delve into the realm of policy to help guide their decisions.

The self-perpetuating nature of the common law seems to be at once presented as a good and a bad feature. If courts are making good decisions, then the self-perpetuating nature means that their principles will continue to be upheld. But if the courts make bad decisions, then the community is stuck with bad results. And it is a genuine worry that the common law system might perpetuate bad or wrong decisions. *Plessy v. Ferguson* set a precedent that allowed segregation for 58 years. But if the decisions are discordant with the community's values, then the legislature can (and should) step in and legislate a change. If judges are careful about making decisions according to the CCM, and not based on alternative sources like a community's mere opinions, then the risks of setting precedent that are wrong or off-base are minimized. Furthermore, it is important to remember that the piecemeal fashion of common law development

means that precedents and principles change slowly on a case-by-case basis. There are rarely large or dramatic changes that happen suddenly, and judges have the opportunity in each case to distinguish their current issue from those addressed by past precedent.

The final issue that Marmor raises is not a theoretical problem for the common law theory. He argues that there is no feedback involved in a common law constitutional system, but bases this argument only on the model of judicial supremacy of the United States of America. It is true that there is no binding method of feedback in the American system. But nothing in Waluchow's theory requires a strong model of judicial review. Feedback should, and does, exist. While the mechanisms of feedback vary between jurisdictions, in places where the constitutional review is only weak judicial review, the legislature has some power to review judicial decisions or change laws to affect the impact of court cases. Stephen Gardbaum presents a theory that aims to balance the forces of weak judicial review and parliamentary sovereignty called the "New Commonwealth Model" of constitutionalism.<sup>52</sup> He argues that a combination of mandatory pre-enactment political rights review and weak-form judicial review can achieve the advantages of strong judicial review and parliamentary supremacy while leaving open room for dialogue and feedback.<sup>53</sup> His theory is only one of many that seeks to reconcile judicial review with parliamentary sovereignty, but it is representative of the possibility. There is no theoretical reason why the common law constitutionalism method should lack feedback.

---

<sup>52</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism—Theory and Practice* (New York: Cambridge University Press, 2013).

<sup>53</sup> Ibid., 25.

Whether the content of cases is focused on domestic laws or whether the cases see international norms in conflict with constitutional rights, the courts need not have the final say on the matter.

#### *4.4 Problems for Democracy*

The final set of critiques that I am going to consider involve challenges to Waluchow's claim that his theory protects the democratic status of judicial review. Some address the content of the community's constitutional morality that Waluchow uses to argue that judges are making decisions according to the commitments of the citizens. Others go beyond the content of the CCM and question the scope of judicial powers or the kinds of decisions they are actually making.

Jeffrey Brand-Ballard expresses confusion about the nature of the community's morality. He states that Waluchow is in an awkward position because "he is strongly committed to the notion that judicial review should enforce nothing but *the community's* constitutional morality... but he gives the community little say regarding the implications of its own constitutional morality."<sup>54</sup> This critique is based on the fact that Waluchow rejects the idea that judges should be applying the community's constitutional morality as the community members would actually apply it. Judges are supposed to filter the community's mere moral opinions through a process of reflective equilibrium to end up at the actual commitments that the community has made. As such, it could be the case that many people do not realize that they are committed to

---

<sup>54</sup> Jeffrey Brand-Ballard, "A Common Law Theory of Judicial Review: The Living Tree," in *Notre Dame Philosophical Reviews*, (2008.11.05): s. IV.

constitutional principles about certain issues until the Supreme Court makes a ruling on those issues.<sup>55</sup> Waluchow argues, for example, that the authentic commitments of a community to principles of equality and respect (among others) make it such that it would be inconsistent to extend marriage to same-sex couples.<sup>56</sup> But, Brand-Ballard argues, this insistence that the commitments of the community require constitutional consistency is silly because common law reasoning “readily accommodates unprincipled exceptions and ad hoc compromises.”<sup>57</sup> To claim a principle requires other cases to be decided in the same way is not a feature of the common law. And so, he claims, the reasoning about the CCM that Waluchow does seems to be curiously “top-down” even as he champions a bottom-up approach.<sup>58</sup> The content of the community’s constitutional morality and the way the principles the community apparently accepts do not seem to directly entail any connection to the actual community or any bottom-up method of argument.

Brand-Ballard has italicized the wrong word in his statement that Waluchow is in an awkward position because “he is strongly committed to the notion that judicial review should enforce nothing but *the community’s* constitutional morality...”<sup>59</sup> The important part of the idea is the focus on the community’s *constitutional* morality. Waluchow’s theory is about the morality that has actually been expressed through the law, not the morality that the people in the community hold. To worry that individual community members do not

---

<sup>55</sup> Brand-Ballard, “A Common Law Theory of Judicial Review: The Living Tree,” s.III.

<sup>56</sup> Ibid., s.III.

<sup>57</sup> Ibid., s.III.

<sup>58</sup> Ibid., s.III.

<sup>59</sup> Ibid., s.III.



contribute directly to the content of the CCM is to ignore the source and the purpose of the CCM. It is not meant to be the direct expression of the democratic will through individual contributions. The CCM is essentially a distillation of the principles involved in all of the political and legal decisions that a society has made. Everything that people, as a nation, are committed to enough that it becomes part of the law is a part of the CCM. The fact that the Supreme Court can take the CCM and then use it to make a binding decision is important because it represents the extension of the principles, to which the political nation has committed, to a particular expression of those principles. One of the general claims of democracy is to give people the power of self-rule and the authority to be involved in the decisions that affect their society. The CCM allows the commitments that citizens have expressed formally through the law to direct the courts' decisions. For constitutional cases, especially, there is a very strict standard that the judges must meet. Judges must identify the community's morality *specifically* as it has been expressed through laws related to the constitution. These laws are the most authoritative laws, but also the most difficult to create and change because of their constitutional status. For decisions with high stakes like cases related to constitutional issues, it is important for judges to draw upon a stringent set of principles that come directly from the community's *constitutional* commitments. This reasoning is top-down insofar as it draws principles from existing laws and decisions, but the process that judges take is itself bottom-up. They begin with a particular case and look to the facts and the precedent. For further guidance, the judges move away from the particular details to more general principles that have been derived from the evidence of other legal issues as part of the CCM. The approach to the case does

not begin from a position at the top with a principle in mind. It moves from the ground-level details and precedent up to more general principles as needed. The CCM acts as additional source material, rather than as the starting point.

Natalie Stoljar also critiques the moral content of the supposed community's constitutional morality, but the implications of her argument directly affect Waluchow's democratic argument. Her argument speaks to the understanding of the authenticity test for the CCM. Either, she claims, the test of authenticity of citizens' commitments can be understood as purely epistemic, satisfying non-moral conditions, or the test might require agents' reasoning to satisfy moral conditions in addition to epistemic ones.<sup>60</sup> After reviewing different understandings of authenticity, Stoljar concludes that conditions for authentic positions like prejudice (one of the features that Waluchow rejects as part of the CCM) make Waluchow's account of authentic beliefs over-inclusive.<sup>61</sup> It may be that a community has genuine moral commitments arrived at after careful deliberation and thoughtful weighing of values but that are still based, for example, in prejudice.<sup>62</sup> If this is the case, then there could be a disagreement about minority rights that remains even after the community's "authentic" commitments have been noted. In order to achieve Waluchow's apparent goal of classifying any preferences that deny rights to minorities as inauthentic, the authenticity test must be a moral one.<sup>63</sup> A criterion for the test of authenticity like the lack of prejudice adds a moral component to the epistemic criteria that a

---

<sup>60</sup> Natalie Stoljar, "Waluchow on Moral Opinions and Moral Commitments," in *Problema. Anuario de Filosofía y Teoría del Derecho*, no. 3 (2009): 123.

<sup>61</sup> Ibid., 125.

<sup>62</sup> Ibid., 127.

<sup>63</sup> Ibid., 128.

commitment must also meet. But because authenticity is a moral concept, it also builds a substantive conception of democracy into Waluchow's position.<sup>64</sup> If majoritarian processes are judged to be inauthentic when they violate a moral condition (like the lack of prejudice), then the democracy is being evaluated in a substantive way.<sup>65</sup> So if rights are classified as disagreements between authentic and inauthentic commitments to be determined by the CCM, then these disagreements are moral ones. When the courts take a position in this kind of case that is not the position of the legislature, then they are implicitly imposing a moral constraint on majoritarian procedures.<sup>66</sup>

Stoljar's worry about the moral constraints on majoritarian processes may be a warranted critique in some cases, but she has misunderstood what Waluchow is doing with his authenticity test. The CCM only applies moral constraints on majoritarian procedures by using the moral constraints that the majority has itself created. Anti-prejudice is not a necessary feature of a CCM. In the particular case of Canada's Charter, citizens have accepted anti-prejudice as part of the constitution. It is a moral test imposed by the people, through democratic means, on the kinds of things allowed in the law, not a moral test imposed by judges. Principles or beliefs that conflict with accepted and fundamental principles of the CCM are not rejected by a moral test of their content. The rejection is based on the coherence (or lack thereof) between the principles that have been accepted, especially as constitutional limits, and the principles that are being professed. Judges are trying to remain consistent in

---

64 Stoljar, "Waluchow on Moral Opinions and Moral Commitments," 128.

65 Ibid., 129.

66 Ibid., 129.

applying principles with the principles that the community has accepted and made law in the past. The authentic constitutional morality consists of those principles that we know people are actually committed to because they have already been expressed in the law. When judges apply the CCM in a case, they are not using moral criteria to filter the views of the community based on a substantive test. What they are doing is looking to see what it is that the laws actually say on a particular point. They are filtering the views of the community, but they are doing so based on whether or not there is evidence for the expression of a view in the law. The only moral constraints that are being applied are the constraints that the people have accepted for themselves as constraints.

In the case of international norms, judges are also only applying principles that have already been expressed in the law. The source of these principles is smaller than the source of constitutional norms, since it is only from those treaties that Canada is involved with and the customary laws that apply to Canada. But the point is that, when judges apply the CCM to international laws, they are only relying on laws that have already been expressed by parliament as the authentic domestic commitments to international norms. Like Stoljar, the Incompatibilists are worried about putting constraints on democracies and about the people losing autonomy and sovereignty. But in a constitutional democracy, there is a *prima facie* contradiction between the self-rule of the people and the constraints put on the authority of the government. The balance between the freedom of democracy and the constraints of constitutional rights is an

interesting and relevant one.<sup>67</sup> But if one does not accept that rights can constrain legislature in some way, then one is no longer within the realm of the constitutional democracy. There will always be some kind of constraint on majoritarian processes in a constitutional democracy. A better focus of critics and supports alike would be to find the right balance between the competing values of democracy and constitutional constraints.

Larry Alexander is also worried about the imposition of constraints on majoritarian procedures. But, more specifically, he is worried about the kinds of improper constraints that Waluchow's theory might put on the legislature. Alexander raises two objects. He first argues that constitutions have determinate content, and that content comes from a particular kind of constitutional morality. For Alexander, this source morality is the authors' intended meaning.<sup>68</sup> The text was created in a particular historical context with words whose meanings were products of what the users intended. Alexander claims that

if the constitutional morality derives from the constitution—and if the constitution is a dateable set of instructions authored by actual people—then constitutional morality and the originalist's constitution must be the same.<sup>69</sup>

Judicial decisions and precedent do not change the content or meaning of the constitution because “there is just the constitution, properly interpreted, and the

---

<sup>67</sup> This debate is well beyond the scope of my thesis. Some preliminary sources for the debate include Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: The University of Chicago Press, 1995); Richard Bellamy and Dario Castiglione, “Constitutionalism and Democracy-Political Theory and the American Constitution,” *British Journal of Political Science* 27 no. 4 (1997); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: Oxford University Press, 2001); and Sidney Hook, *The Paradoxes of Freedom* (Los Angeles: University of California Press, 1962).

<sup>68</sup> Larry Alexander, “Review: Waluchow's Living Tree Constitutionalism,” in *Law and Philosophy*, 29 no.1 (2010): 96.

<sup>69</sup> Ibid., 96.

precedents based on it, some erroneous.”<sup>70</sup> Precedents that are not correct and not accepted as constitutional can be repudiated on the grounds that they are inconsistent with the constitution. Alexander argues that, when Waluchow rejects originalism, “he saps the constitution of its substance.”<sup>71</sup> If Waluchow had paid attention to the “constituting the government” and “settling the rules of the game” functions of the constitution, he would recognize that his constitutional morality is an unhelpful methodology.<sup>72</sup>

Alexander’s second objection follows from this discussion of the constitutional morality. He expresses scepticism about the fact that the constitution and other legal materials represent a community’s moral commitments.<sup>73</sup> Furthermore, Alexander argues that judges do not have any advantage over more representative groups like the legislature at determining the moral commitments of the community and properly expressing these commitments. Democratic authorities should not have their decisions overruled by judges in the name of true principles of morality or in the name of the community’s fleeting moral commitments.<sup>74</sup> The discussion of originalism makes it clear that Alexander leaves room for judicial decisions to overrule legislative decisions, but only if those judicial decisions are based on the originalist meaning of the text. In his view, the original meaning literally constitutes the rules of the democracy, and so has authority over the legislature. But if judges take any other approach to applying the constitution, especially through the community’s

---

<sup>70</sup> Alexander, “Review: Waluchow’s Living Tree Constitutionalism,” 97.

<sup>71</sup> Ibid., 97.

<sup>72</sup> Ibid., 98.

<sup>73</sup> Ibid., 98.

<sup>74</sup> Ibid., 99.

morality, then they are going beyond the authority of the constitution and usurping the power of elected representatives.

Both of Alexander's critiques rely on an Originalist position. There are already many arguments against Originalism.<sup>75</sup> I will not provide a new argument against the originalists, but I do want to reject the foundation of Alexander's claim. The authority and the morality of the constitution does not necessarily rely on the original meaning of the text. While the constitution may literally be the constituting document of a country, it is not necessarily a dateable set of instructions. It does have guiding principles, but those principles almost always require more than a basic textual interpretation. There are many reasons to reject the Originalist view, but for my purposes here, I will focus on the democratic ones. The whole aim of this paper has been to respond to the worries of the Incompatibilists, many of which were based on worries about democracy and self-governance. If we take the Incompatibilists seriously (which I do) then it would be ridiculous to respond to their arguments from the position of an originalist whose theory itself faces serious democratic challenges. An originalist constitution is beholden to the views of a society from the past that was reasoning about the issues at stake decades or centuries ago. For people, today, to be restricted by the views of entirely different set people from the past is just as undemocratic as it is for people, today, to be restricted by the views of people living elsewhere in the world today. Without changing to reflect the principles of self-government and democratic authority of the people, now, the constitution is, at best, an impediment to democracy, or worse, a complete denial of the

---

<sup>75</sup> See, for example, David A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010) and Mitchell N. Berman, "Originalism is Bunk" in *New York University Law Review* 84 no.1 (2009).

principles of self-rule. The constitution is only sapped of its substance, as Alexander put it, if you assume that what matters about the constitution is the founders' opinions about the moral principles. And I am not convinced that we should care about the founders' particular moral opinions. The whole point of Waluchow's argument is that no individual person's moral opinions about constituting norms should matter; it is the developed and officially expressed commitments made by the democratic community that matter.

The issue of Originalism aside, I will also point out that judges are not overruling legislatures improperly based on an unacceptable morality. The CCM is made up of the morality that emerges from the legislature and the constitution. Applying this particular morality is democratically acceptable because it is only those principles that people have accepted. The application of these principles as limits to the legislature is not an improper act of judicial power. There are democratically derived principles putting checks on the majority in order to protect the rights (democratic and otherwise) of all members of the society. And when judges use the same process but in the context of international decisions, they are using the same process of applying the commitments of the constitutional democracy but focused on international norms.



## CONCLUSION

This project began with the task of responding to a number of arguments that challenged the compatibility of international law with constitutional democracy. In the first chapter, I introduced the supposed conflict between constitutional democracy and international law according to the Incompatibilists. The survey article by Buchanan and Powell provided a framework of the so-called “Incompatibilist arguments” that includes worries about in-principle incompatibilities between international law and democracy, the democratic deficits of international institutions, the risk that international law poses to constitutional structures, and the improper application or creation of law by judges. After describing the Incompatibilist arguments and the initial responses of Buchanan and Powell, I gave an account of the current state of international law. I examined the different sources of international norms and the ways in which such norms are applied in Canada. In this section, I highlighted some of the problems that Canadian courts face when dealing with international norms in the domestic context.

The second chapter provided the structural set-up for the argument that I ultimately made in the third chapter. I began with an account of the Critics’ Case against judicial review as Waluchow presents it. I then explained the analogy on which my argument relies. The analogy is based on a comparison between the Critics’ case and the Incompatibilists’ critiques. By grouping the arguments of both sides into categories based on arguments about principles, arguments about political structures, and arguments about methods of decision-making, I showed the similarities between the two sides. After describing the critical side of the

analogy, I gave Waluchow's response to the Critics' case. The focus, in particular, was on the role of the CCM in judicial decision-making and the process of common law judicial review. With Waluchow's theory in place, the analogy is almost complete. All that is left to do is to explore the analogous solution to the Incompatibilists.

I began the third chapter by arguing that it is both possible to apply Waluchow's theory of common law review and the CCM to the Incompatibilist context and appropriate to do so. The details of the application of Waluchow's theory emerged by applying Waluchow's reasoning to the argument categories of principles, structures, and methods. Despite apparent differences between international law and domestic law, the theory can be applied through the same reasoning that Waluchow uses. The main difference is that, in cases where the constitution is not directly involved, the morality of the community that judges draw upon is the *Community's Legal Morality*, CLM, a less specific form of the CCM that looks to sources of law beyond the constitution, and relevant to each particular case. I argue that judges, when dealing with international norms in domestic cases, ought to be using the common law method and relying on the CLM/CCM. Moreover, I draw on Waluchow's argument about reasoning from a point of view to argue that judges can be making decisions in cases about international law that meet the requirements of democracy even if the law or the CCM does not provide a clear answer. There are different ways of responding to these kinds of difficult cases, including having the courts refer the question back to the legislature in a form of weak judicial review, or having a strong form of judicial review (which Waluchow argues for) in which judges are relied upon to make even these difficult decisions.

The fourth chapter was a pre-emptive attempt to respond to the possible critics of my argument. By drawing on the critics who have expressed concerns with Waluchow's theory, I addressed some of the worries that would also apply in the context of international norms domestically. I addressed worries about the guiding power of the CCM and its moral status. I also considered possible problems with the common law. The final, and most important, concern was about the undemocratic nature of judicial review in the face of disagreement and uncertainty about the CCM.

This last concern, the democratic problem, points to an interesting question that remains unanswered here. Who ought to have the final say in domestic constitutional (or even simply legal) matters? The debate between strong judicial review, weak review, and forms of parliamentary supremacy in a domestic context has been raging for some time. Waluchow argues in favour of strong review while others, like Gardbaum, promote a weaker form of review or a balance with parliamentary supremacy. As international law, particularly human rights law, grows in scope and power, it might be the case that one form of constitutional review emerges as more effective in protecting constitutional democracies while adopting international norms. My arguments in the previous chapters hinted at the possibility of strong review being a better choice, but more thought is required to establish such a claim. Tied to the question of constitutional review are questions about the way in which international laws are incorporated in other constitutional democracies. While this argument focuses on the Canadian context, it would be straightforward to apply Waluchow's theory as a solution to Incompatibilist arguments in other countries. Different problems might arise as this solution is applied in different constitutional contexts, but

these problems might point to the need for different kinds of constitutional review (strong, weak, parliamentary, etc.), rather than to a failure of the solution.

There are further questions about the development and use of the CCM or CLM that remain unanswered. The possibility of reasoning from the point of view of the democratic community allows for decisions to be made in cases where it seems as though the CCM does not speak directly or provide an answer to an issue. But the question of how judges actually reason from the point of view of the community, if the CCM does not provide guidance on the matter, remains potent. Can judges draw upon other community resources that are not part of the CCM? If so, then judges would be using principles or beliefs that have not been expressed in the law. But the expression of commitments in the law is what gave the CCM its relatively determined and democratic nature. Could there be a role for widespread and long-lasting beliefs of the community that have not yet been expressed through the law? It is unclear how such beliefs would fit in with Waluchow's theories of the CCM and normative reasoning from a point of view.

The final point of further inquiry that I will raise is one that Buchanan and Powell introduce in their paper and is also one that Waluchow identifies as a possible response to the democratic challenge of judicial review but ultimately does not address. It might be possible to defend the compatibility of international law and constitutional democracy on grounds other than democratic principles. This paper has focused on a line of argument that speaks directly to the Incompatibilists' position in order to support the connection between international law and constitutional democracy. But it would also be possible to support that connection on grounds entirely separate from the Incompatibilists' claims. Buchanan and Powell introduce cosmopolitan arguments into their paper

as a way of supporting international law. They argue that the case for constitutional democracies to accept and support international law extends beyond the scope of the Incompatibilists' argumentative turf. There are more global reasons about issues like human rights and wellbeing that ought to compel us to accept RIL in constitutional democracies. This cosmopolitan case might provide support for a connection between robust international law and constitutional democracies. It also might alienate those Incompatibilists who believe strongly in the sovereignty of states. But in an increasingly global world, the cosmopolitan line of argument is at least worth investigating.

Some question whether the international legal system is actually a proper "legal system" at all. But in a world that is connected by technology, trade, and a shared ecosystem, some kind of binding international relations seems to be important or even necessary. As the traditional roles of sovereign states change, governments are trying to figure out how to interact with other governments around the world and with their own citizens. But as I have argued in this thesis, the increase of robust international law is not an existential threat to constitutional democracies. Governments just need to find a way of balancing, incorporating, and applying international law domestically. And, as I have argued, a good way of doing so is through common law judicial review and the guidance of the community's constitutional or legal morality.

## BIBLIOGRAPHY

- Ahani v. Canada (Attorney General), 2002 ONCA 58 O.R. (3d).
- Alexander, Larry. "Review: Waluchow's Living Tree Constitutionalism." in *Law and Philosophy*, 29 no.1 (2010): 93-99.
- Atkins v. Virginia 536 U.S. 304 (2002).
- Attorney General for Canada v Attorney General for Ontario, 1937, AC 326, 1DLR 673 (PC)
- Baker v Canada (Minister of Citizenship and Immigration) [69], CanLII 699, [1999] 2 SCR 817
- Bradley, Curtis A. and Jack L. Goldsmith. "Current Illegitimacy of International Human Rights Litigation." *Fordham Law Review* 66 no.2 (1997): 319-369.
- Bradley, Curtis A. and Jack L. Goldsmith. "Customary International Law as Federal Common Law: A Critique of the Modern Position." *Harvard Law Review* 110 no.4 (1997): 816-876.
- Bradley, Curtis A. and Jack L. Goldsmith. "Treaties, Human Rights, and Conditional Consent." *University of Pennsylvania Law Review* 149 no.2 (2000): 399-468.
- Brand-Ballard, Jeffrey. "A Common Law Theory of Judicial Review: The Living Tree." *Notre Dame Philosophical Reviews*. Published 05/11/2008. Accessed 05/2017.  
<http://ndpr.nd.edu/news/a-common-law-theory-of-judicial-review-the-living-tree/>
- Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)
- Brunnée, Jutta and Stephen J. Toope. "A Hesitant Embrace: The Application of International Law by Canadian Courts." *The Canadian Yearbook of International Law*, vol. 40, (2002): 3-60.
- Buchanan, Allen and Russell Powell. "Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?" *The Journal of Political Philosophy* 16 no.3 (2008): 326-349.
- Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4
- Charkaoui v. Canada (Citizenship and Immigration). SCC 9, [2007] 1 S.C.R. 350.

Civil Marriage Act. S.C.C. 2005, c. 33.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.  
<http://canlii.ca/t/ldsx>

Continental Shelf, Libya v Malta, Merits, Judgment, [1985] ICJ Rep 13, ICGJ 118 (ICJ 1985), 3rd June 1985, International Court of Justice [ICJ]

Falk, Richard and Andres Strauss. “On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty.” *Stanford Journal of International Law* 36 no.191 (2000): 191-219.

Flores, Imer B. “The Living Tree Constitutionalism: Fixity and Flexibility.” *Problema.Anuario de Filosofía y Teoría del Derecho*, no. 3 (2009): 37-74.

Gardbaum, Stephen. *The New Commonwealth Model of Constitutionalism—Theory and Practice*. New York: Cambridge University Press, 2013.

Hart, H. L. A., *The Concept of Law*. Oxford: Oxford University Press, 1997.

ICJ Reports, 1986, pp. 108-109; 76 ILR, pp. 442-443.

Kindred, Hugh M., Saunders, Phillip M., and Robert J. Currie. “Chapter 3—National Application of International Law.” In *International Law, Chiefly as Interpreted and Applied in Canada, 8th Edition*, 149-202. Toronto: Eamond Montgomery Publications, 2014.

Marmor, “Are Constitutions Legitimate?” *Canadian Journal of Law and Jurisprudence*, no.20 (January 2007): 69-94.

Miller, Bradley W. “Review Essay: A Common Law Theory of Judicial Review by W.J. Waluchow.” *The American Journal of Jurisprudence*, vol. 52 (2007): 1-17. <https://ssrn.com/abstract=1093365>

Provost, René. “Judging in Splendid Isolation,” in *The American Journal of Comparative Law*, 56 no.1 (2008): 125-172.

Rabkin, Jeremy A. *Law Without Nations? Why Constitutional Government Requires Sovereign States*. Princeton, NJ: Princeton University Press, 2005.

Rabkin, Jeremy A. *Why Sovereignty Matters*. Washington, D.C.: the AEI Press, 1998.

Rawls, John. *Political Liberalism, expanded ed*. New York: Columbia University Press, 2005.

*Reference Re: Offshore Mineral Rights*, [1967] S.C.R. 792.

*Reference re Same-sex Marriage* [2004] S.C.C. 79.

*R. v. Hape* [2007] S.C.C. 26.

Scalia, Antonin and Stephen Breyer. Transcript of discussion between US Supreme Court Justices Antonin Scalia and Stephen Breyer on 'The constitutional relevance of foreign court decisions,' American University, January 13, 2005.  
<http://augcluster.american.edu/AU/media/mediarel.nsf/608575dac58ec4a785256869007c9cba/1f2f7dc4757fd01e85256f890068e6e0?OpenDocument&Click=>

*Schachter v. Canada*, [1992] 2 S.C.R. 679.

Shaw, Malcolm N. *International Law*. New York: Cambridge University Press, 2003. <http://books.scholarsportal.info/viewdoc.html?id=401613>

Stoljar, Natalie. "Waluchow on Moral Opinions and Moral Commitments." *Problema. Anuario de Filosofía y Teoría del Derecho*, no. 3 (2009): 101-132.

Struchiner, Noel and Fábio Perin Shecaira. "Trying to Fix Roots in Quicksand: Some difficulties with Waluchow's conception of the True Community Morality." *Problema. Anuario de Filosofía y Teoría del Derecho*, no. 3 (2009): 133-145.

United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331,  
<http://www.refworld.org/docid/3ae6b3a10.html>.

Waldron, Jeremy. *Law and Disagreement*. New York: Oxford University Press, 2004.

Waluchow, W. J. *A Common Law Theory of Judicial Review: the Living Tree*. New York: Cambridge University Press, 2009.

Waluchow, Wil. "Constitutional Rights and the Possibility of Detached Constructive Interpretation." *Problema: Anuario de Filosofía y Teoría del Derecho* no.9 (2015): 23-52.

Waluchow, Wilfred. "Constitutions as Living Trees: An Idiot Defends." *the Canadian Journal of Law and Jurisprudence*, 18, (2005): 207-247.

Waluchow, Wil. "Normative Reasoning from a Point of View." manuscript (2017): 1-25.

Wood, Michael (Special Rapporteur). "Second Report on Identification of Customary International Law." International Law Commission, 66th session, UN General Assembly, A/CN.4/672, 2014.