
FORTY-NINTH PARALLEL CONSTITUTIONALISM:
HOW CANADIANS INVOKE AMERICAN
CONSTITUTIONAL TRADITIONS

I. INTRODUCTION

While a debate over citing foreign law rages in America, Canadian constitutional discourse references the United States with frequency, familiarity, and no second thoughts. This is nothing new. After all, Canada's original constitutional framework was in some ways a reaction against American constitutionalism.¹ Similarly, the drafters of the Canadian Charter of Rights and Freedoms,² passed in 1982, took careful account of the American Bill of Rights.³

Nevertheless, today's burgeoning of comparative constitutionalism invites a closer and more structured look at the role America plays in Canadian constitutional discourse. As comparative constitutionalists strive for methodological discipline,⁴ setting out criteria for how and when foreign constitutional experience should be employed, the Canadian example, with its rich references to American constitutionalism, serves as a useful case study.⁵

This Note proposes a framework for understanding the ways in which Canadian constitutional discourse invokes American constitutionalism. Canadian political and legal actors, it suggests, use American sources in three ways: as a model to follow, as an anti-model to avoid, and as a dialogical resource for reflecting on Canada's own constitutional identity.⁶ Each of these positions, moreover, is situated

¹ See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY* 12 (3d ed. 2004) (“[The] basic constitutional assumptions [at the time of Confederation] were those of Burke and the Whig constitutional settlement of 1689 rather than of Locke and the American Constitution.”); *id.* at 23 (describing how the Fathers of Confederation saw American federalism as “thoroughly flawed”).

² Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

³ See Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 16–27 (2004) (explaining how section 7 of the Charter was drafted differently than the Due Process Clause of the U.S. Constitution to avoid the pitfalls of the *Lochner* era).

⁴ See, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

⁵ Cf. Ran Hirschl & Christopher L. Eisgruber, *Prologue: North American Constitutionalism?*, 4 INT'L J. CONST. L. 203, 205 (2006) (noting that “Canada and the United States form an especially promising context for comparative scholarship” based on their many similarities and close proximity).

⁶ Professor Vicki Jackson uses a similar typology to describe American approaches to the citation of foreign law. See Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

within one of three larger narratives about Canadian legal and political culture, each of which forms a basis for political mobilization. This Note calls these the evolution narrative, the degeneration narrative, and the independence narrative. Part II explicates in broad terms each of the three narratives and its relationship to the uses of American sources. Part III shows each of the three narratives at work in a specific context: an ongoing debate about appointments to the Supreme Court of Canada. Part IV concludes by assessing the relevance of this narrative structure for comparative constitutionalism.

II. THREE NARRATIVES

“No set of legal institutions or prescriptions,” writes Professor Robert Cover in his influential *Harvard Law Review* Foreword, “exists apart from the narratives that locate it and give it meaning.”⁷ Professor Cover goes on:

For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose. . . . History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.⁸

This Note accepts Professor Cover’s insistence on the interrelatedness of law and its institutions on the one hand, and broader patterns of social and political discourse on the other. Situating references to the American constitutional tradition within larger narratives about Canadian politics and society can enrich our understanding of American constitutionalism’s role in Canada.⁹ If one accepts Professor Cover’s framework, Canadian references to American constitutionalism have meaning *only* when viewed in the context of these narratives.

This Part attempts to link three positions on the use of American sources — model, anti-model, dialogue — with three narratives about

⁷ Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

⁸ *Id.* at 4–5 (footnotes omitted).

⁹ For further exploration of the interrelatedness of constitutional law and political culture, see Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

Canadian constitutionalism. The model position links to a narrative of evolution, the anti-model position to a narrative of degeneration, and the dialogue position to a narrative of independence. The narratives are sketched below in broad terms. Because they are narratives and not arguments, none is tightly logical, nor for that matter does any flow directly from the position on the use of American sources with which it is linked. A few examples of the parties who tend to invoke each narrative — including politicians, professors, judges, and journalists — are scattered throughout. The boundaries of each narrative are fluid, and the identities of those who speak the narratives shift over time. Still, the hope is that each narrative as a whole captures a meaningful and relatively cohesive strain of Canadian constitutional discourse.

Whereas most comparative constitutional scholarship deals with adjudication, case law, and constitutional interpretation, the framework proposed here is concerned less with how Canadian courts invoke U.S. case law and more with the role American constitutionalism plays in the popular and legislative spheres. That said, the framework is meant to be suggestive rather than exhaustive and therefore holds the potential for expansion to judicial and other constitutional realms.

A. America as Model: The Evolution Narrative

The America-as-model view holds that the American constitutional tradition is a useful one for Canada to follow. It contends that drawing on the United States's long experience with constitutionalism can be helpful to Canada, whose experience with constitutional democracy is more limited. America's institutions and broad constitutional structure can serve as a model for Canada as it grapples with the impact of the Charter of Rights and Freedoms on Canadian political and legal culture — including an increase in active judicial review and individual rights-based litigation. American constitutional experience is also useful because of the similarity between the two countries — both large federations with similar liberal democratic values and multiethnic, multicultural populations.

The America-as-model approach is situated within a narrative of evolution — a progress story. In this story, Canadian democracy has yet to fulfill the requirements of a modern constitutional democracy. Whereas Americans have always been pioneers in the realm of democratic government, Canada has always played and continues to play catch-up. Archaic, unrepresentative, and unaccountable institutions and practices continue to occupy important places in the Canadian system. The primary example of this backwardness is Canada's Senate, the members of which are not elected but appointed by the Prime Minister to serve until age seventy-five, and which has the power (though it rarely exercises it) to defeat any legislation passed by the

House of Commons. Americans, the evolution narrative holds, would never tolerate such an institution, and neither should Canadians. Moreover, political power is misallocated, leading to a disproportionate concentration of resources in certain branches of government and certain regions of the country. For instance, voters in some provinces (British Columbia and Alberta, for example) have less voting power than voters in other provinces (Saskatchewan and Prince Edward Island, for example) because their electoral districts are more populous.¹⁰ The evolution narrative contends that Canada should counter this disparity in voting by adopting the American principle of “one person, one vote.”¹¹ For Canada to follow America’s lead on political and legal institutions, therefore, would represent an evolution toward a more democratic future.¹²

The evolution narrative approves of the institutions and structures of American constitutionalism, particularly the separation of powers and the system of checks and balances dictated by the U.S. Constitution — what James Madison meant when he said “[a]mbition must be made to counteract ambition.”¹³ The evolution narrative contrasts this power-constraining structure with the Canadian parliamentary system’s increasing concentration of power in the hands of the Prime Minister,¹⁴ who has unchecked authority to appoint all Senators as well as all judges sitting on courts of general jurisdiction.

The evolution narrative admires other things about American constitutionalism as well. It admires the Founding — the deliberate, pioneering, and principled establishment of fundamental governing principles set out and ratified by “We the People” — which it contrasts with the more pragmatic and compromise-driven origins of Canadian constitutionalism and with the continued failure of the Canadian peo-

¹⁰ See Michael Pal & Sujit Choudhry, *Is Every Ballot Equal? Visible-Minority Vote Dilution in Canada*, IRPP CHOICES (Inst. for Research on Pub. Policy, Montreal, Que., Can.), Jan. 2007, at 8, available at <http://www.irpp.org/choices/archive/vol13no1.pdf> (presenting data on the relative voting power of voters in different provinces).

¹¹ Cf. Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, 182, 186 (rejecting a Charter challenge to electoral boundaries, based on the American “one person, one vote” principle, partly because “democracy in Canada is rooted in a different history than in the United States”).

¹² Of course, the same argument about uneven distribution of political power could be leveled at the U.S. Senate, which overrepresents the interests of small states. This inconsistency is just one example of how each of the narratives relies on some aspects of the American constitutional experience while ignoring others.

¹³ THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961); see also Rainer Knopff, *Populism and the Politics of Rights: The Dual Attack on Representative Democracy*, 31 CAN. J. POL. SCI. 683 (1998) (using James Madison’s constitutional philosophy to advocate a checks-and-balances approach to Canadian constitutionalism).

¹⁴ See DONALD J. SAVOIE, GOVERNING FROM THE CENTRE (1999); JEFFREY SIMPSON, THE FRIENDLY DICTATORSHIP 3–64 (2001).

ple to create and endorse a Lockean social contract of their own.¹⁵ It admires the U.S. Constitution's protection of property rights, which it regards as an essential bulwark against tyranny. Indeed, the Conservative Party of Canada's 2006 federal election platform included a plan to entrench property rights in the Charter, which has no equivalent to the Takings Clause.¹⁶ Finally, it admires the intense scrutiny to which the United States subjects its judges, including the close attention paid to judicial appointments and the political success of the mobilization against judicial activism. Exponents of the evolution narrative have imported to Canada the American Right's rhetoric regarding originalism and judicial activism, raising the specter of activist judges using the Charter to usurp the people's ability to decide important questions of social policy.¹⁷

The advent of the Charter thus plays a pivotal role in the evolution narrative. In *The Charter Revolution and the Court Party*, Professors F.L. Morton and Rainer Knopff describe the Charter as having "transformed" Canadian politics, leading judges to "abandon[] the deference and self-restraint that characterized their pre-Charter jurisprudence and become more active players in the political process."¹⁸ The Charter, they argue, thus ushered in a "revolution"¹⁹ not only in judging, but also in the broader Canadian political culture, resulting in unwarranted gains for liberal, elite special interests such as feminists and same-sex rights advocates.²⁰ Careful not to blame the highly popular Charter itself for this judicialization of democratic politics, the evolution narrative instead blames activist judges and special interests for departing from a Golden Age of deferential and apolitical adjudication. By framing the Charter as a rupture in the historical arc of Canadian constitutional culture, the evolution narrative avoids looking like the enemy of tradition. Instead it portrays itself as merely want-

¹⁵ Professor Peter Russell describes Canada's still incomplete journey toward becoming a "sovereign people." See RUSSELL, *supra* note 1, at 107–26. Recent legs of that journey include the following: In 1982, Canada adopted the Charter of Rights and Freedoms and obtained the power to amend its constitution without the approval of the British Parliament. See *id.* However, Quebec decided not to ratify the new constitution. See *id.* at 119–26. This led to two further attempts to bring Quebec into the constitutional fold over the subsequent decade — the Meech Lake Accord in 1987 and the Charlottetown Accord in 1992 — both of which failed. See *id.* at 127–53, 190–227.

¹⁶ CONSERVATIVE PARTY OF CAN., FEDERAL ELECTION PLATFORM 2006, at 43 (2006).

¹⁷ See, e.g., RORY LEISHMAN, AGAINST JUDICIAL ACTIVISM (2006); ROBERT IVAN MARTIN, THE MOST DANGEROUS BRANCH (2003); F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY (2000); Preston Manning, Op-Ed, *Parliament, Not Judges, Must Make the Laws of the Land*, GLOBE & MAIL (Toronto), June 16, 1998, at A21, 1998 WLNR 6202042.

¹⁸ MORTON & KNOPFF, *supra* note 17, at 13.

¹⁹ *Id.* (quoting Antonio Lamer, Chief Justice of the Canadian Supreme Court).

²⁰ See *id.* at 13–15.

ing to put democratic limits on the power of those who have already undermined tradition. In addition to being a narrative of progress and modernity, then, the evolution narrative has a motif of restoration.

The evolution narrative's views on judges and the Charter are encapsulated in its position on the Charter's legislative override provision, known as the Notwithstanding Clause.²¹ The Notwithstanding Clause effectively allows Parliament to overrule or preempt a court ruling of unconstitutionality based on certain specified sections of the Charter by expressly declaring that a piece of legislation applies "notwithstanding" the Charter.²² Such declarations expire after five years, though they can be reenacted after that time. The provision is politically controversial and has been used infrequently, leading one commentator to call it "dead letter."²³ The evolution narrative favors expanded use of the Notwithstanding Clause as a tool to rein in activist judges and to reinvest in elected officials the power to decide questions of social policy. The override clause provides a means of injecting majoritarian values into a constitutional system that the evolution narrative believes has come to serve the interests of liberal elites.²⁴

Politically, the evolution narrative has been deployed mainly by the Right, in particular the Western-based Reform wing of the Conservative Party. Reformers have long favored introducing more U.S.-style

²¹ Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33 (U.K.).

²² *Id.*

²³ PETER MCCORMICK, SUPREME AT LAST 175 (2000).

²⁴ See LEISHMAN, *supra* note 17, at 250–68; Paul Bunner, *The Framers' Revolt*, W. STANDARD (Calgary), Apr. 4, 2005, available at http://www.westernstandard.ca/website/index.cfm?page=article&article_id=694&pagenumber=5. There is concededly something odd about associating the Notwithstanding Clause with American constitutionalism. The American system is one of judicial supremacy. From this point of view, expanded use of the override provision suggests a move away from U.S.-style judicial supremacy toward the British model of parliamentary supremacy. Indeed, this objection could be expanded. If one takes judicial supremacy and the protection of individual rights to be the keystones of American constitutionalism, then the evolution narrative, with its skepticism regarding Charter adjudication, begins to look like a rejection rather than an embrace of the American model. However, the evolution narrative's understanding of the American model is not simply the mechanisms of judicial supremacy and individual rights protection, but a particular *attitude* toward judicial supremacy and individual rights protection. Under this attitude, judicial authority is checked and subjected to close public scrutiny, textualism and originalism form important components of judges' interpretive methodology, and constitutional adjudication is regarded as an activity that is potentially political in nature and that should therefore be kept within tight bounds of accountability. The evolution narrative draws much of its inspiration from this distinctively American set of reactions to the institutions of judicial review and individual rights protection. On this account, its endorsement of expanded use of the Notwithstanding Clause is a movement toward the American model insofar as it is a means of constraining judicial power. Moreover, even if, functionally, evolution narrative proposals suggest a move away from American constitutionalism, the rhetoric of the evolution narrative nevertheless suggests a greater friendliness toward American examples than can be found in either the degeneration narrative or the independence narrative. And because this Note attempts to identify lines of narrative as opposed to lines of argument, rhetoric matters.

checks into the judicial nominations process.²⁵ As individualist advocates of free markets and small government, Reform Conservatives are philosophically closer to the American political mainstream than are other Canadian parties, which are more collectivist and favorably disposed toward government intervention. This may partly explain why Reform Conservatives are more comfortable with drawing on American examples.²⁶ It may also explain why the U.S. system of checks and balances, motivated as it was by a fear of tyrannical government, appeals to them.

B. America as Anti-Model: The Degeneration Narrative

In contrast to the America-as-model view, the America-as-anti-model view holds that Canada should deliberately avoid following American constitutional traditions. It regards Canadian and American traditions as fundamentally dissimilar. Further, it considers American constitutional history to be marred by significant mistakes. Because of these differences and shortcomings, American examples are useful to Canadian constitutional decisionmaking mainly insofar as they reveal the path Canada should avoid.

This anti-model approach is located within a narrative of degeneration — a cautionary tale of what would befall Canada's constitutional system were it to follow the American model. The degeneration narrative embodies what Professor Kim Scheppele calls “aversive constitutionalism,” a backward-oriented way of constitution-building that knows more what it wants to avoid than what it wants to achieve.²⁷ Unlike the evolution narrative, this story does not include a transformative constitutional vision. Instead, the degeneration narrative is relatively satisfied with the achievements of Canadian constitutionalism. It celebrates Canadian courts for the expansive protection they afford human rights, the respect with which they are viewed around the world, and their professional, apolitical approach to adjudication.

The degeneration narrative takes a dark view of the American constitutional experience. It contrasts an objective, apolitical, cosmopolitan, and consensus-building Canadian judiciary with a politicized, partisan, parochial, and ideologically riven American judiciary, a juxtaposition that is embodied in the degeneration narrative's view of

²⁵ See, e.g., Manning, *supra* note 17.

²⁶ See Roger Gibbins, *The Impact of the American Constitution on Contemporary Canadian Constitutional Politics*, in *THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE* 131, 144 (Marian C. McKenna ed., 1993) (“There is a greater receptivity to American ideas . . . within the Reform Party than there is within the more established parties.”).

²⁷ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 *INT'L J. CONST. L.* 296, 300 (2003).

the American approach to judicial confirmations. The *Lochner*²⁸ era also has a central place in the degeneration view. As Professor Sujit Choudhry illustrates in considerable detail, Canadian judges, politicians, and commentators have used *Lochner* to symbolize several pitfalls that Canadian constitutionalism should avoid.²⁹ For Canadian constitutionalists, Professor Choudhry argues, *Lochner* has come to represent at once the dangers of judicial activism, constitutional entrenchment of contract and property rights, and interbranch conflict, as illustrated by President Roosevelt's Court-packing plan. The drafters of the Charter, for example, deliberately avoided the language of "due process" because they feared judges would employ such wording, à la *Lochner*, to impose economic libertarianism.³⁰ This use of *Lochner* as the "whipping boy"³¹ of Canadian constitutionalism shows the degeneration narrative at work. The basic assertion is that by following the American model, Canadian constitutionalism will replicate American missteps.

In addition, the degeneration narrative sees American constitutionalism as having isolated itself from the rest of the world, in contrast with Canadian constitutionalism, which it depicts as cosmopolitan, with Canada an active and cooperative member of a transnational family of constitutional cultures. Professor Lorraine Weinrib labels this international order "the postwar paradigm" of constitutionalism, which she says is characterized by engagement with other constitutional traditions and with international legal institutions, by strong protection for human rights, and by nontextual, purposive interpretive methods.³² By contrast, Professor Weinrib speaks of the "exceptionalism" of American constitutionalism, which she portrays as self-enclosed, textualist, and deferential to legislative majorities.³³

Like the evolution narrative, the degeneration narrative relies on a particular image of the Charter of Rights. Whereas the evolution narrative views the Charter as a judicial power grab, the degeneration narrative celebrates the Charter for the expansive protection it affords human rights,³⁴ contrasting this broad protection with the narrower

²⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁹ See Choudhry, *supra* note 3.

³⁰ See *id.* at 16–27.

³¹ Cf. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 82 (1996) (calling *Lochner* the "whipping boy" of American constitutional law).

³² See Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 85 (Sujit Choudhry ed., 2006).

³³ *Id.*

³⁴ See, e.g., Rosalie Silberman Abella, *Public Policy and the Judicial Role*, in *THE CANADIAN AND AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE*, *supra* note 26, at 167, 177 ("The *Charter* is about human rights, not about judicial versus legislative roles, nor about judicial activism versus restraint, nor about the politicization of the judiciary.").

scope and more conservative tilt of the American Bill of Rights.³⁵ The degeneration narrative regards Charter rights as universal, nonnegotiable products of legal science and thus frowns on what it sees as attempts to “politicize” rights. For this reason, it tends to oppose the use of the Charter’s Notwithstanding Clause, which it sees as a means for the legislature illegitimately to restrict fundamental rights, to the detriment of the minority populations the Charter is meant to protect.

Politically, the degeneration narrative mobilizes an amorphous coalition of groups. On the one hand, it draws support from important segments of the Canadian legal establishment, including most judges and bar associations. The degeneration narrative appeals to these groups because of the positive image it paints of Canadian legal culture in comparison to its American counterpart: a globally respected court system, a professional and apolitical judiciary, a civil and respectful bar. Moreover, law has always served as a powerful metaphor in differentiating the Canadian experience from the American. As Professor Seymour Martin Lipset puts it in his seminal comparative sociological work, *Continental Divide*, “[e]fforts to distinguish Canada and the United States almost invariably point to the greater respect for law and those who uphold it north of the border.”³⁶ The degeneration narrative thus gives the legal profession a way to valorize its contribution to the construction of Canada’s imagined community.

The degeneration narrative is also increasingly invoked by the Left, in particular the New Democratic Party (NDP).³⁷ Although the NDP was initially divided over the Charter, with some New Democrats seeing a bill of rights as being in tension with social democratic principles, the party has restyled itself as the true defender of rights, especially those of minority populations. For example, the NDP was the party most strenuously opposed to interviewing Supreme Court nominees in public. It has also recently criticized the Liberals for “playing politics with rights” by allowing a free vote on a bill granting same-sex marriage, which several provincial appellate courts had held was constitutionally required.³⁸ The Left draws on the narrative of degeneration as a way to appeal to discontent with the United States and to defend

³⁵ See, e.g., Lorraine Eisenstat Weinrib, *The Activist Constitution*, POLICY OPTIONS, Apr. 1999, at 28 (“In sharp and deliberate contrast to the [U.S.] Bill of Rights, the Charter is unequivocal in departing from the values of a stable, hierarchical, paternalistic, and patriarchal society.”).

³⁶ SEYMOUR MARTIN LIPSET, *CONTINENTAL DIVIDE* 90 (1990).

³⁷ While legal elites and social democrats may appear to be odd bedfellows, some scholars view them as aligned. Professors Morton and Knopff speak of a “Court Party,” which unites a “coalition of social interests . . . that has promoted the growth of judicial power.” MORTON & KNOPFF, *supra* note 17, at 21. They include in that group not only much of the legal profession, but also “national unity advocates, civil libertarians, equality seekers, social engineers, and post-materialists.” *Id.* at 31.

³⁸ Jack Layton, Op-Ed, *Playing Politics with Rights*, TORONTO STAR, Jan. 26, 2005, at A21.

a particular vision of Canadian nationalism that contrasts Canadian virtue with American vice. The degeneration narrative, which paints rights as nonnegotiable, can also be seen as a means of safeguarding the progressive, rights-expansive Charter jurisprudence of the past twenty-five years, which has brought gains for constituencies in which support for the Left is strong.

C. America as Dialogical Resource: The Independence Narrative

The dialogical approach takes a middle ground between the America-as-model and America-as-anti-model approaches. It understands the main utility to Canada of American constitutional sources as being for the development of Canada's *own* constitutional identity. American constitutionalism is thus a dialogical³⁹ resource for Canadian constitutional actors, who may use American institutions, decisions, and principles to provoke reflection about Canada's own sense of self and future direction. This approach follows what Professor Choudhry calls "dialogical interpretation" in comparative constitutional law.⁴⁰ Rather than serving as positive or negative examples to be copied or rejected, American constitutional traditions shed light on the aspects of Canadian constitutionalism that make it unique, thereby strengthening Canadian constitutional identity. American constitutionalism, the dialogical approach holds, is similar enough to its Canadian counterpart that it can serve as a helpful basis of comparison, yet distinct enough that the intersystem differences can reveal previously undiscovered particularities in the Canadian tradition.

This dialogical approach is situated within a narrative of independence — a coming-of-age story about Canada developing its own distinct constitutional culture, one that is no longer derivative of Britain's, yet is also different from America's. Canada, here, is an active agent, neither clinging to its colonial past nor succumbing to an Americanized future, but continually aware of both. Unlike the evolution narrative, the independence narrative is neither deeply aspirational nor based on a transformative constitutional vision. But unlike the degeneration narrative, neither is it primarily reactionary, or, in Professor Scheppele's words, "aversive."⁴¹ Instead, it is based on self-discovery — the process of mining one's own and others' traditions to develop a conception of one's unique place in the world.

³⁹ "Dialogical" here refers to the philosophical and psychological idea that selfhood is constituted not in isolation or autonomously, but through relationships and dialogue with others. See generally Charles Taylor, *The Dialogical Self*, in *THE INTERPRETIVE TURN* 304 (David R. Hiley et al. eds., 1991).

⁴⁰ See Choudhry, *supra* note 4, at 855–66.

⁴¹ Scheppele, *supra* note 27, at 300.

One of the consequences of this coming of age is that Canada's constitutional culture has become sufficiently durable that it can draw some degree of inspiration from American models without risking Americanization. In this regard, the independence narrative differs from the degeneration narrative, which warns that following the United States could lead Canada down the slippery slope toward losing its constitutional culture.

The independence narrative imagines America neither as a constitutional mentor nor as a negative constitutional example. Rather, it regards America as a constitutional equal. Yet, according to the independence narrative, America is an equal that has chosen a different path. Central to the independence narrative's view of U.S. constitutionalism, therefore, is America's shift over the past several decades from the progressive constitutionalism of the 1950s and 1960s to the more conservative constitutionalism of the 1980s through the present day. This shift is contrasted with an opposite trend in Canadian constitutionalism, in which courts have become increasingly receptive to rights claims and to noninterpretivist methods of interpretation. As Professor Christopher Manfredi puts it, "the Canadian [Supreme] Court [is] exhibiting a level of activism that its [U.S.] counterpart has abandoned."⁴²

Divergence is thus a core motif of the independence narrative. As such, the independence narrative runs counter to the common claim that Canada is becoming increasingly similar to the United States, both in general political, economic, and cultural terms,⁴³ as well as in terms of constitutionalism.⁴⁴ It echoes the findings of a popular recent book by Michael Adams called *Fire and Ice*, which uses twenty years of survey data to argue that Canadians are becoming more secular, cosmopolitan, and willing to challenge authority and Americans more devout, closed to strangers, and deferential.⁴⁵

Consistent with the divergence theme, the independence narrative celebrates those recent constitutional developments that have helped Canada differentiate itself from its neighbor. Most significant among these developments is the advent of the Charter. Unlike the evolution

⁴² Christopher Manfredi, *Rights and the Judicialization of Politics in Canada and the United States*, in CANADA AND THE UNITED STATES: DIFFERENCES THAT COUNT 301, 311 (David M. Thomas ed., 2d ed. 2000).

⁴³ See, e.g., JEFFREY SIMPSON, *STAR-SPANGLED CANADIANS* (2000).

⁴⁴ See, e.g., LIPSET, *supra* note 36, at 225 (describing the adoption of the Charter as "[p]erhaps the most important step that Canada has taken to Americanize itself"); MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* 4 (1989) (describing a "gradual shift" in Canada "from a British to an American conception of the appropriate relations between the legal profession and representative institutions").

⁴⁵ See MICHAEL ADAMS, *FIRE AND ICE: THE UNITED STATES, CANADA AND THE MYTH OF CONVERGING VALUES* (2003).

narrative, however, which tends to portray the Charter and its interpretation as a power grab by special interests and legal elites, the independence narrative sees the creation of the Charter as a triumph for Canadian democracy, identity, and unity — perhaps Canada's greatest political achievement in the twentieth century. And unlike the degeneration narrative, which values the Charter primarily for the specific rights it protects, the independence narrative values the Charter primarily as an indigenous political document. Exponents of the independence narrative, then, are “Charter patriots,”⁴⁶ to borrow Professor Peter Russell's term: they see the Charter as not only embodying, but also helping to solidify, an emerging set of distinctly Canadian values.

The independence narrative also points to specific aspects of the Charter as innovative and unique, contrasting them with American constitutionalism to emphasize the point. It sees the Notwithstanding Clause as a healthy balance between the parliamentary supremacy of the British model and the judicial supremacy of the American model⁴⁷ and as a way to avoid the interbranch conflicts of the American system and to promote a democracy-enhancing “dialogue” between the judiciary and the legislature over the content of rights.⁴⁸ Likewise, the independence narrative celebrates the Charter's group rights provisions as a relatively successful attempt to accommodate several different linguistic, cultural, and national groups within one constitutional tradition, contrasting Canada's “mosaic” approach to multiculturalism with America's “melting pot.”⁴⁹ Another area of perceived divergence is in the use of foreign and international law, a phenomenon in which Canadian courts are active participants, in contrast to their reluctant American counterparts.

The independence narrative tends to mobilize the Center and Center-Left of Canadian politics, in particular the Liberal Party. For this constituency, the independence narrative is attractive because the

⁴⁶ See Peter H. Russell, *The Political Purposes of the Charter: Have They Been Fulfilled? An Agnostic's Report Card*, in PROTECTING RIGHTS AND FREEDOMS 33, 42 (Philip Bryden et al. eds., 1994).

⁴⁷ See, e.g., KENT ROACH, THE SUPREME COURT ON TRIAL 7–8 (2001) (arguing that the Charter's ability to balance a role for judges with a role for legislators in determining the place of rights in society reflects its “genius”).

⁴⁸ See Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997). Professor Kent Roach puts this argument in comparative perspective, arguing that the Canadian Constitution is better than the U.S. Constitution at facilitating such interbranch dialogue. See Kent Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347 (2006).

⁴⁹ See MICHAEL IGNATIEFF, THE RIGHTS REVOLUTION 124–25 (2000) (“[T]he essential distinctiveness of Canada . . . lies in the fact that we are a tri-national community, trying to balance individual and collective rights without sacrificing the unity and equality of our citizenship.”).

achievements that the narrative celebrates — the Charter, linguistic rights, the patriation of the Constitution — were accomplished under Prime Minister Pierre Trudeau's Liberal government.⁵⁰ By casting elements of the Charter as innovative and distinct from the American tradition, the independence narrative portrays Liberals as nation-builders and constitutional visionaries. The independence narrative is also a natural fit for Liberals insofar as they have long concerned themselves with questions of Canadian identity and Canada's place in the world. Finally, the independence narrative is consistent with Liberal positions on Canada-U.S. relations. Just as the dialogical approach takes a moderate stance on American constitutionalism compared to the America-as-model and America-as-anti-model approaches, the Liberals have tried to stake out a middle ground between the NDP, whom they see as anti-American, and the Conservatives, whom they see as coopted by the United States.

III. THE SUPREME COURT APPOINTMENTS DEBATE

Last year, the Canadian judiciary underwent a significant reform. For the first time, a nominee for the Supreme Court of Canada, Justice Marshall Rothstein, was publicly interviewed by a parliamentary committee. The interview followed several years of focused debate about reforming the appointments process for Canada's highest court. By law, the Prime Minister has unilateral, unchecked authority to appoint Canada's nine Supreme Court justices,⁵¹ who may hold office "during good behaviour" until age seventy-five.⁵² Although the interview of Justice Rothstein arguably created some political accountability for the Prime Minister's appointment power, it did not change this legal structure, since the parliamentary committee had no *de jure* power to affect the Prime Minister's decision. The debate over a reformed appointments process (and over Justice Rothstein's nomination in particular) was heavily influenced by the American experience with judicial nominations. It therefore provides a useful illustration for how the three narratives — evolution, degeneration, and independence — play themselves out within a single issue. The Supreme Court appointments debate is also a valuable case study because it implicated a rich array of questions of constitutional law and politics — including questions about the quality of the Canadian judiciary, the degree to

⁵⁰ For a history of the patriation process, through which Canada acquired the ability to amend its constitution without the British Parliament's approval, see RUSSELL, *supra* note 1, at 107–26.

⁵¹ Constitution Act, 1867, 30 & 31 Vict., ch. 3, § 96 (U.K.), reprinted in R.S.C. app. 5 (1985). According to one prominent commentator, the Canadian system is unparalleled among federal states in the amount of judicial appointment authority it invests in a single individual. See PETER H. RUSSELL, *THE JUDICIARY IN CANADA* 114 (1987).

⁵² Supreme Court Act, R.S.C., ch. S-26, § 9 (1985).

which constitutional law is political, the meaning of judicial independence, and the desirability of judicial review. This breadth lends itself well to an exposition of the three narratives in their multiple dimensions.

A. The Evolution Narrative

The evolution narrative favors considerable reform of Canada's Supreme Court appointments system and does not oppose a confirmation system similar to the American approach. Its central claim is that the old system — secretive and concentrated in the hands of one person — is an outdated process not in line with the demands of modern democracy. The public interview of a Supreme Court nominee was a Conservative Party initiative. Justice Minister and Attorney General Vic Toews framed the hearing as an attempt to “bring greater openness and accountability” to the appointments process.⁵³ The nonbinding interview process was in fact a less radical version of the model set out in a 2005 Conservative Party policy document, which called for Supreme Court nominees to be confirmed by a free vote of Parliament.⁵⁴ Proposals to reform the judicial appointments process were also commonly made by the Western-based Reform Party, which is now subsumed within the Conservative Party of Canada. The Reform Party once proposed granting the power to appoint Supreme Court justices to provincial legislatures rather than to the Prime Minister.⁵⁵

The evolution narrative's predominant motifs of progress and modernity are evident in the following statement by Professor Morton, testifying before the House of Commons Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness (Justice Committee): “I would suggest it is high time that Canada abandoned the legalistic, autocratic, and outdated method of prime ministerial monopoly of judicial appointments and join the real world of 21st century democracy.”⁵⁶ Similarly, University of Lethbridge political scientist Peter McCormick called the existing procedure an “absurd anachronism.”⁵⁷

⁵³ *Hearing Before the Ad Hoc Comm. on Supreme Court Appointments*, 39th Parl., Feb. 27, 2006 [hereinafter *Hearing Before the Ad Hoc Comm.*] (statement of Vic Toews, Minister of Justice and Att'y Gen. of Canada) (transcript on file with the Harvard Law School Library).

⁵⁴ See CONSERVATIVE PARTY OF CAN., POLICY DECLARATION 5 (2005).

⁵⁵ See Peter H. Russell, *Reform's Judicial Agenda*, in JUDICIAL POWER AND CANADIAN DEMOCRACY 121 (Paul Howe & Peter H. Russell eds., 2001).

⁵⁶ *The Selection of Supreme Court Justices: Hearing Before the House of Commons Standing Comm. on Justice, Human Rights, Public Safety, and Emergency Preparedness*, 37th Parl., 3d Sess., Apr. 1, 2004 (statement of Professor F.L. Morton, University of Calgary), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=77698>.

⁵⁷ *Id.* (statement of Professor Peter McCormick, University of Lethbridge).

According to the evolution narrative, the Rothstein hearing was a step in the right direction. For two reasons, however, the hearing did not go far enough. First, it did not introduce a meaningful check on the Prime Minister's power to appoint.⁵⁸ Second, the parliamentarians asking questions of Justice Rothstein were too deferential toward the nominee. *National Post* columnist Andrew Coyne described the hearing as "a few perfunctory questions from star-struck MPs."⁵⁹

Whereas the degeneration narrative paints the American experience with judicial nominations as exceptional — highlighting the Judge Bork and Justice Thomas nominations as examples of a system hypercharged with politics — the evolution narrative applies the exceptionalism label to the Canadian nominations system. What is exceptional about the Canadian system, from this point of view, is the amount of unchecked power it grants the Prime Minister in selecting judges. The proponents of the evolution narrative respond to the degeneration narrative's concerns about a politicized judiciary by saying that the politicization has already occurred.⁶⁰ They offer examples of issue-based interest groups (women's rights and same-sex rights groups are their favorite examples) lobbying the Prime Minister to nominate judges favorable to their causes.⁶¹ The choice, they say, is not between a politicized judiciary and an apolitical one, but rather between a system where judicial politics are subjected to open, democratic debate, and one in which such politics occur behind closed doors.

B. *The Degeneration Narrative*

In the context of the nominations debate, the degeneration narrative warns of a slow but ineluctable slide toward the politicization of Canada's judiciary and the erosion of the independence of its courts. If Canada adopts a model even modestly inspired by the U.S. approach, Canadian law will degenerate into politics and partisanship, and judicial nominations will degenerate into divisive, highly partisan, and invasive affairs.

The degeneration narrative's rallying cry is the fear of a politicized judiciary, which it sees as embodied in the American court system. For instance, commenting on the prospect of reforming the appointments process, former Chief Justice Antonio Lamer warned that

⁵⁸ Andrew Coyne, *A Show Trial in Reverse*, NAT'L POST (Toronto), Mar. 1, 2006, at A17.

⁵⁹ *Id.*; see also Editorial, *Democracy in Action*, NAT'L POST (Toronto), Mar. 1, 2006, at A14 ("If anything, the questioners were too cautious.").

⁶⁰ See, e.g., F.L. Morton, *To Bring Judicial Appointments Out of the Closet*, GLOBE & MAIL (Toronto), Sept. 22, 1997, at A15, reprinted in LAW, POLITICS, AND THE JUDICIAL PROCESS IN CANADA 154 (F.L. Morton ed., 3d ed. 2002).

⁶¹ See, e.g., MARTIN, *supra* note 17; MORTON & KNOPFF, *supra* note 17, at 59–86; Morton, *supra* note 60.

“[w]hat we must be very careful not to do is to politicize the process. That’s what the Americans have done.”⁶² Current Chief Justice Beverly McLachlin expressed a similar sentiment prior to the implementation of the new process, opposing it because of its potential to politicize the judiciary.⁶³

To evoke a degeneration is to imply the loss of something valuable, and here that something is a Canadian legal culture that is usually characterized as objective, civil, restrained, and respectful. William Johnson, then President of the Canadian Bar Association, testified to the House of Commons Justice Committee: “Do we know where the Supreme Court judges come from [ideologically]? In the United States, I think that they do know. That is not the case in Canada, because our Supreme Court judges are apolitical.”⁶⁴

The degeneration narrative sees the U.S. judicial appointments process as corrupted by ideology, partisanship, and impingements on privacy. U.S. Senate confirmation hearings, testified former Quebec Bar Association President Denis Jacques, “have often degenerated into ridicule and rhetoric. During election years, they have sometimes resembled witch-hunts.”⁶⁵ The imagined failure of the U.S. approach reaches its nadir with the confirmation processes of Judge Bork and Justice Thomas, which exponents of the degeneration narrative portray as almost unqualifiedly negative — the former for its ideological character, the latter for its intrusiveness upon personal life. During his testimony before the House of Commons Justice Committee, William Trudell, chair of the Canadian Council of Criminal Defence Lawyers, suggested that making interviews with Supreme Court nominees private would “avoid[] the Clarence Thomas circus that we’ve heard about, public embarrassment, the question that should not be asked, and political grandstanding.”⁶⁶

The degeneration narrative also relies on the related premise that the Canadian judiciary is of high quality, meaning that past Prime

⁶² F.L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER* 56, 61–62 (Kate Malleon & Peter H. Russell eds., 2006) (internal quotation mark omitted).

⁶³ See John Ibbitson, *Judicial Reform: It’s the Newest ‘Liberal’ Initiative*, *GLOBE & MAIL* (Toronto), Feb. 21, 2006, at A7, 2005 WLNR 3404302.

⁶⁴ *The Selection of Supreme Court Justices: Hearing Before the House of Commons Standing Comm. on Justice, Human Rights, Public Safety, and Emergency Preparedness*, 37th Parl., 3d Sess., Mar. 25, 2004 [hereinafter *Hearing*, Mar. 25, 2004] (statement of William Johnson, President, Canadian Bar Association), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76540>.

⁶⁵ *Id.* (statement of Denis Jacques, former President, Quebec Bar Association).

⁶⁶ *The Selection of Supreme Court Justices: Hearing Before the House of Commons Standing Comm. on Justice, Human Rights, Public Safety, and Emergency Preparedness*, 37th Parl., 3d Sess., Apr. 20, 2004 (statement of William Trudell, Chair, Canadian Council of Criminal Defence Lawyers), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=80050>.

Ministers have nominated the right judges and that the system works well as is. Quality is usually gauged by the opinions of people outside Canada. According to Professor Lorraine Weinrib, “[t]he members of the court and the court’s work are given not only the highest regard in other countries; the work of the Court is emulated where possible, and where not emulated is often the subject of aspirations and great envy.”⁶⁷ Similarly, former Supreme Court of Canada Justice Claire L’Heureux-Dubé praised the Canadian judiciary as “a model for the world.”⁶⁸

Many of the degeneration arguments rely on slippery-slope reasoning. Even small, seemingly benign reforms have the potential to slide the Canadian system toward an American-style approach. After the Rothstein hearing, an editorial in the left-leaning *Toronto Star* issued such a warning:

[Prime Minister Stephen] Harper has opened the door to American-style politicking. Some of [the hearing’s] questions came uncomfortably close. If future MPs choose to play politics instead of exercising restraint, or if a nominee is controversial, the review process may degenerate into a partisan affair that could subvert public confidence in the independence of our judiciary.⁶⁹

For these reasons, the degeneration narrative is opposed to public interviews with judicial nominees. New Democrats and much of the Canadian legal elite took strong positions against having judges appear publicly. During the Rothstein hearing, for instance, NDP MP Joe Comartin voiced this disapproval in front of the nominee, objecting that it was “a bit difficult for [him] to be asking questions” given his “serious objections to this process.”⁷⁰ Similarly, Jacques argued that, in order to maintain judicial independence, the government should “*not even consider* a parliamentary review process where candidates would have to parade before a committee to respond to a whole host of questions relating to their values, their beliefs, their decisions or past experience.”⁷¹

⁶⁷ *The Selection of Supreme Court Justices: Hearing Before the House of Commons Standing Comm. on Justice, Human Rights, Public Safety, and Emergency Preparedness*, 37th Parl., 3d Sess., Mar. 23, 2004 [hereinafter *Hearing*, Mar. 23, 2004] (statement of Professor Lorraine Weinrib, University of Toronto), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76518>.

⁶⁸ *The Selection of Supreme Court Justices: Hearing Before the House of Commons Standing Comm. on Justice, Human Rights, Public Safety, and Emergency Preparedness*, 37th Parl., 3d Sess., Mar. 30, 2004 (statement of Justice Clair L’Heureux-Dubé, Supreme Court of Canada (retired)), available at <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=76982>.

⁶⁹ Editorial, *Rothstein Review Invites Concern*, TORONTO STAR, Feb. 28, 2006, at A18.

⁷⁰ *Hearing Before the Ad Hoc Comm.*, *supra* note 53 (statement of Joe Comartin, Minister of Parliament).

⁷¹ *Hearing*, Mar. 25, 2004, *supra* note 64 (statement of Denis Jacques) (emphasis added).

C. *The Independence Narrative*

The independence narrative favors some reform to the nominations process. But rather than adopting the American model, the aim should be for a “made-in-Canada” approach.⁷² Like the degeneration narrative, the independence narrative regards the American confirmation experience as tainted by division, partisanship, and invasiveness. However, it does not object as strongly to taking inspiration from that admittedly flawed model because it sees Canadian constitutional culture as robust enough that adopting an American-style process is not likely to result in an American-style content to that process.

The Liberal Party viewed the public interviews reform with a mixture of approval and caution: approval because when the Liberals held office they themselves had implemented some more modest reforms to the appointments process, including having the Minister of Justice testify before the House of Commons Justice Committee to explain new Supreme Court appointments after those appointments had been made;⁷³ caution because of a worry that the public interview reform was a step toward a more radical Conservative agenda on justice and constitutional issues.

But the independence narrative ultimately regarded the hearing as a success — as proof that the Canadian virtues of civility, restraint, and deference would allow a reformed nominations process to avoid the pitfalls of the American experience. A *Toronto Star* column the day after the hearing offers a good example of this attitude: “Instead of an intrusive, U.S.-style exploration of, say, Rothstein’s attitude toward same-sex marriage, abortion or gun control, the nearly four-hour session became a cautious oh-so Canadian exercise in decorum.”⁷⁴ John Ibbitson expressed a similar view the day after the hearing in his column in the *Globe and Mail*, calling the affair “quite dull, and therefore quite successful.”⁷⁵ He suggested that the hearings “offer a compromise between the secrecy of the old process and the no-holds-barred fiascos that characterize some U.S. confirmation hearings,” and said that although “[i]t’s all still very muddled and very tentative,” it is also “[v]ery Canadian . . . and that’s just fine.”⁷⁶

⁷² See, e.g., *Hearing*, Mar. 23, 2004, *supra* note 67 (statement of Professor Peter Russell, University of Toronto) (calling for a “made-in-Canada model” that combines nominating commissions with a role for parliamentarians).

⁷³ Irwin Cotler, Minister of Justice and Att’y Gen. of Canada, Speaking Notes on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments (Aug. 25, 2004), http://canada.justice.gc.ca/en/news/sp/2004/doc_31212.html.

⁷⁴ James Travers, *Hearing Merely Reinforced a Proven Process*, TORONTO STAR, Feb. 28, 2006, at A6.

⁷⁵ John Ibbitson, *What’s the Verdict? Grilling Judges Is Innocent*, GLOBE & MAIL (Toronto), Feb. 28, 2006, at A1, 2006 WLNR 3404302.

⁷⁶ *Id.*

Professor Peter Hogg, the noted constitutional law scholar who spoke at the hearing to advise committee members on the kinds of questions they should ask the nominee, in the end seemed satisfied with the tone of the exchange between the parliamentarians and the judge. He congratulated the MPs:

The questions were penetrating, yet they very rarely strayed into the forbidden areas that were marked out by my opening remarks. When they did so, it was very easy for Justice Rothstein to give, first of all, a partial answer, and then to explain why he couldn't give a complete answer. The proceedings were conducted with moderation and civility. Justice Rothstein's privacy and dignity were scrupulously respected.⁷⁷

Thus, unlike the degeneration narrative, which saw the Rothstein hearing as cause for dismay and the thin edge of the wedge, the independence narrative used the hearing as an opportunity to praise what it regards as distinctly Canadian values, while reinforcing the difference between those values and the discord it believes has characterized recent American experience with judicial nominations.

IV. CONCLUSION

It is important to stress that the three narratives described in Parts II and III are not *arguments*. They do not always exhibit internal logical consistency. Each relies on a highly selective image of American constitutionalism. The degeneration narrative, for example, rejects American models, but adheres to an approach to rights adjudication that closely mirrors the Warren Court's progressive jurisprudence.⁷⁸ Furthermore, political actors do not always adhere faithfully to a single narrative.⁷⁹ Conservatives decry judicial activism, yet favor more rights when those rights protect property and contract. Liberals campaigned on a promise to rescind the Notwithstanding Clause less than a year after threatening to use the legislative override themselves. New Democrats claim rights are sacred, yet opposed a recent Supreme Court decision striking down a ban on private health insurance as a violation of the right to personal security and inviolability.⁸⁰

Therefore, to evaluate the narratives from a purely rational perspective would not be a useful endeavor. Nor would it be productive to assess which of the narratives — or which of the three approaches

⁷⁷ *Hearing Before the Ad Hoc Comm.*, *supra* note 53 (statement of Professor Peter Hogg, Osgoode Hall Law School).

⁷⁸ See Weinrib, *supra* note 32, at 99 (describing the Warren Court's jurisprudence as "heroic").

⁷⁹ See Andrew Coyne, *Rights Are Rights Are . . . ?*, NAT'L POST (Toronto), Jan. 14, 2006, at A23 (implying that Conservatives, Liberals, and New Democrats are all hypocritical on Charter issues).

⁸⁰ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.R. 791.

to comparative constitutionalism (model, anti-model, dialogic) embedded within the narratives — is most correct from a jurisprudential or philosophical point of view. The focus of this Note is positive, not normative. Its aim is to provide an exposition of three distinct kinds of stories about constitutional politics and to show how each of those stories is linked to a view of the utility of American constitutional sources, as well as to a relatively well-defined political constituency.

That said, the strains of discourse outlined above do have interesting analytical implications for the comparative study of constitutional traditions. Perhaps most obviously, the narratives reveal a highly complex picture of how constitutional systems influence one another. The influence shown here is dynamic and ongoing, suggesting that foreign constitutions do not necessarily exert less sway once the stage of constitution-building has ended. American constitutionalism pervades each of the three narratives, and each, in its own way, uses the U.S. model as a tool in articulating a constitutional vision (or dystopia) for Canada. In other words, each narrative uses the American experience as a means of nation-building. American influence is also dynamic: it can be expected to vary depending upon the party forming the government in Canada, the composition of the Canadian judiciary, the general state of bilateral relations, and trends in American constitutionalism that may make Canadian political discourse either more or less disposed to drawing on the American model.⁸¹

The narratives also show that American influence on Canadian constitutionalism, far from being unitary, is fractured along partisan lines. It therefore becomes difficult to say that a particular idea from American constitutionalism has received either uniform embrace or uniform rejection in Canada. Consider the Supreme Court nominations debate: did the American model of Senate confirmation hearings inspire or repel Canadians? On the one hand, but for the American model, Canadians might never have considered interviewing a senior judge in a public forum. On the other hand, both designers of and participants in the reformed nominations process reacted *against* American experience with contentious nominations such as those of Judge Bork and Justice Thomas. The influences are multiple and occur on multiple levels. This insight calls into question sweeping assertions that the globalization of constitutionalism is either Americanization or a reaction against Americanization. In any given country, it is likely to be both — and both in a unique manner that depends on indigenous political and cultural factors.

⁸¹ Professor Roger Gibbins suggests that the influence of American constitutionalism may also depend on the success of Canadian constitutional negotiations. Writing in the early 1990s, he predicted that if a constitutional accord was not concluded, American influence would increase. See Gibbins, *supra* note 26, at 145.

This complex picture suggests the need for a multidimensional model for describing the use and spread of constitutional law. The influence of American constitutionalism on Canada includes examples of “borrowing,” of what Professor Scheppelle calls “aversive constitutionalism,”⁸² and of what Professor Choudhry calls “dialogical interpretation.”⁸³ The Canadian experience illustrates, then, that even at a given point in history, cross-cultural constitutional influence tracks numerous and diverse metaphors.

The narratives also reveal that foreign constitutional experience has an unavoidably political dimension. The comparative literature tends to take one of two opposing views of how foreign sources are deployed: One (pessimistic) view holds that they are strategic tools to be deployed opportunistically and mainly for political reasons.⁸⁴ Another (optimistic) view holds that they are neutral learning resources, approached with scientific curiosity in hopes of moving one toward a correct decision.⁸⁵ The Canadian experience seems to undermine both views. It undermines the latter because it shows that some foreign sources are so politically charged that they simply cannot be studied and invoked as neutral learning devices. Episodes such as the Bork nomination or the *Lochner* era are so symbolically powerful for Canadian constitutionalism that it is hard to imagine how one could invoke either of them for solely epistemic reasons. To invoke either one — positively or negatively — is to take a political position, whether one likes it or not. This is especially so when the provenance of the comparative sources is a powerful neighbor that exerts considerable sway over the lives of the country’s citizens.⁸⁶ The Canadian experience undermines the former view of foreign sources because whereas that view seems to equate the use of foreign sources with deviousness, cunning, bad motives, or inappropriate judicial activism, the use of foreign sources in the Canadian debate does not seem to have a normative slant one way or the other. It seems more like a plain reality, a constituent fact of identity-building in a polity that has been heavily influenced by the constitutionalism of its neighbor.

This is not to say it is impossible or worthless to develop abstract philosophical or jurisprudential arguments for and against the use of foreign constitutional sources, weighing such factors as democratic le-

⁸² Scheppelle, *supra* note 27, at 300.

⁸³ Choudhry, *supra* note 4, at 835.

⁸⁴ See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–90 (2005).

⁸⁵ See, e.g., Jackson, *supra* note 6, at 116–18 (advocating “[e]ngagement with foreign and international law, in a spirit of inquiry and openness to improved understandings”).

⁸⁶ One would expect a similar, highly politicized dynamic when a former colony invokes constitutional sources from its former colonial ruler.

gitimacy, the universality of norms, the epistemic value of foreign experience, and so on. It *is* to say that the use of foreign constitutional sources by courts is difficult to understand fully without a parallel understanding of the contextual meaning of those foreign sources in the political sphere. This Note suggests that the political and legal meanings of foreign sources exist in dynamic interplay, and that a close analysis of both dimensions is necessary for understanding the globalization of constitutionalism in the twenty-first century.