PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 32 | Issue 4 Article 3

5-15-2005

Is a Written Constitution Necessary?

Diarmuid F. O'Scannlain

Is a Written Constitution Necessary?

Diarmuid F. O'Scannlain*

Ladies and gentlemen, I am most delighted to join you here today in Auckland, New Zealand. As you know from the introduction, I am a United States Circuit Judge, having been nominated in 1986 to the Ninth Circuit Court of Appeals by President Ronald Reagan and confirmed by the United States Senate. My court, just one level below the Supreme Court, is our largest regional circuit, encompassing the nine Western states, including California, Oregon, and Hawaii, as well as the Pacific Territories, and comprising roughly twenty percent of the population of the country. And while I will strive today to represent my circuit well, I must make explicit that I speak only for myself as an individual American citizen and not for the court of which I am a member.

In my brief time in your beautiful and hospitable country, I've observed some of the remarkable similarities between our respective cultures. As Americans and Kiwis, we share common values, common aspirations, common challenges, and a common tongue. In other respects, however, we are each unique peoples, and some of our differences are manifested in the features of our respective legal systems. Indeed, while the United States and New Zealand share the same common-law heritage, each country has molded the common law to comport with its own political traditions and history. One of the principal distinctions between our nations' respective legal systems is the fact that the United States long ago adopted a written constitution, while New Zealand relies upon an informal, unwritten constitution, which is comprised of tradition, the Treaty of Waitangi, and various constitutional acts passed by Parliament over the years. It is my understanding,

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. This speech was delivered on August 17, 2004, at the Auckland University Law School in Auckland, New Zealand, when I was serving on an international exchange program sponsored by the United States Department of State. I would like to acknowledge the hospitality of Christine Vivian of the American Embassy's Office of Public Affairs in Wellington, New Zealand, in making arrangements for this lecture. I would also like to acknowledge, with thanks, the assistance of Amir Cameron Tayrani, my law clerk, in preparing these remarks.

however, that New Zealanders are debating whether to replace their current constitutional arrangement with a formal, written constitution, and it is upon this topic that I would like to focus my remarks today.

Americans certainly revere their written constitution: Chief Justice Marshall, the nineteenth-century jurist who shaped significant aspects of American constitutional law, considered a written constitution to be "the greatest improvement on political institutions."[1] But Americans cannot claim to have a monopoly on the only successful iteration of democracy. Indeed, by all accounts, New Zealand's robust democracy has functioned admirably for over a century without a written constitution. The question whether New Zealand should now fundamentally alter its constitutional structure is therefore an exceedingly complex one, and I'm sure that all New Zealanders will continue to debate vigorously whether a written constitution can be reconciled with their country's legal and political heritage.

I would not presume to make a recommendation to you on this topic; for one thing, I could not hope to have sufficient knowledge of your people or your government. And, in any event, it's your constitution and your country, after all! But I can relate some of the American experience with a written constitution and share some of my personal observations as a federal judge on how our Constitution has shaped American government. Two specific issues come to mind. First, the adoption of a written constitution could significantly reconfigure the relationship between the branches of government by affording the judiciary the power to issue authoritative interpretations of the document's meaning. In the United States, for example, once the Supreme Court has construed a constitutional provision, Congress is bound by the Court's pronouncement and is powerless to alter the Court's interpretation through the ordinary legislative process. In the ongoing constitutional debate, New Zealanders may want to consider whether imbuing their courts with such significant powers is consistent with this country's tradition of parliamentary supremacy.

A second, related point concerns the use of foreign practice and precedent to interpret a written constitution. There is an ongoing debate in the United States regarding the propriety of so-called "comparative constitutional analysis," and the adoption of a written constitution in New Zealand may prompt a similar discussion in this country. I will therefore briefly touch upon the American experience in this area.

I

Let me begin, however, by discussing some of the fundamental distinctions between a written and an unwritten constitution. Chief Justice Marshall observed that the "constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it."[2]

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
2. *Id.* at 177.

The United States Constitution falls within the Chief Justice's first category: It is the supreme law of the land, and Congress lacks the authority to alter it without undertaking the arduous process of amending the Constitution—a procedure that requires the assent of two-thirds of both Houses of Congress and three-fourths of the States. New Zealand, by contrast, presently falls within the Chief Justice's second category because—with the notable exception of the Treaty of Waitangi—New Zealand's informal, unwritten constitution consists largely of parliamentary acts that can be repealed through the normal legislative process, notwithstanding the enduring impact of tradition.

As I noted a moment ago, this distinction has significant implications for the balance of power between the legislative and judicial branches. In the United States, the Supreme Court is the final expositor of the Constitution's meaning. Contrary congressional interpretations of the Constitution must yield in the face of the Supreme Court's pronouncements. If the people, and their elected representatives in Congress, disagree with the Supreme Court's construction of a constitutional right, they are powerless to alter that judicial interpretation, unless they successfully adopt a constitutional amendment.

This dynamic is well illustrated by a recent disagreement between the Court and Congress concerning the scope of the religious freedoms granted by the Constitution's First Amendment, which prevents Congress and the States from "prohibiting the free exercise [of religion]."[3] In 1990, the Supreme Court decided the case of *Employment Division v. Smith*.[4] There, the Court addressed whether the First Amendment prohibits a State from denying unemployment benefits to persons terminated from their jobs for ingesting the illegal drug peyote during a Native American religious ritual.[5] The Court held that the denial of unemployment benefits did not infringe upon the claimants' religious freedom because the First Amendment does not exempt persons from complying with generally applicable laws that happen to place an incidental burden upon religious practices.[6] The universally applicable law banning the use of peyote was enacted because the legislature was concerned about such drug's dangers, and there was no legislative animus toward religion underlying the prohibition.[7] The Court therefore concluded that the peyote ban was consistent with the First Amendment.[8]

Congress disagreed with what it considered to be the Court's unduly narrow interpretation of the First Amendment and responded by enacting the

3. U.S. CONST. amend. I.
4. 494 U.S. 872 (1990).
5. *Id.* at 876.
6. *Id.* at 882.
7. *Id.* at 890.
8. *Id.*

Religious Freedom Restoration Act[9] three years later. Under the terms of the Act, the government was prohibited from substantially burdening a person's exercise of religion–even if the burden resulted from a generally applicable law such as the peyote prohibition–unless the government could demonstrate that the regulation furthered a compelling state interest and was the least restrictive means of achieving that interest.[10] Such a standard–known in American law as "strict scrutiny"–is extremely exacting, and the Religious Freedom Restoration Act thus greatly expanded the scope of the First Amendment's religious protections.

The Supreme Court, however, refused to acquiesce in Congress's attempt to redefine the First Amendment's parameters. In the case of *City of Boerne v. Flores*,[11] which was decided in 1997, the Court held the Religious Freedom Restoration Act to be an unconstitutional attempt by Congress to usurp the Court's power to interpret the Constitution.[12] The Court reiterated that Congress lacks the power to enact "[l]egislation which alters the meaning of the Free Exercise Clause,"[13] and explained that the *Smith* decision had authoritatively construed the boundaries of the Constitution's free exercise protections. Absent a constitutional amendment, Congress could not alter the scope of those rights.

I understand that under New Zealand's current constitutional arrangement, Parliament–rather than the judiciary–has the authority to define the content of the religious freedoms–and other rights–guaranteed by the Bill of Rights Act.[14] Thus, if the New Zealand Supreme Court were to construe the Act's free exercise protections in a manner with which Parliament disagreed, Parliament could overrule that judicial interpretation through the simple expedient of a legislative enactment because it is Parliament that has the last word on the interpretation of its statutes.[15] By endorsing a written constitution that incorporates the American mode of judicial review, however, the New Zealand Parliament could potentially cede a portion of its supremacy to the courts by transferring to the judiciary the power to issue authoritative constitutional pronouncements.

In considering whether to adopt a written constitution, New Zealanders may want to consider carefully whether such judicial primacy can be reconciled with this country's political values and legal traditions. Although according the judiciary the final say on matters of constitutional interpretation has worked well in the United States, it is possible that such an arrangement may not be equally well suited to nations that have a tradition of parliamentary supremacy. This is certainly not to suggest that an American-style written constitution could not succeed in New Zealand; my limited objective to-

9. 42 U.S.C. § 2000bb.

10. *Id.*

11. 521 U.S. 507 (1997).

12. *Id.* at 535-36.

13. *Id.* at 519.

14. *See* Susanna Frederick Fischer, *Rethinking* Sullivan*: New Approaches in Australia, New Zealand, and England*, 34 GEO. WASH. INT'L L. REV. 101, 136 (2002).

15. *Id.* at 136-37.

day has been merely to highlight some of the significant legal repercussions typically attributable to such a constitutional model.

II

While contemplating the enhanced judicial power that may result from the adoption of a written constitution, New Zealanders may also want to take stock of the interpretative tools that this country's courts will employ in construing that document. Will judges deem themselves strictly confined by the constitution's text, or will they free themselves from the textual bounds in order to reach results consistent with their personal value systems? What weight will judges accord to the intentions of the constitution's framers? And what relevance will judges attribute to the legal traditions of other constitutional democracies? Should New Zealand judges look to the manner in which courts in other countries have interpreted similar constitutional provisions? Should special status apply to cases from Commonwealth or English speaking countries?

Historically, judges in New Zealand have frequently invoked foreign sources of law as a jurisprudential tool.[16] Indeed, a study by Professor Janet McLean of the University of Auckland found that fully thirty percent of the case law cited by New Zealand courts is from foreign jurisdictions, with the most heavy reliance being placed upon English, Australian, Canadian, and American decisions.[17] A representative example is the case of *Bryan v. Philips New Zealand Ltd.*,[18] where the High Court sought to determine whether an employee who had been exposed to asbestos was entitled to recover his ongoing medical monitoring expenses. Because the issue had never been addressed in New Zealand, the High Court relied upon decisions from two United States federal courts—as well as from state courts in New York and Missouri—to guide its decision-making.[19]

By way of comparison, American courts have traditionally been extremely reluctant to draw upon foreign sources of law. Indeed, between 1990 and the middle of 2003, the Supreme Court of the United States cited decisions of its Canadian counterpart only seven times.[20] Meanwhile, the Canadian Supreme Court cited American decisions 230 times in the year 1990 alone![21]

16. Janet McLean, *From Empire to Globalization: The New Zealand Experience*, 11 IND. J. GLOBAL LEGAL STUD. 161, 165-66 (2004).

17. *Id.*

18. [1995] 1 N.Z.L.R. 632 (H.C.).

19. *Id.*

20. Results of LEXIS search, Jan. 15, 2003.

21. Peter McCormick, *The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview*, 8 SUP. CT. L. REV. 527, 534 & fig.1 (1997).

In light of the fact that three out of every ten decisions cited by New Zealand judges are issued by an overseas court, it is reasonable to assume that this country's courts will similarly look to foreign sources of law to interpret any written constitution that New Zealand eventually adopts. In determining whether to place ultimate interpretative power in the hands of the judiciary, New Zealanders may find themselves debating whether such heavy reliance upon foreign legal authority is an appropriate tool for construing this country's supreme law. It thus may be of interest to survey briefly the ongoing American debate about comparative constitutionalism.

Many members of the American legal community who argue that reliance upon foreign law is misplaced contend that the United States is politically, socially, and legally distinct from the rest of the world and that foreign legal authority is therefore inapposite to American conditions. This controversial thesis, known as "American exceptionalism," has its origins in the late eighteenth century during the nation's Founding Era, when a number of Americans saw themselves as establishing a unique polity that was radically different from the Old World.[22] U.S. Supreme Court Justice Antonin Scalia, who is one of the principal contemporary opponents of comparative constitutionalism, echoed this belief when he cautioned that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding,"[23] a play on the famous passage uttered by Chief Justice Marshall in 1819.[24]

Justice Scalia's view has lately drawn significant criticism, however, from an influential array of legal scholars and judges–including other members of the Supreme Court[25]–who argue that the United States should abandon its antiquated notions of exceptionalism and start paying heed to the guidance offered by other constitutional democracies. This school of thought contends that foreign practice and precedent should be invoked as a source of persuasive legal authority, especially when American law is silent on a matter.[26] Several members of the Supreme Court have been especially receptive to comparative constitutionalism as a means of determining what

22. *See* Seminole Tribe v. Florida, 517 U.S. 44, 132 (1996) (Souter, J., dissenting) ("One of the characteristics of the founding generation . . . was its joinder of an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic."); *see also* Bryon E. Shafer, *Preface* to IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM, at v, v (Byron E. Shafer ed., 1991) (explaining that exceptionalism "is the notion that the United States was created differently, developed differently, and thus has to be understood differently—essentially on its own terms and within its own context").

23. Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting); *see also* Antonin Scalia, *Keynote Address, Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 309 (2004) ("The men who founded our republic did not aspire to emulating Europeans, much less the rest of the world.").

24. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("In considering this question, then, we must never forget, that it is *a constitution* we are expounding.").

25. Justice Scalia and Justice Breyer recently debated the "Constitutional Relevance of Foreign Court Decisions" at an event hosted by the American University Washington College of Law. *See* Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer (Jan. 13, 2005), http://domino.american.edu/AU/media/mediarel.nsf/41cc7d6ab41c6e4685256869007a3b8f?OpenView.

26. *See, e.g.*, Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 254 (2001).

constitutes "cruel and unusual punishment" under the Constitution's Eighth Amendment. For example, in a 2002 decision that held the execution of the mentally retarded to be unconstitutional, the Court's majority favorably referenced international perceptions of the death penalty to bolster its conclusion.[27]

I have raised this issue today not to resolve the debate over comparative constitutionalism, but, rather, to highlight the immense discretion that judges possess in interpreting a written constitution. Judges who lack judicial restraint will draw upon a variety of interpretative tools in an effort to arrive at a conclusion that is consistent with their own value judgments. My experience in the American legal system has taught me that the vast power that our written constitution grants to the judiciary is subject to abuse when wielded by activist judges who engage in result-oriented adjudication. Because judges are the final expositors of the United States Constitution, the people and their elected representatives face significant legal hurdles in overruling such value-laden constitutional interpretations. In New Zealand's ongoing constitutional debate, you may therefore want to give significant attention to the judiciary's role in any revised constitutional arrangement and to discuss how best to place effective constitutional checks upon the potential abuse of judicial power. Of course, each country must determine for itself the appropriate level of discretion to be afforded to its judges, and I merely hope that my experience will serve as a helpful point of comparison for New Zealanders.

I wish you the best of luck as your country continues its important constitutional debate. I am confident that if New Zealand does decide to adopt a written constitution, that document will stand as a testament to your country's deep belief in democracy and the rule of law, while also reflecting the unique traditions and values that have fostered the incomparable Kiwi mentality.

Thank you. I will be happy to take any questions you may have.

27. *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); *see also* Roper v. Simmons, 125 S. Ct. 1183, 1198-200 (2005) (invoking international covenants and foreign practices to support the conclusion that it is unconstitutional to execute persons who were under the age of eighteen when they committed their crime).