Entrenched constitutional bills of rights entail that judges will have more influence over spheres of decision-making otherwise ruled by different political actors. The theme of modern judicial power, attributed to the spread of entrenched bills of rights, underlies two recent works that analyze this power from different angles and with different perspectives. Both of these works offer insights but leave unaddressed important matters that might naturally have arisen within their respective scopes of study. Nonetheless, as I will argue at the end of this review, they together issue an important challenge to us all.

Rory Leishman’s tone is manifest from the outset in his title: *Against Judicial Activism: The Decline of Freedom and Democracy in Canada*. Leishman, a newspaper columnist and former lecturer in political science at the University of Western Ontario, claims to offer a sustained argument that courts’ interpretations of the *Charter* and the progressive broadening of human rights codes have undermined Canadian freedom, democracy, and the rule of law. The argument, from the outset, prolongs some of the shrillness of the title. Readers will hear within fifteen pages that “Canadians are living in a quasi-Orwellian nightmare, where freedom often means slavery and ignorance strengthens activist judges.” Three pages later comes the first comparison to Nazi Germany.

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Leishman is by no means unique in falling into hyperbole in the course of trying to contribute to discussion of important political topics. Nor is exaggeration unique to any side of the political spectrum. Those engaging in hyperbole may not even realize that the overstated argument will alienate some who might have been open to persuasion. On the other hand, of course, academics who write only in mealy-mouthed moderation may not communicate effectively to a broader readership.

Putting his rhetoric aside, how does Leishman’s argument fare? Interpreting it charitably, the book studies a series of cases where the recent development of the Charter and human rights codes has imposed results at odds with specific interpretations of the traditional family, with traditionally preferred freedoms like freedom of speech, or with a restrained role for the courts. More detailed attention to his argument, or at least select portions of it, finds both strengths and weaknesses.

Leishman opens his argument by discussing at length the case of Nixon v. Vancouver Rape Relief Society, a decision of a human rights tribunal concerning a rape counselling group’s exclusion of a transgendered individual from participating in its training program for rape crisis counsellors. Interestingly, the rape counselling group won in the courts, as Leishman acknowledges, including a victory in the British Columbia Court of Appeal after his book was at the publishers. So, his criticism of this case is of necessity the more muted concern that large sums of money have been spent on litigation. Concern with costs of the justice system might sometimes be appropriate, but the fact that there would be litigation over rights issues does not seem the most significant of possible concerns.

Leishman goes on to take up at length the judicial decision to treat sexual orientation as an analogous ground in section 15 of the Charter even after legislators had voted against including it during their drafting of the constitutional text. His second chapter offers a detailed and fascinating account of local politics around recognition of gay and lesbian pride days, but offers only weak punches against judicial activism. However, the discussion of detail about the political context of cases is interesting and Leishman at various points offers informative factual perspectives. The typical reader of Supreme Court judgments will

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5 Leishman, supra note 1 at 44.


7 Leishman, supra note 1 at 45.

8 Ibid. at 37.
not have learned from the stylized facts in the famed judgment of the Court in *Vriend v. Alberta*\(^9\) that the Christian college that employed Vriend fired him not simply for being homosexual but for wearing a t-shirt with a homosexual rights slogan and otherwise speaking out in ways inconsistent with the religious commitments of the college.\(^10\)

Whether or not one has any sympathy with the position of those like Leishman, his book offers insights into why members of the general public may have different perceptions about what the courts are doing than those ensconced in ivory towers presume.

That said, Leishman is himself resistant to differing perspectives. In later chapters, he repeatedly enters into assertions about individuals going to jail if they do not follow human rights commission decisions,\(^11\) with a sort of suggestion that individuals will face prison for not meeting a political correctness litmus test.\(^12\) This is despite a brief reference to an explanation he received about the difference between the initial violation and the possibility of prison for contempt if an individual then failed to comply with a court order.\(^13\) With Leishman’s sort of reasoning, every offence carries a possible prison term, and meaningful discussion becomes difficult. Leishman makes the claim that the United States Supreme Court decision in *Roe v. Wade*\(^14\) was “totally unprecedented [and] had no basis in law”\(^15\) without engaging in any way with the implications of previous decisions on related matters in *Griswold v. Connecticut*\(^16\) and *Eisenstadt v. Baird*.\(^17\) Again, Leishman is ready to disagree in a summary sort of fashion but not to engage in real discussion. He reports on the broad-ranging statistical data of Patrick Monahan and its suggestions that the Supreme Court of Canada is relatively deferential; he then, however, dismisses all of Monahan’s data

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\(^10\) Leishman, *supra* note 1 at 3. Leishman cites only to a brief comment in a REAL Women newsletter; a fuller report, which Leishman does not cite, with many more details appears in P. Stockland, “Vriend was not fired from his job for being gay: And, no, the Supreme Court is not redressing his wrongful dismissal” *Calgary Herald* (10 April 1998) A10, which also records how the college engaged in soul-searching for around a year on its appropriate response before coming to the decision to fire Vriend for his various actions.


\(^12\) *Ibid.* at 103 (describing Bill Whatcott as a prospective “Christian prisoner of conscience as long as he refuses to renounce the publication of any more flyers that Pandila and homosexual complainants might consider offensive.”)


\(^14\) 410 US 113 (1973).

\(^15\) Leishman, *supra* note 1 at 138.

\(^16\) 381 US 479 (1965).

\(^17\) 405 US 438 (1972)
by referring to several particular cases and then quoting F.L. Morton and Rainer Knopff’s claim that “[a] single blockbuster case like this renders denials of judicial activism problematic.”

A media-style anecdotalism and quick appeal to authority might well communicate to a broad audience, but they do so at the expense of rigour and advancing real understanding. This is an unfortunate characteristic of a book that does go on, for instance, to characterize effectively some significant trends of judicial insensitivity to the circumstances of conservative Christians. If one is honest about it, conservative Christians (whether fundamentalist Protestants or Catholics) have become one group many individuals are fully prepared to ridicule in a way they frankly would not dare with respect to other groups, and a constituency others seek even to exclude from political discussion. Their cause deserves attention, and it is unfortunate that Leishman’s book does not make the full contribution it could have. Similarly, his final chapter on “Reviving Parliamentary Democracy” offers some interesting suggestions, including that of the Supreme Court hiring a public interest officer who might specifically examine the policy implications of possible judicial decisions. Caught up in his bluster about “legislatively incompetent judges,” however, he does not explore his ideas as fully as he might have. This is similarly the case with his suggestion of increased parliamentary scrutiny of judicial appointments, on which he provides no actual details. One is left only with whatever one might draw from his suggestion in the foreword that if it were his choice, he would appoint Gwen Landolt, President of REAL Women, as Chief Justice of Canada—a choice that would not likely be as apolitical as Leishman seems to think.

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19 For another instance, see Leishman, supra note 1 at 162-63 (citing an obscure academic’s analysis of the Secession Reference rather than discussing it at adequate length).

20 See Leishman, supra note 1 at c. 6.

21 Compare the way many ridicule the deeply held religious beliefs of conservative Christians concerning Creation while making no similarly offensive remarks against those believing in traditional Aboriginal spiritual accounts of Creation.


23 Leishman, supra note 1 at 244.

24 Ibid. at 250.

25 Ibid. at 243.

26 Ibid. at viii.
Kate Malleson and Peter H. Russell take up the challenge of examining the implications of judicial power for judicial appointments around the world in their edited collection, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*. Reviewing an edited collection is always challenging, for it is bound to lack the unity of voice that a single-authored book will (or should) have. In this case, though, both Malleson and Russell go far in imposing a sort of structure within which the issues are said to fit. Malleson’s introduction orients the choice of a judicial appointment procedure around a central balance between judicial independence and accountability, suggesting that close contextual attention to the particular political culture and circumstances can impact on the appropriate balance to strike. She suggests that the objective of diverse composition of the bench will then lead to modifications of the process in some instances. Russell’s conclusion echoes precisely this particular structuring of the matters at issue, as does the occasional author within.

However, most of the authors do not necessarily accept the framework offered but are engaged in a more empirical task detailing, in nineteen chapters, the judicial selection processes in countries from New Zealand to the Netherlands, Egypt to Namibia, with only a few authors having space for consideration of theoretical factors. The coverage arises from research interests of these particular authors and excludes, for instance, all of Latin America as well as the world’s largest democracy, India, which might have been an interesting comparator. Nonetheless, the contents are fascinating in places. Derek Matyszak’s piece on Zimbabwe takes a reverse tack of sorts and details the processes by which a government took away the independence of its judiciary. James Allan’s chapter on New Zealand interrogates deeply some advantages and disadvantages of judicial appointment boards. Eli M.

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31 E.g. A. Trochov, “Judicial Selection in Russia: Towards Accountability and Centralization”, c. 18 in Malleson & Russell, *supra* note 27 at 375-76 (using the same structuring around independence and accountability, with explicit reference to Malleson and Russell’s use of this structure).
34 J. Allan, “Judicial Appointments in New Zealand: If it were done when ’tis
Salzberger’s pages examine carefully how the Israeli Supreme Court gained respect as an agent posing a liberal democratic value system within a potentially conservative religious Jewish state and in defence of freedoms in the context of real security concerns.35

Despite Malleson and Russell’s introduction of the issue and the references to diversity and representation in some of the pieces, none of the authors engages with one potentially compelling argument for representation, that of appropriate representation of different legal systems within legally pluralistic states. F.L. Morton’s chapter makes a glancing reference to the representation of Quebec civil law on the Supreme Court of Canada,36 but neither Morton’s essay nor the pieces on Australia37 or New Zealand38 refer to the presence of indigenous legal systems as relevant to judicial appointments. Most surprisingly, François du Bois’s chapter,39 although seriously engaging with diversity issues in post-apartheid South Africa, does not refer to representation of African customary law, which the Constitution now requires the courts to apply.40 The South African courts have become enmeshed in complex issues concerned with the interaction between customary law and the constitutional values of the modern state, and the interaction of these issues with judicial appointments warrants attention.41

Morton’s chapter on Canada is particularly attuned to how increased judicial power creates new stakes in judicial appointment disputes.42 He discusses how certain political actors have begun to consider the interpretation of rights as something they will seek to capture via the judicial appointments process.43 Written before the most recent developments in the latest nomination to the Supreme Court of

37 E. Handsley, “‘The judicial whisper goes around’: Appointment of Judicial Officers in Australia”, c. 6 in Malleson & Russell, supra note 27.
38 Allan, supra note 34.
40 Constitution of the Republic of South Africa 1996, No. 108 of 1996, art. 211(3) (“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”)
41 E.g. Bhe v. Khayelitsha Magistrate, 2004 (2) SA 544.
42 Morton, supra note 36 at 56.
43 Ibid. at 60-61 (National Action Committee on the Status of Women (NAC)), 62
Morton’s piece also slightly transforms the theoretical structure Malleson and Russell would have proposed. Where they saw representation as a sort of add-on not entering into the accountability-independence tradeoff, Morton sees the potential for tradeoffs between representation and traditional concerns for merit and independence. Morton, like Malleson and Russell, speaks of tradeoffs between different objectives in judicial selection. What would have been interesting would have been an attempt in the book to find creative processes of judicial appointment to enhance accountability and independence at the same time — to step outside some of the tradeoffs. Indeed, if it is entirely impossible to escape these tradeoffs, as the language of “balancing” between the objectives seems to presume, the book implicitly presumes another tradeoff, one between judicial power and the simultaneous achievement of representative democracy and rule of law. That is, it would suggest a tradeoff amongst judicial power, representative democracy (as expressed in the accountability of political actors to democratic representatives), and rule of law (as expressed in judicial independence). Malleson and Russell’s book would implicitly call for Leishman’s title.

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Canada, Morton’s piece argued that the present composition of the judiciary has enabled maintenance of the status quo and that prospects for changes to the appointment process were “slight.”

45 Morton, supra note 36 at 71.

46 Ibid. at 74.

47 Malleson, supra note 28 at 8-9; Russell, supra note 30 at 431-32.

48 Morton, supra note 36 at 73.

49 E.g. Malleson, supra note 28 at 4; Russell, supra note 30 at 427.
One traditional response to any such discussion has been the claim that the correct conception of democracy is other than representative majoritarian political aggregation.\(^{50}\) But the fact that these responses have not been entirely convincing is evident both in Leishman’s deep skepticism of judicial power and in Malleson and Russell’s questions about how to carry out judicial appointments in an age of judicial power. An alternative response to such discussion, and one worth consideration, is the undertaking of serious attempts to minimize the conflicts between the set of values at issue. There might, for instance, be ways to think creatively about how judicial appointment processes can advance accountability and independence at the same time. Aside from chattering about parliamentarians not getting into the private lives of prospective Supreme Court judges, commentators have not specified what questions should be asked at a hearing so as to advance accountability while not interfering with, or preferably even encouraging, independence. I would argue that the right kind of questions asking judges to show their understanding of the judicial task have much potential. Further work exploring such possibilities is very much needed.

The challenge of judicial power is a challenge to us all. Judicial power challenges parliamentarians to find responsible ways to govern without simply leaving the difficult issues for the courts. It challenges governmental actors to find ways to engage in good judicial selection processes. It challenges judges, legal academics and practitioners, and the legal and mass media, to refute, if they can (as they should be able to), claims like that of Leishman that “[a]ctivist judges on the Supreme Court of Canada have assumed entirely on their own authority to read whatever they want into the Charter.”\(^{51}\) One can disagree with Leishman, but one then has the responsibility to make clear why he is wrong. Judges must explain carefully their reasons and why they justify a particular legal outcome, and legal academics and practitioners must hold them accountable to do so. All too often, and resulting partly from the corrosive influence of legal realism and its variants that undermine the very ideal of the rule of law, legal academics have become engaged in judging courts by the results they reach.\(^{52}\) Such an approach undermines the legitimacy of the courts in the eyes of the broader public. We actually


\(^{51}\) Leishman, supra note 1 at 78.

need a renewed attention to the legal reasoning processes judges use and should use.

To the extent the legal and mass media is the means by which the courts’ reasoning in particular cases and the modes of judicial reasoning in general reach the Canadian public, it has vital responsibilities upon it too. As recent work\(^53\) powerfully highlights, all too often the media’s approach to cases is distorted by other factors.\(^54\) The media generally pays limited attention to the legal reasons behind the judgments,\(^55\) thereby contributing to public perceptions that judges decide based on personal political preferences. Furthermore, media coverage of appointment processes has too often become about personality rather than being sufficiently attentive to the applicable processes and relevant considerations. Witness the media’s wish in the past year to report repeatedly on the possible appointment to the Supreme Court of Judge Mary Ellen Turpel-Lafond\(^56\) when she was, throughout the process, actually legally ineligible for such an appointment.\(^57\) On an ongoing basis, we all need to make the legal and general media an ever-renewed site of accurate, insightful, and intense discussion of judicial power and the law. In so doing, we can see the public better informed on matters on which it needs to be in order for Canadian democracy to flourish.

Both Leishman’s book and the edited collection by Malleson and Russell manifest perceptions about the destructive impact of judicial power. If judicial power is to contribute positively to Canada, it is up to


\(^54\) E.g., *ibid.* at 197-99, 214, 219-20 (discussing the relevance of institutional forms, audience expectations, and resource and time constraints).

\(^55\) Cf. e.g. Fiscus, *supra* note 52.

\(^56\) A search of relevant newspaper databases reveals dozens of stories reporting on her prospects throughout 2005.

\(^57\) Section 5 of Canada’s *Supreme Court Act*, R.S.C. 1985, c. S-26 provides that “[a]ny person may be appointed a judge [of the Supreme Court] who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.” Judge Turpel-Lafond was admitted to the Nova Scotia bar in 1990 and to the Saskatchewan bar in 1993 and was appointed to the Saskatchewan Provincial Court in 1998 (Saskatchewan Justice, Press Release, #98-112, “Turpel-Lafond Appointed Provincial Court Judge” (March 4, 1998), online: <http://www.gov.sk.ca/newsrel/releases/1998/03/04-112.html>). Since she could not be a member of the bar after being a judge, she could not have been a barrister for more than eight years, and she was never a member of a superior court. Thus, she was legally ineligible under section 5 of the *Supreme Court Act* to even be considered. I say this not to say anything against Judge Turpel-Lafond, whom I believe should have been eligible for consideration on her merits, but to show how the media failed to report accurately on a very prominent story about judicial appointments.
all of us to prove them wrong — something to be proven not through mere words dismissing their concerns but through ongoing deeds that will seek to ensure their concerns cannot become right.