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The Notwithstanding Clause of the Canadian Charter of Rights and Freedoms

Giving legitimacy to Constitutional Court/Supreme Court decisions

Vorgelegt von

Melanie MAURER

Beurteiler: Univ.-Prof. Dr. Matthias Klatt

am Institut für Rechtswissenschaftliche Grundlagen

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Introduction

The text of a Constitution is often ambiguous and contains abstract values of a society. When a court strikes down a legislation as unconstitutional the decision often involves not only questions of law, but also questions of a political nature. This creates an area of tension between the legislature and the court as the court assumes the role of the legislature in these cases. However, a court lacks the necessary democratic legitimacy to do so. Different from legislatures, courts are usually not elected by the population, but nominated and appointed by the executive and legislative branches of government. Additionally, they are not accountable to the electorate. Their decisions are “counter-majoritarian” in nature, because they run directly against the will of the political majorities. As a result a decision of a final court in constitutional matters is inherently lacking democratic legitimacy. On the other hand, in systems without such judicial review minority rights are usually only protected poorly. Neither system seems ideal, although many states after the Second World War decided to opt for the former after going through the atrocities of the war.

Having said this, there were some states, that resisted this trend and tried a new path - an intermediate model, that appeared to reconcile rights protection with democratic legitimacy. Stephen Gardbaum compiled a theory on this phenomenon and found that essentially old Commonwealth countries, such as Canada, New Zealand and Australia, as well as the United Kingdom itself, had diverted from the global trend. According to him, these states are following an intermediate model of constitutionalism because they implemented a unique system of pre-enactment political rights review linked with a weak post-enactment judicial review. As the title implies, I will focus on Canada, particularly on the notwithstanding clause of the Canadian Charter of Rights and Freedoms. This provision is a unique piece of constitutional design as it enables legislatures to override a court decision on certain Charter rights, although without an obligation to use it. The question I will try to answer in the following pages is, whether or not the notwithstanding clause is a viable tool for facilitating strong rights protection of minorities, while equally curing the lacking democratic legitimacy of final judicial decisions.

Therefore, I will first explain the underlying concept, namely weak-form judicial review. For this reason I will elucidate judicial review generally, before illustrating the differences between strong-form and weak-form judicial review. Concluding the first chapter will be an examination of Gardbaum’s theory of a “new Commonwealth model of constitutionalism”.

Chapter two is the main part of this paper that will analyse the notwithstanding clause of the Canadian Charter in detail. First, the methodology of the provision will be examined, both semantically and structurally, followed by the uses of it since the enactment of the Charter in 1982. It will be shown, that it was only used scarcely since its birth and consequently explore the reasons for this dormancy or the *de facto* non-use of it. The chapter will finish with an assessment of possible alternatives to the notwithstanding clause and their suitability as such.

Lastly, I will answer the question I posed above with my findings in the previous chapters. It will be demonstrated how the Canadian model proves most successful in uniting strong rights protection through adjudication with democratic legitimacy of decisions thereof. The notwithstanding clause plays a significant part in this, as it is this provision that enables a deliberate dialogue between the institutions, which promises to cure the illegitimacy of final judicial decisions.

**Chapter 1: Introduction to weak-form judicial review**

A. **What is judicial review?**

Plainly said, judicial review is the authority bestowed on courts to review legislative and/or executive acts for consistency with superior/supreme law. One of the most prominent countries to exercise judicial review is the US with its strong Supreme Court that functions as the guardian of the US Constitution. But today nearly every ‘western’ democracy, and increasingly Asian democracies as well as Latin American and African democracies, have a ‘guardian’ of their Constitution. The aspect of a ‘guardian’ of a constitution presupposes that a constitution needs ‘guarding’ from someone or something. The modern perception is that a constitution, and especially the rights entrenched in it, needs to be guarded from majoritarian partisan politics. And this ‘guardian’ is a court, usually the highest court of a country or a specialised constitutional court, that has the authority to review legislative and/or executive acts.

There is, however, one flaw of judicial review. This is the question of the democratic legitimacy of it. Because judges are usually appointed and not elected, they lack a democratic foundation. This is not a problem for cases arising in criminal, civil or tort law, because in these matters the law is usually very clear and the job of judges is to apply that law. Should legislators disagree with a

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decision, they simply have to enact a new legislation. The problem lies in the application of constitutional law by judges. Constitutions are usually quite vague, especially in their provisions concerning the protection of individuals’ rights and freedoms. As Bickel said: “Judicial review […] is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.”⁵ It was Bickel who coined the term “counter-majoritarian difficulty”, meaning that judges, by invalidating legislation were countering the majority’s decisions. The real issue with constitutional law though is, that it is often very political. To allow or prohibit abortion or same-sex marriage is a policy decision. If a court is ultimately deciding over a policy its decision will affect the policy and with it the political development of the country. The court will become more than just a “deputy to the legislature” - it will become a “deputy legislature”.⁶ Herein lies the true problem of judicial review. It is easy, in the sense of being possible through a vote, to bring a bad policy decision down - the electorate just needs to vote for a new government. To bring down a judicial policy decision announced in the words of the Constitution though, is considerably more difficult. Because judges are independent and usually unaccountable for their decisions, only a higher court could overturn a judicial decision. But once the highest court renders a bad decision there is no one to correct its mistake anymore. High court judges are also generally appointed for a longer time than governments and are irremovable of their office.⁷ However, different from a decision of a criminal or civil court, legislators cannot overturn a constitutional decision that easily. Because a Constitution needs safeguarding against the often fast changing political reality, there is usually a special procedure for amending a Constitution. As a result, once a strong Court as the US Supreme Court renders a decision in a constitutional matter a government or legislator has nearly no chance of altering the outcome anymore. This is clearly visible on the US Constitution, that was only amended 27 times in 230 years.

This markedly shows how a strong and final court can usurp the power of the legislature and how, in the case of a bad judicial decision, the other branches of government, but also and maybe foremost, the people, are powerless against it.

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⁵ Bickel, The Least Dangerous Branch The Supreme Court at the Bar of Politics (1986) p. 20.
⁶ Dworkin, Ronald, Taking Rights Seriously (1977), p. 82, where he writes: “When judges make law, so the expectation runs, they will act not only as deputy to the legislature but as a deputy legislature. They will make law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own.” He refutes this argument himself later, because of his distinction between arguments of principle and of policy, which in his opinion prevent judges to act as legislators. As he is a proponent of judicial review it is not surprising that he tried to find a solution for judges’ interfering in the political sphere.
I. Historical development of judicial review

The US was per chance the first state that practiced judicial review in this strong sense. The US Supreme Court conferred this authority to itself in the famous landmark case of *Marbury v. Madison* in 1803. It decided, because it is the duty of the judiciary to “say what the law is”, and constitutional law is law as well, that it had the competence to interpret constitutional law. This laid the foundation for judicial review in the US.

In the rest of the world during that time, though, judicial review and generally the power of judges to overturn law was considered the worst possible scenario. Especially civil law states of old Europe feared a ‘gouvernement des juges’ and were heavily influenced by positive law during the 19th century. However, also common law countries such as the United Kingdom, with a long tradition of parliamentary supremacy, rejected the idea of judicial review for a very long time. In fact, the United Kingdom does still not allow a court to invalidate any law. The only possibility for courts is to declare a law incompatible with a right proclaimed in the *Human Rights Act 1998* (HRA). This declaration of incompatibility though is not binding on Parliament.

This changed rapidly after the Second World War, when fascists rattled the faith in positive law and the legislature in general. After the horrible ‘legal’ atrocities committed by various fascist regimes during that time, a judicial check of the legislature did not seem so bad anymore after all. For Cappelletti this change of attitude took place in three steps: First, written constitutions were established, to codify “individual and social values”. Secondly, a constitution had to be somewhat rigid, so that it was relatively immune to amendment by legislatures. Lastly, the legislatures’ and executives’ obedience to the constitution had to be guaranteed. This happened either through ordinary judges on regular courts or through a specialised constitutional court.

The recognition of “individual and social values” emerged in the concession of individual rights and freedoms of persons that needed protection. Before individual rights were entrenched in a bill of rights or otherwise recognised in a Constitution, it was mostly administrative law that was open to review or simple separation of power issues. As Cappelletti wrote though in his article, this

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8 *Marbury v. Madison*, 5 U.S. 137 [1803].
changed after World War II. And it did not only change in Europe, but across the globe. In Japan for example judicial review started in 1947, as Kawagishi writes, almost by accident, and has since then enhanced individuals rights protection immensely.\textsuperscript{14} Through a strong rights adjudication courts intervene quite strongly in the political process. However, even in highly politically charged cases judicial review is seen as a valuable way to resolve such issues.\textsuperscript{15}

Nowadays, judicial review is rooted so deeply in most people’s minds, that we would think it strange to not have it. We expect the judiciary to correct possible mistakes of the legislatures. Maybe the only difference between states’ judicial review system is how far the peoples’ distrust against their elected representatives go.

II. Rights adjudication and judicial review

Nevertheless, it can be asserted, that judicial review functions as a counterweight to majoritarian politics. The question then is why is it needed? The most common answer is this: Judicial review is needed to protect rights of minorities from the decisions of the majority and for various reasons judges can protect rights better than legislatures.\textsuperscript{16} There is, however, more than one way to achieve that and different states have implemented different ways of judicial review. Until around the turning of the millennia there were thought to be only two possible constitutional designs: either one would follow constitutional/judicial supremacy or legislative/parliamentary supremacy. Constitutional or judicial supremacy means the Constitution is the supreme law of the land and every law passed by the legislature needs to conform to it - in the case it does not a court can invalidate the law. Legislative or parliamentary supremacy on the other side encompasses the principle that whatever parliament says is supreme - courts have no power to invalidate a law based on a higher law because there is no higher law than what parliament enacts.\textsuperscript{17}

As already mentioned, judicial review is mostly thought to be connected to the protection of individual rights and freedoms. However, for a long time before individual rights’ adjudication

\textsuperscript{15} See for example Chang, Wen-Chen, Strategic judicial responses in politically charged cases: East Asian experiences, International Journal of Constitutional Law, Vol. 8 No. 4, 2010.
\textsuperscript{17} Cf Tushnet, Weak Courts, Strong Rights (2008), p. 33-36.
became so prominent, administrative acts were already reviewed.\textsuperscript{18} Today, rights protection and judicial review are so tightly intertwined, that they are thought to amplify each other. On the one side judicial review is needed for effectively protecting individual rights. This then, so goes the argument, establishes some democratic legitimacy of judicial review, because protecting individual rights is strengthening a democracy.\textsuperscript{19}

However, in the last two decades literature about ‘weak-form judicial review’ and ‘alternative forms of judicial review’ have emerged.\textsuperscript{20} They claim that it is not an either-or decision between having a strong judicial review or no judicial review at all, but that it is a spectrum on which different nuances of judicial review can exist.\textsuperscript{21} The various distinctions of judicial review can then be categorised to be either strong-form or weak-form judicial review. I will explain this more in the following section.

\textbf{B. Strong-form and weak-form judicial review}

Judicial review was, for a long time, understood synonymously with legal constitutionalism. One came with the other. To understand the difference between strong- and weak-form judicial review it is important to first understand the two theories between which it operates. As already mentioned above, we can differentiate between legal constitutionalism and parliamentary supremacy. I will discuss those two theories briefly and explain how judicial review operates in each theory respectively.

\textbf{I. Legal and political constitutionalism}

In a nutshell, constitutionalism means, that there is a Constitution of a specific state and this is the ‘supreme law of the land’, to which every other (or inferior) law has to abide to. Entrenched in the Constitution are often vague and imprecise values and goals. Who has the authority to interpret those values and goals and whether or not the same institution has the final say in this constitutional

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\textsuperscript{18} See for example Mashaw, Jerry L., Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability, Direito GV Law Review 1.5 Especial 1, 2005.


interpretation decides if a state adheres to legal constitutionalism or parliamentary supremacy (by some also called political constitutionalism).\textsuperscript{22-23}

\section*{1. Legal constitutionalism}

Legal constitutionalism is used synonymously with judicial or constitutional supremacy.\textsuperscript{25} All three expressions are used for the same thought: The Constitution governs everything and each branch must adhere to the Constitution. However, someone needs to make a judgement of whether or not someone violated the Constitution. In legal constitutionalism this task falls to the courts. This can be the case, because the Constitution itself provides for it\textsuperscript{26} or because the courts interpreted the Constitution in this way.\textsuperscript{27} In these systems, the interpretation of the court is final and cannot be revised by a normal majority of the legislature anymore. In legal constitutionalism judges are trusted more to be better interpreters of the constitution than legislatures. However, as former Justice of the US Supreme Court Robert Jackson put it: “We are not final because we are infallible, but we are infallible only because we are final.”\textsuperscript{28}

This system brings both strengths and weaknesses with it. One of the most important strengths of legal constitutionalism is attached to the protection of fundamental rights. This happens on two levels. First, legal constitutionalism enhances the overall public consciousness and awareness of rights, because normally the Constitution provides for a comprehensive and straight-forward enumeration of rights, usually in a bill of rights. On the second level, because courts have the authority to interpret these rights finally, and their independence, expertise and overall incentive to


\textsuperscript{26} For example Art. 140 B-VG (Austrian Constitution) which permits an appeal of a legislative act to the Constitutional Court of Austria; Art. 81 Japanese Constitution: “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”; Art. 33 South African Constitution provides for the review of administrative action through a court and Art 39 SAC authorises courts to interpret the Bill of Rights.

\textsuperscript{27} The best known example for this is the US Supreme Court in Marbury v. Madison, 5 U.S. 137 [1803], in which Chief Justice Marshall inferred the competence of the Court to interpret the Constitution because the Constitution is law as well and courts are bestowed with the power to “say what the law is”.

concern themselves with rights, helps prevent under-enforcement of rights. Because judges do not have to think about possible re-elections, their incentive to decide a controversial case in the best moral and public interest is higher than for an elected politician. There are also many arguments in favour of democratic legitimacy of judicial review. Not in the sense, that judicial review itself is democratically legitimate, but that through judicial review overall constitutional democracy is strengthened. This stems partly from the perceived protection of under-enforcement of rights. It is submitted that this leads to a “trade-off” among different sources of legitimacy.29

Nevertheless, for every strength there is a weakness that can be attested to it. As much as judicial review can help to prevent under-enforcement of rights, it can itself under-enforce them as well. This has two negative effects. First, in states where courts have the final say, a judicial under-enforcement of rights legitimises the legislative under-enforcement. Secondly, it sets precedent, meaning that future cases and statutes will be treated alike, thus resulting in a common under-enforcement of rights in this direction. On the other hand, courts could also over-enforce rights, in the sense that courts could be implied to put more limits on governmental action than required.30

This might not sound so bad, after all everyone wants to live more freely and unrestricted. However, it should not be forgotten, that the restriction of one’s right is the liberation for another. Therefore, by putting a greater limitation, on for example a statute enforcing limitations on working hours, because it might restrict the freedom to contract, only one side ‘earns’ more freedom. The other side, all the workers and employees, lose dearly.31

A third weakness, especially in states that only allow concrete judicial review, is that some laws might never get litigated, because there is no one directly or indirectly affected by it. States that allow abstract judicial review can circumvent this problem at least partly as mostly either elected representatives or certain offices have a right of standing without having to be affected by the law.32

There is also the problem of the “over-legalisation” of rights, because courts are interpreting laws, their rights review tends to focus on the legal aspects of the rights and laws in question and this can prevent a coherent review of moral and political aspects. Lastly, maybe the most prominent weakness of legal constitutionalism at least for its opponents, is its lacking legitimacy. As already stated above, even proponents of legal constitutionalism do not attempt to say that judicial review

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31 This was the case for example in *Lochner v. New York*, 198 U.S. 45 [1905].
32 For example the Austrian Constitutional Court allows federal laws to be contested by a state’s government, a third of the members of the National Assembly or a third of the Federal Council without them having to be affected personally by the law (Art 140 B-VG [Austrian Constitution]).
itself is democratically legitimate. Therefore, the strongest argument against judicial review is its lack of democratically accountable representatives of and to the people, even though a high court is generally rendering decisions on behalf of the most important questions of a society.\textsuperscript{33}

2. Political constitutionalism

On the complete other side is political constitutionalism, also known as parliamentary or legislative supremacy.\textsuperscript{34} Historically speaking, especially after the Second World War and then again after the fall of the Soviet Union, the ‘trend’ was legal constitutionalism. Parliamentary sovereignty seemed to have failed and nowadays there are only very few states left that still follow it. The most prominent state to still adhere to parliamentary sovereignty is the United Kingdom, although even there many already think that even the UK does not have a ‘perfect’ or ‘absolut’ sovereign parliament anymore.\textsuperscript{35} Because of British colonialisation throughout history different modes of the Westminster Model were established throughout the world. As a result of this Canada, Australia, New Zealand, many Caribbean states, and Asian states, such as India, Hong Kong or Singapore, build their own legal systems upon the traditions of British common law. For example Bermuda, British Virgin Islands, Anguilla and others in the Caribbean are still under the sovereignty of the British Crown. Others such as Belize, Barbados, Trinidad & Tobago have their independent sovereignty by now, but were heavily influenced by British common law traditions.\textsuperscript{36}

The quintessence of parliamentary sovereignty is, that even though there might be a constitution, it is the legislature which has final authority over the interpretation of it. I say ‘even though there might be a constitution’, because the United Kingdom does in fact not have a written constitution that a court or legislature could turn to. The constitutional law of the United Kingdom consists of constitutional conventions, case law and a few Acts of Parliament that are considered to encompass a constitutional doctrine.\textsuperscript{37} Nevertheless, the important difference to legal constitutionalism lies in the authorisation of the final interpretation of the Constitution. In a system of parliamentary

\textsuperscript{33} Gardbaum, The New Commonwealth Model of Constitutionalism (2013), 57-60.


\textsuperscript{37} Cf Wieser, Vergleichendes Verfassungsrecht (2005), p. 51-52.
sovereignty it always falls to the legislatures. Courts can decide on a case that the law might be unconstitutional, but Parliament is not bound by this decision to enact a new law and it does not become new law by itself. This derives from the understanding that only Parliament is elected and only Parliament is democratically legitimised to enact laws. A court, that lacks this democratic legitimacy, cannot have the power to revoke legitimately passed laws of an elected Parliament.38

As with legal constitutionalism, political constitutionalism has its own strengths and weaknesses as well. Its major strength is the cure of legal constitutionalism’s biggest deficiency, that is its democratic legitimacy. It achieves this by putting in place political instead of legal limits on government. This is usually done by making the political bodies accountable to their electorate and a structural checks and balancing.39 For example, in the United Kingdom until 2009 the ‘highest court’ were the Law Lords of the House of Lords, a special committee of the legislative body. Only in 2009 the Supreme Court of the United Kingdom was founded and ‘outsourced’ of the legislative branch.40 Still, as the new Supreme Court was only transferred the rights and obligations of the Law Lords from the House of Lords, the legislature retains the final say. Therefore, a system of political constitutionalism is organised on the principle of democracy and thus legitimate. Whether or not political and moral rights stay abstract or are given legal form does not affect this legitimacy as it stays in the discretion of the democratically elected to change them by ordinary legislation.

Concerning rights protection it is thought by some that legislative reasoning is in fact superior to judicial reasoning. Waldron for example is of this opinion, because in his view judges cannot consider purely moral arguments, but have to take into account precedents, doctrines, legal texts, and interpretation. This in turn prevents them from rendering a decision that really encompasses moral reasoning. For Waldron, legislatures are the better moral reasoners because they can focus more on political and moral arguments when enacting a law and do not have to think about doctrines or precedents.41 Legislatures are also a more diverse body than a judiciary as it consists of

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a greater variety of different views and opinions on rights deliberations.\textsuperscript{42} A court, and especially high courts, usually consist of a very small elite group that are all trained in a certain way of thinking and even though their opinions on rights can differ, controversial cases illustrate that often only a majority of five to four votes (assuming it is a high court consisting of nine members) can make the difference. Let’s say those nine judges sit on the Supreme Court of Canada. The Parliament of Canada consists of 443 voting Members of Parliament and Senators. In my opinion, I would rather have 443 people deliberating my rights than only nine. The possibility of them making an error in judgment is as high as it is for judges, however, I believe 443 people will hopefully bring more ideas and perspectives into the debate than only nine, and hopefully come to a fair enough conclusion.

This brings me to the weaknesses of political constitutionalism. Although legislatures might be more profound in moral reasoning than judges, they too have other deliberations on their agendas and this can lead to an under-enforcement of rights. This can for example stem from party blockages or party traditions or a certain timidity to touch upon controversial topics in fear of losing votes for a re-election.\textsuperscript{43} There are also certain legislative “blind spots” and "burden of inertia”. Blind spots can occur in the application of laws to actual cases, meaning legislatures cannot foresee every possible scenario. They are also possible if a (minority) perspective is not sufficiently represented in the legislature and is therefore, forgotten or overlooked. Burden of inertia on the other hand prevent a correction of a former blind spot. This can several reasons and is linked, amongst others, to the reasons given before.\textsuperscript{44} In many political systems there exists an incumbent party diktat and free votes on the grounds of the members’ own moral grounds can be scarce. This is exceptionally manifest in Ontario, Canada at the moment by the Progressive Conservative Party of Ontario which is excessively strict on party discipline.

The second weakness derives from the first one. Opponents of political constitutionalism lament that democratic legitimacy cannot be the only legitimacy we seek in a constitutional democracy. A possible under-enforcement of rights by the legislature can result in institutional social injustice and this in turn cannot be legitimate. A system of political constitutionalism, however, cannot provide an adequate forum for individuals burdened by this injustice to voice their opinion and ask for a

remedy. Therefore, judicial review with the possibility of overturning unjust legislation has to be put in place.\textsuperscript{45}

Thus, both sides have at least two similarities: a constitution, that needs interpretation, and some sort of judicial review, ranging from final judicial review to no judicial review. The binding effect of a judicially rendered interpretation is decisive of whether a state follows legal constitutionalism or political constitutionalism. Thus, normally a strong judicial review is associated with legal constitutionalism and a weak, or non-existent judicial review with political constitutionalism. As I already described, they should not be understood as opposite sides, but as ends of a spectrum in which several possible variations of judicial review can operate in. Hence, a state adhering to legal constitutionalism with strong judicial review could have some features of weak judicial review or political constitutionalism in some aspects and \textit{vice versa}.\textsuperscript{46}

\section*{II. Forms of judicial review}

Today it is widely acknowledged that there are several forms of judicial review.\textsuperscript{47} The most common differentiation is between strong-form and weak-form judicial review. Strong-form judicial review is ‘ordinary’ judicial review, in the sense, that it is the kind of judicial review in traditional legal constitutionalism. Meaning a court can invalidate legislative and/or executive acts without a legislature’s recourse to override the decision by ordinary majority. Weak-form judicial review on the other side, is broadly speaking everything less than that. This term was coined by Tushnet, among others in his book \textit{Weak Courts, Strong Rights}, where he describes weak-form review as a system, in which judicial interpretations of constitutional provisions can be revised by a normal majority.\textsuperscript{48} However, the first one to really touch upon the possibility of alternative forms of judicial review might have been Stephen Gardbaum in 2001, when he put forward the idea of a “new Commonwealth Model of Constitutionalism”.\textsuperscript{49} I will consider Gardbaum’s theory in greater detail in the next sub-chapter.

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For now, the crucial part of Gardbaum’s theory are the states he linked his new model to. These are essentially old Commonwealth states, namely Canada, New Zealand, Australia, and the United Kingdom itself. When other authors then write about alternative forms of judicial review, they usually also refer to these specific states. Tushnet then differentiates again to the degree of weak-form judicial review states’ can implement in their legal systems. He discerns between an interpretative mandate, an augmented interpretative mandate and a ‘dialogue’ mode of review by the courts.50

1. The interpretative mandate

For Tushnet, the Bill of Rights of New Zealand (NZBORA) contains an interpretative mandate. The structure of the NZBORA is the following: it is a statutory Bill of Rights that can be either wholly or partly repealed by ordinary majority; it encompasses a list of rights and freedoms, such as a right to free expression or equality; it rejects the possibility of a court to repeal or revoke a legislative act (section 4) and expressly directs the courts to interpret enactments in a way consistent with the Bill of Rights (section 6). Under an interpretative mandate the courts’ interpretive task is twofold. First, they have to interpret rights on a substantive basis, meaning what is the scope of the rights’ protection? Secondly, courts have to ascertain whether or not the statutory provision is in conflict with their interpretation of the rights protections. Under the NZBORA judges are obliged to interpret the conflicting statute in a manner that is consistent with the NZBORA. If it is not, bluntly speaking, they cannot do anything about it. Therefore it is the legislature’s response to the courts’ interpretations that are of interest. A legislature can either accept the courts interpretation, both of the scope of the right and of the conflict with the statute in question, or it can disagree with it.54 In the second case lies the fundamental assumption of weak-form judicial review. If the legislature disagrees, it disagrees. It is not bound to the judicial decision, because in weak-form systems there can be “reasonable disagreement over the meaning of constitutional provisions” between courts and legislatures.55

52 New Zealand Bill of Rights Act 1990, section 19.
53 New Zealand Bill of Rights Act 1990, section 6: Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.
2. The augmented interpretative mandate

The augmented interpretative mandate is one step ‘more’. ‘More’ as in, a step further away from really weak-form judicial review and a step closer to strong-form judicial review. This, according to Tushnet, is the case in the United Kingdom. The *Human Rights Act 1998* (HRA)\(^56\) is similar to the NZBORA as it provides for an obligation of the courts to a consistent interpretation of legislation with the HRA’s enumerated rights.\(^57\) However, different from the NZBORA the HRA allows courts to issue a declaration of incompatibility (section 4), that is yet again not binding on the legislature (as well as not on the parties of the proceedings).\(^58\) Through the enactment of the HRA and enabling courts to issue declarations of incompatibility it was hoped that Parliament would respond to them by amending statutes so to eliminate the incompatibility. Because even though British courts cannot go further than issue a declaration of incompatibility, a party to the proceedings also has the possibility to go to the European Court of Human Rights, as the HRA is effectively an assimilation of the rights of the European Convention of Human Rights into domestic British law. To reduce the political embarrassment of losing in the European Court, British politicians needed to act. With the HRA they enabled Brits to litigate their rights in their own courts, but because parliamentary supremacy is so deeply rooted in the legal system of the United Kingdom, a court that could revoke or repeal a statute would have been too much. Hence, the declaration of incompatibility was included. This way, Parliament could still decide whether or not to act after a declaration of incompatibility and has, as it always had, the last say.\(^59\)

3. The dialogue model

The last alternative model of judicial review that Tushnet describes is that of a dialogue. The dialogue model was not, however, invented by him. Already long before him, Canadian scholars were infatuated with the idea of dialogue. Probably the first ones to start the craze about ‘dialogue’ were Peter Hogg and his student Allison Bushell.\(^60\) For them dialogue can occur when a judicial

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\(^57\) *Human Rights Act 1998*, section 3: So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

\(^58\) *Human Rights Act 1998*, section 4 (6): A declaration under this section (“a declaration of incompatibility”) (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.


decision is open to legislative reversal, modification, or avoidance. This is the case when a judicial decision causes public debate “in which Charter values play a more prominent role than they would if there had been no judicial decision.” In Canada this is theoretically the case all the time, as the Canadian Constitution has one very unique feature, the notwithstanding clause. Through the notwithstanding clause (section 33 of the Canadian Charter of Rights and Freedoms in Part I of the Canadian Constitution) legislatures can declare an Act or a provision thereof to operate notwithstanding certain Charter provisions. Unfortunately, the wording of section 33 is very poor and because of it many understand it as an ‘override’ provision to circumvent certain rights provisions. I will explain this problem later when I come to the methodology of section 33. Nevertheless, the notwithstanding clause is a prime example of what weak-form judicial review stands for. At the end there are two reasonable interpretations of rights provisions - one of the Court and one of the legislature. The notwithstanding clause enables the legislature to say that they prefer their own interpretation. It does not say, that legislatures diminish a right or disregard it. It simply means that there is disagreement and the Canadian Constitution gave the authority to dissolve this disagreement to the legislature.

These three examples exemplify quite perfectly the different nuances judicial review can take. The first example, the interpretative mandate, is the weakest of them. Courts in New Zealand can do virtually nothing about a violation of a right prescribed by the NZBORA. The next mandate is a bit stronger in protecting rights through a court, because it allows the courts to issue a declaration of incompatibility. However, the problem continues to exist that a litigant before the court will end up with nothing - his or her rights will still be infringed and he or she might not even be able to be awarded a remedy for it. This is the reason why the dialogue model proves the most efficient. And with most efficient I mean, it is the best method to protect individuals’ rights on one side and to retain democratic legitimacy on the other side.

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C. **The New Commonwealth Model of Constitutionalism by Gardbaum**

In 2001 Stephen Gardbaum published his first article about the “New Commonwealth Model of Constitutionalism”, in which he claimed a common alternative form of constitutionalism to exist in the United Kingdom and its (old) Commonwealth.\(^{63}\) He was one of the first to identify a third approach in between the two previously existing theories of legislative and judicial supremacy. His argument is, that although the ‘rest of the world’ decided on an either-or basis (between legislative or judicial supremacy) states such as Canada, New Zealand, the United Kingdom and the sub-national entities of the Australian Capital Territory and the state of Victoria, took a different path in strengthening their rights protection. Because he saw this third approach in mostly (old) Commonwealth states he named his theory ‘the new Commonwealth model of constitutionalism’.\(^{64}\)

For Gardbaum these states have two distinctive features that separate them from the “post-1945 rights revolution”, which enacted usually a strong judicial review. The first distinctive feature is the rejection of operating in a system of judicial supremacy. Albeit all five states enacted bills of rights with the goal of protecting individuals’ rights and freedoms, all of them refrained from doing so in expense of their legislative supremacy. The second feature is about the rights incorporated in their bills of rights. Unlike most states after 1945, these Commonwealth states drew their inspiration largely and some directly from international covenants of human rights. The NZBORA, for example, affirms in its preamble that one of the reason of its enactment was to conform to the International Covenant on Civil and Political Rights (ICCPR).\(^{65}\)

In this sub-chapter I will follow the structure of Gardbaum’s book ‘The New Commonwealth Model of Constitutionalism Theory and Practice’, thus I will start with the theoretical part before explaining how he sees it operating in practice. For the practice part, I will only focus on Canada as this paper is only concerned with the notwithstanding clause of the Canadian Charter.

### I. Theory

As already explained the new model opens up a third approach to the question of constitutional design. It allows intermediate options to disembark from the strict either-or decision and, as Gardbaum writes, promises to take the strengths and to reduce the weaknesses of both. He sees two

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elements of the new model that are crucial for the protection of rights and form the core of his theory. The first is pre-enactment political rights review and the second is weak-form judicial review.66

Pre-enactment political rights review is to be fulfilled by the legislative and executive branch. The two elective branches have to consider possible rights’ implications of proposed bills before and during the legislative process. In Canada, for example, it is mandatory for the Minister of Justice to review proposed legislation on its conformity with the Charter. If he thinks there could be a possible right’s infringement, he needs to issue a statement of incompatibility.67 A political rights review enhances the sensibility of the elective branches for rights sensitive issues. It also provides an ex ante rights protection, which is especially useful for legislative outputs that never get litigated before a court, as is often the case in systems that do not allow abstract review. For every legislative output that is able to get litigated after it is a double protection - first ex ante through a political rights review and later ex post through a court.68

The second element is weak-form judicial review. I already discussed this above. For Gardbaum the essential feature of weak-form judicial review is, that it leaves the final say of interpretation to the legislative majority. The new model is not asking the respective institutions anymore how they are going to exercise their power, but whether.69 As a result of these two elements, that can be as strong or as weak as a state deems them to be necessary, there are by definition already more than one new models.

Next, these two elements can be divided into four institutional requirements: (1) a legalised and codified bill of rights (as opposed to mere moral and political rights), that is either statuary or constitutional; (2) mandatory pre-enactment rights review by the political branches; (3) some form of judicial review, that employs more than just ordinary statutory interpretation; and (4) a formal legislative power to be the final arbiter by ordinary majority.70

67 Section 3 (1) of the Canadian Bill of Rights reads “…the Minister of Justice shall,… examine every… Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.”
Thus, to summarise it, the new model (or models) are essentially about “the relative scope of legislative and judicial power”, with other words about a new “division of labour between legislatures and courts”.71

1. **External justification**

Gardbaum is founding his theory on two requisite presumptions. His theory is able to work well in a mature democracy, with both a reasonably well-working legislature and judiciary, commitment to individual and minority rights, and good faith disagreement about the specifics and scope of rights.72 Second, he construed his theory so to not be rights-specific, but on a more general, regime-level.73 In his external justification Gardbaum tries to make the new model appeal by contrasting it with legislative and judicial supremacy and pointing out its advantages.

The core case for his model is, as he describes it, a “distinct and appealing third way in between two purer but flawed extremes”. This offers on one side a new way for constitutional design, because it is not necessary to decide between either legislative or judicial supremacy or to put up with their respective weaknesses.74 On the other side it also enriches legal debate. When one had to decide before to either have a strong rights protection on the cost of democratic legitimacy or the other way around, the new model offers both. It enables courts to review rights on a substantive basis, without diminishing the democratic legitimacy of it as it is open to the legislature to disagree with them. The new model offers a more “proportionate representation” of both side’s strengths, while reducing their weaknesses.75

Foremost, the model addresses the question of who is the ‘better’ moral reasoner by following Dyzenhaus’ suggestion of treating all the forums as in being a relation to each other.76 Thus, instead of giving the sole power of interpretation to one side or the other, the new model puts both the legislature and the judiciary on the table. This is achieved by enacting political pre-enactment rights

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76 Dyzenhaus, Are legislatures good at morality? Or better at it than the courts?, International Journal of Constitutional Law, Vol. 7 No. 4, 2009, p. 50-52.
review as a first round of moral reasoning on the legislative side. After that it is continued in the judicial sphere by way of an appeal to the courts as a post-enactment rights review. Therefore, both the legislature and the judiciary have the possibility of voicing their view of how to rightly assess the moral aspects in question and it will eventually lead to a better overall moral reasoning.\textsuperscript{77}

On the question of who has the final say, the new model seems to fall onto the side of political constitutionalism as it awards the legislature with the power of finality. However, this is only partly true as a certain degree of judicial review is imminent to it as well. The difference to legal constitutionalism is, that the courts are only one ‘checkpoint’ in the overall system and not its last arbiter. This follows from the original idea of the new model to strengthen rights protection while avoiding the legitimacy deficiency of legal constitutionalism. Hence, the final say is retained by the legislature, but enhanced judicial review is integrated in the system to avoid possible under-enforcement of rights by the legislature. As such democratic legitimacy is maintained with judicial review reinforcing political legitimacy by promoting social justice.\textsuperscript{78}

Encapsulating the institutional strengths of the new model, they are as followed: From political constitutionalism it takes the benefits of a more unadulterated and comprehensive style of moral reasoning inherent to the legislature and retaining the principles of electorally accountable decision-making, while avoiding its pitfalls of rights-relevant pathologies. From legal constitutionalism the new model adopts a more rights-conscious approach by enacting fairly visible and comprehensive catalogues of rights and freedoms in legal form. It also enables courts to review legislation, giving individuals the chance to challenge perceived rights under-enforcement before a court, thereby strengthening overall political legitimacy. To avoid a ‘gouvernement des juges’ the new model dams the courts powers by allowing the legislature to review judicial decision.\textsuperscript{79}

2. \textit{Internal justification}

In his internal normative justification for his new model Gardbaum illustrates the ideal model and how it should operate. He also argues why a stronger tendency in either the direction of legislative or judicial supremacy does not mean that the new model is collapsing into one of the extremes. The ideal model then follows three steps. First, there is a pre-enactment political rights review done by the executive and legislative branches. Following this, a judicial rights review takes places, which can be anything from statutory interpretation to invalidating legislation. Lastly, the legislature has a


second chance to reconsider, both its own first enacted legislation and the decision of the court. It is by no means obligated to use this power, however this gap between having the power and whether or not to use it is the most distinct and visible aspect of the new model.  

Starting with the pre-enactment political rights review, it is the first step of a three-stage rights review. As its name suggests it is undertaken by the political players, namely the executive and legislative branches. It is also done before and during the considerations of passing a bill to become law, making it a unique feature of the new model. Last but not least, it is primarily engaged in political and moral reasoning as distinguished from legal reasoning that the courts usually engage in. At least, Gardbaum’s ideal model expects executive officers and legislatures to focus on political and moral reasoning, to bring this broader and undistorted view of the non-judicial branches on the table. The worst would be if they would only try to expect how the court would deal with it if brought before one, instead of engaging in genuine political and moral deliberations.

For Gardbaum this pre-enactment political rights review fulfils at least six function in the new model. First, it disperses the responsibility of rights deliberation across all three branches, because if a bill is proposed by the executive it will have to consider right relevant issues, as does the legislature when debating about the proposed bill in Parliament. This in turn might trigger a freer and wider legislative inherent approach to rights deliberation. Next, public awareness about the issue can rise and thereby public engagement in rights relevant issues. It can also help to explore political rights deliberations that would be left untouched after a restricting court decision. Another advantage is that courts can have recourse to political rights-relevant deliberations of laws and do not only have to judge based on statements made my a government after a case is brought before it.

Lastly, it is a safety valve for cases in which laws might never get litigated and for every case that could get litigated it is an additional safety net that already tried to eradicate some rights violations. As such possible rights violations can be safeguarded against. For Gardbaum it is important that all deliberations of the executive before giving it to Parliament for consideration should be given to the public and distributed by the media to open up a public debate about all matters.

The next step occurs after the enactment of a law in the form of a concrete case in front of a court as judicial review. Gardbaum only describes concrete judicial review as all the states his analysing do not allow abstract judicial review. Judicial review in the new model has some distinctive features. At the outset it erected judicial review in states formerly not allowing any kind of judicial review of

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any kind of law. The new power of the courts can, as mentioned above, range from statutory
interpretation to invalidation. Through this institutionalisation of this new power a more “fact-
specific” deliberation of rights is possible and courts have the possibility of guarding against a
potential under-enforcement by the legislature.\footnote{Gardbaum, The New Commonwealth Model of Constitutionalism (2013), p. 83-84.} After all, the new model does not expect any one branch to be perfect in its reasoning, but to be reasonably well in it without closing the door behind
themselves. This is noteworthy for the courts adjudication, because in the new model they are not
final \textit{de jure}. Hence, when they give a judgment they can be freer in their judgment, knowing they
only have to focus on the legal questions. Their main focus in the new model should be to inform and alert the legislature and the people of legal rights concerns with a certain piece of legislation. Thus, the legislature as well stands in a better and more informed role whether or not to use their
power of final disagreement with the court. For this a court has to really decide and reason on the
merits of the case and not purely perform a “reasonableness review”. Gardbaum means with this, that a court should not look at a case and ask itself if the political consideration for the legislation were reasonable, but whether or not the legislation in question is sufficiently protecting rights on a
legal basis. This is because a reasonableness review would lead to too high a political cost to
disagree with the court, as it would be hard to argue for the legislature why they were not
unreasonable in enacting a certain law. Albeit, Gardbaum admits that if a court finds too many
legislative acts to be inconsistent with rights on the merits, it could as well prove fatal for a
legislature to overturn a judicial decision. Therefore, every institution should be made aware of its
heightened responsibilities of rights review so that also the public does not think of the court as the
supreme power to interpret rights, thus reducing the cost for legislatures to disagree with a
decision.\footnote{Gardbaum, The New Commonwealth Model of Constitutionalism (2013), p. 84-87.}

The final and last distinctive feature of the new model is the possible, but not obligated, final word
of the legislature after a judicial decision. This presupposes that there is a certain tension between
the judicial decision and the legislature’s preferred legislation. For Gardbaum, the most distinct
feature of the new model comes into play here, that the legislative retains the power to put its own
view over the judicial one. For him it is important to establish a normative theory of its legitimate
use. After all the legislative final authority should bring about a greater balance between the
legislature and the judiciary while also enhancing rights protection. This is because on one side,
judicial reasoning is too narrow, as rights issues are never exclusively legal or interpretive,
predominantly they are moral in nature and policies that are woven into legislations are always


effected by political reasons. On the other side, legal pathologies can be responded to by less restrictive judicial means than an absolute veto. A less restrictive judicial mechanism can also further public justification of governmental and legislative action.  

Gardbaum sees both a procedural as a substantial reasons for the legitimate use of a final legislative authority. Procedurally for using its final authority a legislature has to engage seriously with the judicial rights considerations. This encompasses sufficient time allocated for debate and a genuine debate about the considerations of the court. After this procedure whether a legislature complies or does not comply with the court should not matter anymore, because it is this procedural aspect that makes either choice legitimate. On a substantive basis the use of a legislative finality is legitimate in cases where the legislature has reasonable grounds to disagree on the merits with a court. This can be a disagreement about any sub-issue of a rights - its application, its scope or justifications of its limits, as long as there is substantive reasonable disagreement between the two opinions. In most cases this will mean that a legislature will not follow the opinion of the majority but the dissenting one. Indeed, the political costs on the part of the legislature cannot be forgotten.  

A final decision by the legislature is seen too readily as overriding a right, because in our rights-centred cultures courts give rights to the individual that would have been withheld by the legislature. Thus, a legal culture must first imprint the acceptance of reasonable disagreement between legislatures and courts in it as normal. Otherwise the political cost for this reasonable disagreement will always be seen as overriding a court decision and taking away rights from citizens, although no rights are taken away from anyone in the process. There is just a disagreement based on reasonable considerations of both sides. Therefore, I agree with Gardbaum that the political cost for disagreeing with a judicial decision has to be lowered and the awareness of a suitability for moral reasoning has to be accepted for every branch. 

Essentially he then summarises his points as follows: Apart from other theories given so far, his theory is not static, but dynamic, in the sense that it does not try to allocate the final say in advance to either the legislature or the courts, but that it allows an ex post allocation of the final say to whoever has the better reasoning in the end. The final power however stays by the legislature, so that a diverging outcome after a judicial decision is feasible.  

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II. Practice: Canada

In Gardbaum’s book four different states are examined. These are Canada, New Zealand, Australia and the United Kingdom. As stated above I will only look at the practice of Canada here as I am foremost only looking at the notwithstanding clause of the Canadian Charter.

Canada has been the first of these states to institutionalise the new Commonwealth model. Astoundingly Canada did not do it just once but actually twice. The first step was done in 1960 with the enactment of the CBOR on statutory level erecting pre-enactment political rights review. The second step was achieved in 1982 after Canada’s patriation of the United Kingdom and its new Charter, establishing judicial review of rights. New Zealand, Australia and the United Kingdom learned and adapted the Canadian model, thus forming the new Commonwealth model of constitutionalism.

1. Structure of CBOR and Charter

The CBOR is still in operation today, although most of it is redundant as the Charter incorporates most rights from the CBOR. Nevertheless, there are some rights unique to the CBOR, such as a right to ‘enjoyment of property’ (section 1 (a) of the CBOR) and certain features, such as the duty of the Minister of Justice to review every bill proposed to the House of Commons (section 3 (1) of the CBOR) and Parliament’s power to declare in an Act that a law shall operate notwithstanding the CBOR (section 2 of the CBOR). It is this the pre-enactment political rights review linked with the legislative finality that marks Canada’s embarkment into a new hybrid model of constitutionalism.

The CBOR is a statutory bill of rights that only binds the federal government. It is mostly seen as having been ineffective due to its lack of use, and connectedly the courts uncertainty of how to deal with a statue that could not be interpreted consistently with the CBOR’s rights. In the one case in which the CBOR was applied, R v. Drybones, a bare majority of the Supreme Court held that they could declare a statue inoperative if it cannot be construed consistently with a right, given there is no express declaration of Parliament that a law should operate notwithstanding the CBOR. The courts, however, saw their new power subject to traditional parliamentary supremacy. As a result they were deferential to Parliament and most rights were left unprotected by the CBOR as the courts did not see themselves in a position to overturn legislation. With Canada’s patriation from the United Kingdom and the construction of their own Constitution, it also wanted to avoid a second failure such as the CBOR. For this reason the Canadian Charter of Rights and Freedoms was put as

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the first part of the new Constitution to entrench a bill of rights and raise the enumerated rights and freedoms to the status of supreme law.\textsuperscript{89}

The new Canadian Constitution has a comprehensive list of civil and political rights, ranging from fundamental freedoms such as a freedom to religion and freedom of expression, over democratic rights, legal, and language rights to equality rights.\textsuperscript{90} All these rights are subject to “such reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.”\textsuperscript{91} Section 32 of the Charter states, that it applies to both federal and provincial governments and legislatures. Section 33 incorporates the legislative override and section 52 provides for the Charter to be supreme to any inconsistent law, which is to the extent of the inconsistency, of no force or effect. Since the enactment of the new Constitution and with it the Charter, the Canadian Supreme Court has performed his new duty outstandingly. Its new powers are derived from section 52, to declare any law inconsistent with the Constitution to be of no force or effect, and section 24, which provides for judicial remedies in case of rights infringements.

Taking section 33 out of the equation, Canada would seem like a prime example of a model of legal constitutionalism. However, in 1985 an Act respecting the Department of Justice was enacted granting the Minister of Justice, who is \textit{ex officio} also the Attorney General of Canada, the authority to examine all bills before their proposal to the House of Commons to their consistency with the Charter of Rights and Freedoms.\textsuperscript{92} This Act establishes the Minister of Justice’s authority under the Charter which he already had under the CBOR. Taken together with section 33 of the new Charter then, Canada fulfils Gardbaum’s criteria for constituting a new model that does not adhere to either legislative or judicial supremacy.\textsuperscript{93}

2. Application of the Charter

The pre-enactment political rights review put the executive as the first protector of rights, as it is vested into the authority of the Minister of Justice. Most of this work is done by the Human Rights Law Section of the Department of Justice. Should a draft be found to be inconsistent with the Charter the Minister of Justice would have to write a report of inconsistency to Parliament about his

\textsuperscript{90} Constitution Act, 1982, Part I, Canadian Charter of Rights and Freedoms, section 2 - 23.
\textsuperscript{91} Canadian Charter, section 1.
\textsuperscript{92} Department of Justice Act, R.S.C., 1985, c. J-2; accessible online: https://laws-lois.justice.gc.ca/eng/acts/J-2/ (last accessed on 22 February 2019).
objections. Until the end of 2018 no such reports were ever made\(^94\) and Gardbaum expects no reports to emerge, as this would mean that Parliament is willing to push through a law that is evidently infringing the Charter. For him zero reports mean that there were always amendments made so to adhere to the Charter.\(^95\)

The problem with parliamentary systems, such as in place in Canada, is that usually bills are prepared by the executive and there is a high tendency to secrecy about the deliberations before the proposal so that Parliament does not take part in large in the pre-enactment political rights review. Canada especially has a system of strict party discipline and a dominance of the government in the House of Commons, which makes it hard for the Committees in the House to make a fair assessment about the proposed bill’s rights consistency. Hence, the legislature is \textit{de facto} mostly excluded from the pre-enactment political rights review.\(^96\) It can be concluded from this that although there is a pre-enactment political rights review, it is very one-sided. The executive prepares and proposes a bill but it is the executive itself that considers if its proposal could be in tension with Charter rights. This is only half-satisfactory. For there to be a conclusive rights review the legislature should have a stronger and more independent say in it.

The Supreme Court took up its new power of judicial review eagerly and has since then established a long line of precedents protecting rights rigorously. It developed the doctrine of the constitution as a ‘living tree’, by which means the courts adapted a broad and generous approach to Charter rights. In \textit{R v. Oakes}\(^97\) the Supreme Court established a proportionality analysis not unlike the one of the German Constitutional Court. Under its proportionality analysis section 1 of the Charter (the limitation clause) is its most crucial tool to determine whether or not a rights infringement constitutes a rights violation.\(^98\)

Section 1 is thought to have opened up a forum in which the legislature and the Court enter into a dialogue. The legislature can argue under section 1 exhaustively as to why it enacted this law, what policies it shall accomplish and how possible rights violations shall be prevented. If such a


justification follows after a judicial decision in a *de facto* re-enactment of a previous statute, Hogg and Bushell call this a ‘legislative sequel’. For them these cover the basis of their theory of dialogue.99 Subsequent case law of the Supreme Court shows that the court is quite deferential to the legislature’s grounds of justification and upheld laws that in previous cases were struck down by it although it was ‘just’ a re-enactment of the previous law with a section 1 justification. In its decision in the second-look case of the *O’Connor* regime the Supreme Court stated: “Although […] Bill C-46 differs significantly from the *O’Connor* regime, it does not follow that Bill C-46 is unconstitutional. Parliament may build on the Court’s decision, and develop a different scheme as long as it meets the required constitutional standards […] The relationship between the courts and the legislature should be one of dialogue. The courts do not hold a monopoly on the protection and promotion of rights and freedoms”100.101 The courts deferral in such cases, however, has contributed to the overall neglect of section 33 and its *de facto* non-use.102

### 3. Dialogue theory and its uniqueness in the Charter regime

I have already discussed the dialogue theory above and will therefore now concentrate on the perceived distinctiveness of it under the Charter regime. Gardbaum recognises three different positions in the dialogue debate in Canada. First, contended by proponents of dialogue theory is the view that because there is a dialogue between the Court and the legislature judicial review in Canada is weaker than in its neighbouring country the United States. This view advances three dialogical features: section 33, the notwithstanding clause, the most obvious way a legislature has the final say; section 1, under which a legislature has the chance to re-enact a law with a less restrictive means, that was deemed to unreasonably limit a right before; and lastly the remedial discretion of the court in granting a suspended declaration of invalidity.103

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100 *R v. Mills* [1999] 3 SCR 668, at 670 per the majority opinion.

101 Cf *R v. O’Connor* [1995] 4 SCR 411. This case was concerned with the production of records to the accused in sexual offence trials. The Court decided in favour of the accused and against the equality of women, legislature found this unsatisfactory and followed the dissenting opinion. This was followed by the enactment of Bill C-46 that effectively overturned the *O’Connor* regime. Although completely disagreeing with the Court Parliament did not invoke section 33 here but ‘only’ gave a section 1 justification. In a subsequent case, *R v. Mills* [1999] 3 SCR 668, the Supreme Court upheld the law.


The second position disagrees wholly with the first and is indeed of the opinion that Canada operates under a strong-form judicial review regime, notwithstanding the dialogical features of the Charter. A defender of this view is especially Andrew Petter, who shows that a ‘dialogue culture’ was already in place in the US-American constitutional theory before Hogg and Bushell published anything about it. He disputes that Canada does in fact have a weaker form of judicial review than the US. The de facto non-use of the Notwithstanding Clause is another indicator for Petter that Canada has indeed given way to judicial supremacy.104 The last position occupies a place in between the two others.105 Proponents of this view do not in fact disagree with dialogue theory, however, they think it has failed so far. This position is held by Manfredi and Kelly, and Dixon, who all contest Hogg’s and Bushell’s presented dialogue theory.106

For Gardbaum it is not important if Canada is weaker in its judicial review than the US, but whether or not it can be said that Canada operates in the new model of constitutionalism. Therefore, the two elements that constitute Canada as operating within the new model are the political rights review undertaken by the Minister of Justice and section 33. Section 1 is not a feature of the new model, but merely a characteristic of a ‘normal’ limitation clause common to many post-war constitutions operating under judicial supremacy. It also leaves the final word to the courts and not to the legislature. As distinguished from section 33 which is a distinct feature of the Canadian Charter and gives the legislature an unlimited power to override judicial decisions. However, in the current dialogue debate in Canada scholars tend to ignore section 33 mostly, and consequently Gardbaum deems the dialogue theory to not constitute a new intermediate form of constitutionalism, but rather to affirm how judicial supremacy operates under legitimate political limitations of rights.107

Gardbaum concludes his practical findings about Canada with a rather unadorned result. As long as the notwithstanding clause stays dormant Canada is moving closer and closer to a strong form of judicial review common to judicial supremacy. For the Charter to operate in Gardbaum’s envisaged intermediate form a shift in power from the judiciary to the legislature and into the political sphere hast to occur.108

In this chapter I drew out a short introduction to judicial review and the emerging divergent theories about it. History shows a clear surge of legal constitutionalism after the Second World War with only a small number of states retaining a system of political constitutionalism. This has had its cause in the perceived failure of political constitutionalism and the advent of a ‘rights revolution’ that advocated strong rights protection with minimum state interference. Accepting that judicial review is something inherent in nowadays constitutionalism it was necessary to differentiate between the different forms of judicial review. Mark Tushnet provides a good breakdown of different forms with this categorisation of “mandates”. Ranging from the weakest possible form, the interpretative mandate, over the augmented interpretative mandate to the strongest weak-form of judicial review, the dialogue model. Although not mentioned by Tushnet, the last “mandate” of judicial review, of course is strong-form judicial review and not the dialogue model when starting from weakest to strongest form.

This chapter concludes with a quick introduction to Gardbaum’s theory of the new Commonwealth model of constitutionalism. As described above he builds his theory upon the observation that recently old Commonwealth states have started deviating from the traditional either-or approach of legal or political constitutionalism. States such as Canada, New Zealand, Australia and the UK itself had to act to keep up with the worldwide rise of rights adjudication and the outcry for better rights protection in their respective territories. His new model then advocates for a third way, the juste milieu between two flawed extremes. This can be achieved by a political pre-enactment rights review and a post-enactment weak-form judicial review. For Gardbaum this enhances legal discourse on the one side, but also allows both the legislature and the courts to engage in substantive rights deliberation, furthering well working rights protection. To heal the democratic lack of judicial review in legal constitutionalism, Gardbaum bestows the final say to the legislature. However, this power of finality is seen by him as something new to the new model, because legislatures are not expected to use it routinely, but only to have the possibility of disagreement should a court make a horrendous decision. Lastly, I set forth Gardbaum’s thoughts on the operation of the new model in Canada. For him Canada moves closer and closer to strong-form judicial review as a result of the dormancy of the notwithstanding clause. He still counts it formally to the new model as the Canadian Constitution has for him, in form only, fulfilled the criteria set out for operating in the new model.

I disagree with Gardbaum on the last notion. For me Canada is more than just formally a part of the new model. The dormancy of the notwithstanding clause does not change the fact, that it is distinct from both legal and political constitutionalism. It is definitely on a stronger substantive rights
protection course than New Zealand or Australia. In my view though, this is only because Canada is trying harder to find a balance between proper rights protection and political accountability than the others. I will explain the notwithstanding clause and the overall situation in Canada in more detail in the next Chapter. For this reason I will first elucidate the methodology of the notwithstanding clause, its origins and scarcely uses and lastly the alternative approaches found by Canada to connect strong rights protection with democratic legitimacy. The next chapter will show, why Gardbaum’s conclusion cannot be followed and that Canada is in fact not moving to strong-form judicial review.

Chapter 2: The Notwithstanding Clause

Canada has one very unique feature in its Constitution, that distinguishes it from others. This is section 33, better known as the notwithstanding clause or legislative override provision. This chapter will show how the notwithstanding clause operates and how it came into existence. It was a long and stoney road for the drafters of the Canadian Constitution and the provision was seen by many as just a compromise between the federal government and the provinces. Recently, however, the interest in the notwithstanding clause was spiked again and scholarly debate started rising anew.

Canada was the oldest dominion of the United Kingdom before it gained complete independence in 1982. This was the year it gave itself a new and profoundly Canadian Constitution encompassing a strong rights protection through judicial review while simultaneously adhering to the principle of parliamentary sovereignty. The new Canadian Constitution combines five major features: parliamentary democracy, federalism, individual and group rights, Aboriginal rights, and the principle of constitutionalism. The principle of parliamentary democracy, the legacy of the British colonisation, forms the heart of the Canadian constitutional structure. Judicial review then seems to be an alien element that does not fit with the core principle of the Canadian Constitution. It is here that the notwithstanding clause enters the stage, prepared to offer a solution, by giving the final say back to the legislature. Ironically, it was the provinces that pushed for a safety valve for legislative supremacy, however, after the enactment of the new Constitution it was them condemning the use of the notwithstanding clause. The political cost to use it has been seen as too high ever since. As such, section 33 fell into dormancy and a kind of stigma fell upon its use.

This chapter will first lay out the methodology of section 33. Accordingly I will first explain it semantically, before analysing the provision’s structural incorporation in the Canadian Constitution.

This will be followed by the origins of section 33 and the uses of the provision. I will exemplify the few cases provinces have actually resorted to use the notwithstanding clause. As will be shown, the federal government has never used it thus far. Lastly, I will conclude the chapter with three alternative approaches used mainly for circumventing a section 33 invocation. I will analyse both the operation of the three alternatives as well as their expediency as alternatives to section 33.

A. Methodology

Section 33 of the Canadian Charter of Rights and Freedoms reads as follows:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).110

I. Semantic Analysis

I will begin this chapter by analysing section 33 plainly on its semantics. For this purpose I will look at each paragraph on itself, starting with paragraph 1.

The first paragraph of section 33 lays down its foundation and consists of various components. It first establishes, that both federal and provincial legislatures have authority to use the override provision. They have to ‘expressly declare’ in an Act, that the Act or a provision thereof shall operate notwithstanding certain provisions of the Charter. What ‘expressly declare’ in this sense

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means was already a question before the Supreme Court in *Ford v. Quebec (AG)*\(^{111}\) and will be discussed later on in greater detail. It will suffice here to say, that the words have their ordinary meaning. As defined by the Cambridge Dictionary ‘expressly’ means ‘in a way that is clear’ or ‘for a particular purpose’; ‘to declare’ means ‘to announce something clearly, firmly, publicly, or officially’\(^{112}\). Legislatures can either declare the whole Act or only certain provisions of it to operate notwithstanding Charter provisions. Lastly, not all provisions of the Charter are overridable, but only section 2 (fundamental freedoms) and sections 7 to 15 (legal and equality rights) of the Charter are. Therefore, legislatures cannot declare Acts or provisions thereof operating notwithstanding sections 3 to 5 (democratic rights), section 6 (mobility rights) or sections 16 to 23 (language and minority rights).

Paragraph 2 is straightforward in its meaning - the Act or the designated provision(s) operate according to what they are intended to without the limitations of the excluded Charter provisions. Thus, an invocation of section 33 does not change anything about the ordinary meaning of the Act or its operation.

Paragraph 3 sets the time limit for an invocation of section 33 to five years. It can be earlier if so specified, but will expire *ex lege* after five years. If a legislature wants to prolong the override it can do so under paragraph 4. Paragraph 4 enables legislatures to re-enact section 33 after the five year period for yet another five years again (paragraph 5) if they so wish.

There are several points in section 33 that are not explainable purely by its text. The first question that I asked myself was why it was only possible to override some rights but not all of the Charter. It might be that the original drafters deemed some rights to need more protection than others, because some rights might be more vulnerable to provincial or regional government actions.\(^{113}\) This makes sense for language and minority rights. French is only really prevailing in Quebec. The other provinces might feel tempted to disregard French minorities in their regions, but this would run counter to Canada’s long held tradition of bilingualism, which is most prominently visible in its bijuralism. The Honourable Mr. Justice Michel Bastarache (Supreme Court Judge from 1997 to 2008) said once during a workshop on bijuralism and judicial function, that language is “one

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\(^{112}\) Definitions were taken from the Online Cambridge English Dictionary, accessible online: [https://dictionary.cambridge.org](https://dictionary.cambridge.org) (last accessed on 07 February 2019).

integral issue relating to Canada’s bijuralism”. However, democratic rights seem to not fall under this assumption. I’d say the right to vote for example is rather so important that it was deemed to be infrangible and not open to interpretation by public policy concerns.

Another interesting part of section 33 is its five year renewable period. Why exactly five years? Why renewable? The five year period is a clever way of ensuring that governments that enact the notwithstanding clause can be held accountable by their electorates. Kahana terms the five year period the provision’s “sunset mechanism” that not only provides for a re-evaluation of the enactment of section 33 after five years, but it will also almost every time guarantee that an election will occur some time close to the re-enactment. To make it extend beyond five years through a re-enactment, the government is forced to open up both legislative as well as public discussion about the matter again. If the first enactment of section 33 caused a public uproar and there was an election between it and the re-enactment it might well be that it is a different government all together that will decide upon re-enactment. If the case should be that it is the same government, either because there was no election or it got elected again, the safety valve of re-opened public discussion about it will (hopefully) prevent a reckless second enactment. Yet another reason might be that the reason why a certain Act or some provisions of a certain Act were declared notwithstanding specific Charter provisions, has ceased to exist after five years. This was for example the case in Quebec, after the five year period of the contested sign laws passed and the then government, which was the same as the one when the notwithstanding clause was enacted first. It just let the Act expire without renewing it.

To conclude, section 33 is exceptional in the way that it is a constitutional guaranteed ‘right’ for legislatures to, what seems like, ‘override’ certain Charter rights. I will explain at the end of this sub-chapter why ‘override’ is misleading. For now I will end the textual analysis with just that: there was only one instance in which a section 33 invocation came before the Supreme Court and that was in *Ford v. Quebec (AG)*. I am only assuming here, but I think if a similar case would come to the Court today it might re-evaluate its decision of 1988 and maybe specify its findings. There is still much uncertain about the notwithstanding clause and the decision in *Ford* received a lot of

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criticism from scholarly sides. Nevertheless, because of its scarce use no one can predict how the Supreme Court might decide should it have another chance to review a notwithstanding declaration. There is much more literature available now than in 1988 and the Court also had ample time to develop its rights jurisprudence. It should not be forgotten after all, that the Canadian Supreme Court is only a final court since 1982 and section 33 also only exists since then.

II. Structural Analysis

I will focus on the structure of the Constitution Act, 1982 itself and its unique balancing act of legislative supremacy on the one side and legal constitutionality on the other side to explain how section 33 fits into it.

The Constitution Act, 1982 is divided into seven parts. Part I incorporates the Charter of Rights and Freedoms, part II the rights of the aboriginal peoples of Canada, part III equalisation and regional disparities, part IV constitutional conference, part V the amending procedure for the constitution, part VI the amendment of the Constitution Act, 1867 and part VII is concerned with general matters. Important for the structural analysis of section 33 are part I and VII.

Part I enshrines the Charter into the Constitution. It sets out in its section 1 a limitation clause, that states that the rights “set out in [the Charter are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This is the opening of the Charter, before enumerating all the freedoms and rights protected therein. The last enumerated rights are minority language educational rights in section 23. Section 24 then states “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” And section 52 of the Constitution Act, 1982 stipulates that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Taken together, those two sections provide for legally legitimate judicial review and the possibility to receive remedies for an infringement of Charter rights. Section 24 (1) provides for personal

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119 Charter of Rights and Freedoms, section 24 (1).
120 Constitution Act, 1982, Part VII, section 52 (1).
remedies, that occur because of a governmental action of unconstitutional behaviour of a public official. Remedies under section 52 (1) are granted because of an unconstitutional law.\(^{121}\)

It is apparent that sections 1, 24 (1) and 52 (1) of the Constitution enable judicial review and I will come back to them later, when I address possible alternatives to section 33. The most important aspect here though is, that section 33 is a counterweight to those provisions, as it should pass back the ball of the final say to the legislatures. Thus, judicial supremacy, as is for example the case in the US, should be avoided. Even though many think Canada is headed (or has already arrived) at judicial supremacy, because section 33 is mostly dormant\(^{122}\), Gardbaum for example lists Canada as a country that is in between judicial and legislative supremacy because of section 33.\(^{123}\)

I agree with Gardbaum, that section 33 definitely makes Canada formally stand in between the two sides. There are various reasons why section 33 is considered dormant today. One reason was already articulated by the drafters of it, because it was one of the reasons for adopting it in the first place. This is the political cost of invoking the notwithstanding clause.\(^{124}\) Another reasons stems from the interpretation of section 33 by the Supreme Court. The Supreme Court uses the ‘living tree’ doctrine when deciding constitutional cases. This doctrine thinks of the Constitution as a living document that can and will evolve over time.\(^{125}\) Intentions of original drafters are therefore often omitted, or at least less important, in the interpretation of constitutional provisions. When a section 33 invocation in the *Ford* case came before the Court in 1988, it did exactly that. As Bastarache Justice said: “…the Court endorsed a substantive approach to the principle of fundamental justice rather than a merely procedural interpretation as appeared to be intended by the framers.”\(^{126}\) That is why some think the Court judged too favourable in *Ford* for the notwithstanding clause, allowing it


\(^{122}\) See for example Tushnet, Mark, *Weak Courts, Strong Rights - Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008). Tushnet thinks Canada is heading to strong-form judicial review and thus judicial supremacy, because legislatures *de facto* follow the courts and therefore give them the final say.


to evolve in a ‘normal’ tool for legislative override of Charter rights instead of a platform for legislative disagreement on the interpretation of Charter rights.

Unfortunately, because of the decision in *Ford* many believed afterwards that section 33 is actually a means of ‘overriding’ rights. Today as well there are still many scholars who see section 33 as a mechanism to override rights or as a sort of last resort, for when a court fails to defer to a legislative sequel in second look cases.\(^{127}\) This needs to be contested, as section 33 was envisaged to be the legislatures’ means to correct judicial activism and retain the authority to make laws in Parliament’s hands. The notwithstanding clause is meant to allow legislatures’ views to prevail in cases where courts and legislatures disagree about the interpretation of a right. It is not about the legislature disregarding a right.\(^{128}\) Nevertheless, the expression of section 33 being the ‘notwithstanding clause’ or the ‘legislative override’ is already so manifest in the literature, that I will also continue to use the term ‘override’, when talking about the mechanism of it. However, when I say ‘override’ I mean it in its envisaged form, namely that legislatures ‘override’ the interpretation of the courts with their own interpretation of a right. As Knopff et al. put it, the other branches (apart from the judiciary) can have their own ‘reasonable’ views on how to interpret a right. The judiciary has its own ‘reasonable’ judgement and even though it is the task of the court to decide in the immediate case which reasonable interpretation should prevail, it should not do so for the broader public policy a stake. A legislative ‘override’ then gives the legislature the possibility of exchanging the judicial ‘reasonable’ interpretation with its own contrary understanding of the constitutional issue.\(^{129}\)

I started this section with stating that Canada is trying to balance legislative and judicial supremacy. Despite its dormant status, the notwithstanding clause respects legislative supremacy and awards the final say in certain rights adjudications to the legislatures. The important part is, that the formal existence of the notwithstanding clause puts Canada in a weak-form judicial review system. That it is not used regularly might be an indication for the good work of the courts in applying the Charter.\(^{130}\)

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B. Origins and Uses

Until 1982 Canada was a dominion of the United Kingdom. When it negotiated its patriation from the UK, therefore making its own law the supreme law of the country, it needed its own constitution. Canada is a federation and the drafting of a new constitution was a long and stony road of negotiations and deals between the federal government and the states. There were several attempts to draft a text that ultimately failed because the states were unable to reach an agreement. Finally, in 1982 the federal government was able to put a draft forward that found agreement. The new Canadian Constitution now has an entrenched bill of rights, the Charter of Rights and Freedoms, which provides in its section 33 the notwithstanding clause. This gives the Canadian Constitution a very unique feature as it enables legislatures to override judicial decisions on the interpretation of the Charter for a renewable period of five years.\footnote{Statute of Westminster, 1931, chapter 4 [UK]; accessible online: http://www.legislation.gov.uk/ukpga/Geo5/22-23/4 (last accessed on 31 January 2019).}

I. A compromise for drafting a Constitution

To understand this unique feature of constitutional design in Canadian legal culture, it is necessary to have a brief look at the history of the country. Unlike its neighbour in the South, Canada did not draft its Constitution in a revolutionary manner. It gradually evolved from a British colony to an independent nation state. The evolution lasted more than a century, starting in 1865 with the Colonial Laws Validity Act, invalidating every colonial law in conflict with imperial law and the British North America Act of 1867 creating the new country of Canada and establishing its constitution. Only in 1931 Canada’s colonial status was brought to an end with the Statute of Westminster. It repealed the Colonial Laws Validity Act, although retaining one exception. Namely, that the British Parliament retained its power to amend the most crucial parts of the Canadian Constitution, although only at the request and with the consent of Canada.\footnote{Macklem, Rogerson, Canadian Constitutional Law (2017) p. 7.} One other colonial structure that remained was the possibility of last appeal to the Privy Council, albeit the Canadian Supreme Court was already established in 1875.\footnote{Constitution Act, 1982, Part I, Charter of Rights and Freedoms, section 33.} In the 1960s demands for constitutional reform increased and many Canadians wanted to see full independence. Finally in 1982 the British Parliament passed the Canada Act, 1982, establishing that “no Act of the Parliament of the United
Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law.”  

At the same time Canada proclaimed the Constitution Act of 1982, completely patriating the country and its laws from the United Kingdom.

Arriving at the Constitution Act, 1982 however, was not easy. On one side, Canada was a British colony for so long, that parliamentary supremacy was seen as the norm. On another side, Canada was a federation with powers divided between federal and state level. The states of Canada were worried that federal government would gain too much power and especially, that an entrenched bill of rights would weaken their own powers and jurisdictions even more because it would give courts the power to invalidate their laws when they were found to be in conflict with the Constitution.

Therefore, a compromise was needed and it came in the form of section 33 of the Canadian Charter of Rights and Freedoms. Although the Canadian Bill of Rights (CBOR) and several states’ bill of rights had already provided for an override procedure, all of them were only statuary bills of rights and easily amendable. When the Canadian Charter of Rights and Freedoms was enacted on federal level as constitutional law, the states feared its entrenched rights would deprive them of their sovereignty. Thus, already in the summer of 1980 Saskatchewan proposed a notwithstanding provision to the Federal-Provincial Continuing Committee of Ministers Responsible for Constitutional Affairs to be taken up in the new Charter. The differences back then, however, were still to big between the states and the federal government and the idea was not further considered. Next, during the Federal-Provincial Conference of First Ministers in the fall of 1980, Quebec also made an attempt to put a notwithstanding clause into the new Charter, but only concerning legal and non-discrimination rights. Known as the “Chateau consensus”, it never got agreed on by all provinces and in the end not even by Quebec itself anymore.

The first First Ministers’ conference did not succeed, and until fall 1981 the provinces were actively trying to continue negotiations in their own parlaments and courts. In September 1981 the

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138 Cf Canadian Bill of Rights (S.C. 1960, c. 44); for bill of rights on state level see The Saskatchewan Human Rights Code, S.S., c. S-24.2, s. 52 (b); Alberta Bill of Rights, R.S.A. 2000, c. A-14, s. 2; Quebec Charter of Rights and Freedoms, C.Q.S.R c. C-12, s. 52.
Canadian Supreme Court then decided that federal government had the sole legal right to engage in unilateral constitutional patriation. However, according to constitutional convention, a certain degree of provincial support was needed. “A certain degree” means inevitably that not all provinces need to agree to a patriation deal. When another First Ministers’ conference was held in November 1981 it seemed as though the provinces could not agree again. Hence, the then federal Minister of Justice, together with the then Attorney Generals of Ontario and Saskatchewan drafted a compromise containing an entrenched charter of rights with an override possibility. A compromise, which was ultimately signed by all provinces except Quebec and could thereafter come into fruition.\textsuperscript{141}

The view on the newly entrenched notwithstanding clause was twofold. While Quebec did not even show up for the Conference and refused to sign the accord, other provinces were very satisfied with the outcome and congratulated each other for the good work.\textsuperscript{142} For example G.W.J. Mercier (then Attorney General of Manitoba) stated that, “the rights of Canadians will be protected […] by a continuation of the basic political rights […] the right to use the authority of Parliament and the elected Legislatures to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy.”\textsuperscript{143} The tenor of the then premier of Saskatchewan Mr. Blakeney was similar: “[The new Constitution] contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so well for so many centuries.”\textsuperscript{144} Blakeney was also of the opinion that the provinces were able to reach “a reasonable compromise, a bargain and an honourable bargain for Canada”.\textsuperscript{145} It can be concluded, that the drafters of the new Constitution felt that they had done a good job, maybe even the best\textsuperscript{146}, in finding a balance between parliamentary supremacy and legal constitutionalism.

\textsuperscript{142} Cf Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Ottawa, November 2-5, 1981, p. 88-133.
\textsuperscript{143} Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Ottawa, November 2-5, 1981, p. 115.
\textsuperscript{144} Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Ottawa, November 2-5, 1981, p. 125.
\textsuperscript{146} Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Ottawa, November 2-5, 1981, p. 90.
II. Ford v. Quebec and its criticism

Since its implementation in the Charter the notwithstanding clause was never invoked by federal government. Canada’s provinces though did use it in the past - Quebec by far the most, but also other provinces such as Alberta or Saskatchewan. Other provinces only threatened to use it, most recently the province of Ontario in the summer of 2018. There are actually only four really well known cases of the use of the notwithstanding clause, namely the omnibus override by Quebec which came before the Supreme Court in Ford v. Quebec, the back-to-work-legislation by Saskatchewan, the Land Planning and Development Act by Yukon and a same-sex marriage legislation of Alberta. However, many more cases went unnoticed. Kahana counted 16 different pieces of legislation that invoked the notwithstanding clause of which seven were still in force at the time of the publication of his article in 2008. To understand why so many instances of a section 33 invocation went unnoticed it is best to look at the first case brought before the Supreme Court dealing with it - Ford v. Quebec (Attorney General).

1. Ford v. Quebec

The case originated over several disputes related to the highly contested Sign Laws enacted in 1984 by the government of Quebec. The law effectively prohibited the use of English on public signs and posters, also commercial advertising, to protect and enhance French as the primary language. Ms. Ford was the lead litigant and was faced with the dilemma of not being allowed to show “laine - wool” on her shop front because of the restrictive sign laws. She and several other litigants challenged the restrictive Quebec’ legislation before the Supreme Court, asking it to invalidate the law on grounds of a violation of their freedom to expression under section 2 (b) of the Charter.

It should be noted at that point that this was two years after the enactment of the new Constitution in 1982. Quebec was outraged about being bypassed in the enactment of the Constitution, so only after two months of its coming into force it passed An Act respecting the Constitution Act, 1982.

147 See for example Mike Crawley, CBC News, Doug Ford ‘won't be shy' to use notwithstanding clause again, and he's getting support for that, September 12, 2018, accessible at: https://www.cbc.ca/news/canada/toronto/doug-ford-notwithstanding-charter-1.4818730 (last accessed on 03 February 2019).
This act proclaimed the re-enactment of all prior legislation to 1982 with an override provision. With this it enacted an omnibus notwithstanding declaration on all its legislation. Then in 1983 the National Assembly (Parliament of Quebec) assented to *An Act to amend the Charter of the French Language* which came into force on February 1, 1984 and stated in its section 58, that “Public signs and posters and commercial advertising shall be solely in the official language”. Section 69 made it clear, that French was the only allowed language version. In section 52 it invoked section 33 of the Canadian Charter of Rights and Freedoms to safeguard this controversial provision against judicial review.

Hence, the Supreme Court had to clarify three questions:

1. Was the omnibus invocation of section 33 in *An Act respecting the Constitution Act, 1982* valid, by just stating that “this Act shall operate notwithstanding the provision of sections 2 and 7 to 15 of the Constitution Act, 1982”?

2. Is section 58 or section 69 of *An Act to amend the Charter of the French Language* saved by a valid and applicable invocation of the notwithstanding clause?

3. Is a retrospective use of section 33 valid?

Ms. Ford and the other litigants contested a valid invocation of section 33 in all cases, relying thereby on a judgment of the Quebec Court of Appeal in *Alliance des Professeurs de Montréal v. Procureur général du Québec*, which held the standard override provisions in *An Act respecting the Constitution Act, 1982*, to not meet the requirements of section 33 and therefore declared them “ultra vires and void”. The Court of Appeal came to its conclusion on the grounds that it needs to be more specified which provision of the Charter is meant to be overridden, because only stating that an “Act shall operate notwithstanding the provisions of section 2 and 7 to 15 of the Constitution Act, 1982” is not declaring expressly which particular provisions are meant. Such an act is not

153 *An Act respecting the Constitution Act, 1982*, Quebec Laws and Regulations chapitre L-4.2; accessible online: http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/L-4.2 (last accessed on 05 February 2019).

154 *An Act to amend the Charter of the French Language*, S.Q. 1983, c. 56 (not accessible online anymore; only referral in *Ford v. Quebec* (Attorney General) [1988] 2 S.C.R 712); The Act was amended and partly repealed several times since then with the earliest online version being from October 1, 2002, accessible on: https://www.canlii.org/en qc/laws/stat/cqlr-c-c-11/13542/cqlr-c-c-11.html#history (last accessed on 05 February 2019).


159 *Alliance des Professeurs de Montréal v. Procureur général du Québec* [1985] CA 376.

160 *Alliance des Professeurs de Montréal v. Procureur général du Québec* [1985] CA 376, 10.
meant for a particular provision, but is, without due consideration, overriding every possible provision of the Charter. Two perspectives were brought before the Supreme Court: on the one side (as reflects the view of the Quebec Court of Appeal) a provision of the Charter should not be overridden without a prior informed democratic process and thereby due consideration. On the other side, section 33 is seen as a reflection of a continuation of legislative supremacy. The Supreme Court rejected the first argument and followed the latter. In its view, section 33 only lays down requirements of form. Requiring a legislature to ponder every possible outcome of an enactment of the *non obstante* clause would lead to a “*prima facie* justification of the decision to exercise the override authority”. Thus, it affirmed its first question and with it its second question as well. The omnibus invocation of the notwithstanding clause was a valid exercise of the legislative authority of the Quebec National Assembly as was the subsequent invocation of it in *An Act to amend the Charter of the French Language*. The Supreme Court held, that it was a valid and applicable exercise of the override authority by the legislature.

The last question the Supreme Court had to consider was whether or not a retrospective use of section 33 was valid. The provision itself is ambiguous in this manner - it could have “prospective or [] imperative meaning or both”. To answer this question the Court looked at works of scholars and convention pertaining the status of retrospective laws. It concluded that the rule is to not construe a law in such a way that it would have retrospective effect, unless the law expressly states the contrary. In the case of an ambiguous provisions, as in the case of the notwithstanding clause, it is the same and it must be interpreted in a way that only prospective derogation is permissible.

2. Criticism on Ford and why other cases go unnoticed

*Ford* can definitely be said to be a win for the Notwithstanding Clause, I dare say even one win too much. I agree with the Court of Appeal in *Alliance des Professeurs de Montréal* that “expressly declare” is demanding more than just stating in one Act that every Act will operate notwithstanding all overridable provisions of the Charter. Even if the implementation of the notwithstanding clause in the Constitution was “just” a compromise, I do not believe its drafters did not well think it through. In fact, a comparison of the statutory CBOR, in effect already years before the Charter, and the Charter itself leads to a very different conclusion. The CBOR also includes an override provision. However, it already differs in its wording, stating that “[e]very law of Canada shall,

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unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared”\textsuperscript{164}. On the other hand, section 33 of the Charter speaks clearly about an “Act or a provision thereof”, which “shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter”. Given the wording of those two different, yet similar, bills of rights it seems to me the drafters of section 33 of the Charter did not write this specific provision on a whim. They had the CBOR and several provincial bills of rights with similar provisions on their hands and they decided to write it differently. They decided to specifically state that it had to include a provision of section 2 or sections 7 to 15 of the Charter.

Another problem with the Supreme Court’s decision in \textit{Ford} is, that allowing the omnibus invocation by Quebec’s government of all their acts and statutes led to the acceptance of an \textit{a priori} override declaration for legislations. It is true, that paragraph 1 of section 33 read alone could encompass both. A reaction by the legislature after a court decision was rendered and the possibility to make a piece of legislation immune to judicial review from the start (at least in response to the possible provisions in the Charter that can be overridden). Paragraph 1 is ambiguous to this. However, reading it in conjunction with paragraph 2 it seems, that a prior declaration of notwithstanding was not intended. Paragraph 2 states “…shall have such operation as it would have but for the provision of this Charter referred to in the declaration”. I doubt a legislature would enact a law, invoke section 33 for certain parts of this new law and then go on to say, that only of course those provisions have effect that are not bound by the section 33 invocation. After all why should it enact the other provisions then at all? This sounds contradictory in itself. We must assume then, that paragraph 2 points us in the direction of the courts and expects a declaration to be made after a court found a provision to violate section 2 or sections 7 to 15 of the Charter. This is also in line with the expectations of the drafters of the Charter. For example Roy McMurtry, who was the Attorney General for Ontario at the time of adoption, thought, that the notwithstanding clause would provide a balancing mechanism between the legislatures and the courts in the event of a court decision (!) which went contrary to the public interest. Then Minister of Justice Jean Chrétien was also of the opinion, that Canada needed a safety valve so that legislatures would have the final say on important public policy issues.\textsuperscript{165} To have the final say, though, means there was a say about the same topic beforehand from a different party.

\textsuperscript{164} \textit{Canadian Bill of Rights}, S.C. 1960, c. 44, s. 2.

To invoke the notwithstanding clause would also make more sense only after a court decision, because this would enhance public awareness about a possible override declaration. The whole purpose of section 33 is after all to give the possibility of overturning a judicial decision by the legislative branch. Because Canadiens realised that no one is infallible, and given their long tradition of legislative supremacy, the notwithstanding clause was adopted. I reject the idea of it being only a compromise between the federal and provincial powers. Even if the Charter was drafted in a very fast manner between the First Ministers’ Conferences, a provision, such as section 33, is not drafted overnight. Given their ties to the United Kingdom parliamentary supremacy was clearly Canada’s way of government and it is understandable that they did not want to change that. However, more and more voices called for stronger rights protection of individuals in the form of the US style, where a strong court performed strong adjudication. So, to conclude, section 33 is more than ‘just’ a compromise. It was also the striking of a balance between Canada’s old ties to the UK and parliamentary supremacy on one side and legal constitutionalism and strong(er) rights adjudication on the other side.

My next argument builds upon my last. If a legislative override was triggered after a judicial decision, public awareness would be high. We can assume that Canadiens are very proud of their Charter and a restriction of their rights therein would make a very bad picture, no matter if it is the federal government or a provincial government who is invoking section 33. Media would probably report extensively about it, Canadians themselves will try to make their voices heard in social media and offline and highly respected scholars would give a comment on it. All this happened last summer in Toronto, when Ontario threatened to use the notwithstanding clause after a judicial decision. I will come to this in the next section in greater detail, but for now it will suffice to know, that the expected ‘uprising’ or ‘outcry of the people’ was there. Not so in many other unnoticed cases, when provincial legislatures invoked section 33 prior to any judicial decision.\textsuperscript{166} By guarding their legislation against judicial review the legislatures effectively deter public discussion and make it impossible not only for courts, but for the people themselves to assist in the interpretation of their very own rights.

III. Recent discussions

As I already mentioned above there was a very recent ‘nearly’ invocation of section 33 in Ontario last summer. Shortly after coming into office in July 2018 the new government of Ontario announced the Better Local Government Act, 2018 (better known as Bill 5)\textsuperscript{167}, which would reduce the electoral wards of Toronto from 47 to 25. The Act passed on August 14, 2018, in the middle of the municipal election of the City of Toronto. The City of Toronto took immediate action and filed a complaint to the Superior Court of Justice of Ontario on the matter. On September 10, 2018, the City challenged the constitutionality of the Act, accusing the government of Ontario to violate through it its and its peoples’ right to freedom of expression protected under section 2 (b) of the Charter. Because of the pressing matter the judge decided swiftly and ruled the Act to be unconstitutional.\textsuperscript{168} An appeal was brought before the Court of Appeal for Ontario only nine days after, on September 19, 2018. The full appeal is yet to be heard before the court, however, it granted a stay for the impugned legislation. This means, Bill 5 stays in effect until a proper appeal was heard. It should be noted at this point that a Canadian Court only grants a stay when it has strong reasons to believe that the decision of the inferior court was wrong.\textsuperscript{169} We can assume then here, that the Court of Appeal will overturn the decision of the first court and declare Bill 5 constitutional.

Nevertheless, the really important and most interesting part transpired between the time of the announcement of the decision of the first and second court. During those nine days the Premier of Ontario, Doug Ford, issued a statement declaring he will use the notwithstanding clause to overturn the first court’s decision. Feelings ran high after that. Premier Ford had to stand up to a fierce opposition, the media went hysterical about it and people all over Canada cried out about what they saw as an affront to their Constitution. While Ford himself is of the opinion, that he mandated his legislative authority correctly\textsuperscript{170}, his opposition thinks of him as a tyrant in the disguise of a democratically elected Premier.\textsuperscript{171} Even three of the original drafters of the notwithstanding clause,

\textsuperscript{167} Better Local Government Act, 2018, S.O. 2018, c. 11 - Bill 5.
\textsuperscript{169} Toronto (City) v. Ontario (Attorney General) [2018] ONCA 761.
\textsuperscript{170} See Doug Ford’s Twitter statement from September 15, 2018 about a section 33 invocation, where he explains both section 33 and its constitutionality: https://twitter.com/fordnation/status/1041064288436158464 (last accessed on 06 February 2019).
Jean Chrétien, Roy Romanow and Roy McMurtry condemned Ford’s use of it, stating that this was not the intended use of section 33.\footnote{Statement of Chrétien, Romanow and McMurtry in \textit{Maclean’s} “Chretien, Romanow and McMurtry attack Ford’s use of the notwithstanding clause”, September 14, 2018, accessible online: https://www.macleans.ca/politics/ottawa/chretien-romanow-and-mcmurtry-attack-fords-use-of-the-notwithstanding-clause/ (last accessed on 06 February 2019).}

I agree with the former drafters, that section 33 was indeed not meant to be used in this fashion. Ford used it in exactly the manner which the original drafters feared would be a misuse of the notwithstanding clause. The purpose of section 33 is to engage in a profound dialogue between courts and legislatures about the ‘correct’ interpretation of rights. It is not meant to be used to overturn a court decision or overrun a protected right simply because a legislature disagrees with it. As the former drafters said in their statement to Maclean’s: “The clause was designed to be invoked by legislatures in exceptional situations, and only as a last resort after careful consideration. It was not designed to be used by governments as a convenience or as a means to circumvent proper process.” However, as improper as the use of the notwithstanding clause by Ford’s government seems, it was still its constitutional right to use it. Unfortunately, nearly every media outlet through the bench mixed things up. While some purely stated that Ford was rejecting the Charter and overriding rights with the notwithstanding clause\footnote{See for example Perrin, Benjamin, Doug Ford needs a lesson in how democracies avoid authoritarianism, \textit{The Washington Post}, September 19, 2018, accessible online: https://www.washingtonpost.com/news/global-opinions/wp/2018/09/19/doug-fords-abuse-of-the-notwithstanding-clause-backfires-heres-how-it-should-be-used/?utm_term=.47301211eca6 (last accessed on 06 February 2019); De Luca, Rob, The notwithstanding clause: a dangerous precedent has been set, \textit{The Star}, September 19, 2018, accessible online: https://www.thestar.com/opinion/contributors/2018/09/19/the-notwithstanding-clause-a-dangerous-precedent-has-been-set.html (last accessed on 06 February 2019); Moon, Richard, Doug Ford's use of the notwithstanding clause reduces democracy to majority rule, \textit{CBC News}, September 13, 2018, accessible online: https://www.cbc.ca/news/opinion/doug-ford-notwithstanding-1.4821302 (last accessed on 06 February 2018).}, others were more nuanced in their opinions.

Lorraine Weinrib, a professor at the University of Toronto, Faculty of Law, for example wrote an opinion for \textit{The Globe and Mail}, in which she renders Ford’s use of the notwithstanding clause as unconstitutional because it would be applied retroactively. She also condemned Ford’s actions stating that “…the Premier of Ontario’s statements and actions make it clear that he believes he has an electoral mandate to impose legislative supremacy.”\footnote{Weinrib, Lorraine, Doug Ford can’t apply the notwithstanding clause retroactively to impede democracy, \textit{The Globe and Mail}, September 18, 2018, accessible online: https://www.theglobeandmail.com/opinion/article-doug-ford-cant-apply-the-notwithstanding-clause-retroactively-to/ (last accessed on 06 February 2019).} She is correct in her assertion that the clause cannot be applied retroactively. As already illustrated above this was one question the Supreme Court in \textit{Ford v. Quebec} had to answer and it decided, that the clause could not be applied
in retrospect. However, I disagree with her statement about Ford’s believe to impose legislative supremacy. Yes, he might use his power to declare his government’s legislations notwithstanding Charter rights, but whether or not that is improper is not exactly the question at issue. The question should be whether or not it was constitutional of him to do so. And in this regard it was. Section 33 imposes legislative supremacy. It was included in the new Constitution because the provinces wanted to continue to have legislative supremacy (at least partly). Ford is unfortunately Canada’s first bad example of how it was not intended to be used and one might think he has poisoned it forever with his actions.

I, in fact, do not think that way. Ford could actually become a very good example of how the notwithstanding clause should not be used. Already, discussions about the clause and its uses have spurred. Not only in the media and among the people of Canada, but also in academic discourse. He might just have opened up a long dormant discussion of how to properly use section 33 and this might in the end be beneficial for Canada.

Emmett Macfarlane, an associate professor of political science at the University of Waterloo, also agrees with Ford’s use of section 33 being his constitutional right. However, while he is not questioning whether or not Ford’s use is in fact constitutional, he is more concerned with the ruling of the Superior Court’s Judge in the first instance, who declared Bill 5 unconstitutional. For Macfarlane the judge misinterpreted the Charter and was close to rewrite the Constitution, thereby grossly exceeding the limit of judicial rulings. Ford, thus threatened to used the notwithstanding clause for exactly the reason it was intended to: to correct judicial overreach. This argument has a lot of weight. While probably everyone can agree on Bill 5 to be unfair, because the Toronto city election was coming up only 2 months after its passing, Macfarlane points out an important issue. It is not the function of a judge to correct bad policy. If a government decides on a bad policy and is able to enact a corresponding law, it should be left to the voters to decide whether or not to live with this policy. They can simply outvote the current government at the next election.

I want to conclude this chapter by discussing “Standing up for notwithstanding” by Tsvi Kahana written for The Globe and Mail first published in September 2003 and updated in April 2018. As the title suggests, he is a proponent of the notwithstanding clause. Kahana makes a strong case in

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175 Macfarlane, Emmett, Doug Ford’s law to slash Toronto council is unfair - but the court shouldn’t have spiked it, Maclean’s, September 10, 2018, accessible online: https://www.macleans.ca/opinion/doug-fords-law-to-slash-toronto-council-is-unfair-but-it-should-not-be-struck-down/ (last accessed on 06 February 2019).

176 Kahana, Tsvi, Standing up for notwithstanding, The Globe and Mail, last updated on April 18, 2018, accessible online: https://www.theglobeandmail.com/opinion/standing-up-for-notwithstanding/article772576/ (last accessed on 06 February 2019).
favour of the clause and illustrates the way legislators should go for a proper use of the provision. He explains how the intended use of the override power would enhance Canadian democracy because it would favour a dialogue on reasonable disagreement about the interpretation of the Charter. It would also ameliorate political consequences for the use of it, if politicians would truly understand its intended use. For Kahana there are three requirements that must be met for a responsible use of section 33. First, the notwithstanding clause is not meant for an ‘opting-out’ of the Charter itself. It should be used when a legislature disagrees with the interpretation of a court about a certain Charter provision. Secondly, legislatures should not act prematurely and threaten to use the notwithstanding clause if the judiciary strikes down their legislation. They should wait for the judiciary to come to a conclusion and then explain why they disagree. Lastly, it needs an exceptional and genuine debate about an invocation of the notwithstanding clause. For Kahana a debate is exceptional if the invocation debate receives more deliberation than a normal legislative debate. It is genuine if it is accompanied by a free vote. He finishes his article by comparing section 33 with being a forbidden fruit and how he suspects Canadians to grant their legislatures the chance to try it in a responsible way.

If we follow Kahana’s three points of a responsible invocation of the notwithstanding clause there is only one conclusion: the Ford government did not adhere to any of them. It is too early yet to judge if this will wipe out any possible future invocations of the provision or if it will lead to a more responsible government that will indulge in meaningful interpretation of the Charter. I hope it will be the latter and Ford’s threat was the only one of its kind. The notwithstanding clause is an exceptional balancing act of legislative and judicial supremacy. I doubt anyone thought in 1982 that it will be an easy or straight-forward venture when legislatures and courts have a disagreement. But just because it is difficult does not mean it is impossible. I am certain if Kahana’s three conditions are met Canada could emerge with an even stronger rights adjudication than it has now.

C. Alternatives

As was shown in the previous sub-chapters the notwithstanding clause seems to have mostly failed and has fallen into dormancy. Its non-use, however, did not discourage Canadian scholars and practitioners to search for ways to reconcile strong judicial rights adjudication with democratic legitimacy. Over the years both legislatures as well as the Supreme Court found ways to circumvent a direct use of section 33 without relinquishing all of its benefits. The underlying power of
legislatures to have the final say was deemed too important to forgo, thus all alternatives can be seen to have this as their ultimate objective.

Most commonly legislatures answer a judicial decision with the enactment of a new law filled with a long preamble full of reasons and justifications for its enactment. This is done to justify a law under section 1 of the Charter to prevent an invalidation through the Court should the law be brought before it. Hogg and Bushell refer to these instances as “second look cases”.177 I will analyse this as the first alternative and assess whether or not it is suitable to achieve the same as a use of the notwithstanding clause.

A justification under section 1 is the usual approach legislatures take. The judiciary on the other side found its own approach through suspended declarations of invalidity. By some this is seen as judicial restrain and in line with dialogue as it allows legislatures to emend legislations178, for others it is seen as a gross renunciation of the rule of law179. I will consider the judicial approach as the second alternative and as with the justification under section one analyse if it a viable option.

Before starting this sub-chapter I want to briefly touch upon the different perspectives all the authors draw from that I will consider. Some, like Hogg et al. clearly advocate for a dialogue between the legislature and the Court, however, they are in essence not against judicial review. Quite the contrary is true. Although their articles seem to aim at giving the legislature a say in rights interpretation they do not actually expect the legislature to have the final say in it.180 On the other hand Kelly and Hennigar make a good case for defending Canada against the accusation to have fallen into strong-form judicial review. They too are proponents of dialogue theory but other than Hogg and his students advocate for a stronger place of the legislature in interpreting rights and seem to realise that the judiciary does not have to be final.181 There are more authors I will consider in the


sections to follow, however most of them accept judicial review as a given and argue only about how a legislature might participate in rights interpretation without questioning the Supreme Court’s finality. All share a common starting point though, namely, dialogue theory, which I explained aptly above. For all authors this is the bedrock of their arguments.

I. Justification under section 1 in legislative sequels

The practice of putting lengthy preambles at the beginning of new laws has its roots in section 1 of the Charter. It is also known as the limitation clause and reads “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Soon after the invocation of the notwithstanding clause has become too costly to use for governments, they diverted to an extensive use of section 1 when enacting a law previously held unconstitutional by the Supreme Court. Especially in countering an undesirable court decision government made sure to include a long and usually well-versed justification under section 1 for securing the new law against a second overruling by a court. This is termed “second look cases” by Hogg and his students and “notwithstanding-by-stealth” by Kelly and Hennigar.\(^\text{182}\) Both however mean the same, namely, that legislation that would in fact require a section 33 declaration, because it effectively overturns a court ruling on Charter issues, is passed by ordinary means with only a justification under section 1 and upheld by the Supreme Court.

In applying the limitation clause the Supreme Court engages in a proportionality analysis. The rules and steps for this analysis were laid out in \(R v. Oakes\)\(^\text{183}\) and although without express reference, the structure of the analysis is very similar to the German Federal Constitutional Court and its European counterparts. It consists of four prongs that need to be satisfied for a law to be constitutional:

(1) A sufficiently important objective that warrants an overriding of a constitutionally protected right;

(2) The means to achieve this objective need to be able to achieve it and rationally connected to the objective;

(3) The means should impair the right(s) in the least possible way;


\(^{183}\) \(R v. Oakes\) [1986] 1 SCR 103.
(4) The objective and the intended effects of the limitation of the right(s) must be proportionate to each other.\textsuperscript{184}

It is already easily possible to see why a justification under section 1 can be useful for both legislatures and courts to engage in dialogue. According to Hogg and Bushell, the biggest room for deliberations exists on the third level, when it is asked whether or not the law impaired a right in the least restrictive way. In a first instance case (a case bringing a law before the Court which it had not yet the chance to decide on) it is a chance for the judiciary to lay down its reasons for striking down a law. The legislature in turn then can rely on these reasons when correcting a law or drafting a new one.\textsuperscript{185} Already, it is visible, that Hogg and Bushell presume the Supreme Court to be final as they only expect legislators to react to the Court’s decision. This is even more exemplified in their second article 10 years later, where they write that a Court should not defer to a legislature simply because the legislature has revised and re-enacted a law that the Court found unconstitutional before.\textsuperscript{186} Here, they talk about instances of “second look cases”. As I described above Kelly and Hennigar term these instances as “notwithstanding-by-stealth” (in contrast to ‘ordinary’ notwithstanding by use of section 33).\textsuperscript{187}

Hogg and his students differ from Kelly and Hennigar insofar as Hogg et al are clearly expecting legislatures to move according to the Court’s established position on a right’s interpretation, but not the other way around. Kelly and Hennigar on the other hand seem to struggle with this assumption. Although they too write about how the legislature should react to a Court’s decision in their article, they ultimately advocate for this to change and to give legislatures a bigger part in the interpretation of rights. In my view, they realised better that true dialogue does not mean that one side argues in the words and manners the other side postulates. Albeit not making a direct reference to Gardbaum’s theory about a new model of constitutionalism, Kelly and Hennigar still grasped the notion of an underlying different system governing the Canadian Constitution. This is mostly evident when they advance the view that the Attorney General and the Minister of Justice need to be two separate offices to enhance constitutional advice given by it to Parliament and the

\textsuperscript{184} \textit{R v. Oakes} [1986] 1 SCR 103, 105-106.


This would improve pre-enactment political rights review, something Gardbaum sees as crucial for the intermediate model. I agree that a strengthening of pre-enactment political rights review would lessen the final authority of the Court as it would have to take into account the review by the political branches of government. It might also help the Court in finding a good balance between protecting rights of minorities while simultaneously respecting the policy considerations and aims of Parliament.

Notwithstanding my critic on these authors, even the Court seems to be uncertain as to its role in the whole dialogue debate. This is exceptionally apparent in these “second look cases” as the Court is often divided on the issue of whether or not it should be deferential to the legislature. One of the first cases in which Parliament resorted to a simple justification under section 1 of the Charter instead of an invocation of section 33 when disagreeing with a judicial decision was after *R v. Seaboyer*. In *Seaboyer* the Supreme Court struck down certain “rape-shield” provisions of the Criminal Code, allowing defence to cross-examine and lead evidence of the complainant’s previous sexual conduct. Although it found the provisions to have a constitutional valid purpose they could not be saved by section 1. The Supreme Court’s decision was followed by an immense outrage and opposition by women’s groups and public health organisations. Parliament enacted a law overturning the Court’s decision and re-enacting the judicially held unconstitutional provisions of the Criminal Code but also partially complying with some aspects of the decision. The Supreme Court struck down the law because it was, among other reasons, too rigid and broad. Therefore, instead of excluding all evidence about a complainant’s sexual history Parliament listed certain exceptions. These exceptions though covered in effect again nearly all of a complainant’s sexual history. The law came before the Court again nearly 10 years later in *R v. Darrach*. In this “second look case” the Court upheld the impugned provisions, stating that Parliament “had essentially codified the decision in *Seaboyer*”. This is an interesting notion as Parliament did in

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actuality not codify the whole Seaboyer decision. For Dixon this is a prime example of a narrow ex post restatement by the Court in legislative sequels. She argues, that in legislative sequels the Court should assess two grounds. First, whether or not the legislative sequel is reasonable considering basic commitments to freedom and democracy. Secondly, whether or not the new law is reasonable with respect to the Court’s prior decision.196

This demonstrates again, that Dixon as well as Hogg and his students do not question the Court to have final authority over the interpretation of Charter rights. Dixon concedes in her own article that she is writing about how judicial review is weaker in Canada relative to the United States.197 Although deeply invested in the dialogue theory, she too argues on the ground of judicial supremacy with only a weak participatory mandate for the legislature in the interpretation of rights. Her assessment about how the Court should adopt a narrow ex post review of legislative sequels though is appealing. I agree with her first ground of assessment, reject the second though. Allowing a Court to review the reasonableness of a legislative sequel in reference to its own prior decision is giving the sole interpretive power yet again to only the Court. Ultimately the Court would only judge whether or not the legislature realised its prior judgment reasonably or not. However, by only rendering a decision on the reasonableness of the legislative sequel against constitutional commitments such as freedom and democracy a Court would accept the legislature as an equal interpreter of rights.

Another case that effectively overruled a judicial decision without invoking the notwithstanding clause occurred after R v. Daviault.198 Daviault was a criminal law case dealing with sexual assault while being intoxicated on a level amounting to a state of automatism. The Court found the common law rule of denying self-induced intoxication as a defence to crimes of general intent (sexual assault was considered a crime of general intent) as infringing section 7 and 11 of the Charter.199 As such the Court allowed drunkenness as a valid defence to sexual assault cases. The legislature reacted by enacting a law that stipulated the common law rule as a statutory rule, without invoking section 33 and thus overruling the Court’s decision.200 The law has not reached the Supreme Court again since then. Closely after Daviault R v. O’Connor was decided, dealing as well

with a sexual assault case. In *O'Connor* the Supreme Court held, that private records held in the possession of third parties could be disclosed to allow the defendant to make full answer and defence. The Court established two requirements for this, namely that the records are relevant to the case and that the judge needs to balance the need for the records to make full answer and defence on the one hand with the right to privacy on the other. The Court was divided on the proper procedure of the production of these records five to four. In the end a less rigorous procedure was adopted by the majority. Parliament, however, followed the minority opinion when amending the Criminal Code and adopted a stricter procedure for the production of private records in the hands of third parties. The Act to amend the Criminal Code was enacted with a lengthy preamble stating Parliament’s reasons for the stricter procedure. It also asserted extensively its concern with ongoing sexual violence against women and children and how a strict regime could better prevent a deterioration of reporting of sexual offences. The preamble was written clearly to hold up to a possible justification under section 1 of the Charter in court. The amended law came before the Court only four years after its decision in *O'Connor*. In *R v. Mills* the Supreme Court upheld the legislative sequel. As Hogg, Bushell Thornton and Wright write, *Mills* is surprising because the Court does not engage in a proportionality analysis under section 1, but only assess the relationship between the Court and Parliament. At one point the Court notes: “Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups.”

In my opinion these two cases showcase particularly well how the Court was erroneous and Parliament rectified its errors. *Daviault* caused a public outcry in 1994 and continues to be a public outrage until today when trial judges challenge the constitutionality of the law yet again and grant the defence, although these decision are usually already overturned on the appellate level. It is still one of the most controversial cases of the Canadian Supreme Court. *Mills* on the other hand

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203 An Act to Amend the Criminal Code (production and disclosure of personal records), S.C. 1997 c.30, s. 1.
seems less severe than Daviault as the Court still put some restrictions on the production of private records. Nevertheless, Parliament intended a stricter regime and given that there is no negative media to be found about it, I conclude that the population agreed with Parliament. Thus, although not having to rectify an error of the Court, Parliament still felt the need that the judiciary did not take the right to privacy and the equality of women seriously enough and decided to follow their own preferred balancing of the competing rights.

Unfortunately, Parliament chose to not invoke section 33 after Daviault, despite having had a chance of valorising the notwithstanding clause greatly. This would have been a perfect opportunity for Parliament to enact the notwithstanding clause without any major political backdrop as most of the population was against the Court’s decision. Parliament’s decision to merely re-enact the law with a lengthy preamble to justify the new law under section 1 of the Charter diminished the notwithstanding clause further. It also prevented a full scale public debate over the constitutional issues raised by the decision and the subsequent law. Daviault and the amended law then, in my opinion, did not set precedent for an alternative to the notwithstanding clause but only drove away a resurrection of it even further.

In Mills it is not as clearcut as after Daviault if Parliament would have been advised better to re-enact the law with the notwithstanding clause. In the end the Court and Parliament did not disagree about the issue of whether or not private records in the hands of third parties should be disclosed or not. They only disagreed about how to produce these records. They also did not disagree about which rights were impaired and the scope of these rights. The Court and Parliament eventually simply weighted the competing rights differently. I am not sure if in this case a section 33 invocation would have been admissible, because there was no disagreement on the interpretation of the rights in question. Therefore, I think a re-enactment with a comprehensive recital of Parliament’s reasons and considerations was the proper answer to O’Connor.

Now, the question is whether or not a justification under section 1 is a viable alternative to the notwithstanding clause. As was shown with the cases considered, all of them dealt with sexual assault offences and a clear line of Parliament and of the Court is discernible. While the Court valued the right to life, liberty and security of person and the right to a fair trial higher, Parliament was always more concerned about the victims of sexual assault offences and their right to privacy and equality. All three cases occurred during the timeframe of around 10 years and each dealt with another aspect of sexual assault offences. In the first decision of Seaboyer I think public opposition to the Court’s ruling was high enough that the government or Parliament could have invoked the notwithstanding clause without having to fear too big of a backlash from the electorate. This would
have sent a clear signal to the Court, that Parliament did not want sexual assault cases to be decided too liberal. On the other hand it would have also sent a positive affirmation to the public, showing that Parliament was intent on protecting especially women and children who suffered most from sexual violence.

However, I can see how Seaboyer happened perhaps too early after Ford (only three years had passed since then) and that the federal government and Parliament feared the same counter-reaction from the provinces. Nevertheless, after Daviault, as I already illustrated above, Parliament and the government gave away a perfect opportunity to use the notwithstanding clause in its intended use. The use of a legislative sequel with a simple justification under section 1 gave away the possibility the two non-judicial branches had. Instead of seizing this chance they abdicated their power to the Court. Hence, it came a bit as a surprise to me that the Court in Mills bowed their head to Parliament and affirmed Parliament’s role in interpreting Charter rights. My guess though, is that the Court also saw the development of the past 10 years and how Parliament undermined the Court’s authority every single time by enacting a new law effectively overturning its majority’s decisions. Looking at it from the Court’s perspective, it is more beneficial for the Court to defer to Parliament once in a while instead of provoking an invocation of the notwithstanding clause. As Dixon also writes, “to strike down a legislature’s attempt […] they run at risk, not only of losing influence in a particular area of Charter interpretation, but also of losing influence more generally, in the eyes of the public.”

Therefore, a justification under section 1 can prove useful in cases where the scope of rights is already identified and the only question remaining is how to balance competing rights. I do not assume here that this interpretation has to come from either side, I merely presume that it is already in place. Thus, in such cases the use of the notwithstanding clause would be unwise as it was intended to only override judicial interpretations of rights contrary to the preferred interpretation of the legislature. When the interpretation of rights is already concluded, a section 1 justification works as a good alternative for ensuring Parliament can have an equal say in the balancing of competing rights as well. The sexual assault cases considered, as well as the Court’s reasons in Mills, show that the judiciary accepts the legislature’s role as a competent interpreter. After several ‘dialogic instances’ between them the Court accepted that Parliament pursued a policy of especially protecting women and children and that Parliament was the competent institution to realise this

Nevertheless, it is not a true alternative to the notwithstanding clause, as the question of what a right means is not touched upon under a justification of section 1. The legislature is precluded from interpreting a right’s meaning and scope and would have to resort to section 33 eventually should it disagree with the Court about it.

II. Suspended declaration of invalidity

The second alternative I will look at is the judicial remedy of suspended declarations of invalidity. In essence a suspended declaration of invalidity means, that the Court declares a statute or an Act of no force or effect because it is unconstitutional, but to give the government an opportunity to correct the constitutional wrong the effect is delayed. Therefore, the invalidity is suspended for a certain period of time (usually six to 18 months). The Court’s authority to invalidate legislative acts is derived from section 52 (1) of the Canadian Constitution, stating that “any law […] inconsistent with a provision of the Constitution, is to the extent of the inconsistency, of no force or effect”. Taken together with section 24 (1) of the Charter, which allows individuals to “apply to a court of competent jurisdiction” in the case of an infringement of a right or freedom, it puts an obligation on the court to remedy a rights violation.

The first time the Supreme Court comprehensively dealt with this remedial issue raised by the Charter was in Schachter v. Canada. Lamer CJ, delivering the majority opinion, established three guidelines on when a declaration of invalidity should be suspended: when striking down a legislation (1) “would pose a danger to the public”, (2) “would threaten the rule of law”, or (3) “would result in the deprivation of benefits from deserving persons”. The Schachter guidelines pointed to an application of suspending declarations of invalidity only in exceptional cases. However, these guidelines were mostly ignored in subsequent cases. Recently, suspended declarations of invalidity became the primary remedy in cases of unconstitutionality. For some this has its roots in the ongoing and developing dialogue between the legislatures and the courts, for

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others it is because of a shift of perception in legislatures’ responsibility for providing remedies for constitutional breaches of rights. The latter argument needs more explaining as it is not directly evident how this is connected to the judicial remedy of a suspended declaration of invalidity. For Choudhry and Roach these two are connected and legislative remedies are possible through the participation of the judiciary by returning remedial issues to the legislature for further consideration. This makes sense as for a legislature to give a legislative remedy it is necessary that it has the chance to engage in remedial action. If the Supreme Court, however, would simply strike down a law and declare it as of no force or effect, a legislature can only decide to either leave it at that or enact a new law. Notwithstanding this, the legislature will have little incentive to concern itself with the invalid law right away if the Court additionally already put forward new rules in place for the invalid law. However, through a suspended declaration of invalidity a Court is able to leave it to the legislature to reconsider the impugned law or provisions thereof.

Nevertheless, should a legislature decide to not act during the time a declaration of invalidity is suspended or not be able to redraft a new law on time, the Court’s view will prevail and the law will be struck down. For some authors the legislature is also not free to choose its own interpretation over the Court’s, as the impugned law is sent back for reconsideration according to the Court’s judgment. Scholarly debate seems to divide starkly on the advantages of suspended declarations of invalidity. Some see it as harmful to rights bearers and the overall rights systems and even detrimental to the rule of law, because the “certainty and stability” of laws are shaken. Others welcome the new approach by the Court and praise it as another instance of successful dialogue between the Court and legislatures. The Court seems to agree with the latter view, although not

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continuously. In *Corbiere v. Canada* L’Heureux-Dubé J. refers to dialogue as a reason for the Court’s decision to delay the invalidation. She states that the principle of democracy “encourages remedies that allow the democratic process of consultation and dialogue to occur” and that “in determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process.” *Corbiere* dealt with voting rights of off-reserve members of Native tribes, namely that they were excluded from voting. The Court found that Parliament was in a better position to find a solution to the problem as it could consult with the tribes and had generally a better understanding of how to balance voting legislation against Aboriginal rights and the equality interests of tribes’ members.

Opponents of suspended declaration of invalidity lament mostly that constitutional supremacy is undermined as a result. Again, just as in the case of a justification under section 1 these authors do not regard Canada as operating in a distinct model outside the strict either-or distinction between judicial and legislative supremacy. From the standpoint of legal constitutionalism it is only logical to consider a temporarily delayed decision of unconstitutionality as a perversion of the system. Seeing it through the eyes of a legal constitutionalist a court is giving away power it was given by the Constitution to the legislature. Dismissing this view allows for a greater appreciation of this judicial remedy. On the one hand it puts certain rights issues on the legislative agenda, that need to be addressed by the legislature as they only have a limited time frame to save the law from invalidity. In this sense a suspended declaration might help counter legislative blind spots and inertia in certain areas that were not touched upon before for different reasons, pertaining to in-party conflicts, political blockages through competing party politics or competing legislative priorities.

In my opinion, a suspended declaration of invalidity is the Court’s approach to prevent an invocation of the notwithstanding clause. I already explained why it would be disadvantageous to the Court as well should a legislature resort to the use of the notwithstanding clause. It makes sense then, that the Court prefers to make room for the legislature on how to re-construct an unconstitutional law instead of striking it down immediately. Consequently, it is hard to see how this could serve as an alternative to section 33 right away. It could be described as just an escape route for the Court. One though, that puts the legislature in a strong position to take part in the

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224 *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203.
225 *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, 116-117.
226 *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, 119-121.
interpretation of rights as an independent evaluator. I think it is a very good tool that renders judicial decisions only penultimate, and as such give the final say to the legislatures. In any case, the legislature can either decide to do nothing, which would be a proper response as well culminating in the law being invalidated, or it can react and debate about a new law. I do not see that the legislature is bound by the Court’s decision in its deliberations (it always has the option of disagreeing completely, without an invocation of the notwithstanding clause though the new law can be easily struck down again by the Court). If anything, I would see the judicial decision as a good reference for legal considerations, without accepting though that it encompasses policy or broader moral and political considerations. Thus, I think it serves well as a tool of dialogue and could also prove useful to strengthen the legitimacy of the Court’s decision, however, it is unfit as an alternative for the notwithstanding clause. This is so, because similar to a justification under section 1 this judicial remedy presupposes that there is no conflict about the interpretation of the scope of the right, because it considers its own interpretation of the rights in question as binding. Only the weighing against different rights and interest should be left to the legislature, because the Court does not want to touch upon policy considerations. As such it does not acknowledge the legislature as a proper and equal interpreter of Charter rights.

This chapter outlined in detail section 33 of the Canadian Charter of Rights and Freedoms, also known as the notwithstanding clause. It is evident, that the wording of the notwithstanding clause was chosen unluckily and this is clearly one of the reason for the demotion of it. ‘Overriding a right’ sounds more offensive than ‘overriding a judicial decision’ or ‘overriding a judicial interpretation of a right’. The notwithstanding clause appears in its envisaged meaning as the solution to the tension between legislatures and courts. The provision's strategic placement in the Charter after the enumerated rights and their enforcement by courts, but before the primacy clause of the Constitution demonstrates its unique standing between the authority of the courts and the legislature. Section 33 might have been 'only’ a compromise between Canada’s federal government and its provinces in 1982, however, it developed into a feature of constitutional design that is considered across jurisdiction and gives rise to lively discussions. Although the use of the provision can be counted on the fingers of two hands, its threatened use by the Ontario government

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229 See also Tushnet, Weak Courts, Strong Rights (2008), p. 33, footnote 39, where he writes, that a better expression of section 33 could have been “[the legislature is] making this statute effective notwithstanding what the Supreme Court has said the Charter says (or what [the legislature] expect[s] the Court to say the Charter means)”.

230 Cf Gardbaum, The New Commonwealth Model of Constitutionalism (2013), p. 97, where he states, that in the adoption of their Bills of Rights New Zealand, the United Kingdom and the Australian Capital Territory and the state of Victoria observed and learned from the Canadian model.
in the summer of 2018 spiked both mediumistic and scholarly debate about it. Unfortunately, at the
time of this writing there is still no decision out, neither by the Court of Appeal on whether or not it
will strike down the impugned law nor by the Ontario government of whether or not it will be used
to override a possible negative judicial decision. Nevertheless, it is refreshing to see that the
discussions about section 33 are resumed and in a manner that clearly strives to educate both courts
and legislature, but also the public about the real meaning of it.

Lastly, I addressed two possible alternatives to the notwithstanding clause that are commonly used
in Canada nowadays. The first alternative is a justification under section 1 when enacting a new law
after the Court invalidated an old one for being unconstitutional. This is by far the most common
used approach of legislatures in Canada today and for many proponents of dialogue theory this
constitutes a successful institutional dialogue. Through this mean the legislature is not
disagreeing with the Court on the meaning of a Charter right, but how it should be balanced with
competing rights. Under section 1 the Court conducts a proportionality analysis to see if a law
impairs a right in the least restrictive way possible. Legislatures took over this language and started
putting lengthy preambles before laws to justify their reasons behind the enactment. The second
possible alternative was through judicial remedial discretion in the form of a suspended declaration
of invalidity. This gives legislatures time to draft a new law or correct an existing law. However,
just like a justification under section 1, a legislature is not on equal footing with the Court here
either. Both alternatives only give the legislature an opportunity to weigh competing rights against
each other or against broader interests and policy considerations. As such neither is an alternative to
the notwithstanding clause that allows legislatures’ own reasonable interpretation of rights to prevail
over an equal reasonable interpretation of a court. Yet, both can be useful supplementary tools to
section 33. Especially in the absence of the use of the notwithstanding clause, these two approaches
provide for a suitable forum in which all three branches of government can interact and enter into
inter-institutional dialogue.

Perhaps the notwithstanding clause is simply not needed so far, because the Supreme Court and the
legislature actually agree on the interpretation of rights. A look across the border to the US could
strengthen that view. Many scholars only compare the Canadian Supreme Court’s review to the US
Supreme Court’s. Following them, I mean that in the history of the Canadian Supreme Court there
was no case up until now that enraged the public so much that they rallied against the decision.
Differently in the US, where for nearly 50 years people had to live with the US Supreme Court’s

231 See for example Hogg, Bushell Thornton, Wright, Charter Dialogue Revisited: Or “Much Ado About
decision in *Plessy v. Ferguson*, that upheld the constitutionality of racial segregation and was seen as a grave error in judgment.232 Such a case never happened in Canada though. Also, reading through judgments of the Canadian Supreme Court, one cannot ignore the mutual respect courts and legislatures share. This is evident in the suspended declarations of invalidity and in the upholding of the laws in “second look cases”.

In conclusion it remains to say, that although the notwithstanding clause is nearly not used at all anymore, it is in the back of the mind of both the legislatures and the courts and it ensures that all branches interact with each other in one way or another without assuming complete authority over rights deliberations. As such, Canada is a great example of Gardbaum’s intermediate model of constitutionalism, because through the dialogue that is going on between all three branches it does neither adhere to perfect judicial nor to perfect legislative supremacy. It is true, that it leans stronger to judicial supremacy on the outset, however this can be easily explained by its history, as it did not have a strong court and enshrined rights before 1982. However, once both legislatures and the population realise that a court is not the only defender of rights this will tilt back naturally in the direction of a weaker judiciary. It can be seen as a metronome that starts swinging to both sides strongly at first before finding its equilibrium. Canada was for more than 200 years a stronghold of legislative supremacy - now it tests the waters of judicial supremacy. The inclusion of section 33 in its Constitution though shows that it did not want to give in completely to judicial supremacy, but already prepared a way to reconcile both extremes.

Chapter 3: The cure for illegitimacy of final judicial decisions

Decision of Constitutional Courts or general courts that have the authority to review the constitutionality of legislative and/or executive acts have one inherent flaw. This is their intrinsic lack of democratic legitimacy. This deficiency of legitimacy stems on one hand from the appointment process of judges and on the other hand from the issues these courts deal with. As judges of a Constitutional Court or a Supreme Court are usually nominated and appointed by the other two non-judicial branches of government, they lack a democratic base. The government and Parliament are elected by the people - their legitimacy derives from the will of the electorate to elect these people as their representatives. Judges, however, are ‘elected’ by the elected government and Parliament - this is a very far stretched link to a democratic foundation. Additionally judges are not accountable to any electorate (be it the other two branches that nominated them or the broader

electorate of the population). Furthermore, constitutional texts incorporate abstract values in the form and substance of abstract rights and freedoms. Interpreting these abstract values, judges cannot decide a case before them without touching upon policy consideration and the broader interests at stake. This results then in an illegitimacy of final judicial decisions on constitutional matters as an unaccountable small group of legal elites could overturn a law which the other branches see as essential in furthering a preferred policy to enhance social welfare or equality or any kind of interest.\(^\text{233}\)

This sets a rather doomed outset for judicial review in general. Nevertheless, I argue that judicial review is not something bad to begin with. Quite the contrary, I am of the opinion, as are its proponents, that judicial review brought significant victories in rights adjudication and enhanced the protection of them immensely. The core advantages of judicial review are well known: prevention of under-enforcement of rights and highlighting and fostering public awareness on rights issues.\(^\text{234}\)

There is also an answer to the illegitimacy of judicial review, namely that a strong protection of rights would enhance the overall democratic legitimacy of a government’s regime.\(^\text{235}\) I agree with Fallon that democratic legitimacy is not only derived from one source and whether or not a certain regime is legitimate is not only a question of the process in which it was developed. Therefore, I am not making the case that judicial review should be abolished (as for example Waldron does), however Fallon’s argument is too weak in itself as well to cure the overall democratic illegitimacy of judicial review. For this reason, Gardbaum’s intermediate model, the new Commonwealth model of constitutionalism, seems to be able to reconcile best the opposing views and mend the illegitimacy of final judicial decisions on constitutional matters. In my view final judicial decisions can be saved from illegitimacy through a combination of Gardbaum’s intermediate model, that accounts the final say to the legislature, but also through retaining a strong rights adjudication. I agree with Fallon that the protection of minority rights is another integral part of a democracy and neither legislation nor court decision can be democratically legitimate if they fail to protect these rights. As such my suggestion for a cure is a reconciliation of legislative finality and strong rights protection.


I will present this theory in greater detail below in the following sub-chapters. For this reason I will explain first why I think, that the alternative forms of judicial review present in the UK, New Zealand and Australia are insufficient in achieving true legitimacy. This is build upon my acceptance that legitimacy is not only derived from the democratic legitimacy of the decision making body of the people, but that democratic legitimacy has several sources. One of these sources is the protection of individuals’ rights. Secondly, I will demonstrate, in contrast to the other systems, what it is that makes the notwithstanding clause of the Canadian Charter so special. Lastly, I will assemble all of the pieces and present the case of how the ‘Canadian way’ can overcome the illegitimacy of final judicial decision.

A. Alternative judicial review methods and the idiosyncrasy of the notwithstanding clause

To understand what makes the notwithstanding clause so distinct to other existing methods, it is necessary to understand the others. I will follow Tushnet’s distinction here again between an interpretative mandate and an augmented interpretative mandate. The notwithstanding clause falls into the dialogue method, that I will not consider specially here anymore. I will start my analysis with the UK, that operates with an augmented interpretative mandate according to Tushnet, followed by New Zealand and the Australian Capital Territory and the state of Victoria, which use only an interpretive mandate. As I already described the different mandates above in detail I will focus here on the insufficiencies of these in connection to heal the illegitimacy of final judicial decisions.

I. The regimes in the UK, New Zealand and Australia

The HRA brought the rights and freedoms of the ECHR into domestic British law. With it the novel feature of courts being able to issue a declaration of incompatibility, should they find a law to be in conflict with the HRA, was introduced. This issue, however, is not binding on Parliament, which is made clear in section 4(6), where it says that a declaration has no “affect [on] the validity, continuing operation or enforcement of the provision in respect of which it is given”. Its section 10 provides additionally for a “fast-track” remedial order, that allows the relevant minister to amend an

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impugned legislation without having to go through the long process of enacting a new law. For Tushnet the HRA is an augmented interpretative mandate as it does not only direct courts to interpret legislation in accordance with fundamental rights, but also gives them the power to issue declarations of incompatibility.

It is then evident, that the UK operates closer to parliamentary supremacy than judicial supremacy. Nevertheless, Gardbaum finds that in 2013 there were 19 declaration of incompatibility of which 18 have resulted in an amendment or repeal of the provisions in question. Hence, it seems as if the British government is in fact very compliant to the Court, although it is legally not obligated to do anything in these cases. Does that mean the UK has departed further from parliamentary supremacy as it seems? I do not think this is the case per se. The HRA was enacted as a response to a constant failure on the international level by the British government to perform its obligations under the ECHR. Due to this, the compliance of the government can be explained by its understanding that, should it decide to be inactive in the face of a declaration of incompatibility, the claimant can always go to Strasbourg and demand justice in the European Court.

Something noteworthy of the HRA though is its pre-enactment political rights review, that Gardbaum attests as one of the key features for the intermediate model. Under section 19 of the HRA the minister in charge of the enactment of a bill has, before the second reading of it, to make either a statement of compatibility (i.e. that the bill is compatible with Convention rights) or that although he cannot attest compatibility the government wishes the House to proceed with the bill (“nevertheless statement”). This developed into a four-staged review of the following order: (1) “pre-introductory executive review”; (2) “section 19 statement practice”; (3) scrutiny by the Joint Committee on Human Rights (JCHR; a specialised committee of Parliament to consider legislation on relevant rights issues); and (4) “subsequent parliamentary deliberation”. For Gardbaum the JCHR was the most successful in means of pre-enactment political rights review in all systems he considered.

I agree that a strong pre-enactment political rights review can lay a good foundation for proper rights protection. However, there also needs to be a strong post-enactment review to ensure ongoing

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protection. The UK Supreme Court does not have the power to remedy an individual in the case of an infringement of rights as it cannot invalidate legislative acts. Although, there is no problem with political legitimacy in the UK, as Parliament can always just repeal the HRA or decide to not act after a declaration of incompatibility, there is insufficient immediate protection for a rights violation. A claimant might have to wait several months before Parliament amends or repeals a statute that infringed his or her rights; the chance that Parliament stays inactive is probable as well. And even in the case that a claimant decides to go all the way to Strasbourg, this is again timely and costly and will not bring him or her any earlier relief. Therefore, the UK’s augmented interpretive mandate under the HRA cannot cure the illegitimacy of final judicial decision, because, first, it does not even allow them to render a final decision, and second, it is not able to reward a remedy to an infringed rights bearer. I explained before that I will only see it as sufficient should the method be able to be both democratically legitimate in its political legitimacy, as well as be able to promote a strong rights protection as this is another pillar of democratic legitimacy. As a result, the method of judicial review used in the UK is insufficient.

Proceeding to New Zealand, Tushnet defines the NZBORA as operating as an interpretive mandate as it gives the courts only the power to interpret conflicting statutes in a manner consistent with the NZBORA’s rights and freedoms. There are two scenarios how this interpretive power can be used. In the first, a statutory can be interpreted in a rights-protective meaning. This is the easy case, as the Court can simply interpret the statute conforming to the rights-protective meaning. The second scenario is tricky, as here the Court is faced with a rights-restrictive meaning available only. Here, the Court needs to attest meaning to a statute that it might not have by its ordinary meaning to bring it in conformity with the rights of the NZBORA. Courts in New Zealand have no authority to declare a legislation invalid or even incompatible with the enumerated rights. It is therefore, considerable weaker than the UK HRA. As such, as already the UK HRA is not able to protect rights sufficiently, the NZBORA can achieve this even less and has to be rejected as a possible cure.

Lastly, the Human Rights Act of the Australian Capital Territory (ACTHRA) and the state of Victoria’s Charter of Human Rights and Responsibilities (VCHRR) incorporate the interpretive features of the NZBORA and the UK HRA as well as a judicial power to issue declarations of incompatibility like the UK HRA. Gardbaum puts them on a spectrum and assign the two Australian bills of rights the closes place next to legislative supremacy, as they comprise the weakest form of judicial rights enforcement. Coming next on the spectrum is the NZBORA, before the UK HRA and lastly the Canadian Charter, which is definitely already closer to judicial

supremacy than legislative supremacy.\textsuperscript{245} Therefore, I will not consider the Australian regimes in detail here anymore. It follows as a logical consequence, that if not even the UK HRA, which grants the biggest (or strongest) power to the courts in protecting individuals’ rights of all these weak forms of judicial review, can achieve a sufficient means to protect minority rights, the weaker regimes will not be able to do it either. None of the regimes considered than can sufficiently cure the illegitimacy of final judicial decision, because (1) none of them allows a judicial decision to be final in the sense that it can overturn a legislation, and (2) they all fail to protect rights sufficiently in the post-enactment stage.

\textbf{II. The idiosyncrasy of the notwithstanding clause}

Turning to the notwithstanding clause, I will now demonstrate what it is that contrast the Canadian provision from its counterparts in the other Commonwealth states. In short, it is the penultimate power it gives to the courts that makes it extraordinary. By legally giving the final word to the legislature it ensures democratic legitimacy through political legitimacy as the legislature can always, if it so wishes, disagree with the Court on certain rights provisions through the invocation of the notwithstanding clause. This comes with a certain cost though, so that the legislature cannot use this power routinely. The idea is that it only uses the notwithstanding clause if the legislature’s reasonable interpretation cannot be reconciled with the court’s equally reasonable one.\textsuperscript{246} The notwithstanding clause then, even during its dormancy, enables inter-institutional dialogue. Knopff et al. call this form of dialogue “coordinate interpretation” or “coordinate dialogue” and Tremblay means the same when he talks about “institutional dialogue”.\textsuperscript{247} Knopff et al. endorse the concept of “coordinate dialogue” and see this fulfilled with an express section 33 declaration when there is interpretative disagreement. Tremblay on the other hand seems to have trouble to accept that a dialogue between institutions can really occur. It is noteworthy to take a closer look at his theory.

Tremblay differentiates between two different forms of dialogue - dialogue as conversation and dialogue as deliberation. Only the latter can confer legitimacy on the outcome of such a dialogue. For him, a dialogue as conversation has no specific purpose, is informal and the participants of the dialogue simply want to explore or create a “common world and body of meanings”, learn


something new, or discover “new perspectives”. This form of dialogue is not aimed at taking a collective decision or to reach a mutual agreement. It is like a talk friends have among each other.248 A dialogue as deliberation on the other side is formal, between two or more persons with equal standing and aimed at a specific purpose. This purpose can be to take a common decision, to reach a mutual agreement, to solve a problem or conflict, to determine “together which opinion or thesis is true, the most justified, or the best” or “which particular practical view should govern actions and decisions”.249 This form of dialogue further rests on certain preconditions. First, that each participant recognises the other as an equal partner. Furthermore, the dialogue is a “process of rational persuasion”, participant should therefore not coerce the other into their way of thinking. It is also of importance to accept that a dialogue is not about winning, but that every participant is able accept the most reasonable argument. Lastly, in a dialogue as deliberation the reasonable arguments brought forward need to be reasonable to all participant if they should prevail, meaning an argument needs to be acceptable to all for its success. However, he admits that there can be instances were equal participants to a dialogue cannot rationally agree. In these cases, they need to agree to disagree. This does not diminish the dialogue as deliberation, though, as long as the outcome is the result of “free and reasoned agreement (or disagreement)”. Hence, in conclusion Tremblay infers from this, that under these requirements a dialogue as deliberation would legitimise judicial review as it seeks to arrive at collective decisions, settle conflicts and reach agreements under the conditions of equality, rationality and reasoned agreement.250

Having said this, Tremblay is ultimately of the opinion that this form of dialogue cannot occur between courts and legislatures. His reason for such a negative outlook lies in the doctrine of judicial responsibility. As he writes, this doctrine prescribes judges to be completely committed to the decision they reach in each case. The doctrine then prohibits judges from subordinating their “convictions and practical judgments” to the judgment of others.251 This said, it is evident how he is of the opinion that a dialogue as deliberation cannot occur between the different branches. In a dialogue as deliberation every participant need to be ready to subordinate their own view to a better reasoned one. This stands in stark contrast Tremblay’s doctrine of judicial responsibility. For

Tremblay the doctrine of judicial responsibility entails certain duties, one being that every party before a judge has a right to be heard. For him this means that legislatures and courts cannot be equal, because a court is only obligated to hear a legislature, not to accept it as an equal participant in the process of reaching a reasonable agreement.252

I do not think his view can be sustained. If this doctrine would hold true, then judges could never overturn their own decision should a law reach them again as this doctrine expects judges to hold onto their “convictions and practical judgments”. Also, considering this doctrine in light of the living tree doctrine dominating Canadian constitutional interpretation, I can only conclude that the doctrine of judicial responsibility cannot be maintained next to the living tree doctrine. They clearly have two different aims in mind.

Tremblay’s account of dialogue as deliberation on the other hand is interesting. It seems clear, that inter-institutional dialogue should not and cannot be only a dialogue as conversation. This is obvious, as in the form of inter-institutional dialogue the participants always strive to solve a problem or a conflict, or to reach a common agreement. When a legislature enacts a law with a lengthy preamble to justify the law under section 1 of the Charter it does so, because it wants to convince the Court of its reasonable interpretation on the correct balancing of rights, interests and policies. The invocation of the notwithstanding clause then would be a case in which the court and the legislature agree to disagree on the correct reasonable interpretation.

What makes the notwithstanding clause then so unique though? Although dormant, it enables this inter-institutional dialogue. Without the notwithstanding clause the Court would not have to fear that its interpretation might be challenged. The only way for the legislature to correct an erroneous judicial decision would be through constitutional amendment. This is, however, not an easy task as the amendment of the Canadian Constitution is very difficult. The Canadian Constitution offers five different amendment formulas depending on what should be amended.253 Therefore, the Court could be certain that its own interpretation would always prevail. The mere existence of the notwithstanding clause changes everything. With it the legislature has legally the final power and as the Court cannot know before a decision if it will be overturned right after through an invocation of the notwithstanding clause it will be careful to consider the legislature’s reasonable arguments.

The elaborative ways both the legislature and the Court found to circumvent a possible section 33 invocation indicate further that both sides accept there to be a dialogue instead of a monologue.


going on. And the form of this dialogue is in the form of dialogue as deliberation. Both the extensive justifications under section 1 on the legislature’s side as well as the suspended declaration of invalidity by the Court only make sense when accepting that both branches want to engage in a deliberate dialogue. However, someone needs to have the final word as otherwise there would be constant uncertainty. The notwithstanding clause accords the legal final word to the legislature, however it equally establishes that absent a legislative final word this should fall to the court.

Hence, the notwithstanding clause enables a strong rights adjudication with access to remedies for individuals who’s rights were infringed. It also ensures democratic legitimacy through two factors. First, the use of the notwithstanding clause obviously results in democratic legitimacy qua its use. Secondly, through its non-use it indirectly mandates every branch to engage in deliberate dialogue. The Court has to keep in mind that, should its decision not meet reasonable agreement by the legislature, it can be easily overturned, which would result in the Court losing influence in the interpretation of certain Charter provisions and eventually might result in the Court losing public support.254 So the Court has an incentive to engage in meaningful dialogue and as Dixon notes, this incentive is even greater in “second look cases” as the Court should consider deferring to the legislature if their new law is within reasonable boundaries.255 There is also incentive for the legislature and government to prefer a deliberate dialogue to an invocation of section 33. As stated numerous times already, section 33 comes with a high political cost because of its perceived ‘override’ of rights. Thus, governments and legislatures will want to avoid to incur this cost if possible.

This elucidates the special nature of the notwithstanding clause. Even in its state of non-use it influences the regular conduct of all branches of government. It ensures that minority rights are not only protected stronger than under legislative supremacy, but it also guarantees democratic legitimacy. This is possible through its actual use and through the deliberate dialogue it orders on the other branches. Consequently, the notwithstanding clause is a truly unique piece of constitutional design that dared an attempt to balance democratic legitimacy and strong rights adjudication. I conclude, that it was quite successful in its attempt, although differently than probably envisaged by its drafters. Nevertheless, the language used by the courts and by the legislatures suggest that all institutions share a mutual respect for each other and are eager to find a common agreement on constitutional matters.


B. The 'Canadian way' as answer to legitimise judicial decisions on constitutional matters

Last but not least I will make the case for the ‘Canadian way’. I will illustrate how the overall process of pre-enactment political rights review, as well as a strong post-enactment judicial rights review ensure minority rights are respected, while simultaneously resisting judicial supremacy and realising democratic legitimacy of judicial decisions. To make a clear argument I will follow the process of a legislative act from its pre-enactment stage to a possible judicial review and possible legislative response.

Starting at the pre-enactment phase, the Canadian Minister of Justice is responsible for the political rights review. As already mentioned above the Minister of Justice is *ex officio* also the Attorney General of Canada. This naturally leads to a constant tension between two different offices united in one person. The recent scandal around SNC-Lavalin clarifies this painfully and many call for the separation of the office into two separate ones. The Minister’s obligation to conduct pre-enactment political rights review derives from section 4.1.1 of the Department of Justice Act. This puts the duty of giving constitutional advice to the Crown on the Minister and entails a reporting duty to the House of Commons should the Minister find a proposed bill inconsistent with the Charter. Such a report however, was never filed, because the Minister is bound by the principle of cabinet solidarity, which is designed to retain the appearance of a united cabinet. The list of zero reports then can be understood as amendments being made before the introduction of the bill so as to be consistent with Charter rights, or at least to be arguable under section 1 of the Charter. Unfortunately, the Ministry’s practice is secrecy here and the process of how the Minister reaches the conclusion that no report is needed is shredded in clouds. Because of this, a reform of the office of Minster of Justice is suggested, that would split the office of the Attorney General into a separate office independent from the Minster of Justice. In this scenario both would have independent agendas. The Minister of Justice would be the head of the Department of Justice and

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have responsibility of advancing legal policy within cabinet together with the administration of programs and institutions related to the justice system. The Attorney General on the other hand would be the head of the AG’s office and have the responsibility to provide legal advice to cabinet and litigate on behalf of the Crown. The reporting duty would fall to the Attorney General as he or she would be able to make an independent judgment of whether or not the government’s agenda is consistent with the Charter.259

The reform would definitely enhance the pre-enactment political rights review in Canada. However, until then it needs to carry on with the current situation and this is not the worst either. Although there is no transparency in why there is no report filed from the Minister of Justice, it can only be assumed that this means that the proposed bill is in conformity with the Charter rights. Yet I admit, that, would the pre-enactment review be more transparent it would strengthen the political branches’ position as competent interpreters of rights and therefore strengthen their role in a deliberate dialogue as equals to the judiciary in interpreting rights. It would also enable the Court, in deciding on the constitutionality of a legislation, to make a better judgement on the government’s reason for enacting the legislation.

In the next step, the legislation is enacted and brought before a court to test its constitutionality. The Constitution confers the authority to the courts to invalidate a law should it be inconsistent with the Constitution. As I described above, the Court has an incentive to render a judgment that is not entirely hostile to the government’s and legislature’s reasonable arguments. Of course, the Court has no such incentive for unreasonable arguments brought forward by the other branches. Thus, the Court can scrutinise a legislation closely on all the relevant legal issues that might arise under it. However, as the legislature has the possibility of overriding its decision, it does not have to be a ‘perfect’ decision that addresses every potential issue. Rather the Court is in a position to simply add its legal perspective on the facts of the case and evince cases that were not anticipated by the legislature or the government or potential legislative blind spots. Through a respectful language the Court can then in return encourage the legislature and the government to reconsider their legislation. Due to a suspended declaration of invalidity the other branches also have the chance to correct a legislation without it being formally invalidated. This ensures a consistently strong rights protection. On the same hand, it legitimises the judicial decision. Through a suspended declaration of invalidity the Court refrains from having the final say and leaves it to the legislature to find an appropriate solution.

Should the legislation come before the Court yet again, it can decide anew whether or not the law can be upheld. As some have suggested, in these cases the Court should be especially mindful of the legislature’s arguments and accept a rather deferential attitude. Whether or not the Court is deferential in these cases is only in its own best interest for the reason given above already. The legislature can always resort to the notwithstanding clause should it find the Court too defying. Consequently, the ‘Canadian way’ achieves a strong rights protection without giving in to judicial supremacy while simultaneously striving to achieve democratic legitimacy in the process. Admittedly, this rests heavily on the Court’s own perception about being in a dialogue with the other branches of government. A more hostile Court would probably invite the use of the notwithstanding clause more often and could eventually render the Court unnecessary. As this is not the case in Canada though, it can be concluded that the ‘Canadian way’ can pave the road to legitimate final judicial decision. This is accomplished by an inter-institutional deliberate dialogue between all branches of government.

The debate about the illegitimacy of final judicial decision is perhaps as old as the debate about which system is better - judicial supremacy or legislative supremacy. Gardbaum was the first to introduce an intermediate model that would reconcile both sides. Of the assessed regimes by Gardbaum I find Canada’s approach the most compelling as it tries not only to reconcile judicial with legislative supremacy, but also stronger rights protection with democratic legitimacy of judicial decisions. As the other regimes Gardbaum evaluated do not have such a strong rights protection as Canada, the next step was to look at the uniqueness for the Canadian regime. The distinct feature is the notwithstanding clause of the Charter, that enables legislatures to use ordinary legislative means to override a judicial decision on certain Charter provisions. As illustrated above, even the notwithstanding clause's non-use contributes to democratically legitimise judicial decisions on constitutional matters. However, it is the overall ‘Canadian way’, from pre-enactment political rights review to post-enactment judicial review that furthers the democratic legitimacy of final judicial decisions.

Conclusion

As was aptly shown the notwithstanding clause of the Canadian Charter of Rights and Freedoms is a unique feature of constitutional design. Unfortunately, as its history shows, it has been suffering of a misunderstanding ever since its first enactment in 1982. This has its origin in the poor wording of the provision that seemingly allows legislatures to ‘override a right’. Yet, its original purpose was something completely else, namely to allow legislatures to have their own reasonable interpretation of a right prevail over an equally reasonable interpretation of a right by the courts. It was never envisaged to hand a tool to the legislatures to disregard rights. The drafters of the Canadian Constitution were led by a long history of parliamentary sovereignty and many provinces did not want to lose this power. As such, it is accurate to call the implementation of the notwithstanding clause into the Constitution a compromise between the drafters. Nevertheless, they also understood that the Canadian Bill of Rights, which was only a statutory bill of rights, had failed and needed revising. It was a bold step to go from a statutory bill of rights to a constitutional one. Perhaps, because they saw the situation in the US, Canada did not want to give in to judicial supremacy. As a result, the notwithstanding clause was introduced, allowing legislatures to retain the final word.

Soon after its introduction it was already tested in court. In *Ford* the Supreme Court judged generously in favour of the notwithstanding clause allowing the omnibus declaration of it giving, in effect, a wider meaning to the provision than granted by the Constitution. *Ford* received lots of criticism, particularly because of the improper use of the notwithstanding clause by Québec. Since *Ford* the provision has become stigmatised as the legislative override of rights. The recent threatened use of section 33 by the government of Ontario has spurred the debate again with voices arguing in favour of the provision and advocating its intended use.

Ever since its failure though a theory of dialogue has emerged in Canadian constitutional debate, not only on a scholarly level, but also among the judiciary. It is among this dialogue theory that Canadian legislatures and courts found interesting ways of circumventing a direct section 33 invocation. One of these alternatives is found in section 1 of the Charter, the general limitation clause. This enables courts to engage in a proportionality analysis in the case of an infringement of an individual’s right. At this stage, the court is able to weigh competing interests against each other and find that although infringed, a right might not be violated after all. This is also the preferred tool of the legislature for voicing their disagreement with the Supreme Court. By enacting revised or new laws with a comprehensive preamble, enumerating their reasons and deliberations, the

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261 The first time the existence of a dialogue between legislatures and courts was expressed by the judiciary was in *Vriend v. Alberta* [1998] 1 SCR 493.
legislature reinforces its legislation against a possible litigation through a justification under section 1. The Court profits as well from this as it has a better understanding of the policy goals the government and legislature want to advance. This does not mean that the Court should always defer to the legislature, when faced with a comprehensive justification under section 1. If there is no reasonable ground for the rights restricting legislation it will be unconstitutional. However, the Court should show some degree of deference where it is not wholly unreasonable. Should there still be disagreement left, the legislature is free to use the notwithstanding clause as a last resort. On the other hand, the judiciary also found a way to engage in meaningful dialogue with the other branches. This is achieved by suspended declarations of invalidity, that leave the solution to an unconstitutional law to the legislature.

I concluded that this is ultimately the right approach to reconcile strong rights protection of minorities with democratic legitimacy of final judicial decisions. The regimes of the other states in this intermediate model of constitutionalism are not worse than the Canadian in ensuring democratic legitimacy. I would even say, they are actually more sufficient in it than Canada. Nevertheless, this comes on the expense of a weaker rights protection, as these other regimes are not adequately ensuring a remedy for an individual’s infringement of rights. I do not believe that in a democratic society we should accept this. Therefore, an independent arbiter is needed to protect the rights of minorities against the majority, without though losing out on democratic legitimacy in the process. Hence, only the ‘Canadian way’ fulfils both requirements. Although the Supreme Court is final in its decision, that only holds true as long as a legislature does not invoke the notwithstanding clause. Insofar, the Court always only renders penultimate decisions, because it never knows whether or not a decision of it will not be overturned after. This ensures that its decision stay inside democratic limits. Still, this seems too weak an argument to stand alone. I agree. Consequently, I do not assume that the mere existence of the notwithstanding clause is legitimising a judicial decision sufficiently. Especially not, as the notwithstanding clause is de facto not used. However, the existence of the provision is enabling a deliberate dialogue between all the institutions involved. Due to this deliberate dialogue the decision of a court becomes democratic legitimate, because the institutions come together as equals to deliberate the right’s issue before them with equal respect to each other and equal respect for the rights enshrined in the Constitution.

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