

## CHAPTER FIVE

### THE CONSTRAINED OVERRIDE: CANADIAN LESSONS FOR AMERICAN JUDICIAL REVIEW

Who gets to decide what the U.S. Constitution means? At least since the turn of the century, the Justices on the Supreme Court have made their answer clear: the courts.<sup>1</sup> But a growing wave of scholars offers a different answer: Congress.<sup>2</sup> These scholars point out the tension between democratic values and judicial supremacy.<sup>3</sup> They observe that federal courts have been worse than Congress at protecting minority rights and strengthening democracy.<sup>4</sup> They remind that “courts are a potential source of tyranny,” not just “imperfect guardians against it.”<sup>5</sup> And they admire the patches of American jurisprudence that have invited Congress to take part in constitutional interpretation.<sup>6</sup>

In response, defenders of judicial supremacy warn against leaving the Constitution in the hands of politicians. As compared to independent federal judges, elected officials have much stronger incentives to entrench their own power while neglecting the most vulnerable in society.<sup>7</sup> Some Canadians have echoed these concerns.<sup>8</sup> Canada’s constitutional bill of rights, the 1982 Charter of Rights and Freedoms,<sup>9</sup> contains a clause allowing both the federal and provincial legislatures to enact

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<sup>1</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 524, 529 (1997); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003).

<sup>2</sup> See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181–82 (1999); LARRY D. KRAMER, THE PEOPLE THEMSELVES 8 (2004); MARK TUSHNET, TAKING BACK THE CONSTITUTION 244 (2020); Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1074–75 (2024).

<sup>3</sup> See, e.g., Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 12–24 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [<https://perma.cc/7WDY-FJE5>].

<sup>4</sup> See, e.g., *id.* at 5–12.

<sup>5</sup> Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 779 (2022); see also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1404–05 (2006) (noting that the argument for judicial review as a countermajoritarian guardian assumes that sympathy for minority rights is stronger among political elites than among ordinary people).

<sup>6</sup> See Post & Siegel, *supra* note 1, at 38; Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2020 (2022); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2301 (2023).

<sup>7</sup> See Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1463 (2017).

<sup>8</sup> See, e.g., Ira Wells, *The Notwithstanding Clause: Is It Time for Canada to Repeal It?*, THE WALRUS (Dec. 12, 2022, 3:52 PM), <https://thewalrus.ca/the-notwithstanding-clause-is-it-time-for-canada-to-repeal-it> [<https://perma.cc/WZQ3-TSVY>]; Jeffrey B. Meyers, *It’s Time to Banish the Notwithstanding Clause, The Slow Killer of Canada’s Rule of Law*, THE CONVERSATION (Oct. 11, 2023, 5:27 PM), <https://theconversation.com/its-time-to-banish-the-notwithstanding-clause-the-slow-killer-of-canadas-rule-of-law-215106> [<https://perma.cc/R49P-83L4>].

<sup>9</sup> Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

laws “notwithstanding” courts’ interpretations of certain sections of the Charter<sup>10</sup> — or notwithstanding those provisions of the Charter themselves, depending on who you ask<sup>11</sup> — for renewable five-year periods.<sup>12</sup> This “Notwithstanding Clause” (NWC) has never been invoked by the federal government, thus failing to facilitate the horizontal constitutional dialogue that some hoped it would.<sup>13</sup> Instead, it has been used by *provincial* governments to discriminate against same-sex couples<sup>14</sup> and prevent Muslim public servants from wearing religious attire.<sup>15</sup> These examples highlight the dangers of popular constitutionalism.<sup>16</sup>

So, which view of judicial review is right? Both are. This Chapter asks what the experience of the NWC can teach us about how to optimize for an enduring, rights-protecting constitutional democracy.<sup>17</sup> Based on those lessons, it proposes that the United States should adopt a model “constrained override” power that leverages the benefits of the NWC but avoids its drawbacks.

Unlike the NWC, this constrained override would only empower Congress, not state legislatures. It would thus capture the benefits of giving federal legislatures the power to engage in constitutional interpretation, as many American critics of judicial supremacy would be eager to see, while avoiding the dangers of a vertical override power that Canadian critics of the NWC have lamented. Use of the override would

<sup>10</sup> These are sections 2 (fundamental freedoms), 7 to 14 (legal rights), and 15 (equality rights). *Id.* § 33(1).

<sup>11</sup> Compare, e.g., Geoffrey Sigalet, *Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review*, 61 OSGOODE HALL L.J. (forthcoming 2024) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4254342](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254342) [<https://perma.cc/SZF6-KR75>] (reading section 33 as notwithstanding “judicial review”), and Grégoire Webber, *Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation*, 71 U. TORONTO L.J. 510, 513 (2021) (notwithstanding “remedy”), with Maxime St-Hilaire & Xavier Focroulle Ménard, *Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause*, 29 CONST. F. CONSTITUTIONNEL 38, 40–41 (2020).

<sup>12</sup> See Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.). Section 33 gives the Canadian Parliament and provincial legislatures the power to “expressly declare in an Act . . . that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” *Id.* § 33(1). Following such a declaration, the Act “shall have such operation as it would have but for the provision of this Charter referred to in the declaration.” *Id.* § 33(2). Any such declaration “shall cease to have effect five years after it comes into force,” *id.* § 33(3), but the legislature can reenact them, with each subsequent reenactment again subject to the five-year sunset, *id.* § 33(4)–(5).

<sup>13</sup> See Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 268 (2004).

<sup>14</sup> See Marriage Amendment Act, R.S.A. 2000, c M-5, § 5 (Can. Alta.).

<sup>15</sup> See An Act Respecting the Laicity of the State, S.Q. 2019, c 12, § 34 (Can. Que.).

<sup>16</sup> See Wells, *supra* note 8.

<sup>17</sup> This Chapter focuses on approximating the expected normative consequences of different forms of judicial review rather than on evaluating theoretical debates that might ground perspectives on judicial review regardless of consequences, such as the view that judicial review is inherently antidemocratic. For an example of the latter perspective, see Bowie, *supra* note 3, at 12–24.

also be subject to further conditions that would promote democratic accountability and dialogue. For example, the constrained override could only be used to immunize legislation that the Court has already declared unconstitutional. And, as a final bulwark against abusive constitutionalism,<sup>18</sup> use of the override would be subject to a “double override” by a Court acting in consensus.

The Chapter proceeds as follows. Section A first offers a pessimistic view of the NWC. Section B then turns to a more optimistic interpretation: several checks on the NWC reduce its likelihood of being abused (the negative defense); the NWC prevents a dangerous concentration of power in one branch of government (the first affirmative defense); and the NWC has led to a greater respect for constitutional rights among legislators and the public (the second affirmative defense). Section C identifies remaining problems with the Canadian NWC: it has only been used by provinces, has been used in ways that fail to promote constitutional dialogue or accountability, and lacks sufficient safeguards to prevent the federal government from abusing it. Section D compares the appeal of an override clause in the United States and Canada based on institutional differences; it concludes that even if judicial review is desirable to compensate for weak frictions between the legislative and executive branches in parliamentary countries, that justification has less purchase in the United States, where executive checks on Congress are much stronger.

Section E sketches the contours of the constrained override. Section F addresses three remaining counterarguments: Congress lacks the power to implement the constrained override without a constitutional amendment; the override will be ineffective in the United States because the country lacks a sufficiently robust constitutional culture; and the override could be a slippery slope toward further erosions of judicial power. Notwithstanding these concerns, this Chapter concludes that Congress should implement the constrained override. Doing so will minimize the dangers of giving one branch of government exclusive power to interpret this country’s most consequential document. And it will more deeply entrench constitutional norms in their ultimate enforcer: the people. The Court may be the least dangerous branch,<sup>19</sup> but the constrained override would yield the least dangerous system.<sup>20</sup>

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<sup>18</sup> See generally David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

<sup>19</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (2d ed. 1986). But see Christopher Jon Sprigman, *Three Plans for Saving Voters from a Right-Wing Activist Supreme Court*, SLATE (Oct. 11, 2018, 2:35 PM), <https://slate.com/news-and-politics/2018/10/supreme-court-court-packing-good.html> [<https://perma.cc/G4XS-HJGQ>] (“The court is in fact very dangerous.”).

<sup>20</sup> Cf. Tascha Shahriari-Parsa, *Notwithstanding the Right to Strike: A Canadian Province Defies the Constitution — And Workers Strike Back*, HARV. L. REV. BLOG (Nov. 28, 2022), <https://harvardlawreview.org/blog/2022/11/notwithstanding-the-right-to-strike-a-canadian-province-defies-the-constitution-and-workers-strike-back> [<https://perma.cc/MN9C-YDKL>] (making this argument with respect to the Canadian NWC).

### A. Critique of the Notwithstanding Clause

This section recounts a pessimistic view of the NWC: that it undermines the constitutional revolution that the Charter otherwise engendered. In the early 1980s, Prime Minister Pierre Trudeau's draft Charter was transformed through significant public participation.<sup>21</sup> But just before it was finalized, the provinces demanded the ability to override most of the Charter's provisions as a condition of consenting to it.<sup>22</sup>

The one province absent from these negotiations was Quebec.<sup>23</sup> As Canada's only francophone-majority province,<sup>24</sup> Quebec had just two years earlier held a referendum on whether the province should pursue a path toward independent sovereignty, with forty percent of voters in favor.<sup>25</sup> Though the referendum was not successful, it reflected the tensions between Quebec and anglophone Canada, which, at the time, made it nearly impossible for national agreement on a new constitution.<sup>26</sup>

Soon after the Charter's adoption, the government of Quebec was emboldened to defy the constitutional revolution from which it had been excluded.<sup>27</sup> Quebec's unicameral legislature repealed and reenacted the entirety of its civil law code, adding in a "standard override clause" into every statute.<sup>28</sup> In each case, that clause affirmed the law's operation notwithstanding sections 2 and 7 to 15 of the Charter — that is, *every* overridable Charter right.<sup>29</sup> Quebec continued including NWCs in all of its legislation until 1985.<sup>30</sup> The Supreme Court upheld Quebec's omnibus use, holding that the NWC was a requirement in form only.<sup>31</sup>

Since 1985, Quebec has used the NWC in sixteen bills,<sup>32</sup> with two

<sup>21</sup> See Lorraine Eisenstat Weinrib, *Trudeau and the Canadian Charter of Rights and Freedoms: A Question of Constitutional Maturation*, in *TRUDEAU'S SHADOW* 257, 270–72, 274 (Andrew Cohen & J.L. Granatstein eds., 1998).

<sup>22</sup> *Id.* at 274. In an advisory opinion, the Supreme Court of Canada held that, by convention, a "substantial degree of provincial consent is required" to amend the Canadian Constitution. *In re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, 904–05 (Can.).

<sup>23</sup> Weinrib, *supra* note 21, at 274; LAURENCE BROSSEAU & MARC-ANDRÉ ROY, *LIBR. OF PARLIAMENT, THE NOTWITHSTANDING CLAUSE OF THE CHARTER* 3 (2018).

<sup>24</sup> François Rocher, *Self-Determination and the Use of Referendums: The Case of Quebec*, 27 *INT'L J. POL. CULTURE & SOC'Y* 25, 27 (2014).

<sup>25</sup> *Id.* at 32.

<sup>26</sup> See generally R. Roy McMurtry, *The Search for a Constitutional Accord — A Personal Memoir*, 8 *QUEEN'S L.J.* 28 (1983).

<sup>27</sup> Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, 35 *MCGILL L.J.* 541, 544 (1990).

<sup>28</sup> *Id.*

<sup>29</sup> *Ford v. Quebec (Att'y Gen.)*, [1988] 2 S.C.R. 712, 727–28 (Can.) (quoting An Act Respecting the Constitution Act, S.Q. 1982, c 21 (Can. Que.)).

<sup>30</sup> Tsvi Kahana, *The Notwithstanding Clause in Canada: The First Forty Years*, 60 *OSGOODE HALL L.J.* 1, 22–23 (2023).

<sup>31</sup> *Ford*, 2 S.C.R. at 740–41.

<sup>32</sup> See Kahana, *supra* note 30, at 8.

recent ones drawing the most attention. In 2019, Quebec used the NWC in An Act Respecting the Laicity of the State<sup>33</sup> to limit the rights of Muslim women and other religious minorities by banning certain public employees from covering their faces<sup>34</sup> or wearing religious garments “in the exercise of their functions.”<sup>35</sup> Quebec’s national assembly had originally passed a version of the bill that did not contain the NWC.<sup>36</sup> Quebec’s premier affirmed that his government had not used the NWC because the ban was constitutionally justified.<sup>37</sup> But after Quebec courts temporarily enjoined the bill pending a final judgment on the merits,<sup>38</sup> the National Assembly enacted a new version of the bill invoking the override.<sup>39</sup> Despite causing public outcry, the party responsible for the ban was reelected with *even more* seats in the next election.<sup>40</sup>

In 2022, Quebec invoked the NWC in Bill 96,<sup>41</sup> a language reform law that limited the number of people who could access government services in English,<sup>42</sup> required most civil servants to “speak and write exclusively in French” and required adhesion contracts to be drafted in French.<sup>43</sup> The law was met with waves of protest<sup>44</sup> and lawsuits,<sup>45</sup>

<sup>33</sup> S.Q. 2019, c 12.

<sup>34</sup> *Id.* § 8.

<sup>35</sup> *See id.* § 6; Steve Rukavina, *New Research Shows Bill 21 Having “Devastating” Impact on Religious Minorities in Quebec*, CBC (Aug. 10, 2022), <https://www.cbc.ca/news/canada/montreal/bill-21-impact-religious-minorities-survey-1.6541241> [<https://perma.cc/7WZ7-B38F>]; *Bill 21*, CANADIAN C.L. ASS’N, <https://ccla.org/major-cases-and-reports/bill-21> [<https://perma.cc/NTB7-S9FC>].

<sup>36</sup> Kahana, *supra* note 30, at 45.

<sup>37</sup> *Id.*

<sup>38</sup> Anthony Breton, *Canada: Quebec Court Ruling Prolongs Stay of Uncovered-Face Provision*, LIBR. OF CONG. (July 27, 2018), <https://www.loc.gov/item/global-legal-monitor/2018-07-27/canada-quebec-court-ruling-prolongs-stay-of-uncovered-face-provision> [<https://perma.cc/5VDZ-QHYB>].

<sup>39</sup> Kahana, *supra* note 30, at 45.

<sup>40</sup> Antoni Nerestant, *CAQ Sails to Victory in Quebec with Largest Majority in Decades*, CBC (Oct. 4, 2022), <https://www.cbc.ca/news/canada/montreal/quebec-election-2022-results-1.6603562> [<https://perma.cc/WBK5-FNEU>].

<sup>41</sup> An Act Respecting French, the Official and Common Language of Québec, S.Q. 2022, c 14, § 118.

<sup>42</sup> Philip Authier, *Bill 96 Honour System in Place: Click If You Have the Right to English Services*, MONTREAL GAZETTE (June 2, 2023), <https://montrealgazette.com/business/local-business/bill-96-honour-system-in-place-click-if-you-have-the-right-to-english-services> [<https://perma.cc/LG7F-2JL8>].

<sup>43</sup> Jacob Serebrin, *Bill 96: Here’s What to Expect When Trying to Access English Services in Quebec*, GLOB. NEWS (June 2, 2023, 9:16 PM), <https://globalnews.ca/news/9739267/quebec-french-bill-96-changes> [<https://perma.cc/4YZT-EBX8>].

<sup>44</sup> *See, e.g.*, Jason Magder, *Thousands of Montrealers March in Opposition to Bill 96*, MONTREAL GAZETTE (May 15, 2022), <https://montrealgazette.com/news/local-news/heres-what-you-need-to-know-about-saturdays-bill-96-protest> [<https://perma.cc/DY6J-M4E7>].

<sup>45</sup> *See, e.g.*, Dominic Dupoy & Katherine Prusinkiewicz, *Court Temporarily Suspends Two Provisions of Quebec’s Bill 96 French Language Reform*, NORTON ROSE FULBRIGHT (Aug. 15, 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/beaa88ca/court-temporarily-suspends-two-provisions-of-quebecs-bill-96-french-language-reform> [<https://perma.cc/S9TW-NXZE>]; Felisha Adam, *First Hearing for Lawsuit Against Quebec’s Language Law*, CITYNEWS MONTREAL (Aug. 29, 2023, 6:54 PM), <https://montreal.citynews.ca/2023/08/29/first-hearing-for-lawsuit-against-quebecs-language-law-bill-96> [<https://perma.cc/9ZVJ-V8NV>].

especially from Indigenous groups<sup>46</sup> who successfully pressured the Quebec government to exempt Indigenous students from one part of the law.<sup>47</sup> But, as of November 2023, that exemption has not been extended to the rest of the bill.<sup>48</sup>

Outside of Quebec, the NWC was used only a few times before 2018. In a 1986 back-to-work law, Saskatchewan invoked the clause proactively (before a judicial decision had been rendered on whether the law violated the Charter).<sup>49</sup> And in 2000, Alberta used it to exclude same-sex couples from the provincial definition of marriage after the Supreme Court issued two decisions in support of LGBTQ rights.<sup>50</sup> But in 2018, use of the NWC began to ramp up. First, in May 2018, Saskatchewan used the NWC semi-proactively to guarantee non-Christian students the ability to attend publicly funded Christian schools, while appealing a lower court decision that held Saskatchewan's educational funding law unconstitutional.<sup>51</sup> Then, in an analogous posture in September of that year, the Ontario government threatened to use the NWC for the first time.<sup>52</sup> Bill 31,<sup>53</sup> which would have cut the number of local election

<sup>46</sup> See, e.g., Phil Carpenter, *Kahnawà:ke Youth Protest Against Bill 96*, GLOB. NEWS (May 22, 2022, 9:39 AM), <https://globalnews.ca/news/8854934/kahnawake-youth-protest-against-bill-96> [<https://perma.cc/B5ET-24SY>]; Susan Bell, *Indigenous Calls for Exemptions to Quebec's Bill 96 Get Louder*, CBC (May 26, 2022), <https://www.cbc.ca/news/canada/north/cree-inuit-education-bill-96-indigenous-languages-1.6465703> [<https://perma.cc/K3DE-XMQF>]; Pierre Saint-Arnaud, *First Nations Organizations Going to Court over Quebec's French Language Reforms*, CBC (Apr. 21, 2023), <https://www.cbc.ca/news/canada/montreal/bill-96-indigenous-court-case-1.6817437> [<https://perma.cc/D2W8-Z9WX>].

<sup>47</sup> Philip Authier, *CAQ Government Will Exempt Indigenous CEGEP Students from Bill 96*, MONTREAL GAZETTE (May 26, 2023), <https://montrealgazette.com/news/quebec/caq-indigenous-cegep-students-bill-96> [<https://perma.cc/4AV3-YY6E>].

<sup>48</sup> See Michelle Lalonde, *Indigenous Students in Limbo over Bill 96 as Quebec Mulls More Exemptions*, MONTREAL GAZETTE (Nov. 18, 2023), <https://montrealgazette.com/news/quebec/indigenous-students-in-limbo-over-bill-96-as-quebec-mulls-more-exemptions> [<https://perma.cc/5W38-XFMD>]; Kim Tekakwitha Martin, Opinion, "Complete Exemption from Bill 96" a Must, MONTREAL GAZETTE (June 22, 2023), <https://montrealgazette.com/opinion/opinion-complete-exemption-from-bill-96-a-must> [<https://perma.cc/ZRZ5-5YS8>].

<sup>49</sup> Kahana, *supra* note 30, at 51–52.

<sup>50</sup> *Id.* at 56–57.

<sup>51</sup> *Id.* at 53–54; The School Choice Protection Act, S.S. 2018, c 39, § 2.2(1) (Can. Sask.). The Saskatchewan law, which provided that educational funding could be allocated without regard to students' religious affiliations, was enacted in response to a decision by the Court of Queen's Bench. Kahana, *supra* note 30, at 53–54. That decision prohibited the government from funding non-Catholic students to attend Catholic, publicly funded "separate schools" when the government did not also fund other faith-based schools for the attendance of their respective nonadherent students. *Id.* at 53; see James P Barry, *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 7 OXFORD J.L. & RELIGION 166, 167 (2017).

The use of the override in The School Choice Protection Act might be described as "semi-proactive" because the province was in the process of appealing the lower court decision, and in fact, successfully persuaded the Court of Appeal for Saskatchewan to overrule the lower court's decision that Saskatchewan had violated the Charter. Kahana, *supra* note 30, at 54.

<sup>52</sup> See Omar Ha-Redeye, *Unprecedented Use of S. 33 in Ontario*, CANLII CONNECTS (Sept. 20, 2018), <https://canliiconnects.org/en/commentaries/63900> [<https://perma.cc/X7UZ-NKLM>].

<sup>53</sup> Efficient Local Government Act, S.O. 2018, c 11 (Can. Ont.).

wards nearly in half right before a municipal election,<sup>54</sup> was introduced in response to a superior court decision striking down a previous version of the Act<sup>55</sup> that had not invoked the NWC.<sup>56</sup>

Then came Bill 307.<sup>57</sup> Back in 2017, Ontario had passed a law banning campaign spending by unions and corporations and limiting other third-party campaign spending in the six months before an election.<sup>58</sup> In 2021, Ontario extended the latter limitation to a twelve-month period through Bill 254.<sup>59</sup> The Ontario Superior Court of Justice found that this doubling of the time restriction was unconstitutional as it “did not minimally impair the free expression rights of third party advertisers.”<sup>60</sup> Within a week, Ontario enacted Bill 307, which was identical to Bill 254 except for the addition of the NWC.<sup>61</sup>

Ontario used the NWC again in Bill 28.<sup>62</sup> The law prohibited school board employees represented by the Canadian Union of Public Employees (CUPE) from withholding their labor from the Ontario government, subject to fines against individual workers for noncompliance.<sup>63</sup> Unlike Saskatchewan’s earlier back-to-work legislation, which used the NWC proactively, Bill 28 had to invoke the clause to survive judicial review because of intervening decisions by the Supreme Court that affirmed the right to strike as an “indispensable component” of the right to bargain collectively (where an alternative dispute resolution mechanism does not exist), and thus, of freedom of association.<sup>64</sup>

Most recently, the government of Saskatchewan used the NWC in the fall of 2023 in a “Parents’ Bill of Rights.”<sup>65</sup> The bill mandates parental consent before teachers and other school employees can refer to a student under the age of sixteen by their “new gender-related preferred name or gender identity at school.”<sup>66</sup> After a judge paused the bill’s enactment to allow a constitutional challenge, the Saskatchewan

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<sup>54</sup> Nick Westoll, *Toronto Council Votes to Challenge Law that Would Slash Wards Amid Election Day Uncertainty*, GLOB. NEWS (Sept. 13, 2018, 5:03 PM), <https://globalnews.ca/news/4445053/toronto-city-council-bill-31-efficient-local-government-act> [<https://perma.cc/58HC-EDUW>].

<sup>55</sup> Better Local Government Act, 2018, S.O. 2018, c 11—Bill 5 (Can. Ont.).

<sup>56</sup> See Ha-Redeye, *supra* note 52. After the Ontario Court of Appeals stayed the lower court order pending appeal — which allowed the original Bill to go back into effect — Bill 31 was no longer needed. *Toronto (City) v. Ontario (Att’y Gen.)*, 2021 SCC 34, para. 10 (Can.). The Supreme Court held 5–4 that the original bill did not violate the Charter. *Id.* at para. 4.

<sup>57</sup> Protecting Elections and Defending Democracy Act, 2021, S.O. 2021, c 31 (Can. Ont.).

<sup>58</sup> *Working Fams. Coal. (Can.) Inc. v. Ontario (Att’y Gen.)*, 2023 ONCA 139, paras. 22, 33 (Can. Ont. C.A.).

<sup>59</sup> *Id.* at para. 23.

<sup>60</sup> *Id.* at paras. 7–8.

<sup>61</sup> *Id.* at para. 9; Kahana, *supra* note 30, at 59–60.

<sup>62</sup> Keeping Students in Class Act, S.O. 2022, c 20 (Can. Ont.), *repealed by* Keeping Students in Class Repeal Act, 2022, S.O. 2022, c 20 (Can. Ont.).

<sup>63</sup> Shahriari-Parsa, *supra* note 20.

<sup>64</sup> *Sask. Fed’n of Lab. v. Saskatchewan*, 2015 SCC 4, paras. 3, 25 (Can.).

<sup>65</sup> The Education (Parents’ Bill of Rights) Amendment Act, S.S. 2023, c 46, art. 197.4(3) (Can. Sask.).

<sup>66</sup> *Id.* art. 197.4(1).

government invoked the NWC in a special, expedited legislative session.<sup>67</sup>

These examples support the conventional understanding of the NWC as “repugnant to the rights-protecting project” of the Charter,<sup>68</sup> even a “trap door out of rights protection.”<sup>69</sup> And this view is not limited to Canada: recent calls for a legislative override in Israel were described by former President of the Supreme Court of Israel Aharon Barak as threatening “the beginning of the end” of Israel — the “constitutional equivalent ‘of a coup with tanks.’”<sup>70</sup> But this is only half the story.

### B. A Defense of the Notwithstanding Clause

This section offers three normative arguments in support of the NWC: The *negative argument* is that political checks, the NWC’s time limitation, and judicial review of nonoverridable rights reduce the risk that legislators will successfully abuse the NWC.<sup>71</sup> The *first affirmative argument* is that the NWC guards against judicial abuse of power. The *second affirmative argument* is that the NWC facilitates constitutional dialogue among the courts, the legislature, and the public. If we accept these arguments, we can view the NWC as a tool to preserve constitutional democracy and rights protection in the long run — by both cabin-ing the power of either branch and promoting a public attentiveness to constitutional retrogression.<sup>72</sup>

1. *The Negative Defense: Checks on the Override Power.* — At the time of the Charter’s passage, Prime Minister Pierre Trudeau claimed he did not “fear the notwithstanding clause very much.”<sup>73</sup> Others pointed out that the Canadian Bill of Rights, the statutory precursor to the Charter, also had an override clause, but it “was only employed once in two decades.”<sup>74</sup> Many provinces also had bills of rights with override provisions, and they “show[ed] a similar disinclination” to use them.<sup>75</sup> Members of Parliament, scholars, and other commentators at the time

<sup>67</sup> Adam Hunter, *Sask. Government Use of Notwithstanding Clause, School Policy Could Overshadow Fall Legislative Sitting*, CBC (Oct. 14, 2023), <https://www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-clause-1.6995293> [<https://perma.cc/7BG6-TPDR>].

<sup>68</sup> Weinrib, *supra* note 27, at 563.

<sup>69</sup> *Id.* at 564 (describing and challenging this “conventional understanding”); *see also* Wells, *supra* note 8 (“Why go to the trouble of codifying a Charter of Rights if that very Charter contains a kill switch for the rights themselves?”).

<sup>70</sup> *Ex-top Judge Barak: “Put Me Before a Firing Squad” If It’ll Stop Move to Tyranny*, TIMES OF ISR. (Jan. 8, 2023, 1:59 AM) (quoting Chief Justice Aharon Barak), <https://www.timesofisrael.com/ex-top-judge-barak-put-me-before-a-firing-squad-if-itll-stop-move-to-tyranny> [<https://perma.cc/2GSB-T7P5>] [hereinafter *Interview with Aharon Barak*].

<sup>71</sup> This defense is labeled “negative” because it does not itself justify the NWC; it simply rebuts an argument against it.

<sup>72</sup> *See generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 94–99 (2018).

<sup>73</sup> BROSSEAU & ROY, *supra* note 23, at 4.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.*



of the Charter's adoption widely shared the prediction that the NWC would be used only in exceptional circumstances.<sup>76</sup>

Were they right? Until recently, it seemed so. Outside of Quebec, the clause was invoked only three times before 2018. One of those uses was an anomalous rights-*enhancing* invocation by Yukon in 1982 that never went into effect.<sup>77</sup> Quebec used the clause more frequently, but almost always to shield legislation that was likely already compatible with existing Charter-rights jurisprudence.<sup>78</sup> And, to this day, the federal government has not invoked the clause a single time.<sup>79</sup>

Where provincial legislatures have invoked the clause abusively, three other checks have usually guarded against maximally abusive use: immediate public pressure, the sunset clause, and judicial intervention. The first check is best exemplified by Bill 28, Ontario's 2022 anti-strike legislation discussed in section A. The public response to the bill was unprecedented. What could have been an economic work stoppage became a political strike over Bill 28 itself that forced the closure of schools throughout the province, which most Ontarians blamed on the Ford government.<sup>80</sup> Other unions pledged their solidarity, leading to increasingly credible calls for a general strike.<sup>81</sup> Premier Doug Ford's government took twenty minutes to unanimously repeal the legislation, which

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<sup>76</sup> See, for example, statements of then–Minister of Justice Jean Chrétien, *id.* at 5 (“What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances . . .”), Professor Peter Hogg, *id.* (“Presumably, the exercise of the power would normally attract such political opposition that it would rarely be invoked.”), and future Supreme Court of Canada Justice Gérard V. La Forest, *id.* (“My guess is that this provision will rarely be used.”). One premier at the First Ministers’ Conference even personally affirmed that he would “do everything possible to urge the Legislature of New Brunswick not to use” the override. *Id.* at 4 (quoting Premier Richard Hatfield). *But see* Geoffrey Sigalet, *Notwithstanding Judicial Benediction: Why We Need to Dispel the Myths Around Section 33 of the Charter*, MACDONALD-LAURIER INST. (Dec. 5, 2022), <https://macdonaldlaurier.ca/notwithstanding-judicial-benediction-why-we-need-to-dispel-the-myths-around-section-33-of-the-charter> [<https://perma.cc/HPM2-ZYRF>] (“There is no dispositive historical evidence that the framers of the Charter agreed that the clause should only be used in emergencies or treated as a ‘nuclear option.’”).

<sup>77</sup> Kahana, *supra* note 30, at 50–51.

<sup>78</sup> See *id.* at 24–40. Out of Quebec’s fifteen bills invoking the clause before 2018, only two involved a strong argument that the legislation violated the Charter: the omnibus use of the clause, see *supra* p. 1728, and the French signage legislation, see *infra* p. 1734.

<sup>79</sup> Kahana, *supra* note 30, at 8.

<sup>80</sup> See Shahriari-Parsa, *supra* note 20; Jeremy Appel, *Ontario Premier Doug Ford Is Using the Needs of Students to Justify Attacking Labor Rights*, JACOBIN (Nov. 3, 2022), <https://jacobin.com/2022/11/ontario-doug-ford-cupe-keeping-students-in-class-act> [<https://perma.cc/8XKJ-RVY4>]; Bryann Aguilar, *Poll Finds 6 in 10 Ontarians Blame Ford Government for Education Workers’ Job Action*, CP24 (Nov. 6, 2022, 11:49 AM), <https://www.cp24.com/news/poll-finds-6-in-10-ontarians-blame-ford-government-for-education-workers-job-action-1.6141215> [<https://perma.cc/5EU8-XG64>].

<sup>81</sup> Nick Seebruch, *Ford Blinks in Face of Union Solidarity; Will Repeal Bill 28*, RABBLE (Nov. 7, 2022), <https://rabble.ca/labour/union-solidarity-ford-to-repeal-bill-28> [<https://perma.cc/9EFM-WZ5F>]. CUPE national president Mike Hancock described Canada’s labor movement as “united . . . like never before.” *Id.*

it “deemed for all purposes never to have been in force.”<sup>82</sup>

The second check is the NWC’s five-year sunset. The automatic sunset puts the burden on legislatures to justify overrides every five years if they wish to maintain them and gives the public continuing opportunities to assess their representatives’ use of the NWC. That shift in defaults might be enough to discourage most legislatures from persistent override use. Indeed, none of the uses of the NWC outside of Quebec before 2018 were renewed.<sup>83</sup>

Third, judicial review offers a check on abusive use of the NWC directly and indirectly. Indirectly, an intervening judicial decision explaining how a law infringes on peoples’ constitutional rights can make it more politically costly for the legislature to maintain the law, especially in its most expansive form. For example, early in the Charter’s history, the Canadian Supreme Court struck down a Quebec law requiring all “signs and posters and commercial advertising” to be exclusively in the French language<sup>84</sup> for violating the Charter’s guarantee of freedom of expression.<sup>85</sup> In response, Quebec’s National Assembly invoked the override clause to enact not the same legislation, but a tempered version that limited the French-only requirement to exterior signs.<sup>86</sup> Directly, judicial review checks NWC abuse through nonoverridable constitutional rights. When Ontario changed its campaign finance laws right before an election in Bill 307, the Court of Appeals upheld Ontario’s invocation of the NWC.<sup>87</sup> But in the same opinion, it held that Bill 307 violated Canadians’ democratic rights under section 3 of

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<sup>82</sup> Keeping Students in Class Repeal Act, 2022, S.O. 2022, c 20 (Can. Ont.); Liam Casey, *Ontario Government Repeals Anti-strike Law for CUPE Education Workers*, CBC (Nov. 14, 2022), <https://www.cbc.ca/news/canada/toronto/ont-government-repeals-education-bill-1.6650584> [<https://perma.cc/RK4D-PQZ4>]; see also Kim Lane Scheppele, Laurance S. Rockefeller Professor of Socio. & Int’l Affs., Princeton Univ. & Fac. Fellow, Univ. of Pa. Carey L. Sch., Testimony for the Presidential Commission on the Supreme Court 8 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Scheppele-Written-Testimony.pdf> [<https://perma.cc/5GV3-TU98>] (“Public esteem for courts is generally so much higher than it is for legislatures that it is often a big political mistake for a legislature to refuse to follow court decisions.”); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 724 (2001) (“[I]t was to be expected that use of Section 33 by a legislature would be politically costly rather than routine, forcing principled discussion and justification on the merits before alerted voters would likely accept limitations on their rights.”). For a deeper treatment of Ontario’s experience with the Notwithstanding Clause in Bill 28, see Shahriari-Parsa, *supra* note 20.

<sup>83</sup> See Kahana, *supra* note 30, at 66–67.

<sup>84</sup> *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 746 (Can.).

<sup>85</sup> *Id.* at 748 (“Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice.”).

<sup>86</sup> Kahana, *supra* note 30, at 40–41.

<sup>87</sup> *Working Fams. Coal. (Can.) Inc. v. Ontario (Att’y Gen.)*, 2023 ONCA 139, paras. 56–57 (Can. Ont. C.A.).

the Charter,<sup>88</sup> which is *not* one of the provisions subject to the NWC.<sup>89</sup>

2. *The First Affirmative Defense: Limiting the Risk of Judicial Abuse.* — We are used to seeing constitutional law from the eyes of judges: imagining ourselves in judges' shoes, wondering how judges can prevent *other* branches of government from stepping out of line. But like other branches, the judiciary is made of people. Those people can, and do, make mistakes — including grave ones.<sup>90</sup> Once we accept this, we can understand the NWC as a way to avoid granting to a single body a power that has “no beginning [and] no end.”<sup>91</sup> This view is perhaps best encapsulated by the late Professor Paul Weiler:

Canadian judges are given the initial authority to determine whether a particular law is a “reasonable limit [of a right] . . . demonstrably justified in a free and democratic society.” Almost all of the time, the judicial view will prevail. However, Canadian legislatures were given the final say on those rare occasions where they disagree with the courts with sufficient conviction to take the political risk of challenging the symbolic force of the very popular Charter. That arrangement is justified if one believes, as I do, that on those exceptional occasions when the court has struck down a law as contravening the Charter[] and Parliament re-enacts it, confident of general public support for this action, it is more likely that the legislators are right on the merits than were the judges.<sup>92</sup>

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<sup>88</sup> *Id.* at para. 136. Section 3 of the Charter reads: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.” Canadian Charter of Rights and Freedoms § 3, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

The court found that the expanded restrictions “overly restrict[ed] the informational component of the right to vote” guaranteed by section 3. *Working Families Coalition*, ONCA 139 at para. 136. The court first noted that section 3 guarantees each “citizen’s right to meaningfully participate in the electoral process,” which “includes a citizen’s right to exercise [their] vote in an informed manner.” *Id.* at para. 64 (emphasis omitted) (quoting *Harper v. Canada (Att’y Gen.)*, [2004] 1 S.C.R. 827, 871 (Can.)). But, unlike the United States Supreme Court, the Canadian Supreme Court has recognized that “spending limits are essential to ensure the primacy of the principle of fairness in democratic elections,” a principle that “flows directly from a principle entrenched in the Constitution: that of the political equality of citizens.” *Id.* at para. 77 (quoting *Libman v. Quebec (Att’y Gen.)*, [1997] 3 S.C.R. 569, 598 (Can.)). Thus, to balance these principles that are often in tension, the court must determine whether spending restrictions are (1) carefully tailored and (2) would permit a modest informational campaign. *See id.* at para. 136. The court found that Bill 307 did not meet these conditions, and therefore infringed on section 3 of the Charter. *Id.* The court ordered for its declaration to be suspended for one year “to allow Ontario to fashion new legislation that is compliant.” *Id.* at para. 143.

<sup>89</sup> *See supra* note 10 and accompanying text.

<sup>90</sup> *See* Doerfler & Moyn, *supra* note 5, at 779. After all, the German Reichsgericht “provided the highest level of legal justification for the atrocities of the Nazi era.” *Federal Court of Justice Celebrates 50th Anniversary*, 1 GERMAN L.J. No. 4, ¶ 2 (2000), [https://germanlawjournal.com/wp-content/uploads/GLJ\\_Vol\\_01\\_No\\_01\\_04.pdf](https://germanlawjournal.com/wp-content/uploads/GLJ_Vol_01_No_01_04.pdf) [<https://perma.cc/4PYB-FX85>].

<sup>91</sup> *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

<sup>92</sup> Paul C. Weiler, *The Evolution of the Charter: A View from the Outside*, in *LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 49, 57 (Joseph M. Weiler & Robin M. Elliot eds., 1986) (alterations in original) (footnote omitted) (quoting

Given that the Charter has been around for just over four decades, it is difficult to evaluate whether the NWC has guarded against judicial overreach. It is possible that the Canadian Supreme Court simply has not rendered many objectionable decisions during this time.<sup>93</sup> Perhaps the NWC has even *prevented* the Court from issuing decisions that would be abusive, knowing that the override would likely be invoked in response to trump them. In the United States, however, judicial review of federal legislation has arguably been used to erode the basic norms of constitutional democracy.<sup>94</sup> And as we imagine future possible worlds — worlds where both Congress and the Supreme Court err in existentially dangerous ways — we might be more inclined to give both branches a role in expounding the Constitution’s meaning.

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Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *see also* Rosalind Dixon, Professor of L., Univ. of N.S.W., Testimony for the Presidential Commission on the Supreme Court of the United States (June 25, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf> [<https://perma.cc/HVS6-WTJM>] (noting that Canada’s NWC “provides a cabined mechanism for legislative override that respects rule of law constraints and offers a meaningful source of pressure for courts to accommodate expressions of reasonable democratic disagreement”).

<sup>93</sup> *See* Tushnet, *supra* note 13, at 268 (noting one possible explanation for relative nonuse of the NWC is “that governments generally have agreed with the Supreme Court”).

<sup>94</sup> First, in what might be considered *false positive* cases, the U.S. Supreme Court has prevented Congress from protecting minority rights and reinforcing democracy. *See* Bowie, *supra* note 3, at 11. A prototypical example is the Court’s pronouncement that people “of the African race” could not be “citizens” under the U.S. Constitution in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Other key decisions include *Citizens United v. FEC*, 558 U.S. 310 (2010), which precluded Congress from meaningfully regulating campaign finance “to prevent the wealthy from dominating national elections,” Bowie, *supra* note 3, at 9, and *Shelby County v. Holder*, 570 U.S. 529 (2013), which struck down a key part of the 1965 Voting Rights Act, *id.* at 556–57.

Second, the *false negatives*: the judiciary has failed to actually use judicial review to advance these values in the United States when its countermajoritarian role was most needed. For example, in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court infamously upheld Congress’s power to authorize indefinite military detention of U.S. citizens of Japanese descent on no basis other than their ancestry. *Id.* at 217–18. More generally, the Court has and continues to give Congress near plenary power in its regulation of immigrants, Native Americans, and the United States’s colonial subjects in Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands, suggesting an “external” constitutional law where the tenets of liberal constitutionalism do not apply. *See* Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 53–66, 151 (2023). Indeed, the Court’s lack of countermajoritarian intervention has included cases where “Congress and the president have violently dispossessed Native tribes, excluded Chinese immigrants, persecuted political dissidents, withheld civil rights from U.S. citizens in territories, and banned Muslim refugees.” Bowie, *supra* note 3, at 10–11 (footnotes omitted) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Chinese Exclusion Case*, 130 U.S. 581 (1889); *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)). These false negatives matter: each time judges uphold legislative acts that infringe on the rights of unrepresented or underrepresented groups, their seal of approval implies to the public that those infringements are legitimate and dampens constitutional arguments against them. *Cf.* BICKEL, *supra* note 19, at 30; Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1993–95 (1993) (book review). And both false negatives and false positives counter one of the most important empirical premises behind theories of judicial supremacy: “[T]hat courts are a better bulwark than are elected officials.” Doerfler & Moyn, *supra* note 5, at 779.

3. *The Second Affirmative Defense: Promoting Institutional Dialogue.* — The NWC has encouraged richer conversations about Charter rights in three ways. First, it has promoted constitutional dialogue within legislatures. As Professor Lorraine Weinrib writes: “The availability of the override has transformed the ways in which Canadians analyse public policy and action. Parliament and the provincial legislatures deliberate in their chambers and committee rooms on the scope of these rights, their justifiable limitation and the possibility of override.”<sup>95</sup> Thus, constitutional “values have become an important element of political platforms and election debates.”<sup>96</sup> And the Charter has encouraged a constitutional culture where the “institutional arrangements” of democracy are “locations for cooperation and for the production of freedom-enhancing government policies,” rather than merely “locations for conflict and struggle, with the end of protecting liberty by limiting government power.”<sup>97</sup>

Second, at least outside of Quebec, this cultural shift has translated into greater entrenchment of constitutional norms among the public, as exemplified by the public reaction to Ontario’s anti-strike law. In response to calls for the federal government to stop Ontario from using the clause, Prime Minister Justin Trudeau said that instead of the federal legislature taking action, “it should be Canadians saying, ‘Hold on a minute. You’re suspending my right to collective bargaining? You’re suspending fundamental rights and freedoms that are afforded to us in the Charter?’”<sup>98</sup> And “[t]hat’s exactly what happened.”<sup>99</sup>

Third, the override has allowed for legal dialogue, compromise, and evolution between the legislatures and courts.<sup>100</sup> Consider Quebec’s signage law. As discussed earlier, Quebec responded to the Supreme Court’s decision by limiting the French-only requirement to exterior

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<sup>95</sup> Lorraine E. Weinrib, *The Canadian Charter’s Override Clause: Lessons for Israel*, 49 *ISR. L. REV.* 67, 82 (2016); see also Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 *MICH. L. REV.* 245, 284 (1995) (noting that the NWC “might actually invigorate majoritarian politics by providing the people and their representatives with a way of engaging in direct discussion of constitutional values in the ordinary course of legislation”).

<sup>96</sup> Weinrib, *supra* note 95, at 101.

<sup>97</sup> Mark Tushnet, *The Charter’s Influence Around the World*, 50 *OSGOODE HALL L.J.* 527, 541 (2013).

<sup>98</sup> Shahriari-Parsa, *supra* note 20.

<sup>99</sup> *Id.* Professor Michael J. Perry argues that “[a]dopting the Canadian innovation” in the United States “would certainly encourage greater citizen participation ‘in the conversation about constitutional meaning.’” MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* 201 (1994) (quoting Sanford Levinson, *The Audience for Constitutional Meta-Theory (or, Why, and to Whom, Do I Write the Things I Do?)*, 63 *U. COLO. L. REV.* 389, 407 (1992)).

<sup>100</sup> See generally KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 198 (2d ed. 2016); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 *OSGOODE HALL L.J.* 75 (1997).

signs.<sup>101</sup> That amended version of the law remained on the books until 1993, when the United Nations Human Rights Committee (UNHRC) concluded that the Quebec law contravened the International Covenant on Civil and Political Rights.<sup>102</sup> Although the UNHRC decision was nonbinding, Quebec amended the law again, this time to allow bilingual exterior signs as long as the French part of the sign predominates.<sup>103</sup>

Though the U.S. Constitution does not contain an override clause, there have been patches of constitutional dialogue between Congress and the Court. For example, between 1966 and 1997,<sup>104</sup> the Supreme Court “invited Congress to engage in processes of constitutional interpretation” when exercising its powers under Section 5 of the Fourteenth Amendment.<sup>105</sup> Professors Robert Post and Reva Siegel note that this judicial deference capitalized on Congress’s “distinct institutional competencies, resources, and forms of democratic responsiveness”<sup>106</sup> and generated an evolving constitutional culture.<sup>107</sup> Professors Nikolas Bowie and Daphna Renan also argue that the pre-1926 “republican” conception of separation of powers, which “accepts as authoritative the decision of the political branches” on separation of powers questions, sustained a desirable constitutional order “grounded in deliberation, political compromise, and statecraft.”<sup>108</sup> And Professor Maggie Blackhawk has explained that legislative constitutionalism in federal Indian Law has produced more varied constitutional discourse and reforms.<sup>109</sup>

### C. *Improving the Override*

Although the NWC exhibits many desirable features, the Canadian experience suggests that the override power could be improved in several meaningful ways.

1. *Federal Exclusivity.* — Critics of the NWC in Canada have, above all, regretted the absence of judicial supremacy in *vertical* review (the Supreme Court’s review of state legislation).<sup>110</sup> Meanwhile, critics of judicial supremacy in the United States have primarily questioned the absence of constitutional dialogue in *horizontal* review (the Court’s

<sup>101</sup> See *supra* note 86 and accompanying text.

<sup>102</sup> Kahana, *supra* note 30, at 42.

<sup>103</sup> *Id.* The new version of the clause did not contain an override. *Id.*

<sup>104</sup> That is, the years between the Supreme Court’s decisions in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>105</sup> Post & Siegel, *supra* note 1, at 34.

<sup>106</sup> *Id.* at 38.

<sup>107</sup> *Id.* at 38–39. Perhaps most notably, in section 10 of the Voting Rights Act of 1965, Congress “announce[d] its revisionist constitutional view and ‘direct[ed]’ the attorney general to use these judgments to make an effort to persuade the Court to reject its old jurisprudence.” BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 107 (2014).

<sup>108</sup> Bowie & Renan, *supra* note 6, at 2020.

<sup>109</sup> Blackhawk, *supra* note 6, at 2301.

<sup>110</sup> See, e.g., Wells, *supra* note 8 (lambasting provincial use of the NWC).

review of federal legislation), while sometimes justifying federal judicial review of state legislation as consistent with principles of democracy at the federal level.<sup>111</sup> As Bowie and Renan have noted, seminal cases like *Brown v. Board of Education*,<sup>112</sup> *Roe v. Wade*,<sup>113</sup> and *Obergefell v. Hodges*<sup>114</sup> — the supposed paragons of American judicial supremacy — were brought as suits against state officials under 42 U.S.C. § 1983.<sup>115</sup> That is, they involved judicial enforcement of a federal statute that Congress can revise.<sup>116</sup> Thus, the critical perspectives from both countries can be straightforwardly reconciled by favoring an override power *only* at the federal level.

Federal exclusivity of the override power would be appealing for an additional reason: to encourage the federal legislature to actually use it. The Canadian Parliament has likely been deterred from invoking the NWC to avoid backlash from a public that sees the government as taking its rights away.<sup>117</sup> But Parliament has an even stronger reason to avoid the override: even a single federal invocation could normalize its use, emboldening *provincial* governments to use the clause too. Such a result would be plainly against the federal government's long-term interest in federal supremacy and national cohesion.

To the extent that this consideration deters federal use of the NWC,<sup>118</sup> it counsels against giving the override power to subnational governments. Doing so effectively produces strong-form judicial review of federal legislation and weak-form review of state legislation — an asymmetrical regime in which state legislatures enjoy extraordinary and exclusive power to wrestle over the federal constitution with the federal

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<sup>111</sup> E.g., Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 202–03 (2021).

<sup>112</sup> 347 U.S. 483 (1954).

<sup>113</sup> 410 U.S. 113 (1973).

<sup>114</sup> 576 U.S. 644 (2015).

<sup>115</sup> Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212> [<https://perma.cc/DB9B-Y3ZL>]; Bowie, *supra* note 3, at 23–24. These cases therefore represent more than the powers of judicial review: they at least partially also represent the consequences of majority will at the federal level.

<sup>116</sup> Bowie, *supra* note 3, at 23–24.

<sup>117</sup> See, e.g., Tushnet, *supra* note 13, at 268. Another reason for federal non-use might be that, since the Charter's enactment, Parliament has usually agreed with the Supreme Court. *Id.*

<sup>118</sup> On the one hand, this effect is likely more pronounced in Canada, where the sphere of exclusive provincial authority is greater (and thus, where the federal government may have to rely more on the courts to discipline the provinces), than it would be in the United States, where the federal government may have more opportunities to preempt state legislation. On the other hand — at least on subjects where either federal legislature can preempt subnational laws — this deterrence effect may be stronger in the United States, where gridlock makes it extremely difficult to pass legislation, than in Canada. In any event, even where the federal legislature *can* preempt subnational legislation that invokes the override, doing so comes at a meaningful political and opportunity cost that the legislature can reduce in the aggregate by abstaining from federal override use.

courts.<sup>119</sup> And insofar as the federal legislature is dissuaded from using the override, that will “weaken the case that the clause fosters a valuable dialogue on what the *Charter* means,” at least on the federal level.<sup>120</sup>

2. *Promoting Democratic Accountability and Dialogue.* — The NWC could have better achieved its purposes of promoting dialogue and democratic accountability if not for four defects, owed at least partially to the Supreme Court of Canada’s formalist interpretation of the clause.<sup>121</sup> Though these shortcomings of the NWC have manifested in its use by the provinces, they would likely persist even in a world where the clause could be invoked only by the federal legislature.

The first defect is the risk of *overbroad* override use that dodges political accountability. After Quebec applied the NWC to all of its legislation right after the Charter’s enactment, the Quebec Court of Appeals held that the NWC was meant to “bring into sharp focus the effect of the overriding provisions and the rights deprived,”<sup>122</sup> and thus to “set[] in motion political repercussions” specific to the rights being overridden.<sup>123</sup> The Supreme Court overturned that decision; but it could have agreed with the lower court and held that legislatures (1) need to invoke the specific Charter right(s) that they are overriding (rather than listing all of them), (2) must do so in every individual law (rather than through one omnibus bill), and (3) need to be clear about which specific provisions the NWC is shielding.<sup>124</sup> These requirements would have increased the likelihood that citizens are informed about which of their judicially recognized rights are being abrogated and by which statute — necessary information to assess the costs of the override’s invocation and, in turn, decide whether to hold governments accountable.

A related defect is that legislatures do not have to provide a *justification* for using the override. Neither the public nor the courts can

<sup>119</sup> For the woes of horizontal legislative constitutionalism, see OLIVER WENDELL HOLMES, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in COLLECTED LEGAL PAPERS 291, 295–96 (1952) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”); and Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51, 84–85 (1984).

<sup>120</sup> See Tushnet, *supra* note 13, at 268 (emphasis added); PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 187 (2021) [hereinafter PRESIDENTIAL COMM’N REPORT], <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/6HXT-S3YK>] (“In both Canada and Israel . . . the federal legislatures have used the [override] power rarely. One might predict a similar outcome in the United States . . .” (footnote omitted)). In other words, the negative and positive defenses of the override clause are in tension with each other. The only resolution to that tension is to maintain enough cost on override use (to reduce the risk of abuse) without that cost being so great (that the clause is not used at all). It seems only federal exclusivity might achieve that.

<sup>121</sup> See *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 740–41, 743 (Can.).

<sup>122</sup> *Alliance des Professeurs de Montréal v. A.G. Quebec*, [1985] C.A. 376, para. 34 (Can. Que. C.A.) (translation).

<sup>123</sup> Weinrib, *supra* note 21, at 277.

<sup>124</sup> See Tushnet, *supra* note 95, at 280; Weiler, *supra* note 119, at 90 n.114.



appropriately evaluate legislators' reasons for invoking the clause when those reasons are not provided.

The third defect is permitting *proactive* use of the clause: where legislatures use the NWC not as a sword against an existing court decision, but as a shield against a potential future judicial nullification. Given that litigating up to the Supreme Court can easily take five years<sup>125</sup> — the length of the NWC's sunset — proactive use severely inhibits the Court's ability to meaningfully engage in Charter dialogue with the legislature. Moreover, to promote constitutional rights, legislatures should make a good faith effort to pass legislation that they think is constitutional. Only after the Court disagrees with them, when the two branches' divergent constitutional opinions can be put on the table for individual legislators and the public to examine, should legislatures be allowed to invoke the override. After all, the NWC should promote “a further stage in the dialogue between courts and legislatures as to the meaning of Charter rights, not . . . prevent such dialogue altogether.”<sup>126</sup>

Finally, the NWC would have been better if it clarified that legislators are overriding judicial interpretations of Charter rights, not the rights themselves. This would ensure proposed uses of the NWC trigger public debate on different interpretations of the Charter, not different interpretations of whether the Charter should be followed. However, it might also make it more acceptable for legislators to invoke the clause, with the upside of increasing constitutional dialogue and the downside of empowering legislators to subtly erode constitutional norms.

3. *Guarding Against Constitutional Retrogression.* — Given the rise of autocratic figures in many constitutional democracies, including at the federal level, it would be naive to assume that these checks would fully preclude such would-be autocrats from making use of the override power to entrench their own power.<sup>127</sup> As a last resort, a Supreme Court acting in consensus (or by supermajority vote) should have the power to “double override” legislation invoking the override clause.<sup>128</sup>

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<sup>125</sup> See Tushnet, *supra* note 95, at 289.

<sup>126</sup> See Brian Slattery, *A Theory of the Charter*, 25 OSGOODE HALL L.J. 701, 742 (1987).

<sup>127</sup> Cf., e.g., Landau, *supra* note 18, at 208–11.

<sup>128</sup> Passing a supermajority vote requirement would plausibly fall within Congress's powers to regulate the Supreme Court's appellate jurisdiction. See PRESIDENTIAL COMM'N REPORT, *supra* note 120, at 17; see also *id.* at 170 (“Neither Article III of the Constitution nor Congress in the 1789 Judiciary Act directly specified how the Supreme Court's cases should be decided.”). Three state constitutions and at least ten countries require (or, in the case of Ohio, formerly required) a supermajority threshold before their high courts strike down legislation. *Id.* at 171.

It would functionally achieve a similar end as Thayerian deference (the idea that Courts should strike down only legislation whose unconstitutionality is “so clear that it is not open to rational question.” James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); see PRESIDENTIAL COMM'N REPORT, *supra* note 120, at 177–78. But it would avoid many of the inherent problems of individual Justices having to decide (and often, disagreeing on) whether certain legislation is “clearly” constitutional.

*D. Judicial Review as One of Many Checks and Balances:  
Differences in the Structure of Government*

Reasonable minds may continue to disagree about the utility of the NWC in Canada's constitutional order. But whichever conclusions one draws about the NWC, the applicability of those conclusions for judicial review in the United States must be mediated by considering a crucial way in which Canada and the United States differ.

In a contemporary parliamentary system like Canada's, checks and balances between the legislature and executive are weak. This wasn't always the case.<sup>129</sup> But, as Professor Stephen Gardbaum posits, political parties have become better at "organiz[ing] mass democracy outside [of] parliament, resulting in the ever-greater disciplining of members inside through the whip system."<sup>130</sup> Accordingly, "the major task of (the majority in) parliament became to support the government . . . rather than to hold it to account."<sup>131</sup> Parliamentary democracies, especially Canada's, have also witnessed a greater "centralization of power in the office of the prime minister and away from the cabinet as a whole."<sup>132</sup> Both developments have led to "a concentration of power both *in and within* the contemporary parliamentary executive."<sup>133</sup> Stronger forms of judicial review thus might be seen as "compensation" for the weakening of political checks and balances in parliamentary democracies.<sup>134</sup>

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*See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 161–63 (1998); Mark Tushnet, William Nelson Cromwell Professor of L. Emeritus, Harv. L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 6 (Aug. 17, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf> [<https://perma.cc/T9D6-6SR9>] (advocating for Thayerian deference but acknowledging "doubt that there are any institutional mechanisms that can induce Justices to have a Thayerian cast of mind, or that can select only Justices who would have and sustain that cast of mind"). Unlike Thayerian deference, a supermajority vote requirement would also "preserve[] an active, vigorous judicial role . . . in the discourse about constitutional meaning." PERRY, *supra* note 99, at 200.

And, in the United States, a supermajority double-override might be preferable to designating certain rights as nonoverridable. Consider for example that, under the Charter, equality rights are overridable while voting rights are not. *See* Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *supra* note 10 and accompanying text. But in the United States, both fall under the purview of the Fourteenth and Fifteenth Amendments. *See* U.S. CONST. amends. XIV, XV. Attempting to draw a line between them "would leave great discretion with the Supreme Court." PRESIDENTIAL COMM'N REPORT, *supra* note 120, at 189. Worries of overrides being used to erode the basic democratic process might thus be better assuaged by a double override.

<sup>129</sup> *See* Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMPAR. L. 613, 618 (2014).

<sup>130</sup> *Id.* at 631.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 633.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 617; *cf.* Susan Rose-Ackerman & Oren Tamir, *Comparative Administrative Law: Is the U.S. an Outlier? A Concluding Essay*, BALKINIZATION (Oct. 17, 2023),

Meanwhile, checks and balances between the American legislature and executive are much stronger. The President is elected by the people, can veto legislation (subject to congressional override), and can arguably refuse to execute statutory provisions that she believes are unconstitutional.<sup>135</sup> Severe party polarization in the United States has made these checks and balances even stronger: these days, unless one party maintains control of both houses and the presidency, Congress is all but paralyzed.<sup>136</sup> Reducing the power of judicial review could thus provide breathing room for effective government.<sup>137</sup>

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<https://balkin.blogspot.com/2023/10/comparative-administrative-law-is-us.html> [https://perma.cc/F4CL-TKU3] (“[J]udicial review of administration is potentially more important in parliamentary systems than it is in presidential ones in another key way. It ‘compensates’ for the relative lack of institutional contestation in the legislative process . . . .”).

<sup>135</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926) (sustaining the President’s view of unconstitutionality of statute without any suggestion that the President should not have refused to execute it); *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting the President’s power “to disregard [laws] when they are unconstitutional” in an opinion joined by three other Justices); Dariusz M. Stolicki, *Is the President of the United States Permitted to Disregard Unconstitutional Statutes?*, 12 AD AMERICAM 105, 110 (2011); Bowie & Renan, *supra* note 6, at 2053, 2081. See generally Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

<sup>136</sup> See, e.g., *Paralysis in Congress Makes America a Dysfunctional Superpower*, THE ECONOMIST (Oct. 12, 2023), <https://www.economist.com/united-states/2023/10/12/paralysis-in-congress-makes-america-a-dysfunctional-superpower> [https://perma.cc/LRD6-ZEX6].

<sup>137</sup> See generally CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (Vicki C. Jackson & Yasmin Dawood eds., 2022).

Two other institutional considerations may support the relative desirability of the override clause in both Canada and the United States over some other countries. First is the threshold for constitutional amendment. Both the Canadian and American Constitutions might be among “the world’s most difficult to amend.” See Richard Albert, *The World’s Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007 (2022); AREND LIJPHART, PATTERNS OF DEMOCRACY 208 (2d ed. 2012) (grouping the United States’s, Canada’s, and six other countries’ constitutions as among the most difficult to amend). A legislative override can compensate for the relative lack of democratic legitimacy and checks on judicial power that these constitutions carry because of their herculean amendment processes. See Jedediah Britton-Purdy, *The Constitutional Flaw That’s Killing American Democracy*, THE ATLANTIC (Aug. 28, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/framers-constitution-democracy/671155> [https://perma.cc/7VKD-ZR84].

Second, whereas all Canadian provinces and some countries including Israel, New Zealand, Finland, and Luxembourg have unicameral legislatures, the Canadian Parliament, the U.S. states (except Nebraska), and the U.S. Congress all have bicameral legislatures. MINN. HOUSE OF REPRESENTATIVES RSCH. DEP’T., UNICAMERAL OR BICAMERAL STATE LEGISLATURES: THE POLICY DEBATE 1, 8 (1999). Under unicameral systems, the judiciary serves as a more crucial “check on government power,” given that the check of an upper house does not exist. See *Former AG Slams Netanyahu’s Gov’t for Turning Israel into a “Borderline Dictatorial State,”* HAARETZ (July 12, 2023), <https://www.haaretz.com/israel-news/2023-07-12/ty-article/premium/former-ag-slams-netanyahus-govt-for-turning-israel-into-a-borderline-dictatorial-state/00000189-4a4c-d11a-ade9-4ecfa5ef0000> [https://perma.cc/LKF9-AMCF] (reporting that Israel’s former Attorney General noted that “Israel lacks a bicameral legislature, a constitution and a bill of rights and ‘there is only independence of the courts’ to serve as a check on government power”). Countries like the United Kingdom, with a second chamber that lacks the power to veto legislation, might fit somewhere in between. See *Parliament Acts*, UK PARLIAMENT, <https://www.parliament.uk/site-information/glossary/parliament-acts> [https://perma.cc/B2F4-BBN8].

*E. The Constrained Override: A Proposal for Congress*

Following the lessons for judicial review from Canada and the United States, this section proposes the *constrained override*. The constrained override is a rough model for weak-form review that the United States should adopt. It can do so by constitutional amendment.<sup>138</sup> Or it can do so through an ordinary bill passed through bicameralism and presentment<sup>139</sup> pursuant to Congress's power to regulate the Supreme Court under the Exceptions Clause of Article III.<sup>140</sup> The constrained override would have the following features:

*Time-Bound.* The invocation of the override power is time-bound, like the five-year sunset on uses of the NWC in Canada.

*Retrospectivity.* Congress can invoke the power only to shield laws that are clearly unconstitutional under existing judicial precedents.<sup>141</sup>

*Discreteness.* The override cannot be used as an omnibus clause. The legislature must make a good-faith effort to explain, in plain English, which constitutional rights and statutory provision(s) are at issue.

*Justification.* Congress has to give reasons for using the override power. Those reasons have to be included in the same provision that

Thus, it makes sense that in Israel — a parliamentary democracy that lacks an upper house and passes its semiconstitutional “Basic Laws” through simple majorities — former Chief Justice Barak perceived proposals for an override clause as an existential threat to constitutional democracy. See *Interview with Aharon Barak*, *supra* note 70 (“If Levin’s proposals are fully implemented, ‘nobody will protect them’ from the political majority of the day, since the Knesset is powerless to resist a majority coalition, and Israel has no constitution, no Bill of Rights, and no second House.”). After considering the utility of strong or weak forms of judicial review within broader packages of checks and balances, an override clause is least appealing in Israel, moderately appealing in Canada, and more appealing in the United States.

<sup>138</sup> While constitutional amendment would be ideal to entrench the constrained override from future modification, it might not be feasible given the extraordinarily high threshold for constitutional amendment in the United States.

<sup>139</sup> The legislation would grant Congress the power to override the Supreme Court’s interpretation of the Constitution under the conditions noted below. It would also provide that Congress would agree to be bound by unanimous (or supermajority) decisions of the Supreme Court overriding its use of the override power. But Congress’s commitment to comply with the override constraints in the future would primarily be enforced politically, rather than legally. See *infra* p. 1746.

Both the bill adopting the constrained override power and any subsequent bills invoking it would be subject to the Senate filibuster, which all but guarantees bipartisan support for the legislation. Congress should consider formalizing the Senate supermajority requirement for invocations of the override in case a future Congress decides to do away with the filibuster.

<sup>140</sup> U.S. CONST. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.”); Sprigman, *supra* note 19.

<sup>141</sup> The debate in Canada continues over whether the clause can be invoked proactively or only retrospectively. See, e.g., Jacob Serebrin, *Quebec’s Use of Notwithstanding Clause in Language Law Opens Constitutional Debate*, CBC (May 29, 2022, 11:54 AM), <https://www.cbc.ca/news/canada/montreal/quebec-notwithstanding-clause-constitutional-debate-1.6470091> [<https://perma.cc/VK5V-J49A>]. Retrospectivity as a limitation to the invocation of the override clause was suggested as a reform by some members of Ontario’s Legislative Assembly. See Bill 37, Notwithstanding Clause Limitation Act (Ont. 2022).

invokes the override.<sup>142</sup>

*Overriding the Court, Not the Constitution.* Each time it uses the power, Congress must make clear that it is overriding the Court’s *interpretation* of the Constitution, not the Constitution itself.

*Federal Exclusivity.* The override power can be used only by the U.S. Congress, not by the states.<sup>143</sup>

*Double-Override.* After Congress employs an override, a Supreme Court acting in consensus (or, alternatively, as a supermajority) can double-override Congress.

*Judicial Review.* When the constrained override power is invoked, courts can review both the underlying claim and the validity of the override. On the merits, the Court can still declare the statute unconstitutional and explain its disagreement with the legislature<sup>144</sup> — just without providing a remedy. If the Court finds that procedural conditions for invoking the override have not been met, it may rule the legislation *ultra vires*, this time with a remedy.

*Purposivist Interpretation of the Override Power.* If other unforeseen questions come up, the scope and bounds of the override power should be interpreted functionally to promote democratic deliberation.

## F. Counterarguments

*i. Does Congress Have the Power to Enact the Constrained Override by Statute?* — A comprehensive legal defense of Congress’s power to enact the constrained override by statute is beyond the scope of this Chapter. But according to the Presidential Commission on the Supreme Court of the United States, there is a legitimate constitutional argument that “Congress could enact a statute that affirms congressional

<sup>142</sup> A proposed Ontario bill would have required the Attorney General to issue a report to the Legislative Assembly, accompanying any invocation of the NWC, that details how the law “can be demonstrably justified in a free and democratic society” and “what alternatives were considered before the government introduced a bill with this declaration and why they were deemed to be inadequate.” Bill 37, Notwithstanding Clause Limitation Act (Ont. 2022).

<sup>143</sup> The federal government should be able to invoke the override power to enact legislation authorizing states to regulate “notwithstanding” a Supreme Court opinion holding such regulation unconstitutional (mirroring antitrust law, which allows state governments to authorize local governments to displace competition and thereby avoid antitrust liability, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985)). Such a scheme would bring the benefits of federal supremacy associated with cases like *Brown*, see *supra* note 115 and accompanying text, while avoiding complete insulation of judicial review of state action (with the assumption that Congress would consider states’ interests and act on their behalf in exceptional circumstances, cf. *JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 176–84 (1980) (describing “structural aspects of the national political system” that “assure that states’ rights will not be trampled,” *id.* at 176)).

<sup>144</sup> See Grégoire Webber, Eric Mendelsohn & Robert Leckey, *The Faulty Received Wisdom Around the Notwithstanding Clause*, POL’Y OPTIONS (May 10, 2019), <https://policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause> [<https://perma.cc/Y66F-WKDC>] (“Citizens will be better able to judge a government for invoking [the NWC] if a court, after full and fair argument, has ruled on whether the law violates rights.”).

authority to reenact a statute after a negative Court ruling; Congress could also establish procedures for such reenactment, consistent with bicameralism and presentment requirements.”<sup>145</sup> This follows textually: Article III “never expressly states that the Supreme Court is the final or sole arbiter of statutes’ constitutionality.”<sup>146</sup> And it is consistent with a long history of the political branches independently interpreting the Constitution.<sup>147</sup>

The Supreme Court might rule otherwise.<sup>148</sup> But deference to the Supreme Court’s view on judicial supremacy “begs the very question at issue” and “makes the Supreme Court judge in its own cause.”<sup>149</sup> Ultimately, Congress will have to convince the public that the constrained override power is legitimate and desirable. Whether it is successful in so doing, even over the Court’s objections, will dictate whether Congress has “the power” to enact the constrained override.<sup>150</sup>

2. *Does the United States Have the Constitutional Culture to Make the Override Work?* — Another counterargument to implementing the constrained override power might be that the people of the United States lack the kind of constitutional culture necessary to check legislators for their use of the clause. Scholarship on Congress’s role in various areas of constitutional lawmaking already counters this premise.<sup>151</sup> But even accepting it as true, it commits a chicken-and-egg fallacy. Did Canadians have such a culture prior to the Charter? Or was it the Charter that helped create such a culture? Within Canada, the Charter has been voted by Canadians as the country’s most important national symbol — even more popular than hockey.<sup>152</sup> It seems likely that the

<sup>145</sup> PRESIDENTIAL COMM’N REPORT, *supra* note 120, at 190. Note, however, that the override would apply only to subsequent parties, and would not overturn the specific holding made by a court in a given case. *Id.*

<sup>146</sup> *Id.* (describing a view “long contended” by “numerous scholars”).

<sup>147</sup> See, e.g., Ilan Wurman, Assoc. Professor of L., Sandra Day O’Connor Coll. of L., Testimony Before the Presidential Commission on the Supreme Court of the United States 5–9 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Wurman-Testimony-Supreme-Court-Commission.pdf> [<https://perma.cc/63V7-YQ79>]; Bowie & Renan, *supra* note 6, at 2041–47.

<sup>148</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

<sup>149</sup> Samuel Moyn, Henry R. Luce Professor of Juris. & Professor of Hist., Yale Univ., Written Statement to the Presidential Commission on the Supreme Court of the United States 20 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Moyn-Testimony.pdf> [<https://perma.cc/V96W-GE8W>].

<sup>150</sup> Congress could also call for a referendum and ask the executive branch to respect its results in order to ground its position in public legitimacy. Cf. ACKERMAN, *supra* note 107, at 17 (suggesting popular consent plays an important role in American constitutionalism). Though there is no guarantee such a referendum would be successful or, even if it is, that the government would respect it in the face of a decision by the Supreme Court rendering it null.

<sup>151</sup> See *supra* p. 1738.

<sup>152</sup> See, e.g., Greg Quinn, *Survey Finds We Like the Charter of Rights More Than Hockey*, CALGARY HERALD (Oct. 1, 2015), <https://calgaryherald.com/news/national/canadians-like-hockey-they-love-the-constitutional-bill-of-rights> [<https://perma.cc/B4QC-PDDA>]; Benjamin Shingler, *Charter of Rights, Universal Health Care Top Canadian Unity Poll*, GLOB. NEWS (June 30, 2014, 1:24 PM), <https://globalnews.ca/news/1424367/charter-universal-health-care-top-canadian-unity-poll/> [<https://perma.cc/H27R-EB6U>].

NWC has promoted popular engagement with the Charter.<sup>153</sup> The constrained override could play the same role in the United States.

3. *Will the Constrained Override Precipitate Further Erosions of Judicial Power?* — In the absence of a constitutional amendment, a current Congress likely cannot bind the Congress of tomorrow.<sup>154</sup> Thus, the constrained override might be a slippery slope towards an “unconstrained” override and other erosions of judicial power, including through increased executive assertions of constitutional authority.<sup>155</sup>

These are legitimate worries. Congress can mitigate them by being clear that the constrained override is not an erosion of constitutionalism, but a deepening of its principles<sup>156</sup>: by providing additional checks and dialogue between the different branches to ensure that neither are capable of capturing enough power to descend the polity into autocracy. Congress should plan extensive public outreach and civic education around the constrained override and its function within constitutional democracy, with an emphasis on the importance of the constraint. Congress must also affirmatively distinguish between congressional authority to enact the override clause through legislation from any alleged *executive* authority to challenge the Supreme Court’s understanding of the Constitution, which could carry much graver consequences.<sup>157</sup>

Ultimately, these risks must be weighed against the risks under the status quo: not only the everyday harms of uncheckable judicial decision making, but also the democratic debilitation that it carries with it.<sup>158</sup> Consider these words from Chief Justice Barak:

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<sup>153</sup> That said, the NWC is one among several features of the Charter that facilitate constitutional dialogue. See Hogg & Bushell, *supra* note 100, at 82–91.

<sup>154</sup> See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion) (“[O]ne legislature may not bind the legislative authority of its successors . . .” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*90)).

<sup>155</sup> Cf. Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2011 (2011) (suggesting judicial supremacy fosters constitutional compliance and reduces violence).

<sup>156</sup> See Tushnet, *supra* note 13, at 263.

<sup>157</sup> For a recent example demonstrating such dangers, see Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), <https://www.documentcloud.org/documents/23939549-december-6-memo-from-kenneth-chesebro-to-james-troupis> [<https://perma.cc/X7GV-Q59H>] (arguing that the Vice President has plenary constitutional authority to “both open *and* count the votes” in a presidential election and thereby allow for its results to be determined by the votes of fake electors, *id.* at 1). See also Scheppele, *supra* note 18, at 547 (“Some constitutional democracies are being deliberately hijacked by a set of legally clever autocrats, who use constitutionalism and democracy to destroy both.”).

<sup>158</sup> See Tushnet, *supra* note 95, at 247 (“[J]udicial review might debilitate decision-making by leading legislatures to enact laws without regard to constitutional considerations, counting on the courts to strike from the statute books those laws that violate the Constitution . . .”); Levinson, *supra* note 99, at 406–07 (“[T]he United States Constitution can meaningfully structure our polity if and only if every public official — and ultimately every citizen — becomes a participant in the conversation about constitutional meaning, as opposed to the pernicious practice of identifying the Constitution with the decisions of the United States Supreme Court or even of courts and judges more generally.”).

A nation that does not want a constitution, a nation that does not want rights, will get its wish. . . . I hope that the people will demand their rights, will want their rights, will support the court so that it will be able to protect their rights. . . . [I]f there is no spirit of freedom, if there is no aspiration to have rights, then no court would do any good.<sup>159</sup>

The status quo of American judicial review treats courts as the exclusive guardians of rights, freedoms, democracy, equality — everything we hold dear — instead of recognizing that the people are the ultimate protectors of these values.

Further, expounding and defending a Constitution is something that must be learned, tried, and developed in practice. Just as judges undergo years of legal training before they make binding interpretations of the Constitution, the people need to develop their constitutional reflexes too. The current system does not give the people that opportunity. It therefore leaves us with the grave danger that Chief Justice Barak warned of: that an autocrat ushers us into despotism with the public behind him and no judge able to stop it. An override power might be the only way to ensure that a Constitution that is “of the people, by the people, and for the people” does “not perish from the earth.”<sup>160</sup>

### *Conclusion*

As President Abraham Lincoln remarked in his First Inaugural Address, “if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”<sup>161</sup> To “protect the Constitution for the people,”<sup>162</sup> Congress should pass legislation reclaiming its role in interpreting the Constitution. Canada’s experience with the Notwithstanding Clause suggests that such power should be accompanied by meaningful constraints that stimulate public constitutionalism, political accountability, and constitutional dialogue between the branches. If implemented, the constrained override power will also help protect freedom, equality, and democracy from erosion by any branch of government. And it will reaffirm that the Constitution belongs neither to the Court, nor to Congress, but to the people themselves.

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<sup>159</sup> Kan 11 Network, *Special Interview with Aaron Barak, Former Chief Justice of the Supreme Court of Israel*, YOUTUBE (Feb. 11, 2023), <https://www.youtube.com/watch?v=XkyqODdZgAU> [<https://perma.cc/2EPG-8LU5>] (English translation).

<sup>160</sup> Abraham Lincoln, Address at the Dedication of the Gettysburg National Cemetery (Nov. 19, 1863), in 9 COMPLETE WORKS OF ABRAHAM LINCOLN 209, 210 (John G. Nicolay & John Hay eds., Francis D. Tandy Co. 1905) (1894).

<sup>161</sup> Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5, 9 (James D. Richardson ed., Washington 1898).

<sup>162</sup> Post & Siegel, *supra* note 1, at 45.