

UNDERUSE OF THE OVERRIDE

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1. Great Expectations

One of the most striking and innovative features of the so-called ‘Commonwealth model of constitutionalism’¹ was that it included a legislative power to override rights and counteract court rulings on what those rights require. Self-consciously departing from the American model of giving the courts ‘the last word’ on what rights require, Commonwealth countries found various ways of ‘decoupl[ing] judicial review from judicial supremacy by empowering the legislature to have the last word’.² This ‘de-coupling’ was achieved in various ways. In Canada, section 33 of the Canadian Charter of Rights and Freedoms empowers the Parliament of Canada and the Provincial legislatures to legislate ‘notwithstanding’ some of the rights guaranteed in the Charter, and notwithstanding a judicial determination that such rights have been violated. In the UK, section 19 of the Human Rights Act 1998 (HRA) allows Parliament to enact legislation notwithstanding its apparent incompatibility with rights.³ Moreover, the HRA deliberately withheld from courts the power to invalidate or strike down legislation which they found to violate rights. Instead, it gave courts the power to issue a legally non-binding ‘declaration of incompatibility’ which has no direct legal impact on the validity or effect of the legislation, and creates no legal obligation on the Westminster Parliament to change the law in light of the declaration.⁴

The idea of giving the legislature the power to override judicial rulings on rights generated great expectations amongst constitutional theorists the world over. After all, it seemed to provide a beguilingly simple solution to the perennial counter-majoritarian

¹ S Gardbaum, *The New Commonwealth Model of Constitutionalism* (CUP, 2013)

² S Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 *Am J Comp L* 707, 709; see also A Kavanagh, ‘A Hard Look at the Last Word’ (2015) 35 *Oxford J of Leg Studies* 825.

³ Section 19 HRA.

⁴ Section 4 HRA 1998; A Kavanagh, *Constitutional Review under the UK Human Rights act 1998* (CUP, 2009).

difficulty.⁵ Instead of giving judges a *veto* over democratic politics, the courts could act as a *checking-point*, performing ‘an interpretative, alerting and informative function’⁶ as part of an ongoing dialogue or disagreement with the legislature about what rights require.⁷ For this reason, the legislative override mechanisms in both countries were presented as a leading exemplar of ‘dialogic constitutionalism’⁸ and the distinctive lynchpin of the new Commonwealth model of constitutionalism.⁹ By combining judicial oversight with legislative override, we could give the courts the ‘constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word’.¹⁰ We could have our constitutional cake and eat it too.

But despite great expectations that the override offered a reconfigured set of constitutional dynamics which gave the legislature the last word, the most well-known fact about these override mechanisms is that they have hardly ever been used.¹¹ The Canadian notwithstanding clause has never been used by the Federal Parliament of Canada and it has only been used occasionally by a handful of provincial legislatures.¹² In recent years, the clause has been thrust back onto the political agenda as a live issue, after the Provincial Premiers in Ontario, Saskatchewan, Yukon and Quebec attempted – or at least proposed – to use the clause. But despite attracting controversy - or perhaps partly because of it - the only override to have materialised from these proposed invocations has been a controversial measure in Quebec to ban public workers in positions of authority (including teachers and lawyers) from wearing religious symbols.¹³ But Quebec has tended to be an outlier on the override from the outset.¹⁴ Even if we include Quebec, there have only been

⁵ Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’, 49 AM. J. COMP. L. 707, 744, 748 (2001). 748; Tushnet, above n. 9, 62, 52.

⁶ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013), 64, 68, 86.

⁷ Gardbaum, *ibid*; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1354 (2006), 1355.

⁸ Kent Roach, ‘Dialogic Judicial Review’, 63; Po-Jen Yap, ‘Defending Dialogue’ [2012] PL 527, 534; Dimitrios Kyritsis, *Where Our Protection Lies* (OUP, 2016), 104.

⁹ Gardbaum, n.11; Dimitrios Kyritsis, *Where Our Protection Lies* (OUP, 2016), 110-114.

¹⁰ Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, 63; MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008), ix; Gardbaum, NCM, 61; Tushnet, ‘New Forms of Judicial Review’, 831.

¹¹ Kavanagh, n 5, 825, 833.

¹² Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 221 (2002); Kahana, ‘The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of section 33 of the Charter’ 2008 *Canadian Public Administration* 64.

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¹⁴ Used as political protest against the terms of the new Canadian Constitution, see Hiebert

18 successful uses of the override in almost 4 decades, with Quebec accounting for 15 of those uses.¹⁵ Therefore, the general picture is that invocation of the override is a rare and exceptional event.¹⁶ Across Canada, there is still a 'deeply entrenched reticence to invoke the notwithstanding clause'.¹⁷

In the UK, a similar pattern of non-use or underuse has emerged. The UK Parliament has only invoked its section 19 power to legislate contrary to rights on two occasions since 1998; and on one of those occasions, the legislation was subsequently upheld by the courts as compliant with Convention rights.¹⁸ Moreover, despite the fact that the Westminster Parliament is under no legal obligation to comply with judicial declarations of incompatibility, there has been a near-perfect - if not perfect - rate of compliance with declarations across almost two decades.¹⁹ This high rate of compliance is all the more remarkable when we consider that Parliament benefits from the burden of inertia. By simply doing nothing and ignoring the declaration, Parliament can maintain the *status quo ante*.²⁰ Nonetheless, in almost every case in which a declaration of incompatibility has been issued - now 24 in total - the UK Government and Parliament have eventually introduced remedial measures to comply with the judicial declarations. Indeed, they have articulated an ongoing commitment to doing so.²¹ Despite great expectations of a new constitutional dawn, there has been a curious and conspicuous underuse of the override.

¹⁵ Saskatchewan; Doug Ford threatened to use it in Ontario, but ultimately refrained, see letter by 400 legal professionals and 80 Law Professors, Brenda Cossman (who argued for a rare rather than regular use of the override). Quebec.

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¹⁷ Hiebert, 'The Notwithstanding Clause: Why Non-use does not Necessarily Equate with Abiding by Judicial Norms', 695

¹⁸ Communications Bill 2002-3, H.C. Bill [6]; *R. (Animal Defenders International) v. Culture Secretary*, [2008] U.K.H.L. 15, ¶ 53 (Baroness Hale).

¹⁹ The only possible exception is prisoner voting, see Aileen Kavanagh, 'What's So Weak about Weak-Form Review? The Case of the UK Human Rights Act (2015) 13 ICON 1008, 1026-7.

²⁰ Adrian Vermeule, *The Atrophy of Constitutional Powers*, 3 OXFORD J. LEGAL SCI. 421, 442 (2012); Sathanapally, 24.

²¹ See Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2017-2018*, Cm 9728 November 2018, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756346/responding-human-rights-judgments-2017-18.pdf

This presents something of a puzzle for constitutional theorists and comparative law scholars alike.²² After all, if the perennial problem of US-style constitutional review is that the legislature is unjustifiably thwarted by the courts, surely we would expect legislators to escape the suffocating stranglehold of court rulings, especially when that power has been bestowed upon them in a Bill of Rights? Similarly, if the purpose of the override was to promote dialogue and disagreement between courts and legislatures, then why have Canadian and UK legislatures adopted a consistently compliant rather than conversational stance towards judicial rulings?²³ Whether one's constitutional vision of court-legislature relations rests on *combat* (where the branches battle for supremacy to get the 'the last word' on rights) or *conversation* (where the branches engage in an ongoing dialogue about the meaning of rights), the underuse of the override remains a mystery. So how do we solve it? The common narrative is that whilst the legislatures in both countries wanted to use the clause more frequently, they were prevented from doing so due to the exorbitant political costs of seeming to violate rights. Since overriding rights is both bad press and bad politics, the override was discredited and delegitimised, thus putting it off-limits as an effective mode of legislative dialogue and disagreement with court rulings on rights.

The aim of this chapter is to offer a novel solution to the underuse mystery which departs from the dominant narrative. Whilst accepting that the political costs are part of the story, I argue that they are not the whole story and not the most important part at that. Drawing on a deeper narrative about the need for the branches of government to forge constructive working relationships between them, I argue that the underuse of the override is an epiphenomenal expression of a set of unwritten but deeply-rooted constitutional norms requiring the branches of government to treat each other with comity and mutual respect – norms which preclude the legislature from regularly or lightly overriding court decisions merely because they disagree with them. Foregrounding the norms of comity, collaboration and conflict-avoidance, I conclude that legislatures *should* apply - and in

²² Jeffrey Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' (2003) 38 *Wake Forest L. Rev.* 451, 470; P Russell & P Howe, 'Editors' Note' in Howard Leeson, 'Section 33, The Notwithstanding Clause: A Paper Tiger?', 2000 6 *Choices: Courts and Legislatures*, IRPP, 2.

²³ Emmett MacFarlane, 'Dialogue or Compliance? Measuring Legislatures' Policy Responses to court Rulings on Rights' (2013) 34 *International Political Science Review* 51; Robert Leckey, *Bills of Rights in the Common Law*, 158-9.

Canada and the UK, *do* apply - a general presumption in favour of compliance with judicial decisions, unless that presumption is rebutted by exceptional or egregious circumstances.

The paper will proceed in the following way. Parts II and III put the Canadian and UK constitutional schemes in context, exploring the common narratives about the underuse of the override in their respective constitutional habitats. After examining the legislative history in both countries, Part IV reveals that far from being the source of its tragic demise, the political costs of using the override were hardwired into the design of these mechanisms precisely in order to ensure that the overrides would only be used in rare and exceptional circumstances. The political costs were a feature not a bug in the system. There was underuse by design rather than demonisation. Part V provides a normative defence of the rare use of the override, grounded in principles of the collaborative constitution. Contrary to the common belief that the override has failed and fallen into desuetude, my analysis suggests that a legislative reluctance to use the override may be a constitutional success story. Such reluctance shows that even though governments and legislatures have been given the power to override court rulings in Canada and the UK, they have generally accepted the constraints of constitutionalism within a collaborative framework.

Two terminological clarifications before I begin. First, I will use the word 'override' to refer both to the power of the Canadian and UK parliaments to legislate notwithstanding rights, as well as the power of the UK Parliament to legislate notwithstanding rights, or to override or ignore a declaration of incompatibility. Second, by using the phrase 'underuse of the override', I am not presuming that these powers have been used less than they should or that there is any culpable underuse at issue. Although many scholars decry and lament 'the underuse of the override', I am simply using this phrase in a neutral way to capture the fact that these override powers are rarely used, if ever. In fact, as the chapter unfolds, it will become clear that I believe it is normatively desirable for the override to be used rarely, reserved for suitably exceptional circumstances.

2. Canada in Context

Section 33 of the *Canadian Charter of Rights and Freedoms* provides that the Parliament of Canada or a provincial legislature ‘*may expressly declare* in an Act of Parliament or of the legislature ... that the Act or a provision thereof *shall operate notwithstanding* [certain specified Charter rights]’;²⁴ and that a legislative provision or statute subject to such a declaration ‘shall have such operation as it would have *but for* the provision of this Charter referred to in the declaration’.²⁵ Section 33 does not mention judicial decisions. Therefore, the wording seems to permit legislatures to derogate from the specified Charter rights regardless of whether there was been a judicial decision on the matter, but received wisdom is that it can also be used *pre-emptively* (in order to immunise legislation from subsequent judicial challenge) or *reactively* (in order to avoid or overcome the effects of a judicial decision).²⁶

Although the power to legislate notwithstanding rights is set out in fairly broad terms, section 33 nonetheless places significant limits on its exercise. First, there must an *express declaration* to override a particular Charter right; rights cannot be overridden covertly, implicitly or obliquely.²⁷ Second, the declaration must be contained within *an Act of Parliament* or the legislature. Therefore, a proposed override must garner majority support in Parliament as part of the legislative process. Third, the override is only allowed with respect to *some specified Charter rights*, not all. Thus, it is precluded for the right to democratic rights, mobility rights and language rights.²⁸ Finally, the override is subject to a *sunset and re-enactment clause*. If enacted, the override ceases to have effect five years

²⁴ Section 33 (1) (emphasis added). Section 2 protects freedom of conscience, freedom of expression, freedom of association, freedom of assembly and sections 7-15 protect the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest and detention, and the right to equality).

²⁵ Section 33 (2) (emphasis added)

²⁶ Gardbaum, book 110. Much controversy surrounds the issue of pre-emptive derogations, see Greschner and Norman, 188; Gardbaum, 110 (fn 54); Dodek, *Bete Noir*, 55-56; Tsvi Kahana, ‘Ignored Practice’, 277; Webber, Mendelsohn, Leckey, ‘The Faulty Received Wisdom around the notwithstanding clause’, *Policy Options* May 2019 A top civil servant involved in the federal/provincial negotiations leading up the Charter (Howard Leeson) noted that many who had agreed with the insertion of a non-obstante clause in 1981 had not anticipated that it would be used pre-emptively to ‘bullet-proof’ legislation, 15.

²⁷ Hogg, 881 5th edition 2007

²⁸ Under section 33(1), the notwithstanding clause only operates with reference to section 2 (, and sections 7-15 of the Charter.

after it comes into force,²⁹ whereupon Parliament may re-enact the override if it so wishes for a further five years.³⁰ By requiring review and renewal at five-year intervals, section 33 ensures that any derogation from the Charter requires repeated mobilisation of a political majority across different electoral cycles.³¹

Therefore, whilst section 33 gives Canadian legislatures the power to legislate notwithstanding rights, it is by no means a constitutional *carte blanche*. Instead, it is a limited power of restricted temporal and substantive scope, subject to all the publicity, transparency and justificatory requirements embedded in the legislative process.³² Tellingly, section 33 does not speak in strident terms of legislatures ‘overriding’ rights or disregarding court rulings. Instead, it relies on more reserved and conditional phrasing which acknowledges that legislatures ‘may’ proceed with legislation ‘notwithstanding’ some of the rights otherwise entrenched in the Charter, subject to specified conditions and constraints. As the general heading to section 33 clarifies, it provides an ‘exception’ to the general norm of Charter compliance, where there is an ‘express declaration’ to do so.³³ The Charter seeks to uphold rights, whilst nonetheless providing for a limited legislative derogation from some rights in specified circumstances.³⁴

Section 33 began life as part of an eleventh-hour compromise to get agreement between the federal government and the provincial leaders on what became the Canadian Charter.³⁵ Some provincial leaders feared that judicial decisions under the Charter would unduly constrict their ability to protect deeply-held social values and institutions in their province.

²⁹ Section 33 (3)

³⁰ Section 33 (4).

³¹ Goldsworthy, n 21, 468; Leeson, n 21, 19; Newman, 223.

³² Some of these limits operate as ‘manner-and-form’ conditions on legislation which derogates from the Charter Kyritsis, book, 110; Vanessa MacDonald, ‘The New Parliamentary Sovereignty’, 25.

³³ The heading to section 33 reads ‘Exception where express declaration’; see also Adam Dodek, *bete noir*, 48-49; Leckey, ‘Notwithstanding piece’, 3-6 (arguing that the override allows for an exceptional derogation from Charter rights, but is not a ‘nuclear privative clause’).

³⁴ For this reason, it is apt to describe section 33 as a ‘derogation clause’ (Leckey, book) or a ‘nevertheless clause’ (Gardbaum); Lorraine Weinrib, *The Canadian Charter’s Override Clause*, 74.

³⁵ For an insider’s view of the role of the notwithstanding clause in the Charter negotiations, see Peter Loughheed, ‘Why a Notwithstanding Clause?’ 1998, Library and Archives Canada, available at <https://www.bac-lac.gc.ca/eng/discover/politics-government/building-just-society/Pages/honourable-peter-loughheed.aspx> (last accessed September 18th 2019); Leeson, paper tiger 3; see also Hiebert, ‘The Notwithstanding Clause: Why Non-use does not necessarily equate with Abiding by Judicial Norms’, in Oliver, Macklem & Des Rosiers (eds) *The Oxford Handbook of the Canadian Constitution*; Vanessa MacDonald, ‘The New Parliamentary Sovereignty’ 25; Weinrib, ‘Learning to Live with the Override’, 554.

Therefore, they sought some reassurance that democratic legislatures would have some meaningful input into the constitutional debate about 'which rights are fundamental in Canadian society and which should prevail when rights are in conflict'.³⁶ Whilst they accepted that rights should be entrenched in the Charter, they wanted to ensure that the legislature would retain the political capacity to disagree with the courts and have 'the last word' on particularly contentious issues.³⁷ Drawing on the historical precedents of the notwithstanding clause in the *Canadian Bill of Rights 1960* and similar provisions in other Provincial Bills of Rights,³⁸ they argued that the Charter should include a legislative power 'to override a court decision which might affect the basic social institutions of a province or region'.³⁹ In order to reconcile entrenched rights with Canadian traditions of parliamentary democracy, they supported 'the constitutionalisation of rights, subject to a final political judgment in certain instances, rather than a final judicial determination as to the extent of all rights'.⁴⁰

Whilst the Canadian notwithstanding clause eventually basked in the glow of international admiration as an ingenious solution to the notorious counter-majoritarian difficulty,⁴¹ it received decidedly mixed reviews in its early days on the Canadian constitutional scene.⁴² Critics of the clause castigated it as an alien graft onto an otherwise rights-respecting document which was fundamentally inconsistent with the Charter's commitment to entrenching rights.⁴³ The then Prime Minister - Pierre Trudeau - believed

³⁶ Wayne McCulloch, cited in David Johansen & Philip Rosen, 'The Notwithstanding Clause of the Charter', *Background Paper, Library of Parliament*, 16 October 2008, revised 17 May 2012, Law and Government Division, Parliamentary Information and Research Service, 5; Alan Blakeney, 'The Notwithstanding Clause, the Charter and Canada's Patriated Constitution: What I Thought we Were Doing' 2010 (19) *Constitutional Forum constitutionnel* 1-9.

³⁷ Lougheed, 'Why a Notwithstanding Clause' in Centre for Constitutional Studies Points of View, No. 6, 14; Newman, 221 Dwight Newman, 215; Blakeney, 'Judges: Canada's New Aristocracy – An Interview with Alan Blakeney' 2006 18 *Inroads* 31-32; Hiebert, *Compromise in Contested Constitutionalism* 113, 116.

³⁸ Canadian Bill of Rights 1960; Saskatchewan Human Rights Code, s.44, the Alberta Bill of Rights 2000, s.2 and the Quebec Charter of Human Rights and Freedoms, s.52. For an analysis of these historical precursors, see Leeson, 5-6; see Johansen & Rosen, n 32, 2.

³⁹ Particularly the Premier of Saskatchewan and Blakeney, In Johansen, n 32; Roger Tasse, 'Application of the Canadian Charter of Rights and Freedoms' in *The Canadian Charter of Rights and freedoms* 105 (Gerald Beaudoin & Ed Ratushny eds), 2nd ed. 1989; Dwight Newman, 'Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities'; Janet Hiebert, 'The Evolution of the Limitation Clause' (1990) 28 *Osgoode Hall LJ* 103, 105-6.

⁴⁰ Lougheed, 203, cited by Newman, 218.

⁴¹ Gardbaum; Tushnet

⁴² Paul Weiler, 'Rights and Judges in a Democracy', 92.

⁴³ Vanessa MacDonald, 'The New Parliamentary Sovereignty', 25.

that it was deeply wrong to allow governments to suspend any part of the Charter, and only reluctantly agreed to section 33 on condition that it contained a sunset clause.⁴⁴ The worry was that section 33 gave legislatures an illegitimate opt-out clause to trample over rights whenever that was deemed politically convenient.⁴⁵ The fact that the override was viewed as the product of a ‘grubby late-night deal’⁴⁶ struck in the ‘the raw politics’⁴⁷ of constitutional negotiation behind closed doors, tainted its reputation from the outset, casting it as an illegitimate child born into a family of noble rights-provisions, all of which could claim much higher breeding.

But the fears of those who worried that the override would undermine the Charter were not borne out in practice. Mirroring the pattern of non-use of its historical precursor in the 1960 Canadian Bill of Rights,⁴⁸ the clause was never invoked by the Parliament of Canada and only rarely in the Provinces. Whilst the notwithstanding clause has hit the headlines in recent times because a number of Provincial Premiers (in Ontario, Saskatchewan, Yukon and Quebec have threatened to use the clause, only the one in Quebec - accompanying the notorious Bill 21 – has become valid. The others never materialised, either because the override was no longer necessary,⁴⁹ or because of widespread public outcry and strident political pushback.⁵⁰ Even factoring in the recent invocations, the notwithstanding clause has only been used 19 times at Provincial level, the vast majority of which occurred in Quebec.⁵¹ Seventeen out of the nineteen overrides have been *pre-emptive* rather than *reactive* i.e. they have been used to derogate from a protected right and/or immunise Charter provisions prophylactically from future judicial

⁴⁴ For an overview of the origins of section 33 and the various Ministerial meetings which preceded its agreement, see Johansen and Rosen, n 32, 2-6; Hiebert, ‘Compromise ...’, 4.

⁴⁵ Richard Hatfield, Premier of New Brunswick, Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 Nov 1981, p. 114, cited in Johansen, n 32, 4.

⁴⁶ Andrew Coyne, ‘Notwithstanding Clause is a bottle labelled ‘drink me’ that cheapens the Charter’, May 3 2017 *National Post*,

⁴⁷ Hiebert, ‘Compromise’; Leeson, n 21, 3; Dodek, *Bete Noir*, 53, 57-58.

⁴⁸ The non-obstante clause was used once in controversial circumstances, see Dodek, *Bete Noir*, 51, fn 29.

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⁵⁰ See eg Alberta; Ontario, Canadian Bar Association decrying use in Quebec; letter decrying threatened use in Ontario.

⁵¹ fifteen times in Quebec, twice in Saskatchewan and once each in Yukon and Alberta (though the latter two instances never became effective).

challenge, rather than as a way of overriding a pre-existing judicial ruling.⁵² Therefore, Provincial use of the override is still rare. If we bracket Quebec, it is rarer still.

So what explains the underuse of the override in the Canadian context? Four key reasons are commonly advanced. The first is the *path dependence argument*. Just nine weeks after the Charter was proclaimed, the Quebec legislature used the notwithstanding clause in an omnibus fashion to encompass all statutes enacted in Quebec and even to immunise future statutes from constitutional review.⁵³ Since Quebec was the sole province not to have signed up to the Constitutional Act 1982, its omnibus use of the override was widely regarded as a form of political protest against the Charter project as a whole.⁵⁴ Be that as it may, Quebec's 'sweeping and indiscriminate use of the clause'⁵⁵ during its delicate incubation period, discredited the override as a constitutional device, shrouding it in a seemingly permanent aura of illegitimacy.⁵⁶ As the Canadian political scientist, Christopher Manfredi, put it: 'Canadians experienced a use of the notwithstanding clause that they found outrageous before they experienced a Supreme Court decision of equivalent political unpopularity'.⁵⁷ Therefore, many commentators claim that this historical contingency set Canada on a path towards underuse of the override from which there was no going back.⁵⁸

The second reason is the familiar *political costs argument*.⁵⁹ This is the claim that although the Canadian Parliament and provincial legislatures wished to use the override, they were effectively disabled from doing so by the enormous political costs of doing so.⁶⁰ Since Charter rights are highly prized in Canadian political culture, a political attempt to

⁵² Saskatchewan

⁵³ See further Tushnet, n 9, 55ff; Library of Canada, 2018 pp. 6-8; David Snow, 'Notwithstanding the Override: Path Dependence, Section 33, and the Charter' (2008-9) 8 *Innovations: A Journal of Politics* 1.

⁵⁴ Hiebert, 'The Notwithstanding Clause: Why Non-Use', 698-699

⁵⁵ Goldsworthy, n 21, 468.

⁵⁶ Goldsworthy, n 21, 465; Tushnet, n 9, 52; Christine Bateup, 'Expanding the Conversation', 8; Dodek, 59.

⁵⁷ Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (OUP, 2nd edition, 2011) 204, 194; Tushnet, n 9, 59; Newman, 224.

⁵⁸ See further Tushnet, n 9, 55ff; David Snow, 'Notwithstanding the Override', 1; Goldsworthy, 469; Tushnet, policy distortion, 277, 296; Gardbaum, book 110. For a sophisticated discussion of the nature and dynamics of path-dependence arguments, see Richard Albert, 'Advisory Review: The Reincarnation of the Notwithstanding Clause' (2007-8) 45 *Alberta Law Review* 1037, 1042-43.

⁵⁹ Paul Weiler, 'Rights and Judges in a Democracy', 82; Gardbaum, n 11, 90, 110, 201, 239; Tushnet, Policy Distortion, 296, 284; Goldsworthy, n 21, 467; Kavanagh, n 5, 837-8.

⁶⁰ Goldsworthy, n 21; Huscroft, 'Rationalising Judicial Power', 56.

override them would inevitably cast politicians in the role of ‘human rights transgressors’⁶¹ and Charter deniers, determined to ride roughshod over the rule of law.⁶² These political costs are further compounded by the fact that judges are highly respected within Canadian constitutional culture and are perceived to be the ultimate custodians of Charter rights.⁶³ All told, Canadian politicians are acutely aware that they will suffer significant popular and political pushback if they attempt to override rights for a judicial decision interpreting those rights.⁶⁴

The third reason is the *textual constraints* argument. This is the claim that the various restrictions on the exercise of the override in section 33 increased the political costs of using it, thus rendering it effectively impossible to use.⁶⁵ The sunset and re-enactment clause may operate as a particularly strong disincentive in this regard, because even if a government manages to mobilise sufficient political support to use it once, this is only a ‘temporary stop-gap’⁶⁶ which requires the expenditure of further political capital five years down the line.⁶⁷ Another variant of this claim about textual constraints is the suggestion made by leading Canadian and comparative constitutional scholars, that the wording of section 33 deters legislatures from using it, because it creates the false impression that legislatures wish to violate or deny rights altogether, whereas in fact they simply want to offer a different conception of rights than that proposed by the judiciary.⁶⁸ But this impression is typically false to the facts, some scholars suggest, because legislatures may simply want to offer a different conception of rights from those proposed by the judiciary.⁶⁹ As Jeremy Waldron put it, the notwithstanding clause misrepresents the legislature as

⁶¹ Michael Mandel, *The Charter of Rights and the Legalisation of Politics in Canada*, (1989) 76; Duxbury, disapproval.

⁶² Goldsworthy describes this perception as ‘politically lethal’, n 21, 467

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⁶⁴ Manfredi, n 48, 189; Tushnet, n 9, 48; Hiebert, ‘New Constitutional Ideas’; Leeson, n 21, 18-19; Goldsworthy, n 21, 455-6, 467; Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 52 U. TORONTO L.J. 89 (2002) 89; Goldsworthy, n 21, 470; Waldron, ‘Some Models of Dialogue Between Judges and Legislators’, in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Ontario: Butterworths, 2004), 9, 36-7

⁶⁵ Greschner and Norman, 163; Kahana, ‘Understanding’ n 16, 222; Tushnet, n 54, 289; Cameron, ‘Feat or Fignment’, 142; Tushnet, n 9, 56

⁶⁶ Leeson, 20.

⁶⁷ Gardbaum, 110; Howard Leeson, 20

⁶⁸ Waldron, ‘Some Models of Dialogue Between Judges and Legislators’, in Grant Huscroft & Ian Brodie, eds, *Constitutionalism in the Charter Era* (Ontario: Butterworths, 2004), 9, 34-7; Gardbaum, 124; Goldsworthy; Knopff and Morton, *Charter Politics*, 231; Huscroft, ‘Rationalising’ in *Contested Constitutionalism*, 56; Manfredi, *Judicial Power and the Charter*, 2nd edition, 191-3;

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having (disreputable) 'rights misgivings', instead of being engaged in (reasonable) 'rights disagreements' with courts.⁷⁰ Naturally, legislators will be reluctant to use a clause which paints them in a negative light and misrepresents their true position.⁷¹

The fourth reason for the underuse of the override can be labelled the *less drastic measures* argument. In Canadian constitutional discourse, the override is often characterised in drastic terms as a 'nuclear bomb',⁷² a 'sledgehammer'⁷³ or as a 'dagger pointed at the heart of our fundamental freedoms'.⁷⁴ In this context, using the clause can seem like 'radical overkill'⁷⁵ and it is hardly surprising that politicians will seek out less confrontational and dramatic ways of achieving the same or similar effect.⁷⁶ Why use a sledgehammer when you have more subtle and tailored tools to do the work? The most obvious option is trying to justify a rights-limitation under section 1 of the Charter.⁷⁷ Another is simply enacting a law which implements the court ruling in a minimal way.⁷⁸ These more subtle approaches enable the government and legislature to achieve its policy objectives to some degree, whilst avoiding the popular outcry and political costs involved to seeking to override a court ruling outright. The availability – and utility - of these less drastic measures leads to an underuse of the override.

3. Reconciling Rights and Democracy UK-Style

When the Human Rights Act 1998 was being enacted, the central concern across the political spectrum was to find a way of allowing judges to enforce human rights whilst

⁷⁰ Waldron, 36 (describing this as 'the characteristic standoff between courts and legislature on individual rights').

⁷¹ Waldron, 36-37

⁷² Leeson, paper tiger, 19; David Snow, 10; Richard McAdam, the constitutional taboo, 3.

⁷³ Vanessa MacDonald, new ps, 27; Prime Minister Paul Martin described it as 'a hammer that can only be used to pound away at the Charter and claw back any one of a number of rights', January 2006 Leaders' Debate, cited in Axworthy, 1; Kent Roach, 'Is Brad Wall really defending school choice with his use of the Notwithstanding clause?' May 2nd 2017, Globe and Mail.

⁷⁴ Eugene Forsey cited in Thomas Axworthy, 'The Notwithstanding Clause: Sword of Damocles or Paper Tiger?', Policy Options, 3.

⁷⁵ Howard Leeson, paper tiger, 19

⁷⁶ For a stylised analysis of the tendency amongst political actors to use lower-cost over high-cost powers, see Vermeule, Atrophy, 432-433.

⁷⁷ Kent Roach

⁷⁸ Jamie Cameron argues that it is 'easier for legislatures to fix the statute than to override the court's decision', 163.

preserving parliamentary sovereignty.⁷⁹ Previous attempts to incorporate Convention rights into UK law had foundered on a deep-seated aversion to the idea of allowing judges to strike down legislation enacted by Parliament.⁸⁰ Such a power was perceived to be ‘anathema to the political and legal culture of the United Kingdom under which ultimate sovereignty rests with Parliament’.⁸¹ Therefore, all the key political actors knew that a Bill of Rights which included a strike-down power would never get enacted. The Canadian solution of including a judicial strike-down whilst offsetting it with a legislative override provision was considered but ultimately rejected, because the combination of rights-entrenchment and judicial invalidation was perceived to violate the fundamental doctrine of parliamentary sovereignty which was ‘so uncompromisingly embedded in [the British] political and legal culture’.⁸² The central challenge facing the political architects of the HRA, therefore, was to devise a scheme which would give the courts ‘as much space as possible to protect rights, short of a power to set aside or ignore Acts of Parliament’.⁸³

The solution to this conundrum was a carefully crafted legislative scheme which included two crucial components designed to shore up parliamentary sovereignty. The first was the legally non-binding declaration of incompatibility under section 4; the second was the statement of compatibility (or, crucially, *incompatibility*) under section 19. On a surface reading, both provisions seem to leave the UK government and Parliament entirely free to legislate contrary to Convention rights and contrary to court rulings on what those rights require. Indeed, they seem specifically designed to do so. So what explains the consistent practice of compliance with such rulings, and compliance with the requirements of the HRA more generally? Two key reasons are typically advanced.

The first reason is rooted in the vitally important *Strasbourg dimension* of the HRA which works as follows. If the UK government and Parliament decide to ignore or override a declaration of incompatibility by the UK Supreme Court, then the aggrieved litigant can then

⁷⁹ Lord Irvine, HL Debs, 582, col. 1229 (nov 3 1997); Klug, deference 125; Klug, BOR, 703; Kavanagh, book, 5, 310-313; Leigh and Lustgarten, 336; Leigh and Masterman, *Making Rights Real* (2009 Hart Publishing) 18.

⁸⁰ Lester, Magnetism, 58; Ewing and Gearty, Society of Labour lawyers, 4; Klug, long road, 198; Klug, BOR, 709

⁸¹ Lord Irvine, British solutions to Universal Problems, 44; Feldman, HRA and constitutional principles, 169; Straw, Last man standing, 272; Conor Gearty, *Fantasy Island*, 67 (there was ‘no appetite for an Americanisation of the British system’); Chandrachud, *Balanced Constitutionalism: Courts and Legislatures in Indian and the United Kingdom*, xxxvii.

⁸² Lord Irvine, ‘Britain’s programme for change’; White Paper *Rights Brought Home*, 2.11; Kavanagh, n 7, 4; Feldman, ‘Constitutional Principles’, 168-9.

⁸³ Lord Irvine, speech, *Legislation for Human Rights*, 9; Leigh and Lustgarten, ‘Making Rights Real’, 536.

take their case to Strasbourg, armed with a considered declaration by the UK Supreme Court that domestic legislation violates their rights.⁸⁴ In this situation, the Strasbourg court is highly likely to find in the litigant's favour and will then hand down a ruling that the UK is in violation of its international law obligations under the European Convention.⁸⁵ Not only is an adverse ruling from Strasbourg politically embarrassing for the UK for reputational reasons,⁸⁶ it also triggers an international law obligation on the UK to remedy the rights-violation. Therefore, Governments are well aware that little will be achieved – and a good deal may be lost – by not amending the incompatible legislation' once the declaration is issued.⁸⁷ In sum, given the rhetorical force of a domestic judicial ruling that legislation violates human rights, combined with the political and legal repercussions at the international level, Parliament is placed under enormous political pressure to amend statutes to accommodate the judicial ruling.⁸⁸ This helps to explain why compliance rather than defiance of declarations of incompatibility is the norm within the UK system.

The second reason is the familiar *argument from political costs*. As in Canada, many UK-based scholars argue that the legislative freedom enact laws notwithstanding rights or to disregard declarations, was effectively negated by the political costs of using that power. They suggest that reverence for rights and esteem for the courts made it 'not only politically difficult but also constitutionally questionable for Parliament to reject a particular interpretation or even question courts' interpretive method'.⁸⁹ Therefore, although the Westminster Parliament was and is legally free to disagree with courts, in reality it was forced to adopt a 'compliance oriented mentality'⁹⁰ - capitulating to a dominant judiciary rather than questioning or challenging their rulings. Instead of creating a 'culture of controversy'⁹¹ between legislatures and courts, the political dynamics surrounding the HRA created a lamentable 'culture of compliance'.⁹²

⁸⁴ Kavanagh, n 7.

⁸⁵ Kavanagh, n 7

⁸⁶ Jack Straw and Boateng, 74.

⁸⁷ Elliott, 2002, 348; Kavanagh, n 7, 284.

⁸⁸ For analysis of the Strasbourg dimension as a 'fundamental aspect' of the HRA, see Ekins and Sales, 229-30; Kavanagh, CR, 285; Leckey, 47-48.

⁸⁹ Campbell, Incorporation, 87; Sathanapally, n 8, 72.

⁹⁰ Tushnet, n 54, 248; Janet Hiebert & James Kelly, *Parliamentary Bills of Rights* (CUP, 2015), 9

⁹¹ Campbell

⁹² Campbell, 'culture of controversy'

4. Underuse by Design

Though there are many and varied reasons for the underuse of the override in both countries, they converge on a common theme, namely, that the override was thwarted by various political costs, contingencies and cultural constraints which prevented legislatures from using it to get ‘the last word’ on rights. The suggestion is that the override failed to realise its full potential as a mode of inter-institutional dialogue and disagreement, because it was subtly subverted by a set of political dynamics which rendered it ‘politically impotent’.⁹³ Since the override was embedded in a culture of judicial supremacy and reverence for rights, the legislative override became delegitimised and, therefore, fell into desuetude.⁹⁴ The constitutional culture and the political dynamics conspired to undermine the override.

Once this diagnosis of demise and desuetude is accepted, a natural cure presents itself. In order to forestall the failure of the override and rescue it from a dismal descent into desuetude, scholars have tried to find ways of lowering the political costs and changing those aspects of the constitutional culture which have combined to thwart the override. Thus, the scholarly landscape on the override is strewn with normative claims that we should ‘reframe’⁹⁵ popular conceptions of the override in order to highlight its legitimacy as a mode of legislative disagreement with courts. We should ‘rethink’,⁹⁶ ‘reconstruct’,⁹⁷ and ‘reconfigure’⁹⁸ the role of the legislature in order to ‘reincarnate’,⁹⁹ ‘rehabilitate’¹⁰⁰ and

⁹³ Fergal Davis Grant Huscroft Fergal Davis; Gregoire Webber;

⁹⁴ Taboo – David Snow

⁹⁵ Gardbaum, 124

⁹⁶ Kahana, ‘Understanding the Notwithstanding Clause’, 274 (arguing that we should rethink both the legislature’s and the court’s role in relation to the notwithstanding clause).

⁹⁷ Kavanagh, A Hard Look at the Last word, 836.

⁹⁸ Jeff King argues that many scholars who advocate ‘dialogic’ or weak-form review bid for a ‘reconfigured understanding’ of the relationship between the branches of government, see King, ‘Dialogue, Finality, Legality’ (Sigalet, Dixon and Webber (eds) *Constitutional Dialogue*), 201.

⁹⁹ Richard Albert, n 49.

¹⁰⁰ Hiebert, ‘Is it too late to Rehabilitate the Notwithstanding Clause?’; Waldron, Goldsworthy, Gardbaum, ‘norm of regular use’ Jeff King, ‘Rights and the Rule of Law in Third Way Constitutionalism’ (2015) 30 *Constitutional Commentary* 10, Klug, ‘Deference’, 131.

‘reinvigorate’¹⁰¹ a flourishing legislative practice of overriding court rulings on rights.¹⁰² Issuing a clarion call to Parliament to defy the courts and ‘assert its own supremacy’¹⁰³ on rights, some scholars argue that a practice of regular override of court rulings would ‘reaffirm the “genius” of the HRA’¹⁰⁴ and realise the true potential of dialogue under the Canadian Charter.¹⁰⁵

But this narrative of thwarted potential and unrealised promise is deeply problematic. For one thing, it is not clear that the political costs of using the override are as severe or unequivocal as the argument assumes. In the UK, popular buy-in to the HRA is virtually non-existent and leading political elites have often aligned with the tabloid press to portray HRA as a ‘villain’s charter’.¹⁰⁶ Indeed, Conservative politicians may garner significant electoral and political plaudits from a tough-talking commitment to ‘scrap’¹⁰⁷ the HRA altogether and they seemed to suffer no electoral costs from digging their heels in to resist a court ruling requiring them to give prisoners the right to vote.¹⁰⁸ In this political context, the argument that the government and Parliament is political hamstrung from defying court rulings on the rights of sex offenders, terrorist suspects or prisoners, seems tenuous at best.¹⁰⁹ Of course, the political and constitutional dynamics in Canada are different, given that Canadians have generally embraced the Charter as a key element of Canadian self-identity and a symbolic focal point which orients political discourse.¹¹⁰ In this context, where popular support both for the courts and the Charter runs high, it seems clear that the political costs of using the Canadian notwithstanding clause are typically formidable.¹¹¹ However, even in Canada, leading commentators suggest that this commitment could vary from issue to issue, time to

¹⁰¹ Fergal Davis, ‘Parliamentary Supremacy and the Re-invigoration of Institutional Dialogue in the UK’ (2014) 67 *Parliamentary Affairs* 137-150; Fergal Davis, ‘The Human Rights Act and Juridification: Saving Democracy from Law’ 2010 30 *Politics* 91, 93, 96; Dwight Newman, 234.

¹⁰² Adrian Vermeule recommends this strategy generally as a way of countering constitutional atrophy, see Vermeule,

¹⁰³ Davis, ‘Re-Invigoration’, n 89, 145.

¹⁰⁴ Fergal Davis, *Juridification*, 93, 96; Klug, ;

¹⁰⁵ Webber, *dialogue*,

¹⁰⁶ Lieve Gies, ‘A Villain’s Charter? The Press and the Human Rights Act’ (2011) *Crime, Media & Culture: An International Journal*

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¹⁰⁸ Kavanagh, *WF Review*, 1026.

¹⁰⁹ For an astute analysis of this political move and the associated commitment to bringing in a British Bill of Rights, see Klug, *do we have one? Do we need one?*

¹¹⁰ Peter Russell observes that the popularity of the Canadian Charter is clear in ‘poll after poll’, ‘The Charter and Canadian Democracy’, 293.

¹¹¹ Weinrib, ‘The Canadian Charter’s Override Clause’, 79-80

time and Province to Province, such that public opinion could well go against a court ruling on a particularly contentious and sensitive issue.¹¹² Thus, whilst political costs may give us vital clues to the underuse of the override in some contexts, it does not solve the mystery of the 'underuse of the override' in a satisfactory way. The case is not closed.

But there is a deeper problem with the narrative of thwarted potential and unrealised promise. This is that it rests on the assumption that the override was intended to realise the promise these scholars impute to it, namely, that of facilitating ongoing dialogue and disagreement between legislatures and courts in circumstances where they disagree.¹¹³ However, when we look at the legislative history of the override mechanisms in both countries, it seems as if these assumptions were not shared by the political architects of these override mechanisms either in Canada or the UK.¹¹⁴ In Canada, the key political actors who brokered the compromise on the Charter typically presented the override as 'a safety valve to correct absurd situations'¹¹⁵ only to be used in the 'unlikely event of a decision of the courts that is clearly contrary to the public interest'.¹¹⁶ Rather than viewing it as a vehicle for ongoing dialogue and routine legislative second-guessing of judicial decisions, the key political architects conceived it more narrowly as a mechanism for judicial error-correction *in extremis* to counteract 'absurd decisions'¹¹⁷ or as an exceptional way of resolving intractable disagreements about what rights require in a democracy. Like a safety valve in a boiler, the override was designed to diffuse tension in a potentially explosive situation, thus keeping the boiler functioning in the longer term.

¹¹² Howard Leeson argues that the evidence in terms of political costs in Canada is mixed and that the general aversion to the override could be overcome on particularly contentious issues, 18; see also Hogg, Thornton, Wright, 'A Reply on "Charter Dialogue Revisited" (2007), 201; Peter Russell, 'The Charter and Canadian Democracy', 293 (arguing that there would have been strong public support for using the notwithstanding clause to preserve Canada's public medical insurance plan); Gardbaum, 121; Manfredi, 2nd edition, 204-5, 210; Dodek, 61, 65. Bill 21 is very popular in Quebec, see xxx.

¹¹³ Gardbaum 125, 127; Newman, 212-213

¹¹⁴ Jeff King makes this point in *Rights Third Way*

¹¹⁵ Jean Chretien, then Minister of Justice, House of Commons, Canada, Legislative Debates (Nov. 20 1981); see further Catherine Fraser, 'Constitutional Dialogues Between Courts and Legislatures: Can we Talk?' (2005) 14 *Forum Constitutionnel* 7, 10, 13-14; Bateup, *Expanding the Conversation*, 2; Cited in Johansen 5

¹¹⁶ Honourable Roy McMurtry, 'The Search for a Constitutional Accord – A Personal Memoire' (1982) 8 *Queens' Law Journal* 28, 65 (who was Attorney General for Ontario at the time of the Accord); Johansen, *The legislative history surrounding the notwithstanding clause is well documented in johanesen*; see further Kahana, n 16, 227; Cameron, 149; Bateup, *Brooklyn*, 1147; Russell, *Standing up for*, 295; Kahana, *Understanding*, 223; Morton, *the political impact*, 54; Russell, 'The Charter and Canadian Democracy', 292 (describing section 33 as providing 'a democratic safety valve').

¹¹⁷ Minister for Justice, Gibson, 125; Tasse, *Application*, 102-3; Tushnet, *book*, 279.

Once it was apparent that the notwithstanding clause would be included in the Charter, the crux of the political negotiations turned to placing adequate safeguards and constraints on its use, so that it could not be used lightly, hastily, covertly or without due legislative deliberation.¹¹⁸ The requirement of having an express declaration in an Act of Parliament was designed to ensure that any proposed override would be subject to the full glare of political, parliamentary, media and public attention.¹¹⁹ The sunset and re-enactment clause was inserted precisely to dis-incentivise its use *ex ante*, as well as limiting its effects *ex post*.¹²⁰ All told, whilst section 33 gave life to the notwithstanding clause, it did so in a way which deliberately ratcheted up the political costs of using it, whilst reducing the potential political gains.¹²¹ The aim was not to enable legislatures to reject and override judicial decisions whenever they disagreed with them,¹²² but rather to facilitate a limited derogation from the Charter in circumstances of deep and intractable disagreement where no other solution could be found. Rather than being ‘a bottle labelled “Drink me” that cheapens the Charter’,¹²³ the override was more like a bottle bearing a large health warning saying ‘This drink may endanger the long-term health of the constitutional system. Only drink me if you have no other option and be mindful of negative side-effects.’ It may have given the legislature the last word, but it was a last word as last resort.

A similar picture emerges when we examine the legislative history of the HRA. Although the declaration of incompatibility created no immediate legal obligation to comply with it, the White Paper preceding the Act announced the government’s firm expectation that a declaration would ‘*almost certainly prompt* the Government and Parliament to change the law’.¹²⁴ Similarly, when the Human Rights Bill was being debated in Parliament, Government Ministers acknowledged that there might be a rare case ‘of great controversy’¹²⁵ where Parliament might not wish to accept a declaration of incompatibility.

¹¹⁸ Leeson, 10; Axworthy, 5; Hiebert, Rehabilitate, 171; Honourable Rory McMurtry, ‘The Search for a Constitutional Accord – A Personal Memoir’ (1982) 8 *Queens’ Law Journal* 28, 65 (who was Attorney General for Ontario at the time of the constitutional accord); Blakeney; Russell, Standing up for, 295; Bastarache, 2.

¹¹⁹ Greschner and Norman, 163; Tsvi Kahana, n 16, 222

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¹²¹ Tushnet, n 9.

¹²² Johansen, 5-6; King.

¹²³

¹²⁴ White Paper 2.10; Irvine book, 12 (using almost identical language to the White Paper).

¹²⁵ 307 HC 1301 (instancing the hypothetical and fairly far-fetched possibility of the courts declaring the UK’s abortion regime to be incompatible with the Convention); MRR, 113

But the emphasis was on the rarity of this eventuality. As Jack Straw MP, the key ‘midwife’¹²⁶ of the Human Rights Bill in the House of Commons, put it:

*In the overwhelming majority of cases, regardless of which party was in government, I think that Ministers would examine the matter and say ‘A declaration of incompatibility has been made and we shall have to accept it. We shall therefore have to remedy the defect in the law spotted by the Judicial Committee of the House of Lords.’*¹²⁷

The use of obligatory language is telling. Why would such an obligation arise? One reason to posit an obligation rather than a simply option to comply is that whilst the declaration of incompatibility is not in itself legally or formally binding, it operates as ‘a municipal alert of non-compliance with international law’.¹²⁸ Therefore, it is not only a declaratory statement about the legal position in the United Kingdom. Instead, it provides ‘a clear signal to Government and Parliament that a provision does not confirm to the standards of the Convention’.¹²⁹ If the Government fails to implement the declaration, an aggrieved litigant could take their case to Strasbourg and most likely win against the Government. In a classic use of British understatement, we may say that a declaration of incompatibility provides ‘a healthy incentive to the government to take speedy remedial action, rather than face the likelihood of eventual defeat before the European Court’.¹³⁰ By connecting the domestic declaration to the international law obligation to comply with the Convention and the Strasbourg enforcement machinery, the drafters sought to encourage a regular practice of compliance with declarations of incompatibility.¹³¹ Indeed, they facilitated such a practice by providing for a fast-track amendment procedure under section 10 HRA, which allowed the Executive to amend the law swiftly by Remedial Order following a declaration of incompatibility.¹³²

¹²⁶ Jack Straw, *Last Man Standing*, .

¹²⁷ 317 HC 1301 (October 21, 1998); cited in Klug, pepper, 264

¹²⁸ Sathanapally, 135; Jack Straw, ‘clear signal to gov and Parliament that, in the court’s view, a provision of legislation does not conform to the standards of the Convention’ 65 *legislation*, col 780; King, response, 184

¹²⁹ Jack straw, *legislation* 65

¹³⁰ Lester, *Magnetism*, 67; Straw, HC, 6 *Legislating*; *Legislating*, 148, 65; White Paper 2.17

¹³¹ Chandrachud, 635.

¹³² Section 10 HRA.

Second, although section 19 HRA allows the UK government to propose legislation which violates rights, the expectation was also that such statements would also be a rare rather than regular occurrence. The White Paper stressed that whilst a statement of incompatibility was possible, it was '*obviously ... incumbent on Ministers ... to do their best to ensure that bills are compatible with the Convention*'¹³³ and that '*Ministers will obviously want to make a positive statement whenever possible*'.¹³⁴ The rationale of requiring governments to make a statement in incompatibility '*openly, in the full glare of parliamentary and public opinion*',¹³⁵ was to ensure that they would think hard – and ultimately refrain – from going down this politically costly route unless there was no other option.¹³⁶ Thus, whilst the HRA retained '*Parliament's legal right to enact legislation which is incompatible with the Convention, it dramatically reduce[d] its political capacity to do so.*'¹³⁷ Rather than giving politicians a carte blanche to disregard rights, section 19 galvanised the power of publicity and various mechanisms of political accountability to force Ministers '*to stand up and be counted for human rights*'.¹³⁸ At the very least, section 19 sought to ensure that if any Government wished to depart from Convention rights, they should be '*conscious, reasoned departures, and not the product of rashness, muddle or ignorance*'.¹³⁹ Thus, whilst compliance with a declaration of incompatibility was eased by the fast-track amendment procedure which allowed the Executive to bypass the full rigours of the legislative process, any decision to legislate in contravention of those rights had to face the political costs head on. Compliance was eased; defiance was exacerbated.

Of course, we should beware of succumbing to a crude originalism which would treat political statements about the origin of the override as determinative of its nature and purpose.¹⁴⁰ No doubt, we should read the historical record with a healthy dose of scepticism, alert to the possibility that the statements about the overrides could be '*cheap*

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¹³⁴ Irvine,

¹³⁵ Irvine, 98

¹³⁶ Rivka Weill puts this point strongly when she argues that '*the idea of the override*' was '*to deter the legislature by shaming it into refraining from infringing rights*', '*Interplay between Common Law Override and Sunset Override*', 128.

¹³⁷ 114 book

¹³⁸ Irvine, 98; 583 HL 1163 (Nov 27, 1997).

¹³⁹ Lord Irvine, 23; David Feldman

¹⁴⁰ Kavanagh, originalism

talk masking other motivations'.¹⁴¹ However, the consistently expressed views of the key political architects who devised these mechanisms on both sides of the Atlantic cannot be cast aside as irrelevant either. Not only are these views borne out by the texts of the constitutional documents they agreed, the expectation of compliance rather than defiance in relation to court rulings on rights has been borne out by subsequent practice in both countries. In the UK, the expectation of consistent compliance was clearly stated in the White Paper which preceded the HRA, and the contents of White Papers have long been treated as relevant to statutory meaning for the purposes of statutory interpretation.¹⁴² Moreover, although the government sponsors of the Human Rights Bill could have easily invoked the principle of parliamentary sovereignty to emphasise complete legislative freedom to disregard rights, they chose instead to emphasise the political and international legal constraints on that freedom.¹⁴³ On both sides of the Atlantic, it seems implausible that seasoned politicians would not have been aware of the political costs of seeking to legislate notwithstanding rights and the inevitable political dynamics which would ensue. Instead of finding ways of reducing those costs, they deliberately increased them in order to ensure that the override could not be used lightly, covertly, obliquely, or rashly. The fact that they structured these mechanisms precisely in order to ramp up the political costs, bolsters the suggestion that they did not want a legislative override to be an easy or everyday occurrence.

When we look at the genesis of these provisions in Canada and the UK, it seems clear that the key political architects of the override viewed the mechanism as a safety valve for exceptional circumstances, rather than a regular mode of engagement between the courts and legislature. Whilst they undoubtedly gave the legislature 'the last word', it was a *last word as last resort*. This opens up a novel solution to the mystery of the underuse of the override, namely, that 'underuse' - or, more accurately, 'rare use' - was a feature, not a bug, in the system. It was exactly what was intended to occur, and then did occur when these human rights mechanisms were institutionalised in practice. This was exactly how they were intended to work all along. Rather than treating the political costs as unforeseen or unwelcome impediments to its ideal functioning - as scholarly champions of the override

¹⁴¹ Bradley & Siegel, *Historical Gloss*, 280;

¹⁴²

¹⁴³ Bradley & Siegel

tend to suggest – the historical narrative suggests we should view them instead as a feature rather than a bug in the system. Underuse emerged by design rather than demonization, by foresight rather than oversight.

Therefore, the looming presence of the various political costs associated with defying a court ruling on rights do not provide a convincing explanation for the underuse of the override in situations where the political costs go the other way. Something more is needed to explain the phenomenon of consistent compliance with court rulings and guaranteed rights in circumstances where legislators disagree with those rulings *and* the political costs of rejecting those rulings are low.¹⁴⁴ Moreover, my historical narrative uncovers a mystery of its own, namely: why is there a deep disjuncture between the prevailing scholarly analysis of the override, on the one hand, and how it was conceived and operationalised in the crucible of constitutional design? We are now presented with two different conceptions of the override: one as an ongoing ‘mechanism for legislatures to express their disagreement with courts’¹⁴⁵ and engage in ‘coordinate interpretation’;¹⁴⁶ and another which views it as a safety valve to be used in rare and exceptional cases. But we cannot choose between these two options by appealing to the historical record alone. We need to dig deeper into matters of constitutional principle to evaluate them on their constitutional and normative merits. After all, even if the historical narrative is correct, it still leaves open the possibility that the political elites who devised these clauses were normatively misguided and simply failed to appreciate the dialogic and democratic advantages of allowing – indeed encouraging – legislatures to regularly review, revise and reject court rulings on rights with which they disagree. To evaluate this, we must appeal to arguments of constitutional principle.

5. From Dialogue and Disagreement to Comity and Collaboration

In order to understand the override, we need to situate it as part of the constitutional partnership between the branches of government and the need to forge constructive working relationships between them. In the collaborative constitution, the relationship

¹⁴⁴ Gavin Phillipson, CLP lecture

¹⁴⁵ Garbaum; Tsvi Kahana, *Understanding the Notwithstanding Clause*, 225, 248ff (who advocates a ‘deliberative disagreement approach’ to understanding the override).

¹⁴⁶ Newman; Huscroft, ‘Rationalising Judicial powers’, 51; Dennis Baker (2010).

between the branches of government rests on a constitutional division of labour between the three branches, where each branch makes a distinct and valuable contribution to the collaborative enterprise, which the other branches must treat with comity and respect. As we saw in chapter 3, comity has two dimensions - *mutual self-restraint* and *mutual support*.¹⁴⁷ The requirement of mutual self-restraint means that each branch should refrain from interfering with the other's capacity to carry out their role, ensuring that they do not damage the ability of the other branches to carry out their role as part of the constitutional scheme. The duty of *mutual support* captures the 'affirmative obligations'¹⁴⁸ which require the branches of government to positively assist and support one another in carrying out their respective roles in a scheme of constitutional governance.¹⁴⁹ Instead of perceiving the branches of government as 'satellites in independent orbit', they are partners in a joint endeavour where each has a valuable role to play. The duty to work together constructively as part of a joint enterprise therefore constrains the proper modes of interaction between them.

As in any well-functioning partnership, mutual respect is the foundational normative requirement. And since the working relationships between the branches need to be sustained over the long-term in a relationship of reciprocity and interdependence, the interaction between the branches is guided by the requirements of 'repeat-play, reciprocity and reputation'.¹⁵⁰ An antagonistic move against another branch might trigger open retaliation and a break-down in reciprocal respect. Opportunistic power-play might secure short-term advantage, but can undermine a branch's reputation as a reliable partner in the constitutional endeavor in the longer-term. The upshot is that in order to sustain good working relations over the long-term and accrue the mutual benefits of a stable constitutional order, the branches of government should adopt a norm of conflict-avoidance or conflict-minimisation. These three norms – comity, collaboration and conflict-avoidance – frame the

¹⁴⁷ Kavanagh, n 145, 236

¹⁴⁸ David Pozen, 'Self-Help and the Separation of Powers' (2014) YLJ 38; Vicki Jackson, 'Pro-constitutional behaviour'. For a nuanced discussion of the affirmative constitutional obligations on the government in Canadian and German constitutional law, see Vanessa MacDonald, 'The Constitution as Framework for Government', 626-636; see also Mattias Kumm, 'Who's Afraid, 115 (who argues that all three branches of government must 'implement' constitutional requirements).

¹⁴⁹ Kyritsis, n 14, 46.

¹⁵⁰ Daryl Levinson, *Empire-Building*, 940; Larry Kramer, 'Putting the Politics Back into the Political Safeguards of Federalism' (2000) 100 Colum L Rev 215.

relationship between the branches of government and constrain the interaction between them.

How do these norms bear on the operation of the override? They suggest that the override should be used with caution and care, ever attentive to the need to treat the other branches with comity and respect as part of a collaborative enterprise. I argue that they preclude the legislature from regularly or lightly overriding court decisions merely because they disagree with them. Instead, they create a presumption in favour of compliance with court rulings on rights, which should only be rebutted in exceptional circumstances. What justifies this presumption? I will outline four key reasons here.

First, if judicial decisions are brushed aside whenever the government or legislature disagrees with them, this would evince disrespect for judicial rulings and undermine their institutional integrity within the joint enterprise of governing.¹⁵¹ As Jeff King observed:

Without a norm requiring the legislature to not depart from judicial findings lightly, the courts will know that to issue judgments that will be ignored will undermine their credibility and thus institutional integrity.¹⁵²

Judicial independence is supposed to create an institutional environment where judges can be confident that they will not be sanctioned or ignored if their rulings do not find favour with the powers that be.¹⁵³ For that reason, the rule of law creates a rule of thumb that the government and legislature should generally comply with court rulings, even if they disagree with them. This presumption gives the judiciary the independence they need to uphold the rule of law, especially in those situations where the other branches are reluctant to adhere to it. Therefore, out of respect for the constitutional role of the courts in the collaborative enterprise and the value of judicial independence which underpins that role, Parliament should operate a presumption in favour of complying with court rulings which can only be displaced in exceptional circumstances.

Second, to treat court rulings as mere opinions to be cast aside whenever another branch disagrees with them is to misconceive – and ultimately undermine – the authoritative nature

¹⁵¹ Jeff King, *D, L, F, 202-203; rights and third way*, 124.

¹⁵² *Dfl*, 202; Kahana, *Understanding*, 241.

¹⁵³ *CR*, 321

of judicial decisions in the collaborative constitutional framework.¹⁵⁴ After all, it is the mark of authority that it binds even when we disagree.¹⁵⁵ Of course, if we view the interaction between the courts and the legislature through a dialogic lens, we may be tempted to think that it is 'a dynamic process involving the interchange of proposals for constitutional meaning'¹⁵⁶ where 'each institutional actor brings forth its understanding for consideration and examination by the other'.¹⁵⁷ But as I argued in chapter 2, the dialogic framing distorts our understanding of the relationship between the branches of government and obscures the authoritative nature of judicial rulings.¹⁵⁸ We should not be lured into thinking that the purpose of constitutional review is 'to deliberate and not to decide cases',¹⁵⁹ when this is clearly false to the facts. Of course, by treating judicial decisions as authoritative does not mean that they are never open to revision, repeal or amendment. But it is incompatible with treating them as a proposal to the legislature which is it can then examine, revise and reject whenever it disagrees.

Third, the presumption in favour of compliance is a way of respecting the constitutional division of labour on which the collaborative constitution depends. On a collaborative understanding, the role of the courts is not simply to offer a judicial opinion on what rights require. Instead, it is to provide an authoritative resolution of the legal disputes which come before them in a fair and impartial way under the constitution. If the legislature regularly second-guessed court decisions and substituted their decisions for those of the judiciary, the legislature would be arrogating to itself the role of a final court of appeal, thereby subverting the constitutional division of labour.¹⁶⁰ But neither the legislature as a whole - nor individual Ministers or parliamentarians - have the institutional capacity, competence or the legitimacy to carry out such the role of reviewing and revising court decisions.¹⁶¹ It is not the legislature's job to sit in judgment on judicial decisions and revise or reject them whenever they have a

¹⁵⁴ Jeff King, *Third Way*, 123; Hickman, *Public Law*, 83-87.

¹⁵⁵ Raz

¹⁵⁶ Webber, 457

¹⁵⁷ *Ibid* 453

¹⁵⁸ *Lure and Limits*, 115-116

¹⁵⁹ Kahana, *Understanding*, 249; cf Dimitrios Kyritsis, *Where Our Protection Lies*; Hickman, 'Dialogue'

¹⁶⁰ Weinrib, *Learning to Live*, 569; Slattery, 'Theory of the Charter', 742; Kahana, 'Understanding the Notwithstanding Clause', 244.

¹⁶¹ For the argument that legislators are not competent to supervise particular cases or reverse them after the court has decided, see Paul Gewirth, 'Legislative Supervision of Court Cases', *International Symposium on Judicial Fairness and Supervision*, Beijing, China, January 10-13 2004, available at .

different view. Conceiving of the override as ‘a legislative review of judicial review’¹⁶² subverts that division of labour or at least argues for a radical reconceptualization of the roles of the three branches of government in a constitutional system.

Fourth, a regular practice of overriding the courts would create enormous uncertainty, unpredictability and unfairness for litigants.¹⁶³ If judicial decisions were merely provisional pronouncements subject to regular reversal by the legislature, this would mean that litigants could not rely on the courts to give them a final, authoritative ruling about whether their rights have been violated.¹⁶⁴ Whilst it might be ‘normatively appealing’¹⁶⁵ to think of courts not having the final say because this would seem to solve the counter-majoritarian difficulty, it is not so appealing to litigants, who look to the courts for an authoritative ruling on what their rights require, not an ongoing contribution to a constitutional dialogue.¹⁶⁶ Allowing parliamentarians to re-adjudicate every case, ultimately rejecting decisions they dislike, would be a cruel waste of time and energy for litigants who need an authoritative resolution of their constitutional claim.¹⁶⁷ Therefore, judges have a constitutional responsibility to litigants - and to the legal system as a whole - to resolve these cases in an authoritative, fair and impartial way. A regular legislative override of their decisions would undercut this responsibility.¹⁶⁸

It follows that the override is correctly conceived as a safety valve for exceptional circumstances to be treated with caution and care, rather than a regular outlet for disagreement and dialogic exchange. Far from being deeply misguided on constitutional fundamentals, my analysis suggests that the political architects of the override on both sides of the Atlantic were giving expression to a normatively justified self-understanding of their institutional roles in a relatively well-functioning system of constitutional governance.¹⁶⁹ Indeed, I suggest that the political actors who operate the override over time share that

¹⁶² Russell?

¹⁶³ Waldron, on settlement function; King, *Dialogue*; Hickman, n 169; the settlement function of the law is grounded in the rule-of-law value of finality i.e. that an institutional decision should not be upset or overridden unless there is good reason for it, Endicott, *Admin Law*, 3rd edition 234. Get 4th edition.

¹⁶⁴ Dwight Newman; King

¹⁶⁵ Kavanagh, ‘last word’ 840

¹⁶⁶ Kavanagh, *Last Word*, 840; Sales, ‘partnership and Challenge’, 469 (‘the court sits in judgment on what the legislature has done and either approves or condemns; it does not seek to debate’); Hickman.

¹⁶⁷ Dwight Newman, 224; King, *third way*, 123-124; Hickman, *book*, 83-87.

¹⁶⁸ Jan Van Zyl Smit, ‘Promoting the Rule of Courts or Resisting the Misuse of Courts? A Response to Ekins and Forsyth’, *Blogpost*, *Judicial Power Project*.

¹⁶⁹ Kavanagh, *Hard Look*, 838

understanding. Rare rather than regular use of the override is, therefore, an epiphenomenal expression of a set of unwritten but deeply-held constitutional norms requiring the branches to treat each other with comity and respect as part of the joint enterprise of governing.

Of crucial importance is the fact that the constitutional presumption in favour of compliance with court rulings is not based on the first-order reasons legislators might have for agreeing or disagreeing with a particular court ruling on rights. Nor is it based on the threat of political costs alone. Rather, it is based on second-order institutional reasons for respecting the work-product of a coordinate branch as part of a collaborative enterprise which respects judicial independence and the rule of law.¹⁷⁰ Thus, when the executive or legislature considers whether to use the override, the question before them is *not* simply whether they agree or disagree with the ruling. Instead, it is whether the judicial decision is so egregiously wrong or so deeply contrary to the public interest that it warrants displacing the strong institutional presumption in favour of complying with those rulings as part of a collaborative working relationship based on comity and respect. The norms of comity and collaboration give the executive and the legislature content-independent reasons for compliance with court rulings,¹⁷¹ just as the enactments of the democratic legislature give the courts content-independent reasons to comply with and give effect to those enactments.¹⁷² Mere disagreement is not sufficient to displace this constitutionally grounded presumption. The upshot is that whilst Parliament has the *power* to override court rulings on rights, it has a constitutional *responsibility* to treat those rulings with comity and respect.¹⁷³

Thus, instead of characterising the legislative reluctance to use the override as evidence of undue 'legislative passivity'¹⁷⁴ or even 'slavish submission'¹⁷⁵ to the courts, it can be understood instead as parliamentarians honouring their duties of comity towards a coordinate branch and respecting the constitutional division of labour on which the collaborative constitution is based. Once we situate the override in the context of the need for forge constructive working relationships between the branches of government, we can

¹⁷⁰ See chapter 4 on the distinction between first-order and second-order considerations ...

¹⁷¹ Pozen, n 156, 31; Frederick Schauer, 'Authority and Authorities' (2008) 94 Va L Rev 1931, 1935-40.

¹⁷² Schauer.

¹⁷³ Halberstam, Power and Responsibility

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see that the legislature does not - and should not - have the kind of equal, revisory or dialogic role attributed to them by scholars. The relationship between the branches of government is not like a dialogue where each branch offers an opinion about rights, which the others can then evaluate and reject if they disagree. Instead, those relationships are embedded within the institutional role-moralities of the branches of government – roles based on the norms of comity, collaboration and conflict-avoidance which shape and constrain the mode of interaction between them.

This provides an explanation for why politicians would comply with court rulings in situations where they disagree with them *and* there are no political costs involved in adopting that position. The reason is that overriding the courts regularly would strain the relations of comity between the branches, and undermine the courts' ability to carry out their designated role in the collaborative endeavor. The principles of comity and collaboration give political actors content-independent reasons to respect court rulings even if they disagree with them, and even if they can get away with rejecting or overriding them on particular issues because they will suffer no political costs. In making this argument, I am in no way signing up the naïve view that constitutional principle trumps political calculations across the board. But part of the rationale of forcing politicians to go public with their decision to override rights and counter court rulings on rights was precisely to incentivize compliance with those rulings by activating the pressures of political accountability to shore up those constitutional commitments, precisely when it might be tempting to ignore them. To be clear, by arguing that these mechanisms are accompanied by norms of political behavior which generally call for constitutional compliance rather than political defiance, I am not suggesting that either the Canadian Charter or the UK Human Rights Act trusted in constitutional virtue alone. As a matter of prudent constitutional design, they oriented political actors' incentive-structure towards constitutionally virtuous behavior by forcing the key protagonists to bring a potential violation into the open for all to see. Under the spotlight of the public gaze, the political incentives to comply would kick in. That is in fact what occurred. Mystery solved.

6. From Showdown to Slowdown

In the previous section, I argued that once we situate the override as part of the collaborative relationship between the branches of government, we can see that the norms

of comity and collaboration support a practice of rare rather than regular use of the override. But what about the norm of conflict-avoidance? At the level of constitutional design, it is possible to view the inclusion of a limited legislative override in the Canadian Charter and the UK Human Rights Act as a form of conflict-avoidance. Many Canadian commentators defended the notwithstanding clause on the basis that a temporary suspension of some defined Charter rights under strict conditions was preferable to resorting to the more openly confrontational mechanisms associated with the US constitutional history, namely, court-packing, impeachment or court-bashing.¹⁷⁶ Better to have a limited derogation from the Charter in exceptional circumstances, thus keeping the Parliament of Canada and the Provincial legislatures within the justificatory orbit of the Charter, rather than allowing them to abandon or even sabotage that framework altogether. Perhaps paradoxically, the idea was that allowing some flexibility to derogate from the Charter may enhance constitutional stability in the longer-term. Indeed, given how pivotal the notwithstanding clause was in securing Provincial agreement to sign up to the Charter in the first place, we can view it as a form of conflict-resolution already at the negotiation stage.

But whilst the notwithstanding clause may have been introduced partly to prevent an existential constitutional crisis or breakdown, the Canadian override is now viewed within the Canadian constitutional culture as itself a confrontational mode of engagement between legislatures and courts. This is illustrated by the fact that it is often characterised as a 'sledgehammer'¹⁷⁷ or a 'dagger'¹⁷⁸ pointing at the heart of the Charter. Of course, whether an action is confrontational or not is partly a matter of social convention and, therefore, contingent on the particular constitutional culture. Therefore, if invoking the override is perceived to be a confrontational move in Canadian constitutional discourse, then it just *is* confrontational in that culture. Legislatures or governments invoking the clause will know that it is perceived as an antagonistic move in the constitutional culture, and the constitutional community hearing news of that invocation will know that the legislature are now wielding a dagger. Naturally, these perceptions further entrench the underuse of the override, because regardless of the content or the justification, the override

¹⁷⁶ Paul Weiler,

¹⁷⁷ Vanessa MacDonald

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becomes associated in the public mind with a wilful disregard of proper constitutional constraints. And equally naturally, those who view the override as a valuable form of legislative empowerment and democratic dialogue designed to curtail aberrant judicial decisions, this perception is both lamentable and deeply misguided.

It may be that the de-legitimation of the override in the Canadian context has gone too far, effectively precluding its exercise even when it might be justified on constitutional grounds. However, the four reasons I advanced earlier against regularly or routinely using the override tend to suggest that using the override runs the risk of heightening the tension between the branches of government and straining the relations of comity between them. If a legislative override evinces disrespect for the courts and interferes with their ability to uphold the rule of law in the collaborative constitution, then that is correctly perceived as a combative and antagonistic move. All the more so since there are many other less drastic and overtly confrontational ways in which legislatures can respond to court rulings, such as e.g. justifying limitations on those rights during litigation and/or implementing them in a minimal or 'creative' way in order to preserve the original legislative goals.¹⁷⁹ By making a public announcement that the legislature wishes to override rights or override a judicial decision on what those rights require, the legislature signals that it wishes to go all out in challenging the court ruling. It chooses to have a *constitutional showdown* with the courts for all to see, rather than engaging in the less visible – but often no less effective – methods of *constitutional slowdown* which could moderate the impact of the court ruling from the legislative point of view, and diffuse tensions between the branches.¹⁸⁰

Indeed, both the Canadian Charter and the UK HRA include mechanisms of constitutional slowdown precisely in order to forestall a dramatic showdown where politicians play to the galleries in a no-holds-barred vituperation of courts. For example, under the Canadian Charter, the notwithstanding clause requires that any proposed override of rights must go through all the time-consuming and painstaking stages of the legislative process, where political mobilisation and persuasion are required at every stage. An override cannot be announced by executive fiat. It must receive the assent of the legislature where the issue is

¹⁷⁹ Hiebert, *Why Non-Use*, 705-6; James Kelly & Matthew Hennigar, 'The Canadian Charter of Rights and the Minister for Justice: Weak-Form Review within a Constitutional Charter of Rights' (2012) 10 I-CON 35 (describing this phenomenon of creative legislative response as 'notwithstanding by stealth').

¹⁸⁰ Chapter 3.

played out publicly, both in parliamentary debate and popular discourse. This prevents an override being used as a dagger in the heat of the moment. Instead, the political actors are required to submit to a cooling-off period as the initial proposal to override makes its way through the legislative process. Similarly, the sunset clause in the Canadian Charter entails that even if there is sufficient political support for an override, it must go through another stage of deliberation and ‘sober second thought’¹⁸¹ five years down the line if it is to remain in force. These slowdown devices emphasise that the *power* to override must be accompanied by a *responsibility* to do so in a way which is accountable to the legislature and the populace as a whole.

The emphasis on *constitutional slowdown* is also legible in other aspects of the political dynamics surrounding the UK Human Rights Act. Section 19 of the UK Human Rights Act which stipulates that any government who wishes to legislate notwithstanding rights must make a statement of *incompatibility* in the Bill in both Houses of Parliament, thus ensuring that any proposed override is evaluated in two differently constituted chambers.¹⁸² When we look at the legislative responses to declarations of incompatibility, we can discern a marked preference for slowdown rather than showdown in the UK constitutional order. Even in cases where politicians have been deeply resistant to complying with a declaration of incompatibility in the UK, they have tended to eschew ‘the sensational route of open disagreement with a judicial decision’,¹⁸³ preferring instead to opt for less confrontational and transparent strategies, such as a delayed response, minimal compliance and/or minimal compliance combined with public expressions of disagreement.¹⁸⁴ These strategies of accommodation rather than antagonism - slowdown rather than showdown - enable the government and legislature to achieve its policy objectives to some degree, without posing a potential challenge to judicial independence and the rule of law. They also show how norms of comity, collaboration and conflict-avoidance shape and constrain the interaction between the branches of government in Canada and the UK.

¹⁸¹ Adrian Vermeule

¹⁸² Section 19 (2). Note that all the Provincial legislatures in Canada are unicameral, so this added layer of slowdown in the Westminster Parliament does not apply there.

¹⁸³ Sathanapally, n 8, 155.

¹⁸⁴ Kavanagh, ‘Hard Look’, 837

7. Consequences

This argument that the underuse of the override is an epiphenomenal expression of the norms of respectful engagement between the branches of government in a collaborative constitution has a number of important consequences. First, it suggests that the perceived ‘underuse’ of the override may be a constitutional success story rather than evidence of a ‘tragic undermining’¹⁸⁵ of the override. On my analysis, rare rather than regular use of the override should be lauded as a legitimate outworking of the collaborative constitution, rather than lamented as a failure of dialogue. It is evidence of government Ministers and parliamentarians striving to respect rights, whilst simultaneously having due regard to the legitimate role of the courts in the joint enterprise of governing.

Second, if my analysis is correct, it is by no means a foregone conclusion that the override mechanisms have ‘atrophied’¹⁸⁶ or fallen into desuetude.¹⁸⁷ After all, the diagnosis of desuetude rests on an underlying conception of the override as a regular mode of inter-institutional dialogue and disagreement. And since the override has not operated in that way, it is then tempting to conclude that the power to override courts has lamentably – and somewhat mysteriously - ‘withered on the vine’.¹⁸⁸ Similarly, my argument casts doubt on Adrian Vermeule’s suggestion that the underuse of the override is an example of ‘the atrophy of constitutional powers’,¹⁸⁹ borne out of a slippage in the modal status of the power ‘from optional to prohibited’¹⁹⁰ over time. But there never was a flourishing and vigorous practice of legislative override in either country, which then waned and atrophied. Nor were they presented as purely optional mechanisms when they were conceived and launched onto the constitutional scene. Instead, the power to override was given to the political actors on the assumption and expectation that the power would be used with responsibility and constitutional care. There has been no slippage in the modal status of the power. Instead, the rare use of the override has been a stable feature of the constitutional

¹⁸⁵ Dwight Newman

¹⁸⁶ Vermeule article

¹⁸⁷ Gardbaum, Book, 110; Huscroft, ‘Constitutionalism from the Top Down’, 96

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¹⁸⁹ Article

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practice surrounding the override. The modal status of the power has remained unchanged since its inception in both countries, namely, as presumptively obligatory except in exceptional and egregious circumstances.¹⁹¹ Once we conceive of the override as a safety valve for cases of severe judicial malfunction, then we can see that these mechanisms may be operating exactly as they should, lying in wait for the rare or exceptional circumstance which would warrant their use.¹⁹² If my boiler has worked well over the last twenty years without ever needing to release the safety valve, this does not mean that the safety valve is either defective or defunct. It simply means that my boiler is working relatively well *and* that the safety valve is still operating as a valuable fail-safe in case excess pressure builds up in the future.

Third, my analysis shows that in order to understand constitutional phenomena, we must supplement our reading of constitutional text with an appreciation of the normative constitutional practices which underpin and surround them. The Canadian Charter and the UK Human Rights Act gave their respective legislatures the *power* – the option – of overriding judicial decisions on rights, but the unwritten norms and practices of the collaborative constitution gives them a *responsibility* to exercise that option with caution and with due regard for the other branches.¹⁹³ Thus, whilst the constitutional text confers the power, this power is ‘coupled with a duty to act with care and comity’.¹⁹⁴ My account departs from the prevailing scholarly characterisation of the override as ‘expressing the *empowerment* of the legislature’¹⁹⁵ and the right of the legislature ‘to *insist* on its position’¹⁹⁶ and ‘make it stick’.¹⁹⁷ By situating the override within the broader landscape of the relationship between the branches of government, my account emphasises instead the responsibilities which accompany that power and the constraints under which institutions labour when involved in a collaborative enterprise.

¹⁹¹ This point may also apply to the norm against court-packing in the US – a norm which Vermeule suggests took hold after Roosevelt threatened to pack the court, 425-6. Another possibility is that the norm was already in existence before Roosevelt cooked up the court-packing plan. Indeed, that is what explains his failure to pack the court.

¹⁹² Kavanagh, WF review; Last Word, 838

¹⁹³ Pozen, ‘Self-help and the Separation of Powers’, 39; David Halberstam, ‘Power and Responsibility’

¹⁹⁴ Levi, SP, 391; Pozen

¹⁹⁵ Gardbaum, *The New Commonwealth Model of Constitutionalism*, 124 (emphasis in original)

¹⁹⁶ Gardbaum, *The New Commonwealth Model of Constitutionalism*, 125 (emphasis added).

¹⁹⁷ Tushnet, *Weak Courts, Strong Rights*

Fourth, my argument takes issue with the common scholarly plea to ‘reinvigorate’¹⁹⁸ or ‘reincarnate’¹⁹⁹ the override as a regular mechanism for ongoing dialogue and disagreement between legislatures and courts.²⁰⁰ I oppose such a ‘reincarnation’ because it would violate the norms of comity and collaboration and upset the differentiated division of labour on which collaborative constitutionalism rests. Indeed, a practice of regular override would not be a matter of ‘re-instating’ anything, but rather of creating a brand new practice of ongoing legislative disagreement with court rulings which was never envisaged by the key political actors who devised these mechanisms and never existed. Therefore, liberal use of the override is less like a ‘reincarnation’, and more like the dawning of a new constitutional day – and not a good day at that. For the reasons already advanced, I believe that the inauguration of such a practice would in fact corrode and weaken foundational constitutional norms and values, rather than usher in a new vision of democratic constitutionalism.

Fifth, my analysis casts severe doubt on the recommendation made by Jeremy Waldron and others that we should amend the wording of section 33 of the Charter in order to clarify that when legislatures are engaged in legitimate and reasonable ‘rights disagreements’ with courts, rather than having misgivings about the value of rights *tout court*.²⁰¹ For one thing, the issue of whether legislators or governments harbour rights ‘mispgivings’ rather than disagreements about how to conceptualise rights, is an empirical question, whose answer will most likely be mixed in any system. My estimation is that even in a relatively well-functioning, democratic system, legislators may well have serious misgivings about rights, or at least misgivings about recognising the rights of particular classes of people, such as prisoners or terrorists. When we consider the British Prime Minister’s statement in Parliament that giving prisoners the right to vote would make him ‘physically ill’,²⁰² or the Quebec government’s ban on the wearing of religious symbols in public employment,²⁰³ the nomenclature of ‘mispgivings’ may be putting it mildly. Adding the qualifier ‘reasonable’ to the theoretical characterisation of the typical form of disagreement between legislatures

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²⁰⁰ See Gardbaum,

²⁰¹ Waldron, Gardbaum, Goldsworthy

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and courts does not help matters, because the reasonableness of those disagreements will also vary. Therefore, we cannot posit a legislative preference for reasonable 'rights disagreements' over disreputable 'rights misgivings' as a philosophical prior. My sense is that there is a much wider array of legislative motivations and orientations towards rights than Waldron's optimistic assessment allows.²⁰⁴

Even if we accept the assumption for the sake of argument, it is difficult to see how clarifying this in the wording of section 33 would succeed in easing its use and shoring up its legitimacy. Whilst the distinction between 'rights disagreements' and 'rights misgivings' may gain some traction in the cerebral atmosphere of an academic seminar, it is unlikely to have any serious purchase in the charged political dynamics surrounding a potential legislative override of a judicial decision. In that context, the distinction would be torn apart by the political opposition, the media and various rights campaigners.²⁰⁵ In fact, we may wonder whether the general populace in either Canada or the UK actually view disagreements with the courts about what rights require as more legitimate and justified than merely seeking to override a Charter right *simpliciter*. Opinion polls in Canada frequently show that judges are widely trusted officials in Canadian society, often far more trusted than elected politicians.²⁰⁶ Therefore, any move to disregard their decisions may be viewed with suspicion on this count alone. But the popular aversion to the override may also draw on a perception that judicial decisions are authoritative legal rulings on what rights require, which legislators are duty-bound to respect as a matter of deep-seated constitutional propriety which is embedded into the constitutional and even popular culture. And as argued earlier, people may well view that duty as content-independent i.e. that in a constitutional system based on the rule of law, politicians should respect court rulings whether they like them or not.²⁰⁷ If this is true, then political attempts to override a judicial decision of the Supreme Court of Canada may actually be more controversial - and

²⁰⁴ Jeff King argues convincingly that the standard of 'reasonable legislative disagreement' will have no disciplining effect on the reasoning process within a legislature, *Third Way*, 120-121

²⁰⁵ Kavanagh, *Last Word* 838

²⁰⁶ Peter Russell, ; Lorraine Weinrib, 'The Canadian Charter's Override', 96; Angus Reid Institute, 'Canadians Have a More Favourable View of Their Supreme Court than Americans Have of Their Own', 17 August 2015, 6, <http://angusreid.org/wp-content/uploads/2015/08/2015.08.14-Supreme-Court-final.pdf>.

²⁰⁷ Lorraine Weinrib suggests that the popular aversion to the override in Canada is partly content-independent, extending beyond the particular rights alleged to be infringed, *Israel Law Review*, 96.

more constitutionally suspect - than a legislative decision to derogate from a Charter right *de novo*.

All told, the argument that amending section 33 in order to ease the use of the override faces enormous practical challenges. It also runs contrary to the deeply-held self-understanding of the key political actors, who do not see their constitutional role as one of advancing an alternative conception of rights in an ongoing disagreement about what rights require. Instead, these actors tend to believe that they should generally respect judicial decisions on what rights require in individual cases, whilst working from those judicial decisions to devise a suitable remedy for rights-violations.²⁰⁸ In order to understand the operation of the override, we need to move 'beyond disagreement'²⁰⁹ as the emblematic mode of interaction between legislatures and courts, engaging more deeply with the norms and constraints under which legislatures and courts labour when engaged in a collaborative constitutional endeavour.

Of course, scholars who argue in favour of an increased use of the override may agree that its use should not be *de rigueur* either. In striving to stake out a middle ground between a system of legislative supremacy (where, they claim, the legislature always has the last word) and a system of judicial supremacy (where the courts get the final say), they often argue that in a hybrid system, they may suggest that the legislature should sometimes – but not always or routinely – gets its way.²¹⁰ Otherwise, the hybridity dissolves and it collapses into a system of parliamentary sovereignty. But this argument faces significant challenges. For one thing, the suggestion that key political actors should change their behaviour in order to achieve a better fit with a theoretical model devised by scholars, will presumably hold very little sway over the key actors involved in operating the clause.²¹¹ More importantly, however, if the interaction between the branches of government is conceived as an interchange of proposals about constitutional meaning where legislatures are urged to override court rulings when they disagree with them, then we have no argumentative resources to argue for legislative self-restraint. Without a presumption that court rulings are authoritative and binding, why should the legislature ever hold back from

²⁰⁸ Jeff King

²⁰⁹ Sathanapally, *Open Remedies: Beyond Disagreement*

²¹⁰ Tushnet, *Weak Courts, Strong Rights*, 25, 47; Gardbaum

²¹¹ Leckey, *Bills of Rights*,

seizing the last word when they disagree with the court's conclusions? By grounding my analysis in a collaborative understanding of the roles and relationships between the branches of government, I provide reasons for legislative self-restraint which coheres with the underlying norms of a well-functioning constitutional system.

8. Conclusion

The aim of this chapter was to solve the mystery of the underuse of the override. Challenging the dominant narrative that the override failed to flourish because it was thwarted by unwelcome political costs, I argued that those costs were part of the original design, hardwired into the system precisely in order to forestall its frequent use. By locating the override in the broader context of the constitutional roles and relationships between the branches of government, I argued that it should be viewed – and generally *is* viewed in Canada and the UK - as a safety valve for exceptional circumstances to be used with caution and care, rather than as a regular mode of dialogue and disagreement between legislatures and courts. This solves the mystery of the underuse of the override, by arguing that it is an epiphenomenal expression of the underlying norms of respectful engagement between the branches of government within a collaborative constitutional framework. This does not discount the vitally important role of political costs in constraining political behaviour and inhibiting a more liberal use of the override. But it puts those costs in perspective, presenting them as a useful means of bolstering and undergirding the underlying norms.

This account scores better than the prevailing narratives both on grounds of 'fit' and 'justification'.²¹² As well as providing a normatively attractive understanding of the roles and relationships between the branches of government, it fits with the intentions of the key political architects of the override mechanisms on both sides of the Atlantic; it provides a plausible explanation for the continuing practice of rare rather than regular use of the override in both countries; and it explains why governments and parliamentarians tend to comply with court rulings even when they disagree with them, and even when the political costs favour their rejection. Leading empirical analyses of parliamentary engagement with

²¹² Dworkin,

rights confirm that UK governments and legislatures operate ‘a strong presumption’²¹³ in favour of presenting rights-compliant legislation to Parliament combined with a strong presumption in favour of complying with declarations of incompatibility.²¹⁴ In Janet Hiebert’s close analysis of political behaviour under the Canadian Charter, she discerns a strong presumption against invoking the notwithstanding clause amongst Canadian political elites at both Federal and Provincial level.²¹⁵

This ‘fit’ is neither accidental, aberrant nor abhorrent. It is partly borne out of a commitment to locate the override within a deeper constitutional narrative which appreciates constitutionalism from ‘the internal point of view’,²¹⁶ i.e. from the perspective of the normative obligations and values recognised and practiced by the key constitutional actors in both of these countries.²¹⁷ Whilst the dominant narrative on the override emphasised the political costs from without, it overlooked the constitutional norms which shape political behaviour from within. Whilst focusing on the lively first-order disagreement between legislatures and courts about rights, it underplayed the second-order institutional norms which shape and constrain the interaction between the branches of government in the crucible of constitutional practice. Viewed from the internal point of view, the rare rather than regular use of the override is grounded in the institutional role-moralities of the executive and legislature in a well-functioning system of constitutional governance, where judicial decisions are treated as authoritative rulings on legal disputes which typically warrant respect not rejection, compliance not combat.

Finally, in making the argument for a cautious approach to the legislative override, I am not underestimating - still less excluding - the valuable and crucial role of the executive and legislature in the joint project of protecting rights. Throughout this book, I have documented at length their vital roles in the collaborative endeavour. But this does not mean that it is constitutionally valuable for legislators to adopt a practice of regular and routine override of judicial decisions, since judges, too, have a valuable role in the

²¹³ Hiebert and Kelly

²¹⁴ Hiebert and Kelly; King;

²¹⁵ Hiebert, *Why Non-Use does not*, 704-5.

²¹⁶ Hart, 3rd edition

²¹⁷ For a similar methodological orientation, see Leckey, *Bills of Rights in the Common Law*, 3, 11-17; Alon Harel, *Why Law Matters*, 230.

collaborative endeavour. Ironically, my argument gives more credence to MPs and parliamentarians as ‘pro-constitutional actors’,²¹⁸ than those scholars who seem to champion a regular use of the override. After all, they seem to argue that legislators have been afflicted by chronic political passivity due to a combination of false consciousness concerning judicial supremacy and raw calculations of political self-interest and preservation.²¹⁹ Instead, I argue that despite being given the formal legal power to override those rights and to discard judicial rulings on what those rights require, the Canadian and UK legislatures have generally succeeded in honouring their constitutional commitment to rights, whilst simultaneously paying due regard for the role of the courts in the joint enterprise of governing. The underuse of the override, therefore, reflects well – not badly – on the governments and legislatures on both sides of the Atlantic.

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²¹⁸ Vicki Jackson, ‘Pro-constitutional actors’; Amy Gutmann, ‘Foreword’, ix (arguing that the elected branches of government are ‘co-determiners with courts of constitutional law’).

²¹⁹ Goldsworthy, Waldron,