THE PARTNERSHIP MODEL
OF THE CANADIAN NOTWITHSTANDING MECHANISM:
FAILURE AND HOPE

by

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A thesis submitted in conformity with the requirements
for the degree of Doctor of Juridical Science
Graduate Department of the Faculty of Law
University of Toronto

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Abstract

This work inquires into the idea of the notwithstanding clause contained in s. 33 of the Canadian Charter of Right and Freedoms. It sets out the theoretical perspectives for the discussion of the notwithstanding mechanism, and examines the theory and practice of this device in Canada.

The dissertation discusses the shift in Canadian constitutional theory from seeing the Charter with the notwithstanding clause as a reflection of a compromised constitutionalism based on the remnants of legislative supremacy to the view of it as creating a new system of judicial review with legislative finality, which I call the New Institutional Paradigm (NIP). According to the NIP, rather than authorizing the legislature to override constitutional rights, the notwithstanding clause creates a gateway for legislative participation in the interpretation of the Constitution in rights issues.

The NIP creates a system of judicial review with legislative finality. But why should the legislature have the final say on constitutional issues? I discuss two answers to this question. One is that legislative finality is needed in order to check judicial errors. This answer, however, creates a theoretical inconsistency between judicial review and legislative finality. Judicial review is based on the idea that courts have a greater ability and incentive to guard the Constitution than do legislators. Legislative finality, on the other hand, rests on the opposite assumption and conceives of legislatures as being superior to courts in their ability to guard the Constitution such that they should supervise the courts' work.
The other justification for legislative finality is the idea of a partnership. According to this notion, legislatures and courts within the Canadian constitutional setting do not check and balance each other, but rather perform different functions under the Constitution. The role of courts is to deliberate on the meaning of the Constitution. The role of legislatures is to make a final decision with regard to this meaning. This approach is coherent as it unifies judicial review and legislative finality. Judicial review is based on the court’s superior ability to deliberate about the meaning of the Constitution while the legislature maintains the power to reject the court’s deliberation through the use of the notwithstanding clause. I further develop my own model of partnership between courts and legislatures and set out the manner in which legislatures should use the notwithstanding clause once they have decided to invoke it.

In light of my suggested partnership model, I examine the practice of the notwithstanding clause in Canada. I demonstrate that Canadian legislatures have, generally speaking, refrained from using the mechanism. However, on the two occasions where a Canadian legislature did invoke the notwithstanding clause in response to a judicial decision, it did not act in a partnership oriented way. In addition, I examine how two uses, and one attempted use, of the notwithstanding mechanism have provoked harsh public reactions in Canada. These negative public responses reflect the fact that accountability might make it politically impossible to abuse the notwithstanding clause.
Acknowledgments

This dissertation started with a conversation over coffee in 1995 with a Visiting Professor at the Hebrew University in Jerusalem that I had come all the way from Tel-Aviv to listen to. Little did I know then that Professor Lorraine Weinrib would soon become my mentor, supervisor and great friend. I am profoundly grateful for her support, endless patience, and, most importantly, her constant smile.

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My father Dov, is not only a great father, but also a great friend. I thank him greatly and wish him many more happy years.

Finally, I dedicate this work to the memory of my mother, Ester Golda Kahana, who passed away in the fall of 1998. Her support and encouragement throughout the years were crucial to my personal and professional development and without her, this work would not have been possible.
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Appendix 1
Appendix 2
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Chapter 1: Introduction

In a recent article, Peter Hogg and Allison Bushell described the challenge of inquiring into the question of the legitimacy of judicial review:

[The g]reat bulk of the academic commentary was devoted to advancing ingenious theories to justify judicial review, and each new theory provoked a further round of criticism and new theories until the literature reached avalanche proportions... The uninitiated might be excused for believing that, given the deluge of writing on the topic, everything useful that could possibly be said about the legitimacy of judicial review has now been said.¹

Nevertheless, eighteen years ago, in 1982, something happened which remains capable of inspiring fresh approaches to the study of constitutionalism. It has, at the very least, opened up many more opportunities to say “something useful” about the legitimacy of judicial review and the relationship between courts and legislatures. This event was the invention of a new and innovative constitutional mechanism. Known as the “notwithstanding clause”, it was introduced to the world as s. 33 of the Canadian Charter of Rights and Freedoms.² This dissertation will explore the paths of analysis that the idea of the notwithstanding clause created, by examining the theory and the practice of this new mechanism both in the Canadian context and beyond.

S. 33 provides that a Canadian legislature can expressly declare in an act that the legislation shall operate notwithstanding most Charter rights.³ In cases where such a declaration is enacted, the act operates notwithstanding the relevant Charter provisions. The declaration expires after 5 years but can be renewed.⁴

³ The rights that can be overridden by s. 33 are fundamental freedoms (s. 2, including freedom of religion and conscience, freedom of expression and assembly, and freedom of association), legal rights (ss. 7-14), and equality rights (s. 15). The rights to which s. 33 does not apply are democratic rights (s. 3-5), mobility rights (s. 6), rights regarding the official languages of Canada (ss. 16-22) and minority language education rights (s. 23).
⁴ S. 33 reads:

Exception where express declaration
33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
The Notwithstanding Mechanism (NM) should be understood in light of the framework of rights protection contained in the _Charter_. The most distinctive characteristic of the _Charter_ is its structure of rights and limits. While the rights occupy most of the _Charter_ 's sections, the opening section of the _Charter_ creates a structure of rights and limits by prescribing that _Charter_ rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If legislation limits a right in a way that is not in accordance with s. 1, it becomes "of no force or effect" as the "Constitution of Canada is the Supreme law of the land" (s. 52 of the _Constitution Act, 1982_). As a result, the judiciary has the power to strike down this legislation or to offer such other "remedy as the court considers appropriate" (s. 24 of the _Constitution Act, 1982_).

A system that fully protects rights puts them beyond the reach of majorities. Some say that this is the very definition of rights. Rights, it has been written, are the "political trumps held by individuals" against collective goals. In Canada, however, rights are not beyond the power of a majority of the public. Canadian legislatures can enact legislation which will have "such operation as it would have but for" a given provision of the _Charter_, i.e., as if the rights in

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

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

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

Five year limitation
(5) Subsection (3) applies in respect of a re-enactment made under subsection (4) [hereinafter s. 33].

The literature often refers to a "notwithstanding clause". This term is confusing since it has three different meanings in the literature. It is referred to as: (a) the text of s. 33, (b) the mechanism that the section creates, or (c) a clause in an act stating that the act shall operate notwithstanding the _Charter_. I use the term "notwithstanding clause" exclusively to refer to the text of s. 33. (Similarly, "the limitation clause" denotes s. 1 of the _Charter_.) In this work, the mechanism that the notwithstanding clauses establish is termed the "notwithstanding mechanism", a declaration in an act that the act or a provision thereof operates notwithstanding the _Charter_ is called "a notwithstanding declaration", and an act in which a notwithstanding declaration appears is "a notwithstanding act". Many refer to the NM as the "legislative override". For reasons that will appear at the beginning of Chapter 2, below, I do not adopt this terminology.


question were not guaranteed. Thus most fundamental rights in Canada - such as the right to freedom of religion, freedom of expression, and equality rights - do not enjoy full protection. Nevertheless, it will be difficult for the legislature to ignore such rights since it will have to expressly declare that it is doing so, and it will have to re-enact the rights violating measure, quite likely in the face of a public outcry, every five years. Nevertheless, if the legislature wishes to do so, it can. In a system which fully protects rights, it cannot.

The reason why Canada does not have a full rights protection system is that there was no consensus in Canada to adopt a Charter of Rights. The NM was introduced in the final stages of the negotiations regarding the effort to patriate the Canadian Constitution. This effort, led by then Prime Minister Pierre Trudeau, sought for Canada legal independence from Britain, the affixing of an amendment procedure to the Constitution, and the entrenchment of a Charter of Rights and Freedoms. The historical compromise was that instead of no Charter at all, as the opponents of patriation desired, or a rigid Charter, as the supporters of entrenchment desired, the Charter would be entrenched subject to a NM, which would allow legislatures to deviate from it. In other words, the NM represented the historical remnants of legislative supremacy, which was the regime in place prior to the 1982 adoption of the Constitution Act and the Charter.

The historical reason for the introduction of the NM was that it represented a necessary compromise. Full constitutional rights protection was not a political option and so the choice was between no constitutional rights protection and partial constitutional rights protection, i.e., a Charter of Rights with a NM. Politically speaking, there is no doubt that the compromise arrived at was a clever choice. The practice of the NM in Canada clearly suggests that whereas many

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9 The division of powers between the federal government and the provinces is to be found at ss. 91-92 of the Constitution Act, 1867 (U.K.), 30&31 Vict., c. 3. The residuary power lies with the federal Parliament (see s. 91).
10 Freedom of religion is guaranteed by s. 2(a); freedom of speech is guaranteed by s. 2(b); and equality is guaranteed by s. 15. The NM makes it possible to enact legislation notwithstanding all of these Charter sections.
11 For the history of the 1982 patriation, see R. Romanow, J. Whyte, H. Leeson, Canada Notwithstanding (Toronto: Carswell/Methuen, 1984).
12 Until the 1982 patriation, legislative powers in Canada were based on the British North America Act, 1867, which was an act of the British Parliament. The 1982 patriation rectified this situation and gave to Canada the power to amend its own Constitution without the need to first seek the consent of the British Parliament. See B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L.R. 369. As long as Canada's highest law was the British North America Act, any amendment had to be approved in the U.K. Once the power of the British Parliament in this regard was terminated, however, there emerged a need for a protocol according to which the Constitution could be amended in Canada. See P.W. Hogg, Constitutional Law of Canada, loose-leaf edition, vol. 1 (Toronto: Carswell, 1992) at 4.1, 4-1-4-4.
laws have been found to be unconstitutional by the courts due to Charter infringement. The NM was used only 14 times in the context of specific pieces of legislation. In other words, even if Canada does not enjoy a full rights protection regime *de jure*, it clearly enjoys a full constitutional rights protection regime *de facto*.

But the historical compromise was not the only justification suggested for the existence of the NM. Both before and after patriation, Paul Weiler suggested that Canada should adopt, or had cleverly adopted, a Constitution with a NM. According to Weiler, a NM bearing Constitution was the country’s best choice and should not be seen as an unfortunate compromise. His argument was simple. A constitutional bill of rights does not administer itself. It is administered by the judiciary, which, in a constitutional democracy, has the power to interpret and enforce the constitution. It is the judiciary that decides the meaning of terms like “freedom of expression”, and it is the judiciary that decides when the limiting of freedom of speech is justified. The judiciary, however, is not infallible. A NM could therefore be a way for the legislature to override mistaken judicial decisions. When the legislature used the NM to override an erroneous judicial decision, it would do so not because it sought to enact legislation notwithstanding the Constitution. The opposite would be true. It is the court that would have ruled against the Constitution, and it would be the legislature which, by overriding this decision, ensured adherence to the Constitution.

The importance of Weiler’s approach is that it shifts the discussion from the idea of a higher law to the idea of judicial review. It holds that the NM does not comprise the idea of a higher law, but rather restricts the scope of judicial review. A NM bearing Charter, according to this approach, does not weaken constitutional supremacy. Rather, it weakens judicial supremacy, by creating a different form of constitutional supremacy. The NM, according to this approach, is not a compromise between entrenchment and no entrenchment. Rather, it is a more sophisticated form of entrenchment, which does not leave the last word over the meaning of a Constitution to the court. Weiler was thus the first to realize that the NM requires the development of what I call the New Institutional Paradigm (NIP).

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But Weiler's account of the NIP is incoherent in terms of constitutional theory. The very reason why courts are assigned the role of interpreting the Constitution, and especially the sections of the Constitution which protect rights, is that legislatures have neither the requisite ability nor motivation to engage in constitutional rights protection. Legislatures are not accustomed to engaging in legal interpretation. In addition, legislatures, unlike courts, are supposed to be responsive to the electorate and hence are more susceptible to majoritarian preferences. Clearly, the court can make mistakes, but simply referring the decision back to the legislature undermines the very idea of constitutional rights protection. While it is possible that legislatures use the NM to correct perceived judicial mistakes, this practice renders the NM incoherent in terms of constitutional theory. Moreover, talking about the legislative supervision (the NM) of judicial supervision (judicial review) is certainly important, but it does not constitute a theoretical innovation, since it discusses the NM by way of the old terminology of checks and balances between the branches of government.

An alternative to Weiler's argument from judicial error is the idea of partnership. This innovative concept was introduced by Lorraine Weinrib. The idea of partnership suggests that rather than supervising each other, courts and legislatures are assigned different roles under the NIP. Such a division of labour can also be found in the works of the American political scientist John Agresto. My reading of his work suggests that he believed that because the role of the court is to deliberate and not to decide, a system of judicial review with legislative finality is justified. The role of the court is to offer sophisticated deliberation concerning constitutional issues which the legislature is free to either accept or, by using the NM, to reject. The partnership approach advocated by Weinrib and Agresto does not face the theoretical difficulty that Weiler's check on judicial error approach does. It does not see the courts and legislatures as supervising each other and being engaged in an identical activity. In accordance with this approach, a NM bearing constitution is not theoretically incoherent. Thus the innovation of the NM is not that it creates one more stage in the constitutional decision making process, whereby the legislature has acquired the ability to strike down judicial decisions the same way courts can strike down legislation. Rather, the NM allows for a new way to organize our thoughts regarding the role of courts and legislatures in a constitutional democracy.
This dissertation is organized around the themes of the NM, the NIP, the concept of judicial error and the concept of partnership. Chapter 2 begins with the NM. In this initial stage of the work, the NM is not conceived of as a means to allocate judicial and legislative roles under the Constitution, but rather as a compromise between constitutional rights protection and legislative supremacy. The chapter introduces the features of the Canadian Charter's s. 33, as well as analyzing the way in which it has been interpreted by Canadian courts. It discusses Quebec's omnibus use of the NM in 1982 and the Ford decision, which found this use to be constitutional. The chapter also incorporates a comparative constitutional discussion of the Canadian NM and the Israeli NM, which was modeled after the Canadian one. A meaningful comparison of these two systems is possible since, in addition to having a NM, Israel also has a rights protection system similar to Canada's. The chapter's comparative law section will also analyze two Supreme Court decisions from the two countries - the aforementioned Canadian ruling in Ford and the Israeli Supreme Court's Meatra1 decision, which was handed down in 1995. Both dealt with fundamental questions regarding the structure of the respective countries' rights protection systems.

The last part of Chapter 2 makes the transition from the NM to the NIP, from seeing the NM as a mechanism that compromises constitutional supremacy to a mechanism that compromises judicial supremacy. It shows how the two approaches to the NIP, Weiler's check on judicial power approach and Weinrib's partnership approach, arose out of the text of s. 33. These approaches shift the academic discussion concerning s. 33 from the NM to the NIP. The following two chapters, Chapters 3 and 4, discuss these two concepts. Chapter 3 analyzes the check on judicial power approach while Chapter 4 looks at the partnership approach.

Chapter 3 introduces the first version of the NIP: Weiler's argument from judicial error. This argument is the most popular one among advocates of the NIP and is also supported by Peter Russell and Christopher Manfredi, two Canadian political scientists. The chapter shows that despite the fact that Weiler, Russell and Manfredi all have a different take on the argument from judicial error, none of them is able to resolve the tension that renders the argument incoherent in terms of constitutional theory. None is able to demonstrate that legislative

supervision of the courts is consistent with the idea of rights protection through judicial review, wherein the courts are supposed to supervise the legislature. This point is further demonstrated by two academic debates regarding judicial finality, one between Canadian scholars John Whyte and Peter Russell, and the other between American scholars Ronald Dworkin and Frank Michelman. Focusing on the idea of mutual supervision, both exchanges saw participants talking past each other, one side praising the judiciary and the other side pointing to the judiciary’s fallibility.

Chapter 4 takes a look at the second version of the NIP: Weinrib’s partnership approach. Introducing the works of Weinrib and Agresto, the analysis suggests that it is possible to view the NM not as a mechanism for the legislature to supervise the court, but rather as a mechanism for the legislature to accept or reject the court’s deliberation. This approach seeks to create a partnership between courts and legislatures whereby each party is engaged in a different exercise. The courts deliberate and the legislatures decide. The analysis focuses on the idea of the court as a national deliberator and highlights the importance of this deliberation to the public’s understanding of constitutional issues. While there is no disagreement that judicial deliberation influences public discussion, there is controversy regarding the nature of this influence. Chapter 4 will introduce this disagreement as exemplified by an exchange between Ronald Dworkin and Mark Tushnet. Tushnet believes that in a judicial finality system, there is less public discussion of constitutional issues since citizens trust the court to take care of constitutional interpretation for them. Tushnet therefore supports the NIP because of his belief that the public will only engage in a discussion when they realize that constitutional issues are their responsibility. In contrast, Dworkin believes that when the public knows that it has the power to override a judicial decision, it will see the issue as a matter of politics, and will not engage in a principled discussion. Legislative finality, according to Dworkin, means the destruction of principled public discussion.

The last part of Chapter 4 develops my own model of the NM as a partnership between courts and legislatures under the Charter. In order to construct this model, I first make a distinction between the notions of partnership as a concept and partnership as a practice. I argue

that even Weiler, who sees the relationship between courts and legislatures as one of mutual supervision, can accept that the way this supervision should be accomplished is not by means of clashes between the legislative and judicial branches, but rather by means of co-operation between them. This is the idea of partnership as practice which my model develops. Rejecting the American model of the clashing branches, I suggest that a more appropriate dynamic for the Canadian context is one wherein the legislative and judicial branches treat each other respectfully and as partners.

There is a significant theoretical difference between the approaches to the NM discussed in Chapters 2, 3 and 4. Chapter 2 discusses the NM as a compromise between rigid constitutional rights protection and no constitutional rights protection. Chapter 3 examines the check on judicial error approach and is concerned with the mutual supervision undertaken by courts and legislatures. Chapter 4 discusses the partnership approach and is concerned with a division of labour between courts and legislatures. However, all three approaches make an assumption with respect to legislative behaviour under the NIP. namely that the legislature will not abuse the NM ("the no abuse assumption"). Examples of the practice of the NM in Canada, discussed in Chapter 5, offer some insights as to this assumption.

Chapter 5 will first define what is an "abuse" of the NM. The meaning of this notion is different according to the three approaches to the NM. According to the compromise approach to the NM, an abuse of the NM occurs when it is used in a tyrannical way, namely in order to enact severe violations of rights. Chapter 5 will show that according to this definition, the NM has not been abused in Canada. The NM was used 12 times in Quebec, 16 once in Saskatchewan, and once in the Yukon territory. These uses involved legislation regarding pension plans, education, the agricultural sector, language, land planning, and labour relations. None of these uses was tyrannical.

The other element of the no abuse assumption is that even if the legislature does try to abuse the mechanism, the public will respond so negatively to such an action that the legislature will be deterred from following through with its intentions. Chapter 5 also presents some evidence regarding this assumption. It examines the one incident in Canada where an arguably

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16 In addition to its omnibus use of the NM in 1982. See Chapter 2, Section 3(B), below.
tyrannical bill sought to employ the NM. This was a 1998 Alberta bill which involved victims of a forced sterilization program implemented by the Alberta government. The bill in question capped the amount of compensation that these victims could be awarded in their subsequent lawsuits against the government. The bill provoked such an angry public response that the Alberta government felt compelled to withdraw it. In addition to an account of this incident, Chapter 5 will also discuss two other instances where the use of the NM provoked intense, though less vociferous, public responses. These other two examples are a 1986 Saskatchewan back to work law, and a 1988 Quebec law regulating signs. The analysis in Chapter 5 compares these three incidents (the sterilization bill, the sign law, and the back to work law) to the other 12 uses of the NM which were ignored by the public. It analyzes the reasons why there was such a difference in the public’s reaction. In addition, it suggests that waiting for a judicial decision before invoking the NM might both increase public awareness of its use such that no use of the mechanism is ignored, and educate the public as to what exactly is at stake.

While the definition of an abuse of the NM, according to the compromise approach introduced in Chapter 2, is a use of the mechanism which is tyrannical, the definitions of abuse employed by the other two approaches to the NM are broader. According to the check on judicial error approach, an abuse of the mechanism occurs not only when it is invoked tyrannically but also when it is meant to override a correct judicial decision. This last type of abuse is seen to exist even in the absence of a tyrannical result. Similarly, according to the partnership approach, an abuse of the NM occurs when a legislature re-asserts its supremacy by overriding a judicial decision before considering, and being informed by, the contents of the ruling. Chapter 5 also examines how Canadian legislatures debated the use of the NM in the two cases where it was invoked as a response to a judicial decision. These two cases are Quebec’s Bill 178, which overrode the Supreme Court of Canada’s decision in Ford and the Saskatchewan back to work law, which responded to a lower court ruling that the Charter protected the right to strike. I consider whether the debates in the legislative assemblies of Quebec and Saskatchewan followed the check on judicial error approach or the partnership approach. My analysis will demonstrate that these two legislatures missed an opportunity to engage in these approaches and instead treated the NM as if it represented a remnant of legislative supremacy. The legislators in both cases did not point to any judicial errors or consider the court’s deliberation. In other words, from
the perspective of both the check on judicial error approach and the partnership approach, the NM was abused.

The concluding chapter of the dissertation, Chapter 6, will discuss four test cases for the use of the NM. The cases are *National Citizens' Coalition Inc. v. A.G. Canada*. Ford v. Quebec (A.G.), R. v. Seaboyer, and R. v. Askov. These are cases which were cited by Paul Weiler, Peter Russell, Christopher Manfredi and Lois MacDonald, as being examples of judicial decisions which either should have been overridden or were rightly overridden with the NM. In light of the ideas developed throughout the dissertation, my analysis will examine whether these rulings were indeed worthy of being overridden. I will show that the answer to this question is negative and that the way in which these scholars attacked the judiciary and their rulings was largely by way of unsubstantiated allegations. The chapter will end by arguing that such a lack of prudence on the part of academics endangers the project of partnership between courts and legislatures.

Finally, note should be taken of what this work will not discuss. This dissertation focuses on the separation of powers under the Charter, but not on the federal division of powers under the *Constitution Act, 1867*. While federalism issues are mentioned, especially in the context of the Quebec government's use of the NM, this work should by no means be taken to suggest any theory regarding the NM and federalism. In addition, the work does not thoroughly canvass other nations' legal systems. Clearly, there are some extensive references to such systems. Chapter 2 compares the Canadian and Israeli NMs, and Chapters 3 and 4 make frequent reference to American scholarship. The focus of the work, however, remains on Canada.

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18 Supra note 17.
Chapter 2

The Notwithstanding Mechanism

1. Introduction: The NM in the Structure of Rights Protection in Canada

While the subject of this dissertation is the partnership between courts and legislatures in a system where there is a Constitution and a NM, most of this chapter deals with the theory of a NM bearing Constitution and does not address the relationship between courts or legislatures at all. Rather, it addresses the idea of a constitutional rights protection system which the legislature can choose not to adhere to. A prudent theoretical discussion must begin with an examination of its context. In our case, the context is the wording of the Charter and, in particular, s. 33. Nowhere in s. 33 is there any mention of the relationship between courts and legislatures. What s. 33 discusses is the power of the legislature to enact legislation “notwithstanding”, i.e., despite being otherwise prohibited by the Constitution.¹ Thus this chapter discusses the idea of a Constitution with a NM, as a unique form of constitutionalism. The NM will be seen not as a means for a legislature to override a court’s decision to protect its own legislative reading of the Constitution but rather as a means by which the legislature can opt out of the Constitution.

The structure of constitutional rights protection in Canada will be discussed in depth throughout the work. However, a brief introduction of its basic form could be useful at this point. S. 1 of the Charter makes a distinction between rights and limits.² This means that the protection of constitutional rights in Canada occurs in two stages. At first, the court has to decide whether the impugned legislative measure limits a right. If a right is found to have been infringed, the court proceeds to examine whether the limit is justified according to s. 1’s criteria. S. 1 thus provides for the possibility of a justified limitation on a right. I will refer to an infringement of a

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¹ S. 33 (1) refers to a declaration that an act, or a provision of an act, shall operate “notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter” and s. 33(3) provides that once a declaration has been made, the act or the provision referred to by the declaration shall have “such operation as it would have but for the provision of this Charter” [emphases added].
² Section 1. entitled “Rights and Freedoms in Canada”, reads: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.
right which is *not* found to be justified according to s. 1 as a *violation* of a right. Using this terminology, we can say that the NM is aimed at legalizing violations of rights.

While the main focus of this dissertation is on Canada, this chapter will also discuss Israel which has a rights protection system with a NM similar to Canada’s. As with the Canadian NM, the text of the Israeli NM does not mention courts and legislatures, but rather amounts to an authorization of the legislature to enact laws notwithstanding constitutional guarantees. Because of their similarity, a comparison between the two NMs is illuminating.

After establishing the comparative context in Section 2, the next two sections proceed to make two inquiries. The first is concerned with the nature of a Constitution with a NM: the second addresses the nature of a constitutional right in the NM bearing constitutional rights protecting documents of Canada and Israel. While these inquiries are similar, they are not identical. Section 3 looks into the first area of inquiry, namely what is the nature of a NM bearing Constitution. It asks whether the use of the NM allows a legislature to *opt out* of the constitutional order or simply to deviate from it. Opting out refers to a situation where once the NM is invoked, the Constitution is no longer of any force or effect. Deviation means that even when the NM is invoked, the Constitution retains its potency, albeit now in the background. My conclusion is that both the Canadian and the Israeli NMs only allow legislatures to deviate from the Constitution and not to opt out of it. This is evident once we realize that the NMs cannot be applied to all constitutionally protected rights. that the effect of any notwithstanding declaration is temporary, and that the legislature must follow a certain procedure before invoking the NM. This explains why I believe that the term “override” is inappropriate. This term implies that legislation enacted by way of the NM is no longer subject to, and has indeed superseded, any constitutional order. The reality, however, is that the enactment of legislation by way of the NM is accomplished within the constitutional order. Therefore, instead of using, as many others do, the term “override”, I refer to the “Notwithstanding Mechanism”. Indeed, the text of s. 33 uses the term “notwithstanding”, but does not use the term “override”.

Section 4 shifts from the inquiry into the nature of a NM bearing Constitution to an examination of the attributes of the rights therein. My central finding in Section 4 is opposite to that arrived at in Section 3. I believe that the legislature does have the power to override rights.
Once the NM is invoked, the right ceases to exist. The legislature does not have to respect it and can completely ignore it.

Both the inquiry into the nature of a NM bearing Constitution and the inquiry regarding the rights therein were dealt with in a Canadian and an Israeli Supreme Court decision. The Canadian decision, *Ford v. Quebec*, is discussed in Section 3. In its ruling, the Supreme Court of Canada held that the Quebec government’s omnibus use of the NM in its *Act respecting the Constitution Act* was constitutional. I argue against this holding since the omnibus use should be characterized as an opting out of the constitutional order and not merely a deviation from it. The Israeli decision, *Meatrael v. the Knesset of Israel*, is discussed in Section 4. Unlike *Ford*, this decision did not examine the nature of a NM bearing Constitution but analyzed instead the attributes of the rights such a Constitution contains. My analysis will show that the court’s rights analysis was confused.

Section 5 marks the transition from the discussion of the NM as a compromise between legislative supremacy and constitutional supremacy to the view of the NM as a new division of labour between the courts and the legislatures under a supreme Constitution. It introduces the works of three Canadian scholars, Paul Weiler, Lorraine Weinrib and Brian Slattery, who have offered a theory of s. 33. Weiler believes that s. 33 is aimed at enabling the legislature to correct judicial mistakes. Weinrib’s view is that the mechanism’s purpose is to create legislative “exceptions” to rights. Slattery presents an intermediate approach. The section will analyze these three theories according to the wording of s. 33 and in the context of the *Charter* as a whole.

While remaining rooted in readings of the constitutional texts, the approaches presented in Section 5 represent general accounts of the interaction between courts and legislatures in a constitutional democracy. These approaches are the subject matter of the rest of the dissertation. Chapter 3 discusses the check on judicial approach as presented by Weiler and Chapter 4 analyzes Weinrib’s approach whereby the NM represents a “partnership” between courts and

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3 H.C 4676/94 *Meatrael v. the Knesset of Israel*, 50(5) P.D. 16 (1997) [hereinafter *Meatrael*]. The author’s translation of the case is appendix 1 to this dissertation. Any references in this dissertation to this decision are to the translation.
legislatures. Chapters 5 and 6 discuss the practice of the NM and potential uses of the mechanism in Canada in light of these theoretical inquiries.

2. The Canadian NM and the Israeli NM

A. Introduction

The story of the Canadian NM has already been told. Simplified greatly, it is essentially as follows. Pierre Elliott Trudeau led Canada's patriation effort, which included securing legal independence from Britain, affixing an amendment procedure to the Constitution, and entrenching a Charter of Rights and Freedoms.\(^6\) Up to the final stages of the negotiations regarding these issues, eight out of the ten provinces opposed the suggested package, including the proposed Charter.\(^7\) Objection to the Charter stemmed from considerations of the division of powers between the provinces and the federal government, and because of considerations of the separation of powers, i.e., fear of transferring powers to the judiciary.\(^8\) In the agreement that ultimately gained the acceptance of eight of the opposing provinces, it was established that a NM would be added to the Charter.\(^9\) Because NMs are included in the Canadian Bill of Rights and in four provincial Bills of Rights,\(^10\) the notion of the notwithstanding clause was not new to

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\(^7\) Ibid. at 106 et seq.


\(^9\) See R. Romanow, Whyte and Leeson, supra note 6 at 206-11. The text of the agreement reads: “In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:

'b) The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:

..."


\(^11\) Canadian Bill of Rights, S.C. 1960. c. 44. s. 2, reads: “Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe... any of the rights and freedoms herein recognized and declared” [emphasis added]. Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977 c. 12, s 52 stipulates: "Sections 9 to 38 prevail over any provision of any subsequent act which may be inconsistent therewith unless such
Canadians.\textsuperscript{11} Academic commentators are unanimous that the decision to include a NM in the new Charter was crucial to gaining provincial consent. and was thus a "sine qua non" of the adoption of the Charter.\textsuperscript{12}

Unlike its Canadian equivalent, the story of the Israeli notwithstanding clause has not yet been discussed and so a more detailed description is in order. The story of the Israeli NM involves a chain of three constitutional events. The first occurred in 1992 when the two Israeli rights protecting documents, Basic Law: Human Dignity and Liberty\textsuperscript{11} ('BLH') and Basic Law: Freedom of Occupation\textsuperscript{14} (BLO), were enacted without a NM. Thereafter, in 1994, BLO was reformed, with the new version including a NM. Finally, in 1998, BLO was amended again and s. 8, which prescribes the NM, was changed.

Unlike the story of the Canadian NM's origin, which only concerned the idea of a constitutional Bill of Rights, the advent of Israel's NM dealt mainly with a very specific political and constitutional issue, namely the matter of non-kosher meat importation.

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\textsuperscript{11} The "fact sheet" accompanying the signing of the accord stated: "The notwithstanding principle has been recognized and is contained in a number of bills of rights, including the Canadian Bill of Rights (1960), the Alberta Bill of Rights (1972), The Quebec Charter of Rights and Freedoms (1975), the Saskatchewan Human Rights Code (1979) and Ontario's Bill 7 to Amend its Human Rights Code (1981)."


\textsuperscript{13} Hok Yesod: Kevod HaAdam VeHeirutu (Basic Law: Human Dignity and Liberty), Sefer HaHukim (S.H.) 150 (1992).

B. Rights Protection in Israel and the 1992 Basic Laws on Human Rights - General Principles

Until 1992, Israel did not have a constitutional document for rights protection. While it did have the nine Basic Laws, these do not safeguard rights constitutionally. In part, this is because these 9 Basic Laws deal not with rights but rather with governmental structure. Furthermore, they are not entrenched and can be amended or repealed by legislative majorities. In fact, eight of the nine Basic Laws do not even require an absolute majority (61 of the 120 Knesset members) in the Knesset. Israel’s parliament and constituent assembly, for amendment or repeal. Since the Knesset has no quorum requirement, a 2:1 vote in the plenum is sufficient. Finally, the Basic Laws are not supreme. It has been held that because of the principle of legislative supremacy, if a later ordinary act contradicts an earlier Basic Law, the ordinary act prevails. However, the Supreme Court ruled that where a Basic Law stipulated that one or more of its provisions can be changed only by a certain majority of Knesset deputies, a subsequent act which contradicts this Basic Law must be passed by the majority prescribed by the Basic Law which is being contradicted, otherwise it is void. There were indeed some cases in which the court struck down ordinary acts which contradicted such entrenched provisions in Basic Laws without being passed by the required majority. Thus, in this sense, legislative supremacy was not strictly applicable in the Israeli legal system. A given Knesset has the power to fetter the hands of future Knessets, by stipulating that future acts have to be passed by a certain majority. A future Knesset would not have the power to amend or repeal this act unless it adhered to this majority requirement.

15 S. 4 of Hok Yesod: ha-Knesset (Basic Law: The Knesset), 12 Laws of the State of Israel (L.S.I.) 85 (1958) is the single exception to this rule, since it prescribes an equality provision in a particular field, namely that of elections.
16 The only exceptions are the provisions providing that the legislature must be re-elected every four years and that the provisions of Basic Law: the Knesset cannot be changed by emergency regulations. See ibid. at ss. 9B, 44-45.
19 See Bergman v. Minister of Fin., 23(1) P.D. 693 (1969); Agudat Derech Eretz v. Broadcasting Auth., 35(4) P.D. 1 (1981); Rubinstein v. Speaker of the Knesset, 37(3) P.D. 141 (1983); Tnuat Laor v. Speaker of the Knesset, 44(3) P.D. 529 (1990). The provisions struck down in these cases allocated funds or time on national T.V. for election campaigning. The court held that the provisions were in violation of s. 4 of Basic Law: the Knesset (supra note 15) which provides for the principle of equal elections and which prescribes that it can only be changed by a majority of
In March 1992, the Knesset created the two new Basic Laws, BLO and BLH. In what was later termed the “Constitutional Revolution”, BLH enumerates several rights but makes no reference to three of the most important ones, namely equality, freedom of speech and freedom of religion. BLO protects freedom of occupation. Both of the new Basic Laws adopt the Canadian structure of rights protection. A first similarity is the inclusion of a limitation clause: rather than phrasing rights guarantees of the Constitution in absolute terms, limitation clauses are provided such that the rights can be infringed upon under certain conditions. As a result, constitutional scrutiny in Israel, as in Canada, is to be done in two separate stages: the rights protection stage and the limitation stage. A second similarity to the Canadian formulation is the provision by BLH of one general limitation clause applying to all of the rights protected by this Basic Law.

Despite the similar rights protection structures in Israel and Canada, there are three very significant differences between the two systems. First and foremost, unlike the Canadian Charter, neither of the two new Basic Laws is entrenched. BLO requires only an absolute majority of Knesset members (i.e., 61 of 120 members) for its amendment, while BLH does not even require this, being subject to amendment or repeal by an ordinary vote in the legislature (i.e., a majority of the deputies voting, which may be fewer than 61). This implies that, even with the introduction of the new Basic Laws, majority rule still reigns in Israel in the area of rights. Secondly, unlike the Charter, the new Basic Laws do not apply to past legislation: constitutional review in Israel is limited to new laws. Since the modern state of Israel has existed since 1948, Knesset Members. Since these provisions were not passed by the majority of the Knesset members, it struck them down.


21 These are the rights to protection of the life, the body, and the dignity of the person (ss. 2, 4), property rights (s. 3), freedom to leave Israel (s. 6(a)), right of Israeli citizens to enter Israel, privacy (s. 7).

22 It was suggested, however, that these three are protected under the human dignity guarantee in ss. 2 and 4 of the Basic Law. See A. Barak, Parshanut Bamishpat, volume III - Parshanut Hukatit (Interpretation in Law, Volume III, Constitutional interpretation) (Jerusalem: Nevo Publishing, 1994) at 417-23.

23 S. 8 of BLH and s. 4 of BLO.

24 It should be noted that at this point in 1992, following the initial creation of BLH and BLO, none of the Basic Laws included a NM.

25 BLH explicitly stated that it is not to affect the validity of existing laws (s. 10). BLO initially provided a 2 year period of adjustment, until March 1994, after which it would have applied to past legislation. In March 1994, BLH was replaced by a new version, and the new version of the Basic Law extended this period for two years, until March 1996; see Hok Yesod: Hofesh Halsuk (Basic Law: Freedom of Occupation), S.H. 90 (1994), s.10. (For the
44 years' worth of legislation is therefore not to be reviewed for constitutionality under the Basic Laws unless re-enacted or reformed.

The third way in which the two new Basic Laws of Israel differ from the Canadian Charter is that neither BLH nor BLO includes a supremacy clause. However, analyzing the supremacy issue from the perspective of the aforementioned Supreme Court rulings reveals a difference between the new Basic Laws. Since BLH does not stipulate any majority requirement for its amendment, when a new act contradicts it, the act prevails. In contrast, changing BLO requires a majority of the full Knesset, such that if BLO is contradicted by a new act, the act will prevail only if passed by 61 members. The issue of supremacy was later remedied in 1995 when the Supreme Court ruled that the two new Basic Laws are supreme, based primarily on the fact that they include a limitation clause which carries specific stipulations regarding the validity of statutes.

Seeing the Basic Laws as supreme is what makes the comparison between Canada and Israel meaningful. It implies that, although Israel has a document providing for only partial rights protection (leaving out some very important rights), and although its rights protections are weak (given their inapplicability to past laws) and fragile (allowing the majority to violate rights), it still has a supreme document that is applied and enforced by the court. Against this background, I turn now to the non-kosher meat story, which in 1994 precipitated the adoption of the NM in Israel.

C. The Meat Crisis and the NM

For years, the importation of frozen meat into Israel was undertaken almost solely by the state. The rationale for this restriction was that private entities should not be entrusted with the performance of essential services. Since Israel had to maintain a constant state of war readiness,
its designation of essential services was unusually broad and came to encompass many activities, such as importing frozen meat, which ordinarily would have been left to the private sector. While this justification for the near state monopoly had nothing to do with religion, it resulted in a situation where most of the imported meat was kosher. The government did allow private entities to import non kosher meat on the basis of a quota regime but most of the imported meat was kosher. In 1992, the government decided to privatize the meat market and declared its intention to change the governing regulations accordingly. Some religious communities in Israel, including the religious political parties, viewed these decisions with concern and sought to prevent the possible flooding of the country with non-kosher meat. The government of Prime Minister Yitzhak Rabin wished to accommodate the concerns of the religious parties. The government needed their support in order to further the peace process and so struggled to keep them in its governmental coalition. Consequently, the government failed to pursue its decision. Following a petition by Meatrael Inc., a meat importer, the Supreme Court ordered the government to proceed with the privatization plan and to enact the relevant regulation within four months. To gain more time to figure out how to resolve the meat importation issue, the government postponed the privatization until the issue could be settled by legislation. The original plan had been to settle the issue by regulation.

This move provoked another petition by Meatrael, which resulted in the Supreme Court’s nullification of the government’s decision to postpone privatization of the meat importation on the grounds that it was “unreasonable”. In so concluding, the Court noted that the purpose of the government’s decision was to impose Kashrut (the requirement that food be kosher) on those who were not interested in it, as opposed to merely providing kosher meat to observant Jews, which would have been a legitimate goal in itself. Concerning the government’s plan to deal with the issue by way of legislation, the Court added in obiter that even primary legislation

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28 See HC 3872/93 Meatrael v. The Prime Minister and Minister of Religious affairs. 47(5) PD 485 at 492.
29 Ibid.
30 Ibid. at 495.
32 Ibid. at 497.
33 Ibid. at 504, 506-9, 515. According to Israeli administrative case law, even prior to the enactment of the two new Basic Laws, the court could abolish administrative acts (i.e., secondary legislation and executive decisions) if they were not “reasonable”.
34 Meatrael, supra note 28 at 500.
imposing Kashrut on those who do not observe it, if enacted, would be unconstitutional. The Court reasoned that religious coercion is not a "proper purpose", as required by the limitation clause of BLO, for the sake of which the freedom of occupation of meat importers could be infringed.35

Approximately one month prior to the delivery of this judgment, a committee in the Ministry of Justice concluded its work revising BLO (for reasons unrelated to the privatization of the meat industry).36 Just before the committee's recommendations were turned into a bill to amend the Basic Law, the Ministry of Justice was asked to deal with the non-kosher meat problem.37 Borrowing the Canadian idea,38 it was decided that, in order to bypass the aforementioned obiter dictum, a notwithstanding mechanism would be added to the Basic Law, such that a law banning the import of non-kosher meat could be enacted.39 On March 8, 1992, the Knesset passed this new version of the BLO including s. 8 - the NM.40 During the same night, it

35The limitation clauses in both the BLH and BLO Basic Laws require that the infringement on the protected rights be contained "in a statute befitting the values of the State of Israel, aimed at a proper purpose and to an extent no greater than is required, or according to such a statute by virtue of express authorization by it"; s. 8 of BLH and s. 4 of BLO. This is the new version of the limitation clauses, from 1994 (see infra text accompanying notes 35-42). The requirement of a "proper purpose", however, appeared in the initial 1992 version of the limitation clauses too.

36 See the letter of the head of the committee, Mr. Shlomo Guberman, to the Minister of Justice (19 September 1993) (The letter is on file with the author. The author thanks Mr. Guberman for providing me with a copy of the letter).

There were two main problems in the original text of the Basic Law. First, the Basic Law stipulated that existing legislation with which it was incompatible would cease to be valid in March 1994, two years after the Basic Law's inception (the date is now March 2002; see supra note 25). The work of examining and accommodating existing legislation to BLO had to be done before that date. Second, the text of the limitation clause at the time required that all limitations on freedom of occupation must be made "in a statute" - as opposed to being "prescribed by a statute" (or by law) - which would have rendered invalid thousands of provisions in secondary legislation that influenced freedom of occupation. Finally, on a more general level, BLO - as well as BLH - was a private bill, and so did not receive the normal governmental treatment. The committee was supposed to "nationalize" it. See Diverney HaKnesset (Knesset Protocols) 133 (1994) at 4525-4529 [hereinafter Knesset Protocols].


39 See Guberman's speech, supra note 37.

40 Hok Yesod: Hofesh ha-Ishuk (Basic Law: Freedom of Occupation). S.H. 90 (1994). See also supra note 25. At the time of its enactment, the text of s. 8, entitled "The Validity of a Deviating Statute", read: "A provision of a statute that infringes on freedom of occupation shall be valid, even though not in accordance with section 4, if it has been included in a statute passed by a majority of the Knesset members, which expressly states that it shall be valid notwithstanding this Basic Law: the validity of such a statute shall expire four years from the day of its
also passed the *Meat and Meat Products Importation Act*, a law which stipulated that it was forbidden to import meat into Israel unless the meat had been granted a kosher certificate from the Rabbinate.\textsuperscript{41} The *Meat Law* stated explicitly that it was valid notwithstanding the *BLO*.\textsuperscript{42}

The text of s. 8 did not long remain intact: as noted earlier, there soon came a third development in the story of the Israeli NM. An amendment to the text of s. 8 took place in 1998, transforming s. 8 into s. 8(a) and adding s. 8(b). The latter subsection provided that, despite the stipulation of s. 8(a) that acts with a notwithstanding declaration expire after four years, the *Meat Law* would remain in force indefinitely. I shall analyze this amendment in subsequent sections; for the purpose of introducing the Israeli NM below, this analysis is unnecessary.

3. The Nature of a Constitution with a NM

A. The Opt Out model and the Deviation Model

Talking about a compromise implies that a NM bearing Constitution creates a legal order the constitutional character of which is intermediate. It is less constitutional than a rigid constitutional order but it is more constitutional than a state of affairs with no Constitution. What is the nature of this intermediacy? What happens to the constitutional framework when the notwithstanding clause is invoked? Two possible answers will take us to two different models of notwithstanding clauses. One is the opt out model and the other is the deviation model.

According to the opt out model, a law that invokes the notwithstanding clause opts out of the Constitution. According to the deviation model, the deviation takes place within the constitutional order. The Constitution is not dismissed: rather it applies in a different – at this point we can say weaker – way. For the opt out model, the intermediacy is one of timing. The Constitution is a Constitution only as long as the option to opt out remains unused. For the deviation model, the Constitution is a Constitution both before and after the deviation. Before - it is a full Constitution: afterwards - it is not.


\textsuperscript{42} To clarify, *BLH* does not include a NM.
An example of the opt out model could be the NM in BLH according to the view that this Basic Law does include an implicit NM. As discussed earlier, BLH does not have a supremacy clause. and prior to the 1995 Bank Mizrahi\(^\text{4\text{3}}\) decision it was not clear whether it enjoyed constitutional supremacy. The reason for the doubt was that on the one hand, this Basic Law does not stipulate any requirement as to its supremacy. and according to the Israeli case law at that point in time, this implied that any subsequent act could contradict it; on the other hand, it does include a limitation clause which seems to stipulate some conditions as to the validity of future enactments that infringe on rights. Some academic writers think that the way to acknowledge both the lack of a supremacy clause and the existence of a limitation clause is to suggest that the BLH is supreme (as its limitation clause commands compliance from future legislation) as long as a subsequent act did not explicitly assert its validity notwithstanding BLH (as BLH does not have an explicit supremacy clause).\(^\text{4\text{4}}\) According to this interpretation, BLH enjoys constitutional status only to the extent that another law does not explicitly state otherwise. When such a statement does appear in a law, the latter has the power to opt out - and not only to deviate - from the Basic Law.\(^\text{4\text{4}}\) According to this view, a Constitution with a NM is a Constitution only as long as and to the extent that this mechanism is not used.

\(\text{4\text{3}}\) Supra note 27.


\(\text{4\text{5}}\) The notwithstanding clauses in the Canadian Bill of Rights and in the provincial Bills of Rights (see supra note 10) could also be an example of a notwithstanding clause of the opt out model, for their texts also enable opting out from the entire document and do not subordinate the opting out to any frame of rules or values (aside from the very specific requirement of express declaration, which is a means of identifying the opting out law). See M.E. Gold, "Equality Before The Law in The Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall L. J. 336 at 358. It should be noted, however, that, legally speaking, those Bills were not constitutional but rather legislative. Because of the British parliamentary sovereignty principle, the Canadian Parliament and legislatures cannot bind themselves; See P.W. Hogg, Constitutional Law of Canada, loose-leaf edition, vol. 1 (Toronto: Carswell, 1992) at 12.3(a), 12-7-12-8. Therefore their notwithstanding clauses represent an opting out from rights protection. Indeed, the notwithstanding clause in those bills is not a separate one from the supremacy clause. Rather, the very supremacy is affixed pursuant to the condition that the NM not be used. That is, the deviation is not an exception; it is part of the rule.
What is the model adopted by s. 33 and s. 8 of BLH? I think that they adopt the deviation model. First of all, they do not refer to the constitutional document as a whole but rather to some of its provisions: the Canadian notwithstanding clause leaves some rights intact. The Israeli one refers only to one right (freedom of occupation) and does not refer to the rights protected by BLH, and even regarding this right it leaves the right itself intact and refers only to the limitation clause. Both clauses limit the force of laws with notwithstanding declarations in terms of time and thereby do not provide for opting out from the Constitution altogether. The Constitution is always in the background and, whenever a notwithstanding declaration expires, it reasserts its supremacy. This is why I object to the term “legislative override”. Indeed, the title of s. 33(1) is “Exception where express declaration” and the title of s. 33(2) is “Operation of exception” [emphasis added]. Similarly, the title of the Israeli s. 8 is “the validity of a deviating act” [emphasis added]. Because the Constitution is supreme, it can never be overridden by the legislature. Invoking ss. 33 or 8 enables the legislature to create an exception to the Constitution. The exception is legitimized by the Constitution and it is exactly and solely by virtue of the Constitution that it is valid.

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46 For the influence of this fact on theories of the NM, see Section 5, below.
47 See infra text accompanying note 94-95.
48 Weinrib, supra note 12 at 554.
49 In the Israeli context, the entire act expires. See infra note 82.
50 The Canadian notwithstanding clause provides explicitly for renewing notwithstanding acts (s. 33(4)). See Hogg, supra note 45, volume 2, at 36.4. 36-4-36-5. Lacking an explicit reference in the text, it is not clear if the Israeli laws with a notwithstanding declaration can be reenacted.
51 In every case in which Quebec invoked s. 33 for a specific act, the National Assembly aptly titled the section affected by the notwithstanding declaration an “exception”. In the sole case in Saskatchewan, it was titled “non obstante”. For the references to these declarations, see Chapter 5. Section 2, below.
52 In the Israeli context, there is an additional problem with the term “override”. Because the Hebrew word for “to override” (“Hitgabrut”) is the same as for “to get over” or “to overcome”, it bears with it a positive - not to say an heroic meaning, that is not appropriate for the NM (or, at least, that is not prima facie justified and that is not conveyed by the constitutional text).
53 I could not find any Canadian material about who first deviated from the text of the title of the section, and came up with the term “override”. In Israel, the term was first used by Barak, who told me in conversation that he had first heard it from the late Professor Aharon Yoran of the Hebrew University of Jerusalem. The interesting thing is that the Israeli constitutional text correctly translated the Canadian one and the Israeli literature correctly translated the language of the Canadian literature but neither literature adhered to the terms of its constitutional text.
B. The Quebec Act Respecting the Constitution Act - the Opt Out model and the Deviation Model

An application of the two models for understanding the NM can be found in the way that different Canadian courts referred to the very first invocation of the mechanism in Canada - the notorious Quebec Act respecting the Constitution Act, 1982."

This act, which confirmed "many of the worst fears of those who objected to S. 33", is in some sense fantastic. On June 23, 1982, a short while after the Charter was made into law, the Quebec National Assembly passed this act, which made all Quebec legislation into notwithstanding acts" retroactively as of April 17, 1982, the day the Charter came into force. This Quebec use of the NM was "comprehensive": first, by using a standard notwithstanding declaration, the Act referred to all available Charter rights. Second, this standard declaration referred to all existing legislation. Third, the Quebec legislature of the day maintained a practice of adding this standard declaration to every new act. Fourth, the deviation applied retroactively from the day the Charter came into force (a retroactive force of approximately three months).

What accounts for such a bizarre piece of legislation is that its aim was not to protect a specific piece of legislation, to reject a specific judicial decision or to address a specific right. Rather, it represented an attack on the very legitimacy of the Charter. It was a statement on the part of the separatist Parti Québécois government in Quebec that it did not intend to accept or respect the Charter." The background to this statement was the Quebec government's view that The Constitution Act, 1982 was not legitimate and did not bind Quebec. This view was based on the argument that the 1981 agreement, and, following that, the submission of the Constitution Act to Britain for its approval there, was all achieved without the consent of the Quebec

53 Supra note 4.
54 Manfredi, supra note 12 at 201.
55 The technique was replacing the text of all existing acts with a new text that included in its conclusion the following declaration of exception: "This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982" (Sections 1 and 2). For the irony of this legislation's title ("respecting"), see D. Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions" (1993) 72 Can. Bar. Rev. 417 at 433.
56 Weinrib, supra note 7.
57 Manfredi, supra note 12 at 200-201. In the language of the then Premier of Quebec: "We're going to make it as complicated, legitimately, and as difficult as we can for some aspects of that bloody Charter to be applied in Quebec" (The Globe and Mail), 4 April 1982.
The Quebec government's action had nothing to do with either human rights generally, or with the role of the courts. It did not invoke the NM of the Quebec Charter of Human Rights and Freedoms. Therefore rights protection and judicial review were to continue in Quebec, except not at the constitutional level.

The validity of this use of the NM was the subject of three different court rulings. The Quebec Superior Court found it valid: the Quebec Court of Appeal found it void: the Supreme Court of Canada found it valid except for the retroactive force issue. The starting point for the judges in all three instances was that on its face, each of the notwithstanding acts that was enacted in the standard and omnibus way fulfilled the requirements of s. 33. for each one of them included an express notwithstanding declaration. The question is whether this starting point was sufficient.

The Quebec Superior Court upheld the act. In the case of Alliance des Professeurs de Montreal v. A.-G. Quebec it ruled that the act fulfilled all of s. 33's requirements. It included an express notwithstanding declaration. This declaration referred to the Act's provisions and the declaration referred to Charter rights that permit deviation. The court explicitly rejected the argument that using the NM should be limited to extraordinary situations. The court did not get into any theoretical discussion.

The Quebec Court of Appeal overruled this decision. It found that an additional condition embedded in s. 33 was the duty of a legislature when invoking the NM to specify the Charter provision from which it sought to deviate. The Court inferred this from the language of “shall operate notwithstanding” which requires that the Charter provision be “mentioned and specified”. The Court supported this textual understanding with theoretical foundations which

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59 See Weinrib, supra note 12, at 560, note 58.
61 Ibid. at 164.
62 Ibid. at 164-6.
63 Ibid. at 166-7.
64 Ibid. at 163.
66 Ibid. at 361.
67 Ibid.
reflect the deviation model. These were: the essence of democracy, the purpose of the Constitution, and the purpose of s. 33. The essence of democracy includes the awareness of individuals of what is going on. The purpose of a Constitution includes limiting the power of majoritarian legislatures. The purpose of s. 33 is to bring the deviation to the public's attention. To satisfy these three ideas, the notwithstanding acts must point out the connection between the act and the right from which this act is deviating. When notwithstanding acts are enacted in a standard and omnibus fashion, the public cannot understand the deviation sufficiently. Thus the court insisted on reading s. 33 in light of the constitutional structure and as enabling a deviation from it, and not as being outside of the constitutional structure, and allowing opting out from it.

Overruling this decision, the Supreme Court of Canada did adopt the opt out model. In its famous Ford decision it ruled that s. 33 should not be construed so as to include requirements that are not explicit in it. Ordering the legislature to state, in the notwithstanding act, the Charter provision from which it sought to deviate and the connection between the notwithstanding act and the Charter right constituted such an additional requirement. Furthermore, "s. 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review".

Requiring the legislature's consideration of what rights might be violated by a notwithstanding act amounted to a substantive judicial review of notwithstanding acts. Rejecting such a requirement, the court said that since each notwithstanding act enacted with the

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68 Ibid. at 356-9.
70 Alliance des Professeurs de Montreal, supra note 65 at 364. In this context, the court reiterated that s. 3's democratic right to vote cannot be deviated from.
71 Ford, supra note 3. The Ford case overruled the second Alliance decision, but it was not an appeal of the latter. See Weinrib, supra note 12 at 545, note 9. The lower Ford decision was delivered after the Quebec Superior Court upheld the validity of the Act Respecting the Constitution Act in the first Alliance des Professeurs de Montreal decision (supra note 60) and before this decision was overruled by the Quebec Court of Appeal in the second Alliance des Professeurs de Montreal decision (supra note 65). It therefore assumed that the Act Respecting the Constitution Act was valid but struck down the impugned legislation for violating the Quebec Charter. See Ford v. Quebec (1985), 18 D.L.R (4th) 711(Que. S.C.).
72 Ford, supra note 3 at 740.
standard and omnibus declaration fulfilled s. 33's form requirements. they were therefore lawful.

Thus, although stating that neither of the two views could be of interpretive assistance in interpreting s. 33, the court in fact preferred the view of the "continuing importance of legislative supremacy", adopting the opt out model, over the view stressing "the seriousness of a legislative decision to override guaranteed rights" which reflected the deviation model. It was exactly because of this misunderstanding that Weinrib criticized the court's ruling.

She explained that the main point of the court ruling, the formal character of s. 33, was not relevant. The Court was not asked to declare that a certain notwithstanding act was void due to its content; the Court was asked to decide that the form of invoking the NM was unconstitutional. On a deeper level, Weinrib diagnosed that unlike the Quebec Court of Appeal, the Supreme Court understood s. 33 as an instrument to preserve legislative supremacy (the opt out model), whereas in fact it is part of a complicated constitutional structure, whose main idea is to force legislatures to think deeply and to take seriously the violation of constitutional human rights, and not to undermine constitutionalism (the deviation model). This failure had led the court to enable the Quebec legislature not to take the NM seriously by creating notwithstanding acts without any deliberation about the meaning of the deviations, and thereby turning s. 33 into an "override" mechanism.

74 Ford, supra note 3 at 742-743. The Supreme Court agreed that the Act respecting the Constitution Act was invalid with respect to the retroactivity issue. The Court said that given the general rule against the retrospective force of legal instruments, and lacking an explicit reference in s. 33, the section should be construed as not providing for the enactment of retrospective notwithstanding acts (at 744-745).

75 Ibid. at 740.

76 Ibid.

77 Geoffrey Marshall writes about the NM: "Those who advocate this device often argue that it would rarely be used, and that it is a proper compromise between the rights principle and the principle of legislative sovereignty. Canada's experience suggests that its availability is too great a temptation to a determined and aroused political majority. It is not so much a compromise as a capitulation." G. Marshall, "Taking Rights for an Override: Free Expression and Commercial Expression" (1989) 4 Public Law 5 at 11. It is not clear, though, if Marshall was referring to the Act Respecting the Constitution Act or to the Ford case.

78 Weinrib, supra note 12 at 558-9.

79 Ibid. at 554-559. See also P.H. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L. Rev 293 at 299.

Fortunately, the Act respecting the Constitution Act episode did not last. In December 1985, the Parti Quebecois Government was replaced by a Liberal one, which did not keep up the practice of adding a notwithstanding declaration to new laws. See Hogg, supra note 45, volume 2, 36.2 at 36-2-36-3; R. Tassé, "Application of the Canadian Charter of Rights and Freedoms" in G. A. Beaudoin and F. Ratushny, eds., The
C. The Intermediate Nature of the NM: Express Declaration, Time Limit, and Absolute Majority

The rights to which the NMs of Canada and Israel apply enjoy an intermediate constitutional status, and the manner in which this is so is clear. On the one hand, it is possible to override a right and to deviate from the Charter or from the BLO. On the other hand, the notwithstanding act is characterized by three things, which reflect the fact that it deviates from the Constitution: seriousness, political risk, and limited application.

The seriousness and the political risk are expressed in the requirement of express declaration. If a legislature expressly declares that it is deviating from the Constitution, it demonstrates that it is aware of what it is doing (seriousness): it informs the public about the deviation and thereby encourages public debate about it. and it takes the risk of being exposed to public criticism. The limited application is one of time: unlike normal acts, which are in force as long as they are not repealed, a notwithstanding act ceases to be in force after several years unless it is renewed. Thus a notwithstanding act is generally weaker than other laws. In case of renewal, the legislature will have to repeat the express declaration, and encounters the seriousness and the political risk once again. The five year limitation ensures that an election to the deviating legislative body takes place before every renewal of a notwithstanding act, so that the deviation would have the potential to be an election issue. To summarize, the enactment of a

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*Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989) 67 at 107. When the *Act respecting the Constitution Act* itself expired in June 1987, it was not renewed.

80 Tushnet, *supra* note 73 at 280.
81 Weiler, *supra* note 8 at 81-82; L.G. MacDonald, “Promoting Social Equality through the Legislative Override” (1994) 4 N.J.C.L. 1 at 18; Tushnet, *supra* note 73 at 280. The issue of the public response to the invocation of the NM is discussed in Chapter 5, Section 3, below.
82 There is a difference between ss. 8 and 33 with respect to what instrument expires after the limited period of time (four years in the case of s. 8 and five with respect to s. 33). The Canadian notwithstanding clause refers to the notwithstanding declaration, which can be attached either to a provision in an act or to a whole act. The Israeli provision provides for the expiration of the whole act in which the notwithstanding declaration was included. Thus, for example, if an act with 200 sections was enacted (or amended) and a notwithstanding declaration was attached to even one of its provisions, all 200 provisions would expire after four years. There is no explanation in the Israeli mechanism’s legislative history (i.e., in the legislative debates or the proceedings of the Knesset’s committee on the Constitution, Law and Justice) for the breadth of its expiry provision.
83 Manfredi offered to change the time of expiration so that a notwithstanding act would expire “upon the dissolution of the Parliament making the declaration or five years after it comes into force”. Manfredi, *supra* note 12 at 209. Interestingly enough, an earlier version of s. 8 mentioned expiration six months after new elections to the Knesset. See *Hatsa'at Hok Yesod: Hufesh Ha-Išuk (Tikun) (Proposed Basic Law: Freedom of Occupation*
notwithstanding act is not as difficult as amending the Constitution, but it is not as easy as enacting a regular law. This is exactly the essence of the compromise that makes the deviatable Constitution less stringent than the full one but more stringent than a statute.

With regard to the seriousness notion, there is a difference between the Canadian and Israeli NMs. As stated before, the enactment of a notwithstanding act in Israel requires the vote of an absolute majority (61 Knesset members out of 120, i.e., 51%). whereas in Canada, it requires an ordinary majority (i.e., of those members who take part in the vote). The need to recruit an absolute majority of Knesset members makes it politically harder to enact a controversial notwithstanding act, and might increase parliamentary and public focus on the issue both when the notwithstanding act is originally enacted and when it is renewed. In that sense, the Israeli seriousness requirement is stronger than the Canadian one. Indeed, suggestions have been made by the Canadian Federal Government by Christopher Manfredi and by Peter Lougheed that a majority of three-fifths should be required for the enactment of a notwithstanding act.

The analysis in this section shows that the NM does not make the Constitution as a structure disappear. Since this is the case with the Constitution, is this not also the case with constitutional rights? The next section demonstrates that the answer is no.

4. The Nature of Rights in a Constitution with a NM

A. Introduction

We understand now that the notwithstanding mechanisms we are dealing with do not enable opting out from the Constitution, but rather ensure that the Constitution is the basis for the

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\(\text{(Amendment)}\), Hatza'ot Hok (H.H.) 129 (1994), s. 2; Hatz'a't Hok Yesod: Hufesh Ha-Ishuk (Tikun) (Nosah Haluf) ((Proposed Basic Law: Freedom of Occupation (Amendment) (Alternative Version)), H.H. 289 (1994), s. 2. There is no explanation in the history of the text as to why the text of the BLH that was eventually adopted does not include this mechanism, but rather provides for expiration after 4 years. Affixing the expiration date closer to the election would increase the chances that the deviation would be an issue in the election campaign.

84 As mentioned before, it is not clear whether s. 8 allows for the re-enactment of notwithstanding acts.


86 Manfredi, supra note 12 at 208-209.

force of notwithstanding acts and that it sketches the boundaries of the NM’s operation. What are the limits of the deviation sketched by the Constitution in Israel and in Canada, as far as constitutional rights are concerned? In this section, I will show that although the NM does not enable opting out from the Constitution itself – or for overriding it – it does provide for the total overriding of the constitutional rights.\(^\text{66}\) As a result, although I rejected the term “override” in relation to the Constitution itself, I accept it in relation to rights.

There are two dimensions in which a notwithstanding act can curtail a right: it can curtail its scope and its substance. The dimension of scope refers to the right itself and is quantitative. It is about the degree to which the notwithstanding act limits the total number of activities protected by the right. The substance dimension refers to the limitations on the right, and is qualitative. It refers to the purposes of the rights’ violation permitted by the NM. I will deal with scope first and then with substance, dividing the discussion in both cases between Canada and Israel. I will conclude by analyzing a recent Israeli judgment that referred to this issue.

**B. Scope**

Do ss. 8 and 33 legalize only violations of the protected rights or, additionally, is the negation of these rights enabled? I will first explain what it means to negate a right. Earlier, we were introduced to two notions: limitation and violation. I said that when the limitation of a right is not permissible according to the limitation clause, it is a violation. The notion of violation refers to the quality of the limitation. The notion of negation refers to the degree of the limitation. Suppose, for example, that a law forces someone to choose a certain occupation. This limitation might be justified or it might not (and hence be a violation); however, since it leaves a person with no freedom of occupation, it effectively is a negation of the right.\(^\text{67}\) My claim is that s. 33

\(^{66}\) As I will show, this rule has one exception in the Israeli context.

\(^{67}\) To avoid confusion, I do not use the term “denial”. This term was understood by Hogg to be what I call “negation”, and he criticized the distinction between this term (“denials” according to his terminology and “negations” according to mine) and “limits” on rights for being “amorphous” and creating an “unnecessary and inappropriate” additional stage to Charter inquiries implied to be required by A. G. Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66 at 86. Instead of having a two stage Charter inquiry, one stage for rights and one stage for limits, the court would have to engage in a three stage inquiry. First, there would be the rights inquiry and second, a pre-limits inquiry. In this latter stage, the court would examine whether the infringement on the right was a limit and should thus be examined according to s. 1 criteria or whether it was a “denial” that could not be upheld even by section 1. Only if the infringement was a limit and not a denial could the
provides also for the negation of the right, and, conversely, that s. 8 does not. I will start with s. 8.

S. 8 legalizes (given the fulfillment of the express declaration and absolute majority requirements) a provision that "infringes on freedom of occupation... even though not in accordance with section +" [emphasis added]. S. 3 is the section that protects the right itself: "[E]very Israeli national or resident has the right to engage in any occupation, profession or trade". The fact that s. 3 is not mentioned in s. 8, as well as the use of the term "infringes on" as opposed to "denies" or "negates", tells us that freedom of occupation cannot be negated even by the NM. For this purpose, a constitutional amendment is required. In this sense, the notwithstanding clause is similar to the limitation clause. Both clauses use the term "infringement". The former enables the legislature to put justified limits on the right; the latter legalizes even violations, but neither is empowered to enable negations of the right.

In Canada's Charter, in contrast. s. 33 reads "notwithstanding a provision included in section 2 or sections 7 to 15" [emphasis added]. The legislature's working premise is that the right itself can be treated as if it does not exist. Indeed. the text further tells us that after the NM is used, the notwithstanding act or provision "shall have such an operation as it would have but for the provision" of the Charter, from which it deviated. Thus s. 33 permits not only violating rights but also negating them altogether. Unlike the Israeli NM, the Canadian one, in this respect, does resemble a constitutional amendment.** Despite its theoretical importance. however, this

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** Indeed. when the Supreme Court of Canada decided to strike down the Quebec education legislation that contradicted section 23 of the Charter without going through a s. 1 analysis. it reasoned that the legislation "directly collided" with the Charter provision. It explained that such a collision could be permitted only by a constitutional amendment or by the NM: "...the limits which s. 1 of the Charter allows to be placed on the rights and freedoms set out in it cannot be equated with exceptions such as those authorized by s. 33(1)... Nor can those limits be tantamount to amendments to the Constitution of Canada" [emphasis added]: A. G. Quebec v. Quebec Association of Protestant School Boards, supra note 89.

In the context of the similarity between the NM and a constitutional amendment, it is interesting to compare the issue of negating rights with the issue of the procedure required to enact a notwithstanding act. Here, with respect to the issue of negation, the Canadian NM resembles a constitutional amendment while the Israeli mechanism does not. On the issue of procedure. the Israeli NM resembles a constitutional amendment while the Canadian does not.
difference between the Canadian and Israeli NMs is not significant. for the situations in which an act creates a negation of a right are extremely rare.

C. Substance

Assume a legislature enacted a notwithstanding act following the s. 33 or s. 8 requirements (express declaration and. in Israel. an absolute majority). Is this enough to legalize anything? Or are there any limits to how unjustified and oppressive a notwithstanding act can be? Are there any rights-oriented principles of substance. aside from those that explicitly appear in the texts of the notwithstanding clauses. that delimit the invocation of the NMs? Let us take a hypothetical act that forbids the teaching of any part of the Bible because the Bible contains violent ideas. Let us further assume that such an act violates both freedom of occupation and freedom of religion. Can such an act be legitimized by using the NM? Earlier. I introduced the idea of a violation of a right. I suggested that when a limitation is not justified. it is a violation. In keeping with this terminology. the question can be reframed as follows: is there a limit to how profoundly a violation can contradict Charter values or is every violation capable of being legitimized by s. 33?

In Canada. it seems within the text of the Charter. there are no limits whatsoever to the substance of notwithstanding acts. S. 33 explicitly stipulates that a deviating act or provision “shall have such an operation as it would have but for the provision” of the relevant Charter provision and thereby directs the interpreter to depict the legal world after the NM is used as if the right is gone. In this sense also. it will be true to say that s. 33 enables legislative bodies to override rights (although not to override the Constitution).

Brian Slattery and Daniel Arbess have argued that s. 33 does not legalize everything. Slattery and Arbess claim that since s. 1 is not mentioned in s. 33. and since a notwithstanding act is. at the end of the day. a limitation on rights. then for a notwithstanding act to be valid. it has to survive some kind of s. 1 analysis. This s. 1 analysis would be weaker than usual. to give some meaning to s. 33. However. s. 1 is not to be totally disregarded.” Hogg rejects this view because in the Canadian context one has to look first at the right and only then at the limitations,
and therefore once a *Charter* right is overridden by invoking the NM, s. 1 does not arise at all.\(^2\) Aside from this explanation of Hogg's, I disagree with Slattery and Arbess for an additional reason. Slattery and Arbess' view fails to fit the Canadian structure of rights protection. If the boundaries of permissible or "normal" violations are determined by s. 1-like principles, then s. 33 is only a modified version, a mere subsection, of s. 1. That does not make sense of s. 33 as an independent section, providing a separate route for legislation, and creating exceptions to the *Charter* rights.\(^3\) If we want to put limits of substance on invocations of the NM, they should be internal to s. 33, rooted in non-overridable *Charter* rights, or rooted in some other constitutional provisions, but not in the limitation clause.\(^4\)

It seems that the Israeli constitutional text incorporates this message. In the Israeli context, it is clear that if there are limits on the substance of notwithstanding acts, they are definitely not rooted in the text of the limitation clause. This is because unlike the Canadian one, the Israeli notwithstanding clause does explicitly refer to the limitation clause. There are, however, two relevant provisions in *BLO* that might be the source of the illegitimacy of a "severe violation". These are ss. 1 and 2 of the *BLO*, entitled "fundamental principles" and "purpose", which read:

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of his life, and on him being free, and they shall be respected in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.
2. The purpose of this Basic Law is to protect freedom of occupation in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

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\(^{3}\) See Hogg, *supra* note 45, volume 2, 36.7 at 36-7-36-8; Manfredi, *supra* note 12 at 202. For this reason, sections 24 (enforcement) and 52 (supremacy) of the *Constitution Act, 1982*, are also not relevant. Therefore I do not accept William Conklin's attempt to support the views of Arbess and Slattery with those sections. See W. E. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989) at 240-241. For an attempt to counter Hogg's criticism, see Slattery, *supra* note 91 at 395 and Arbess, *supra* note 91 at 131-132.

\(^{4}\) Indeed, Slattery writes that "[S]ection 33 represents an elaboration of the scheme envisaged in s. 1 rather than an exception to it". Slattery, *supra* note 91 at 393. Slattery did not address the possible contradiction between this statement and his view.

\(^{4}\) Slattery and Arbess's view was also rejected in the *Ford* ruling, *supra* note 3, where the court did not examine the degree of the human rights violation it found in the impugned provisions. See Hogg, *supra* note 45, volume 2, 36.7 at 36-7-36-8.
And the question is very simple: what if a certain notwithstanding act does not respect the fundamental principles in s. 1 or the purpose set forth in s. 2?

I think that textually speaking, it is very clear that these sections cannot be used to put substantive limits on the use of s. 8. The limitation clause tells us that in order to be valid, acts that limit freedom of occupation must. inter alia. “befit the values of the state of Israel”. The notwithstanding clause explicitly enables the overriding s. 4 not to respect these values. S. 1 refers to some of the values of the state (“the value of the human being”, “the sanctity of his life”, “him being free”, “the principles set forth in the Declaration of the Establishment of the State of Israel”). If we are explicitly allowed to override all the values (ss. 8 and 4), how could we be implicitly still bound by some of them (s. 1)? A very similar argument is true with regard to s. 2. If s. 4 explicitly tells us that we can override “the values of the State of Israel”, how can we still be bound by s. 2’s “values of the State of Israel as a Jewish and democratic state”? Even if it is possible to argue that the very same words - “the values of the State of Israel” - have different meanings within the same Basic Law, it is clear that it is better not to choose this possibility.\(^9\)

D. The Meatrael Case: Scope, Substance, and Theory

1. The case

In an obiter dictum in the Israeli Meatrael judgment\(^9\) the Israeli Supreme Court referred to some of the issues discussed above. Most importantly, it tried to articulate a test to differentiate between normal and severe violations of the right to freedom of occupation. It is not clear how successful it was. In addition, it mixed the issues of scope and substance.

The case dealt once again with the Meat Law. The petitioner was yet again Meatrael, the company for whose “benefit” the notwithstanding clause was originally added to BLO and “for”

\(^9\) If we do choose to accept this interpretive anomaly, it seems that, unlike s. 2, s. 1 will not be helpful in drawing the line between normal violations and severe ones. This is because s. 1 does not incorporate the whole constitutional structure of rights and limits but only the need to protect rights. It tells us that fundamental human rights “shall be respected... in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel”. It represents the general obligation of the two new Basic Laws: to respect human rights. It is clear that notwithstanding acts are exceptions to this rule and are by their very nature aimed at violating human rights. S. 1 does not provide the interpreter with any tools to differentiate between normal deviations and severe ones because both types of violations contradict it. S. 2, on the other hand, is helpful because it refers to “the values of the State of Israel”, that is, the whole underlying constitutional structure as the ultimate purpose of the protection of freedom of occupation.
whom the *Meat Law* was enacted. Meatrael now claimed that the *Meat Law* was unconstitutional. Meatrael was involved in the importation of non kosher meat under the quota regime. When the government announced its decision to privatize the meat market, it made significant investments in order to expand its business. The enactment of the *Meat Law* meant that Meatrael was not able to engage in meat importing to the increased extent it was now capable of but was instead once again made to depend on governmental quotas. Meatrael’s significant investments risked being lost. It was argued that these losses, as well as the cancellation of the permission to import meat without governmental approval, infringed upon Meatrael’s freedom of occupation. Further, it was maintained that this infringement was not justified by the limitation clause since the purpose of the government’s action was religious coercion. While the *Meat Law* was protected with a notwithstanding declaration, Meatrael argued that it was still unconstitutional for two reasons. One reason involved BLH and will be analyzed later in the section. The other reason was exactly what is being discussed in this section: the idea that some rights violations are so severe that they cannot be legitimized even with the NM.

2. **Substance: What is a severe violation?**

Meatrael claimed that “the override clause does not protect the law from constitutional review under the fundamental principles in S. 1”. The clause could allow the legislature to deviate from a constitutional provision, but not to “break the framework totally.”

The first barrier the court had to overcome on its way to rule on the question was the textual difficulty whereby if we do say that notwithstanding acts are subordinate to “the values of the State of Israel” then this term has different meanings throughout the *Basic Law*. The Court did not negate this strange suggestion, and called it instead “a nice question”. The Court did not think it had to elaborate at all on the possibility or desirability of such an inconsistent interpretation because:

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96 *Supra* note 5.
97 *Ibid.* at section 2(C).
98 But also freedom of conscience, equality, and property. See *infra* text accompanying notes 106-108.
99 *Meatrael, supra* note 5 at para. 10.
100 See *supra* text accompanying note 95.
101 *Meatrael, supra* note 5 at para. 16.
Even if we assume - without deciding - that there are fundamental principles and purposes that a notwithstanding act cannot infringe, these are certainly fundamental principles and purposes upon which our whole constitutional structure, including the Basic Laws themselves, is built, and that their infringement is substantive and harsh (compare: ...Yardor v. The Elections Committee of the Sixth Knesset... : Tnuat Laor v. The Knesset’s Speaker...) otherwise the override clause is emptied of its main content. This is not the case in front of us.\textsuperscript{102}

What does the Court tell us here? Within the dimension of substance, it sketches yet another division between scope and substance, in order to distinguish between severe violations and normal violations. In terms of substance, only the infringement of “fundamental principles and purposes” upon which the “whole constitutional structure” is built would constitute a severe violation of a right, and one that cannot be preserved even by the NM. In terms of scope, it is not enough that these fundamental principles are infringed: the infringement has to be “substantive and harsh”. The court’s language reaffirms the argument I made previously concerning the placing of substantive limits on notwithstanding acts. This could not be accomplished by creating a weaker limitation clause which would decrease the threshold of constitutionality such that a “normal” violation would be constitutional but a severe violation would be struck down. In the test the Court lays down, there is no analysis of either the purposes or proportionality of the infringement; it simply asserts that there are some basic principles whose harsh infringement is never justified. Further, it seems that the court would accept my view that whereas the rights themselves are overridable, the NM enables legislatures only to deviate from, and not to opt out of, the constitutional framework.

I think, however, that the court went too far, perhaps inadvertently and without noticing. Look at the principles that the Court is talking about. Where can we find them? Are they part of the Basic Law? It seems that the answer is no. The Court talks about “principles and purposes upon which our whole constitutional structure, including the Basic Laws themselves, is built”. That is, to strike down a notwithstanding act for its substance, it is not enough that this act will infringe upon constitutional principles. It has to infringe on the principles of the principles - the principles upon which constitutional principles are built. These “super principles” - like, for example, the rule of law and the very legitimacy of constitutionalism - are, in the Israeli context,

\textsuperscript{102} Ibid.
not written ones. And indeed, one of the cases that the court refers to in the cited paragraph is the Tnuat Laor case. This is a famous case because it is the only time when an Israeli Supreme Court judge - Judge Barak - seriously discussed, but rejected, the possibility, even prior to the new Basic Laws, of striking down an act not because it contradicted any written norm, but because it contradicted what the Court called "the fundamental values of the system". 103

In fact, the court's point is irrelevant. The question that the court referred to, though in obiter dictum, was "assuming that it is possible to say that 'the values of the State of Israel' in s. 1 or s. 2 are different from those in s. 4, what are the boundaries that ss. 1 's and 2 's 'values of the state of Israel' stipulate'? The court's answer referred not to ss. 1 and 2's values but rather to the norms underlying ss. 1 and 2. The underlying principles of the whole constitutional structure are supreme, and prevail not only over notwithstanding acts, but also over the Basic Laws themselves. The same rationale that would enable us to strike down notwithstanding acts that do not contradict the Constitution, but contradict its premises, would enable us to strike down the constitutional provisions themselves. Indeed, the language in the Tnuat Laor case refers not only to the possibility of striking down ordinary legislation for infringing on "the fundamental values of the system" but also of striking down Basic Laws.

3. Scope

The previous citation from the language of the Court, articulating the test for what constitutes a severe violation, ended with the words "This is not the case in front of us". Why? The court continued and applied the rule it laid down earlier in the decision:

The infringement on freedom of occupation is of a limited nature since it remains open to the petitioners to import kosher meat, and to do so is in contrast to the situation before the change in the government policy [the decision to privatize the meat market] - with no need of importing licenses. The infringement on property, freedom of occupation and equality - as much as it is hidden among the folds of the law - does not amount to infringement on the fundamentals of our constitutional regime." 104

103 See Tnuat Laor v. Speaker of the Knesset. supra note 19. It should be noted, however, that the reference starts with the word "compare" and therefore it is unclear whether the Court agrees or disagrees with the theoretical discussion in the Laor case. The second case that the Court refers to is Elections Appeal 1/65. Yardor v. The Chairman of the Election Committee, 19(3) P.D. 365 which also discusses the role of the principles of natural law, though not in the context of striking a law down, but in the context of the central elections committee, an administrative board, disqualifying a political party from running in an election.

104 Mearrael, supra note 5 at para. 16.
Here, I think the Court got it wrong. What the Court shows us is that the scope of the limitation on freedom of occupation is small, because some freedom of occupation remained to Meatrael, i.e., Meatrael's freedom of occupation was not negated. However, the petitioners said nothing about negating freedom of occupation. They did not claim that they had lost their freedom of occupation. Indeed, if that was their problem, they would not need to rely on s. 1 because, as I suggested above and as the Court itself said earlier in the judgment when it gave an overview of the NM, s. 8 itself does not allow for the total negation of freedom of occupation. The complaint of the petitioners was not with the scope of the infringement on freedom of occupation but with the kind of reasons - the substance - for the sake of which the NM was invoked. Following the rule it laid down before, the Court should have asked: did the Meat law infringe on any principles "upon which our whole constitutional structure, including the Basic Laws themselves, is built"? Was the infringement "substantive and harsh"? Instead, the question that the Court answered was: did the limitation on freedom of occupation in this case amount to its total negation? In this sense, the Court mixed the notions of the scope of the violation and its content: from the fact that the scope was not considerable, it inferred that the substance was permissible.

E. Conclusion: Meatrael, Ford, and the Role of the Court

The Israeli Supreme Court's willingness to consider the option of striking down legislation protected by the NM was in clear contrast to the Supreme Court of Canada's refusal to look beyond the text of s. 33. The difference between the two courts' approaches is made even more striking by the Israeli court's response to Meatrael's other claim. In addition to arguing that the NM does not allow severe violations of the right to freedom of occupation. Meatrael also claimed that the Meat Law was unconstitutional in terms of BLH, the other Basic Law. For aside from violating freedom of occupation, an overridable right, the Meat Law violated, according to Meatrael, three other constitutional rights - freedom of conscience, equality, and property. These rights are protected in BLH, a Basic Law that does not include a NM, and therefore,

105 Ibid. at para. 15.
claimed Meatrael, a notwithstanding act cannot violate them. With regard to this claim, the Court ruled that even assuming, without deciding, that these three rights were violated, their violations were small, an adjunct to the violation of freedom of occupation, and derivative of it, and therefore not unlawful. Otherwise, the Court said, the notwithstanding clause in BLO loses its normative force, for frequently limitations of freedom of occupation entail limitations of equality or property.

This line of reasoning clearly does not follow the path of Ford. In that decision, the Supreme Court of Canada did not look at other sections of the Charter, and certainly did not look beyond the Charter to the other parts of the Constitution Act or to the underlying principles of Canadian constitutionalism. Had the Israeli Supreme Court followed that route in Meatrael, it might have struck down the Meat Law. It would have only looked to the BLH. realized that this Basic Law did not include a NM, and hence discussed the claims about the limitations of freedom of conscience, equality rights, and property rights. It might have found the various limitations to be unjustified under the limitation clause and hence unconstitutional. Even had the court not found the limitations to be constitutional, it would not have dismissed them as “adjuncts” to the limitation of freedom of occupation. But the court did not only look to the BLH. It also looked to another element of the Israeli constitutional context, another Basic Law, namely the BLO. It ruled that in order to render the NM in that Basic Law meaningful, it must be said that the NM in BLO “radiates” onto BLH too.

A cynical explanation for this difference between the Israeli and Canadian decisions would focus on their results. In both cases, this explanation would remind us the court did not strike down the legislation. In Ford, it did this by reading only the specific NM section. In

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106 Property rights are protected by s. 3 of BLH. Equality and freedom of conscience were argued to be protected by the right to “dignity” in ss. 2 and 4 of BLH. For this point see infra note 110.
107 Meatrael. supra note 5 at paras. 22-23.
108 Ibid. at para. 22.
109 Supra note 3.
110 Admittedly, that would not have been easy. Freedom of conscience and equality rights are not explicitly part of BLH, and the court would have to decide whether the right to “dignity” includes them. The issue of the constitutionalization of freedom of religion, freedom of conscience and equality rights in Israel is very controversial. See, e.g., R. Gavison, “The Controversy Over Israel’s Bill of Rights” (1985) 15 Isr. Y.B. on Hum. Rts. 113 at 148-49. As for property rights, it is not obvious that causing someone to lose money is a limit on their property rights although in the Bank Mizrahi case, supra note 27 at 573, the court ruled that contractual interests were “property” within the meaning of the BLH property right.
Meutrael, it did this by paying attention to the context. The cynical argument would further remind us that both the issue of the application of the Charter in Quebec and the issue of the interaction between the law and religion in Israel are contested matters regarding which the court did not want to interfere with the will of the legislature.

A less cynical explanation would be that the difference between the cases arises out of the distinct ways the two Supreme Courts view their roles in the rights protection system. The Supreme Court of Canada saw itself as performing a checking function. Once it found that the Act respecting the Constitution Act did not violate the text of s. 33, its mission was over. It was not interested in deliberating upon the deeper meanings of the ideas embedded in the Constitution. This was so even though in order to guard the Constitution properly, one must sometimes look beyond the specific constitutional text. The Israeli Supreme Court, in contrast, saw itself as more of a leader and as a national deliberator on constitutional values. Not only did it look beyond the specific constitutional text to other constitutional texts but it was also willing to consider the possibility of a court making use of the constitutional structure in order to prevent severe rights violations.\footnote{For a use in the constitutional structure in Canada, see Reference re Secession of Quebec, [1998] 2 S.C.R. 217.}

Obviously, I am not suggesting that, as a general rule, the Israeli Supreme Court sees itself as a deliberator while the Canadian Supreme Court sees itself as a guardian. A definitive finding on this point is far outside the scope of this work. But these two roles of the court, that of guardian and that of deliberator, as well as their relation to the idea behind a NM are the subjects of most of the theoretical part of this work which begins in the next chapter. The concluding section of this chapter makes the transition between the specifics of s. 33 to these broader ideas of constitutional theory.

5. The Theory of the NM: The NM and the Constitutional Texts

A. From Compromise to Theory

As we saw in Section 2, it is clear that the deviatable Charter and BLO enjoy an intermediate constitutional status. It is also clear that this intermediacy is the result of political compromise, and that the NM was included in the documents to satisfy certain political actors.
To call something a compromise implies that it is less than perfect and that it is not established on principle. Indeed, after the adoption of the Charter with the notwithstanding clause and with the insertion of a NM into the BLO, critical reactions reflected the general view that a Constitution with a NM is a compromise between a full Constitution and no Constitution. This view was the source of the main criticism of the NM, namely that there can be no such thing as half a Constitution, and that the NM might be "a free ticket to religious, political, or racial discrimination"; and that once the power of the legislature is not ultimately limited, there is no point in a Constitution.

Nonetheless, it was suggested that the NM can be understood in terms of constitutional theory and might actually be a good thing. The arguments that were put forward in this regard are the subject of this section. I will examine these arguments in light of the Canadian and Israeli constitutional texts and see whether they make the NM, in the terminology of Dworkin, "fit" those texts. In the following chapters, I will move from constitutional law to constitutional theory to discuss some of the arguments in terms of the broader principles of constitutionalism.


113 Slattery, supra note 91 at 397; See also Whyte, supra note 112, at 354-357.

114 See Macklem, supra note 112 and Bayefsky, supra note 112. However, this criticism regarding the emasculation of the Basic Law was prevalent in the Knesset itself. See Knesset Protocols, supra note 36 at 4533-4545, 5368 and 5378. I will discuss the issue of the fear of legislative abuse of the NM in Chapter 5, below.


116 All the scholars I discuss here support constitutionalism and judicial review, and yet believe that the NM can be looked at from the perspective of principle and that its adoption might have been a positive development. There are those who object to the Charter altogether and see the deviable Charter as less harmful than a full Charter but not as, in itself, a welcome development. The best representative of this approach is Michael Mandel. See Mandel, supra note 12 at 87-96. See also A. Peter. “Immaculate Deception: The Charter’s Hidden Agenda” (1987) 45 Advocate 857.
B. The Quest for a “Clean” Constitution and the 1998 Amendment to the BLO

In contrast to the Canadian literature, no Israeli scholar has proposed a principled reading of the new NM-bearing Constitution. Nevertheless, the text of the BLO makes it possible to suggest such an understanding, in which the NM goes beyond its political origins. On this reading, the existence of the NM prevents the need for specific constitutional amendments. To present this view, I shall start with a question: Since the only reason for adopting a NM in the BLO was the meat crisis, would the better solution to the crisis not have been to amend the BLO such that the legislature is explicitly authorized to regulate kashrut? Why not adopt a NM which will make it possible to violate freedom of occupation not only in respect of kashrut issues but also on every other matter? The answer can be found in the legislative history and in the drafting documents. The explanatory notes state that s. 8 is aimed at situations where “temporary needs necessitate deviating from the Basic Law in a particular matter” but where “there is no justification to perpetuate [the deviation] in a Basic Law.” In other words, the Israeli NM is an elegant way to enact specific and temporary constitutional amendments. Israel’s Minister of Justice expressed this approach while introducing the BLO:

It might happen that the Knesset will be of the opinion that there is a need to deviate from the provisions of BLO on a specific matter that is not captured by the limitation clause, and that the place for the deviation is not necessarily in a Basic Law.

The kosher meat issue illustrated a fear on the part of the Knesset of contaminating the Constitution with particular provisions, a concern that is best expressed in the 1998 amendment of the BLO. Since the Meat Law was passed in March 1994, it was to expire in March 1998. However, by 1998, the religious parties had more power in the Knesset, as compared with the 1994 Knesset that enacted the Meat Law along with the new version of the BLO with the NM. In light of this, rather than merely re-enacting the Meat Law for another four years, the government agreed to cancel the temporary nature of the legislation altogether. Thus, in an amendment to the BLO, s. 8 became s. 8(a) and an additional subsection, s. 8(b), was added, providing that: “The expiration stipulation of sub-section (a) shall not apply to an act that was accepted within a year

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118 Knesset Protocols, supra note 36 at 4329. This approach to the NM is mentioned, albeit not supported or developed, in Barak, supra note 22 at 407.
of the commencement of this Basic Law." Although the language of the amendment refers to "an act" passed within the year, the Meat Law was the only such act to which the NM was to be applied. The drafters preferred general terms, avoiding mention of the Meat Law even at the expense of adding an amendment to the constitutional text whose real purpose was comically transparent.

Seeing the Israeli NM as a means of avoiding specific constitutional amendments explains why it is as difficult to invoke the Israeli NM as it is to amend the BLO. As we will soon see, in Canada it was suggested that the NM offers legislatures an easy way to respond to problematic judicial decisions without having to go through the difficult process of amendment.\textsuperscript{119} However, because the Israeli NM is aimed at enabling – in effect – specific constitutional amendments, it should be as difficult to operate as is the process of constitutional amendment.

The problem with this account of the Israeli NM is that it does not explain the temporary nature of acts with notwithstanding declarations. If the NM makes a particular constitutional amendment possible, why should such a change be temporary? Moreover, if an act with a notwithstanding declaration has the role of a specific constitutional amendment, why does s. 8 not stipulate that repealing the act also requires the assent of an absolute majority of Knesset members? Should not the processes of passing and repealing an amendment be identical?

The answer may be that, although the origins of the Israeli NM lie in the desire to avoid a specific constitutional amendment, the NM can also be applied to situations where there is a need for an experimental constitutional modification. Such situations may arise where a government suspects that a constitutional amendment might be helpful as a response to a social need, but is unsure as to whether the amendment will indeed achieve its goal. In such a case, the government must choose between amending the Constitution – taking a risk, in so doing, that its irreversible experiment will not yield the desired results – or leaving the Constitution unchanged and neglecting to respond to the relevant social need. The NM empowers governments to avoid this difficult choice, allowing them to enact temporary amendments that may be canceled at any time.

\textsuperscript{119} For a discussion of the NM as a form of constitutional amendment, see section 5(B) and Chapter 3. Section 2(F), below.
Such a mechanism is especially appropriate for systems in transition, where the Constitution is relatively new.\textsuperscript{120}

The final hurdle that this account of the Israeli NM must pass is the inconsistency entailed by the absence of such a mechanism in BLH: why would the need for a particular or temporary amendment not arise equally in connection with rights such as those of privacy and property?

Although the idea of the NM as a way to permit particular or temporary amendments to the Constitution is an interesting one, I shall not discuss it further in this work. It is an idea more about the notion of a Constitution than about the relationship between courts and legislatures, which is the focus of this work.\textsuperscript{121} I move now to a discussion of attempts in Canada to explain s. 33 in light of this relationship.

\textbf{C. Weiler: A Check on Judicial Error}

The first Canadian to suggest that the NM was a good thing, and not merely a compromise, was Paul Weiler. In a lecture he delivered in 1979, he expressed the view that Canada should adopt a constitutional Bill of Rights with a “non obstante provision”.\textsuperscript{122} The idea itself was obviously not new because the Canadian Bill of Rights, which was enacted in 1960, included such a clause;\textsuperscript{123} what was new was the reasoning.\textsuperscript{124} Weiler stressed that although “in a

\textsuperscript{120} Weiler refers in another way to the idea of the NM as appropriate for a system in transition to constitutionalism. He suggests that knowing that the legislature can always correct judicial mistakes will enable the court to be less hesitant to deal with the many innovative cases that a new bill of rights brings with it. See Weiler, supra note 8 at 80, note 98.

\textsuperscript{121} For the need of constitutional provisions to be general, see L. H. Tribe, “A Constitution We Are Amending: In Defense of A Restrainted Judicial Role” (1983) 97 Harv. Law. Rev. 433 at 441.

\textsuperscript{122} P.C. Weiler, “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?” (1980-81) 60 Dal. Rev. 205. 232 [hereinafter Weiler’s 1980 paper]. This paper was a lecture given in Halifax in 1979. See the later version of the article, Weiler’s 1984 paper, supra note 8 at 80, note 96.

\textsuperscript{123} See supra note 10.

\textsuperscript{124} Although conceding that the idea of the notwithstanding clause was not new, Weiler saw the idea of including such a clause in the Charter as “my own modest proposal” (Weiler’s 1980 paper, supra note 122 at 231). In the later version of the article, he writes that in late 1981, during the negotiations towards the 1981 constitutional agreement, he spoke about this idea with the Premiers of Ontario and Saskatchewan, as well as with officials from Ottawa and British Columbia about the idea, such that they came to the November 1981 meetings “[e]quipped with this basic familiarity with the non obstante notion within Canadian law, and with one extended scholarly defense of its virtues in the constitutional context, [and] reached for this formula for their Accord in the early hours of the morning of November 3, 1981”; Weiler’s 1984 paper, supra note 8 at 80. note 97. LaSelva also writes that the fact that the Charter includes a notwithstanding clause could be attributed to the earlier version of this article by Weiler. See S.
this idea was "a compromise between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority". He did not see accepting this idea as "to settle for half a loaf" but rather endorsed it "on its intrinsic merits".

And what are those intrinsic merits? Here is Weiler's answer:

once the judges have issued their verdict, I would leave Parliament, not the Supreme Court of Canada, with the final say. If Parliament wants to overturn such a judicial ruling, it will have to face the issue squarely and commit itself to the merits. There would be considerable political hurdles to any government choosing to take the step... few Canadian governments would be prepared to take the flak for such a measure... unless one was strongly persuaded that the Court had erred and felt that there was widespread public support for that point of view.

The purpose of s. 33 is, then, to solve the problem of judicial finality. Weiler thought that a notwithstanding clause was a good check on the power of the court in case of judicial failure. The seriousness, political risk, and limited application requirements were not part of the theoretical background to the NM but rather functioned as a check on the check.

LaSelva, "Only in Canada: Reflections on the Charter's Notwithstanding clause" (1983) 63 Dalhousie Rev. 383. Former Alberta Premier Peter Lougheed has a somewhat different account of whose idea the NM was and how the Premiers learnt about it. He suggests that the inclusion of the NM in the Charter was former Alberta Attorney General Merv Leitch's idea. Based on Leitch's advice, he (Lougheed) proposed it to the Premiers in late 1980 at the First Ministers' Conference in Ottawa. See Lougheed, supra note 87 at 1-2. Janet Hiebert also writes that "Alberta Premier Peter Lougheed had first proposed the inclusion of a legislative override in 1979". J.L. Hiebert, Limiting Rights - The Dilemma of Judicial Review (Montreal & Kingston: McGill-Queens University Press, 1996) at 163, note 43. As Ann Bayefsky noted, however, a first version of a notwithstanding clause was included in a draft of a constitutional bill of rights as early as 1969. See Bayefsky, supra note 112 at 813, note 75. Since this work does not focus on the history of the NM, or of the Charter, this question is not of central importance. Perhaps this somewhat contradictory evidence, however, reflects the many other controversies regarding the history of the 1982 patriation.

Weiler's 1980 paper, supra note 122 at 232.

Ibid.

Ibid.

Ibid. at 233-234.

One of those requirements looked different in Weiler's view in comparison to what eventually became section 33. Weiler did not think of a sunset clause but rather of a requirement to enact a deviating law twice - before and after elections. See ibid. at 234.
Weiler's approach "the check on judicial error approach". Peter Russell and Manfredi also hold the view that the NM is also intended to correct judicial mistakes.

The "check on judicial error" approach is an institutional approach to the NM. It implies that when a deviating law is enacted, it is not that the legislature deviates from the Constitution. Rather, it adheres to the Constitution and corrects the court's misinterpretation of the Constitution.

Weiler's approach is well reflected in the speech that the then Canadian Minister of Justice Jean Chrétien delivered while introducing the Charter. He explained the notwithstanding clause as "a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments" [emphasis added]. Why would the Charter create "absurd situations" in the first place? If we read the page before, we find the answer. Again with the notion of a safety valve, now with an adoption of Weiler's point:

What the Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by parliament or legislatures to override certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.

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120 Interestingly, Weiler himself also does not explicitly suggest that the NM can be used only as a response to a judicial decision. However, it is very clear from both his papers that this is the way in which he views the mechanism.
121 Russell, supra note 79 at 295-299; Manfredi, supra note 12 at Chapter 7. Russell takes the issue of gravity and the political difficulty of invoking section 33 especially seriously. He repeats his and Weiler's suggestion of a requirement to enact deviating laws twice: once before an election and once after it. This would provide for a "cooling off period and time for second thoughts". Moreover, it would ensure "broad citizen involvement, thus contributing to the fundamental process value of the Override". Ibid. at 301-2. Manfredi further proposes to amend s. 33 such that its invocation would require a prior judicial decision and three-fifths of the Parliament or legislature which invokes it. Manfredi, supra note 12 at 208-9. For Russell's approach, see Chapter 3, Section 3, below. For Manfredi's approach, see Chapter 3, Section 5, below. For the check on judicial error approach, see also P. Monahan, Politics and The Constitution - The Charter, Federalism and the Supreme Court of Canada (Toronto: Carswell/Methuen, 1987) at 118 and MacDonald, supra note 81 at 23. Tushnet talked about disagreement, not about correction. Tushnet, supra note 73 at 282. See also F.L. Morton. "The Political Impact of the Canadian Charter of Rights and Freedoms" (1987) 20 Can. J. Pol. Sci. 31 at 55. The check on judicial error approach to the NM is the subject matter of the next chapter.
122 House of Commons Debates (20 November 1981) at 13043.
133 Ibid. at 13042. See also D. Greschner and K. Norman, "The Courts and Section 33" (1987) 12 Queen's L.J. 155 at 189. It should be noted, however, that the part of Chrétien's speech that dealt with the NM was intended to explain not why this mechanism was beneficial but why "[w]hat the Premiers and the Prime Minister agreed to", the compromise including the NM, would not emasculate the Charter.
It seems that Weiler's approach was also in the mind of many Israeli Knesset members when they passed the Meat Law and overrode the Meatrael case. As we recall, this law, which forbids the importation of frozen non-kosher meat into Israel, was enacted in order to satisfy certain political groups. The question was whether this law infringed on freedom of occupation, whether fostering and preserving the Jewish character of the state was a "proper purpose" that "befits the values of the State of Israel", and whether forbidding the importation of non-kosher meat was really required to achieve this purpose. A Supreme Court judge hinted, in an obiter dictum in another case, that for him this law constituted an infringement on freedom of occupation that will not survive the limitation clause. As could be seen from the speeches of these Knesset Members, they agreed that the Meat Law limited freedom of occupation, but did not agree that it did not satisfy the limitation clause. The best articulation of this approach can be found in the speech of Knesset Member Yitshak Levy, a member of the National Religious Party:

I think that the Knesset also has the discretion to define what a proper purpose is and also the extent that does not exceed what is required. Therefore we can be in disagreement with the court about the interpretation of these values. For example in the case before us, if the Court said that limiting the import of non-kosher meat is not a proper purpose and does not befit the values of the state of Israel, and the Knesset says that it does, we are not horse thieves and not values thieves. Rather we truly determine that it is a proper purpose and these are the values of the State of Israel. And when we come to enact the Basic Law, it should not be said that we enacted a law against the values of the State of Israel and against a proper purpose.

The problem with the "check on judicial error" approach is that it does not fit the text of s. 33. First and foremost, the fit is lacking in that s. 33 does not limit itself to remedial operation, and in fact does not require a judgment or re-enactment at all. But if the NM serves as a "legislative..."
review of judicial review". Then in the same way that judicial review cannot be exercised prior to legislation, "legislative review of judicial review" cannot then be exercised before judicial review. If it is the case that, "just as judicial review serves as a check on a certain kind of legislative mistake, so 'legislative review' serves as a check on judicial error". then s. 33 should have been limited to the re-enactment of laws that had been struck down.

There are two other fit problems raised by Weiler’s account, though they might be capable of resolution. One is that if s. 33 is aimed at correcting judicial mistakes, why then does it not apply to all Charter rights? Might the court not make mistakes concerning rights that s. 33 does not mention? This difficulty may be solved by noting the possible legislative biases associated with the rights protected in the sections of the Charter to which s. 33 does not apply. These are the democratic rights (ss. 3-5), mobility rights (s. 6) and language rights (s. 16-22). Although there is a chance that the court will make a mistake in interpreting these rights, Weiler

But the problem of fit Greschner and Norman create is, in my view, greater than the fit advantage their approach brings. This advantage is that the word "notwithstanding" will be more meaningful if we require a prior judicial decision. However, the disadvantage, in terms of fit, from the fact that the court is not mentioned, seems to me more significant. Moreover, the notwithstanding declaration is not a descriptive declaration, saying that the act operates notwithstanding the Charter provision, but is rather an imperative declaration, prescribing that the act shall operate notwithstanding the provision. Thus, at the end of the day, the act shall operate notwithstanding the existence of the Charter provision, regardless of whether that provision commands that the act is invalid or is indifferent to the act. Finally, Greschner and Norman’s approach would make it impossible to exercise any legislative or administrative power because the court will have to clarify the meaning of the text that authorizes this power first.

In a broader sense, the approach of Greschner and Norman goes against the accepted idea that every branch must initially interpret the Constitution before it acts. Indeed, they say that the textual basis for requiring a prior judicial decision in order to invoke the NM is not "the strongest basis" for this requirement (ibid. at 189) and they suggest a substantive support for their view. Their arguments in this regard shall be discussed in the next chapter when I move to a discussion of the idea of a NM in terms of a more general theory. Here I focus on fit with the constitutional text.

limitation clauses in both Basic Laws put it) or explained why a prohibition on the import of non-kosher meat was required to achieve this purpose.
136 Morton, supra note 131 at 55.
137 Ibid.
138 In reply, Weiler might invoke Donna Greschner and Ken Norman’s account of s. 33. Arguing that s. 33 should be read as requiring a prior judicial striking down of an act, they write:

In order to give the ‘notwithstanding’ declaration any legal effect, the law must be in conflict with the Charter provision. If the law was not inconsistent with the Charter right or freedom, the notwithstanding declaration would be unnecessary, a meaningless appendage. In other words, when a legislative assembly says that a law operates in spite of a Charter provision, there must be a conflict between the law and the provision if the statement is to have any meaning. The institution charged with rendering an authoritative ruling with respect to incompatibility, before s. 33 is invoked, is the court. Hence the override power is contingent on a prior judicial determination that a law violates a Charter right or freedom. (Greschner and Norman, supra note 133 at 188)
might say that the risk of leaving them in the hands of legislatures outweighs the benefits of a check on judicial interpretive mistakes. The democratic rights deal directly with legislatures, suggesting an obvious bias where legislatures are entrusted with them. Similarly, with the mobility and language rights touching on the essence of Canadian federalism, provincial legislatures cannot be entrusted with the last word on these rights.

The final fit problem that Weiler’s check on judicial approach creates arises from the time limit on notwithstanding acts. If the legislature corrects a judicial error, why should the correction be limited in time? Why let the erroneous decision regain effect if the legislature is, for some reason, incapable of renewing the notwithstanding declaration? Weiler’s answer could be that, because both courts and legislatures are fallible, the fact that a notwithstanding declaration expires and must be re-considered by the legislature provides an extra safeguard against legislative errors in correcting judicial errors. Additionally, the express declaration will ensure that the public is aware that the legislature has corrected a judicial error. Finally, since elections must take place before the next invocation of the NM five years hence, the public will have a way to respond to a legislative correction that it may deem worse than the decision corrected.

D. Weinrib: Legislative Exceptions to Rights

Weinrib’s justification of the NM has nothing to do with correcting the Court’s errors. Like Weiler, she starts from the idea that the deviatable Constitution is not a compromise between constitutionalism and non-constitutionalism but rather something that “melds the best of the contending views into something new and better.” Then she goes exactly to the place where the check on judicial error approach fails: the structure of the Charter.

Weinrib sees the structure of rights protection in the Charter as follows. To start with, legislative power is limited by the Charter (ss. 32 and 52 to the Constitution Act, 1982). The Courts are the institutions which are charged with the duty to enforce the Charter (s. 24). The examination that the courts have to engage in involves two different steps - defining the rights

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139 See Russell, supra note 79 at 301.
140 Weinrib, supra note 12 at 564.
and determining the permissibility of their limitations (s. 1). And this is where s. 33 comes into play:

To the categories of rights and limits, s. 33 adds the category of denials of the guaranteed rights and freedoms by exercise of the override. For this category, the designation of institutional power also follows along traditional functional lines. Appropriately, it is the legislatures that the Charter permits to nullify rights in the name of majoritarian or representational values.

That is, the reason why we need a NM is to be able to nullify rights - I would say: to violate rights - when it is needed. This is a substantive approach to the NM. The legislature does not deviate from the constitutional interpretation of the constitutional text, thinking that it interprets it in a better way. The legislature is aware of the fact that it is deviating from the Constitution by nullifying rights, but it thinks it is the right thing to do.

This account of the NM makes perfect sense of the Charter's text where the check on judicial error approach failed to. First of all, there is no need for a preliminary judgment, for the deviating legislature makes up its mind about the need to deviate independently and not in the context of a specific judicial error. Second, not all the Charter rights are capable of being overridden. Some of them that deal with "the structural components of our federalism and separation of powers," namely democratic rights, mobility rights, and language rights, can never be nullified for "majoritarian or representational values". This is because they are part of what underlies the whole system. Third, the mechanism of re-enactment fits legislative practice more than it fits judicial practice: generally speaking, courts do not initiate revisions of their past decisions, and then wait for a future case to change their minds; in contrast, legislatures engage constantly in rethinking and reforming the law.

For Weinrib, then, the requirements of seriousness and time limited force are not only an external check on the check that would be unnecessary if we were sure the legislature was very responsible. For her these requirements are inherent in the mechanism itself:

The legislature must consider not only the policy to be transformed into law, but also the terms of the override and the specific rights and freedoms in issue. These conditions...

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141 Ibid. at 565-7.
142 Ibid. at 567-568. As I understand it, the term "denials" in this paragraph includes all infringements of rights that are not permissible according to s. 1, i.e., to use my terminology, both negations and violations of rights.
143 Ibid. at 568, note 77.
work to intensify the democratic function that legitimates the legislative process by
ensuring that debate, i.e., the democratic process of law making focuses on the
subordination of the rights and freedoms in action.\textsuperscript{144}

But if we want such values to be a part of the system in some cases, why cannot they be
considered by the courts as part of their application of the limitation clause? If there is a real need
to violate rights, the court will justify the limitation. The answer to this claim is Weinrib's
second point. Judges, she says, are constrained by the legal framework:

The courts are nowhere empowered to go beyond the traditional bounds of the judicial
function into the legislative waters of balancing or maximizing utility - that function is
left to the legislatures. under s. 33.\textsuperscript{145}

It is not, then, that the legislature will re-consider the same kinds of issues that the courts did, and
correct the latter when it went wrong. Rather, judges will think only about legal considerations
(s. 1) and the legislature will, when necessary, consider political issues (s. 33). Such a structure,
as Weinrib put it, is one in which "courts can be courts and legislatures, legislatures".\textsuperscript{146}

A nice demonstration of Weinrib's approach can be found in the text of the preamble to
the back to work law that was enacted in Saskatchewan in 1986, which included a
notwithstanding declaration because of the fear that the Supreme Court would find that the right
to freedom of association included the right to strike and therefore might render the act
unconstitutional.\textsuperscript{147}

The preamble starts by explaining that the strike of the Saskatchewan Government
Employees' Union "is causing hardship to increasing numbers of Saskatchewan residents and
poses a risk of harm to all Saskatchewan residents" and therefore it was "in the public interest" to
end it. Then it goes on to explain the idea of s. 33, as the Saskatchewan Legislative Assembly
understood it:

\textsuperscript{144} Ibid. at 569. With respect to the political risk requirement. Weinrib would agree that it is a check on the deviating
legislature to avoid misuses of the NM.
\textsuperscript{145} Ibid. at 567.
\textsuperscript{146} Ibid. at 568.
\textsuperscript{147} An Act to provide for Settlement of a Certain Labour-Management Dispute between the Government of
Saskatchewan and the Saskatchewan Government Employees' Union. S.S. 1984-85-86, c. 111. The notwithstanding
declaration is in s. 9. The different incidents in which Canadian legislatures invoked the NM are discussed in
Chapter 5, below.
Whereas Section 33 to the Canadian Charter of Rights and Freedoms exists for the purpose of permitting publicly accountable legislators to finally determine essential economic and social policy; and
Whereas the present state of law is unclear as to the meaning of certain provisions of the Canadian Charter of Rights and Freedoms and the Saskatchewan Human Rights Code; and

... Whereas it has been determined that the decision as to whether or not to end the Saskatchewan Government Employees’ Union strike should be made by the Legislative Assembly of Saskatchewan; and Whereas the Legislative assembly believes that ending the Saskatchewan Government Employees’ Union strike, on the basis set out in this Act is reasonable, responsible and necessary...

The Government of Saskatchewan does not tell us that it thinks that its interpretation of freedom of association does not include the right to strike, and it does not tell us that the act fulfills the requirements of the limitation clause. It tells us that, being reasonable and responsible, it believes that it - and no other institution or document - should decide the issue. Hence it is not a disagreement between courts and legislatures about the values of the Charter: rather, it is a decision to allow non-legal considerations of “the public interest” - what Weinrib might call “majoritarian” considerations - to determine the issue.

The language of the Israeli Mister of Justice Libai when introducing the new version of the BLO in the Knesset expresses an amalgamation of Weiler and Weinrib’s approach. He said:

As a Knesset member, you might want to decide and not leave to the high Court of Justice the final determination as to what is a proper purpose and what is not, and to remove any doubt about a certain specific matter... This Knesset thinks, and it is willing to be judged on this politically and publicly on election day... that certain provisions have to be of force notwithstanding the Basic Law... the Knesset reserves for itself some power in the constitutional arena, so that there shall be exceptions according to its mind, while it is in service, without infringing the Basic Law and without infringing the validity of the basic right [emphasis added].

Libai begins with what we saw before in the speech of Knesset Member Levy: the Knesset power to interpret the Basic Law in a way the court disagrees with. i.e., with the claim that it

148 Knesset Protocols, supra note 36 at 4334-4335. It should be noted, however, that Libai did not deny and explicitly conceded that the immediate reason for adopting the NM was the need to cope with the Meatrael decision (supra note 28). See Knesset Protocols, supra note 36 at 4324, 4528.
149 Supra, text accompanying note 135.
itself adheres to the Basic Law (Weiler). But then he moves on to say that the Knesset knows that the legislation contradicts the Basic Law itself, but is willing to pay the price for the legislation (Weinrib).

E. Slattery: An Intermediate Approach

There are two main differences between Weiler and Weinrib's approaches to the NM. The first concerns the purpose of the NM: Weiler believes that it is aimed at correcting judicial errors, whereas Weinrib does not see the NM as operating in relation to the errors of the courts. The second and related difference concerns the nature of what a legislature does when it invokes the mechanism. In Weiler's understanding, the legislature is suggesting an interpretation of the Constitution; Weinrib, in contrast, sees the legislature as deviating from the Constitution, creating "exceptions" to rights. Brian Slattery falls between the two. Like Weinrib, he does not believe that the purpose of the mechanism is to provide a check on judicial error: nor does he think that the mechanism can be used only as a response to a judicial error. However, like Weiler, he believes that while invoking the NM, the legislature suggests its own interpretation of the constitutional text.

The context of Slattery's account of the NM is a theory of the Charter he suggests. His theory, which he calls the "Coordinate Model" of the Charter, distinguishes between first- and second-order duties of different institutions under the Charter. A first-order duty is the Charter's direct power to order a given institution to do something or to refrain from doing something. A second-order duty is the Charter's imperative on a given institution to review the actions (or failures to act) of another institution while the latter is exercising its first-order responsibilities. Slattery says that s. 32, the application clause of the Charter, implies that all "branches of government have the constitutional duty to comply with the Charter, regardless of whether any other body can enforce this obligation".

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150 Although one other Knesset member also understood it this way (ibid. at 5368-5369), most Knesset members adopted the check on judicial error approach.
152 Ibid. at 708.
Based on the distinction between first- and second-order duties, this is Slattery’s account of the NM:

[A] legislature is always under a first-order duty to comply with *Charter* standards in enacting a statute, even when the statute contains a notwithstanding clause. The effect of a valid notwithstanding clause is to curtail or to eliminate judicial review, not to release a legislature from its constitutional responsibilities under the *Charter*. So when a government drafts a bill with a notwithstanding clause and a legislature considers it, they both have the duty to ensure that in their judgment the bill does not unjustifiably infringe any *Charter* rights, including those covered by the notwithstanding clause.155

Although Slattery does not refer to Weiler explicitly, it is easy to see, in light of Slattery’s terminology, that he does not agree with Weiler. For Weiler, the legislature, while exercising the NM, in fact operates a third-order duty: it reviews the court’s review of the legislature’s first-order duties. For Slattery, invoking the NM is a first-order power of the legislature. At the same time, unlike Weinrib, Slattery does believe that, while invoking the NM, the legislature “converts itself into a High Court of Parliament”,156 implying that the *Charter* converts legislatures into super courts—an idea that Weinrib rejects.157

Similarly to Weinrib, but unlike Weiler, Slattery is concerned with the structure of the *Charter*. Like Weinrib, he focuses on ss. 1, 32 and 33 in order to sketch his conception of the *Charter* and of the NM, and his account seems to fit the *Charter*’s text. The main fit problems that Weiler’s account raises do not arise under Slattery’s account. For Slattery, as for Weinrib, the NM is not aimed at the legislative response to judicial errors, so it makes sense that the court is not mentioned in s. 33. Slattery also connects his reading of s. 33 to his view, discussed above, that severe violations of *Charter* rights are not allowed even by s. 33.158 He says that since the power to invoke the NM is a first-order power (to enact legislation in a certain way) and not a third-order power (to review judicial review), the legislature is bound, while invoking it, by the general framework of the *Charter*. Thus the legislature cannot invoke the mechanism when it

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157 When discussing Greschner and Norman’s view that s. 33 should be operated only as a response to a final judicial review, he says that their argument “merits full and serious consideration, which cannot be given here” (*ibid.*), but he does not adopt their view. For a substantive (as opposed to a textual) defence of Slattery’s approach, see *infra* Chapter 3, note, 148).
158 Section 4(C), below.
believes that an act violates a *Charter* right. Correspondingly, because the *Charter* charges the court with the second-order duty to review first-order functions of institutions under the *Charter*, the court has the power to review the legislature’s first-order notwithstanding power. As pointed out earlier, however, this approach itself is not unproblematic in terms of fit. since it makes s. 33 into a mere subsection of s. 1. with a weaker formula for scrutiny.\(^{157}\)

The main fit problem with Slattery’s approach is that it does not explain why some *Charter* rights are not overridable. This problem exposes a deeper problem in his account: he does not justify the NM. The reason why Weiler and Weinrib could explain this fit problem was that they introduced a justification for the NM. Weiler thought that it was aimed at correcting judicial errors, and therefore it was possible to explain that with regard to certain rights we prefer the risk of judicial error to the risk of legislative misuse of the NM. Weinrib suggests that the role of the mechanism is to enable the creation of legislative exceptions to rights, but some rights cannot have exceptions. Slattery, in contrast to these two, does not explain what the purpose of the NM is, and therefore obviously cannot explain why it applies only to most *Charter* rights and not to all of them.

### 6. Conclusion: The New Institutional Paradigm

Both Weiler and Weinrib seem then to have a theoretical account for the NM. Weiler thinks that it is meant to respond to problematic judicial decisions, and Weinrib thinks that it authorizes the legislature to create legislative exceptions to rights. Both of these views suggest a modification to traditional constitutionalism. Weiler envisages a system of judicial review and legislative finality, as opposed to the traditional model of final judicial review, and Weinrib envisages a system in which legislatures sometimes act in deviation from the Constitution, as opposed to the traditional model of strict adherence to the Constitution. As both authors have said, these accounts suggest that the NM brings with it something new to the constitutional world. I call this new creation the “New Institutional Paradigm” (NIP).

\(^{157}\) *Supra* note 93 and accompanying text.
Both versions of the NIP raise serious challenges in terms of constitutional theory. Weiler's picture in which legislatures override judicial errors raises questions such as: what does Weiler mean by a judicial error? Does not the idea of the NM as a mechanism to correct judicial error go against the very basis of judicial review, which is that the court is a better institution for rights protection than the legislature? Weinrib's approach does not encounter such problems, because she believes that the role of the legislature under the NM is not to override judicial decisions, but rather to create legislative exceptions to rights. This idea also requires explication. What is the meaning of these "exceptions"? Why should exceptions to rights be a part of a rights protection system? Is not the whole idea of a *Charter of Rights* to avoid exceptions altogether?

These questions and others will be the subject of the next two chapters. Chapter 3 will present a deeper examination of Weiler's work, as well as an analysis of his followers: Peter Russell and Christopher Manfredi. Chapter 4 will examine Weinrib's idea of the NM as a "partnership" between courts and legislatures and also discuss other works that view the NM as such a partnership, mainly those of Agresto, and Greschner and Norman. The chapter will then end with my understanding of the NIP, which combines elements from Weiler and Weinrib. This will lead me to the last part of the work. Chapters 5 and 6, where the theories of the NIP detailed to that point will be examined against the practice of the NM in Canada.
Chapter 3

Weiler's 'Check on Judicial Error' Approach and its Followers

1. Introduction

Although much has been written in Canada about Charter adjudication and jurisprudence from practical and theoretical angles, there has been little theoretical discussion of the NM. Much of the writing on the Charter has either ignored s. 33, mentioned it by means of description, or simply expressed either support or objection to the mechanism. Few theorists have actually attempted to approach the NM in terms of theory – it is the work of these scholars that provides the subject matter for this and the following chapters, with the addition of some others who have written on the NM or on the ideas of judicial review and legislative finality.

This chapter focuses on the work of Paul Weiler who was the first supporter of the “New Institutional Paradigm” (NIP). He proposed what I have called the “check on judicial error” understanding of s. 33. This approach was introduced in the previous chapter as being based on the need for a check on judicial power where judicial error occurs. The present chapter focuses on the argument from judicial error, looking at its centrality in Weiler’s justification of the NIP.

The argument from judicial error is this: judges make mistakes, and so the final word over the meaning of the Constitution should be the legislature’s. The NM is not a way for the legislature to re-assert legislative supremacy but rather is there to allow for the correction of mistaken judicial interpretations of the Constitution and the re-enactment of laws improperly struck down. Aside from the fact that judges are fallible generally and the fallible should not have the final say, Weiler suggested that there are two reasons why the court is especially susceptible to making mistakes in Charter adjudication. First, much of the language employed in the Charter is ambiguous. Secondly, legal expertise is not merely incapable of resolving the

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2 See, e.g., J. Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997). This book does not mention s. 33 at all.; See also A.C. Hutchinson, Waiting for Coraf - A Critique of Law and Rights (Toronto: University of Toronto Press, 1995). Hutchinson mentions the NM in passing at 19, 24, and 28.
3 See Chapter 2, Section 2. above.
complicated policy issues Charter adjudication often involves. It is sometimes counterproductive to this effort.

The argument from judicial error is about the advantages of legislative finality. But the downside to legislative finality is the danger that the legislature may abuse the NM. In other words, the legislature can use the mechanism when the court’s interpretation of the Constitution is correct as well as when it is wrong. Using the NM other than in a case where the courts had erred would weaken a country’s rights protection system. In order to deal with this danger, Weiler introduced what I will refer to as “the no abuse assumption”. Aside from the argument from judicial error, this assumption is the other significant element of his conceptual approach. It suggests that the legislature will not abuse the NM because the legislature is trustworthy. Moreover, even if the legislature’s own good will cannot be relied upon to prevent the abuse of the NM, the structure of the NM itself can. First, the legislature will have to expressly declare its intention to override the rights enumerated in the notwithstanding acts and thus open itself up to a negative public response. Second, its invocation of the notwithstanding power will eventually expire and should it wish to keep the notwithstanding acts in force, it will have to re-enact them and potentially face an angry public once again. Third, an election will take place between every two enactments of a notwithstanding declaration meaning that this contentious issue will be hard to keep off a given election’s agenda.

Weiler’s account of the NM makes sense pragmatically. Indeed, Chapter 5 will show that the no abuse assumption is correct and that the NM has rarely been used in Canada. The purpose of this and the next chapter, however, is not to examine Weiler’s account in terms of its pragmatic feasibility, but rather in terms of its theoretical coherence. My argument throughout this chapter will be that the argument from judicial error is not consistent with the very justification for judicial review which Weiler suggested. Instead, there is a tension between the argument from judicial error and this justification for judicial review. While the argument in favour of judicial review holds that the court is better able to protect rights than is the legislature, the argument from judicial error suggests that, despite this comparative advantage, the court may sometimes make mistakes in rights protection, such that a legislative act becomes necessary. The problem with this approach is that there is no principled way to know when the court or the legislature is right. The only means for deciding between judicial and legislative finality is
therefore not by principle, but rather through policy. Correspondingly, rather than suggesting a coherent justification for the NIP. Weiler’s account sees the NM as an easier way to amend the Constitution. As such, the mechanism is at odds with the idea of constitutional rights protection that was adopted in Canada with the adoption of the Charter.

The themes which Weiler discussed in his two papers in support of the NM inform the debate about the NIP in this chapter. Section 2 of the chapter presents Weiler’s work in detail, focusing on the argument from judicial error, the argument that Charter cases are ambiguous, the no abuse assumption, and the idea that the NM is an easier form of constitutional amendment. The rest of the chapter moves from Weiler himself to Weiler’s followers and shows that they too were not able to resolve the basic theoretical problem with the argument from judicial error.

Section 3 then introduces the exchange between Peter Russell, a follower of Weiler’s, and John Whyte, an opponent of Weiler’s. The section examines how the two analyze the connection between three principles of Canadian government – rights protection, legalism and democracy – and the NM. I argue that Whyte put too little emphasis on rights protection, and that Russell failed to address Whyte’s arguments from the perspective of principle. The analysis connects Russell’s omission to the emphasis that he, like Weiler, puts on the argument from judicial error which cannot offer a coherent account of the NIP.

The argument from judicial error arises again in Section 4. In this section, the analysis looks southward to a critique by the American theoretician Frank Michelman, according to which we see that the justification offered for judicial review by another American theoretician, Ronald Dworkin, does not capture judicial finality. The analysis demonstrates the similarities and differences between the Americans’ debate and the previous exchange between Whyte and Russell, again showing that the NM cannot be supported, theoretically speaking, on the basis of the argument from judicial error.

Section 5 introduces an improved version of the argument from judicial error. Focusing on the work of Christopher Manfredi, it discusses what I call the argument from policy making. This argument suggests that the reason why judicial error might be more prevalent in Charter cases is that most such cases raise questions that the court cannot solve as well as can the legislature. The argument justifies legislative finality so effectively that one is forced to re-inquire as to the need for judicial review. The section’s conclusion is that, being a sub-argument
of the argument from judicial error. the argument from policy making cannot suggest a coherent justification of the NIP.

The concluding segment of this chapter. Section 6, summarizes the arguments and approaches that were introduced and analyzed throughout the chapter, leading as well to an introduction of the next chapter. That chapter, which discusses the works of Lorraine Weinrib, John Agresto, and Donna Greschner and Ken Norman. focuses not on the NIP as a check on judicial error, but on the idea that the NIP can facilitate a partnership between courts and legislatures in protecting Charter rights. The chapter ends with my own approach to the NIP.

2. Weiler’s Initial Perspectives

A. From Judicial Review to Legislative Finality

Paul Weiler was the NM’s first scholarly proponent, expressing his support in a paper published in 1980, and re-stating it in a second 1984 piece after the Charter and s. 33 came into force.4 Weiler’s two papers are very similar: each follows a path from democracy to judicial review to the problem of judicial finality.1

The basis of Weiler’s support for judicial review is the classical justification for constitutional rights protection with judicial enforcement:

There must be some moral limits on the actions of any government, even a democratic government. The decisions of the majority can claim no absolute value. They must decently respect basic liberties and principles of justice. But these moral limits often have a tenuous hold on the majority especially when they are put forward by dissenting individuals or enduring minorities. Thus somewhere in the system there should be a forum where an overzealous legislature – spurred on by current popular sentiments – can

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1 The main innovation of Weiler’s 1984 paper is his mentioning of the idea of the NIP as a partnership between courts and legislatures (ibid. at 84, 86). This notion, which is not developed by Weiler at all, is dealt with in the next chapter. Aside from this addition in 1984, the differences between Weiler’s two papers are not important in terms of theory. Two are nonetheless worth mentioning. First, whereas in the 1980 paper, he suggested the subordination of the invocation of the mechanism to two enactments, one before and one after elections (see Weiler’s 1980 paper, supra note 4 at 234), in the 1984 paper he refers to the check that was actually added to s. 33 – the 5-year time limit (see Weiler’s 1984 paper, supra note 4 at 81). Secondly, whereas in the 1980 paper, he proposes to give the notwithstanding power to the Canadian Parliament and not to the provinces (see Weiler’s 1980 paper, supra note 4 at 234-5), in the 1984 paper he seems to accept without any misgivings the fact that this power was given to provincial legislatures as well (see Weiler’s 1984 paper, supra note 4 at 85-86). Since this work deals with the separation of powers and not with the federal division of powers, I shall not elaborate on this point.
be forcefully reminded of these restraining principles. It seems to be asking too much of human nature to expect the political branch of government to always police itself. The natural alternative is an independent judiciary, which is not beholden to the people for office and which can provide access and relief... 6

Consequently, says Weiler, an objection to judicial review which complains of its counter-majoritarian nature “misses the point about fundamental rights”. Since courts are not accountable, they have a different – and better – incentive to protect rights. For their part, legislatures cannot be trusted to carry out this function themselves. Though the quoted passage appears in Weiler’s 1980 paper and thus predates the Charter, the Charter has indeed adopted this approach to rights protection. 7

But Weiler believes, with good reason, that the courts are entrusted with rights protection not only because of their better incentive, but also due to their superior abilities. Explaining the advantages that courts have over legislatures in resolving questions of constitutional interpretation, he says:

Courts do have certain institutional advantages that make this claim plausible. Whereas legislators tend to fob off troublesome moral issues. feeling that they can only lose votes by taking a stand on them, judges are obliged to respond to each claim on its legal merits, no matter how unpopular its exponent may be. Nor is it enough for the judges just to assert a bare preference for a particular result: the court must also provide a reasoned justification for its decision, extending to the instant case the benefit of principles that underlie analogous cases. Because they are not compelled by electoral self-preservation simply to reflect existing community moral values and prejudices, judges are free to move the law forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept once they see it spelled out, but that an electorally accountable body would have been loath to risk proposing in the face of current attitudes. As Ronald Dworkin once put it, judicial review transfers fundamental right issues “from the battleground of power politics to the forum of [moral and legal] principle”. 8

If judges are better motivated and better able to protect rights, why the NM? Here is Weiler’s answer:

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6 Weiler’s 1980 paper, supra note 4 at 214-215.
7 Ibid. at 212.
9 Weiler’s 1984 paper, supra note 4 at 71-72; notes omitted.
...[T]here is an ambiguity in [the] entire case for judicial enforcement of constitutional rights. The argument presumes that when judges say what our fundamental rights are, they are right about that. This is a natural assumption to make, especially for the legal mind. ...[I]f we do locate in the courts the final authority to decipher our Bill of Rights, it will be just as easy to assume that when the judges say that our rights have been infringed upon, they really were. That is a fallacy nonetheless. nowhere better expressed than by Mr. Justice Jackson of the United States Supreme Court, when he confessed that 'we are not final because we are infallible, we are only infallible because we are final!'

This is the third, and to me the most serious, dilemma in the case for a constitutional Bill of Rights. Assume, as I think we must, that the definition of the proper nature and limits of our rights is always an ambiguous and debatable matter. especially in the kinds of modern controversy which are the grist for the judicial mill. These require social and philosophical sensitivity rather than narrow legal expertise. The third institutional question, then, is why we should believe that the judicial branch of government is the ideal source of wisdom on this subject. such that it should have the final, constitutionally enforceable say. as and when it differs with the political branch.10

A careful reading of this passage suggests two distinct, if related, points arguing that judicial review should not be final. These points appear to be in conflict with Weiler's defence of judicial review that was based on the court's better incentive and ability to protect rights. The first point is that, contrary to Mr. Justice Jackson's statement, judges are indeed fallible. I shall call this first argument in support of the NIP "the argument from judicial error". Secondly, questions of constitutional interpretation are "always an ambiguous and debatable matter". I shall call this argument "the argument from ambiguity".

B. The Argument from Judicial Error

The first problem with the argument from judicial error is expressed by Weiler's contention that the "assumption" that judges are "right" about fundamental rights is a "fallacy". Judicial finality is in fact not based on the assumption that judges are right: suggesting this connection, Weiler actually follows Justice Jackson's mistake. The correct understanding of judicial finality is that judges are not final because they are infallible. and neither are they infallible because they are final. They are final although they are fallible. Judicial finality is

10 Weiler's 1980 paper, supra note 4 at 222.
based on the argument that, because of their ability and motivation, courts have a better chance than legislatures to protect rights well, even if they sometimes make mistakes.

Thus a system of constitutional rights protection assigns to courts the final power over fundamental rights with the recognition that the courts might be wrong. Now, if we believe – as does Weiler – that the court is the institution best situated to deal with rights issues, how can we trust the legislature to correct the court's mistakes? The problem in this scenario is not in detecting the error; a student can often find a mistake in the way her Professor marked her exam although the Professor's mastery of the material is undoubtedly greater than her own. The problem is in authorizing a legislature to exercise final power over an issue regarding which it has a lower ability and incentive to deal with appropriately, and doing so with the justification that the court sometimes makes mistakes. Continuing with the student-Professor analogy, granting legislatures final power on rights issues is like granting students the power to change marks granted to them by their Professors, because Professors sometimes make mistakes in marking.

Another problem with Weiler's argument from judicial error is that he does not clarify his notion of judicial mistake. Does it refer to an error in identifying the problem? In reviewing the evidence? In reasoning? In the result? Aggravating this lack of clarity is Weiler's failure to put forward any examples of the errors he envisions. In both of his papers, we find only general statements about bad judicial performance. Furthermore, throughout the two works Weiler seems to talk of two different concepts of judicial error. First, there is an objective one; in response to these, the NM enables legislatures to act in situations where the court is actually wrong. Thus in the quoted passage, Weiler writes about judicial "fallibility" and argues that it is wrong to assume that the court is right. Similarly, he refers to situations where the judiciary has "miscarried" or "gone awry". The second concept of error is a subjective one, and it refers to

\footnote{Ibid. at 223-4; Weiler's 1984 paper, supra note 4 at 73-4. In a footnote to the Epilogue of the 1984 paper, Weiler does mention one case in which he agrees with the conclusion, but thinks the reasoning could have been better (ibid. at 89, note 113).

Unlike his treatment of Charter adjudication, with respect to the matter of federalism, Weiler is more detailed. After introducing his view that "the performance of the Supreme Court of Canada in the federalism arena did not, for many of our governmental leaders, inspire confidence in the Court's competence to fulfill its new role as the oracle of our fundamental rights" (at 74), he refers to his previous work where he gave examples of the court's incapacity and unsatisfactory performance in the area of federalism.
\footnote{Ibid. at 83.}}
the legislature’s perception of the court’s decision. Weiler says that the NM can be used when the government is “strongly persuaded that the Court ha[s] erred”. In addition to these two concepts of error, Weiler also talks of a “disagreement” between the court and the legislature without mentioning the idea of error at all – either in terms of the objective description of the court’s action or in terms of what the legislature thinks about the court’s action. Thus at the end of the quoted passage, Weiler writes of situations where the judicial “say” differs from the legislative “say”. Similarly, he notes that the NM is there for legislators in cases where they have “disagreed with the courts”.

“Disagreement” is the more appropriate concept for Weiler’s argument. In talking of a scenario where judicial error is corrected by the legislature, Weiler creates a system of review that starts in the lower courts and ends with the legislature. Just as an upper court might find a lower court ruling wrong and overrule the lower court, so might the legislature find a decision of the Supreme Court to be wrong and overrule it. The legislative action (i.e., the act) becomes the climax of judicial acts (i.e., the judgments). Although Weiler was not as explicit about this point as was Brian Slattery, who explicitly suggested that in invoking the NM, the legislature “converts itself to a High Court of Parliament”, the argument from judicial error effectively converts the legislature into a “super court”. Taking this “conversion” seriously entails three odd results that Weiler never discusses and, I suspect, would not accept. First, it means that legislatures can decide cases without parties, without any judicial process and without reasoning. This result is intolerable, especially in criminal cases. Secondly, it would mean that the legislative “judgment” applies retroactively to the parties before the court that decided the case and provoked the invocation of the NM. If, for example, the court struck down an act imposing a...

13 Ibid. at 84.
14 Weiler’s 1980 paper, supra note 4 at 233-234.
15 Weiler’s 1984 paper, supra note 4 at 82.
16 This term was used by Mark Tushnet. See M. Tushnet, “Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Problem” (1995) 94 Mich. L. Rev. 245 at 282. For Tushnet’s approach to the NM, see Chapter 4, Section 5. below.
18 This is Weinrib’s term. See L. Weinrib, “Learning to Live With the Override” (1990) 35 McGill L. J. 541 at 569.
19 This result seems to be at odds with s. 11(d) of the Charter which guarantees the right to a “fair and public hearing by an independent and impartial tribunal”.
form of criminal liability. A notwithstanding act could send an accused to jail.\textsuperscript{20} Third, it means that future adjudication would have to take the legislative "judgment" into account, at least to some degree, in cases similar to the one struck down by the court.

Weiler could respond that the "judgment" he is talking about is a different kind of "judgment". It does not apply to the parties and it does not apply retroactively; therefore there is no need for parties, process or reasoning. It is also limited to the specific act that the legislature thinks should not have been struck down, so future adjudication does not have to take it into account. This explanation is good, as it strips the notwithstanding act of its "judicial" nature and assigns it legislative features again. This being the case, it is more accurate to say that the legislature does not "correct" a judicial error, rather it re-enacts an act despite its nullification by the court. Calling it a judicial error is, therefore, not appropriate.\textsuperscript{21}

\textbf{C. The Argument from Ambiguity}

Weiler's second point is the argument from ambiguity. Like the notion of judicial error, Weiler uses the term "ambiguity" in an ambiguous way. There could be two understandings of the idea of ambiguity. The first – which seems to be the more commonly used definition – is that some questions of constitutional interpretation in rights issues do not have right answers. Therefore, the answers that a court provides are no better than the answers arrived at by the legislature. Invoking the override therefore cannot result in an inferior form of rights protection. The other interpretation is that the ambiguous nature of these questions lies in the fact that it is simply more difficult to arrive at their correct resolution, i.e. to find the right answer. As a result, ambiguity increases the risk of a mistake being committed by the court while searching for the rights answer.

\textsuperscript{20} This result seems to be at odds with the Supreme Court's decision in \textit{Ford v. Quebec}. [1988] 2 S.C.R 712 at 744-5. See also Weinrib, \textit{supra} note 18 at 559-563.

\textsuperscript{21} In Chapter 6, below, I show that in their analysis of the caselaw, Russell and MacDonald, two of Weiler's followers, made a special effort to point out some judicial errors as opposed to instances where they simply disagreed with the court. I further demonstrate that their attempts to establish a judicial error were unsuccessful.
It seems that Weiler employs the latter meaning of the term "ambiguity". His main example for the argument from ambiguity is the issue of language of education rights in Canada.\(^{22}\) Introducing the subject, he writes:

> [I]n a society civilized enough to adopt and live by a *Charter* of Rights, the kinds of cases likely to arise under such a document rarely have clear-cut answers, as a matter of either moral principle or legal interpretation. Thus, by putting these rights in its constitution, a nation in fact transfers the final authority for settling inherently contestable dilemmas about the appropriate limits of public action from the political to the judicial branch of government.\(^{23}\)

In saying that most constitutional cases rarely have "clear cut" answers, it seems that Weiler means that these cases have right answers, but that these answers are not easily determined. This, then, is the variety of ambiguity that he has in mind. Indeed, as a conclusion to his discussion of language rights, Weiler writes that the example illustrates that "in a country like Canada, the typical 'rights' case has no single, obviously correct answer, but rather presents a subtle moral choice between individual claims and community needs".\(^{24}\) That is, there is not "one obvious" answer: there might be more than one answer – and this answer might be difficult to figure out – but the case can ultimately be resolved in a better or worse way. According to this understanding, the argument from ambiguity is supplementary and reproduces the argument from judicial error; because constitutional interpretation deals with ambiguous terms, there is a greater chance that the court will make mistakes. As a result, justifying the NM on the basis of the argument from ambiguity suffers from the same flaw that afflicts the argument from judicial error. Nations decide to entrench rights exactly on the understanding that the best way to protect them is by putting them beyond the reach of the majority, entrusting judges with their interpretation and phrasing them in general terms to enable a certain degree of change and flexibility. A decision to entrench rights is made with the recognition that the general language of the Constitution will force judges to explicate this open textured text. Therefore, defending a NM on the basis of the


\(^{23}\) *Ibid.* at 54. Weiler's example of educational language rights is actually not such a good representation of the issue of ambiguity since s. 23 of the *Charter*, which deals with that issue, is actually very clear and detailed. Weiler's argument, however, is certainly true with respect to other *Charter* sections, which are phrased in open textured language.

\(^{24}\) *Ibid.* at 60.
general language of the Charter, and on the consequent ambiguity, goes against the very idea underlying constitutional rights protection.

Notably, Weiler's claim about the Charter's "ambiguous" language is not only based on the fact that constitutional rights protection documents are phrased, generally speaking, in broad language. He goes on to say that this is especially so for the Charter. Comparing it to the United States' Bill of Rights, he says that the Charter, with its limitation clause, is "more candid" about the court's need to deal with "moral controversies". He goes on to say:

Unlike the American Constitution with its blanket statements of rights such as "freedom of speech," which have allowed some American judges to adopt an absolutist interpretation of their legal force, the Canadian Charter opens with the caveat that its guarantees are subject to "such reasonable limits . . . as can be demonstrably justified in a free and democratic society." This provision qualifies even rights such as language rights, which are otherwise expressed in fairly specific terms. Canada's broad limitations clause accords with the general approach of post-war constitutional writers around the world and also accords in principle, if not in detail, with American constitutional jurisprudence. Experience has demonstrated that although in the abstract such fundamental rights as freedom of speech may seem unbridgable, in practice they must be restricted when they conflict with the rights of others or with the needs of the community. In the Canadian context, the evolution of section 1 of the Charter clearly indicates that the judiciary, not Parliament, is the institution responsible for drawing the line.26

I do not accept that, as this reading implies, the limitation clause gives rise to greater ambiguity. The purpose of s. 1 is not solely to limit legislative power; if that were the case, a supremacy clause stipulating that the Constitution is supreme, together with a list of rights, would have been enough, and the court would create rules as to when each right prevails. (Indeed, this is precisely the case in the U.S.) The purpose of s. 1 is also to direct the judiciary as to how and when rights should be limited. S. 1 is thus a mechanism to decrease ambiguity, not to increase it. To be sure, even with s. 1, the judiciary has a lot of explication to do and many believe that, in fact, s. 1 did not succeed in decreasing ambiguity.27 However, the argument that the section contributes to the Charter's ambiguity misses part of what s. 1 is about.

25 Ibid. at 61.
26 Ibid.
27 See, e.g., Bakan, supra note 2 at 27-30. 98-100.
D. Coherent and Incoherent Accounts of Judicial Review and Legislative Finality

The problem with the two related arguments of judicial error and ambiguity, with which Weiler supports the NM, is that there is a tension between them and the very justifications for judicial review that Weiler suggests. They thus constitute an incoherent exception to the rule of judicial review. The argument from judicial error says that although judicial review is based on the assumption that the court is better suited for rights protection, sometimes it makes mistakes. The argument from ambiguity says that although the rights protection provisions in the Constitution have to be general, sometimes this generality creates ambiguity that might contribute to judicial mistakes. On this account, legislative finality is in tension with the idea that underlies judicial review, but it is nevertheless adopted because of a belief that a compromise between no judicial review and final judicial review is the best arrangement for rights protection. I shall call this kind of justification for the NIP a "incoherent justification".

The two extremes of final judicial review and the absence of judicial review have been extensively discussed, and supported, or objected to, by various schools of thought; both extremes have some advantages and some disadvantages. An incoherent justification of the NIP is neither innovative nor difficult to devise, and would be either balancing-oriented or results-oriented. The balancing justification would point to the pros and cons of judicial finality, as compared with legislative supremacy, and suggest that the middle ground of judicial review with legislative finality has the better balance of advantages and disadvantages. Alternatively, one could demonstrate that a system of judicial review with legislative finality produces better rights protection than either a system with final judicial review or a system with no judicial review. (The results can be predicted or judged by empirical evidence.) For such a justification, the "new" paradigm that the NIP envisages is not an innovative project in terms of theory, although a new balance or compromise between two existing ideas is undoubtedly important.²⁸

²⁸ I am not ignoring the fact that, in the real world, neither judicial finality nor legislative finality are truly final. The American literature is replete with works showing that the legislative branch has many ways to retaliate against the judiciary and vice versa. See, e.g., G.N. Rozenberg, The Hollow Hope: Can Courts Bring About Social Change (Chicago: U. of Chicago Press, 1991). In the next chapter, I examine the work of John Agresto, who also focuses on the U.S. Congress' ability to retaliate against the court. Still, in terms of theory, the Constitution can have only one final interpreter such that the discussion about finality makes sense. See J. Harrison, "The Constitutional Origins and Implications of Judicial Review" (1998) 84 Virginia L. Rev. 333 at 357-8.
By way of contrast, a coherent justification of the NIP would have to unify the notions of judicial review and legislative finality. This would require finding a justification for judicial review that will not justify judicial finality, even at the starting point, thus eliminating the tension between judicial review and legislative finality.

E. The No Abuse Assumption

Weiler’s incoherent approach to the NIP is expressed not only by the two arguments that explain what is positive about the NIP, but also in the way he solves a basic dilemma connected to the NIP. The dilemma is this: Weiler’s version of the NIP holds that, because of judicial error, rights protection could benefit from legislative finality, since the legislature can correct judicial mistakes that fail to protect rights or to define properly the rights and limits vis-à-vis each other. But what if the legislature invokes the NM not in the interest of protecting rights, but out of a disregard for rights? I shall call this dilemma the “correction-abuse dilemma”.

Weiler dealt with the dilemma in two ways. One argument involved reliability and the other highlighted accountability. Regarding reliability, Weiler suggested that the legislatures were not rights violators. The first indication of this can be found in one short word in the very title of the 1980 paper: “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?” It is the word “or” that stands out. The question of whether Canada needs a bill of rights, says Weiler, is not a question about the people and rights, or freedom and rights, it is about judges and rights. Why? Because the majority, represented by the legislature, is not tyrannical and human rights in Canada are safe even without a constitutional guarantee. I shall call this conception the “no abuse assumption”. Weiler supports the no abuse assumption by suggesting, via a comparison of the Canadian and U.S. histories of rights protection, that rights were not less protected in Canada than in the U.S. prior to 1982.29 Although he concedes that Canada has a record of rights violations,30 he argues that “there is wide-spread popular

29 Weiler’s 1984 paper, supra note 4 at 53.
30 “Unquestionably there are major blots on our historical record, not simply in the case of the French Canadians... but in the denial of basic human respect for such minorities as Chinese immigrants in British Columbia at the turn of the century, the Japanese Canadians during World War Two, the Jehovah’s Witnesses in Quebec under Duplessis, and countless, helpless targets of our criminal justice system throughout the years. There continue to be significant
acceptance of these values, at least as general principles, and indeed that it is only for that reason that considerable support can be marshalled to imbed them in the constitution”. He goes on to say:

We do not enjoy the luxury of embracing a system which will perfectly guarantee fundamental rights in Canada. The Parliament of Canada can, and has, done injustice to individuals and minority groups. So has the Supreme Court of Canada. We must eventually choose between these only too frail human institutions, locating the final authority in that forum where we anticipate it will do the most good and the least damage.12

In addition to reliability, Weiler seemed to suggest that what prevented abuses of the NM was accountability. “It is understatement”. Weiler wrote in 1980, “to observe that few Canadian governments would be prepared to take the flak” for using the NM. In 1984, after the NM with the sunset mechanism was adopted. Weiler added that the periodical expiration of notwithstanding acts gave the public a say “after the fact”. It was still possible. Weiler maintained, for the public to choose between the court’s interpretation of the Charter and that adopted by the legislature.13 This meant that if the public preferred the judges’ view, they could respond negatively.14

Like the argument from judicial error, the no abuse assumption makes sense in practice. Similarly, just as the fact that courts make mistakes does not render legislative finality consistent with the idea of judicial review, the fact that legislatures can be trusted does not make the no abuse assumption a coherent justification of the NIP. As suggested earlier, the justification for

31 Weiler’s 1980 paper, supra note 4 at 208.
32 Ibid. at 235. Note that although Weiler starts this passage by talking about “fundamental rights”, he moves on to discuss “injustice” and “good” and “damage” and does not stress rights. Indeed, his reference to situations where the Supreme Court of Canada has “done injustice to individuals and minority groups” is not clear. If he was referring to situations where the court failed to stop the legislative violations of the rights of individuals and minority groups, then this point is irrelevant, since it does not support legislative finality. All it implies is the fact that judicial finality does not guarantee rights protection. If he was referring to situations where the legislature operated to protect rights and the court blocked this protection, then his argument is not supported. Nowhere in either of his two papers does Weiler introduce a single example of such a situation. It should be said, however, that the quoted passage is from Weiler’s 1980 paper which was published before the advent of the Charter. See also the 1984 paper, supra note 4 at 81. Ever since the Charter, it has been suggested by many that the court in effect strikes down rights-protecting legislation. See, e.g., MacDonald’s criticism of the Seaboyer ruling, Chapter 6, Section 3(B), below.
33 Weiler’s 1984 paper, supra note 4 at 81.
34 In Chapter 5, Section 6, below. I explore the nature of this negative response.
judicial review is partly based on a reluctance to place confidence in the legislature as far as rights protection is concerned. Weiler's no abuse assumption does not accept this reluctance, and in fact suggests that we should be equivalently reluctant to put confidence in judges with regard to rights protection.

F. The NM as an Easier Constitutional Amendment

Weiler indeed does not even try to suggest an account of the NM that would be consistent with the idea of entrenchment. One of the traditional features of constitutional rights protection is that, in order to amend provisions concerning the protection of rights, the majority must go through a process that is significantly more difficult than the amendment of ordinary legislation. Weiler suggests that invoking the NM can be, in effect, an easier way to amend the Constitution. He says:

It is rare to find constitutional guarantees, no matter how inalienable they may seem, which are entirely beyond legal amendment. The question is where we should locate the authority to approve such an amendment. I am prepared to trust Parliament with such a role, at least as long as it does so in accordance with a procedure which clearly focuses political responsibility for such action.  

There are two kinds of "amendments" to constitutional guarantees then that must be taken note of. Constitutional amendment, which is the normal way to change the guarantees, and "legal amendment" – the NM – which is "more of a surgical instrument" but still operates to change the guarantees. Seeing the NM as an easier means of effecting "amendments" to the constitutional text is problematic for three reasons. First, if the NM functions in this way, then the Charter is "not fully entrenched" as Weiler himself puts it, because it is the amendment formula that gives a Constitution its strength.

A second problem is that viewing the NM as an amendment to the constitutional guarantees themselves is inconsistent with Weiler's own argument from judicial error. That

15 Weiler's 1980 paper, supra note 4 at 234.
16 Weiler's 1984 paper, supra note 4 at 83, note 101.
17 Weiler's 1980 paper, supra note 4 at 234. In the 1984 paper, supra note 4. Weiler is less extreme. He suggests at 82 that for democratic rights, which cannot be overridden, to some extent there is a full guarantee against oppressive government.
argument holds that, while invoking the NM, the legislature is asserting its own reading of the Constitution because the court's reading is inappropriate. The idea of legal amendment implies that when the legislature invokes the NM, it is not offering a reading of the Constitution, but is rather changing the actual text.

Third, if the NM is an "amendment", then the legislature that invokes it is a constituent assembly. This structure alters the legislature once again. While Weiler's argument from judicial error converts the legislature into a super court, the idea of "legal amendment" transforms the legislature into a constituent assembly. Like the first, this second conversion is problematic, since it fails to capture the nature of the NM as a legislative mechanism. Correspondingly, it creates a problem of fit in terms of the time limit on notwithstanding acts. Weiler's suggestion was to require that notwithstanding acts be enacted twice — once before an election and once after. In contrast, the Charter adopts an expiration — or "sunset" — system. The two-enactment mechanism would fit a model of amendment more than a model of change that is temporary in nature. This is, firstly, due to the emphasis being on the hardship of the approval in the amendment formula; two enactments are more difficult to accomplish than one. Under the system of the Charter, on the other hand, it is not more difficult to pass a temporary act; it may in fact be easier, if it is the case that legislators feel they are not doing something irreversible. Secondly, the Charter's idea of periodic revision fits more closely with legislative rather than constitutional practice — amendments to the Constitution are normally conceived of as being made once and for all, and not to be revisited.

G. Conclusion: Back to the Compromise

When Weiler summarizes his view of the Charter's structure with the NM toward the end of his 1984 paper, it is clear that his is an incoherent account of the NIP. After presenting the argument that rights should be fully protected from violations by legislatures, he says:

38 Weiler's 1980 paper, supra note 4 at 234; see also Weiler's 1984 paper, supra note 4 at 82, note 9.
39 Tushnet, supra note 16 at 282, note 184.
40 Indeed, in his 1984 paper (supra note 4), Weiler suggests he would have preferred the two-enactment requirement over the expiration mechanism. Weiler emphasizes that the Charter's NM does not adopt his model. But see Chapter 2, Section 5(B) above, for the idea of experimental constitutional amendment.
In one respect, this argument might take us too far. It would rule out even objectionable constitutional amendments pushed through by a dominant majority using this vehicle to trample on the rights of the individual. The immediate rejoinder, of course, is to require the concurrence of a supermajority for constitutional revisions so that the people will rarely encroach on the judicial plane. The problem with the argument in this form is that it assumes the point at issue: it implies that the legislative override rather than the judicial construction is likely to be wrong on the merits. In those cases where the judiciary has miscarried, to permit popular change only through formal amendment means that a tiny minority could hold the nation in a constitutional vice from which, as the American people have found, it might take even a war to break loose.

One cannot choose, then, between formal amendment and legislative override as the preferred method for revising judge-made constitutional policy simply by a priori reasoning about rights and democracy. One must make a practical judgment about the relative competence of two imperfect institutions in the context of a particular nation. The premise of the Charter is that the optimal arrangement for Canada is a new partnership between court and legislature. Under this approach judges will be on the front lines: they will possess both the responsibility and the legal clout necessary to tackle “rights” issues as they regularly arise. At the same time, however, the Charter reserves for the legislature a final say to be used sparingly in the exceptional case where the judiciary has gone awry. This institutional division of labor rests on the assumption that the chief threat to rights in Canada comes from legislative thoughtlessness about particular intrusions, a fault that can be cured by thoroughly airing the issues of principle in a judicial forum. The Charter contemplates no serious danger of outright legislative oppression: certainly none sufficient to concede ultimate authority to Canadian judges and lawyers.\footnote{Weiler’s 1984 paper, supra note 4 at 83-84.}

This passage elegantly and comprehensively summarizes Weiler’s account of the Charter, with the NM being seen as a compromise between full entrenchment and no entrenchment, between full rights protection and no rights protection. Weiler asserts that, unlike what we expect from a strong rights protection document, the Charter is not aimed at legislative oppression, but rather only at legislative “thoughtlessness”. Moreover, the Charter should be fully entrenched because a constitutional amendment is too difficult a way to deal with judicial “miscarriage”. Finally, and most importantly, “a priori reasoning about rights and democracy”\footnote{Compare this to what he writes two pages later: “For better or for worse, Canada did stumble on this distinctive constitutional partnership between court and legislature for the protection of fundamental rights. While its merits are appraised here from the point of view of constitutional theory: the acid test will be not logic but experience” [emphasis added]. Ibid. at 86.} cannot resolve the question of the NM.
It should be said that there is nothing wrong with seeing the NM as a compromise between full entrenchment and no entrenchment. Weiler himself uses the term "compromise" throughout his two papers, and I suspect he would not object to my analysis of his work in this regard. The purpose of the analysis in this section was primarily to establish that the argument from judicial error, which lies at the heart of Weiler’s approach, does not provide a coherent justification for the NM. The argument is based on the conviction that judicial review with legislative finality is likely to produce better rights protection than would final judicial review. In the next chapter, I will introduce an account of the NIP that does solve this coherence problem. Prior to that, in the sections of this chapter that follow, I demonstrate that Russell, Michelman and Manfredi – three other writers who have focused their writings on the argument from judicial error – also fail to offer a coherent argument for the NM.\footnote{See, e.g., Weiler’s 1980 paper, supra note 4 at 232 where Weiler talks of the NM as “a compromise, between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority” and in Weiler’s 1984 paper, supra note 4 at 79 where he suggests that the NM solution “appeared to be a tolerable compromise to the deadlock over the Charter”.
\footnote{The argument from judicial error supports constitutionalism and judicial review, and yet believes that the NM is a positive development. There are those who object to the Charter altogether and see an NM bearing Charter as less onerous than an unencumbered Charter but still not beneficial in and of itself. The best representative of this approach is Michael Mandel. See M. Mandel, The Charter of Rights and the Legalization of Politics in Canada, Revised, Updated, and Expanded Edition, (Toronto: Thompson Educational Publishing, 1994) at 92-6.
\footnote{P.H. Russell and P.C. Weiler, “Don’t Scrap Override Clause – It’s a Very Canadian Solution” The Toronto Star (4 June 1989) B3. For the story of the Quebec overriding of Ford, see Chapter 5, Sections 3(D) and 6(B), below; For Russell and Weiler’s analysis of the decision, see Chapter 6, Section 4, below.
\footnote{Russell expressed further support for using the NM in P.H. Russell, “The First Three years in Charterland” (1985) 28 Can. Public Admin. 367 at 377-8.}}}

3. “Not Standing” and “Standing Up” for Notwithstanding: The Whyte-Russell Exchange

A. Introduction

As one of Canada’s most respected political scientists, Peter Russell is probably the best-known advocate of the NM. Since 1983, he has expressed his support in various works, including a 1989 article co-authored with Weiler. In the piece, published in the Toronto Star, the authors embraced the mechanism and its usage by Quebec after Ford.\footnote{P.H. Russell and P.C. Weiler, “Don’t Scrap Override Clause – It’s a Very Canadian Solution” The Toronto Star (4 June 1989) B3. For the story of the Quebec overriding of Ford, see Chapter 5, Sections 3(D) and 6(B), below; For Russell and Weiler’s analysis of the decision, see Chapter 6, Section 4, below.} Following an attack on the article in a law review piece by John Whyte entitled “On Not Standing for Notwithstanding”. Russell defended the NM once again in a responsive article: “Standing Up for Notwithstanding”\footnote{Russell expressed further support for using the NM in P.H. Russell, “The First Three years in Charterland” (1985) 28 Can. Public Admin. 367 at 377-8.}. The
works were published, respectively, in the 1990 and 1991 issues of the *Alberta Law Review*. The exchange presented in these papers is the subject of this section.

I will begin with an analysis of Whyte's discussion of the NM in light of three principles of government in Canada, namely constitutional rights protection, legalism and democracy. This will be followed by a discussion of the connection Russell makes between the argument from judicial error and the nature of *Charter* cases. An examination of the correction-abuse dilemma, which dominates the Whyte-Russell exchange, will then conclude this section.

**B. Whyte's Analysis of Principle – Rights Protection, Legalism, and Democracy**

Although Russell's observation that Whyte's paper is "the most fully reasoned attack we have had on the *Charter*’s override provision" is still true, and although the paper is often cited as the representative criticism of the NM, Whyte himself says that his objection to the mechanism is rooted in policy and not principle:

I take the position that with respect to the future of the override clause, the role of policy choice is dominant and the answer cannot be found by resort to principle. There are no principles that determine how we ought to vote on keeping or abandoning the legislative trump over rights contained in the Charter of Rights... [O]ur usual expectation that questions of the appropriate institutional arrangement can be answered by inference from the commitments reflected in our basic constitutional order cannot be met in this particular debate.

Whyte does not explain why he takes this view. It could be that he believes, as I suggested Weiler does, that both legislative and judicial supremacy have their advantages and disadvantages, such that each of the two extremes has been justified or opposed by different

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48 Russell, ibid. at 293.
50 Whyte, supra note 47 at 348. See also at 349: “The position that is advanced in this paper is that the debate over keeping the override power should be conducted in terms of what will produce the soundest government and better society and that we should approach this question by trying to anticipate how effective courts and legislatures actually will be in making various sorts of social and political accommodation”. The structure of Whyte's paper further expresses this point. The analysis begins by “Looking for a Lesson in Constitutional theory” (at 349-354) and then “Finding a Lesson in Political Practice” [emphases added] (at 354-7).
51 Section 2(G), above.
schools of thought, and that, since the NM creates a compromise between the two, there is no point in talking about its theoretical value. However, it seems that there is an additional explanation for Whyte’s assertion that the issue of the NM cannot be decided by resorting to theory. In Whyte’s view, the strongest principle which could potentially be applied in opposition to legislative finality, constitutional rights protection, is inapplicable in the Canadian context. He writes:

The problem with basing an argument against the override provision on a prior constitutional commitment to rights is that it begs the question of the nature and extent of the actual constitutional commitment. It is not morally defective for Canada not to have granted to courts hearing claims arising under the *Charter* ultimate authority over other political processes and choices. However, not having done so means that arguments from constitutional principle, based on the claim that Canada has adopted the principle of entrenched human rights, proceed on an inaccurate premise.52

Whyte’s claim in this passage is inaccurate given that, as demonstrated earlier, the Canadian NM is based on what I have called the “deviation model” and not on the “opt out model”. The commitment to constitutional rights protection is kept even when the NM is invoked. This is due to the fact that some rights cannot be overridden by s. 33, that the effect of notwithstanding acts is temporary and that there is a specific process (i.e., express declaration) required in order to operate the NM. Consequently, Whyte might be right when he says that the “extent” of Canada’s commitment to constitutional rights protection is not clear, but he is wrong to suggest that the “nature” of this commitment is not clear.

Whyte’s reluctance to rely on the principle of constitutional rights protection in his criticism of the NM is especially incongruous in light of his willingness to critique the mechanism on the basis of two other principles of government in Canada: legalism and democracy.53

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52 Whyte, *supra* note 47 at 350.
53 Whyte criticizes the mechanism on the basis of a third principle, that of federalism (*ibid.* at 353-4), but since this work focuses on the separation of powers and not on the division of powers, I shall not explore this principle. For the interested reader, Whyte’s federalism argument runs as follows. What federalism rests upon and what it results in, both support the removal of the NM from the *Charter*. Federalism rests upon the desire to provide “protection to minorities from the political choices of political majorities” (at 353). As such, federalism supports the idea that “certain ideals or images will prevail over power” (*ibid.*). What federalism results in is the blockage of governmental policies by the court, as well as in governments accepting this blockage and getting used to working under its constraints. This is also true of *Charter* adjudication – as it should be, according to Whyte. Sometimes it means that governments cannot enact certain policies, and Whyte argues that rather than invoking the NM, they can...
Whyte defines legalism as "the idea that the legitimacy of state power can be measured through legal adjudication." This idea, he asserts, is adhered to in Canada:

As a matter of principle we have adopted the notion that there are adjudicable public issues. Furthermore, we have come to terms with these issues being ultimately adjudicable – not subject to legislative review and revision."

The obvious question is: what is the difference between the principle of constitutional rights protection and the principle of legalism? Why can the adoption of the NM demonstrate that the extent of the commitment to rights protection is questionable but the extent of the commitment to legalism is not?"6

The answer could be one of age. As Whyte puts it, legalism has been part of the Canadian culture "for over half a millennium"." He demonstrates Canada's commitment to legalism by citing sources far older than the Charter of 1982. Thus he writes of judicial independence as expressed in the tenure and pay protections for judges in the 1867 Constitution, and in the principle of separation of judicial powers."8 A recent Supreme Court decision indeed explicitly notes that Canada's commitment to the rule of law has deep roots in Canadian constitutional history."9

However, Whyte himself sees the adoption of the Charter as part of the structure of Canadian legalism:

The idea that some problems may be adjudicated – may be made subject to legal determination – requires there to be substantive constitutional value to be interpreted and applied... Canada, in enacting the Charter of Rights, created a normative order (a text, in other words) to ensure that those issues could be resolved through adjudication. The nation expressed its commitment to... the capacity of the Charter to be interpretable. This commitment... does not fit well with the idea that the ultimate method of resolution of conflicting claims is through a purely political process. In other words, once the

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4Whyte, supra note 47 at 350.
5 Ibid. at 351.
6 Russell makes this point not by comparing the principles of legalism and rights protection, but simply by arguing that adopting the Charter with the NM implies that Canada is not committed to the type of legalism that gives the judiciary ultimate control over rights issues. Russell, supra note 47 at 307.
7 Whyte, supra note 47 at 350.
8 Ibid. at 350-1.
advantages of constitutional interpretation were accepted, as a general matter, it is not easy to see why the framers of the 1982 Constitution then saw political judgment to be a preferred form of political accommodation in each and every instance in which political interests wished to suspend the operation of legalism.\(^6\)

The question again is, why does the 1982 adoption of the *Charter* demonstrate a commitment to legalism but not to constitutional rights protection? Whyte could respond that the *Charter*'s adoption did not strengthen the old commitment to legalism, though it did *apply* this prior legalism interest to the area of rights protection. Therefore, Whyte might say that, whereas it is impossible to attack the NM on the basis of Canada’s commitment to constitutional rights protection, since this commitment is not well established, it is possible to attack the NM on the basis of Canada’s commitment to legalism as applied to rights issues. This commitment to legalism as applied to rights issues is, however, synonymous with Canada’s commitment to constitutional rights protection.

Whyte’s reluctance to use constitutional rights protection as a basis for a principled argument against the NM is problematic also in light of his willingness to use the principle of democracy for that purpose. Democracy, Whyte reminds us, rests “on deeper conditions such as political participation, equality, autonomy, and personal liberty”.\(^61\) He continues:

[D]uly elected and popularly supported governments can, and do, believe that the appropriate conditions for democratic politics include such things as censored political speech, restrictions on political participation, political campaigns that are funded by government, and perhaps most currently, in at least two Canadian jurisdictions, gerrymandering. In considering this list, it is not difficult to see the connection between the use of judicially enforced fundamental rights of speech, equality and due process and the vindication of principles that are designed to protect democratic processes.

Of course it would be wrong to suggest that the whole array of interests identified in the *Charter of Rights* are justifiable on the basis that they enhance democratic process. Some rights (for example, an expanded notion of personal security being protected from substantive injustice under section 7 of the *Charter*) must be explained by reference to other political commitments. However... the democratic principle provides a powerful

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\(^6\) Whyte, *supra* note 47 at 351. Compare to Weiler’s point about s. 1 and ambiguity. Section 2(C).above.

\(^61\) Whyte, *supra* note 47 at 352.
pedigree for judicial control over political choices that erode some fundamental human rights.\textsuperscript{62}

This is a classic process-based argument in the style of John Hart Ely.\textsuperscript{63} It holds that legislatures cannot be trusted to preserve democracy and that, therefore, the NM is inconsistent with Canada's commitment to democracy. However, the Charter goes beyond the protection of democratic rights. As Whyte himself says, some Charter rights "must be explained by reference to other political commitments". That is, the Charter is not only about protecting democratic rights. These "other political commitments" of which Whyte speaks are the commitments to constitutional rights protection. That is, the Charter is about constitutional rights protection. If Whyte is willing to attack the NM on the basis of what the Charter is not (i.e., process protection), why then is he not willing to attack the NM on the basis of what the Charter is (i.e., rights protection)?

It may be that the very existence of a compromise-based mechanism such as the NM precludes arguments from principle altogether. In my analysis of Weiler's work, I demonstrated that Weiler did not suggest a principled support of the mechanism. Indeed, Whyte approaches arguments from principle only after introducing his view that the value of the NM cannot be decided by recourse to principle. However, once one is willing to consider the principles of legalism and democracy in relation to the NM, one must consider the principle of constitutional rights protection too. The idea of a constitutional democracy embraces the themes of legalism, democracy and rights – all at the same time.

C. Russell's Argument from Judicial Error: the Nature of Charter Cases

Russell divides his support of the NM into "substantive considerations" and "process considerations". The substantive considerations are equivalent to the argument from judicial error and will be discussed presently. The process considerations are about the participatory
Russell's argument from judicial error is similar to that of Weiler. Like Weiler, he notes the fallibility of judges⁶⁵ and suggests that the NM provides a "process, more reasoned than court-packing and more accessible than constitutional amendment, through which the justice and wisdom of [judges'] decisions can be publicly discussed and possibly rejected".⁶⁶ He writes, as Weiler does, of judicial decisions that are "seriously flawed"⁶⁷ and about judicial decisions that can cause "injustice and harm".⁶⁸ Furthermore, like Weiler, Russell does not explain what exactly he means by referring to "flawed" judicial decisions.⁶⁹ and does not appear to offer any solution to the difficulties pointed to above in my account of the argument from judicial error.

Russell's analysis of the argument from judicial error presented two points which did not appear in Weiler's initial presentation of the argument. These were the idea of judicial bias and the connection between the argument from judicial error and the nature of Charter cases.

The argument from judicial bias is a supplementary argument to the argument from judicial error. As one response to the claim that legislatures "may act precipitately and make questionable decisions". Russell suggested that judges "are not altogether free from other institutional biases".⁷⁰ Russell did not elaborate on this point.⁷¹ but the idea that judges have institutional biases is widely acknowledged in the constitutional literature.⁷² This dissertation is obviously not the proper forum for the examination of this idea. For our purposes, we can simply state that like the argument from ambiguity, the argument from judicial bias explains the reason why judges arrive at a wrong answer. The latter argument holds that the reason is that judges are

⁶⁴ See Chapter 4, Section 5, below.
⁶⁵ Russell, supra note 47 at 296, 297.
⁶⁶ Ibid. at 295.
⁶⁷ Ibid. at 297.
⁶⁸ Ibid.
⁶⁹ Unlike Weiler, however, Russell does note some examples of judicial decisions he believed to be flawed. For the analysis of these decisions and Russell's treatment of them, see Chapter 6, Sections 2 and 4, below, and ibid, note 100.
⁷⁰ Russell, supra note 47 at 301.
⁷¹ Russell actually referred to one case, B.C.G.E.U. v. British Columbia (A.G.), [1988] 2 S.C.R 122 as a case marred by judicial bias. Russell, supra note 47 at 301. In this case, however, the Government of British Columbia won, and as such it cannot be an example of the need for a NM, which arises only when judicial bias causes judges to strike down legislation.
biased. Being a sub-argument of the argument from judicial error, the argument from judicial bias, like the argument from ambiguity, still cannot be made consistent with the idea of judicial review. The idea of judicial review implies that courts have a better ability to protect rights, even though they might be institutionally biased because courts are, generally speaking, less biased than legislatures. Of course, judicial bias might explain why, pragmatically speaking, it is better to have legislative finality. In terms of theory, however, this approach is not coherent.

Russell’s introduction of the argument from judicial error draws a connection between the argument and the nature of Charter cases. After introducing the argument from judicial error, he says:

At the core of this argument is the recognition of the kind of questions courts typically deal with in interpreting and applying a constitutional charter of rights. These are questions not about the validity of the core values enshrined in the general language of the Charter – freedom of speech, fundamental justice, equality – but about the proper limits of rights based on these values. ...Thus it is quite misleading to describe what the courts are doing in deciding Charter cases as ‘guaranteeing’ the citizens enjoy the rights entrenched in the Charter. What judicial review under the Charter guarantees is careful consideration by the judiciary of a citizen’s claim that a Charter right or freedom has been unreasonably encroached upon by a law or executive act of government. In dealing with such a claim, the court must decide whether it should be upheld or whether it should give way to other important rights or interests with which it conflicts. [emphasis added]73

Illustrating his claim with six cases concerning the freedom of expression provision of s. 2(b) of the Charter,74 he continues:

One does not find in these cases the Court defending citizens against government attacks on what is fundamental to the right of free speech in a democracy, the right to criticize the government and advocate opposition to it. Instead, in each case, the court dealt with an issue at the margin, not at the core, of free speech and whether such a marginal claim should give way to some other value. In effect, in these cases the Court was making decisions about the policy of free speech – how far this essential democratic right should

73 Russell, supra note 47 at 295-6.
74 These cases are: R. v. Canadian Newspaper Company, [1988] S.C.R 122, which dealt with the right of the complainant in a criminal case to have information identifying her banned from publication; B.C.G.E.U v. British Columbia (A.G.), supra note 71, which dealt with the prohibition of picketing at courthouses; Irwin Toy Ltd v. Quebec (A.G), [1989] 1 S.C.R. 927, which dealt with prohibitions against advertisements directed at children; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R 1038, in which an employer’s obligation to write a letter of recommendation for a wrongfully dismissed employee was at issue; Ford, supra note 20, which concerned the French-only requirement for signs in Quebec; and Edmonton Journal v. Alberta (A.G), [1989] 2 S.C.R 1326, which concerned the prohibition against the publication of details from matrimonial proceedings.
be extended and under what circumstances and for what purposes it should be subjected to restriction.\textsuperscript{75}

Russell thus suggests that the argument from judicial error is supported by the nature of Charter cases. However, in describing this nature, Russell mixes two distinctions regarding constitutional adjudication, only one of which is relevant to the argument from judicial error.

The two distinctions that Russell conflates are the distinction between defining the scope of a right and prescribing its legitimate limits and, secondly, the distinction between protecting the core of a right and protecting its margin.\textsuperscript{76} Although Russell is right to assume that many cases about the limits of rights are also about the margin of rights (as all his examples are), cases could equally be about limits while still being about the core. Alternatively, they could be about rights while still being about the margin.\textsuperscript{77} Now Russell’s distinction between scope and limits can be connected to the argument from judicial error: since assessing the validity of the limits on a right involves more analysis of social science evidence than would defining the right, the chance for judicial error increases. (I shall elaborate on this later in this chapter.\textsuperscript{79}) In contrast, the second distinction to which Russell refers – between core and margin – is irrelevant: there is no reason why it would be more difficult to prescribe the legitimate limits of the core of a right than to prescribe the legitimate limits on its margin.

It seems that Russell’s core-margin point is connected not to the argument from judicial error but rather to another notion that I introduced in the context of Weiler’s work: the no abuse assumption. Russell appears to argue that unjustified limits on the margin of rights, as opposed to unjustified limits on the core of rights, are not an expression of tyranny such that even if the

\textsuperscript{75} Russell, supra note 47 at 297.

\textsuperscript{76} Interestingly, in both distinctions, Russell uses the term “core” as a focal point. In the rights-limits distinction, he contrasts “the validity of the core values” of the Charter with prescribing “proper limits on rights based on these values”. In the core-margin distinction, he contrasts the “core” with the “margin” (or “policy”) of rights.

\textsuperscript{77} For examples of cases dealing with limits while still being within the core, one can cite any case in which the cores of two rights seem to collide and the court must prescribe their limits vis-à-vis each other. For instance, R. v. Seaboyer, [1991] 2 S.C.R 577 dealt with the right of the accused to adduce evidence relating to the past sexual conduct of the complainant. The court had to choose between the core of the s. 7 right of the accused to have a fair trial and the core of the s. 15 equality rights of the victims. An example of a case concerning the definition of rights that is also a case about the margin of a right is Ford (supra note 20) – specifically the portion of the case holding that commercial speech is protected by s. 2(b). For an analysis of Seaboyer and of Ford see Chapter 6, Sections 3-4, below.

\textsuperscript{78} See Section 5, below.
legislature abuses the mechanism, the result will not be catastrophic in terms of rights protection.\footnote{Such a reading of Russell would imply that when Russell says “at the core of this argument” preceding his characterization of \textit{Charter} cases, he refers not to the argument from judicial error but to the justification of the NM generally. This is a rather forced reading given the location of the words “at the core of this argument” in Russell’s text. See Russell, \textit{supra} note 47 at 295:

Judges are not infallible. They make decisions about the limits and nature of rights and freedoms which are extremely questionable. There should be a process, more reasoned than court-packing and more accessible than constitutional amendment, through which the justice and wisdom of these decisions can be publicly discussed and possibly rejected. A legislative override clause provide such a process. At the core of this argument...[emphasis added]}

This view implies that tyranny refers not only to the reason for the violation of the right, but also to its extent. Thus in order for an unjustified limit on a right to be tyrannical, it is not enough that it be arbitrary or undertaken for an improper purpose: it also has to impose a significant burden on the right holder. Consequently, says Russell, even if a certain usage of the NM is wrong — i.e., even if the court got the answer right and it is the legislature that got the answer wrong — the risk in having the mechanism is not significant because the core of the right remains preserved.\footnote{Similarly, we see that “this argument” does appear to be the argument from judicial error, and not the general support of the NM.}

How is the “truism that no single right should be treated as an absolute...\textit{also recognized}” [emphasis added] in judicial decisions stating that certain rights are not protected by the \textit{Charter}? What such decisions actually demonstrate is that either the \textit{Charter} text or the judiciary (the choice between the two depends upon how much importance we assign to the text) holds some rights worthy of constitutional protection, and some not. Among those worthy of constitutional protection, there might be absolute ones (or, at least, an absolute one). All that a decision eliminating some rights from the \textit{Charter}’s constitutional protection implies, then, is that not \textit{all} rights are absolute.

There is obviously no connection between the fact that some rights are more important than others and the argument from judicial error. However, there might be a connection between a hierarchical concept of rights and the no abuse assumption in that, with regard to the less important rights (which are less — or not at all — worthy of constitutional protection), legislative finality is appropriate because there is no danger of tyranny even when those rights are not protected in the Constitution at all.
D. The Correction-Abuse Dilemma

Although there is a discussion of principle in the Whyte-Russell exchange, it seems that neither side suggests a way out of the correction-abuse dilemma. Whyte is afraid of the legislative abuse of the NM and Russell is afraid of judicial error. Whyte says:

[T]he anxiety that produced the political demand for entrenched rights cannot rationally be calmed in the face of the legislative power granted by section 33. That anxiety is simply this: political authority will, at some point, be exercised to impose very serious burdens on groups of people when there is no rational justification to doing so.\(^1\)

Russell responds with a different account of courts and legislatures:

Legislatures, it is true, may act precipitately and make questionable decisions. On occasion their consideration of rights issues may, to use Professor Whyte's phrase, be unduly influenced by 'the dominant political winds.' But it is a dreadful distortion to suggest that such impassioned and inconsiderate behavior is the norm in Canadian legislatures. A reading of legislative debates on justice issues such as capital punishment, criminal procedure, aboriginal rights, and language rights does not find legislators simply pandering for popularity. At the same time we should recognize that, while judges are free from any pressure to curry favour with the public, they are not altogether free from other institutional biases...

In designing the institutional matrix for making decisions on rights issues it is a mistake to look for an error-proof solution. Both courts and legislatures are capable of being unreasonable and, in their different ways, self-interested...\(^2\)

Note that Russell and Whyte are not discussing the same issue. Whyte speaks of democracy at its worst and Russell talks of democracy at its best. This discrepancy is representative of the nature of the discussion about the correction-abuse dilemma. As would be expected from those who advocate the no abuse assumption, Russell tries to calm Whyte's fears of the legislative abuse of the NM by suggesting that legislatures are more trustworthy than Whyte portrays them to be.\(^3\)

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\(^1\) Whyte, supra note 47 at 355.
\(^2\) Russell, supra note 47 at 301.
\(^3\) Ibid. at 301, 308. Although I do not have the intention to validate or invalidate the no abuse assumption, two of Russell's statements later in his paper demonstrate that this assumption is not well established. First, the reader may note that the statement in the quoted passage according to which legislators are not "simply pandering for popularity" is not referenced. I am not aware of any research that was done in Canada to demonstrate the seriousness of legislative debates, and it seems that this statement is based on Russell's general impression from his experience with legislative debates. My own personal impression, in contrast, is that this picture is not accurate. (For an example, see Chapter 5, Section 4(C), below.)

Second, at the very end of his paper, Russell seems to replace prudent reasoning with romantic wishful thinking. Responding to Whyte's fear of "moments of 'serious political repression'" he states:
Russell also reminds us that notwithstanding acts are temporary and repeats his and Weiler’s suggestion that two enactments of notwithstanding acts be required. As is typical of the discussion of the correction-abuse dilemma, both Whyte and Russell support their case by introducing examples from Canadian history: Whyte cites the tyrannical behavior of Canadian majorities in the past as Russell points to decisions that appear to him to have been erroneous.

The incoherent approach to the NM and the fact that the disagreement between Whyte and Russell is about policy and not about principle are best expressed in Russell’s response to

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I have no doubt that legislative bodies can act unreasonably and fall under the sway of repressive forces. In the 1950s, we witnessed just that when McCarthyism held sway in the United States. We also witnessed how ineffective that country’s judicial guardians were in checking that repression. But more fundamentally, I would argue that a democracy that puts its faith in its politically active citizenry as in its judges to be the guardians of liberty is stronger than one that would endeavour to vest ultimate responsibility for liberty and fundamental rights exclusively in its judiciary. (Ibid. at 309).

Russell starts his last sentence with the words “but more fundamentally”, indicating that his second statement, regarding Canada’s strength, is “more fundamental” to the discussion about the NM than is his first statement, concerning evidence from U.S. history. Yet asserting that a country is “stronger” if it can trust its legislatures does not demonstrate that such trust, if it exists, should exist. The question of whether Canada should trust its legislatures this way — i.e., whether Canada is strong this way — is exactly what is at stake. Rather than being “more fundamental” to the issue of evidence from history, it is very much — if not entirely — dependent upon it.

A similar confusion of the ideal legislature and the actual legislature can be found in S. LaSelva, supra note 53. After briefly introducing Marbury v. Madison and suggesting that this decision was based upon the “assumption that legislators are unconcerned with constitutionality,” LaSelva writes:

If that assumption were sound; if...legislators relied upon utilitarian and majoritarian considerations, while only judges based their decisions upon the constitution. then our constitutional polity would come to an end. For legislators, rather than judges, bear the exclusive responsibility for the enactment of laws, and most laws are either never tested in courts or receive limited judicial scrutiny only after being in force for a number of years. But a utilitarian and majoritarian legislature, unconcerned with constitutionality, would enact many unconstitutional laws and many of these would escape the judicial veto. Not only would such a legislature reduce to absurdity the presumption of constitutionality found in existing constitutional systems, but the system could not be described as a constitutional system. since it would contain a significant number of unconstitutional laws. (Ibid. at 389).

As in the quotation from Russell appearing above, nothing in this statement establishes the validity of the assumption that legislatures are trustworthy: it simply explains why it is more convenient to assume it.

Russell, supra note 47 at 301-2.

—Japanese Canadians, Hutterites, Doukhobors, aboriginal peoples. Jehovah’s Witnesses. the Acadians, Métis, Roman Catholics, communists and separatists. All of these groups have. at some point. been seen as producing more social disruption and risk than society has been able to bear and all of these groups have been governmentally burdened in order to reduce the fear that has surrounded their presence. ...In all of these the governmental assessment of risk has been facile and overstated....It has been brutal. community crushing and life destroying. Political passion that is generated by the fear that there are communities within whose practices subvert the fabric of our society is powerful and terrifying.”; Whyte. supra note 47 at 355-6.

Whyte’s argument from democracy. As we recall, this argument holds that judicial finality is required to preserve the pre-conditions for democracy. Here is Russell’s response:

I agree with him that a liberal democracy requires checks and balances and that judicial review based on a constitutional bill of rights is not inherently undemocratic. Where I differ with him on the democratic principle is on how best to enhance and develop our capacity for democratic citizenship. The attempt to remove rights issues, irretrievably, from the arena of popular politics is to give up on what democratic politics at its best should be – the resolution of questions of political justice through a process of public discussion... For me, the legislative override clause is a way of countering this flight from democratic politics. It is a signal that we Canadians have not yet given up on our capacity for debating and deciding great issues of political justice in a popular political forum.87

This response is irrelevant. Whyte’s point was that judicial finality is needed precisely in order to secure the kind of democracy Russell envisions: however, Russell does not address this point at all. His response demonstrates again that their disagreement is not about principle, but is rather about policy. Whyte and Russell agree that, on one hand, having a democratic system argues for popular participation in constitutional decision making and that, on the other hand, this system requires some protected pre-conditions. Their disagreement is about how much confidence should be allocated to courts and legislatures. This is the correction-abuse dilemma.88

87 Ibid. at 308.
88 Russell’s response to Whyte’s point from legalism is even more problematic and further demonstrates Russell’s failure to respond to Whyte’s argument from principle in the language of principle. Recall that Whyte’s argument from legalism was that Canada has committed itself to the adjudication of rights issues. Russell’s response to this argument is comprised of two points. The first is a response discussed above, according to which the inclusion of the NM in the Charter might indeed demonstrate that Canada is not committed to the type of legalism Whyte supports (see Section B, above). The second one is this: “The question now before us, using Whyte’s own criteria is whether making Charter issues ‘ultimately adjudicable’ will lead to the soundest and fairest system of government”. Russell, supra note 47 at 307. Referring to arguments made earlier in his paper, Russell then repeats his view that a system with judicial finality is not the soundest and fairest system of government.

But the context of Whyte’s reference to “the soundest government and fairest society” (Whyte, supra note 47 at 349) is this: Whyte says that although his view is that the question of the NM should be decided by recourse to policy, that is, by checking what will lead to “the soundest government and fairest society”, he moves on to examine some principles of Canadian constitutional theory. Thus Whyte is talking about two different inquiries: the inquiry about principle, in the context of which he discusses legalism, and the inquiry about policy, in the context of which he discusses “the soundest government and fairest society”. Russell takes Whyte’s criteria from the policy inquiry and uses it as “Whyte’s own criteria” in the principle inquiry. This exercise demonstrates that Russell was so pre-occupied by the policy question – by the correction-abuse dilemma – that he could not respond to Whyte’s argument from principle with a counter argument from principle.

The exchange between Whyte and Russell is disappointing in another way. Whyte does not refer at all to Weiler’s idea of a partnership between courts and legislatures, namely a system of judicial review with legislative finality. (Weiler’s papers from 1980 and 1984 are not mentioned in Whyte’s paper at all; instead he refers only to Russell and Weiler’s newspaper article. See Russell’s criticism in this regard. supra note 47 at 294). Rather, Whyte
E. Conclusion

It is not surprising that the Whyte-Russell exchange collapses into the correction-abuse dilemma. As suggested in my analysis of Weiler’s work, support for the NIP on the basis of the court’s fallibility is doomed to be worked out in an incoherent way, given that the argument from judicial error is in tension with the very justification for judicial review. The next section will demonstrate this in the context of the works of two American constitutional theorists – Frank Michelman and Ronald Dworkin.

4. Michelman, Judicial Leadership and Judicial Supremacy

A. Introduction

Although it does not mention the NM. Weiler. Whyte or Russell. an essay published by Frank Michelman in 1996 seems to follow a path similar to the one Russell and Weiler take in their account of the NM. Michelman’s argument is that Ronald Dworkin’s justification for judicial review does not work to justify judicial finality. Examining the similarities and differences between the paths of argumentation that Michelman and Russell take further demonstrates that discussing the NM through the prism of the argument from judicial error makes this discussion policy-based and not principle-based.

B. Judicial Leadership, Judicial Error, and Non Judicial Finality

Michelman starts his discussion with the distinction between “judicial leadership”, which he supports, and “judicial supremacy”. which he does not. Judicial leadership is constitutional decision making by judges. Michelman argues that “we stipulate that legal-interpretative work benefits strongly from inputs of learning, skill, experience, and esprit – capacities that grow

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90 Ibid. at 145-6.
under professional training and nurture and that, therefore we can reasonably hope to find in a special concentration among occupants of a judicial office". Yet this, for Michelman, does not justify judicial supremacy (or judicial finality): he writes:

Here, now, is what we do not assume. For reasons that will appear, we do not assume that, under the conditions of judicial leadership just stated, ordinary citizens and their electorally accountable representatives are intellectually or motivationally incapable of arguing competently or judging honestly among contestant constitutional-legal interpretations or of deciding on what occasions to take constitutional interpretations into their own hands. Our arguendo assumption is that the people at large are well served by judicial interpretative leadership. That is not the same thing as being finally governed by judges.

Like Weiler and Russell, Michelman agrees that the court should have a role – even an important one – in constitutional decision making. As well, like the two, he believes that, once the judges have delivered a judgment, the people can decide the issue finally. Unlike Weiler and Russell, however, his solution to the problem of judicial finality is not to give the final word back to the legislature. After asking whether “judicial leadership and judicial finality [are] workably severable in practice”, he suggests a thought experiment. In it, “some body composed of specially elected representatives of the people”, which he calls a “Council of Revision”, would be authorized “to reconsider in its own motion the Supreme Court’s concrete interpretations of constitutional meanings and (when so resolved) to issue mandates contradicting those interpretations”. Michelman thus suggests not legislative finality but rather what could be called “popular finality”. I will address the difference between legislative finality and finality in a “Council of Revision” shortly. For now, I will focus on the case Michelman makes against judicial finality.

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91 Ibid. at 145.
92 Ibid. at 146.
93 Ibid. Michelman’s naming of the institution the “Council of Revision” is probably inspired by the institution discussed at the 1787 Philadelphia Convention and which was based on an idea of James Madison’s. Unlike Michelman’s Council of Revision, the historical one would have been composed of members of Congress and the judiciary and would review legislation before its enactment. See J. Agresto, The Supreme Court and Constitutional Democracy (Ithaca: Cornell University Press, 1984) at 134-5.
94 Michelman, supra note 89 at 146.
95 Unlike Weiler and Russell, Michelman is aware of the problems that overriding a judicial decision by a non-judicial body can create. He suggests that “[n]o doubt it would be a challenging task to draft and put into operation such a reform so as to make it workable and fair” (ibid. at 147). Michelman does not elaborate on this point.
Michelman discusses some objections to his thought experiment and suggests refutations to these objections. He first discusses the claim that judicial finality "simply flows from the idea of law contained in the liberal constitutional ideal of government under law". This is exactly the issue that is in dispute between Whyte and Russell with regard to legalism. It is based on the idea that:

[I]f, in a representative democracy, the people grant themselves or their representatives authority to interpret by their own lights the law of the Constitution, then it is idle to speak any longer of government limited by law. Because what is it, after all, that makes a limit on government a legal limit, if not entrenched against the beck and call of the governors ... to alter or relax it?

Michelman does not accept this objection:

We start again from the observation that concrete applications of constitutional law are often subject to reasonable dispute. We then imagine the people, acting through representative institutions, addressing such disputes and doing so in good faith, just as we are pleased to imagine judges addressing them – that is, addressing them as questions both of principle and of the meaning of the law that is. Assuming the people do thus vote their good faith judgments of true, principled legal meaning, a popularly based procedure for resolving constitutional-legal interpretative questions no more contradicts the idea of law as principled constraint than does allowing such questions to be resolved by the votes of shifting majorities of high court judges.

This paragraph addresses two points, similar to the two points that Weiler makes in his work. First, Michelman's argument that questions of constitutional interpretation are "often subject to reasonable dispute" is a more cautious and accurate version of Weiler's point that these issues are "always ambiguous and debatable". Secondly, and relatedly, Michelman's point about "good faith" can be used as a response to one of my critiques of Weiler. This critique was that if Weiler agrees that judicial review is based upon a certain advantage that judges have over legislators in their ability to deal with constitutional issues, then it does not make sense to suggest that the less able legislature supervise the more able court. Michelman says here that all that is required to

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96 Ibid.
97 See Section 3(B), above.
98 Michelman, supra note 89 at 149.
99 Ibid. at 149-150.
100 See Section 2(C), above.
101 See Section 2(B), above.
have the ability to deal with constitutional issues is "good faith". Michelman does not explain this expression, but one can imagine that it means the opposite of an interest-based interpretation. Hence Michelman concludes:

There is certainly nothing in the concept of law that requires us to make attributions of objectivity to an independent judiciary but forbids us to make them to electorally accountable representatives. So it is not true that the idea of government under law already conceptually contains the idea of government by judiciary or already conceptually rules out provision for popularly based determination of concrete constitutional-legal meaning.\(^\text{102}\)

In the Russell-Whyte exchange then, Michelman sides with Russell, explaining that the idea of the rule of law, or of legalism, or of constitutionalism, does not imply judicial finality. For similar reasons, Michelman – like Russell – does not accept the argument that democracy supports judicial supremacy. Such support is allegedly created by the need to guard the preconditions of democracy from the majority. However, Michelman asserts that, since the meaning of these preconditions is again open to discussion, it is again a question of interpretation, in which "independent judges can surely fail; an engaged people, as we are for the moment supposing, can possibly succeed: neither can do better than their best".\(^\text{101}\)

C. Non Judicial Finality, Ability and Motivation

Up to this point, Michelman and Russell seem to follow the same theoretical path. Both begin by suggesting that neither legalism nor democracy conceptually implies judicial finality. Both base their argument on judicial fallibility in addition to trust in the people's representatives. The difference between Russell and Michelman is revealed once Michelman points to the possible connection between the motivation to find the right answers and the ability to find those answers. After arguing that final constitutional interpretation by the people's representatives is not in conceptual contradiction with the idea of a Constitution as a higher law, Michelman moves on to discuss the question of whether such finality is better from an instrumental perspective.

\(^{102}\) Michelman, supra note 89 at 150.

\(^{103}\) Ibid. at 151.
One of the points he examines in this regard is what he calls "accuracy". If we believe that popular finality will, as a general rule, provide worse results in terms of preserving the values protected by the Constitution, then judicial supremacy is justified. In order to support judicial finality, says Michelman, one has to make "a compelling prediction" based on "experience" or "social-scientific theoretical reason" that judicial finality will provide more right answers - that is, that in our context, it will protect rights in a better way.

Michelman presents Dworkin's view that there are good reasons to predict that legislatures cannot do the job accurately, i.e., that they possess a lower ability than do the courts for dealing with constitutional rights protection. "Judicial review", says Dworkin, ensures that "the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone; a transformation that cannot succeed, in any case not fully, within the legislature itself". Michelman says that the basis of this view is Dworkin's concept of rights protection, according to which constitutional rights are rights "that legislation not be enacted for certain reasons". Therefore, explains Michelman, "the agent whose motive is in question" - the legislature - "cannot by any conceivable effort make itself into a suitable judge of the cause". This argument does not apply. Michelman says with good reason, to the Council of Revision because this is not the same institution that enacts legislation. But Russell and Weiler simply disagree with Dworkin over the assertion that the legislature's motivation is inappropriate. In keeping with the no abuse assumption, their view is that legislatures are also motivated to protect rights. The theoretical disagreement is again dependent on the correctness or incorrectness of the no abuse assumption.

When I presented Weiler's support of judicial review in rights cases. I showed that Weiler makes two classic arguments in support of judicial review. Weiler argued, as many before him did, that the court is better than the legislature at protecting rights for two distinct reasons. First, it has a better ability to deal with matters in which principles are involved. Second, it has a better

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104 The other one is "engagement", i.e., the connection between judicial finality and public participation in constitutional decision making. See ibid. at 159-161. For this point in the context of the NM, see Chapter 4, Section 5, below.
105 Michelman, supra note 89 at 162.
107 Michelman, supra note 89 at 162 quoting Dworkin, supra note 106 at 66.
108 Michelman, supra note 89 at 163.
motivation to protect rights, as it is unaccountable. Michelman's reading of Dworkin really implies that this distinction between legislative ability to engage in constitutional interpretation and legislative incentive to do so is false. The legislature can never really do the job properly because it does not have the right motivation - that is, it lacks the motivation for rights protection. If this is the case, then it makes sense that it is impossible to create an argument for legislative finality that would be coherent with the justification for judicial review.

D. Conclusion

Interestingly, in a later work, Dworkin himself expressed openness to legislative interpretation of the Constitution. After presenting his recent idea of "the moral reading" of the American Constitution, he stresses that he is talking about how the Constitution should be read, and not about "institutional questions". As for those questions, he writes:

I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding them. The best institutional structure is the one best calculated to produce the best answers to the essentially moral questions of what the democratic conditions actually are, and to secure stable compliance with those conditions. A host of practical considerations are relevant, and many of these may argue forcefully for allowing an elected legislature itself to decide on the moral limits of its power. But other considerations argue in the opposite direction, including the fact that legislators are vulnerable to political pressures of manifold kinds, both financial and political, so that a legislature is not the safest vehicle for protecting the rights of politically unpopular groups.

Dworkin goes on to say that the case is different "when we are interpreting an established constitutional system, not starting a new one". But my point here is not to discuss whether judicial finality is appropriate in the American context. My point here is to demonstrate that even one of the leading champions of judicial review on the constitutionality of legislation concedes

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112 Dworkin, *supra* note 109 at 35.
that the questions of judicial review and judicial finality can hardly be decided as matters of principle alone.

The reason why Dworkin realizes that the question of judicial review with legislative finality (or other forms of popular finality) cannot be solved by recourse to principle might be connected to the fact that Dworkin believes that questions of constitutional interpretation (like other questions in law) have a right answer. As a result, legislative finality could be justified only on the basis of the argument from judicial error. But this argument, as I have demonstrated throughout this chapter, cannot serve as a coherent justification for the NM because this argument is in tension with the arguments that support judicial review. The next section, which concludes the discussion of the argument from judicial error, presents what seems to be a slightly better version of this argument. As we shall see, however, even this version cannot provide a coherent account of the NIP.

5. Manfredi and the Argument from Policy Making

A. Introduction

At one point in my discussion of Weiler’s argument from judicial error, I used the analogy of a student and a Professor. I suggested that basing legislative finality on the court’s fallibility is as unreasonable as granting students the final power over other students’ marks because Professors sometimes make mistakes marking. This section deals with a possible response to this point - the response that the court actually does not have a special ability to deal with Charter adjudication, such that the student-Professor analogy is wrong. I shall call this argument the argument from policy making. I will suggest that this latter argument is actually a sub-argument of the argument from judicial error and that it too fails to establish a coherent justification of the NIP.

The argument from policy making appears initially in Weiler’s work, but is analyzed in detail in Manfredi’s work. While both Weiler and Manfredi draw heavily on American traditional work about the court’s incapacity to deal with policy issues, I chose to focus on

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113 See Section 2(B). above.
114 See Weiler’s 1980 paper, supra note 4 at 223-4 and Weiler’s 1984 paper, supra note 4 at 74-7.
Manfredi because he connects this argument to distinctive features of Canadian constitutional adjudication.

Manfredi was the only supporter of the NM to present his support of the mechanism as a climax - the final chapter - of a book length treatise about the Supreme Court of Canada's Charter adjudication. The NM, for Manfredi, can be a solution to "a central paradox in the political theory of liberal constitutionalism in Canada" that stems from the tension between constitutional supremacy and judicial review. According to Manfredi, "[c]onstitutional supremacy requires that political power only be exercised according to the procedural and substantive rules laid down in a Constitution; judicial review means that one of the institutions in which political power is located bears principal responsibility for interpreting and applying these rules in specific instances". This "paradox" is really the counter majoritarian difficulty. Manfredi dedicates much space in his book to addressing the traditional American treatment of this difficulty, with many illustrations from and analyses of Canadian Charter adjudication. Whereas Manfredi's treatment of Canadian case law and constitutional politics is enlightening, his theoretical analysis of both the aforementioned "paradox" and his vision of the NM as a solution to this paradox are based on and similar to the works of Weiler and Russell.

Manfredi supports the no abuse assumption, stating that legislatures are interested in rights protection too. He still offers two additional safeguards to s. 33. First, he suggests that invoking the NM should require a super majority of 60 per-cent of the votes in the legislative body. Second, he suggests that instead of expiring five years after its enactment, notwithstanding declarations should expire with the dissolution of the legislative body which enacted them. This proposal seemed to be aimed at increasing the efficiency of the expiration mechanism. The way s. 33 is drafted now, what is guaranteed is that the notwithstanding declarations will be discussed once every five years. Manfredi's proposals seemed to ensure that this discussion would take

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116 Ibid. at 188.
117 Manfredi also relies heavily on the work of the American scholar John Agresto whose work will be discussed in the next chapter in Section 3. In his discussion of the NM, Manfredi frequently refers to Agresto. mentions Russell once but never mentions Weiler.
118 Manfredi, supra note 115 at 203-4.
place during the election campaign since the re-enactment of the declaration would have to take place immediately after the election.\textsuperscript{119}

Manfredi’s main contribution to the discussion about the NM is his elaboration of the argument from policy making. The argument from policy making supports the argument from judicial error by explaining why this error happens. Manfredi connects this argument to an important feature of \textit{Charter} adjudication – the \textit{Oakes} test.\textsuperscript{120} Before discussing Manfredi then, I shall introduce this test, within the structure of the \textit{Charter}.

\textbf{B. The \textit{Oakes} Test and the Attributes of Constitutional Adjudication}

Anyone who reads the first section of the \textit{Charter} can learn about the \textit{Charter}’s structure. S. 1 contains at least four instructive bits of information. First, that the \textit{Charter} distinguishes between rights and limits; second, that the rule is that rights are guaranteed; third, that there are certain criteria to justify limits on rights; and fourth, that these criteria apply to all the rights. Thus every \textit{Charter} inquiry involves three stages: the rights stage, the limits stage (s. 1) and the remedy stage (s. 24). A discussion of the NIP does not involve the third stage since if the legislature agrees that the impugned act is unconstitutional, in other words, if it does not want to preserve it the way it is and yet would like to correct it in a different way than what the court suggested, then the legislature’s remedy can be enacted as an ordinary act. This new act will necessarily never have been reviewed by the court or found to be unconstitutional. The NIP is therefore only concerned with the first and second stages of this type of constitutional inquiry.

In the first stage, the court decides whether \textit{Charter} rights are limited by the impugned legislation.\textsuperscript{121} For this purpose, the court must decide that the behavior dealt with by the legislation\textsuperscript{122} is protected\textsuperscript{123} by the \textit{Charter} sections that deal with rights.\textsuperscript{124} If the court finds that

\begin{itemize}
\item \textsuperscript{119} \textit{Ibid.} at 208-9. Manfredi also says that this change is an operationalization of “the principal that one consequence of election should be the automatic reconsideration of existing legislative overrides” (at 209). I do not see the virtue in this principle. Perhaps Manfredi means that under his proposal, a notwithstanding declaration will always expire (with the elections) before it is renewed (after the election), whereas under the current arrangement, a declaration can be renewed before it expires. It seems to me that if a declaration is going to be renewed, such a gap in its enforcement is not necessarily helpful. Note that the \textit{Ford} decision bans the retroactive usage of the NM; See \textit{Ford}, supra note 20 at 744-745.
\item \textsuperscript{120} The \textit{Oakes} test was created in \textit{R. v. Oakes}, [1986] 1 S.C.R. 1986 [hereinafter \textit{Oakes}], such that it did not exist when Weiler published his papers in 1980 and 1984. See supra note 4.
\item \textsuperscript{121} The \textit{Charter} applies not only to legislation but also to other legal measures. I refer to legislation, since the NIP is interested in legislative finality by means of legislation.
\item \textsuperscript{122} By banning, imposing, or otherwise.
\end{itemize}
indeed a *Charter* right has been limited, it has to move to the second stage, where it decides whether this limit can be allowed under s. 1.

S. 1 prescribes that in order for a limit to be upheld it has to be "demonstrably justified in a free and democratic society". The meaning of this term was explicated by the *Oakes* decision. The court said that in order for a piece of legislation to be upheld under s. 1, it had to survive a four stage scrutiny. First, its objective must be "pressing and substantial". Second, it must be rationally connected to that objective. Third, it must impair the right in question as little as possible for the sake of achieving the objective. Fourth, the infringement of rights it leads to must be proportionate to the social benefit obtained. Although the Supreme Court has in later caselaw relaxed the stringency of the test, its analytical framework remains intact.

Manfredi focuses his criticism on the minimal impairment element of the *Oakes* test. He begins his discussion of "judicial policy making" by first characterizing *Charter* adjudication:

In the majority of *Charter* cases, the Court performs its most important task not in defining the substantive meaning of rights and freedoms, nor in measuring government action against those definitions, but in applying the section 1 test of reasonable limits. In particular, the most contentious issue within the Courts in most *Charter* cases is whether the government in question has selected the least restrictive means of achieving its policy objectives. The court can only resolve this question by taking into account important policy considerations.

Manfredi never defines what "policy considerations" are. In order to make his statement meaningful, one must assume that this term seeks to distinguish these considerations from the considerations one would expect to see involved in adjudication regarding matters of rights.

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123 By means of allowing, immunizing, or in another way.
124 The court would obviously have to decide whether the impugned measure indeed directs the alleged behavior. This exercise, however, is one of statutory interpretation and is not unique to *Charter* adjudication.
125 S. 1 also requires that the limits be "prescribed by law" and be "reasonable". As for the prescription by law requirement, since the NIP is concerned with the re-enactment of legislation, there is no need for this to be discussed. As for the reasonableness requirement, I accept Hogg's view that "the language of reasonableness and demonstrable justification articulates a single standard". P.W. Hogg. *Constitutional Law of Canada*, loose-leaf edition, vol. 2 (Scarborough: Carswell, 1992) at 35.8(a). 35-16.
126 *Oakes*, supra note 120.
127 See *Weinrib*, supra note 8 at IV(ii).
129 Ibid. at 157-158. Note that unlike Russell, Manfredi is cautious not to invoke the core-margin distinction, but only the rights-limits one.
which I shall call “rights considerations”. Manfredi’s discussion of Charter adjudication, which will be introduced below, demonstrates that by “policy considerations”, he means analysis of social scientific evidence. In other words, it is not that Manfredi is suggesting that a consideration is either a “rights consideration” or a “policy consideration”. Rather, it is that sometimes in order to consider “rights considerations”, one would have to invoke social science evidence.

After introducing the Oakes test, Manfredi characterized this test as “balancing”, and suggested that it “seeks to resolve constitutional disputes through a process that identifies, evaluates, and compares competing interests or rights”. Whereas in some cases the judge who is engaged in balancing decides that some right or interest always prevails over some other right or interest, “more often... the balancing process gives constitutional recognition to several interests, forcing judges to weigh the competing claims of these interests on a case-by-case basis”. Correspondingly, says Manfredi, when the court applies Oakes, only rarely does it decide in favour of a certain right over a certain interest in all circumstances. Regularly, under Oakes, the court assigned “equal weight to individual and collective claims” and “focused its analysis on the ‘least restrictive means’ component of the proportionality test, weighing the impact on individual rights of the actual means used to achieve important policy objectives against the probable impact of alternative measures on those same rights”. The justification for this kind of balancing, says Manfredi, “is not that legislatures absolutely fail to seek the least restrictive means of pursuing their policy objectives but that flaws in the democratic process affect the accuracy of the legislative calculus of reasonable limits”. But the court, says

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130 Ibid. at 161.
131 Ibid.
132 Ibid. at 162. Note that in order to make sense of Manfredi’s statement, one must read the word “weight” in the beginning of the first quotation as “a-priori weight”. Otherwise, it does not make sense to talk about “weighing” the two claims against each other. If we do read the first “weight” as a-priori weight, what Manfredi is saying is that the court has to weigh the competing claims separately in every case without assigning one claim a greater a-priori weight such that it would prevail in all cases. As for the merits of Manfredi’s weight point, while I agree with Manfredi that the very existence of a test (Oakes or another) to prescribe legitimate limits on rights demonstrates that neither the right nor the limit are supreme in all cases, I do not agree that the Oakes test assigns equal weight to rights and to other interests. The whole point of Oakes - and actually of s. 1 - is that rights have greater weight than other interests, so that only some interests, or limits, will be upheld and only under certain conditions.
133 Ibid. Manfredi’s language here focuses not on the legislation, but on the legislature. He says that rather than striking down legislation when “legislatures absolutely fail to seek the least restrictive means of pursuing their policy objectives”, what the court checks is “the accuracy of the legislative calculus of reasonable limits” [emphasizes
Manfredi is hardly equipped to calculate. Relying on work done by American scholars, he sets out some of the attributes of adjudication which lead to this incapacity. I shall introduce his account critically, in order to try to see the connection between it and a system of judicial review with legislative finality.114

First, writes Manfredi, "courts speak the language of rights".115 Whereas legislatures calculate the costs and benefits of different policy routes, "the emphasis on rights and duties in adjudication limits the alternatives available to courts and precludes an explicit concern with cost-benefit analysis: courts are supposed to provide remedies to vindicate violated rights regardless of cost".116

The problem with this point is that even assuming that speaking the language of rights interferes with prudent policy making, the reason that the court speaks the language of rights in Charter cases is that the Charter is a Charter of rights. In other words, Manfredi's problem here is not with the court but with the Charter. Manfredi's view is that some things should be administered not according to rights but rather according to a cost-benefit analysis. Whether this view is correct or not, it does not demonstrate that the court is institutionally incapable of interpreting the Charter.

It seems that what Manfredi means is that the problem with the court is not with its language of rights, but with the fact that because of this language, the court assigns to rights greater weight than they deserve.117 In this account, the problem is not one of language, but of substance. Courts respects rights too much.118 But this approach, at least in the Canadian context,
is self-defeating. Recall that it was the court that created the Oakes test, injecting policy considerations (at least as Manfredi sees it) into the Charter of Rights, while “speaking the language of rights”. Does Manfredi believe that the same court that created the policy oriented Oakes test is incapable of applying it?

Manfredi’s second attribute of adjudication is the courts’ inability to deal with legislative facts. Courts are designed to determine “adjudicative facts” which refer to “the discrete events that happen between parties to a law suit”. Instead of requiring this reflection on the past, the Oakes test’s least drastic means balancing calls for the determination of “legislative facts” which “include information about the causal relationships and ‘recurrent patterns of behavior’ on which policy decisions are based”. In other words, the Oakes test asks courts to reflect on the future. For this purpose, the courts need to have two capacities: the abilities to access relevant information and then to understand it. These are two capacities which the courts, as Manfredi demonstrates in the context of some Canadian cases, do not have.

The third attribute of adjudication that Manfredi refers to is incrementalism which, in ordinary litigation, is aimed at reducing “the costs of large scale policy errors”. This dynamic creates a problem in constitutional adjudication because “constitutional litigation often requires the development of completely new moral principles in order to render ‘all or nothing’ decisions that cannot easily be changed”. In addition, the courts are hampered by their “slow reaction to new information”, “tendency to adapt to new information by qualifying prior decisions rather than engaging in a fresh consideration of the issue”, and “treatment of policy issues in isolation”.

The fourth attribute of adjudication that undermines the courts’ ability to engage properly in policy making regards not what happens during the judicial proceeding, but what happens before it starts. Courts are “passive institutions, in that they have little control over the cases enjoy that status”. L. Weinrib, “The Supreme Court of Canada and Section One of The Charter” (1988) 10 S. C. L. Rev. 469 at 486.

139 Ibid. at 166.
141 Manfredi, supra note 115 at 167-170.
142 Ibid. at 171.
143 Ibid.
litigated before them, depending on others to frame issues and gather necessary information". Moreover, "individual cases do not often represent general conditions".

Before we discuss the final attribute of constitutional adjudication (which is also the one most relevant to our inquiry). I would like to pause and ask the question which has been the focus of my discussion throughout this chapter. Manfredi claims that resolving complicated social science questions is a task for which the Court not only does not possess any advantage in comparison with the legislature (or with the government's own bureaucracy), but actually suffers from an institutional disadvantage. If this is the case, why propose a system of judicial review and legislative finality? Why not abolish judicial review altogether? Working with the Professor-student analogy again, Manfredi seems to be saying that rather than the legislature being the student and the court being the Professor, it is the court that is akin to the student and the legislature that stands in for the Professor. If this is the case, why let the student read the Professor's papers? This question does not arise either under Russell or Michelman's approach to the argument from judicial error because, unlike them. Manfredi suggests that most Charter cases are about policy, regarding which the court is at a disadvantage.

One way to answer this question is by adding an additional assumption to the one that most Charter cases require policy considerations. This second assumption is that the policy issues in most of the cases are not complicated enough to make the court's incapacity affect its decisions. As a result, in most Charter cases, the court ultimately gets the answer right, and the need for legislative correction is exceptional. However, this answer is not satisfying. If the court is less capable than the legislature with respect to policy issues, why let it deal with those issues even if it is not going to make a mistake in each and every case?

Manfredi's response to this question resorts to a process-based theory of judicial review. In the very end of the chapter of his book that deals with judicial policy making, and as an introduction to the concluding chapter in which the NM is presented as the solution to the "paradox of liberal constitutionalism" in Canada, he connects the issue of policy making by courts to the NM and writes:

\[144\] *Ibid.* In the subsequent paragraph, Manfredi qualifies this statement, by saying that "[I]t is important not to exaggerate the passivity of adjudication by failing to recognize that judicial control over court dockets allows judges to select cases on the basis of how important the issues implicated in them appear to be". *Ibid.*
There are good reasons why courts should review the calculus of reasonable limits reflected in legislative enactments. To cite one reason, flaws in the process of representation may mean that in some cases the interests of relevant groups and individuals will be left out of the legislative calculus. In these circumstances, judicial review can alert legislatures and the public to such flaws. However, given the indeterminacy of section 1 review and the formulation of remedies under section 24(1), there is no reason to assume that the judicial calculus of reasonable limits and appropriate remedies is necessarily superior to the decisions reached by legislatures. There is, in other words, no argument that supports judicial supremacy. Consequently, the development of liberal constitutionalism can be advanced by the so-called "notwithstanding" clause contained in section 33 of the Charter.\footnote{Ibid. at 172.}

In addition to his implicit distinction between rights considerations and policy considerations, Manfredi explains the need for judicial review in policy issues by creating another distinction within the policy realm - between the substance of policy considerations and the process of their creation. Although Manfredi does not identify himself as an advocate of process, this argument is process based.\footnote{Ibid. at 186-187. Manfredi similarly connects the NM and the court's incapacity to deal with policy issues in the beginning of his next chapter. Chapter 7. Ibid. at 188-9. It is worth noticing the way Manfredi asks the question which precedes the above quoted passage: "Does this argument lead to the conclusion that judicial review in general, and section 1 review in particular, should simply be abandoned?". The term "judicial review in general" is not appropriate here. Nothing that Manfredi says in the preceding pages negates the need for judicial review in the definition of rights.} The legitimacy of allowing the court to decide policy issues lies not in its ability to discuss these issues, but rather in its ability to ensure equal access to the democratic channels required for the decision making process. The argument from policy making, according to this account, is a combination of the argument from judicial error and the idea that the role of judicial review is "representation-reinforcement". Judicial review is needed in order to protect democratic processes and to allow for the legislative calculation of policy issues. Legislative finality is needed to correct judicial errors in cases where the court's calculation itself was wrong.\footnote{Ibid. at 188-9. It is worth noticing the way Manfredi asks the question which precedes the above quoted passage: "Does this argument lead to the conclusion that judicial review in general, and section 1 review in particular, should simply be abandoned?". The term "judicial review in general" is not appropriate here. Nothing that Manfredi says in the preceding pages negates the need for judicial review in the definition of rights.} Now

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what if the legislature overrides a judicial decision that struck down an act which failed to take into account "the interests of relevant groups and individuals"? The answer is again the no abuse assumption.

After understanding Manfredi's approach to the structure of judicial review and legislative finality, we are in a position to discuss the final attribute of adjudication which appears to be the most relevant one to our inquiry. This attribute is that judicial policy making "contains inadequate provisions for policy review". Manfredi writes that "the relative incapacity of courts to ascertain causal relationships and patterns of behaviour limits their ability to predict the consequences of their decisions". Manfredi goes on to explain that, unlike legislatures, courts cannot directly initiate reviews of their decisions, and therefore it is more difficult for them to correct their rulings based on future developments.

Unlike all the other factors that Manfredi set out regarding the court's incapacity to deal with policy issues, this attribute of constitutional adjudication can be directly connected to the NM if we suggest that this mechanism is needed to "update" judicial decisions where new social science evidence renders such an update necessary. To illustrate Manfredi's argument, consider the Ford case, in which the court ruled that Quebec failed to prove that French only signs were required for the preservation of the French culture in Quebec. Imagine that several years later, some social scientists discover a severe deterioration of French culture in Quebec, and state that unless the presence of English significantly decreases, this deterioration will increase. Because the court does not have a mechanism for "policy review", the legislature should overrule this

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not have to go through the political hardship of using the NM in order to correct judicial errors. In such cases, Hogg suggested, the legislature could legitimately use the NM even in advance of any judicial decision. This approach can be seen as supportive of Slattery's view, discussed in Chapter 2, Section 5(E), above, according to which the legislature is allowed to use the NM even prior to a judicial decision. Hogg has a greater trust in the legislature than Manfredi who believes that it is only after a judicial decision that the legislature can be trusted not to abuse the NM. For reasons that will appear throughout the following chapter, I agree with Manfredi that the NM should only be used in a remedial fashion.

149 Manfredi, supra note 115 at 172.
150 Ibid.
151 Ibid.
152 See Ford, supra note 20 at 779-780.
decision based on the new information. I shall call this sub-argument of the argument from policy making "the policy review argument".  

The obvious question that the policy review argument provokes is this: should it not be the court that examines this new evidence? The reason why we have judicial review is because we believe that the judicial process has some advantages over the legislative process. In policy issues, for Manfredi, the advantage stems from the court's ability to detect representation flaws in the calculations behind certain policies. The reason why we have legislative finality is because we believe that on policy issues, the court might make mistakes because it is not the most capable institution for the discussion of these issues. As for this new evidence, however, there is no judicial error because there is no judicial consideration. In other words, if the problem with constitutional adjudication is that future development requires its change, there should be a mechanism through which the court itself is asked to update its decision. That could be accomplished either by the introduction of new legislation based on the new evidence, or by using the reference institution, i.e., by asking the court's opinion regarding the constitutionality of the law that is based on the new evidence.

Manfredi's answer to this question can again be based on his point regarding the role of the court in safeguarding the democratic process. When what the legislature does in the face of new social evidence is update the judicial finding in terms of the court's own ruling, the chances of such flaws are significantly decreased, and it is appropriate to let the legislature, which is better equipped to decide policy issues, to update the decision.

C. Conclusion

In writing about the NM as a mechanism to correct judicial errors which occur as a result of the court's relative incapacity to deal with policy issues, Manfredi takes the Oakes test seriously. He demonstrates how the different attributes of Charter adjudication might hamper judicial policy making. In this regard, Manfredi focuses on one of the four parts of the Oakes test - the requirement of minimal impairment. It is during this stage that the court has to evaluate

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153 Does the policy review argument fit well with the temporary nature of the notwithstanding declarations in the Canadian NM? On the one hand, it does since the time limit reflects the idea that the issues regulated by notwithstanding acts are subject to constant review and change. On the other hand, it does not since if the notwithstanding act updates the judicial decision, why let it expire and allow the old, non-updated judicial decision be enforced again?
social evidence with respect to the capacity of other means to achieve the legislative goal in the least restrictive way. Manfredi does not focus on the other three parts of the Charter inquiry, but it seems his rationale can also apply to them since all of them could involve social science evidence. In the first part of Oakes, when the court decides whether a certain goal justifies limiting a right, the court might need to examine evidence as to how pressing or substantial the goal is. In discussing the rational connection between the impugned legislation and the legislative goal, the court might have to examine evidence with respect to the ability of the legislative measure to actually achieve its purpose. Finally, in deciding on the fourth element of Oakes, the proportionality test, the court might have to look to evidence regarding the social results of the legislation, as well as the need to infringe upon the right in order to decide whether the limitation on the right was justified, even if in a minimal way.

The need to examine social science evidence might arise even with respect to the inquiry that the court engages in before it gets to the Oakes test, the rights inquiry, or where the court decides whether the law's purpose or result is to limit the right. This could be the case where the court chooses a narrow approach to the definition of rights, according to which the scope of the right is defined vis-a-vis other rights. Take, for example, the question of whether a statute banning pornography is constitutional. As part of its analysis, the court would probably evaluate social science evidence that being exposed to pornographic material increases violent male behavior towards women. If the court's approach to rights is broad, it would decide whether pornography was captured by free speech in the rights stage, and the violence against women question would be considered when the court examined whether the limitation that the statute put on expression was justified. As a result, the rights stage of the analysis would not involve an examination of social evidence, but rather an interpretation of the abstract concepts protected by the Charter. If, on the other hand, the court chose a narrow approach to the right, it would take into account the violations of women's rights created by pornography, while deciding whether pornography was captured by the right to freedom of expression. A narrow approach, then, might lead the court to examine social evidence in the rights stage of the constitutional inquiry.

Because questions of social science evidence can arise with respect to all four of the elements of a Charter inquiry, Manfredi is right not to suggest that the use of the NM is limited to the minimal impairment part of the Oakes test. Indeed, his proposal to amend s. 33 makes it
clear that he will not accept this qualification. He suggests that s. 33 reads that the notwithstanding declaration "shall operate notwithstanding a final judicial decision that the legislation or a provision thereof abrogates or unreasonably limits a provision included in section 2 or sections 7 to 15 of this Charter". He explains that this amendment "emphasizes the fact that, in invoking the notwithstanding clause, legislatures would not be overriding the Charter rights per se, but judicial interpretations of those rights". This amendment means that judicial interpretations of limits will be subordinate to the NM in addition to judicial interpretations of rights.

The ends-means distinction implied in Oakes can be used by the NIP. Limiting the usage of the NM only to cases that deal with means is appropriate in terms of the danger of the results of legislative abuse of the NM. As stated above, all of the advocates of the NIP either suggested that the legislature was trustworthy and would not abuse the mechanism, or pointed to existing or proposed checks on the legislative notwithstanding power. Limiting the power of overriding judicial findings of means, as opposed to judicial findings of ends, could perform such a check. When a court finds the very purpose of legislation to be unconstitutional, what it detects is not a failure to calculate, but rather a failure to understand the values of the Charter. To take the risk of this misunderstanding being re-enacted brings us closer to tyranny than granting the courts the power to re-calculate. Indeed, the fact that situations where the court found the purpose of the legislation to be unconstitutional are extremely rare means that this proposal will not hamper the legislative ability to make use of the NM. At the same time, Hogg and Bushell's finding that in most cases the legislature is capable of replacing unconstitutional with constitutional means that will achieve the legislative goal implies that the cases where the legislature will need the NM to achieve its constitutional end will be rare. There is of course the danger that the court will make a mistake regarding the constitutionality of the legislative goal. However, if the main

154 Manfredi, supra note 115 at 208.
155 Ibid. at 209.
156 Because the point is the misunderstanding represented by the act and not the failure of the legislators, this argument applies also to situations where the legislature that enacted the act is not the same legislature that uses the NM to re-enact the act. It applies even to situations where the act was enacted before the Charter.
157 Hogg suggested that R. v. Big M. Drug Mart. [1985] 1 S.C.R 295 was the only such case. See Hogg, supra note 125 at 35.9(d), 35-23-35-24.
problem with *Charter* adjudication is the minimal impairment stage of the *Oakes* test. This danger is outweighed by the benefits of establishing an additional safeguard against legislative abuse of the NM. Obviously, this proposal does not provide protection from abuse of the NM with regard to the minimal impairment part of the *Oakes* test.

Manfredi’s analysis does not offer a way out of the correction-abuse dilemma. Pointing at some weaknesses that courts have in sorting out rights issues, his analysis explains that there are good reasons why the correction might be needed. But Manfredi’s analysis does suggest an important insight regarding the advantages of the NM. He shows that there are things that courts do better than legislatures, and there are things that legislatures do better than courts. This point is highly relevant to the “partnership” approach to the NM, which will be discussed in the next chapter.

### 6. Conclusion: Weiler’s Progeny

At the end of his book entitled *The Constitution in the Courts - Law or Politics*, which dealt with the proper role of the American Supreme Court in interpreting and enforcing the U.S. Constitution, and as part of an answer to the question “[what about we the people now living - ... Where do we go from here?]”, Michael Perry writes:

But rather than chew on the question of normative minimalism, I want to try, for now, to deflect the question: Whether or not one is, as a general matter, skeptical about the Thayerian, minimalist approach to the specification of constitutional indeterminacy, one should be able to take seriously the possibility of modifying the practice of judicial review in ways that make it at least somewhat more responsive to “We the people” now living.¹⁶⁰

One of the two “modifications” that Perry suggests is the “Canadian innovation”¹⁶¹ - the NM.¹⁶²

Although Perry is American, this line of thought is representative of the Canadian advocates of the NIP. Perry is a leading American constitutional theorist, but rather than trying to

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¹⁶¹ *Ibid* at 198.
¹⁶² *Ibid.* at 198-201. The other is the suggestion to appoint Supreme Court judges not for life but for a prescribed number of years (at 197).
connect the idea of the NIP to the ideas he is introducing throughout his book.\textsuperscript{163} The point where he brings up the NIP is the point at which he does not want to "chew on" the question of judicial review anymore. Instead of trying to offer a principled account of the NIP, Perry conceives of the NM as a way to modify the practice of judicial review. This modification is needed because the court is not perfect,\textsuperscript{164} because the constitutional text is ambiguous,\textsuperscript{165} and because this mechanism enables public participation in constitutional decision making.\textsuperscript{166}

Perry's understanding of the NM is based on Weiler's.\textsuperscript{167} And the way Perry treats the NM is a reflection of Weiler's approach. This chapter showed that like Weiler's Canadian followers (Russell and Manfredi) Perry was not able to offer an account of the NIP that could be unified with the idea of judicial review.

The advocates of the check on judicial error approach had to deal with two problems. First, if the court has a better ability to decide questions of constitutional interpretation, why should the less able legislature ultimately decide those issues? Second, if the legislature is less motivated than the court to suggest a principled interpretation of the Constitution, why let the less motivated legislature ultimately decide those issues?

In discussing motivation, the advocates of the NM believe that this mechanism does not constitute a significant threat to rights protection. First, this is because of what I called the "no abuse" assumption, according to which the legislature's motivation is not significantly different than the court's, either because the legislature does respect rights or because in times of crisis, the court will not block tyranny. Second, there are some checks on the legislature's power, namely the need to be explicit and the fact that notwithstanding declarations are temporary. Some of the advocates of the mechanism proposed making it more difficult to invoke the mechanism. This would make attempts to use the NM more visible to the public. Third, because elections are to take place between every two uses of the mechanism, the legislature will use the NM cautiously, fearing public sanctions should the mechanism be misused.

\textsuperscript{163} Mainly the ideas of originalism and non-minimalism. See \textit{ibid.} at c. 2-6.
\textsuperscript{164} \textit{Ibid.} at 197.
\textsuperscript{165} \textit{Ibid.} at 198-9.
\textsuperscript{166} \textit{Ibid.} at 199-201. Perry also mentions the potential of the NM to create a more vigorous court, and the idea of a dialogue between the courts and the legislatures, which I am going to discuss in the next chapter.
\textsuperscript{167} \textit{Ibid.} at 197-8.
Whether the motivation question is the only question (and the ability question is derivative) or whether the ability question stands on its own feet, it is clear that the incentive question is central to the discussion concerning the NIP. As I have shown throughout this chapter, the incentive question - the question whether we can trust the legislature to protect rights - cannot be resolved by resort to principle only. Rather, as Whyte put it, the answer is "ultimately chosen". The dilemma posed by this question is yet another expression of the still unresolved counter majoritarian difficulty or the Madisonian dilemma.

What about the legislature’s ability to engage in constitutional interpretation? Even if we are satisfied that the legislature does not abuse its power to override judicial decisions, how is the legislature capable of correcting judicial mistakes? It is understandable that one would not support a procedure whereby the court is asked to reconsider its position given a mistake in its decision, because the court, like every institution, has a bias against admitting its failure. (This point is true, though to a lesser extent, regarding new evidence that renders the court’s ruling obsolete or wrong). It is also understandable why the advocates of the NIP did not offer to establish a further judicial institution, since such an institution could also make a mistake. But if the legislature has no ability to deal with constitutional issues, those alternatives seem better than legislative finality.

One way to deal with the ability question is to suggest that the court suffers from institutional incapacity to deal with some questions of constitutional interpretation, so the legislature’s ability to deal with these questions is actually greater than the court’s. This view was introduced by Weiler and elaborated on by Manfredi, in what I called the argument from policy making. This account explains legislative finality so well that one has to re-inquire about the need for judicial review. The answer was that in this case judicial review is needed either for those parts of the constitutional inquiry that the court is more suited to deal with, or for ensuring that the process of calculating the policy issues was fair, regarding which the court’s role is rooted in its better incentive, not in its better ability.

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164 Whyte, supra note 47 at 348.
170 As part of his support of the NIP, Russell mentions “judicial bias and self interest” (Russell, supra note 47 at 301). He does not connect this point to the specific situation of a court being asked to correct its own mistake.
Another answer to the ability question is that although the court’s ability to deal with questions of constitutional interpretation is greater than the legislature’s, the latter still has some ability to deal with them. If the judicial mistake is “serious” or “fundamental”, the legislature can trace it and correct it.171

A third answer to the question is that the ability deficit of the legislature is a result of its incentive deficit. Questions of constitutional interpretation, according to this account, can be adequately answered by legislators, but it is feared that they will not be because legislators seek popularity and not principle. However, once the no abuse assumption or the safeguards against abuse attached to the NM establish that legislatures can and will seek out principled conclusions, their ability to deal with constitutional questions will be as great as the court’s. This view is implicit in Michelman’s suggestion to establish a “Council of Revision”, whose members are not judges, but can still engage in constitutional interpretation because their accountability - their motivation - is different from that of legislators.

The next chapter tries to do precisely what Weiler’s account does not: unify the ideas of judicial review and legislative finality such that they create a coherent account of the NIP. It does so by suggesting a different approach to both the ability and the motivation questions. The ability problem arose because the check on judicial error approach held that, in checking, the judicial and the legislative roles under the NIP are identical. The “partnership” approach to the NIP suggests that courts and legislatures might have different roles under the NIP, such that the problem of the legislature as a “super court” does not arise. Regarding the motivation question, the partnership approach to the NM accepts the confidence that the check on judicial error approach has in legislatures. It further holds, however, that once we decide, as in the check on judicial error approach, that we trust the legislature to have the final word in constitutional issues, we can still have something to say about how the mechanism should be used.

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171 Russell talks about decisions that are “seriously unjust and harmful” (ibid. at 298), and MacDonald talks about decisions that are “fundamentally” unsound (MacDonald. supra note 49 at 18).
Chapter 4

The Partnership Approach to the New Institutional Paradigm

1. Introduction

One can think about the notion of partnership in the context of the NIP in three ways. The most trivial is to see the idea of partnership as a label. If the idea of final judicial review is referred to as "judicial supremacy", and if the idea of no judicial review is referred to as "legislative supremacy", the idea of judicial review and a NM is referred to as "partnership". This notion of partnership has neither practical implications nor conceptual importance. Even if the NM is based on the remnants of legislative supremacy, it can still be called a partnership.

A second way to think about partnership in the context of the NM is to view the partnership as a practice. This idea of partnership can be located within the framework of the argument from judicial error. It holds that when legislatures decide to invoke the NM because of a judicial error, they should do it in a way that reflects a dynamic of partnership and not a dynamic of legislative supremacy. Like the idea of a partnership as a label, the idea of a partnership as a practice does not have any conceptual importance. Unlike the former idea, however, it does have a practical implication. Its application would result in the legislature only discussing the court's mistake and deciding to use the NM in a way which is respectful of the court. A legislature would act out of co-operation and not retaliation. The idea of the partnership as a practice therefore renders the argument from judicial error distinct from the idea of legislative supremacy in two ways. First, seeing the NM as a means of correcting judicial errors in the interpretation of the rights and limits in the Constitution means that the NM is not based on the remnants of legislative supremacy but rather on constitutional supremacy. Second, even when the legislature does detect a judicial error and seeks to override it with the NM, it should not do so in the same way in which it enacts legislation prior to a judicial decision, but rather in a way which reflects the court's role as the main constitutional interpreter.

While such a concept of partnership certainly adds to the argument from judicial error and increases the uniqueness of the NM, it does not remedy the lack of coherence which the
argument from judicial error suffers from. The tension which exists between the traditional justifications for judicial review and the argument from judicial error still exists, even if the correction of the judicial error is accomplished in a partnership oriented way.

A third way to think about a partnership is the idea of partnership as a concept. This idea resolves the fundamental tension in the argument from judicial error since it holds that under the NIP, the two partners, the court and the legislature, do not supervise each other, but rather exercise distinct functions. It maintains that when the legislature invokes the NIP, it does not act as a "super court" engaging in a judicial-like activity. Instead, it acts as a super legislature, engaging in a legislative activity. In order to differentiate between the respective roles of the court and of the legislature, this concept of partnership makes a distinction between deliberation and decision making.

While reviewing the constitutionality of legislation, courts engage in two activities: deliberation and decision. The deliberation is expressed in the judicial reasoning: the decision is reflected in the fact that a legislative act is struck down or remedied in another way. Granted, deliberation and decision are closely connected: part of the reason why the role of interpreting the Constitution is given to the courts is the uniqueness of the judicial process, which includes, among other characteristics, principled deliberation and reasoning. However, this broader notion of partnership suggests that they can still be separated. Under this separation, a system with a NM focuses on the deliberative role of the court and not on its decision making role. It suggests that while the principled deliberation is undertaken by the court, the final decision still resides with the legislature.

Unlike the notions of partnership as a label or as a practice, the idea of partnership as a concept is of significance to constitutional theory. Its contribution lies in its solution to the theoretical inconsistency which the argument from judicial error contains. This inconsistency is a result of the fact that the argument from judicial error assigns to courts and legislatures the identical role of decision making under the Charter. The court first rules and then the legislature decides whether the court made a mistake. The notion of partnership as a concept solves this problem by assigning to the courts and legislatures different roles under the Charter. The courts deliberate while it is the legislatures who decide. Correspondingly, when the legislature decides to invoke the NM, it does not correct a judicial error. Rather, it rejects the court's deliberation.
The concept of partnership is significant to, but extends beyond, the NIP. By shifting the focus from deciding to deliberating, the partnership concept offers a new perspective on the practice of judicial review. It suggests that the justification for judicial review in rights issues is not to protect constitutional guarantees from being trampled upon by majorities, but instead to make it possible for majorities and minorities to more fully empower the Constitution by taking advantage of judicial deliberation. Such an approach assumes the majority will indeed seek to be informed by the court's deliberation and will not use the NM in a tyrannical way. The basis for such trust is the no abuse assumption, which the partnership concept shares with the check on judicial error approach. This assumption, analyzed in the previous chapter, suggests that the legislature can be trusted not to abuse the NM, even where the legislature is in fact inclined towards abusing the NM. In such a situation, the legislature could still be counted on not to engage in any behaviour which would incur the kind of severe political consequences that an abuse of the NM would likely provoke.1

The ideas of the partnership as a practice and as a concept, as well as the idea that the role of the court is to serve as a national deliberator, are the focus of this chapter. It discusses the works of some Canadian as well as American commentators who have dealt with these themes. While some of the works of these American writers were written in the context of American constitutional law and theory, their analyses and ideas can be of general application to any constitutional democracy with a constitutional rights protecting document.

Section 2 of this chapter begins with Weinrib's work. Unlike Paul Weiler's idea of the check on judicial error discussed in the previous chapter, Weinrib stresses that while operating the NM, the legislature acts not as a "super court", but rather as a "super legislature" creating "exceptions" to rights. Weinrib believes that by allowing the legislature to create such exceptions, which represent majoritarian and utilitarian considerations, the NM enables judges to protect rights strictly. Examining the notion of exceptions to rights, I will demonstrate that Weinrib's account is aimed not at justifying the NM, but rather at pointing out its potential, once adopted, to create a partnership between courts and legislatures. Weinrib's writings are the starting point for the idea of partnership as a concept. This idea is the subject of section 3, which

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1 The no abuse assumption is thoroughly discussed in Chapter 5, below.
will discuss an analysis of the partnership between courts and legislatures offered by the American political scientist John Agresto. While Agresto does not focus on the idea of partnership, like Weinrib, he suggests that the NM expresses a division of labour between courts and legislatures. According to Agresto, the role of the court is to deliberate about the meaning of the Constitution through judicial review, and the role of the legislature is to decide its meaning. Agresto's account implies that when the legislature overrides a judicial decision, it does not supervise the court as a super court, but rather rejects the court's deliberation in its role as a super legislature.

Following on Agresto's American analysis, Section 4 returns to Canada to demonstrate how two Canadian supporters of the NM, Peter Russell and Lois MacDonald (and to some extent Weiler himself), suggest that in some "political" Charter cases the role of the court is not to decide, but rather to deliberate. Section 5 builds on the connection between the NM and the view of the court as national deliberator by examining the connection between the NIP and public discussion. The section presents a disagreement between Dworkin and Tushnet regarding the influence of judicial finality on this public discussion. While Dworkin views judicial finality as beneficial to the quality of public debate, Tushnet sees such finality as destructive to public discourse.

Section 6 lays out my account of partnership, which incorporates both the notion of the partnership as a concept and the notion of partnership as a practice. I begin by locating my model of partnership between those of Weiler and Weinrib. Like Weinrib, my view subscribes to the notion of partnership as a concept which implies that while operating the mechanism, a legislature does not act as a super court which supervises the court. Rather, I see the legislature and the courts as partners which exercise distinct functions. However, I believe, as Weiler does, that notwithstanding acts created by this super legislature should be created only as responses to judicial review. I also believe that while creating these notwithstanding acts, legislatures should be informed by the judicial decision and should not dismiss the constitutional text. Accordingly, my account will describe how the legislature can enact "super legislation" through the notion of partnership as a practice. I suggest that the notion of partnership as a practice occupies an intermediate position between two other approaches to the way legislatures should respond to judicial decisions with which they disagree. These two approaches are the "acceptance
approach”, according to which the legislature must accept the judicial decision. and the “clashes approach”, which holds that the legislature must retaliate and should use all the power at its disposal to fight the decision. I end the chapter with a sketch of some of the practical implications of my approach to partnership, making use of ideas offered by Donna Greschner and Ken Norman.

2. Weinrib’s Partnership

My discussion of Weinrib’s partnership approach begins with Weiler – the main proponent of the check on judicial error approach that Weinrib disputes. Weiler introduces the term “partnership” as follows:

The premise of the Charter is that the optimal arrangement for Canada is a new partnership between court and legislature. Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle “rights” issues as they regularly arise. At the same time, however, the Charter reserves for the legislature a final say to be used sparingly in the exceptional case where the judiciary has gone awry.²

The “partnership” term was adopted by Weiler’s followers. Russell³ and MacDonald.⁴

In the above passage, Weiler connects the argument from judicial error – the classic argument pertaining to cases in which the court “has gone awry” – to the partnership idea. In keeping with this approach, under the partnership, courts decide issues and the legislature corrects their wrong decisions. This approach seems to reflect the notion of partnership as a label. While there is no doubt that the so-called “new partnership” is new, it is unclear how it is a “partnership”. The interaction between courts and legislatures envisaged by Weiler is still about supervision, though rather than judges supervising legislatures, we have here legislatures supervising judges supervising legislatures. It is a partnership only inasmuch as legislatures are also part of the process: it is not a partnership in terms of the legislatures and courts having

² P.C. Weiler, “Rights and Judges in a Democracy: A New Canadian Version” (1984) 18 U. Mich. J. of Law Ref. 51 at 84. See also at 86: “For better or for worse, Canada did stumble on this distinctive constitutional partnership between court and legislature for the protection of fundamental rights”.
⁴ MacDonald cites Weiler’s reference to partnership at L. G. MacDonald, “Promoting Social Equality through the Legislative Override” (1994) 4 N.J.C.L 1 at 23.
different and complementary elements to exercise within the process. Furthermore, Weiler never suggests that labeling the Charter with a NM “partnership” has any practical implication.5

Against this background we can appreciate Weinrib’s notion of the partnership between courts and legislatures. She explains that the NM brings with it:

[N]ot rule by super courts at the expense of legislatures, but a complex partnership through institutional dialogue between super courts and super legislatures.6

Unlike Weiler’s idea of partnership as label where the partners supervise each other, Weinrib suggests a theoretical concept of partnership where the partners cooperate by doing different things. Courts do law whereas legislatures do politics: thus courts do “super law” and legislatures do “super politics”.

How can two institutions be supreme? Is the language of “super courts” and “super legislatures” self-contradictory? Does Weinrib try to achieve, to use Ann Bayefsky’s criticism of the NM, “the impossibility of having two supremacies”? The answer can be found later on in her paper, where Weinrib explicated:

The Charter does not envisage the transformation of our courts into super-legislatures. [...] On the contrary, it envisages the transformation of legislatures into super-legislatures, in the exercise of their powers to make law consistent with rights protection and, when prescribed conditions are met, to make law that overrides rights. The transformation of the courts is not into super-legislatures, therefore, but into super-courts, articulating the content of rights, justifying their limitation on grounds conducive to freedom and democracy...7

Weinrib tells us that constitutionalism and the idea of constitutional rights bring with them challenges and responsibilities for both courts and legislatures. Both are “super”, not in the sense

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5 A third follower of Weiler, Christopher Manfredi, did not use the term partnership, but said that s. 33 was based on the idea that “the legislative and executive branches of government possess equal responsibility and authority to inject meaning into the indeterminate words and phrases of the Charter”. C.P. Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism (Toronto: McClelland & Stewart, 1993) at 205. Like Weiler’s “partnership”. Manfredi’s “equal responsibility” notion does not assign courts and legislatures different roles under the Charter, but rather talks of mutual supervision. The term “partnership” in the context of the NM was also used in F. L. Morton, “The Political Impact of the Canadian Charter of Rights and Freedoms” (1987) 20 Can. J. Pol. Science 31 at 55.
8 Ibid. at 569.
that they are superior or inferior to each other, but rather in the sense that both must internalize and operate the idea of constitutionalism. Both are constitutionally engaged.

Weinrib uses the term "exceptions" to explicate her partnership concept. Exceptions to rights should be created by legislatures, and not by courts, she believes, because the exceptions are based on considerations that courts should not make. Weinrib delineates two such categories of considerations: those referring to "majoritarian or representational values" and those that require "balancing or maximizing utility". 9

In Chapter 2, I stressed that the notion of exceptions fits well with the text of s. 33. I noted that the check on judicial error approach does not fit the text of the Charter as s. 33 makes no mention of the court or of judicial decisions, but rather authorizes the legislative override of rights irrespective of courts and judicial decisions. This points to another advantage of the exception approach over the check on judicial error approach. The latter approach holds that both legislatures and courts interpret the Constitution. As a "super court", the legislature interprets the Constitution in order to correct the court's interpretation in case of error. In contrast, the exception approach implies that not only does the legislature not supervise the court, but it also does not do what the court does. Rather than interpreting rights and limits, the legislature creates exceptions to rights - exceptions that are unconnected to the constitutional text.

The basis of the exception notion's advantage is also what makes the notion problematic, however. This basis is the non-normative nature of majoritarian and utilitarian considerations. If, while employing the NM, the legislature does not interpret the Constitution, then it is presumably overriding rights based on majoritarian and utilitarian considerations. But such considerations collide directly with the idea of constitutional rights protection, which is, in part, precisely to put rights beyond the reach of majorities and their representatives. Thus majoritarian and utilitarian considerations should not be part of a rights protection system. The goal of such a system would be defeated by allowing majorities to re-assert their preferences or - worse - by immunizing legislation from judicial scrutiny on the basis that the legislation is important in light of majoritarian or utilitarian considerations.

9 Ibid. at 568.
10 Ibid. at 567.
The explanation that Weinrib seems to be suggesting is that while a Charter without a NM is ultimately better, a Charter with a NM has the advantage of relaxing judicial responsiveness to majoritarian preferences. Although a good court should not care about majoritarian preferences, the NM acknowledges that not all courts are good. To the courts the NM thus sends a message: If you are concerned utility and majoritarian preferences, do not let it influence your judicial work since the majority can ultimately have its way by using the NM.

Weinrib applies this view in her two-part criticism of La Forest J.'s approach to Charter adjudication.\(^1\) She takes exception, first, to his deferential approach to the legislature and his assertion that courts "must be mindful of the legislature's representative function".\(^2\) Second, she criticizes him for failing to take into account the structure of the Charter with s. 33. La Forest J. says Weinrib should not have concerned himself with the legislature's "representative function" because the legislature can take care of itself with s. 33.\(^3\) In Weinrib’s view, given the availability of the NM, a judicial approach that takes into account such purposes is wrong and should be avoided.

Weinrib does not explicitly support the NM, but rather suggests how it may be utilized to allow courts to be courts, leaving majoritarian and utilitarian considerations to legislatures. However, it is possible to extend this reasoning regarding the NM and majoritarian considerations further to a justification of the NM. Thus far the argument has assumed that, though the existence of the NM causes the rights protection system to accommodate majoritarian values, it neither increases nor decreases the prevalence of such values in the system. But it can be argued that the NM does in fact decrease the incidence of majoritarian considerations. If it is the case that judges consider majoritarian preferences in attempts to be responsive to the majority, they might be over-cautious and defer to the majority too often because they cannot know what the majority wants. In contrast, if they know that the majority can have its way by way of the NM, they will never invoke such considerations, and the majority will only rarely express its preferences through the mechanism.

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This scenario points to another advantage of Weinrib’s partnership approach over Weiler’s check on judicial error approach. Weiler suggests that his approach encourages a more active court, which knows that if it makes a mistake it will be corrected. But the court is thus motivated to be a worse court — a court less concerned with mistakes. In contrast, the idea of exceptions encourages a better court that knows that its only job is to be a court — since the court is aware that if the legislature is interested in overriding judicial decisions for the sake of majoritarian and utilitarian considerations, it may do so.

This account assumes that the legislature will use the NM to accommodate majoritarian and utilitarian considerations in fewer cases than would a court in the absence of a NM. While this assumption is reasonable, it is not the only possible scenario. The opposite might transpire. The legislature could invoke the NM in cases more frequently than a court in a system with no NM would incorporate majoritarian and utilitarian considerations into its decisions. Thus these latter considerations would enjoy greater prevalence in the system. Furthermore, there is a danger that the court will perceive use of the NM as injurious to its own reputation and credibility. Wishing to avoid the affront of the override, the court would perhaps defer to the legislature on majoritarian and utilitarian considerations in more cases than it might have without a NM as the optimistic scenario suggests. Because of these two possible scenarios, I prefer to view Weinrib’s point about exceptions as an attempt to “learn to live with the override”\(^3\) rather than being an attempt to justify its existence.

Weinrib’s arguments on partnership and super legislatures resurface in the coming sections of this chapter. It will also be seen in the succeeding sections that Agresto’s account of judicial review similarly assigns different jobs to courts and legislatures.

3. John Agresto: Legislative Finality and the Role of the Court as a Deliberator

A. Introduction

Agresto’s book, *The Supreme Court and Constitutional Democracy*, is not wholly relevant to our inquiry. This is firstly because he does not write from a rights protection

\(^3\) Weinrib, *supra* note 11.
perspective—or at least not from a perspective that sees the court as better for rights protection than the legislature. Secondly, his work has an unmistakable American focus: he analyzes American history and theory and suggests an account of the proper interaction between the U.S. Supreme Court and the U.S. Congress. Nevertheless, Agresto writes in terms that are sufficiently general and universal to be borrowed for any discussion of the relationship between courts and legislatures in a constitutional democracy. Building on the elements of Agresto’s work that are more generic, and not specific to the American context, I will demonstrate how he succeeds in offering a partnership-oriented and theoretically coherent account of the NIP.

What makes Agresto especially relevant to our inquiry is that he actually suggests a NM. Without mentioning the Canadian NM, he writes in his 1984 book:

> In many ways the perfect constitutional solution to the problem of interpretive finality and judicial imperialism would have been for the judiciary to possess the same legislative relationship to Congress as that which governs the executive. Just as Congress, by special majority, can override a presidential veto, a similar process could from the outset have been established to review judicial objections. To have subjected judicial “vetoes” to the same process of review as that to which the constitution subjects presidential vetoes would have been the most unobjectionable method of combining the benefit of active judicial reasoning and scrutiny with final democratic oversight. It would have been the perfect balancing of the principle of constitutionalism with active popular sovereignty.\(^\text{15}\)

Surely, Agresto’s NM\(^\text{16}\) is different from the actual Canadian and Israeli NMs. This is so, firstly, because Agresto does not limit his proposal to rights cases. Moreover, he does not talk about the re-enactment of legislation that has been struck down, but rather refers to striking down the striking down. In addition, his NM does not produce temporary legislation. Finally, Agresto seems to suggest a supermajority requirement.\(^\text{17}\) Still, Agresto does propose a system of judicial review and legislative finality, and as such his understanding is of value to us.

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\(^\text{14}\) As the title of her paper (“Learning to live with the Override”). *supra* note 6, implies.


\(^\text{16}\) Note that Agresto does not propose a NM probably because he realizes that it is not likely to be adopted as a constitutional amendment in the U.S. What Agresto says is that such a process “could from the outset have been established”.

\(^\text{17}\) Agresto talks about a “similar process” [emphasis added] to the congressional power to override executive vetoes. It seems that this similarity includes the supermajority requirement.

There are two more points to notice in Agresto’s account of the NM as compared to the Canadian and Israeli NMs. First, at least partially. Agresto bases his proposal on equalizing Congress’s power to override an executive veto on legislation. This comparison is utterly irrelevant in the Canadian or Israeli context since in both
Agresto is not unique in supporting what American theorists usually call “Congressional supremacy”.

He is unique in what precedes this suggestion, which is a theoretical support to this idea. His account fits the idea of partnership between courts and legislatures: he believes that the role of the court is to deliberate, and the role of the legislature is to decide. Suggesting this, Agresto is able to get over the tension that made the check on judicial error approach theoretically incoherent.

B. Deliberation and Decision

A good part of Agresto’s book, which I shall not discuss here, is dedicated to U.S. constitutional history. Agresto argues that while judicial review was part of the vision of the American founding fathers, judicial finality was not, and that objections to judicial finality can be traced to the writings and views of Abraham Lincoln and James Madison. Combining theory with his historical findings, he argues that the justification for judicial review does not justify judicial finality. Agresto reaches this conclusion by introducing three traditional justifications for judicial review, dismissing one of them entirely, and dismissing the other two partially—suggesting that neither can justify judicial review in itself, but the tension between them can. Unsurprisingly, these three dismissed justifications are exactly the ones that were also discussed by Whyte, Russell and Michelman: rights, constitutionalism and democracy. The rights protection basis for democracy is the one rejected by Agresto entirely. The two that Agresto dismisses as independent justifications for judicial review, but that he sees as creating the tension upon which the justification for judicial review rests, are democracy and constitutionalism.

systems, the Prime Minister has no power to veto legislation, and obviously the legislature does not therefore have (or need) the power to override a veto. This point, however, does not play an important role in Agresto’s account of his NM, and his book focuses on the relationship between the Supreme Court and the Congress.

The second point is relevant only in the American and Canadian contexts, since Israel is a unitary, as opposed to a federal, state. The Canadian notwithstanding power is given to provincial legislatures too, but Agresto is only suggesting that this power be granted to Congress. As suggested above, Weiler’s initial proposal also referred only to Canada’s Parliament (see supra Chapter 3, note 5). Since this work focuses on the separation of powers and not on the division of powers, I shall not address this point.


19 Agresto, supra note 15 at 79-95.

20 Whereas Agresto’s understanding of the way judicial review might be justified by resort to rights protection or to constitutionalism is similar to what can be found in Russell’s, Whyte’s and Michelman’s work, Agresto has a different idea of the possible connection between democracy and judicial review, as will be explained below.
Agresto explicitly dismisses rights protection as a justification for judicial review. He makes the sweeping claim that "throughout the history of America [...] the exercise of judicial review, especially as against national legislation, has been oppressive to the cause of human rights rather than restrictive of illiberal legislation".  

Constitutionalism and democracy standing alone, are also unable to justify judicial review, says Agresto. His understanding of the idea of constitutionalism holds that "professionals of the law rather than of policy" who are "carefully selected by the executive and confirmed by the Senate, then given safe tenure and secured salaries" are "the best watchmen in the constitutional edifice". This is what Whyte calls "legalism", and Michelman calls "the concept of law". Agresto rejects this justification for judicial review based on a legal realist argument

21 *Ibid.* at 27. This claim is not sufficiently supported. The full quotation is as follows:

*The truth* is that throughout the history of America the Court has hardly been the great or consistent champion of individual rights. *Far more often* the exercise of judicial review, especially as against national legislation, has been oppressive to the cause of human rights rather than restrictive of illiberal legislation...

[emphasis added]

Furthermore, Agresto argues that the list of all the illiberal and oppressive judgments will be *heavily weighed* not with cases in which the Court deferred to the illiberalty of the more political branches but with cases in which the court, invoking the name of either the Constitution or of liberty, itself voided liberating and progressive as well as necessary legislation. [emphasis added]

Note the key quantitative terms in both paragraphs: "far more often" in the first one and "heavily weighed" in the second. Agresto, we must assume, has conducted research examining all petitions to strike down legislation in the history of the United States, analyzed the decision in each case, and found "the truth" that (1) in *most of the cases* the Court was oppressive rather than supportive of human rights. and (2) within this bulk of oppressive decisions, *more referred* to cases in which the court hindered the legislature from being supportive of rights, and *fewer referred* to cases in which the court only upheld illiberal legislation. (Agresto does not explain if by legislation he means only legislative acts or also executive acts, but all of his examples refer to legislative acts.) He does not rely on such research. Instead, Agresto mentions the names of 14 cases and "The Civil Rights Cases" and, with regard to only one subject, child labour, does he elaborate on and discuss the contents of the laws and judgments involved (*ibid.* at 27-31). One would have to trust Agresto with regard to the rest of the U.S. Supreme Court judgments regarding the validity or invalidity of laws that are suspected of infringing on constitutional rights.

(If we read the first citation from Agresto carefully, we will find a third quantitative finding that Agresto failed to support. These are the words "especially as against national legislation" which must mean that the statement that the court was "oppressive to the cause of human rights [...] far more often" than it was "restrictive of illiberal legislation" is true generally, but regarding national legislation is "especially" true. This third finding is also not supported.)

22 Throughout the book, Agresto alternates between "democracy" and "democratic government" as well as between "constitutional government" and "constitutionalism". I assume that these variations are not intentional, and that the different terms refer to the same concepts.

25 See Chapter 3, Section 3(B), above.
26 See Chapter 3, Section 4, above.
that "[t]he judgments of the court – the 'opinions' of the justices, as the word is properly used even by them – necessarily bear the marks of individual assessment, of individual perspective, insights, understandings, and even individually formulated goals".27

The third traditional basis for judicial review that Agresto does not accept is democracy. Agresto’s reference to democracy here is different from the one we met in Whyte’s work.28 Agresto does not talk about judicial review for the purpose of preserving the pre-conditions for democracy.29 Building on Jefferson’s view that the democratic will “must be reasonable”30 in order to prevail, Agresto suggests that judicial review can “help perfect democratic life – to make its will more ‘reasonable’ and to give public opinion greater insight, substance, breadth, and constitutional wisdom”.31 This argument follows from the observation that “the courts are generally no more than temporary brakes on the popular will – exactly that salutary restraint which allows time for democratic sober second thoughts”.32 Agresto rejects this justification for two reasons. First, because given his argument that the court has been oppressive rather than supportive of rights, the checking activity of the court “seems hardly sobering”.33 Second, although this defense of judicial review assumes a checking court, the American modern courts have been “legislating in their own name”.34

If rights protection, democracy and constitutionalism are not good justifications for judicial review, what is? Agresto’s answer is the tension between constitutionalism and democratic government. To present this tension he first asks: Why not let the legislature interpret the Constitution for itself?”35 If we fear that such interpretation does not represent the will of the

27 Agresto, supra note 15 at 22-3.
28 See Chapter 3, Section 3(B), above.
29 Agresto explicitly rejects this process based account as a justification for judicial review because this theory grants the court a role that is a "seemingly narrow but actually quite pervasive theory of equal access and equal result, a theory that finds scarcely any warrant in the Constitution itself": Agresto, supra note 15 at 13.
31 Ibid.
32 Ibid.
33 Ibid. at 33.
34 Ibid. at 34. Agresto cites the Warren Court’s decisions on reapportionment, desegregation, obscenity and abortion.
people. the solution, for Agresto, is not judicial review but more frequent elections. "The full meaning of 'constitutionalism'", he continues, "carries with it not only the idea of restraints on governmental action, it surely carries with it also the idea of restraints on the democratic will itself". Hence this is how the tension between democracy and constitutionalism justifies judicial review:

The purpose of judicial review in a democratic nation is not to keep the legislative branch true to the will of the people who elected them [democracy]. Nor can its purpose simply be to keep our political representatives in line with our Constitution [constitutionalism]. If judicial review is to have substance, it must do more than that. It must also bind ourselves to our Constitution..."

[I]t is within later tension that judicial review gains its life and substance. And it is within that tension, as we shall learn, that judicial review finds its inherent limitations."

There is a tension between constitutionalism and democracy because democracy means that the will of the public prevails, and constitutionalism means that the Constitution prevails. On this tension is based the justification for judicial review because the tension binds the democratic will to the Constitution.

But still something is missing. Agresto introduced the tension between constitutionalism and democracy as the justification for judicial review because he found both the basis of constitutionalism alone and the basis of democracy alone insufficient. However, the transition from checking democratic institutions to checking the democratic will does not fill these insufficiencies. Agresto’s problem with justifying judicial review on democratic grounds was that the modern court not only blocks legislation but also legislates, and that its "second thought" is not necessarily sobering. Thus it is wrong to see the court as an institution that merely imposes on the legislature sober second thought. But if the problem is that the court not only checks but also legislates, what difference does it make that what it checks is democratic will and not democratic institutions? The same argument holds for constitutionalism. Here Agresto’s criticism of a court as the guardian of constitutional order was that judicial opinions are "their insight". But why would "their insight" be more legitimate if "they" check democratic will and not democratic institutions?

16 Agresto, supra note 15 at 53 [emphasis added].
17 Ibid.
Although Agresto does not say so explicitly, another key transition that he makes, on top of the transition from checking democratic institutions to checking democratic will, is a transition from "checking" to "reflecting" or "reminding" or "thinking". He writes later in his book:

If we ask the question with which we began this investigation, "Why judicial review?" we can now give at least a general response: To remind us of our ends, to permit the Court to think through with us our principles, and to help us apply our spoken word in law to the turning paths of change and circumstance and event... [W]ith judicial review, we hoped to increase the possibility of living our political life constitutionally — that is, with due reflection on and respect for the principles that bind us together as a nation.

The key terms here are "remind us", "think through with us" and "due reflection". Following Rostow's well-known idea that justices of the U.S. Supreme Court are "teachers in a vital national seminar". Agresto suggests that the court is "the element of thoughtfulness and judgment", "the reasoning element" and "the institutionalized theoretician of the nation". The Court has the power to check democratic institutions but this is not because we want the court to decide for us, but rather because we want it to help us think, to deliberate for us. It is, as John Rawls put it, an "exemplar of public reason". For Agresto, the court's duty is to think and to reason, not to decide, and judicial review is just a means to that end. This transition does resolve the insufficiencies that Agresto found in both constitutionalism and democracy as justifications for judicial review. The problem with basing judicial review on democracy is now solved because, if the court's job is to deliberate and not to check, it does not matter that the court deliberates by means of "legislating" and not only by blocking. It also does not matter that its deliberation might sometimes be wrong. The problem with basing judicial review on constitutionalism is solved because, since what we want is the court's thoughts and not the court's decision, it does not matter that judicial review is "their insight": indeed, it could not be otherwise.

38 Ibid. at 54.
39 Ibid. at 97. See also ibid. at 143.
41 Agresto, supra note 15 at 144.
42 J. Rawls, Political Liberalism (New York: Columbia University Press. 1993) at 231-240. Note that Rawls does not justify judicial review, but sketches the role of the court once such a procedure exists. See at 240.
C. Judicial Deliberation, Judicial Review and Legislative Finality

Agresto thus suggests two departures from the traditional justifications for judicial review. One regarding the reviewed entity – from democratic institutions to democratic will, and one regarding the purpose of review – from checking to deliberating. However, given the latter transition, the former transition seems to be unnecessary. Agresto could have said that the role of the court is to deliberate for the legislature (and not for the people), which would also account for a legislating court (which was the difficulty with basing judicial review on democracy) and for a subjective court (which was the difficulty with basing judicial review on constitutionalism). Why is it important to see the court as a deliberator for the people and not for the legislature?43

To answer this question, consider another question. If the role of judicial review is to deliberate, why should judicial review be operative as opposed to advisory? The answer is that even if the role of judicial review is to deliberate for the legislature, it makes sense to have binding judicial review. This is so for three reasons: in order to ensure legislative consideration of the court’s deliberation, in order to ensure serious judicial consideration of the matter, and for efficiency.

To ensure that the legislators are actually considering the court’s deliberation, it is helpful that the decisions be binding. This stipulation is based on the assumption that if the legislature can achieve a certain goal by inaction, it has less incentive to act than if it must act to achieve the goal. The goal in our case is to have a certain act in force despite the judicial finding that such an act violates the Constitution. In a system with non-binding judicial review, the legislature can achieve this goal by doing nothing, and therefore it has less incentive to take into account what the court said in its deliberation-judgment. In contrast, in a system with binding judicial review, the legislature has to re-enact the act in order to achieve that goal. Therefore, there is a higher

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43 Indeed, the world of comparative constitutionalism provides some examples of judicial review that are undertaken for the sake of assisting the making of a final decision by government. The Canadian “reference” institution (see infra note 55) is one example. Another example is the new British Human Rights Act, 1998, which empowers the House of Lords to issue a declaration that a British statute contradicts the European Convention on Human Rights. The relevant Minister then has the power to bring a parliamentary motion to amend the statute so that it complies with the Convention – or at least with the judicial interpretation of the Convention. The expectation is that Parliament will follow such declarations though it retains the final word. See R. Brazier, Constitutional Practice –
chance (although definitely not a guarantee) that prior to the re-enactment it will consider the court's deliberation. Another explanation for the binding character of judicial review, even if the court is a deliberator for the legislature, focuses not on the legislature but on the court. Like every institution, the court has an incentive to increase its power, and therefore it might work harder if it knows its decisions are binding. A third reason that judicial deliberation should be binding is efficiency. In most cases, the legislature would accept the judicial deliberation (i.e., will not override the nullification of the act) and it is less efficient to make the legislature approve all of the court's deliberations (i.e., judicial nullification of acts), rather than to reject the few deliberations that it dislikes."

These explanations are acceptable. The only barrier that they need to overcome is the legitimacy of those judicial decisions that were never considered by the legislature. This is arguably a barrier because from the perspective that sees the court as deliberator for the legislature, it is the legislative approval that gives judicial decisions their legitimacy. This barrier is overcome once we invoke the idea of implicit legislative adoption. If the legislature does not reject a judicial decision it means that this decision was implicitly adopted. Although it is not entirely unproblematic, the idea of implicit legislative adoption is well established in the theoretical justification for administrative measures and for common law rules, and it can be used also in the context of the binding nature of judicial review.

Returning now to Agresto, we see that binding judicial review with legislative finality can be explained even if the court is seen as a deliberator for the legislature. For the purpose of justifying judicial review with legislative finality, then, Agresto's transition from checking to

The Foundations of British Government (Oxford: Oxford University Press. 1999) at 9-10. (Brazier's book was written before the constitutional reforms which included the Human Rights Act were passed.)

"An application of the idea of the role of the court as a reminder for the legislature in the context of the Canadian NM can be found in LaSelva's brief account of the mechanism. See S. LaSelva, "Only in Canada: Reflections on the Charter's Notwithstanding Clause" (1983) 63 Dalhousie Rev. 383. After introducing the assumption that legislators "are concerned with constitutionality", (ibid. at 390) he goes on to explain that the court's duty "to apply the Charter as supreme law... is important not because it prevents manifest violations of the constitution by the legislature, but because even a legislature which respects the constitution may violate it through inadvertence" (ibid. at 390-391). In such cases, LaSelva goes on to say that the legislature is not likely to use the NM because after the court's reminder, the legislature will not be interested in re-enacting the problematic legislation (ibid. at 391).

LaSelva's account is similar to Agresto's in another way. After LaSelva introduces his point regarding cases of legislative inadvertence, he says: "In other cases courts do not uphold the constitution so much as substitute judicial for legislative judgments of constitutionality" (ibid. at 390). This argument is identical to Agresto's point that judicial review is "their insight".
deliberating is sufficient, and indeed he did not have to introduce the transition from the court as deliberator for democratic institutions to the court as deliberator for the people. To understand the reason why Agresto nevertheless insists that the court be the deliberator for the people and not for the legislature, consider his language further on:

We separated the powers of political life into different departments, giving to some the care of discerning our present needs and desires, and to the Court the charge of reminding us of our enduring principles. Through the dialogue and interaction of these branches America attempted to reconcile both permanence and necessity. Since the Court was to possess our best judgment, it was hardly improper for it to have some revisionary power over the branches of politics. As a body that would help to infuse political life with greater reflection, the Court could realize its promise only if it could make its voice heard and heeded in politics, if it could enter the arena of checks and balances."

Although Agresto does not explain the connection between hearing and heeding the court’s voice in politics and its revisionary, as opposed to advisory, power. it seems that this connection is explained by Agresto’s understanding of and emphasis on the principle of separation of powers. For Agresto, this principle means that “[w]hen we look at the various branches of national power we should see that the answer to the question ‘Who governs’ must remain ‘They govern. All of them’.” Seeing the court as a deliberator for the legislature would mean that the court is subordinate to the legislature, against the “all of them” idea. Seeing the court as a deliberator for the public, however, puts the court on the same plane as the legislature. since both are subordinate to the public. Agresto’s point seems to be that the symbolic value of an independent court with power of revision, enjoying the status of an independent branch in politics, will make all participants in the political game — legislators, administrators, judges, the media, academics.

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46 Agresto, supra note 15 at 97.
44 It is not entirely clear from Agresto’s language here whether he argues that in order for the court’s thoughts to be heard the court must have a revisionary power, or that such power is helpful, but not absolutely necessary. This lack of clarity stems from the fact that Agresto begins by saying that “it was hardly improper” for the court to have such power. This implied that this power was proper — albeit not absolutely necessary — for the court’s job. He continues with the claim that the court can fulfill its mission “only if it could make its voice heard and heeded in politics, if it could enter the arena of checks and balances”. This implies that revisionary power is necessary.
44 Ibid. at 165.
the public – take the court’s deliberation more seriously.” Agresto emphasizes that in order to fulfill its calling, the court should be an active court: but in order to be part of the checks and balances system and not above it, the court’s power cannot be final. Like in Weinrib’s NIP, in Agresto’s NIP the court is encouraged to be a better court – to offer the best and most active deliberation it can offer, and not to be a worse court that can make mistakes, knowing that they will be corrected.

Before we ask whether Agresto’s account can be translated from American terms to a broader Anglo-American framework, we should notice a problem in the account. Agresto uses the discourse of judicial error: immediately following the previous quotation he continues:

Having entered the arena, however, it [the Court] must enter it fully. Since no branch, no institution rules in America by right, no single political institution is in itself final. The noblest task of the Court – to be the element of thoughtfulness and judgment – within the hurried concerns of a democratic polity – should not diminish our awareness of the dangers of judicial supremacy or the potential fallibility of the Court as the reasoning element. Because even the Court can mistake the nature of our binding principles, and because the Court can often be wrong about the relationship of its vision to the pressing needs of a democracy in a complex and changing world, the Court must itself be a part of, and not above, the dynamic interaction of American politics.

But the necessity of the discourse of judicial error is not clear. If the role of the court is to think, to deliberate and to remind, why is it necessary to find a mistake in the deliberation in order to reject it? Why is it not sufficient to say “we have heard these deliberations but we are not interested in adopting them”? Agresto probably believes that only through the discourse of judicial error can we ensure that we are taking the court – the independent court – seriously. If we – the people, the media, legislators, academics – set our public discourse in terms of the judicial thoughts-decision, if we discover its strengths and weaknesses, we can then hope to

49 Rawls writes that one of the functions of the court being an exemplar of public reason is “to give public reason vividness and vitality in the public forum: this it does by its authoritative judgments on fundamental political questions”. Rawls, supra note 42 at 237.
50 Agresto, supra note 15 at 139-167.
51 Ibid. at 97-98. See also Rawls, supra note 42 at 232: “in constitutional government the ultimate power cannot be left to the legislature or to even a supreme court, which is only the highest judicial interpreter of the constitution. Ultimate power is held by the three branches in a duly specified relation with one another with each responsible to the people”. See also ibid. at 334: “The constitution is not what the court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the court to say it is”. Note, however, that, as
actually be engaged in a serious and thoughtful reflection on the matter. However, while it is true that it is helpful to try to find a mistake in the court’s account in order to make sure this account is taken seriously, I see no reason why this should be necessary. Indeed, the advantage of Agresto’s account over Weiler’s account is that the former is principled precisely because it does not see the legislature as a super court. This is so because Agresto assigns the legislature a role different from the role assigned to the court. Talking about a judicial error will re-create the problems in Weiler’s account that Agresto’s account can solve.

D. Conclusion: A Coherent Account of Judicial Review and Legislative Finality

While an advocate of the NIP need not adopt the entirety of Agresto’s account, she can rely on the essence of this account in suggesting a theoretically coherent justification for the NIP – one based not on a concept of mutual supervision, but rather on a partnership between courts and legislatures. The justification would go as follows: the purpose of judicial review is to deliberate for the people about the meaning of the Constitution through sophisticated and carefully reasoned opinions in concrete cases. The chance that judicial thoughts and decisions will be taken seriously increases if the court enjoys an independent status and a revisionary power. Although the people need not accept the court’s opinion, to demonstrate that they have at least considered it seriously, they must re-enact the impugned act, and, preferably, explain why they disagree with the court’s analysis. This is not a story of mutual supervision and checking judicial errors; it is a story of partnership between the court and the legislature, where the role of the court is to deliberate and the role of the legislature is to accept or reject this deliberation.

suggested above, Rawls does not justify judicial review and does not say that this mechanism is necessary for either rights protection or constitutionalism. See ibid. at 240.

52 There is another difficulty with Agresto’s account. This is the supermajority requirement for the operation of his proposed NM (if indeed he is proposing a supermajority requirement. See supra note 17). If the purpose of judicial review is to remind us of the existence of the Constitution and to offer deliberations about what this Constitution means, then the legitimacy of judicial review is only based on a theory of implicit public adoption of the court’s interpretation. As long as the people, through their majority in the legislature, can override a judicial decision with which they do not agree, a theory of implicit adoption can work. Once, however, the majority does not have the power to override a judicial decision, the legitimacy of the court’s thoughts as binding law is no longer clear. In that sense, Agresto’s comparison of the President and the Court is problematic since the President is elected and accountable.

53 It seems that the reason why it was not difficult for Agresto to abandon the court’s traditional role as a decision maker that guards the Constitution is that he did not think that the court was needed for rights protection. As
Telling the story this way shows why Agresto’s account of a system of judicial review with legislative finality can be adopted in any constitutional democracy. Although the context of Agresto’s work is distinctly American, the two ideas he uses in order to suggest a coherent account of the NIP are universal and do not depend upon a specific constitutional structure. The first idea is that the court is a better thinker, a better deliberator of principle than the legislature. Greschner and Norman applied this idea in the Canadian context:

The public will be aware, because of this judicial decision, precisely of what will be lost or gained by invocation of the override. The apathy which is bred by uncertainty and generality will be diminished. The debate ensuing after a court has found a law in violation of a right or freedom will be couched in terms of rights and freedoms and the strength of the government’s arguments for its override. For this discourse to be done in the language of rights is entirely appropriate in a society with an entrenched Charter.  

The other idea that does not require a specific political context is that in order for the court’s thoughts to be heard, the court should have political power.

In fact, Agresto’s account can also explain the time limit on notwithstanding acts that the Canadian and Israeli NMs prescribe. The cases in which the people decide through their representatives that they do not accept the court’s reasoned opinion are expected to be the exception, not the rule. (Had this not been the case, the people would have abolished judicial review altogether since there is no point in having a thinker that generally produces opinions with which the people disagree). As such, it is appropriate that this disagreement is periodically examined. If the notwithstanding acts expire periodically, there is a higher chance that the people will re-examine their disagreement with the court.

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mentioned supra in the text accompanying note 21, what Agresto said was that throughout American constitutional history, the court was more tyrannical than the legislature. If this is true, it is not enough to abandon human rights protection as a basis for judicial review and to find another basis. Rather, even after one finds another justification for judicial review, the advantages of this justification have to be weighed against the disadvantage of rights “anti-protection” by the court. In other words, Agresto’s extreme version of the no abuse assumption – the judicial tyranny assumption – is a strong justification for entirely abolishing judicial review and not only for limiting the power of the court. In fact, Agresto’s model does not make sense under the “judicial tyranny assumption” and can only work where the assumption is that as a general rule, the court and the legislature are equally non-tyrannical (or equally tyrannical), which is what an advocate of the NIP assumes.


45 In one sense, Agresto’s story is actually more appropriate to the Canadian context than to the American context. Although Agresto is very clear about the need for the court’s decision to be operative and not advisory, and although Agresto never uses the terms “advice” or “advisory opinion”, the role of “deliberating” or “reflecting” or “reminding” and, hence, the purpose of judicial review, is closer to “giving advice” than to “deciding”. Or else it
The partnership idea of the court as thinker, with judicial opinions as focal points for public discussion, is used in the next two sections. Section 4 discusses the works of two Canadian writers who make use of the idea of judicial review for the purpose of deliberation in the context of the NM. These are Russell and MacDonald, who believe that some questions of Charter interpretation do not have right answers, such that the role of the court is not to suggest an answer to them, but rather thoughts regarding them. Section 5 focuses on the connection between judicial, as opposed to legislative, finality and public discussion.  

4. Judicial Deliberation, Legislative Finality, the Argument from Politics and the Argument from Judicial Error

A. The Argument from Politics

In my analysis of Agresto's account in the previous section, I argued that once we accept that the primary role of the court under the Constitution should be to deliberate, there is no longer any need to discuss judicial error. since the legislature is free to reject the court's deliberation even if it is not erroneous. This assertion points to a more significant implication of the idea of the deliberative role of the court. This is that judicial review is justified even in situations where there is no right answer and where it cannot be said that the court has an advantage in finding the right answer. This is so because even where there is no right way to resolve a dispute and where its resolution is ultimately dependent on political preferences, a principled discussion of the matter can still facilitate a better understanding of the issue. For example, even if we believe that

includes, at the very least, some advisory aspect. Advisory opinions by federal courts and by the Supreme Court, however, are considered in the U.S. to violate the principle of the separation of powers. See G. Gunther, Constitutional Law, 12th ed. (Westbury, New York: The Foundation Press, 1991) at 1593-1596. In contrast, in Canada advisory opinions are part of the political culture, as the “Reference” institution makes it possible for the Canadian Parliament to refer “important questions of law and fact” to the Supreme Court of Canada. See s. 53 of the Supreme Court Act, R.S.C 1985, c. S-26. Provincial governments can similarly refer questions to the provincial Courts of Appeal. There is a rich practice of using this mechanism in the context of constitutional questions in Canada. See P.W. Hogg, Constitutional Law of Canada, loose-leaf edition, vol. 1 (Toronto: Carswell, 1992) at 8.6, 8-14-8-19: L. Huffman and M. Saathoff, “Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction” (1990) 74 Minn. L. Rev. 1251. For this difference between the American and Canadian systems, see also Section 6(B), below.

The idea of the role of the courts as that of a thinker and a deliberator can also be found in Weiler's writings. See P. Weiler, In the Last Resort - A Critical Study of The Supreme Court of Canada (Toronto: Carswell/Methuen, 1974) at 206-212; P. Weiler, “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights” (1980)
the abortion question does not have a right answer. we are still better off developing our own view on this question after being exposed to the various issues involved. These would include questions such as whether the fetus has rights and from what point, what the implications are of a woman giving birth to a child she does not want, and so on. Judicial deliberation on the abortion issue is thus welcome, even if the court's decision need not be authoritative.

This idea is an important element in the works of Weiler and Russell. In the previous chapter, I showed that their main focus was the argument from judicial error, according to which the NM's purpose is to correct judicial errors when the court gets the answer wrong. However, in addition to that idea, Weiler and Russell invoked an opposite idea. They suggested that in some cases, the legislature can use the NM not because the court provided an incorrect answer, but because the question posed by the court is not capable of being answered correctly. In such cases, the legislature can legitimately assert that the court's final answer is no more valid and worthy of deference than is the legislature's answer. I shall call this argument "the argument from politics". A good way to describe the NIP from this perspective is to say that the argument from politics enables the legislature to impose on the court an invocation of the "political question" doctrine.

Initially, the argument from politics seems less principle-based than does the argument from judicial error. The argument from judicial error assumes that constitutional rights protection is a principle-based exercise, and that the NM is aimed at legislative adherence to these principles in cases where the judiciary errs in upholding them. In contrast, the argument from politics says that sometimes constitutional rights protection is by definition unprincipled, since some rights cases do not have right answers. However, a closer look reveals that the argument from politics is in fact more principled than is the argument from judicial error. The argument from judicial error is based on the check on judicial error approach, which cannot be principled because, as was demonstrated in the previous chapter, it is based on mutual supervision between courts and legislatures. In contrast, the argument from politics is based on partnership, as it assigns different roles to courts and legislatures: deliberation by courts and decision by legislatures.

60 Dalhousie Rev. 205 at 225; Weiler, supra note 2 at 76-77. However, Weiler's emphasis remains on the concept of judicial fallibility and errors, as demonstrated in Chapter 3, above.
While being a more principled argument, the argument from politics contains two potential areas of confusion which should be avoided. The first confusion is between a situation where there is no right answer and one where a political need is allowed to override the search for the right answer. What the argument from politics justifies is the overriding of a court decision in a situation where there is no right answer. This concept can be accommodated by constitutionalism. This is so because if there is no right answer, the legislature’s answer to the question cannot be wrong. An invocation of the NM in such a situation would not stand in contradiction to the constitutional order since the court’s ruling would not represent the constitutional order’s view on the question. But this is true only in a situation where there is no right answer. If the court does arrive at the right answer and the legislature nevertheless overrides the ruling for political reasons, then the invocation of the NM undermines the constitutional order. The legislature does so by creating an act which re-establishes that which the constitutional order legitimately sought to impair. The second confusion we should avoid is also related to the fact that the argument from politics can only apply to cases where there is no right answer. It involves the erroneous assumption that the argument from politics can ever be applied in a situation where the argument from judicial error is also applicable.

The next two sections demonstrate how two advocates of the NIP fell victim to these two confusions. Section B discusses how Russell mistook cases with no right answers for cases with right answers that the legislature overrode for political reasons. Section C discusses how MacDonald erroneously mixed up the argument from politics with the argument from judicial error.

**B. Confusion I: Russell and the Dismissal of the Search for a Right Answer**

In Chapter 3, I introduced Weiler’s concept of “ambiguity.” I suggested that what Weiler meant by this notion was not that some cases are so ambiguous that they do not have right answers, but rather that in some cases the ambiguity makes it very difficult to arrive at these right answers. Such a concept of ambiguity remains part of the argument from judicial error, and it has nothing to do with the argument from politics. According to this interpretation, when Weiler says that “in a society civilized enough to adopt and live by a Charter of Rights, the kinds of cases likely to arise under such a document rarely have clear-cut answers, as a matter of either moral
principle or legal interpretation" and that "in a country like Canada, the typical 'rights' case has no single, obviously correct answer, but rather presents a subtle moral choice between individual claims and community needs".

However, when Weiler and Russell discuss the question of whether Quebec's French only signs policy was legitimate according to the Charter, they say:

From our perspective in Toronto, this conclusion seems reasonable... But we must exhibit the same sense of proportion about the contrary judgment reached by the elected government in Quebec.\(^7\)

This language no longer reflects the argument from judicial error which would allow for ambiguity as a reason for the court's mistake. This is a language of no right answer, such as enunciated by the argument from politics. The court's conclusion is reasonable, but the Quebec National Assembly's response also deserves the "same sense of proportion", because the question decided in Ford does not have a right answer. Mentioning "our perspective" [emphasis added] in Toronto, the capital of Ontario and thereby a symbol of English Canada, further sends a message of the relativity, contestability, and political nature of the Ford decision. In other words, neither the court's answer nor that of the legislature is wrong.

Later, I will examine Weiler and Russell's analyses of Ford. What is important to grasp at this point of our inquiry, however, is that this approach reflects an appropriate invocation of the argument from politics. While the answer that the court gave to the sign question is important in terms of judicial deliberation, the final answer should be the legislature's since there is no right answer. Albeit not in an explicit way, Russell does refer to this idea of the NM being a way to reject judicial deliberation in his 1991 article:

I do not mean to denigrate the contribution judicial decisions can make to public discussion and consideration of rights issues. Some Charter critics tend to underestimate the extent to which legal aid and the organization of advocacy groups have made litigation much more accessible than in the past, as well as the extent to which Charter

\(^7\) Weiler, supra note 2 at 54.

\(^8\) Ibid. at 59.

litigation generates action on law reform issues which are neglected or ignored by legislatures. Also, I would acknowledge that both the presentation of Charter issues before judges and their reasoned decisions on those issues can contribute significantly to public understanding. But I am not persuaded that these benefits are so great as to justify making adjudication always the ultimate means of resolving rights issues."

Thus far Russell, like Weiler, has treated the argument from politics correctly by arguing that in some cases, such as the Quebec sign law situation, there are no right answers. This approach is appropriate since it does not abandon the search for the right answer. It simply suggests that this search does not take us anywhere. The confusion arises when Russell seems to give up on the search for right answers. Russell writes:

A legislative override does not guarantee that we will arrive at the right answers to the questions... raised by the Charter. What it can do is subject these questions to a process of wide public discussion..."

Admittedly, it could be that what Russell means here is not that there are no right answers, but simply that a NM does not guarantee them. or. that whether there are right answers or not, his concern in this part of his paper is to deal with the issue of public discussion. But, later in the paper, when he refers to the Ford case. he explicitly dismisses the importance of getting the answers right:

The key question to ask in the [context] of the Quebec sign case is not whether the Supreme Court or the Quebec National Assembly reached the right decision on the issue at stake, but whether this type of question is one on which the judiciary ought to have the last word."

For Russell, the question "is the Ford decision correct?" is not the key question. That is, even if we know that the court was right, it is still appropriate to override the decision once we answer the question that is the key question - "is this something for the court to decide finally?" If Russell believes in locating rights beyond majoritarian reach, as he says he does,\(^3\): how can he

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\(^{60}\) Russell, supra note 3 at 300-301. Russell's account of the idea of the NM as a means for judicial deliberation is presented in a better way than Agresto's. In Section 3(C), above. I criticize Agresto for the discourse of judicial error that he uses. Russell, in contrast. is cautious not to talk about judicial error in the context of the court's role as a deliberator.

\(^{61}\) Russell, supra note 3 at 299.

\(^{62}\) Ibid. at 304.

\(^{63}\) Ibid. at 295.
give up the search for the right answer for rights protection? Furthermore, consider what Russell adds to this point a little later on:

The sign case poses a fundamental issue of political justice concerning the relationship of the rights and interests of two minorities. On the one hand there is the minority of Quebecers who are not French and their right to express themselves in their own language, and on the other the Francophone Quebecers who are a vulnerable cultural minority in North America and their right to preserve their distinct culture. Working out an appropriate balance between these two concerns about minority rights is a profound challenge not only for Quebecers but for all Canadians. This is not an issue which we Canadians either have withdrawn or should withdraw from considerations by Quebec's legislature for ultimate determination by the Supreme Court. To do so would be to detract too much from the responsibility of Quebecers and other Canadians for participating in the resolution of a question fundamental to the political justice of the political community they share.04

Russell does not explain why, given his belief in constitutionalism and in constitutional rights protection, the questions posed by Ford should not be finally decided by the court. The only helpful information he offers is that this question is "a profound challenge not only for Quebecers but for all Canadians". This language implies that Russell's concern is not institutional incapacity, but political constraints.

But supporting the argument from politics based on political constraints confuses the situation where there is no right answer with a situation where there is no search for a right answer. The idea of situations with no right answers, as suggested above, can be in accordance with constitutionalism since in such a case the overriding of a court's decision would not result in a violation of the constitutional order. Giving up the search for a right answer, however, and suggesting that the legislature should have the last word regardless of whether the court is right or not is an attack on constitutionalism. Such a view represents a revival of legislative supremacy.

C. Confusion II: MacDonald and the Tension Between the Argument from Judicial Error and the Argument from Politics

In one sense, Lois MacDonald is the most enthusiastic supporter of the NM. She is alone among advocates of the NIP in never having suggested that s. 33 should be amended in any way.

04 Ibid. at 305.
Probably related to this is the fact that, although she supports legislative finality, she does not explicitly say that she also supports judicial review. It is only her mention of the idea of partnership that indicates that she does not object to the Charter altogether. Her article “Promoting Social Equality through the Legislative Override” contains an analysis of the Seaboyer decision which she suggests should have been overridden with the NM. This is accompanied by a broader analysis of the issue of evidence regarding past sexual conduct in sexual assault trials, and of the idea of a NM. Later, I shall analyze her treatment of Seaboyer, but now I shall point out some problems in her discussion of the argument from politics, including her confusion regarding the relationship between the argument from judicial error and the argument from politics.

The reason why the argument from judicial error and the argument from politics can be confused is that they have a similar structure in terms of legislative activity. The arguments are different in terms of the judicial activity: the argument from judicial error suggests that the court made the wrong decision while the argument from politics posits that the court did not make the right decision because there was no right decision. However, in terms of the legislative activity, the arguments are similar: both suggest that the legislature’s answer is appropriate – either because of judicial error or because of the fact that the case has no right answer.

The first problem with MacDonald’s support of the argument from politics is that it is based on a characteristic of Charter adjudication which has no link to the argument from politics. This arises out of a term that the other advocates of the NIP did not address - the notion of “the overall protection of the Charter”:

The majority of Charter cases involve the balancing of competing rights and interests rather than oppressive state action. Such a situation results in the prioritization of rights, a process which has been characterized as “arbitrary”, embodying “personal economic and social benefits”. Consequently, invoking the override to reverse the judicial result and give precedence to the rights and interests of the competing groups would not diminish the overall protection offered by the Charter. In fact, the constitutional validation of the rules of evidence relating to past sexual history would have more accurately reflected the underlying principles of the Charter.

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65 See supra note 4.
66 See Chapter 6, Section 3(B), below.
67 MacDonald, supra note 4 at 22.
The idea of the “overall protection offered by the Charter” introduces a third distinction regarding Charter adjudication, in addition to the core-margin and right-limits distinctions that are invoked by Russell. This is the distinction between limiting a right for the sake of a state interest, and limiting a right for the sake of another right. When a right is limited for the sake of protecting a state interest, upholding the limit decreases the “overall protection” of the Charter. When, on the other hand, a right is limited for the sake of protecting another right, upholding the limit does not decrease the “overall protection” because while one right – represented by the Charter right – is limited, another right – represented by the limitation clause – is protected.

This distinction is sometimes invoked by the Supreme Court of Canada in order to justify a less interventionist approach to Charter adjudication.

In the above quoted passage, MacDonald states that the “balancing of competing rights... results in the prioritization of rights, a process which has been characterized as ‘arbitrary’” [emphasis added]. In other words, because most Charter cases are about balancing competing rights, Charter adjudication is “arbitrary”. However, there is no connection between the fact that in most Charter cases the court deals with competing rights and the idea that constitutional adjudication is “arbitrary”. Those who believe in the arbitrary nature of adjudication should not limit their claim to cases that decide competing rights.

Moreover, MacDonald confuses the argument from politics with the argument from judicial error. After suggesting that balancing between two rights is “arbitrary”, she says that deciding Seaboyer differently would have reflected the underlying principles of the Charter.

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58 See Chapter 3, Section 3(C), above.
59 In that sense, MacDonald should not have talked about balancing “competing rights and interests” but rather, about balancing “competing rights”. Since if an individual’s interest is not a Charter right, then limiting a right for the sake of this interest does decrease the “overall protection of the Charter”, even if it does not decrease the overall protection of rights in the system.
60 See Weinrib, supra note 11.
61 While the competing rights point is irrelevant to the argument from politics, it is relevant to the no abuse assumption, according to which the legislature is not likely to use the NM in a tyrannical way. See Chapter 3, Section 2(E), above. If we understand tyranny to be the disregarding of rights by a government, then tyranny can only happen where the government violates a right in the interests of the state. In contrast, if the purpose of a violation is to protect the right of another individual or group, then this violation cannot be defined as “tyranny”. For this point, see also Greschner and Norman. supra note 54 at 183–4. Greschner and Norman, however, do not suggest that most Charter cases are of this nature.
“more accurately”. How can there be talk of accuracy (the argument from judicial error) when the process is “arbitrary” (the argument from politics)?

MacDonald makes the same mistake again when, in a passage which immediately follows the one quoted above, she writes:

The courts, in reviewing the impugned legislation, should be “mindful of the legislature’s representative function”, particularly in respect to the protection of vulnerable groups. Where the judiciary fails in this task, it should be the legislature’s responsibility to invoke the legislative override...

The *Seaboyer* decision illustrates that there is often no consensus amongst the members of the bench as to the values to be protected in cases involving a balancing of competing rights. Invoking the legislative override in this situation would not have been an instance of the domination of majoritarian interests since women are not significantly endowed with political power. In fact, the rules of evidence relating to past sexual history have been characterized as “an important victory of the democratic process over majoritarian interests.”

Mention of the no consensus point hints at the arbitrary nature of adjudication as the argument from politics holds. In addition, the argument that the court should have the representative role of the legislature in mind is relevant only if the court cannot arrive at the right answer, as the argument from politics asserts. But talking about the “failure” of the court, and suggesting that it was the court whose decision in a certain case represented majoritarian values and that it was the legislature whose policy represented the protection of a disempowered group, suggests that there is a correct way to undertake constitutional adjudication. When the court fails to do it correctly.

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72 There is another problem with the quoted passage from MacDonald. Note the word “consequently” at the beginning of the third sentence. MacDonald seems to say that because of the arbitrary nature of the process of prioritization of rights, the overall rights protection under the Charter is not diminished when one right takes priority over another. However, there is no connection between the two. The reason why the overall protection is not diminished is that one right is limited for the sake of another right, and not for the sake of a state interest. This is true whether the process of deciding which right prevails is arbitrary or principled. It makes more sense to say that the word “consequently” refers to the first sentence, where the distinction between the balancing of rights of competing groups and the balancing of rights and state interests is made. But then the point in the second sentence, regarding the arbitrary nature of adjudication, becomes unclear.

73 MacDonald, *supra* note 4 at 24-5. In the middle of this quotation, the sentence “Moreover, the legislative branch is often better placed to fully consider the contextual underpinnings of the policy of the impugned legislation” is omitted. This refers to Weiler’s discussion of the argument from policy making (which was already discussed in Chapter 3, Section 5, above, in the context of Manfredi’s work.) MacDonald never discusses this point.

74 MacDonald states that the disagreement between the judges in *Seaboyer* “illustrates that there is often no consensus amongst the members of the bench” [emphasis added] on rights issues. MacDonald does not explain how one decision can demonstrate that this lack of consensus often occurs. Perhaps what she means is that the lack of consensus in *Seaboyer* is an example of what often happens.
the NM, as the argument from judicial error holds. enables the legislature to correct the court’s mistake.75

D. Conclusion

While the argument from politics does not raise the same difficulties that the argument from judicial error does, the idea of partnership as concept, namely judicial deliberation and legislative decision, is not limited to the argument from politics. In rejecting the court’s deliberation, the legislature does not have to believe that the matter in question does not have a right answer. The legislature could very well find that there is a right answer, but that the court’s answer is the wrong one. The important point for the partnership as concept is that when the legislature rejects the court’s deliberation, it does so not as a “super court” but as a “super legislature”.76

The partnership as concept thus suggests that the role of the court is to deliberate and the role of the legislature is to decide. The reason why the court is the deliberator is that as a “forum of principle”, it can deliberate better than the legislature. After the court deliberates, the legislature and the public are in a better position to discuss the subject in a more informed

74 Later on we shall see that MacDonald failed to recognize the tension between the argument from judicial error and the argument from politics not only in her general analysis of the NM, but also in her analysis of the specific Seaboyer case. See Chapter 6, Section 3(B), below.

Although the confusion between the argument from politics and the argument from judicial error is clearer in MacDonald’s work, it can also be found in Russell’s writings. After discussing the fallibility of the court, Russell writes:

In making the case for a legislative override in the Charter, one need not and indeed should not argue that the judiciary should play no part in policy decisions such as these. I agree with Professor Whyte that “Canada, in enacting the Charter of Rights, accepted that some political problems were capable of adjudication...” But Professor Weiler and I and other defenders of the notwithstanding clause part company with Whyte when he contends that these issues must be “ultimately adjudicable”, that once the judiciary has spoken there must be closure on these issues (Russell, supra note 3 at 397).

The confusion between the two arguments is that whereas the clarification that opposing judicial finality does not mean opposing judicial review is necessary for the argument from politics, it is unnecessary from the perspective of the argument from judicial error. From the perspective of that argument, it is obvious that constitutional decision making should begin with the court and that the NM should only be rarely used in order to correct mistakes. Nobody who subscribes to that argument claims that “the judiciary should play no part” in deciding constitutional issues. This view would only be tenable for those who believed that the court produces more erroneous than correct decisions. The latter view is not shared by Russell.

76 See Weinrib, supra note 6 at 569.

manner. Public discussions, in whatever form they take, whether in the legislatures, in the media, in academic and professional forums, in educational institutions, or over dinner tables would all be enhanced. After the court’s deliberation, the legislature is in a better position to make the constitutional decision to adopt the court’s deliberation or to reject it with the NM. The next section inquires into the way a system of judicial review with legislative finality influences the public discussion of constitutional issues.

5. The Partnership as Concept and Public Discussion

A. Quantity

There is disagreement amongst constitutional theorists as to whether judicial review is conducive or destructive to the public discussion of constitutional issues. One school of thought believes that in a system without judicial review, rights issues are less frequently discussed by the public than in a system where there is judicial review. Without judicial review, rights issues are likely only to be discussed when the legislature enacts legislation which influences rights protection. With judicial review, the same act will likely generate more discussion. This is due to the increase in opportunities for public discussion. Instead of having only one opportunity when a bill is enacted, public discussion in a system with judicial review can also take place whenever any court discusses the constitutionality of an act and issues a ruling. In contrast, another view holds that a rights-protecting constitutional regime sterilizes politics, constrains deliberation, and moves the discussion of important political issues out of the political institutions and into the courts.

A system with judicial review and legislative finality seems to accommodate both of these views. If, after a Supreme Court decision, the legislature has a further opportunity to accept or reject the court’s view with the NM, this represents yet another opportunity for public discussion. It can therefore be seen that the NIP increases the amount of public discussion more so than systems with either final judicial review or no judicial review. Moreover, because of the very possibility of using the NM, the public might discuss the constitutional matter while

discussing whether or not the legislature should invoke the NM. When the notwithstanding declaration expires periodically, such discussion might continue whenever the declaration is renewed.81

Mark Tushnet has suggested an even stronger argument which concerns public discussion and which supports the NIP. He suggests that the NM might be a solution to the problem of "democratic debilitation", which occurs "when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems". Such reliance on the court is problematic for two reasons. The first is that it "may diminish the public's attachment to the Constitution and, more importantly, to the norms they might themselves find in the Constitution". The second is that "to the extent that the courts' articulation of constitutional norms ought to have some connection to the public's views, democratic debilitation may deprive the courts of information they should find useful".82 In a system with a NM, the ultimate power remains in the hands of the legislature, so there is a higher chance that the public will deal with the constitutional issue itself, rather than relying on the court to do so.

Tushnet's argument is stronger than the first public discussion argument in support of the NIP. The first argument suggests that legislative finality provides another opportunity for discussion. It addresses only what happens after the Supreme Court rules. It does not suggest that what happens before that ruling is also influenced by legislative finality. Tushnet's argument, however, demonstrates that legislative finality is good for public discussion not only since it provides an opportunity for more discussion after a court ruling, but also because it influences the very way in which the public discusses court rulings whatever judicial stage the ruling may be at. Without the NM, the public might have less incentive to discuss the matter, since it knows the issue will ultimately be decided by the judiciary. With a NM which provides for legislative

80 In the next section, I shall explain why the NIP allows for the operation of the NM only after the Supreme Court has ruled. For the purposes of this section, this should simply be assumed.
81 As I mentioned Chapter 3, Section 2(F), above, instead of the five year limitation. Weiler and Russell proposed that two enactments should be required in order to invoke the NM. Under this option too, as Russell explains, "broad citizen involvement" is ensured "thus contributing to the fundamental process value of the override"; Russell. supra note 3 at 302.
83 Ibid.
finality, the public has an incentive to discuss the issue since it realizes that it will be the final arbiter.

B. Quality

While Tushnet’s argument supports the NIP in terms of the quantity of public discussion, Dworkin has suggested that the quality of the discussion is better served by judicial finality. His argument starts with a distinction which he uses throughout his work, between issues regarding “the best interests of the community as a whole” and “matters of fundamental principle”. Regarding the former, “numbers should count”, and public participation is important for the sake of counting the numbers. Regarding the latter, the importance of participation is not to learn about the majority’s preference, but because “self respect require that people participate, as partners in a joint venture, in the moral argument over the rules under which they live”. This kind of participation, says Dworkin, “is sometimes better protected if the mechanisms of decision are not ultimately majoritarian”. Based on this distinction, he says:

[T]hough the public debate that precedes a referendum or a legislative decision about some great issue of principle may be of high quality, it rarely is. Depressingly often... the process is dominated by political alliances that are formed around a single issue and use the familiar tactics of pressure groups to bribe or blackmail legislators into voting as they wish. The... moral debate... never begins. Ordinary politics generally aims, moreover, at a political compromise that gives all powerful groups enough of what they want to prevent their disaffection, and reasoned argument underlying moral principles is rarely part of or even congenial to such compromises.

Note the transition Dworkin makes from his depiction of legislative work to his depiction of public discussion of issues decided through legislative work. Because the work of legislators is ruled by political compromise, the energy of the participating public is aimed at “bribing” or “blackmailing” in order to induce compromises and not at moral argument. In the passage

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84 R. Dworkin, Freedom’s Law - The Moral Reading of The American Constitution (Cambridge: Harvard University Press, 1996) at 344. The quoted passage is not taken from a discussion about judicial finality but rather from an article about the legacy of the American Judge Learned Hand. “Freedom’s Law” is a collection of short essays that Dworkin had published previously and which are collected to explicate the idea of, as Dworkin puts it, “the moral reading of the constitution”.

85 Ibid.

86 Ibid. The implication of the word “sometimes” is not entirely clear.
immediately following, he makes the same transition from the way the court works to the way the public discusses the court's work:

When an issue is seen as constitutional, however, and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates from the start on questions of political morality. Legislators often feel compelled to argue for the constitutionality and not just the popularity of measures they support, and Presidents or governors who veto a law cite constitutional arguments to justify their decision. When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed, by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables. 88

The idea that the court can educate the people - that it creates a "national seminar" - is not Dworkin's. This idea is well known in the U.S. constitutional literature, and indeed this idea is the basis of Agresto's work, which was analyzed above. 89 What is unique in this passage of Dworkin's is that he uses this idea to support not only judicial review, but also judicial finality. Dworkin says judicial finality can give public discussion what judicial review with legislative finality cannot. According to Dworkin's approach, even if the discussion in the legislature and the public discussion preceding the court's ruling is governed by principle, after the court's decision, the debate over whether the legislature should override the decision is likely to be unprincipled. This is because what will affect the legislators' decision to override the legislation is not principled argument, but rather political compromise. Dworkin thus suggests that the fact that ultimate decision making in matters of principle resides with the court is a condition for a principled public debate. 90

87 Ibid. at 344-5. Dworkin's reference to legislators is less relevant in the Canadian context because party discipline is much stronger in Canada. Instead, the dynamic that Dworkin describes occurs within the political parties.
88 Ibid. at 345.
89 In Section 3, Rawls suggests that the court "often forces political discussion to take a principled form as to address the constitutional question in line with the political value of justice and public reason. Public discussion becomes more than a contest of power and position. This educates citizens to the use of public reason and its value of political justice by focusing their attention on basic constitutional matters". Rawls, supra note 42 at 239-40. For the educational role of the U.S. Supreme Court, see C. L. Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67 N.Y.U. L. Rev. 961.
90 Dworkin does not refer to the idea of a NM but he nevertheless seems to object to it. Earlier in his book he writes: "It is therefore an inescapable question whether, in the end, the interpretation of the legislatures or those of the judges will prevail, and though lawyers who dislike either answer call for something in between, there is, as Hand points out, no logical space for anything in between". Dworkin, supra note 84 at 343. This approach is obviously
C. Conclusion: The Limits of Partnership as Concept

Dworkin’s view is in direct opposition to Tushnet’s. Dworkin sees judicial finality as something that will promote the legislative and public discussion of principle while Tushnet sees judicial finality as something that will discourage public discussion. The more profound disagreement at the source of this academic conflict is likely over whether legislatures, as the people’s representatives, can be trusted to approach constitutional issues in a principled way. Tushnet thinks they can, but that judicial finality will discourage them from doing so. Dworkin thinks they cannot, and that judicial finality will force them to do it. This dilemma concerns the relative abilities of courts and legislatures to discuss constitutional issues and is not about whether they are able to arrive at right answers for rights protection. However, it is understandably similar to the dilemma regarding right answers which was introduced in the

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not supportive of the idea of the NIP. Compare Dworkin’s language supra in Chapter 3, text accompanying note 110.

My analysis in this section focuses on public discussion. What about means of public participation which do not involve discussion, such as voting, or financing public interest litigation? Here the case for the NIP seems to be much easier. It is clear that the NIP allows for greater citizen participation in politics than does a system with final judicial review. In a system with final judicial review, the people can participate twice. They can do so first in the context of legislation (by voting, for example) and secondly in the context of judicial review (by membership in a public interest litigation group, for example). In a system with judicial review and legislative finality, the people get a third opportunity to participate since there is a second requirement for legislation. Furthermore, Tushnet stresses that the NM enables the public to participate not only by supporting the legislature, but also by supporting the court. When the legislature wishes to use the NM but fails to do so because of a lack of public support, the inaction expresses public support for the court. This avenue is not available without a NM. Tushnet, supra note 82 at 284. Unlike with public discussion, with public participation there is no point in talking about the quality of discussion since there is no discussion.

In his account of the virtue of his “Council of Revision” (Chapter 3, Section 4, above) Michelman fails to utilize this point regarding opportunity for more participation. Referring to Dworkin’s argument that judicial review “provides a forum in politics in which citizens may participate, argumentatively if they wish, and therefore in a manner more directly connected to their moral lives than voting almost ever is” he writes: “If elected representatives could exercise oversight authority regarding questions of concrete constitutional-legal meaning, citizen-electors would be directly called to judge the constitutional-legal interpretive judgments of incumbent and aspiring representatives, as those judgments are manifested in past actions and publicly argued appraisals of past, pending, and potential constitutional-interpretive events. Judging a representative’s constitutional-legal judgment will engage me in the exercise of my own. Even if I ought not to judge her judgment ‘bad’ just because I judge the merits differently. Still I can hardly judge her judgment at all without judging her cases for myself. Thus I would be called as an ordinary voter to this work”. Ibid, at 161. (The passage from Dworkin is from R. Dworkin, “What is Equality? Part 4: Political Equality”, (1987) 22 U. of S. Fran. L. Rev. 1 at 29). While Michelman is certainly correct in his suggestion, it is clear that since the Council of Revision operates after the Supreme Court has issued its judgment, the public gets to participate in the constitutional decision making process both in the context of the Supreme Court’s decision and in the context of the Council of Revision’s.
previous chapter, namely the correction-abuse dilemma. Not surprisingly, Dworkin, whose view of the correction-abuse dilemma is that courts are better equipped to arrive at right answers, also holds the view that the courts can facilitate a better discussion than can the legislatures. Tushnet, who does not believe that the courts have a better chance to arrive at right answers, also does not believe that the courts have a better ability to discuss constitutional issues. As with the correction-abuse dilemma, the discussion dilemma, which represents the notion of partnership as a concept, cannot be solved by resort to principle. As Tushnet put it, “the question to which more-than-minimal judicial review contributes to democratic debilitation is an empirical one”.

Similar to the check on judicial error approach, the partnership concept cannot justify the NIP. However, it can shape the NIP once the NIP comes into existence. The concluding section of this chapter will do exactly that, incorporating both the notion of partnership as a concept and partnership as a practice.

6. A Model of Partnership Under the Charter

A. The Partnership as a Concept: Between Weiler and Weinrib

In order to explain my approach to the partnership between courts and legislatures under the NIP. I shall briefly introduce the three approaches to the Canadian NM presented in Chapter 2 - those of Paul Weiler, Lorraine Weinrib and Brian Slattery - and show how they relate to each other. Between the approaches of Weiler and Weinrib, two main differences exist. The first of these is Weiler’s belief that, while invoking the NM, the legislature acts as a “super court”, which contrasts with Weinrib’s view that it acts as a “super legislature”. Flowing from this is the second difference: while Weiler thinks that the mechanism should only be operated after a judicial decision has been made, Weinrib makes no such stipulation.

Slattery’s approach is intermediate; like Weinrib he does not believe that the NM should be used only in response to judicial decisions, but like Weiler he believes that the legislature functions as a super court when it

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92 Tushnet, supra note 82 at 300, note 204. Both Dworkin and Tushnet cite examples to support their positions. Dworkin’s example is the abortion case (Dworkin, supra note 84 at 345) and Tushnet, while agreeing with the abortion example, introduces the capital punishment debate as a counter example (Tushnet, supra note 82 at 248, note 11).

93 Weiler also does not make an explicit stipulation to this effect, but it is clear that he views the NM as a remedial mechanism. See Chapter 2, Section 2, above.
operates the NM. That is, Slattery sides with Weiler regarding the nature of the NM's operation, while siding with Weinrib on the conditions for its operation. My approach is exactly opposite to Slattery's: I side with Weinrib regarding the nature of the mechanism and with Weiler on the conditions for its operation. Like Weinrib, I believe that the legislature operates the NM as a super legislature, and not as a super court, but like Weiler, in my view the NM should only be invoked after a final judicial decision.

The rationale for my support of Weinrib on the nature of the NM is clear: the previous chapter demonstrated that Weiler's notion of the legislature functioning as a super court in employing the NM to correct judicial errors cannot be sustained in terms of theory. The notion of a partnership as a concept is in opposition to the idea of a legislature being a super court. However, I side with Weiler on the conditions for the operation of the NM. As my analysis of Agresto, Dworkin and Tushnet suggested, legislative and popular understandings of the Constitution, as well as the quantity and quality of legislative and public debate about the issue at hand, will be greater where a judicial decision precedes the use of the NM. The partnership between courts and legislatures seeks a way to let each partner have its way, thus incorporating the advantages that each has to offer. As Greschner and Norman suggest:

"If the courts are charged with the interpretation of Charter right and freedoms [sic], then they should be left free to engage in their task. ... The legislature ought to show respect for the courts by permitting them to go about their business of interpretation. ... It is one to thing for a legislature to decide that the courts are wrong in their interpretations, and to overrule the decision: it is quite another to stop the courts from doing their job altogether."

While talk of "wrong" interpretations and legislative "overruling" of decisions is reminiscent of the argument from judicial error, and not of a partnership, Greschner and Norman's idea that the courts should be allowed to do their job is surely appropriate in terms of partnership too.

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Footnotes:

94 The disagreement between Tushnet and Dworkin is about whether judicial finality will increase or decrease this effect of judicial review, but they do not disagree about its existence.
96 Greschner and Norman, supra note 54 at 192. As we recall, Greschner and Norman provide a textual basis for this reading of s. 33. For the rejection of this reading, see supra Chapter 2, note 138.
96 A further expression of the fact that Greschner and Norman subscribe to the argument from judicial error can be found in the following passage, where they suggest an additional support for their view that the NM should be operated in a remedial way. They write:

"If one concern ... is the competency of the courts, how can they expect the judiciary to become more competent if their function is taken away from them? To analogize to a familiar situation, consider a law
B. The Partnership as a Practice: the Partnership Model, the Clashes Model and the Acceptance Model

The notion of partnership as a practice is not as broad as the notion of partnership as a concept, and therefore can be accepted by both the partnership as concept approach and the check on judicial error approach. Even with Weiler’s approach, which sees the NIP not as a partnership between courts and legislatures, as the partnership as concept suggests, but as a mechanism for the correction of judicial errors, an invocation of the NM can take place in a “partnership way”. This gives meaning to his statement quoted above concerning a “partnership way”. The partnership as practice represents a middle ground between two approaches to the interaction between courts and legislatures under the Constitution – the acceptance model and the clashes model.

One concept that the notion of partnership as a practice seeks to negate is the idea of clashing branches of government. Traditional American scholarship sometimes sees the three branches – separated by virtue of the principle of separation of powers – supervising one another by means of checks and balances. In order to ensure that the supervision works, the branches are expected to clash with each other. Each branch should do everything it can to promote its agenda, for it is the constant conflict among branches that secures the system from tyranny. Following this account, the NM is yet another check on judicial error, qualitatively similar to the constitutional amendment, the appointment process, or any other means through which the legislature can respond to constitutional decision making by judges.

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professor who reasonably concludes, on the basis of past performance, that a particular student does not have the capability to pass the final examination. Regardless of the strength of this conclusion, the professor does not prevent the student from sitting the examination on the grounds that it will be a waste of time. The student has the opportunity to show that she has acquired the expertise required for the course (Greschner and Norman, supra note 54 at 192).

This analogy says that the usage of the NM is like marking an exam – it is not only a way to reject the student’s mistakes; it is also a way to teach the student how to do better. By saying that the use of the NM by the legislature teaches judges how to do law better, Greschner and Norman suggest that the legislature is a “super court”, as the argument from judicial error holds.

97 Greschner and Norman also suggest that prior judicial decisions will transform uses of the NM into a dialogue, whereas invoking the NM before the court has found the act to be unconstitutional is a monologue. I do not deal with the notion of the dialogue between courts and legislature in this work. See infra note 109.
This conception of the interaction between the court and the legislature is reflected in Agresto's work. Although Agresto suggests a principled account of the NIP, as we have seen, and although he does assign courts and legislatures different roles in a constitutional system, the NM he envisages is still conceived of as a means for the legislature to retaliate against the court. Agresto suggests a NM in the context of his discussion of the other checks on judicial power, all of which he rejects for reasons that are relevant in the Canadian context too. Constitutional amendment is dismissed as too difficult, as well as for being subject to judicial interpretation; viewing the process of constitutional amendment as the only way to check the court. Agresto says, wrongly assumes that the court's interpretation of the Constitution is correct. Agresto additionally rejects calls for judicial self-restraint as a means of checking judicial power; in his view, such calls are unlikely to be heeded by the court, and the notion of a restrained court contradicts his own belief in the importance of the court as a national thinker. The check on judicial error approach that Agresto prefers, then, is the "power of the congress literally to force

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8 In the Federalist no. 41, Madison wrote that the accumulation of governmental power in one branch is "the very definition of tyranny". J. Madison, A. Hamilton and J. Jay, The Federalist Papers (New Rochelle: Arlington House, 1966) at 301. 
9 Agresto, supra note 15 at 107-111. 
10 Ibid. at 112-116. Other checks on judicial power that Agresto discounts are impeachment, using the Congress' power under Article III of the U.S. Constitution to make exceptions to the Court's jurisdiction, and "court packing", all of which he sees as "extremely severe, politically impossible, or both". Ibid. at 120. Furthermore, rather than attacking a particular decision, these checks attack the court itself. Ibid.

The alternative of constitutional amendment was also discussed by Canadian scholars (see Weiler, supra note 2 at 82-84; Russell, supra note 3 at 295; Manfredi, supra note 5 at 195-197). However, the Canadian equivalent to Congress' power under Article III was not discussed in Canada in the context of the NIP. But these powers exist. S. 101 of the Constitution Act, 1867 (UK), reproduced in R.S.C. 1985. Appendix II, no. 5, authorizes Parliament "to provide for the constitution, maintenance, and organization of a general court of appeal for Canada". Correspondingly, Parliament established the Supreme Court in 1875. See the Supreme Court Act, supra note 55, which replaced the Supreme and Exchequer Courts Act, 1875, S.C. 1875, c. 11. Since the Supreme Court of Canada is not created by the Constitution but rather by the Supreme Court Act, the Parliament of Canada has both the power to increase the number of the judges, which is the equivalent of Court packing, and the power to regulate the jurisdiction of the Supreme Court, which is the equivalent of Congress' power under Article III. Not only were these powers not discussed in the context of the Canadian NM, but some writers compared Article III and the NM, although the equivalent of Article III is s. 101 of the Constitution Act, 1982. See Tushnet, supra note 82 at 285-7; Manfredi, supra note 5 at 197-198; C.R. Massey, "The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States". (1990) Duke L. J. 1229, 1285-1298. While it is true that through Article III, Congress might achieve what the Canadian legislatures can achieve via the NM, the better comparison is between Article III and s. 101. A discussion of Article III and s. 101 is beyond the scope of this work. The need of scholars - especially American scholars - to find, as Tushnet calls it, "A U.S. Analog to Section 33" (Tushnet, supra note 82 at 285.) to the Canadian NM, is curious and deserves to be the subject of a separate paper.
reconsideration in most areas of constitutional law". Congress can do this either by re-passing legislation "under an alternative constitutional guise". by re-writing it, or by using "the ability to circumscribe the holding of any decision in an attempt to delimit its effect".

Although Agresto notes the possibility of re-writing legislation to accommodate the court’s decision, and sees that the introduction of new legislation "argues for a different constitutional view", what he really describes is a clash, or struggle, between the court and the legislature, where the legislature does what ever it can to have its way. Correspondingly, when Agresto moves to his actual suggestion of a NM, he does not emphasize the legislature’s role in constitutional interpretation. Rather, he stresses (in a paragraph already quoted above) the importance of symmetry between the branches:

In many ways the perfect constitutional solution to the problem of interpretive finality...would have been for the judiciary to possess the same legislative relationship to Congress as that which governs the executive. Just as Congress, by special majority, can override a presidential veto, a similar process could from the outset have been established to review judicial objections.

Not surprisingly, even at the point of Agresto’s sole reference to the term “partnership”, he describes his conception simply as a negation of judicial finality. He writes that “the principle of checks and balances is a partnership and not simply a donation of power to the Court”. This is what was previously referred to as “partnership as a label” since this use of the term simply represents the idea of checks and balances, and not a different type of interaction between courts and legislatures.

A very different approach to the interaction between courts and legislatures under the Constitution is that depicted in the work of Peter Hogg and Allison Bushell. Their study shows that, as a general rule, Canadian legislatures have been able to achieve the goals of legislation struck down by courts, doing so through the introduction of new legislation that adheres to court-

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101 Agresto, supra note 15 at 126.
102 Ibid.
103 Ibid. at 130.
104 Ibid. at 131.
105 Ibid. at 134.
106 Ibid. at 166.
prescribed standards. Furthermore, they show that while discussing this new legislation, legislators engage in "Charter-Speak" and that the court’s decision influences the legislative response even when the court does not strike down an act. Although Agresto’s and Hogg and Bushell’s works discuss the re-introduction of old legislation or the introduction of new legislation, the stories that they tell are different. A first distinction is that Agresto describes a legislature that does not accept the court’s view, and that acts out of disagreement with the court, whereas Hogg and Bushell describe a legislature that accepts the court’s decision. This gives rise to the second difference: unlike the legislature of Agresto, Hogg and Bushell’s legislature must respond in the terms of the decision and will thus be obligated to take the judicial decision more seriously.

The notion of the partnership as a practice suggests a middle ground between the approach advocated by Agresto and that described by Hogg and Bushell. It calls on the legislature to do what Agresto would have it do, but to do it in the manner that Hogg and Bushell describe. Following Agresto, it authorizes the legislature to reject a judicial reading of the Constitution; however, following Hogg and Bushell’s model, it requires that if the legislature

108 Ibid. at 101-105.
109 Notably, both name their very different stories a “dialogue”. Hogg and Bushell entitle their article “The Charter Dialogue between Courts and Legislatures” and this conception is elaborated on throughout the entire paper. Agresto, as well, talks about a “dialogue” between the branches. Agresto, supra note 15 at 97. Although the meaning of the idea of “dialogue” is outside of the scope of this work, my impression is that this almost contradictory usage of the term reflects the fact that this term has come, in recent years, to express many different ideas with regard to the interaction between courts and legislatures, between legislatures and the people, and between the courts and the people.

Janet Hiebert speaks of the NM as a means of “conversation” between the court and the legislature. See J. Hiebert, “Why Must a Bill of Rights be a contest of Political and Judicial Wills?- The Canadian Alternative” (1999) 10 Public Law Review 22 at 31-34. Like Agresto and unlike the approach suggested here, Hiebert seems to be organizing her thoughts about “conversation” in terms of checks and balances (see ibid. at 25) and not in terms of partnership.
110 I use the word “describe” in the context of Hogg and Bushell because, unlike Agresto, the purpose of their work is not to suggest a new argument in favour of judicial review or a new check on judicial power but rather to show that in most cases, the accountable legislature does achieve its social goals and thus “any concern about the legitimacy of judicial review is greatly diminished”. Hogg and Bushell, supra note 107 at 80. In that sense, their work can be seen as supporting the argument that rather than replacing an accountable institution, what the court does is force the legislature to take a “sober second thought”.
111 Hogg and Bushell do not negate this possibility, but say that the usage of the NM in Canada “has become relatively important”; ibid. at 83. As suggested in the previous note, Hogg and Bushell do not advocate a certain legislative role in response to a judicial decision but rather seek to demonstrate how Canadian legislatures actually behaved, so it is not clear whether they support or object to the usage of the NM.
rejects a judicial reading, it must do so while being informed by the judicial decision. The notion of partnership as a practice stands in contrast, then, to both the notion that the role of the legislature is to clash with the court and with the suggestion that the duty of the legislature is to accept the court’s view. It asks the court and legislature to see themselves working together harmoniously on the project of building a better society in light of the principles of the Constitution. In the next section, I shall elaborate further on this idea. At this point, however, I will discuss why the partnership as a practice is favoured over both the acceptance and clashes models.

It is clear why the acceptance model is rejected by the NIP. The driving force behind the NIP is either the fear of judicial error (expressed by Weiler) or the rejection of the court’s reflection (expressed by Agresto). If the legislature is to accept the court’s view, then there is no need for the NM. But what about the clashes model? If the NIP is aimed at having both courts and legislatures play an active role in constitutional decision making, should they not be encouraged to clash and fight with each other as much and as hard as possible? The answer to this question is connected to the no abuse assumption and to the nature of Canadian government.

The fear of tyranny animates the principle of checks and balances, which in the American system sometimes envisages a clash among the branches of government. Analogizing to another field of law, the branches are not permitted to work together to create an anti-trust limitation, since the consumer – or, in the constitutional situation, the individual – might pay higher prices and get worse products. However, a system of clashes has costs: the political discourse becomes more power-oriented than reason-oriented, since every branch tries to play its cards right rather than to convince others that its view is right. Assuming that a reasoned debate is superior to a power struggle, there is some loss arising out of a clashes system. Still, the system is willing to absorb that loss in order to protect itself from tyranny. This is exactly the point at which the Canadian context differs from the American. In the Canadian context, there is less fear of tyranny so there is no need to pay the price exacted by a clashes system.

In the previous chapter, I found a central ingredient of the discussion of the NIP to be the no abuse assumption. Since, under the no abuse assumption, the NIP puts confidence both in
courts and in legislatures, the need for clashes between the court and the legislature decreases. The system need not therefore pay the price of a power struggle when a reasoned debate is preferable. Thus the NIP's no abuse assumption, which in Chapter 3 seemed to have no theoretical value, offers new prospects for a better quality of public discussion. This is especially true in the Canadian context, because, as was suggested by the advocates of the NIP, Canadian legislatures have long been in charge of rights protection, so that with the advent of the Charter, their obligation to protect rights has become more demanding. Furthermore, even after the adoption of the Charter, the principle of separation of powers – the central principle behind the idea of checks and balances and the idea of clashing branches – is not a formal part of Canadian constitutionalism. Rather, Canada’s system of responsible government does not provide for the separation of the executive and legislative branches.111 Additionally, partnership is a concept appropriate to the Canadian context given the Constitution's “reference” system, through which the Supreme Court or provincial Courts of Appeal deliver advisory opinions to Parliament. In the U.S., such judicial activity exists only at the state level, whereas it is forbidden at the federal level as contradicting the role of the court as a separate branch that should not co-operate with the legislative branch lest it lose its independence.114 In a system where the branches are not so separate from each other at the starting point, the expectation of clashes is a priori lower and the branches’ ability to work in a partnership is a priori higher.

The next section explicates the partnership approach to the NIP. It incorporates both the notion of partnership as a concept and the notion of partnership as a practice. It discusses the partnership as a concept ideas of legislatures as super legislatures and not super courts as well the benefits of judicial review. In addition, the partnership as a practice idea of designing the legislative approach in a “partnership” way will also be examined. Finally, I shall set out some of the practical implications of my suggested model of partnership. Since my model incorporates both the notions of partnership as a concept and the notion of partnership as practice, I will not differentiate between the two in the next section, and will simply refer to “partnership”.

113 See Hogg, supra note 55 at 7.3(a), 7-24-7-26.
C. The Partnership Idea Explicated

1. A Partnership of Respect

If the clashes approach is rejected, then according to the alternative approach, rather than struggling for their own agendas to prevail, courts and legislatures each must do what they can to establish that they are right. By implication, then, courts and legislatures must have respect for at least two things: constitutional values and each other.

Respect for constitutional values entails that the partners remember that the partnership is about interpreting the Constitution. A decision to invoke the NM that is not connected to the constitutional text, but rather is taken because the legislature favors a certain substantive result, is a re-assertion of legislative supremacy. This is exactly what the NIP claims not to be.

The notion of mutual respect between the partners is not intended to imply that the very fact that the legislature has acted is sufficient for the court to accept its action (a phenomenon that sometimes is called deference). Nor should it suggest that once the court strikes down a legislative act, this alone should serve as a reason for the legislature not to override it with the NM. Respect in this context means that the court and the legislature listen to each other, present each other’s views fairly, and, in responding, employ arguments rather than rhetoric. In terms of the court listening to the legislature before striking down an act, the current mechanism of litigation is sufficient. The act is represented in front of the court. The government and other intervenors have a chance to justify its enactment, to argue for its constitutionality, and to respond to questions asked by the court. In addition, the government has a chance to respond formally to arguments put forward by those who claim that the act is unconstitutional. If necessary, all parties can submit social science evidence and expert opinions. The arguments that the impugned legal measures are constitutional are heard, analyzed, and responded to by the judicial reasoning.

While the legislature need not engage in a judicial process in responding to a judicial decision (indeed, I rejected the argument from judicial error exactly because it makes the legislature into a super court), its decision to re-enact legislation that has been struck down must be informed by the judicial decision. This is required according to the approaches of both Weiler

114 See Gunther, supra note 55 at 1593-96.
and Agresto. For Weiler’s argument from judicial error, this requirement is obvious given that before the legislature can view a judicial decision as being wrong, it must know what the decision says. According to Agresto’s account – with the court as national deliberator and legislative finality as a means of popular acceptance or rejection of the court’s deliberation – there is a need for this deliberation to be heard. According to both accounts, then, the legislators must have read the overridden judicial decision in its entirety, and not only its result. Moreover, while discussing it, they must have attempted to address the decision’s merits and had a principled discussion, rather than a discussion about power.

These requirements are obviously difficult to explicate. There are many ways to design legislative procedures with the aim of enhancing the seriousness of legislative debate. Traditionally, these have included requirements of absolute majorities or supermajorities, quorums, multiple readings in the passage of acts and express declarations. Indeed, some of these requirements have already been adopted, or have been proposed for adoption, into the Canadian and Israeli NMs.115 One can also conceive of less traditional requirements, including the periodic expiration set out in ss. 33 and 8, or the two enactment requirement originally proposed by Weiler.116 Also less traditional is the requirement of a preamble declaration in the overriding act setting out the specific views of the legislature that led to the override decision. Other new types of requirements can be also conceived of, such as that discussion in the legislature take place more than once, and so on. In Chapter 5, where I deal with the practice of the NM, I will analyze the legislative discussion that occurred during the only incident thus far in which the Canadian NM has been used in response to a judicial decision: Quebec’s Bill 178. In this specific context, I will examine the requirements of respect and seriousness.

Obviously, the legislature cannot decide to invoke the NM before it listens to the court: in the framework of the NIP, the court’s decision is the beginning of a process of decision making. If, prior to the court’s decision, the legislature announced that it would use the NM if the court did not “get it right this time”, the judicial effort would be rendered unnecessary; a lack of respect for the court by the legislature would thus be demonstrated. Moreover, such an approach

115 Express declaration is required by both s. 33 and s. 8. absolute majority is required by s. 8, and the super majority requirement was offered by Manfredi and by Lougheed. See Chapter 2, Section 3(C), above.
116 See Chapter 3, Section 2(F), above
creates an atmosphere of a court working under threat: with the court aware that it must come to a certain result, or else have its decision overridden, judicial independence is abridged.

Finally, the legislature must respect the court in the way in which it presents the court's decisions. When legislators (or scholars, or the public) respond to a judicial decision, the representation of the decision in their own language should be fair. Fair representation is especially appropriate with respect to the concept of partnership, under which the court is not conceived of as an enemy to attack, but rather as a partner in the democratic decision making process.

2. A Partnership of Benefit

Should the legislature delay using the NM until the highest court in the system approves the nullification of an act, or can it be invoked as early as the initial nullification by a lower court? At the root of the dilemma is the NIP's insistence that the court speak first and that it be impossible to immunize an act from judicial scrutiny — thereby muzzling the court — because there is virtue in enabling the court to speak first. However, once a court's voice is heard, must the legislature wait until the highest court speaks?

Greschner and Norman write that the idea of respect means not only that the NM should be used after a judicial decision has been delivered, but also that it could not be used until all appeal avenues have been exhausted with respect to an impugned status. ...If a legislature could re-enact a statute with an override after a negative lower court decision, without launching an appeal ... it would not be showing respect for the judicial process.

However, the notion of respect for the judicial process might be exactly the reason why the legislature should not wait for the highest court's decision. If the legislature plans to invoke the NM anyway, it may in fact be more respectful towards the courts to avoid letting the higher courts waste their time. A better argument in favour of waiting until the highest court issues its

117 By the highest court, I mean the highest court possible. In cases where the parties do not have a right to appeal to the highest court but only to one higher court (or in cases where such a right of appeal is discretionary and has been denied to the government), then the highest court would mean any higher court.

118 Greschner and Norman, supra note 54 at 193. To the same effect, see P. Lougheed, "Why a Notwithstanding Clause?" (The Inaugural Merv Leitch Q.C. Memorial Lecture, delivered at the University of Calgary, November 20, 1991) reprinted in (1998) 6 Points of View 1 at 17-18; Manfredi, supra note 5 at 208-209.
decision, however, is the notion of a partnership of benefit, which seeks to make the best use of the legislative-judicial partnership.

The reason for the NIP's interest in the major judicial contribution to the endeavour of constitutional interpretation is the acknowledgment, in accommodating this contribution, that there is virtue in enabling "courts to be courts and legislatures, legislatures". For the individual court, part of what it means "to be a court" is being surrounded and supported by the judicial system in its normal function. This normal function assumes a dynamic of progress and conversation within the judiciary. Cases start their journey at one court, move to another and sometimes go even further. They may also be sent back to a lower court or to a different court, as the dynamic of progress and conversation continues. The issues at stake are touched and shaped by different hands. It is only when a case reaches its final stop within the judiciary that it can be said that the contribution of the court system has been exhausted. Because the legislature must hear the judicial voice before it decides how to deal with a constitutional issue - a premise of the NIP - it should wait until the judiciary finishes its internal job.

While a legislature that waits for the highest court to speak acknowledges the virtue of enabling the judiciary as a whole to finish its job before its decision is reviewed, this is so not only due to the internal needs of the judicial system but also as a result of the court-legislature relationship.

The argument for using the NM immediately, rather than waiting for the highest court's decision, assumes that the higher court will either approve the lower court's decision or reject it, and that it is more efficient simply to use the NM immediately. This is because if the higher court approves the decision, then the NM will be used to override it, and if the higher court overrules the lower court's decision, then there will be no need to invoke the NM. In either case, the final result will be that the lower court's decision does not stand. However, part of the internal dynamic within the judiciary is the higher court's option to choose a third route: that of changing the lower court's decision. The legislature might be happy with the change, such that invocation

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119 Weinrib, supra note 6 at 568.
of the NM will be unnecessary. Consider, for example, the *Vriend* decision.\(^\text{121}\) In that case, the failure of the Alberta *Human Rights, Citizenship and Multiculturalism Act*\(^\text{122}\) to include sexual orientation as a prohibited ground of discrimination in the private sector was held to be unconstitutional. The Supreme Court read sexual orientation into the act and the Alberta government reacted negatively to this decision.\(^\text{123}\) Suppose now that this decision had been handed down by the Alberta Court of Appeal and not by the Supreme Court. Suppose further that the Alberta legislative Assembly was considering using the NM before any Supreme Court ruling on the grounds that since the Assembly will insist that sexual orientation not be protected in Alberta, and is willing to use the NM for this purpose, there is no point in waiting for the Supreme Court’s decision. Such a legislative position would not have taken into account the fact it was also open to the Supreme Court to, for example, strike down the relevant provision in the act without reading in sexual orientation. This decision would have been neither an adoption nor a rejection of the Court of Appeal’s decision. Rather, it would have been a change in the lower court’s decision which would have eliminated the need to use the NM.

Moreover, the internal dynamic of the judiciary can produce, at higher levels, different reasoning in reaching the same result of the lower courts. These different reasons may convince the legislature that it should not invoke the NM. This is true both from the perspective of Weiler’s argument from judicial error and Agresto’s deliberative judicial role. In terms of the argument from judicial error, it is possible that the higher court would articulate the decision in different language in such a way that the mistake of a lower court is bypassed. In terms of the court’s role as a national deliberator, there is no doubt that the decisions of the higher courts would supply the legislature with an additional source for reflection and deliberation.

The final reason for waiting until the highest court rules relates to the public. First, since the role of the court is to serve as a deliberator for the people and not only to the legislature, the public deserves the best deliberative product, which is likely to be created only when the judicial system as a whole has had the opportunity to act.\(^\text{124}\) Indeed, the no abuse assumption suggests that

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\(^{123}\) The NM was not used after *Vriend*. See Chapter 5, Section 6(D), below.

\(^{124}\) See also Greschner and Norman, *supra* note 54 at 191; J.L. Hiebert, *Limiting Rights - The Dilemma of Judicial Review* (Montreal & Kingston: McGill Queens University Press, 1996) at 142-144; J. Hiebert, *supra* note 109 at 31-
if the legislature does not restrain itself from abusing the mechanism, the public might respond negatively. For this purpose also, the public should receive the best judicial deliberation it can receive. Finally, overriding the highest court’s decision is likely to be more politically difficult than overriding a lower court decision, given the greater prestige of the highest court. If the legislature wishes to use the NM, it should be ready to pay the political price associated not only with overriding a court decision, but also with overriding the decision of the most prestigious court.\footnote{33} 

While the benefit of partnership argues in favour of waiting for the highest court to rule, in exceptional circumstances where a lower court decision results in substantive damage to social interests, it can be appropriate to use the NM in response to the lower court decision. For example, suppose a legislature enacts legislation prescribing a maximum wait of one year between the filing of a charge and the beginning of a criminal trial. The court in this example might find the period to be too long in light of the requirement of s. 11(b) of the \textit{Charter} that a trial be held “within a reasonable time”. Suppose, further, that the court reduces the waiting period to 8 months.\footnote{126} Even if the highest court later decides to overrule the decision, its negative effects cannot be repaired: why should the resulting damage be incurred by society? Arguably, the damage consideration can be extended further – from allowing the use of the NM after a court speaks to allowing it even prior to any judicial consideration. Consider the following example. Following a foreign crisis, tens of thousands of refugees are seen sailing towards Canadian waters. Suppose there is no case law regarding the right of a refugee to have his claim heard.\footnote{127} Fearing huge expense and the paralysis of the Canadian immigration department, Parliament wishes to ensure that hearings are not necessary. Parliament does not trust the

\footnote{33} Hiebert’s argument, like Greschner and Norman’s, focuses on the need for public debate prior to the use of the NM and the potential of a judicial decision to improve such a debate. Their analysis does not focus on the role of the Supreme Court in such a discussion.

\footnote{126} This argument is especially strong in a federal system in which, prior to a judicial decision, a court in jurisdiction A might strike down an act that was upheld in jurisdiction B. In such a case, the legislature which invokes the NM can support its position by resorting to the ruling in the other jurisdiction according to which the act is actually constitutional. After the Supreme Court rules that the act is unconstitutional, this line of argument is weakened (although it still exists since the act was upheld by at least one court).

\footnote{127} This example is based on \textit{Askov v. The Queen}. [1990] 2 S.C.R 1199, which is discussed in Chapter 6, Section 5, below. In \textit{Askov}, however, the 8 month formula was prescribed by the court not in the context of striking down legislation, but rather as an interpretation of s. 11(b) of the \textit{Charter} which provides for the right to trial within a reasonable time.
judiciary to understand the extent of the problem, and is therefore worried that the legislation may be found to be unconstitutional. If Parliament waits for a judicial decision, the refugees might already be on Canadian soil, and such legislation would create a public outcry. Why should Parliament not be allowed to use the NM in advance of a court ruling in such a case? The answer is that in such a case, the government should request a court ruling on an urgent basis in order to quickly ascertain the lower court’s view before invoking the NM. The reason for this is that while for the partnership model, the need for an issue to be examined by the judiciary as a whole is not absolute, the need for the issue to be examined by a court is. The advantages that the judicial process has over the legislative process — arguments, parties, evidence, lack of accountability — all produce qualitative differences between the ways in which legislatures and courts make decisions. If an act that potentially violates rights is immunized from judicial scrutiny altogether, a quality will be absent from the partnership-oriented rights protection. In contrast, if an act is examined by a court, but is thereafter prevented from further consideration in additional courts, what is missing from the partnership-oriented rights protection is more judicial consideration. Thus what would be missing is more quantity. Indeed, the examination of social evidence, which is a crucial component of rulings on the justification of limits on rights for the sake of preventing damage, is normally done in the lower courts. The quantity associated with a further court deciding an issue can be sacrificed to prevent damage: the quality of having a judicial eye examining the issue cannot.

3. A Partnership of Last Resort

The previous section dealt with one situation in which the legislature would like to use a NM instead of following other possible routes, as a means of saving time and money on litigation and avoiding damage to social interests. In the previous section, this avenue was an appeal. The present section deals with situations where the alternative avenue is enacting an ordinary act without using the NM. Consider these three examples: 1) The highest court strikes down an act. The legislature is interested in enacting an act that seems a priori to be unconstitutional based on the court’s decision that struck down the old act. The legislature is nevertheless very interested in

the act. Should it wait until the new act is reviewed by the court — now we can say by the highest court — only to then re-enact it with a NM, or should it enact it immediately with a NM? 2) The highest court strikes down an act, ruling that the social evidence that was introduced to the court does not satisfy the *Oakes* requirements. Some years later, new social science evidence is created, and the government believes that this evidence does satisfy the *Oakes* requirements. Should the legislature enact this act as an ordinary act, without a notwithstanding declaration, making it possible for the court to examine the new evidence, or, since it believes the social science evidence would make the court change its mind, re-enact the act as a notwithstanding act, to save time and money on litigation? 3) The highest court creates a common law rule, based on a certain interpretation of the Constitution. The legislature wants to enact an act that clearly contradicts this common law rule. Should it enact an ordinary act contradicting the common law rule and then only if the court — again the highest court — strikes it down, re-enact it with a notwithstanding declaration? Or should it enact an act that contradicts the common law rule, as a notwithstanding act, without waiting to see whether the court will strike it down?

Let me start with the last situation. The *Daviault* case is an example of such a situation. In this decision, a majority of the Supreme Court ruled that the common law rule according to which intoxication — even self induced — was not a defense to general intent crimes, violated sections 7 and 11(d) of the *Charter*. Even crimes of general intent require a minimal mental element. Substituting self-induced intoxication for this requirement infringes on the s. 7 right to life, liberty and security, is not in accordance with principles of fundamental justice, and infringes s. 11(d)’s presumption of innocence. This infringement could not be justified under s. 1. Consequently, the court changed the common law rule, and allowed that extreme drunkenness could be a defense to the general intent crime of sexual assault. The dissent upheld the common law rule, and suggested that what caused the accused’s drunkenness was “his own blameworthy conduct”. Following a public outcry, Parliament amended the *Criminal Code*.  

128 And most lower court decisions are upheld by higher courts.
129 See Chapter 3, Section 5(B), above.
133 *Ibid.* at 115-132. The quote is at 121.
making the common law rule a statutory rule. and adopting the dissent in the case. Bill C-72 amended the \textit{Criminal Code} and stated that "[I]t is not a defence ... that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence".\(^{135}\) For the purpose of our discussion. let us assume that \textit{Daviault} was indeed wrong. Was Parliament right not to use the NM as a means of preventing judicial review of this \textit{Criminal Code} amendment? The formula set out in the previous section does not give a full answer to this dilemma. On the one hand. this formula requires that the court speak first. No court has ever ruled on the validity of this new act which overrode the judicial decision. Therefore. the legislature should first enact the new act as an ordinary act. and if the court – the highest court – strikes that act down. the legislature should look at the court’s reasoning. and decide whether it wants to override it. On the other hand. in overriding \textit{Daviault}. what Parliament would want to say is not: "we do not like the result of \textit{Daviault}". but rather "we think that the common law rule that self induced intoxication is not a defense to general intent crimes does not violate section 7". Regarding this finding. the Supreme Court has already ruled. In other words. since this response was. as Kent Roach put it. an “in your face response”. the government should have invoked the NM even in order to protect legislation that was never struck down.\(^{136}\) Using the NM. as others put it. would be “straightforward”.\(^{137}\) “symbolic”.\(^{138}\) “honest”.\(^{139}\) and “quicker”.\(^{140}\)

The answer to this problem is that under the NIP. the legislature is not a super court. It does not possess the power to override judicial decisions – thus making it a court higher even than the highest court – whenever it believes that the court’s interpretation is wrong. Its power under the partnership model is limited to those situations where the court’s decision stops it from achieving its goal. This power is therefore exercised through re-enactment of acts. and not


\(^{136}\) K. Roach. “Editorial - When Should the Section 33 Override be Used?”. (1999) 42 C.L.Q. 1 at 2; K. Roach. “Judicial Activism” (paper presented to the Constitutional Roundtable at the Faculty of Law. University of Toronto. December 15. 1999) [on file with the author].


\(^{138}\) T. Williams. \textit{ibid}.

\(^{139}\) A. Young. \textit{ibid}.

\(^{140}\) \textit{ibid}.
through issuing declarations overruling judicial decisions. Consequently, for the operation of the NM, it is not enough that the highest court has ruled: this ruling has to involve the striking down of an act, such that the NM is used as a means of re-enactment and not as a means of overruling. Furthermore, supporting the use of the NM in a response to a judicial decision that did not strike down an act assumes that once the newly enacted act comes in front of the courts, the courts will strike it down. But this is not necessarily the case. The amendment to the Criminal Code created by Bill C-72, which contradicted Daviault, was indeed upheld by the British Columbia Supreme Court.\textsuperscript{141} In addition, the Supreme Court decision in \textit{R. v. Mills}\textsuperscript{142} upheld legislation that clearly contradicted its decision in \textit{R. v. O’Connor}.\textsuperscript{143} by practically adopting the dissent in that decision.

The conclusion that the NM ought only to be used as a response to the striking down of an act, can be reached via another line of reasoning. According to the partnership approach, invocation of the NM is an exception\textsuperscript{144} the nature of which increases legislative and public awareness, as well as provoking a discussion of such invocation. The rule, for this approach, should be that court decisions are adhered to, thus avoiding using the mechanism unless necessary.\textsuperscript{145} This formula addresses the concern – also introduced at the beginning of this section – that the legislature should not be using the NM to protect legislation from judicial review when that legislation is similar to legislation that has been struck down in the past.\textsuperscript{146}

\textsuperscript{142} File no. 26358, delivered on November 25, 1999.
\textsuperscript{143} [1995] 4 S.C.R 411.
\textsuperscript{144} Compare to the meaning of “exception” in Weinri’s analysis, at Section 2, above.
\textsuperscript{145} Don Stuart said that the NM should be used as little as possible because otherwise the government “will have to use it every time there is a Court Charter decision, and that is 50 times a year”. D. Stuart in “Roundtable III”, \textit{supra} note 137 at 310.
\textsuperscript{146} This argument is slightly different from the one offered by Greschner and Norman against the pre-emptive use of the NM when a similar act is struck down. After introducing the structure of Charter scrutiny they suggest that “[I]t is difficult to imagine a case in which every Charter issue is on all fours with a case already decided... Truly identical cases can be anticipated to be so rare that [their approach] is justified in enunciating [...] that the statute first be subject to judicial review”. Greschner and Norman, \textit{supra} note 54 at 193-194. My point here is that even if it is clear that two cases are “truly identical”, the legislature should use the NM before a judicial decision, since the NM should not be used unless there is no other choice.

Arguably, there is another way to reach this conclusion with regard to this example. In both the similar act example and the common law rule example, the legislature cannot know that the court is going to strike down the act it wishes to enact. Rather, it has reasonable grounds to believe so, because the act it wishes to enact is very similar to a measure (an old act or a common law rule) that was struck down by the court in the near or distant past. The question of whether two pieces of legislation are identical enough is a purely legal question. If we let the legislature base its actions – in this case, of using the NM without waiting for the court – on answering this question, we in effect turn the legislature into a body that decides question of legal interpretation. We also in effect turn it into
Requiring that the NM be used only if the legislature has no other choice has two other implications. First, when the legislature disagrees with the court's finding that a piece of legislation violates the Constitution, it has the option of re-enacting the act with a notwithstanding declaration. However, where it could achieve the goals of the original act by enacting a different act that would be constitutional according to the court's decision, the legislature should avoid using the NM. As Hogg and Bushell have suggested, this option is frequently available to legislatures. with the implication that in a partnership-oriented rights protection system, we should expect the NM to be used infrequently.

The other implication pertains to the exception to the requirement that the NM be used only after the highest court has ruled on the issue - an exception which I suggested in the last section. I argued that in cases where exceptional damage might be inflicted if the legislature waits for the highest court to rule, the legislature should be able to override the lower court's decision. However, based on the discussion in this section, before the legislature does that it must file an appeal of the lower court decision and must ask the courts for a stay of execution until the appeal is heard. Only if this request is refused is it justified in invoking the NM. 

7. Conclusion: From a Canadian NM to A Partnership Oriented NIP

This work's theoretical journey began at the end of Chapter 2. There I presented the three theoretical approaches to the Canadian NM: Weiler's check on judicial error approach, Weinrib's exceptions approach, and Slattery's intermediate approach. These themes were discussed in terms of the specificities of the Canadian NM as well with reference to the broader idea of judicial review with legislative finality.

The first element of this discussion was a departure from the view that the NM represents a compromise between rigid constitutionalism and no constitutionalism. It was argued that this means that the NM is a remnant of legislative supremacy. I explained that the different theories of the NM are based on the view that legislative finality is conceived to be a form of a super court, which is at odds with the idea of partnership. This argument, however, is not strong, since legislatures constantly engage in interpretation of the Constitution and interpretation of judicial decisions. Indeed, the partnership model expects legislatures to adhere to judicial decisions as a general rule, and such adherence requires application and interpretation.

Hogg and Bushell, supra note 107.
constitutional supremacy, not of legislative supremacy. This concept is the New Institutional Paradigm, whereby the legislature is the final interpreter of the Constitution. This is different from a legislative supremacy regime where the legislature does not engage in interpreting the Constitution, and its power has nothing to do with normativity whatsoever.

The NIP was further divided into two main concepts. While both accept that while using the NM, the legislature offers its own reading of the Constitution, they differ with regard to what the roles of the court and the legislature are under the Constitution. Weiler's check on judicial error approach holds that the legislature corrects judicial errors. Weinrib's partnership approach says that the legislature does not operate as a super court. After incorporating Agresto's approach, the analysis suggested that the courts and the legislature had different roles under a NM bearing Constitution which were, respectively, deliberation and decision. The courts are the national deliberators, and hence there is judicial review. The legislatures are the decision makers, and hence there is legislative finality.

An argument made in this chapter was that the idea of partnership can be extended from justification of the NM to its operation. Thus, even if one justifies the NIP on the basis of the argument from judicial error, and not on the basis of partnership, there is still a reason for talking about legislative supervision of the court in a partnership way. I called this idea "the partnership as a practice". Appropriately, in his discussion of the argument from judicial error, which is not a partnership based argument but rather a supervision based argument. Russell suggests it should be "properly used". He also cites Weinrib's assertion that it should be used through "reasoned and focused debate by the people's representatives". Fitting with these ideas, the model of partnership developed at the end of this chapter combined the notions of partnership as a concept and partnership as a practice, and suggested that operating the NM should be based on respect for the court, on benefiting from what the court has to offer and on keeping the NM as a last resort.

My partnership model has definitely not been adopted by the constitutions of Canada and Israel. They require nothing of what I understand to be respect for the court. Moreover, because both constitutions enable the legislature to immunize an act from judicial review even prior to

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148 See Greschner and Norman, supra note 54 at 193.
149 Russell, supra note 3 at 299.
150 Ibid. The citation is from Weinrib, supra note 6 at 570.
enactment without any judicial decision involved, they do not bother mentioning the need to read the case. Nor do they provide for a waiting period until the highest court rules. for the use of the NM only in the context of the nullification of an act. or for its use as a last resort. Rather, the requirements of respect, benefit and last resort are normative: they reflect what the NIP should require. I shall therefore refer to what these requirements represent as a "partnership oriented NIP".

The discussion in this and the previous chapter was not tightly connected to the story of the Canadian NM. While it created a theoretical Canadian institution rooted in the Canadian context, it did not tell the real story of the use of the NM in Canada. The different themes that were analyzed from a theoretical perspective in this and the previous chapter will be examined in the next two chapters in light of the practice of the NM in Canada. Chapter 5 discusses the actual practice of the NM – i.e., the occasions when it was actually employed, or in which its usage was discussed but not followed through with. Chapter 6 will then closely examine four judicial decisions which were identified in the literature as worthy of being overridden with the NM.
Chapter 5

The Notwithstanding Mechanism in Practice

1. Introduction: The Practice of S. 33 and the Practice of the NIP

The practice of the NM includes 16 pieces of legislation. First, it includes the Quebec Act respecting the Constitution Act, 1982, which was already discussed in Chapter 2 and therefore will not be discussed in this chapter. In addition to this act, notwithstanding declarations have been included in a total of 14 acts passed by governments in the Yukon, Saskatchewan, and Quebec and in one bill introduced in Alberta but later withdrawn. The subject matter of these 15 pieces of legislation was varied and included matters of land planning, labour relations, pension plans, education, agricultural operations, language policy, and compensation for victims of forced sterilization.

The purpose of this chapter is not to offer a complete account of these pieces of legislation. Rather, it is to examine their stories in light of the ideas and arguments discussed in the previous chapters. To aid this discussion, I will now summarize the main themes introduced in Chapters 2, 3 and 4: the Notwithstanding Mechanism (NM), the New Institutional Paradigm (NIP), the idea of a check on judicial error, and the idea of a partnership between courts and legislatures.

Chapter 2 discussed s. 33 of the Charter. This provision provides for a NM under which legislatures can deviate from the constitutional order by overriding constitutional rights. S. 33 was created as a result of a political compromise between legislative supremacy and constitutional rights protection, and the initial understanding of the NM, discussed in Chapter 2, was that a NM bearing Constitution was indeed such a compromise, making it impossible to explain the mechanism in terms of constitutional theory. Chapters 3 and 4 departed from the compromise understanding and introduced the NIP, according to which the idea of the NM is to establish a system of judicial review with legislative finality. Unlike the compromise

1 Act respecting the Constitution Act, S. Q. 1982 c. 21.
2 Chapter 2, Section 3(B), above.
understanding, the NIP makes it possible to explain the NM in terms of constitutional theory, since rather than compromising constitutional supremacy, the NM creates a system which enables legislative participation in the interpretation of the Constitution.

The NIP appears in two forms - the concept of a check on judicial error and the concept of partnership. Chapter 3 introduced the check on judicial error approach, represented by the writings of Paul Weiler. His view is that the NM is needed in order to enable legislatures to correct judicial errors. According to this approach, the role of the legislature in using the NM is to supervise the court, just as in judicial review, the court supervises the legislature. Chapter 4 introduced the partnership approach of the NIP which is represented by the writings of Lorraine Weinrib and John Agresto. According to this model, the roles of the court and the legislature under the Constitution are not to supervise each other. Rather, there is a division of labour with the court's role being to deliberate on the meaning of the Constitution while the legislature's role is to ultimately decide on this meaning. My approach to the NM incorporates elements of both models. According to my view, when the legislature invokes the NM, it is not operating as a super court. I also encourage the view that the NM should only be invoked in a remedial fashion following a judicial decision. In addition, I introduced the idea of partnership as a practice according to which even if one adopts the check on judicial error approach, the NM can be utilized in a partnership oriented way.

In addition to the theoretical difference, there is an important practical difference between the compromise approach to the NM and the NIP. The compromise approach makes it possible for the legislature to invoke the NM even prior to a judicial decision. The NIP, in contrast, holds that only remedial uses of the NM are legitimate. This is the case for both the check on judicial error approach and the partnership approach. For the check on judicial error approach, the legislature can correct a judicial error only after the court has delivered a decision and made an error. For the partnership approach, the legislature can decide if it accepts or rejects the court's deliberation only after the court has deliberated in a judicial decision. Because of this difference between the compromise approach and the NIP, it is meaningful to talk about two practices. The practice of s. 33 includes all of the 15 instances where pieces of legislation sought to invoke the NM. Within the practice of s. 33, however, there is the practice of the NIP, which includes 2 of these 15 cases, and in which the use of the NM was undertaken in response to a judicial decision.
The following three sections of this chapter adopt this distinction between the practice of s. 33 and the practice of the NIP. After Section 2 introduces all 15 pieces of legislation which included notwithstanding declarations. Section 3 will examine these pieces from the perspective of the compromise approach and will deal with the practice of s. 33. Section 4 will examine the two pieces of legislation which were enacted in response to judicial decisions and thus will discuss the practice of the NIP.

The examination of both the practice of s. 33 and of the practice of the NIP revolves around the notions of reliability and accountability. Whether the NM is compromise based or NIP based, one must address the potential threat that the legislature will abuse the NM. In Chapter 3, I introduced "the no abuse assumption", according to which legislatures can be trusted not to engage in such abuse. This assumption holds that the legislature can be relied upon not to abuse the NM either because of a self-reluctance to use the mechanism or out of a fear of the public's wrath, that is, because of accountability considerations. But what is an "abuse" of the mechanism? The answer to this question is not the same for the compromise approach and for the NIP.

Section 3 deals with the practice of s. 33 and examines it from the perspective of the compromise approach, and it therefore starts by inquiring into what constitutes the "abuse" of the NM according to the compromise approach. After suggesting that abuse, according to this approach, occurs when the NM is used to protect tyrannical legislation. I argue that none of the uses of the NM in Canada have been tyrannical, even if they sometimes legitimized unjustified violations of rights. The only case where a possibly tyrannical use of the NM was imminent was when the Alberta government tabled a bill that limited the rights of victims of forced sterilization to sue for compensation. However, in this case, the people of Alberta protested and the government withdrew the bill.

Of the 15 pieces of legislation which are examples of the practice of s. 33, the Alberta sterilization bill is the only one which provoked such a negative public response that it was never enacted. There were two other notwithstanding acts, however, which also provoked a public response. One was the use of the NM in Saskatchewan in a law which forced workers back to

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1 See Chapter 3, Section 2(E), above.
work and which provoked a mild public condemnation. The other was the Quebec government's use of the NM after the Ford decision in order to re-enact some of the legislative provisions which had been struck down. This use of the NM provoked a harsh condemnation of the government by Quebec's anglophone population and from much of the rest of Canada in addition to criticism from the U.N.'s Human Rights Committee. Thus three of the 15 uses of the NM - the Alberta sterilization bill, the Saskatchewan back to work law, and the Quebec sign law - provoked a public response. However, the other 12 pieces of legislation which invoked the NM were totally ignored by the media and by the public. The analysis in Section 4 will show how the public outrage regarding the Alberta sterilization bill was perhaps exaggerated while the public's ignorance of the other 12 pieces of legislation was perhaps unjustified. The analysis will examine why some uses of the NM were ignored while others provoked such intense public responses. It will suggest that a judicial decision prior to the use of the NM can influence public opinion such that no use of the NM is ignored and any discussion about its use is more informed.

Section 4 moves from the practice of s. 33 to the practice of the NIP. It focuses on the two cases where the NM was used because of a court decision - the Saskatchewan back to work law and the Quebec sign law. The Saskatchewan back to work law invoked the NM because of fears that a prior judicial decision by the Saskatchewan Court of Appeal had rendered its back to work policy unconstitutional. The Quebec sign law was made to include the NM since some of its provisions contradicted the Ford decision. Since Section 4 of this chapter focuses on the NIP and not on the compromise approach, the definition of the "abuse" of the NM that it employs is broader than the definition adopted in Section 3. According to this latter definition, an abuse of the NM occurs whenever the NM is used to protect tyrannical legislation. The NIP, however, requires more than the absence of a tyrannical piece of legislation for a use of the NM to be judged appropriate. It requires that the NM only be used in response to a judicial error (the check on judicial error approach) or as a rejection of a court's deliberation concerning a given issue (the partnership approach). Analyzing the legislative debates prior to the adoption of the back to work law and the sign law reveals that the Saskatchewan and Quebec legislatures did not follow the

*Supra note 4.
Rather than pointing out an error in the judicial decision they overrode or demonstrating that their decisions had been informed by the court's deliberation, they simply discussed political needs: the need to end a strike or the need to balance anglophone and francophone interests.

Section 5 will build on the analysis in Sections 3 and 4 and discuss how accountability considerations influence the legislative reluctance to use the NM. It will first look at the two occasions where the use or proposed use of the NM had clear and negative political consequences. These were the sign law, which resulted in crises within Quebec and between Quebec and the rest of Canada, and the Alberta sterilization bill, which resulted in such fierce public anger that the government was forced to change its legislative plans. It will ask what was it that made the public condemn its legislators? Was it the very use of the NM? Was it the content of the policies which the use of the NM was meant to further? Or was it the way in which the decision to invoke the NM was taken? Section 5 will conclude that it is impossible to isolate any one of these factors as being decisive. In other words, these incidents only provide evidence of the public condemnation of the use of the NM in situations where the public also objected to the policy being promoted by the use of the NM. The public cannot be trusted to stop the legislature from abusing the NM where it actually supports the policy the NM protects. Nevertheless, the concluding part of Section 5 will show that as a result of the sterilization bill fiasco in Alberta, the government refrained from using the NM after the Supreme Court read in sexual orientation as a prohibited ground of discrimination in Alberta's anti-discrimination legislation. This reluctance to use the NM demonstrates that the political cost of using the NM can be high even when the public supports the policy protected by the NM. Other cases where governments have refrained from using the NM as a response to judicial decisions support this conclusion.

2. The 15 Examined Pieces of Legislation

Only three provinces and one territory have included notwithstanding declarations in their legislation. The NM was invoked in a total of 14 acts and one bill. Of the 14 acts, 12 were passed in Quebec, one in Saskatchewan, and one in the Yukon. The bill in question was introduced, but later withdrawn, by the government of Alberta. The other 7 provinces and 2 territories, as well as
the federal Parliament, have never included a notwithstanding declaration in an act or a governmental bill.\textsuperscript{7}

Table 1 in appendix 2 to this work describes the main features of these 15 pieces of legislation. The 12 uses in Quebec can be divided into four groups, based upon the four subject matters they dealt with: pension plans, education, agricultural operations, and the French language. The first four of the 12 acts (acts no. 1-4 in the table) dealt with pension plans. The Quebec government was concerned that some provisions which treated men and women differently, as well as provisions which restricted pension eligibility to only certain kinds of employees,\textsuperscript{4} were potential violations of the Charter's equality rights.\textsuperscript{6} In the second group (acts no. 5-10), are six acts which dealt with education. The need to use the NM arose out of the status, in terms of appointments and the character of educational institutions, which these acts accorded to certain "religious confessions" or "religious denominations". These acts were seen as possible

\textsuperscript{7} This statement is based on information I received from provincial or territorial officials in the various Ministries of Justice or Ministries of the Attorney General.

\textsuperscript{8} The Act Respecting the Teachers Pension Plan (act no. 3) sets out (at ss. 32 and 51) differential pension eligibility requirements for male and female teachers, thereby potentially offending the equality provisions of the Canadian Charter and the Quebec Charter of Human Rights and Freedoms (R.S.Q. c. C-12). Male teachers may generally receive benefits at age 65, as compared with pension eligibility at age 60 for female teachers. Alternatively, after 10 years of teaching service, minimum ages for pension eligibility are 62 and 58 for male and female teachers, respectively. In addition, act no. 3 potentially violates the Quebec and Canadian Charters through its incorporation (at s. 28) of the pension eligibility distinctions of Part VIII of the Education Act, R.S.Q. 1964 c. 235 which date back to 1941. Part VIII of the Education Act provided (at s. 519) for pension benefits to accrue after 20 years of service, with male teachers becoming eligible at age 60, in contrast with female eligibility at age 56.

Like act no. 3, act no. 4, the Act Respecting the Civil Service Superannuation Plan may violate ss. 10 and 15 of the Quebec and Canadian Charters respectively, in that its pension requirements for male civil servants are different than those for female employees. Benefits may be paid to male civil servants who reach the age of 62 after at least 10 years of service. In contrast, the minimum age for female workers is 60. Deferred benefits may be paid to males at age 65, in comparison with a minimum age of 60 for females under the pension plan created by the act.

The notwithstanding declaration contained in the Act Respecting the Pension Plan of Certain Teachers (act no. 1) applies to all of the provisions of the act, many of which may violate ss. 10 and 15 of the Quebec and Canadian Charters respectively. The act sets out (at s. 19) different pension eligibility requirements for males and females. Several other sections refer to, and incorporate, the pension eligibility criteria of acts no. 3 and 4, and are thus potentially open to Charter equality challenges on the basis of the gender distinctions regarding eligibility which are set out in these acts.

Finally, the Act Respecting the government and Public Employees Retirement Plan (act no. 2) may be the subject of Quebec and Canadian Charter equality challenges in that the act provides (at ss. 98 and 115.4) for pension payments on the basis of the pension plans established in acts no. 3 and 4, which themselves potentially contain Charter violations.

\textsuperscript{6} I use the term "violation" of a right to indicate a limit on a right that is not justified according to the limitation clause.
violations of the Charter rights to equality and freedom of religion. One of the 12 uses of the NM (act no. 11) dealt with the development of the agricultural sector in Quebec. Here, the problem was with the eligibility criteria for government grants to assist in the buying or leasing of new farms. The criteria included age restrictions which were thought to be potential violations of the Charter's equality rights. Lastly, the NM was used in the Charter of the French Language (act no. 12), in order to protect the French only requirement for outdoor signs. This policy was held in the Ford decision to violate the rights to freedom of expression and equality.

The last three pieces of legislation described in Table 1 involve uses of the NM from outside Quebec. In the Yukon territory, the one usage of the NM involved nominations to the Land Planning Board and Committees by the Council for Yukon Indians (act no. 13). Similarly to the second group of notwithstanding acts in Quebec which dealt with matters of education, there was a fear that such nominations would violate equality rights. This single Yukon notwithstanding act, however, was never brought into force despite being enacted in 1982. It has never been consolidated nor repealed. In Saskatchewan, the only invocation of the NM occurred in a "back to work" law (act no. 14). The government acted in order to protect this law from

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10 The first five acts (nos. 5-9) deal with the system of separate Catholic and Protestant education in Quebec and contain similarly worded notwithstanding declarations. Each of these acts contributes distinct elements to the separate educational scheme. Their notwithstanding declarations refer to the provisions of the acts that "grant rights and privileges to religious confessions". The Act Respecting the Conseil Supérieur de l’Éducation (act no. 5) creates the Conseil, and mandates (at s. 2) that its members must be drawn in specific proportions primarily from the Catholic and Protestant communities. In addition, the Education Act for Cree, Inuit and Naskapi Native persons (act no. 6) grants special privileges for the inspection of schools (at s. 23) and the establishment of school boards (at s. 39) by Catholics and Protestants or to officials from these groups. Further, the Act Respecting the Ministère de l’Éducation (act no. 7) mandates that the Minister is to consult with Catholic and Protestant groups (at s. 7) and must uphold and "respect" Quebec’s separate religious educational scheme (at s. 8). As well, the Education Act (act no. 8) confers (at s. 6) special privileges for Catholic or Protestant religious “care and guidance”. The Act Respecting School Elections (act no. 9) grants no explicit rights and privileges to religious “confessions” or denominations. However, the government appears to have anticipated Charter scrutiny of this act, perhaps because this act is generally a component of, and makes reference to, the Quebec separate schooling regime. Finally, the Act Respecting Private Education (act no 10) potentially violates ss. 10 and 15 of the Canadian and Quebec Charters, respectively, by submitting Private School education to the general rules concerning Catholic and Protestant education set out under other notwithstanding education acts described in this note. Act no. 10 incorporates the general rules governing Catholic and Protestant education in provisions such as s. 58, which instructs that the Catholic and Protestant committees should have authority to approve certain educational programs.

11 Ford, supra note 4.

12 This fear might not have been justified due to s. 15(2) of the Charter which allows for affirmative action and s. 25 which states that the Charter’s provisions are not to be construed as limiting the rights of the aboriginal people of Canada.

13 I thank Sydney Horton, Legislative Counsel in the Department of Justice of the Yukon, for this information.
possibly being struck down as a violation of the right to strike.\textsuperscript{14} In Alberta, a notwithstanding declaration was included in a bill which limited the amount of money that victims of forced sterilization by the Alberta government could sue for as compensation (act no. 15). This bill was later withdrawn by the government. Column C in Table 1 shows that only one of the notwithstanding declarations in these 15 pieces of legislation was of an omnibus nature. This was the Alberta sterilization bill (no. 15) which sought to override all available Charter rights. The other 14 declarations referred to specific rights. Thirteen of the fifteen declarations referred to section 15 of the Charter which guarantees equality rights.\textsuperscript{14} The one act which did not refer to equality was the back to work law (no. 14). Six of the declarations, the ones in the education acts (no. 5-10), referred also to section 2(a), which protects freedom of religion. One act, the statute that dealt with the French language (no. 12), referred also to section 2(b), the right to freedom of expression. The one act that did not refer to section 15, the “back to work” act, referred to section 2(d), which guarantees the right to freedom of association. Column D demonstrates that 13 of the 15 declarations referred not only to the Canadian Charter, but also to the relevant provisions of the provincial rights protecting documents.\textsuperscript{16}

\textsuperscript{14} This enactment occurred after the Saskatchewan Court of Appeal struck down a similar law in R\textregistered;WDSU v. Govt. of Sask., supra note 5, and before the Supreme Court of Canada overruled this decision by holding that the right to strike was not protected by the Charter in R\textregistered;WDSU v. Govt. of Sask., [1987] 1 S.C.R 460.

\textsuperscript{15} With the exception of the Yukon notwithstanding act (act no. 15), all the notwithstanding acts were enacted after the equality provision of s. 15 came into force in April 1985 (see s. 32(2) of the Charter).

\textsuperscript{16} The two acts that did not deviate from their respective provincial Bills of Rights were the Quebec act that dealt with the development of Quebec’s agricultural sector (act no. 11) and the one Yukon act (act no. 13). The reason for the omission in the Quebec act is that this act makes a distinction based on age which was potentially discriminatory. However, unlike the Canadian Charter, the Quebec Charter protects against discrimination based on age “except as provided by law” (Quebec Charter of Human Rights and Freedoms, supra note 2 at s. 10). The Yukon notwithstanding act, enacted in 1982, did not deviate from the Yukon’s Human Rights Act since the latter was enacted in 1987 (S.Y. c. 3). Interestingly, the Yukon’s one notwithstanding declaration referred to the Canadian Bill of Rights, R.S.C., c. C-12.3. The drafter probably assumed that since the Yukon is a territory and not a province, it was bound by the Canadian Bill of Rights. In Re Branigan (1986), 26 D.L.R (4th) 268 (Y.T.S.C), the Yukon Territory Supreme Court suggested at 275 that in matters “under the legislative authority of the legislative body of the Yukon Territory”, the Canadian Bill of Rights did not apply.

With respect to the provincial Bills of Rights, it is worthwhile to note the different ways in which the Saskatchewan back to work law (act no. 13) treated the Canadian Charter and the Saskatchewan Human Rights Code, S.S. 1979, c. 24.1. While the notwithstanding declaration in s. 9(1), which refers to the Canadian Charter, refers to s. 2(d) of this Charter, the declaration in s. 9(2), which refers to the provincial Code, states that the “back to work” law “operates notwithstanding The Saskatchewan Human Rights Code, particularly section 6 of that Act”. Section 6 protects the right to freedom of association. Thus with respect to the Canadian Charter, the Saskatchewan legislature was cautious and mentioned only one right. With regard to its own rights protection document, it allowed
Columns E-G demonstrate that 2 of the 15 pieces of legislation never came into effect. The Yukon notwithstanding declaration was enacted but never brought into force and the Alberta notwithstanding bill was withdrawn by the government. Another four declarations were not renewed (acts no. 10-14), while the other 10, which dealt with pension plans and education, were renewed either once, twice or three times. The 4 pension plan acts (no. 1-4) were enacted in 1986, re-enacted in 1991 and 1996, and will expire in 2001. Three of the six education acts were enacted in 1986 (acts no. 5-7), one in 1988 (act no. 8) and one in 1989 (act no. 9). These five were re-enacted in 1988 and 1994: four of them were re-enacted again in 1999 for two years, and will also expire in 2001.

While an omnibus approach was not employed in these cases, it should nevertheless be noted that the Quebec National Assembly has inserted notwithstanding declarations into several acts through the enactment of a single act. This is demonstrated by Table 2, in appendix 1 to this work. The four notwithstanding declarations in the four pension plan acts were always dealt with through a single act. They were enacted by a single act in 1986, re-enacted by a single act in 1991, and re-enacted yet again by a single act in 1996. The same is the case with five of the six education acts. Three of them were enacted by the same act in 1986 and these three were then re-enacted by one act in 1988, which also enacted a fourth one of them. These four acts were then re-enacted in 1994 in one act. This 1994 act also re-enacted the fifth of the education acts which had been enacted by itself in 1989. Four of these five were re-enacted again by a single act in 1999. Table 2 demonstrates that with reference to the pension plan acts, the Quebec National Assembly enacted 12 notwithstanding declarations by way of 3 acts. With respect to the education acts, it enacted 17 notwithstanding declarations by way of 5 acts. This technique of itself to use more general language, and to immunize the act from any possible violation of other provisions in the Human Rights Code. Admittedly, the language of "particularly section 6" is strange, and reads like a sweeping clause in a private contract and not like a prudently drafted legislative provision. Once the whole Human Right Code is mentioned in the notwithstanding declaration, there is no need to mention s. 6, and the concept of particularity in this context is meaningless.

There is another way in which the language of the notwithstanding declaration in the back to work law (act no. 14) is unique. Unlike the other 14 pieces of legislation, its drafters were not satisfied with specifying a Charter section. Rather, they referred to "the freedom of association in paragraph 2(d) of the Canadian Charter of Rights and Freedoms". (Here, too, there was a difference between the reference to the Canadian Charter and the reference to the provincial Human Rights Code, as the reference to the latter is only to "section 6" and not to freedom of association.) For the significance of the wording of the right as compared to the section number, see L. Weinrib, "Learning to Live With the Override" (1990) 35 McGill L. J. 541 at 557-8.
using one enactment to create several notwithstanding declarations was also one of the aspects of the Act respecting the Constitution Act.\textsuperscript{18} When I discussed this act in Chapter 2, I introduced Weinrib’s criticism that such a technique went against the notion that s. 33 was meant to encourage the serious legislative consideration of constitutional issues.\textsuperscript{19} Weinrib’s critique is grounded in both the express declaration requirement and the sunset mechanism contained in s. 33. Of course, enacting 5 declarations together is not as problematic as enacting thousands of declarations. Furthermore, the problems that the notwithstanding declarations sought to resolve were identical in all of the acts in which multiple declarations were included. These included different eligibility conditions for men and women in the pension plan acts and the status of religious denominations in the education acts.\textsuperscript{20} The common nature of these concerns differed from the many declarations created by the Act respecting the Constitution Act which had nothing to do with each other. Nevertheless, no two acts are exactly identical, and the legislature should discuss each act separately in order to ensure that a serious debate on the constitutional issues involved takes place.\textsuperscript{21}

Unlike the Act respecting the Constitution Act, 12 of the 15 notwithstanding declarations were appropriately specific not only in terms of the overridden rights, but also in terms of identifying the statutory provisions which were invoking the NM. As column B in Table 1 shows, some of them mentioned the section numbers which were to be protected (acts no. 2-4 and 11-12) and some mentioned the type of matter that the invocation of the NM sought to address (acts no. 5-11).\textsuperscript{22} Only three of them, namely one of the pension plan acts (no. 1), the back to work law (no. 14), and the sterilization bill (no. 15), stated that the NM was protecting the entire act. This was unacceptable in the case of act no. 1 which dealt with a pension plan, the virtual entirety of whose provisions had nothing to do with any potential rights violations. However, this was not the case with the back to work law and the sterilization bill because the very purpose of these two short pieces of legislation was to solve a specific problem (a strike and

\textsuperscript{17} For the recounting of the Alberta notwithstanding bill story, see section 3(E), below.

\textsuperscript{18} Supra note 1.

\textsuperscript{19} See Chapter 2, Section 3(B), above

\textsuperscript{20} See supra note 10.

\textsuperscript{21} See Chapter 4, Section 6(C)(1), above.

\textsuperscript{22} Act no. 11 appears in both groups since its notwithstanding declaration referred to specific provisions of the act and mentioned the matter that the invocation of the NM sought to address.
the risk of an extensive governmental expense) such that most of their provisions were connected to potential violations of rights.\textsuperscript{23}

3. The Practice of S. 33

A. Introduction: Use and Abuse of the NM

The practice of s. 33 encompasses all of the situations where the NM was used, either in response to a judicial decision, or in a pre-emptive way. The reliability and accountability arguments hold that legislatures can be trusted not to abuse s. 33 either because of self restraint or because of accountability considerations.\textsuperscript{24} In order to examine these arguments, one must first define what would be an “abuse” of the NM according to the compromise approach which mandates that s. 33 can be used pre-emptively as well as in response to a judicial decision. It is difficult to arrive at a definition of “abuse” appropriate to the compromise approach since every use of the NM is appropriate in terms of s. 33 and, at the same time, every use of the NM is inappropriate in terms of constitutionalism. Every use of the NM is appropriate according to s. 33 since the NM represents the remnants of legislative supremacy and the legislature is free to operate the NM in the same way that it enacts ordinary legislation. Indeed, we saw that the Supreme Court of Canada approved the use of the Quebec Act respecting the Constitution Act which was a demonstration of a cynical approach to the mechanism.\textsuperscript{25} At the same time, however, every use of the NM is an abuse according to the tenets of constitutionalism. This is because the compromise understanding of the NM implies that the idea of a NM is not justified in terms of constitutional rights protection. As such, every use of the mechanism demonstrates that the legislature is interested in disregarding the protection of constitutional rights. In a constitutional rights protection system, the disregarding of rights, as opposed to the limiting of rights based on normative standards, is always inappropriate.\textsuperscript{26}

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\textsuperscript{23} The back to work law included a preamble which explained the need for, and the importance of, the invocation of the NM. The sterilization bill included a preamble but it did not mention the use of the NM.

\textsuperscript{24} See Chapter 3, Section 2(E), above.

\textsuperscript{25} See Chapter 2, Section 3(B), above, and Weinrib's criticism, \textit{ibid}.

\textsuperscript{26} Slattery suggests that the legislature should use the mechanism only in cases where it believes that there are no rights issues involved, or when the legislation's limitation of rights is justified. See B. Slattery. “A Theory of the Charter” (1987) 25 Osgoode Hall L. J. 701 at 737-745. For analysis of his approach see, Section 5(E), above. But even when the legislature acts under such a conviction, it still operates with disregard for constitutional rights.
Since there are no criteria according to which certain uses of the NM may be judged appropriate or not according to the compromise approach, any discussion about trusting the legislature not to abuse the NM likely refers to trusting the legislature not to use the mechanism in a tyrannical way that violates fundamental rights and freedoms in a severe way. For example, the legislature is trusted not to use the NM in order to discriminate on the basis of race or to limit political speech, even if it might use the mechanism to limit commercial speech. Granted, this standard is somewhat ambiguous since it is difficult to draw the line between "ordinary" violations of rights and violations of rights which amount to tyranny. Indeed, this ambiguity is a result of the fact that for the compromise approach, the NM is a compromise between rigid constitutionalism and no rights protection, and every invocation of the mechanism compromises rights protection. Compromises make it necessary to draw arbitrary lines and divisions between principles. The compromise that the NM represents is that between the distrust of legislatures to protect rights without a constitution, which is the rationale for having a constitutional rights protecting document, and the assumption that legislatures will not act in an oppressive way, which accounts for the presence of the NM. Correspondingly, this is how the reliability and accountability arguments operate within the compromise approach to explain the no abuse assumption. The reliability argument holds that legislatures will not use the NM in a tyrannical way; the accountability argument maintains that while the public might accept some uses of the NM, it will condemn legislatures for any oppressive or tyrannical uses. According to these criteria, was the practice of the NM a practice of uses or a practice of abuses?

The answer to this question depends upon one's definition of "tyranny". My view is that 14 of the 15 uses mentioned above were not tyrannical. These 14 uses involved the introduction of age and gender based eligibility criteria for pension plans (acts. no. 1-4) and for government grants (act no. 11) which might be discriminatory but not tyrannical. A school system in which certain religious groups have greater privileges (acts 5-10) probably violates the right to freedom of religion and equality but is not tyrannical. Prescribing a special status for aboriginal people with respect to land planning (act no. 13) does not appear to violate any constitutional rights. The

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protection, since it seeks to eliminate an important aspect of constitutional rights protection, namely external checks on legislation.

27 See Chapter 2, Sections 4(B-C). above.
use of legislation (act no 14) for the purpose of ending a strike might have been unduly blunt but not outrageous. The only use of the NM which might have been a demonstration of tyranny was the attempt to limit the rights of victims of sexual sterilization (bill no. 15). The story of this bill, as will soon be demonstrated, contradicted the reliability argument since the Alberta government did table it. At the same time, however, it served as support for the accountability argument since the public’s negative reaction caused the government to withdraw the bill.

What is more important than my personal view as to whether these pieces of legislation were tyrannical or not is the public’s opinion on this subject. An examination of the public’s reaction reveals that it ignored 12 of the uses, reacted mildly to one of them (the Saskatchewan back to work law), and harshly to two others (the Alberta sterilization bill and the Quebec sign law). After describing these reactions, or lack thereof. I will analyze the lessons which can be drawn from them.

B. No Public Condemnation: the 12 Ignored Acts

12 of the 15 pieces of legislation in Table 1 were ignored. These include 11 of the Quebec notwithstanding acts (acts 1-11) and the one Yukon notwithstanding act (no. 13). While there is no evidence of any public debate being provoked over these 12 acts, there is evidence that they were ignored. The use of the NM was not even mentioned - still less discussed, analyzed or criticized - in Quebec’s main English newspaper, the Montreal Gazette, in the three days following the passage of the 10 acts which enacted 31 notwithstanding declarations in acts no. 1-11. Similarly, the Yukon use of the NM was not mentioned anywhere in the Whitehorse Star in the three days following its enactment. In addition, these 11 Quebec uses of the NM have never

24 See Section 3(E), below.
25 For the explanation of the figures of 10 and 21, see Table 2 in appendix 2 to this work.
26 The dates on which the ten acts were enacted are as follows: June 19, 1986 (acts “A” and 11); June 6, 1991 (act “B”); June 12, 1996 (act “C”); May 29, 1986 (act “D”); December 23, 1988 (act “E”); June 7, 1994 (act “F”); June 17, 1999 (act “G”); June 21, 1989 (act “H”); December 18, 1992 (act 10). The issues of the Montreal Gazette which were reviewed were those published on the three days following the 9 dates in which the third readings of the 10 acts took place (acts “A” and 11 were passed on the same day). In cases where a Sunday or a holiday fell within these three days, only 2, and not 3, issues were looked at.
27 The Yukon notwithstanding act (act no. 13) passed third reading on December 6, 1982. The Whitehorse Star is published three times a week, and the issues checked by the author were those of December 8 and 10, 1982. Both issues included a section entitled “At the Legislature” in which the paper reported on legislative developments. The journalist who prepared this section apparently did not find the use of the NM interesting or important enough to
been discussed by any scholar writing in English" and the Yukon use has to date never been mentioned in any academic work published in English.\textsuperscript{12}

The use of the NM was ignored by the public not only when the NM declarations were just one aspect of a larger piece of legislation but also in the three cases where the entire purpose, or one of the central purposes, of the legislation was to renew the declarations. The three cases were the enactment of the Act to amend the Charter of Human Rights and Freedoms and other legislative provisions (act "C"), which renewed the notwithstanding declarations in the four pension plan acts in 1996, and the enactment of the two acts entitled Act respecting certain declarations of exception in Acts relating to education (acts "F" and "G") which renewed the notwithstanding declarations in five of the six education acts in 1994. Unlike the other ignored notwithstanding acts which included tens or hundreds of sections, and in which the

\textsuperscript{11} The two writers who did mention the ignored Quebec uses, Ann Bayefsky and Lois MacDonald, did not offer a full account of them. Bayefsky, who wrote in 1987, mentioned the name of the Act respecting the Pension Plan of Certain Teachers and amending various legislation respecting the pension plans of the public and parapublic sector (act "A"), but her reference cites the text of only one of the three notwithstanding declarations which had been inserted into three different acts by act "A". See A.F. Bayefsky, "The Judicial Function Under The Canadian Charter of Rights and Freedoms" (1987) 32 McGill L.J. 791 at 824. MacDonald, who probably relied on Bayefsky's reference not only copied the oversight, but did not update her account with information concerning what had happened between 1987 and 1994. the year her paper was published. She consequently omitted mention of the renewals in acts "B", "C", and "E", the enactments of acts 9 and 10, and the repealing of act no. 11. See L. G. MacDonald, "Promoting Social Equality through the Legislative Override" (1994) 4 N.J.C.L. 1 at 21. The point of this comment is not to reveal the oversights of other scholars. The point is to demonstrate that the enactment of a notwithstanding act is not necessarily a widely noticed event in the Canadian legal community. In this regard, Weiler's comparison between the amendment and the notwithstanding mechanism is very demonstrative (see Chapter 3, Section 2(F), above). It is highly unlikely that an amendment to the Canadian Constitution would not be recorded in a list of amendments that was meant to be comprehensive.

The misperception about the past use of the NM can also be found in political statements. For example, while tabling the Alberta sterilization bill (no. 15), the Alberta Minister of Justice referred to six prior uses of the NM (Alberta Hansard (10 March 1998) at 780). This figure was later adopted by the Alberta press. See, e.g., "Cash Deal: Grit MLA calls move 'chilling'" Calgary Herald (3 March 1998) A2. (Interestingly in listing the "six" uses of the NM, the Calgary Herald stated that its sources were the Library of Parliament and the McGill Law Journal. Bayefsky's paper, supra note 31, had indeed appeared in that journal)

\textsuperscript{12} The reason the statement refers to works published in English is because the author does not read French. I have no information as to works published in French which deal with either the 12 ignored Quebec uses or the Yukon use.
notwithstanding declarations were just individual provisions, these three acts were very short and the position of the notwithstanding declarations within them was very prominent. 33

The public's lack of awareness of these 11 uses of the NM was best symbolized by the following two episodes. On June 20, 1986, the day after the Quebec National Assembly broke for summer vacation, the Montreal Gazette told its readers that "[y]esterda marked the end of a week of day-and-night debate to rush through some 60 bills that have kept MNAs busy since the session resumed in March". 34 The report went on to enumerate eight of these bills, one of which was Bill 55, an Act respecting the Pension Plan of Certain Teachers and amending various legislation respecting the pension plans of the public and parapublic sector (act "A"). The report suggested that "some 2,500 teachers who left religious orders after 1965 will be eligible for better pensions under Bill 55". While this may have been true, it did not represent the full impact of the legislation. Indeed, when Bill 55 was introduced in the National Assembly, the Treasury Board president explained that since this policy might violate the equality rights of other teachers (in addition to discriminating between men and women with respect to retirement ages), it had also been decided that the legislation should invoke the NM. 35 But this was not mentioned in the newspaper report. Failing to report an act containing a notwithstanding declaration is disappointing enough. 36 However, reporting such an act with no mention at all of the NM is much worse. This could only happen if the media failed to notice a notwithstanding declaration even when it was staring one in the face. The second glaring instance of non-awareness took place on

33 The Act to amend the Charter of human rights and freedoms and other legislative provisions (act "C") was a two page act and 4 of its 11 sections dealt with renewing the notwithstanding declarations in the pension plan acts. The other sections of this act, which included amendments to the Quebec Charter of Human Rights and Freedoms, supra note 2, dealt with issues of pensions and retirement or insurance plans. Both of the acts entitled Act Respecting certain declarations of exception in Acts relating to education (acts "F" and "G") were one page acts and were enacted, as their titles suggested, solely for the purpose of renewing the notwithstanding declarations.

34 "National Assembly on summer break as labor woes, welfare issue unsolved" The [Montreal] Gazette (20 June 1986) A4. Interestingly, 7 of the nine dates appearing in supra note 23, in which 8 of the 10 acts which created ignored notwithstanding declarations were enacted in various years are between May 29 and June 21. These dates are close to when the Quebec National Assembly usually ends its session.

35 Debats de l'Assemblée nationale (16 June 1986) at 2873.

36 A similar dynamic of not noticing a notwithstanding act occurred almost exactly a year later. The Act respecting School Elections, (act no. 9), was passed by the Quebec National Assembly on June 21, 1989. Two days later, the Gazette published an article mentioning the passing of 7 bills but not the Act respecting School Elections. And this was not because all of these other 7 bills were of special importance. One of them, for example, dealt, as the paper described it, with "requiring financial planners to obtain a diploma from a government-certified institution". See "64 bills become law as spring sitting ends" The [Montreal] Gazette (23 June 1989) A5.
December 23, 1988. On this date, the Quebec National Assembly passed act “E” but the media did not appear to take any notice. Eight days prior to this enactment, on December 15, 1988, the Supreme Court of Canada handed down its decision in Ford.¹⁷ One day prior to the enactment of act “E”, the National Assembly passed Bill 178 (act no. 12) which overrode Ford and led to a crisis in relations between Quebec and the rest of Canada.¹⁸ Act “E” was therefore enacted in the midst of a public debate concerning language rights and the NM. In the midst of such a crisis, what could have been more topical than an additional use by the National Assembly of the NM? Still, the NM was never mentioned.¹⁹

The fact that the Quebec invocations were ignored is especially troubling because three of them included an unconstitutional characteristic, namely a retroactive application of the NM. These three were acts no. 2-4 which represented three of the four pension plan acts. The notwithstanding declarations in these acts stated that they “applie[d] from 27 June 1975 in respect of the Charter of human rights and freedoms and from 17 April 1985 in respect of the Constitution Act, 1982”.²⁰ June 27, 1975 was the date upon which the Quebec Charter came into force while the corresponding date for the Canadian Charter was April 17, 1982. Since the three pension plan acts were in force previous to 1975 and since the Quebec government did not enact the notwithstanding declarations until 1986, it was stipulated that the notwithstanding declarations would apply retroactively as of the dates the two Charters came into force.²¹ However, the retroactive application of the NM was deemed to be unconstitutional by the Supreme Court of Canada in the Ford decision.²² While the initial 1986 enactment of these

¹⁷ Supra note 4.
¹⁸ See Section 3(D), below.
²⁰ The text of this statement is identical in all three acts. For the section numbers of the notwithstanding declarations, see column A in Table 1.
²¹ The fourth pension plan act (no. 1) was enacted in 1986 and therefore did not have to protect a pension scheme that was in force before the Quebec and Canadian Charters came into force.
²² The Court’s ruling was based on the text of s. 33 of the Canadian Charter. The court did not discuss the issue from the perspective of the Quebec Charter, since the Act respecting the Constitution Act, which inserted the notwithstanding declaration into the Charter of the French Language, did not deviate from that Charter (see Chapter 2, Section 3(B), above). However, in keeping with the Court’s ruling, it can be seen that the Quebec Charter will not likely be held to allow for the retroactive use of the NM either. This is because the holding in Ford was based on the fact that s. 33 of the Canadian Charter did not explicitly provide for a retroactive application and therefore this extraordinary measure could not be permitted. Section 52 of the Quebec Charter, which anchors the
declarations—act "A"—occurred before the Ford decision was handed down in 1988, the 1991 and 1996 re-enactments—acts "B" and "C"—happened after it. The Quebec government therefore had a chance to repeal the paragraph in the declarations that provided for their retroactive application and find another way to deal with the problems of continuity and validity regarding the time prior to their enactment.41

Quebec NM, does not provide for retroactive applications either and so the same analysis which denied retroactivity in the Canadian Charter would also likely apply to it.

It might be that these three notwithstanding declarations are not in force even absent the Ford case. Consider, for example, the text of the notwithstanding declaration in s. 78.1 of the Act Respecting the Teachers Pension Plan (no. 3):

Sections 28, 32 and 51 apply notwithstanding the provisions of section 10 of the Charter of human rights and freedoms [reference omitted]
Sections 28, 32, and 51 have effect notwithstanding the provisions of section 15 of the Constitution Act, 1982 [reference omitted]
The exception relating to section 28 applies from June 27, 1975 in respect of the Charter of human rights and freedoms and from April 17, 1985 in respect of the Constitution Act, 1982

The notwithstanding declarations in the other two acts (nos. 2 and 4) are of exactly the same structure, with the first paragraph being the notwithstanding declaration referring to the Quebec Charter, the second paragraph being the notwithstanding declaration referring to the Canadian Charter; and the third paragraph being the statement regarding the retroactive effect.

However, when the declarations were renewed in 1991 and 1996 (through acts "B" and "C"), only the second paragraph was re-enacted. The third paragraph, dealing with the retroactive effect, was not re-enacted, and its text did not appear in the renewing acts. The drafter’s assumption was probably that once the declaration itself was renewed, the section which prescribed the time for the declaration’s application enjoyed renewed force automatically. But this assumption is wrong in light of the presumption against the retroactive application of legislation. Because of this presumption, the legislature has to be explicit with respect to the retroactive effect. Since the renewed declarations were silent about their application, they do not have a retroactive effect.

One could object and suggest that once the declaration is renewed, the text of the provision is very explicit. It does include a notwithstanding declaration, and an explicit statement as to its application. Moreover, according to this line of argument, in the same way that the provisions which violate rights do not have to be renewed but can still gain force from the renewed declaration, a provision regarding the declaration’s effect does not have to be renewed. The problem with this objection is that the analogy is wrong. The provisions which violate rights derive their power from the declaration, since otherwise they would be voidable. Therefore, once the declaration is renewed, the provisions remain in force. The provision prescribing the time after which the declaration is in force is part of the declaration itself, and thus cannot derive validity from it. Rather, it ceases to have effect 5 years after its re-enactment.

Even if one assumes that the retroactive effect of the notwithstanding declarations is valid, it is clear that the drafting technique of not re-enacting the retroactive application provision is problematic in terms of visibility. It makes it impossible for the legislators who voted on these amending acts, as well as anyone who reads them, to see that the renewed declarations have a retroactive effect. In order to know that, one would have to open up the books of compiled legislation and to look at the amended acts. Not exposing this important feature of the notwithstanding declarations in the text of the renewing acts further decreases legislative and public awareness of what has been done. Perhaps this explains why the Israeli NM stipulates that after 4 years, the entire act expires. This means that any renewal will require a presentation of the NM in its full context.

In addition to retroactivity, there is another problem with the notwithstanding declarations in the four pension plan acts. They might be in violation of s. 28 of the Charter because they provide for different ages of eligibility for men and women. While the eligibility age for men is 65, it is 60 for women (see supra note 2). The
C. Moderate Public Condemnation: the Saskatchewan Back to Work Law

The story of the Saskatchewan "back to work" law starts in January, 1986, after talks between the Saskatchewan Government and the Saskatchewan Government Employees Union (SGEU) concerning a new collective agreement came to a standstill. This impasse was followed by rotating strikes and the agreed upon appointment of a conciliator. After the SGEU refused to accept the conciliator's report, the government enacted a "back to work" law to implement the conciliator's recommendations. This act (no. 14, Table 1) included a notwithstanding declaration regarding section 2(d) of the Canadian Charter and the entirety of the Saskatchewan Human Rights Code. The reason for invoking the NM was a previous ruling by the Saskatchewan Court of Appeal that a similar law had violated the right to freedom of association contained in section 2(d) of the Canadian Charter and section 6 of the Saskatchewan Code. This decision was appealed by the government of Saskatchewan to the Supreme Court of Canada. The Supreme Court allowed the appeal in 1987 and held that the right to freedom of association did not include the right to strike. This meant that the use of the NM was unnecessary, but the government could not have known this with certainty in 1986.

The public was aware of this back to work legislation. Morton writes that "[t]he action was widely criticized by labour and civil liberties groups across the country as setting a
dangerous precedent that could undermine the Charter”. Greschner and Norman believe that the response of the press and the public was “at low volume”, but there were still several reactions by the press and the public inside and outside of Saskatchewan. However, this criticism was neither overwhelming nor of long duration. Nine months after the Conservative government in Saskatchewan enacted the back to work law, elections took place in which the Conservatives were returned to power. The Conservatives did lose some support in urban areas but made gains in rural Saskatchewan. Morton’s explanation for this was that the invocation of the NM “was a nonissue in the rural areas, while in the more heavily unionized cities... it was one of the several factors that contributed to the perception of the Devine Conservative government as anti-labour”. Morton concludes that this case “suggests that if the legislative override is used in a politically astute fashion, it will not necessarily harm a government, and may even help”.

D. Harsh Public Condemnation and Political Price Paid: The Quebec Sign Law

In *Ford*, the Supreme Court of Canada ruled that a provision forcing the use of solely (as opposed to mainly) French signs violated the right to freedom of expression contained in both the Quebec and Canadian Charters. Responding to this decision, the Quebec National Assembly enacted Bill 178 (act no. 12), which modified the French-only stipulation for exterior signs and

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51 Greschner and Norman, supra note 44 at 191. note 84.
52 Ibid.
53 Morton, supra note 50 at 47.
54 Ibid.
55 *Ford*, supra note 4 at 768-787. Thus in *Ford*, the Supreme Court handed down two rulings. The first was that the Quebec notwithstanding policy was valid (see Chapter 2, Section 3(B) above), the second that the impugned provisions of the *Charter of the French Language* were not.

In order to dispel any possible confusion regarding the *Ford* case and its aftermath, a further clarification might be helpful. The *Ford* case dealt with two provisions of the *Charter of the French Language*. S. 58 stipulated that only French was to be used on signs and s. 69 stipulated the same with respect to firm names. Neither provision was immune from Quebec Charter review and indeed the Supreme Court, like the Quebec Court of Appeal, found that they violated the Quebec Charter. With regard to the Canadian Charter, since the *Charter of the French Language* was reenacted by the *Act respecting the Constitution Act* (supra note 1) in June 1982, all of its provisions were immune from Charter review until June 1987 and therefore would have been reviewable by the time that the *Ford* case was heard (November 1987) and delivered (December 1988). However, in February 1984, the signs provision (section 58) was amended and, as with all Quebec legislation between June 1982 and December 1985 (see Chapter 2, Section 3(b), above), the standard declaration was added to the amending bill. Since this declaration was to expire only in February 1989, after the *Ford* judgment was delivered, it is still relevant to discuss the validity of Quebec’s notwithstanding policy.
allowed interior bilingual signs. In direct conflict with the *Ford* judgment, the act included a notwithstanding declaration regarding ss. 2(b) and 15 of the Canadian *Charter* and ss. 3 and 10 of the Quebec *Charter*. In contrast to the Saskatchewan "back to work" law, the Quebec sign law not only provoked public attention, but also had political consequences. If one can assume that the legislative response to the bill reflected the public's opinion of the bill, the Quebec public was divided into three groups in its response to the bill. One group, represented by the Liberal government, supported the bill, that is, it supported both the acceptance of the Supreme Court decision regarding indoor signs, and supported the overriding of the decision with respect to ensuring that outdoor signs would remain French only. A second group of Quebecers was represented by the Parti Quebecois and argued that the bill was not strong enough. It advocated overriding the Supreme Court decision regarding both outdoor and indoor signs in order to deny the use of other languages on both types of sign. A third group of Quebecers was represented by the English faction of the Liberal Party. It opposed the bill and advocated the acceptance of the Court decision regarding both indoor and outdoor signs in order to allow other languages on both types of signs so long as French was predominant.

It was this third group, a minority in the legislature, whose response represented the political price the Quebec government paid for the bill. The bill created a deep crisis between anglophones and francophones in Quebec and between francophones in Quebec and the rest of Canada. For example, all four anglophone ministers resigned from the Quebec Liberal

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*Janet Hiebert argues that Bill 178 was not necessarily in conflict with the *Ford* decision, and she suggests that its use of the NM was "pre-emptive" rather than remedial. See J.L. Hiebert, *Limiting Rights – the Dilemma of Judicial Review* (Montreal and Kingston: McGill-Queens University Press, 1996) at 143. Hiebert suggests that because the Court found that the purpose of preserving French dominance in Quebec was constitutional and it was only the means which were not the least drastic, it is possible that the inside-outside compromise "might [have been] interpreted by the Court as a reasonable attempt to ensure that the promotion of the policy objective did not impose an overly severe restriction on freedom of expression" *ibid.* at 143-144. I disagree with this analysis. The court did not suggest that the package created by the legislation was unconstitutional. What it said was that the specific means of French-only signs was unconstitutional since it was unnecessary to achieving the legitimate goal of preserving French dominance in Quebec. The French only requirement for signs would have therefore remained unconstitutional, whether it applied to certain kind of signs, or all kind of signs. Hiebert would have been right had the court struck down the sign policy based on the proportionality part (the fourth stage) of the *Oakes* test (for a discussion of *Oakes*, see Chapter 3, Section 5(B), above). If that were the case, the fact that the new sign law was less restrictive of rights might have been relevant in considering the overall impact of the legislation. But since the policy was struck down on minimal impairment grounds (the third stage of the *Oakes* test), the fact that the new act was less restrictive of rights is irrelevant.*
government.Outside Quebec, the province of Manitoba withdrew its support for the unratified Meech Lake Accord. This agreement would have secured the Quebec government’s consent to the Constitution Act, 1982, including the Charter, and would have given Quebec the status of a “distinct society” within Canada. Later, in the following months, further indications of a serious crisis in national unity were apparent. In Ontario, protesters trampled upon the Quebec flag. Referring to s. 33, the Prime Minister said “the flawed Constitution Act of 1982... is not worth the paper it is written on”. Bill 178 was understood by many to express the Quebec government’s traditional hostility towards the anglophone minority there. The sign law was not really seen to be about signs. As Patrick Monahan wrote, “[w]hat was at stake was an important symbol of the nature of Quebec society, and, by implication, of Canadian society as a whole”. The use of the NM symbolized that Quebec was a French speaking, and not a bilingual, society. This was an issue which, at the time, was debated across Canada in addition to being of central importance to the Meech Lake Accord. Support for the Accord subsequently decreased throughout English Canada and it was rendered defunct when, in June 1990, the time within which it had to receive the approval of all of the provincial legislatures ran out. While support for the Accord had already been vulnerable for other reasons, many believe that the sign law sealed its fate.

In March 1993, the United Nations Human Rights Committee (U.N.H.C.R.) declared that the sign law violated the International Covenant on Civil and Political Rights. Following this, the Quebec government amended the legislation to allow for bilingual signs and bilingual firm

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58 Monahan, ibid. The text of the accord appears at 297.
59 Ibid. at 168.
60 House of Common Debates (6 April 1989) at 152.
61 Monahan, supra note 57 at 164.
62 Ibid. See also Cohen, supra note 57 at 216.
63 Monahan, supra note 57 at 4.
64 Ibid. at 164-166; Cohen, supra note 57 at 197-200. C.P. Manfredi, Judicial Power and the Charter - Canada and the Paradox of Liberal Constitutionalism (Toronto: McClelland & Stewart, 1993) at 202; Hiebert, supra note 56 at 140-141.
names so long as French was predominant. Naturally, the notwithstanding declaration was not renewed.67

The sign law example demonstrates that it is possible to conceive of public condemnation as originating from external, as well as internal, sources. The majority of Quebecers did not condemn Bill 178. Indeed, commentators have even suggested that part of the motivation for Quebec Premier Bourassa's re- enactment of the sign law was to regain his popularity among francophones.68 However, the condemnation the sign law received from other provincial governments, as well as from the U.N.H.C.R., cannot be dismissed. In an increasingly globalized and democratic world, a province's, or a country's, good image is an extremely valuable asset. Indeed, some believed that this use of the NM by Quebec made other potential uses of the NM virtually impossible. Writing in 1993, Manfredi suggested that Bill 178 weakened the NM's

66 An Act to amend the Charter of the French Language. S.Q. 1993 c. 40, ss. 18, 22, which amended, respectively, sections 58 and 68 of the Charter of the French Language. R.S.Q. c. C-11. The Explanatory Notes to the bill stated that it sought to amend the legislation "in order to bring some of its provisions...into harmony with the decisions rendered by various authorities". Bill 86, An Act to amend the Charter of the French Language. 2nd Sess., 34th Leg., Québec, 1993. It should be noted that the bill amended other aspects of the French language policy in Québec and did not deal exclusively with the sign law and the firm names law. The non-renewal of the notwithstanding declaration was not mentioned in the explanatory notes.

Interestingly, the text of the new section 58 appears to remain unconstitutional according to the decision in Ford. This text reads:

Public signs and posters and commercial advertising must be in French. They may also be both in French and in another language, provided that French is markedly predominant. However, the government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only...

The decision of the government to require only some French-only signs is still unconstitutional according to Ford. The Quebec Government nevertheless used its power in this regard and in December, 1993, it enacted regulations mandating two situations in which a firm's name would have to be exclusively in French. The first situation involved large advertisements (16 square meters or more) which were visible from a public highway and which were not located on a firm's premises. The second situation involved advertisements on, or in, public means of transportation. See Regulation respecting the language of commerce and business, G.O.Q. 1993 (part 2, at 6915).

67 In La procureure générale du Québec c. Les Entreprises W.F.H. Itec, [1999] J.Q. No. 4586 (QL). it was held that Ford's approval of the predominant French requirement was no longer in force since, 10 years after Ford, the government had an obligation to re-introduce evidence that the status of the French language remained vulnerable in Quebec. Since no such evidence was presented, the court struck down s. 56. The Quebec Minister of Justice announced that the province would appeal but the option of using the NM was not even mentioned. See "Judge strikes down key part of language law" National Post (21 October 1999) A1; "Sign rules struck down in Quebec" The Globe and Mail (21 October 1999) A1.

68 Cohen, supra note 57 at 197.
legitimacy and created "strong opposition to any use", as distinct from abuse." of the NM. In 1991, Monahan was even more pessimistic:

[It] is safe to predict that the notwithstanding clause will soon fall into disuse outside of the province of Quebec. It will remain a theoretical option with no practical value. The notwithstanding clause will become the forbidden fruit of the Canadian constitution: any politician who touches or tastes it will be banished from the garden. Indeed, the notwithstanding clause may already have become a dead letter outside of Quebec. Its association in the public mind with the Quebec sign legislation may well be sufficient to render it politically untouchable."

While it is hard to determine whether "the public mind" indeed associates the NM with Bill 178, Monahan's prediction proved quite correct in terms of the actual use of the mechanism. It has not been invoked outside Quebec since he made his prediction. However, Monahan suggested the NM would be "untouchable", implying that politicians would not even try to use the NM. This part of his prediction proved not be as accurate as revealed by events in Alberta which took place 9 years after Bill 178 and 7 years after his prediction. This will be the subject of the next section.

E. Harsh Public Condemnation and Governmental Retreat: The Alberta Sterilization Bill

The public's reaction to the Quebec sign law was harsh, but not sufficiently negative to force the government to retreat. In contrast, the public's reaction to Alberta's Bill 26 (no. 15) was so intensely critical that the government quickly decided to withdraw the bill from the legislature.

Bill 26 was drafted and tabled in order to respond to prospective lawsuits for damages by victims of forced sterilization by Alberta governmental institutions. Two thousand eight hundred and twenty two people were involuntarily sexually sterilized in Alberta by virtue of the Sexual

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64 Manfredi, supra note 64 at 210 [emphasis added]. Manfredi does not define the difference between "any use" of the NM and an "abuse" of the mechanism, but since he is an advocate of the argument from judicial error (see Chapter 3, Section 5, above) it would seem likely that for him an appropriate use of the NM would be its use in response to a judicial error, and, correspondingly, an abuse of the mechanism would be a situation where the legislature overrode a correct judicial decision.

76 Monahan, supra note 57 at 169. In the same spirit, see Manfredi, supra note 64 at 203. Andrew Heard wrote in 1991 that "the present reluctance of most governments to utilize the notwithstanding clause of the Charter may develop into a binding convention". See A.D. Heard, Canadian Constitutional Conventions (Toronto: Oxford University Press Canada, 1991) at 147. Heard did not elaborate on this point.
Sterilization Act. This legislation was enacted in 1928 and repealed in 1972. The Eugenic Board established by the act was empowered to authorize the sterilization of the “mentally defective” in order to prevent them from transmitting their condition to their children and to avoid mental injury. The act reflected “the accepted social thinking of the day respecting genetics and the mentally challenged”, namely the assumption that certain characteristics, like “mental retardation, mental illness, pauperism, criminality, prostitution, sexual perversion and other types of immoral behaviour” were hereditary and hence “it was in society’s interest to reduce the spread of these undesirable traits by limiting the power of reproduction by those individuals and groups who possessed them”.

As if the substance of the legislation was not sufficiently horrific, the Eugenic Board also abused its powers under the Sexual Sterilization Act. The Board’s powers were used “not in accordance with either scientific principles or legislative standards, but in support of social policy about who should be allowed to have children in Alberta”. Moreover, because “much of the early eugenics movement in Canada was based on a concern by those of British stock about the potential weakening of the race” there were “systemic biases” in the board’s activities against females generally, people from Eastern Europe, as well as Catholic and Native women.

Until 1998, there was no legislation regarding the compensation of these victims. Their only recourse was to sue the Province of Alberta in accordance with tort law and ordinary court procedures. In 1996, one victim won such a lawsuit and was awarded $740,000 in damages. Between 1996 and 1998, about 700 other victims filed similar claims. Fearing a potential

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71 Report by expert witness Gerald Robertson, a law Professor at the University of Alberta, and submitted to the Alberta Court of Queen’s Bench as part of the evidence considered in Muir v. Alberta (1996), 132 D.L.R. (4th) 695 (Alta Q.B.) [hereinafter Muir]. The report was endorsed by the Court (at 721-3) and was included at 744 as Appendix “A” to the judgment. See also at 745.
72 Ibid. at 744.
74 Robertson, supra note 71 at 747-8.
75 Ibid. at 747.
76 Muir, supra note 71 at 721-2.
77 Ibid. at 722.
78 Ibid. at 722-3.
79 The exact amount was $740,780 but this figure did not include costs or certain interest items. See ibid. at 699. The background information, supra note 73, states that the amount was “approximately $1,000,000 in damages, interest and costs”.
80 Ibid.
liability in the hundreds of millions of dollars. the government of Alberta tabled, on March 10, 1998, Bill 26 entitled Institutional Confinement and Sexual Sterilization Compensation Act.\(^1\) The main elements of the bill were as follows. First, limitation defences were cancelled;\(^2\) second, actions filed 180 days after the coming into force of the act were prohibited;\(^3\) third, like the limitation defences, any possible defences against liability in a claim regarding sexual sterilization were cancelled as well;\(^4\) fourth, the amount that courts could award to a victim was capped at $150,000 ($300,000 if a sexual assault was also proven);\(^5\) fifth, the courts were prohibited from awarding non-compensatory, punitive, exemplary or aggravated damages,\(^6\) as well as pre-judgment interest,\(^7\) and were ordered to limit the amount of costs.\(^8\) The Act included a notwithstanding declaration in s. 3, which stated that the Act was to operate notwithstanding all available Charter rights - sections 2 and 7 of the Charter and the entire Alberta Bill of Rights.\(^9\)

The Preamble to the bill did not mention the NM. Its most important paragraph stated:

Whereas the Government of Alberta desires to balance the interests of the persons bringing the claims and the interests of all Albertans by removing certain impediments to compensation and by implementing compensation principles to assist in resolving the claims in a consistent manner.\(^10\)

The same approach was taken by Alberta Justice Minister Jon Havelock while tabling the bill in the legislature. Without mentioning the NM, he repeated the idea that the bill sought to "balance

\(^{1}\) Alberta Hansard (10 March 1998) at 775; Bill 26, Institutional Confinement and Sexual Sterilization Compensation Act, 2d Sess., 24th Leg., Alberta, 1998 [hereinafter Sterilization Bill].

\(^{2}\) Sterilization Bill, ibid. at s. 4 (1).

\(^{3}\) Ibid. at s. 4(2).

\(^{4}\) Ibid. at ss. 4(3)-4(4).

\(^{5}\) Ibid. at s. 5(1).

\(^{6}\) Ibid. at s. 5(2), 5(3).

\(^{7}\) Ibid. at s. 6.

\(^{8}\) Ibid. at s. 8.

\(^{9}\) There are two technical yet interesting things to notice about the notwithstanding declarations in this bill. First, they appear at the beginning of the bill, before the provisions they are meant to protect. The other notwithstanding declarations discussed in this chapter (see Table 1 in appendix 1) appear at the end of the acts, after the provisions they protect. Second, the section heading of s. 3 reads “Override of Charter”. This is the first time that the term “override”, as opposed to “exception”, “notwithstanding” or “non-obstante”, appears in a bill or an act. See also supra Chapter 2, note 2 and accompanying text.

\(^{10}\) The other three paragraphs of the Preamble briefly recount the nature of the confinement and the medical procedures that were performed on the individuals bringing claims before the court. Notably, the Preamble uses very neutral language. The terms “victims”, “wrongful” or similar terms are not utilized. Similarly, the Preamble talks about “compensation principles” and not “compensation limitations".
the interests of those who are bringing claims against the government for wrongful sterilization or wrongful confinement in provincial institutions and the interests of all Albertans".  

The government was taken aback by the flood of legislative and public criticism which followed. The outcry began with an exchange in the Legislative Assembly between the New Democratic Party leader Pam Barrett and Justice Minister Havelock. Barrett stated:

[T]he Attorney General and Minister of Justice has just introduced the most galling and arrogant piece of legislation I have ever seen in this assembly. This act calls for overriding the Canadian Charter of Rights, the Alberta Bill of Rights — and, yes, they are invoking the notwithstanding clause — and further, insults the people who were wrongfully institutionalized, sexually sterilized."

After the Justice Minister reiterated the need to balance the victims' rights with the rights of Albertans, that is, to deal carefully with the taxpayers' money, he further insisted that the usage of the NM was appropriate:

[T]he notwithstanding provision in the Charter of Rights and Freedoms is as legitimate a part of the Charter as any other provision... We have instituted it in this situation because we do not want this legislation to be subject to a long constitutional battle..."

Furthermore, in an answer that clearly suggested that they had no idea as to the extent of the public outrage, both the Minister of Justice and the Premier treated Barrett's protest as something to be swept under the carpet. Havelock suggested that she wait patiently until the bill was discussed, thus implying that the bill was just another piece of legislation and that there was no need to rush.  

Premier Ralph Klein mocked Barrett for opposing the act and ignored her argument regarding the NM. The Human Rights critic for the Alberta Liberal Caucus joined Barrett in her prompt criticism of the bill. The responses he received from both the Premier and the Justice Minister were a little more serious and referred to the merits of the legislation.  

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91 Alberta Hansard (10 March 1998) at 775.
92 Ibid. at 779.
93 Ibid. at 779-80.
94 Ibid. at 780.
95 Ibid.
96 "If she thinks this is bad legislation and will do nothing to compensate those people... she can stand up and tell those 700 people who want this adjudicated fairly that she did not support the legislation". Ibid.
97 The Minister of Justice stated that "[t]he compensation proposed within this legislation is reasonable based on existing case law across the country... we have waived all limitation defenses in the legislation. We have waived all
However, both government politicians still suggested that his criticism was premature, and that he too should wait until the bill was discussed.\textsuperscript{98}

The media was aware of what happened in the legislature. After the tabling of the bill, numerous reports appeared throughout the province and the rest of the country. The stories condemned the legislation and profiled the heart-breaking stories of the victims.\textsuperscript{99} The following morning, Bill 26 was featured on the front page of Alberta’s two main newspapers – the \textit{Edmonton Journal}\textsuperscript{100} and the \textit{Calgary Herald}.\textsuperscript{101} as well as the nationally circulated \textit{Globe and Mail}.\textsuperscript{102} A reflection of the public outrage can be found in the March 11, 1998 issue of \textit{The Edmonton Journal}. Its headline read “Province revokes Rights”.\textsuperscript{103} The report explained that “[i]t’s the first time the notwithstanding clause, which effectively suspends rights under the constitution, has been used in Alberta”.\textsuperscript{104} It also reported that the proposed bill was greeted with a “wave of anger [and] outrage”.\textsuperscript{105} The newspaper dedicated a large amount of space to reports, editorials and accounts of the horrors the victims suffered. The stories and editorials were replete with charged language such as “a black day for Alberta”\textsuperscript{106} “blatant disrespect for its citizens”, \textsuperscript{107} “an arrogant move”,\textsuperscript{108} and “robbery of handicapped people”.\textsuperscript{109} It wasn’t only members of the defenses available to us with respect to sterilization. The purpose of this legislation is to facilitate settlement, fair and reasonable settlement for the claimants”. \textit{Ibid.} at 781.

\textsuperscript{98} \textit{Ibid.} at 780-1.

\textsuperscript{99} Ken Nelson, a sterilization victim, told the media: “I stood in the legislature gallery today and watched the Premier of Alberta take the rights away from 700 hundred people” (“Province revokes Rights” \textit{Edmonton Journal} (11 March 1998) A1). It seems that the opposition parties, who knew in advance about the tabling of the bill, made sure that some sterilization victims would be present at the legislature. Mr. Nelson later appeared with his story on national television (“Victims anger moved Klein” \textit{Edmonton Journal} (12 March 1998) A5). One politician stated that it was this television appearance that led him to question the bill. See infra note 113.

\textsuperscript{100} See “Province revokes rights”. \textit{Ibid.}


\textsuperscript{103} \textit{Ibid.}

\textsuperscript{104} \textit{Ibid.}


\textsuperscript{106} This is the language employed by sterilization victim Ken Nelson cited in “Province revokes Rights”. \textit{Supra} note 99.

\textsuperscript{107} “Wave of anger, outrage greets proposed law”, \textit{Supra} note 105.

\textsuperscript{108} \textit{Ibid.}

\textsuperscript{109} \textit{Ibid.} Other examples of this type of reaction are: “absolutely draconian” (Conservative Sen. Ron Ghitter, a spokesman for the Alberta Dignity Foundation and a former Conservative MLA as quoted in \textit{Ibid.}), “terribly repugnant” (\textit{Ibid.}), “a totalitarian regime” (\textit{Ibid.}), “mean-spirited” (\textit{Ibid.}), “heavy-handed” (lawyers for the victims as quoted in “Province revokes Rights”, \textit{Supra} note 99 at A16), “draconian” (\textit{Ibid.}), “the nightmare scenario” (Kathleen Mahoney, a University of Calgary Law Professor, as quoted in “Use of ‘sledgehammer’ law condemned” \textit{Edmonton Journal} (11 March 1998) A5). “like... in banana republics and repressive dictatorial regimes” (\textit{Ibid.}). “[a]
media who unleashed a “barrage of criticism” and anger. Conservative politicians received hundreds of phone calls from citizens expressing their objections to the legislation. The government reacted quickly to the public outcry. On the morning of March 11, 1998, less than 24 hours after the bill had been tabled, the Minister of Justice announced to the Legislative Assembly that the government would no longer be proceeding with Bill 26. Statements made by Conservative politicians confirmed that the reason for the about face was the public reaction. The Premier attributed his government’s misstep to the fact that his “political sense probably didn’t click into gear”. In the following days, the opposition and the press kept attacking the Alberta government for the Bill 26 affair. They suggested that the fiasco in tabling, and then quickly withdrawing, the bill symbolized the government’s incompetence, lack of seriousness, and unaccountability. They further urged Albertans to watch for the next time the government would act oppressively. Thus the Alberta government’s public relations continued to suffer even after they had withdrawn the offensive piece of legislation.

strong-arm tactic” (ibid.), “big, bullying, paternalistic government at its worst” (“Editorial: An outrage, and an abuse of power” Edmonton Journal (11 March 1998) A12), “humiliating” (ibid.), “frightening” (ibid.), “legislative tyranny” (ibid.), “moral emptiness” (Linda Goyette. “Decency doesn’t live here anymore” Edmonton Journal (11 March 1998) A12), “the hard slap that overwhelms other injustices” (ibid.), “a cheat” (ibid.), “How are we to explain to our children that their own Alberta government... felt powerful enough to cheat sterilized Albertans of fair compensation”? (ibid.). “[saving] bucks at the expense of disabled citizens” (ibid.), “disgrace” (ibid.), “bunch of cowards”(ibid.), “disgusting” (ibid.), “shrinking the scope of liberal democracy” (ibid.). “mean, dumb and gutless” (Marc Lisac. “Alberta’s Bill 26 is mean, dumb and gutless” Edmonton Journal (11 March 1998) A13), “chicken-hearted” (ibid.), “pea-brained”(ibid.), “the morality of an egg-stealing magpie and the social conscience of a coyote” (ibid.), “remorselessly” (ibid.). “a large person shoving a small one onto the floor” (ibid.). I chose to quote only the short expressions which the critics used. The reports and editorials obviously went beyond these expressions and also attacked the legislation on its merits and on the lack of political wisdom displayed by the enactment of such a bill.

13 For instance, Conservative backbencher Don Tannas stated: “It was certainly watching the news coverage last night and reading the papers today that caused me to say: ‘OK’ let’s rethink it... It was a problem of perception”. “A problem of perception” Edmonton Journal (12 March 1998) A5.
15 Alberta Hansard (11 March 1998) at 813 - 817; Alberta Hansard (12 March 1998) at 854-5. A question that was raised by legislators and by the press was how such an horrific bill could survive the scrutiny of the drafters and of the caucus of the Conservative Party without the bill itself or the inclusion of the NM being objected to. The Premier was asked “what process of public consultation, legislative consultation, or consultation with his own
F. Public Attention, Public Reaction: From the NM to the NIP

What can account for these differences in public reaction? Why did the public ignore the Quebec and Yukon uses, react mildly to the Saskatchewan back to work law, respond harshly to the Quebec sign law, and display outrage at the Alberta sterilization bill? A reasonable explanation invokes the notion of abuse of the NM discussed in the beginning of this section. The 12 ignored acts were clearly not an abuse of the NM and therefore did not provoke public protest. The Alberta sterilization bill was clearly such an abuse of the NM that the public could not stand it. The Saskatchewan back to work law and the Quebec sign law were somewhere in between, provoking some protest, but not so much as to halt the passing of the contested legislation. The definition of abuse of the NM employed at the beginning of this section defines abuse as a tyrannical use of the mechanism. In other words, the Quebec and Yukon uses were ignored because they were clearly non-tyrannical: the Saskatchewan back to work law provoked more reaction because it came closer to tyranny: the Alberta sterilization bill provoked public outrage because it indeed was tyrannical. This explanation holds that indeed the no abuse

caucus or SPCs did he conduct before the notwithstanding clause was included in Bill 26?" See speech by MLA Nicol, Alberta Hansard (11 March 1998) at 816. For a similar criticism, see speech by MLA Mitchell, Alberta Hansard (16 March 1998) at 885.) The Premier answered that there was "a process that goes to agenda and priorities and on to caucus. There was a good discussion. Prior to that there was a tremendous amount of work done by the Department of Justice with the assistance of outside counsel". Klein further stated that in addition to the opinions of its own lawyers, the government hired two law firms to produce opinions about the matter. Minister of Justice Havelock stated that the advice the government received was "good legal advice", but the lawyers were not supposed to, and were not able to, consider the bill's political ramifications (Alberta Hansard (12 March 1998) at 855). When asked in the legislature, he refused to release these opinions (ibid.). A possible line of argument in favour of invoking the NM with the enactment of the bill without waiting for a judicial decision first could have been the following: if the bill had been enacted without a notwithstanding declaration, the victims would have sued for more than $150,000, and would have asked the court to declare the $150,000 cap unconstitutional. If indeed the court had found that the cap constituted a limit on a Charter right and was not justified by s. 1, it would have been too late to use the NM at this point, since the Ford case ruled that s. 33 cannot be used retroactively (see supra note 4 at 744-745). Thus using the NM after actions had been filed would have meant that the government would still have had to pay more than $150,000 to the victims who filed their claims before the invocation of the NM and thus the purpose of the legislation would have been undermined. This desire to ensure the legislation was valid at all cost probably explains why the notwithstanding declaration in the bill (s. 3) referred to all available Charter rights (s. 2, and 7-15) even though the bill clearly did not violate most of these rights (e.g., freedom of association (s. 2(d)) and the right to an interpreter in court proceedings (s. 14).

A full account of the role of government lawyers in legislation that involves invocations of the NM is beyond the scope of this work. For the role of government lawyers in legislation which involves Charter issues more generally, see P. Monahan and M. Finkelstein, eds., The Impact of the Charter on the Public Policy Process
assumption works, both in terms of reliability and in terms of accountability. The Quebec, Yukon and Saskatchewan uses were not abuses of the NM. They support the view that Canadian legislatures can be relied upon not to abuse the mechanism. For its part, the Alberta story shows that when the reliability argument does not hold, the accountability argument does.

While this account is certainly valid, there is still room for improvement. An analysis of the Quebec uses and of the Alberta proposed use of the NM shows that the public might have under-reacted to the former, and certainly over-reacted to the latter. Take, for example, the pension plan acts (acts no. 1-4). The notwithstanding declaration in these acts dealt with the bread and butter issue of pension plans for civil servants and teachers. These acts differentiated between men and women by holding that men had to reach the age of 65 before being eligible for pension benefits while the applicable age for women was 60.116 Is it really all that clear that this was a non-issue? Why did the government of Quebec create such a distinction? How many employees were affected by it? Who are the people affected? How much money was foregone by potential recipients because of this alteration to the eligibility criteria? How much money did the government save? How did other provinces deal with these problems? Does the average Quebecker really cares less about his or her pension eligibility than the average resident of Saskatchewan cares about a rotating strike? Should the media not have at least discussed the pension plan acts? Should opposition members of the National Assembly not have brought this issue to the media’s attention?

If the public in Quebec under-reacted to the Quebec uses of the NM, the public in Alberta over-reacted to the sterilization bill. First, unlike what is usually expected in terms of the balanced coverage of public controversies, the Edmonton Journal, for example, did not publish one word in support of the bill.117 In fairness, however, the bill, as objectionable as it was, did contain one positive aspect which was the abolition of limitation defences. In the Muir decision.

116 See supra note 8.

117 The Calgary Herald was also very critical of the bill, but it did cite an academic who said that the bill was “understandable” since the government attempted to prevent the cases in which sterilization victims sued the government “from becoming a frenzy for lawyers and to ensure compensation goes to victims and not to their lawyers”. Professor Ted Morton of the University of Calgary as cited in “Scholars divided over rights” Calgary Herald (11 March 1998) A5.
the court explicitly recognized that the government could have used the delay in Muir’s lawsuit as “a complete answer to all of Ms. Muir’s claims” [emphasis added].118 Partly in recognition of the government’s concession of this advantage, the court refused to award punitive damages. Indeed, the court even went so far as to specify that the government’s decision not to invoke the limitation defence coupled with its admission, made in 1972 while repealing the Sexual Sterilization Act, that the policy was wrong, saved it from having to pay $250,000 in punitive damages. This amount represented fully 25% of Muir’s claim.119 Bill 26 would have guaranteed that, in future cases, the government would not have had any discretion to invoke a limitation defence. This point was mentioned in the Minister of Justice’s speech while tabling the bill.120 However, amid the public outrage, the media simply ignored this point.121 Indeed, there was no public controversy regarding Bill 26: there was just public disgust.

An even more fundamental point, however, is that even if the bill was tyrannical, it might not necessarily also have been unconstitutional. As awful as the bill was, it is not clear that it infringed on any Charter right. It might be that limiting the amount of damages that the victims of forced sterilization could receive infringed upon the victims’ s. 7 right to life, liberty and security of the person. It might also be that it discriminates against them on the basis of their disability in contravention of s. 15. But these are claims that would have to be made out and there is no guarantee that a court would accept them. But amid the storm of public outrage, no one mentioned this point – not the media122 and not even the politicians who supported the bill.

What could have improved public awareness in this regard? What could have made the public in Quebec engage in a more meaningful discussion and lead the public in Alberta to be more even-handed in its discussion?

118 Muir, supra note 71 at 735 [emphasis added].
119 Ibid. at 734-5.
120 Ibid. at 781-3.
121 Admittedly, the fault here was not entirely with the media, since the government itself did not stress this point strongly enough.
122 In fact, as much as the discussion in the press talked about “human rights” and about the Charter, there was hardly any reference to actual Charter rights. The two exceptions were: 1- the text of s. 15 was mentioned in an article which reported on what a lawyer for some of the victims had said. “Cash Deal: Grit MLA calls move ‘chilling’”. supra note 26 and: 2- a report cited a comment by Premier Klein to the effect that the legal advice the government received cautioned that the bill might violate “legal rights”. “Klein says goal was to spare tax payers” Calgary Herald (12 March 1998) A3.
If we start by discussing the ignored Quebec legislation, it seems fair to suggest that one reason why this legislation was ignored was that it dealt with issues which were not matters of public knowledge. In contrast, the Saskatchewan back to work law, the Quebec sign law, and the Alberta sterilization bill were all well known issues even before the invocation of the NM. The Quebec and the Yukon uses of the NM also dealt with issues such as pension plans, school boards, land planning boards, and agricultural operations that were not so high on the public's list of priorities. The influence that the public's level of interest had on the media coverage given to the various acts should be obvious. It is also true that it is through the media that most people learn about political and legal developments in their society, an example of which would be an invocation of the NM. The other reason why it was not difficult for the Quebec media, for instance, to report on the sign law crisis was that this was a relatively simple issue. Indeed, the back to work law, the sign law, and the sterilization bill all dealt with straightforward questions which seem to have received uncomplicated, though hotly contested, answers. In the back to work law, the question asked by the layperson was: what is more important: the right of workers to strike, or the avoidance of any harm the strikes might cause to the public? The question posed by the Quebec sign law was simple as well: did Quebec need the French only sign law to protect the French language? The question posed by the Alberta bill was also simple: should there be a limit on how much money a victim of past sterilization can sue the province for? Although lawyers might think that, legally speaking, these are complicated questions, and while a layperson might have a different view of what the question actually is than lawyers, a layperson could still have an opinion on the matter. Moreover, these three pieces of legislation can be examined without any knowledge of the more general legislative schemes in which they operate. The sterilization bill and the back to work law were enacted as independent statutes. The sign law was an amendment to the Charter of the French Language, but it can be understood even without being familiar with the latter act. The other 12 notwithstanding acts, in contrast, dealt

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121 This is especially clear in the sign law example. The courts phrased the question as a minimal impairment question and asked whether the French only signs policy was necessary for the survival of the French language in Quebec. (See Section D. above). The question was discussed by many Quebec legislators as a purely political question regarding the relations between two groups of people, i.e., should anglophone Quebecers have the right to post their signs in English, or would this be too great a concession? For the debate in the Quebec National Assembly regarding Bill 178, see Section 4(B), below.

with more complicated questions. All of them are longer than the *SGEU Dispute Settlement Act*, the sign law, or the sterilization bill. Most of them are much longer, and contain tens or hundreds of sections. In order to understand why the NM was used in these 12 acts and what the consequences were, one had to have a reasonable mastery of the legislation. something it should not be assumed the public had.

The issue of simplicity also influences media coverage. Even with the benefit of legal training, it is extremely difficult to understand all of the NM issues in the 12 acts. Moreover, as explained above,\(^{125}\) for all four pension plan acts and five of the six education acts, an amendment to one act inserted notwithstanding declarations into other acts. This further complicated the tracing of the legislation’s impact. In the case of the renewal of an NM declaration, a reader of the bill would simply see the notwithstanding declaration without anything else to give the renewal any context or substance. These factors would have made the accurate reporting of these 12 acts extremely difficult, especially for reporters without any legal background or assistance. Conversely, the back to work law, the sign law and the sterilization bill were relatively easy stories to report.

If it is correct to suggest that prior public awareness and accessibility were factors in facilitating public awareness of the three pieces of legislation that were not ignored, then one should think of ways to make notwithstanding acts both more visible and more accessible. One way to do this is to adopt the second Alliance ruling, according to which a legislature would have to state the connection between the use of the NM and the right being infringed upon.\(^{128}\) The idea behind this proposal is to change the subject matter regulated by the NM from being external to the legislation to being internal to it, by having the very subject matter inscribed in the text of the act. Another version of this idea is to force the legislature to add preambles to notwithstanding acts as the Saskatchewan Legislative Assembly did.\(^{147}\) However, since what these proposals are really about is adding other declarations to the notwithstanding declaration, it is questionable whether they will be capable of increasing awareness. Indeed, Acts “F” and “G” were both entitled *An Act respecting certain declarations of exception in Acts relating to education and*

\(^{125}\) See Chapter 2, Section 3(B), above.

\(^{127}\) See *supra* note 23.
dealt only with the matter of exception, and yet they too were ignored. These acts also demonstrate the failure of another strategy to get attention, which is to make the matter of exception the only matter discussed in the notwithstanding act.\(^{128}\) Moreover, even if these solutions do contribute to legislative and public awareness, they will do nothing to increase clarity and simplicity. The pension plan acts, for example, will remain long and complicated regardless of how aware the public is of them. Finally, even if these suggestions do increase both visibility and clarity, they do not in turn create a mechanism that can educate the media and the public with regards to the exact meaning of the legislation. Therefore even if they were more aware, it would still be possible for the public to undercriticize or overcriticize the legislation, as was the case with the pension plan acts and with the sterilization bill.

A solution that would appear to solve all three problems – awareness of the notwithstanding legislation, clarity of the meaning of the legislation, and prevention of the public’s misunderstanding of the legislation, is the presence of a Supreme Court decision prior to the invocation of the NM. Such a court decision would necessarily discuss rights, limits, public goals, and alternatives. The media would be able to use this judgment as a starting point for a public discussion about the matter. Such discussion might take place not only after the Supreme Court rules on the matter, but also as the case makes its way throughout the courts system. If a Supreme Court decision preceded the ignored pension plan acts, for example, they probably would not have been ignored. The court would have discussed the different terms of the pension plan acts, and decided whether they amounted to discrimination under s. 15. If so, the court would have examined the s. 1 argument that the government would have invoked. In case the court struck down the legislation, it would have stated exactly why it did so and the public would

\(^{128}\) Aside from acts "F" and "G", there is another act among the 12 ignored notwithstanding acts which dealt mainly, but not exclusively, with renewing the notwithstanding declarations. This was the *Act to amend the Charter of human rights and freedoms and other legislative provisions* (act "C"). Four of the eleven sections of this two page act dealt with renewing the notwithstanding declarations in the pension plan acts. Even the other sections of this act, which included amendments to the Quebec *Charter of Human Rights and Freedoms*, involved pensions and retirement or insurance plans. Similarly to acts "F" and "G", this act too was ignored. It should be noted, however, that while the strategy of making the enactment or renewal of the notwithstanding declaration the sole or main part of the act did not seem to affect the level of public awareness, it did seem to increase the notice paid to the acts by the drafters of the legislation. The explanatory notes to these three acts - "C", "F", and "G" - do mention the renewal of the notwithstanding declaration. However, the explanatory notes attached to the other 9 ignored acts do not. This is significant because the explanatory notes represent the information that the drafters felt to be the most important and relevant for legislators to know.
have had the opportunity to be informed by the court's reasoning. Similarly, a judicial decision preceding the sterilization bill might have had an influence on the public's perception of the bill. The court would have addressed the question of whether Charter rights were infringed upon by the legislation. Its conclusion would have made it possible to criticize the government not only for treating the weak with cruelty but also for violating a specific, concrete Charter right. If the court found that the legislation did limit rights, it would not have been sufficient for the Alberta government to explain that it had to "balance" the rights of the victims with the need to save taxpayers' money. It would have had to make a s. 1 argument which the court would then have scrutinized. The judicial decision would probably have discussed the constitutional scheme in light of the Alberta government's decision to invoke limitation defences and thus make the public realize that the legislation was not entirely negative. It might actually be that after a Supreme Court decision, it would have been politically easier to invoke the NM.

Clearly, I am not suggesting that we should construct our legal system so that whenever we detect a problem with the public's perception of a legal issue, a Supreme Court decision is required. However, the view that such a decision should precede any use of the NM, which our discussion of the practice of the NM also concluded, was, as I have reiterated throughout this work, a conclusion which necessarily flows from the theory of the NM. This theoretical inquiry of the NM brought us to the NIP - to the idea of judicial review with legislative finality, as opposed to a compromise allowing for the pre-emptive use of the NM. The works of Weiler, Agresto and Dworkin explained how the court's decision could be a starting point for a public discussion.129 The Quebec, Yukon and Alberta examples demonstrated that without a judicial decision, there is a risk that the legislators and the public will not understand what is at stake and will ignore the use of the NM. Or, alternatively, these examples showed that the public would not be fully informed about the legislation. In contrast, if a legislature states in a given piece of legislation that it is re-enacting it notwithstanding a certain judicial decision, there is a higher chance that, because of the presence of the previous judicial decision, a legislator, a journalist, or a member of the public would be able to start an informed public discussion. Obviously, nothing guarantees that the legislators, the media, or the public will not either ignore or overreact to a

129 See Chapter 4, Section 5 above.
certain use of the NM or a judicial decision which provoked it. Furthermore, as discussed in Chapter 4, it is difficult to guarantee that the relevant judicial decision will actually be read by legislators, even if we do require this as a condition of the operation of the NM. However, the chance for such an informed public discussion certainly increases with a court's decision.

Thus the first part of our discussion of the practice of the NM, namely the discussion of s. 33, took us to the same place as the theoretical inquiry - from the NM to the NIP. The next part of the practical discussion will indeed discuss the practice of the NIP, namely the two incidents in which the NM was invoked in response to a judicial decision.

4. The practice of the NIP

A. Introduction: Use and Abuse of the NM according to the NIP

Two of the uses of the NM discussed in the previous section, the Saskatchewan back to work law and the Quebec sign law, were enacted in response to judicial decisions, and were seriously discussed in the legislature. In the Saskatchewan case, the use of the NM was effected not as a direct response to a judicial decision but rather in response to a troubling strike. The invocation of the NM was made necessary, however, by a lower court ruling which, it was feared, could be upheld by the Supreme Court of Canada. In the Quebec case, the invocation of the NM was a direct response to a Supreme Court of Canada decision. In this section, I will examine whether the legislative debates surrounding these two acts reflected the NIP, that is, reflected a situation of initial judicial interpretation and final legislative interpretation of the constitution.

As with the pre-emptive uses of the NM, any discussion of the practice of the NIP, that is, of the remedial uses of the NM, should begin with an understanding of what is an abuse of the NM according to the NIP. Obviously, the NIP accepts, as does the compromise approach, that tyrannical uses of the NM are abuses. However, the NIP might also find other uses of the NM to be abuses, even if they do not amount to tyranny. This is because, unlike the compromise

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130 See Chapter 4, Section 6(C)(1), above.
131 See Section 3(C), above.
132 See Section 3(D), above.
approach, the NIP limits the situations in which a legislature can legitimately use the NM. The
first version of the NIP, the check on judicial error approach, holds that the NM should be used
in order to correct a judicial error. If the legislature uses the mechanism outside of the context of
a judicial error, it abuses the mechanism even if this abuse does not result in tyranny. For the
check on judicial error approach, the inquiry concerning whether a certain use of the mechanism
is an abuse emphasizes the merits of the re-enacted legislation as opposed to the merits of the
judgment being overridden. It must rely on an external determination of which of the two is
correct, and which of the two is incorrect. If the court got it right, it does not matter how serious
the legislature was in considering the matter and in making the decision to use the NM. The use
of the mechanism would still be an abuse. The other approach to the NIP is the partnership
approach. In contrast to the check on judicial error approach’s definition of abuse, the partnership
approach’s definition emphasizes process, not outcomes. The partnership approach holds that it
is the role of the court to deliberate and the role of the legislature to make ultimate decisions.
Here the emphasis is not on whether the court got it right or wrong, but whether the legislature
took into account the court’s decision when deciding to re-enact legislation and thereby override
a judicial decision. If the legislature used the NM without being informed by the judicial
decision, it abused the mechanism.

At the end of Chapter 4, I introduced the idea of the partnership as a practice, and I
explained that this notion should be accepted by both the advocates of the check on judicial error
approach and the advocates of the partnership approach. The notion of partnership as a practice
was then explained to include the notions of respect, benefit, and last resort. The respect
requirement mandates that the legislature listen to what the court has to say and either respond to
it explicitly or discuss the constitutional text in light of the court’s deliberations. The element of
benefit refers to the notion that the NM is only to be invoked after the highest court has ruled on
the matter while the last resort requirement means that the NM should only be used when the
legislature has no other choice.

The last two requirements are very precise and are thus easily verifiable. The
Saskatchewan legislature failed to respect them because it did not wait for the Supreme Court of

133 See Chapter 4, Section 6(C), above.
Canada’s decision and instead rushed to use the NM. To practice a partnership of benefit and a partnership of last resort, it would have had to enact the back to work law without a notwithstanding declaration, and then re-enact it with such a declaration should the Supreme Court of Canada rule that the act was unconstitutional. Indeed, had it done so, it would have learned that the Act was constitutional as the Court eventually ruled that the right to strike was not protected by the *Charter*. In contrast, Quebec’s National Assembly dutifully waited for the Supreme Court of Canada’s ruling before invoking the NM in its sign law thus reflecting its adherence in that instance to both partnership requirements.

The respect requirement, unfortunately, is not capable of such clear examination. One has to carefully read the legislative debates in order to ascertain what role the court’s decision played in the legislature’s deliberations. Is there any evidence of the legislature pointing to a judicial error, as the check on judicial error approach would urge? Or, alternatively, of the legislature being informed by the ruling but rejecting its decision as the partnership approach suggests? An examination of the debates regarding the two acts suggests that, as a general rule, this respect requirement was not fulfilled.

**B. The Debate in the Legislative Assembly of Saskatchewan: Back to work and Back to Legislative Supremacy**

The debate in the Saskatchewan legislature concerning the *SGEU Dispute Settlement Act* (act no. 13) did not focus on the usage of the NM, but rather on the way the government of Saskatchewan chose to end the labour dispute. Issues discussed were whether such disputes should be resolved by back to work legislation, whether this specific dispute should be resolved by this specific legislation, and whether the government made a real effort to end the strike and avoid the need for this type of legislation. Government MLAs focussed on the damage inflicted by the strike while opposition members spoke of the government’s anti-labour agenda. This range of debate does not undermine the notion of the partnership as a practice since the latter does not require the NM to be the legislature’s only topic of discussion.

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What does take the debate in the Saskatchewan legislature outside of the NIP, whether in its check on judicial error form or in its partnership version, is that the debate was not about the meaning of the Charter, but rather about the political justice and wisdom of the legislation. Rights or their limits were hardly mentioned. In addition, the lower court decision which ruled that the right to strike was protected by the Charter and which, as a consequence, was the very motivation for the invocation of the NM, was not even referred to. For the most part, the debate could just as easily have taken place in the pre-Charter era. The only points in the debate where the Charter was mentioned are where the usage of the NM was discussed. Indeed, the fact that the Saskatchewan government had to use the NM made it apparent that rights issues were involved. However, while the very need to discuss the NM served as the need for Charter awareness, what was actually said about the NM demonstrates a failure of the NIP and a return to the compromise approach which represents the remnants of the legislative supremacy model. After explaining that it was not clear whether the right to strike was protected by the Charter, the Saskatchewan Minister of Justice moved on to say:

It is our belief that whatever the interpretation is given to freedom of association should not stand in the way of effective operation of this particular Bill. Consequently we invoked section 33 of the Charter. Section 33 specifically authorizes elected officials to declare that legislation shall operate, notwithstanding the Charter. We are using it for the precise purpose for which it was included in the constitution... I wish to emphasize that we are using section 33 in a careful, limited and responsible fashion...

Publicly accountable legislators must be the final arbiters of matters of essential economic and social policy. This is entirely consistent with our centuries-old constitutional and legal history, and I submit that our new Charter should not be read outside of this contextual framework. [emphasis added] 

The key words are the italicized ones: "whatever the interpretation" and "notwithstanding the Charter". The phrase "whatever the interpretation" is used to argue that whatever final legal finding is arrived at by the Supreme Court of Canada, the back to work law must pass. The term "notwithstanding the Charter" implied that the Saskatchewan government enacted the act not because it believed that this is what the Charter required, but rather it enacted the legislation.

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135 The only exception is the speech by MLA Shilington. See infra text accompanying note 138.
136 Saskatchewan, Legislative Assembly, Debates and Proceedings (31 January 1986) at 4341-2 [emphasis added]. For the same idea, see later in his speech, ibid., at 4374.
Despite what the Charter called for. This approach failed to adhere to the notion of a partnership of respect, because rather than respecting the constitutional text. it enacted the law "notwithstanding" the Charter and rather than being informed by the court's decision, it ignored it. Indeed, the Minister's reference to the "centuries-old constitutional and legal history" explicitly revived the notion of legislative supremacy. This debate was not an example of a legislature participating in the interpretation of the Constitution. Rather it represented a legislative opting out of the Charter's rights protection regime.

The government opened itself up to severe criticism from opposition members when it approached the NM as a way to legitimize a possibly unjustified rights violation instead of using it as a way for the legislature to participate in the protection of rights by championing a reading of the constitution according to which the back to work law was constitutional. MLA Shillington applied this concept of the NM as a connector between the back to work legislation and the idea of rights violation when he said:

I submit that that is more deep-seated than any views as to whether or not strikes are good or bad. Far more fundamental is their sense of fair play and understanding by the public that if a government or anyone else is allowed to violate the rules of fair play, then the democracy which has been taken away from the government workers may well be taken away from them.

...It was that sense of fair play and those freedoms which the framers of the Charter of rights sought to incorporate... It is that sense of fair play and those freedoms which this government violates. And they admit, by use of section 33, that they know they are violating that sense of fair play and those freedoms.

...the worst fears and the worst criticisms of section 33 have turned out to come true with this legislation. [emphasis added]

137 It does not matter, in this regard, that the Supreme Court of Canada eventually ruled that the right to strike was not protected by the Charter and thus rendered back to work legislation a non rights protection issue (see supra note 14). At the time of the discussion in the Saskatchewan legislature, this point was not known to the legislators and therefore the issue should then have been addressed as if it were a constitutional issue.

138 Saskatchewan, Legislative Assembly, Debates and Proceedings (31 January 1986) at 4345 [emphasis added]. Notably, Shillington is talking about "fair play" and about "freedom", but does not mention "rights". Perhaps the reason for this was his desire to avoid a response that the right to strike was not protected by the Charter. For similar criticisms of the act, see the speeches of MLA Tchorzewski. Saskatchewan, Legislative Assembly, Debates and Proceedings (31 January 1986) at 4357 and MLA Koskie, Saskatchewan, Legislative Assembly, Debates and Proceedings (31 January 1986) at 4358-9. Later in the debate, Shillington says that it "would be hard to think of a worse abuse of section 33", since the government used the legislature to gain an advantage for itself as an employer. Ibid. at 4374.
This same type of exchange, pitting the government’s view that considerations outside of the Charter justified the use of the NM against the opposition argument that the use of s. 33 was an admission that rights had been violated, can be found in the Alberta legislature’s debate concerning the sterilization bill.130 However, the only way that the use of s. 33 can be considered to be an admission of a rights violation is if the NM is seen, as the compromise approach holds, to represent a legislative overriding of constitutional values. The NIP does not follow this line of thinking. For the NIP, an invocation of the NM can only be based on a legislative reading of the Constitution. This concept is not in evidence in the debates regarding the back to work law or the sterilization bill. But the Saskatchewan and Alberta legislators should not be blamed for not adopting the NIP concept. As the Saskatchewan Minister of Justice suggested140 and as explained in Chapter 2,141 the current text of s. 33 does seem to allow for the legislative violation of rights.

The failure of the Saskatchewan legislators to address the back to work law in terms of rights and limits serves as a further demonstration of why it is desirable, and why the notion of a partnership of benefit requires, that the NM only be used after a judicial decision by the Supreme Court. Had the back to work law been enacted as an ordinary act, been struck down and then reenacted as a notwithstanding act, there would have been a greater chance that the discussion would have been normative, i.e., about rights and limits, as opposed to being political.142 The next section recounts a legislative debate that did take place after, and because of, a Supreme Court decision. Most of its participants still failed to engage in a normative discussion. This is the debate in Quebec’s National Assembly concerning the sign law.

C. The Debate in the Quebec National Assembly regarding Ford: A Potential NIP Unfulfilled

The discussion concerning the Act to amend the Charter of the French language (act no. 12) in the Quebec National Assembly was clearly connected to the Ford decision. Three days

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130 See the exchange between the Alberta Justice Minister Havelock and Opposition Leader Pam Barrett, at Section 3(E), above.
140 See supra text accompanying note 136.
141 See Chapter 2, Section 4, above.
after the Supreme Court of Canada delivered its decision on December 18, 1988, the new bill, which contained a notwithstanding declaration, was tabled. It was discussed in the legislature in the following three days, and less than a week after the ruling, on December 21, 1988, it was approved by the Quebec National Assembly.\textsuperscript{144} While not all of the legislators mentioned the Court's decision or the NM, it is clear from most of the speeches that what was at stake was the overriding of a Supreme Court of Canada decision.\textsuperscript{144}

The Act to amend the Charter of the French language (no. 12) overrode Ford only with respect to external signs. Regarding indoor signs, the Act accepted the Court's ruling and allowed other languages to be used in addition to French so long as French was predominant. This was in contrast to the outdoor signs which could only be in French. As suggested above, supporters and opponents of the Act fell into three groups. The first group was represented by 84 of the 99 members of the Quebec Liberal Party who supported the act's two main elements.\textsuperscript{145} These were the use of the NM with respect to external signs and the acceptance of the Court's ruling regarding internal signs. The second group of legislators was comprised of the 19 members of the Parti Québécois and the one independent MNA who opposed the Act because they felt that it did not sufficiently protect the French language. These members would have preferred that the Act be re-enacted as is without any change by invoking the NM with respect to both external and internal signs. In spite of their support for the French only rule, these members voted against the act.\textsuperscript{146} probably as a means of political protest.\textsuperscript{147} Finally, the third group was

\textsuperscript{142} In fact, as explained above (see supra text accompanying 48), the Supreme Court ruled, subsequent to the enactment of the back to work law as a notwithstanding act, that the right to strike was not protected by the Charter. It would therefore likely have upheld the act.

\textsuperscript{143} The debate took place between December 19 and 21, 1988. See Débats de l'Assemblée nationale (19 December 1988) at 4370-4388, Débats de l'Assemblée nationale (20 December 1988) at 4399-4499 and Débats de l'Assemblée nationale (21 December 1988) at 4513-4571. The author does not speak or read French. I thank Messrs. Christopher Moore and Raymond Maltese for research assistance and translations of the debates from French to English.

\textsuperscript{144} The explanatory notes to the bill began by stating that "[t]he object of this bill is to follow up two decisions rendered by the Supreme Court of Canada declaring certain sections of the Charter of the French Language to be inoperative" Bill 178, An Act to amend the Charter of the French language, 2d. Sess., 33d Leg., Quebec, 1988. The second decision the notes referred to was probably Devine v. Quebec, [1988] 2 S.C.R 790 in which Ford was applied. The explanatory notes ended by suggesting that "the bill contains a provision designed to ensure that certain of the rules it lays down are on a secure legal footing". Ibid. This language was likely meant to put a positive spin on the fact that the act represented an invocation of the NM.

\textsuperscript{145} Débats de l'Assemblée nationale (21 December 1988) at 4571.

\textsuperscript{146} Ibid.
represented by 15 members of the Liberal party who opposed the Act because it did not sufficiently protect anglophone rights. They thought that the NM should not have been invoked at all, and that the sign policy should have been changed for external as well as internal signs. These members, however, did not attend the vote and consequently never actually voted against the act.149

The speeches in Quebec's National Assembly represented these three points of view. For the purposes of this section, only the speeches made by members of the first two groups are relevant since we are only interested in how legislators justified their support of the NM. The speeches by the act's supporters are of obvious importance. The speeches given by those who voted against the Act because they felt it did not sufficiently protect the French language are also relevant. This is because they supported the use of the NM and only objected to its partial use. Since these members actually supported using the NM in the context of the act, their speeches are necessary to our analysis. Correspondingly, the speeches of the third group of members, who opposed the act and its use of the NM, are not relevant for our purposes.150

What would an NIP oriented legislative discussion of the overriding of Ford have involved? In this regard, there is a difference between the check on judicial error approach and the partnership approach. The check on judicial error approach requires the participants in the discussion to show where and why they think the court made a mistake. In order to do that, one would have to refer to either the rights analysis or the limits analysis of the case. In the rights analysis of the ruling, the court found that commercial speech was part of freedom of expression. In the limits analysis, it found that while the purpose of protecting French in Quebec was legitimate, the Quebec government did not prove that its French only sign policy was required to

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147 These members must have known that the act was going to be passed anyway with the support of the Liberal party. They knew therefore that their protest in the form of a refusal to vote would not risk the failure of the act. Such an outcome would have resulted in the complete disappearance of the French only rule which was not their goal.

148 Débats de l'Assemblée nationale (21 December 1988) at 4571.

149 The fact that these members did not attend to vote means that none of the votes against the act in the National Assembly were based on rights protection grounds or on a principled objection to the usage of the NM.

The figure of 15 is based on the number of Liberal Party members who did not attend the vote. Ibid. Since, among this 15, there were some who could not have attended the vote for other reasons, this figure might not be accurate.

150 Later I refer to these speeches while discussing the matter of the NM and accountability. See Section 6(B), below.
achieve that purpose. The partnership approach does not require legislators to point to a judicial error, but nevertheless the discussion must be informed by the principles of the decision.

Many of the speakers in the National Assembly followed either of these two models. One approach taken by some MNAs was to criticize the court for its approach to commercial speech. As MNA Jean Pierre Charbonneau suggested:

[T]hey would like us to believe that the fundamental liberties of Québec anglophones are threatened because five judges, mostly anglophones, have decided that in Québec, commercial discourse is like political rights, it is like religious rights, it is like fundamental rights. We must not go too far Madam Speaker. With all of the respect that I have and that we should have for the justices of the Supreme Court, they are not five popes that have made a pronouncement. They are five human beings, who live in a particular context, who were raised in a particular political society, and who have prejudices just like everyone else.

This seems to be a claim based on the argument from judicial error, according to which the court got the commercial speech issue wrong. There is even an explanation for the court's wrong answer, based on judicial bias. Other MNAs also expressed disagreement with the court's finding regarding commercial speech.

The way in which the issue of commercial speech was discussed in the Quebec legislature was not satisfying. First, the introduction of the view that commercial speech was not protected by the Charter was accomplished without any reference to the text of, or to the theory behind, either the Canadian Charter or the Quebec Charter. Secondly, it was not clear exactly what was felt to be wrong with the court's interpretation. Is the argument that the court erred in the interpretation of s. 2(b) of the Canadian Charter or s. 3 of the Quebec Charter? This would

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151 Ford, supra note 4 at 779-780.
152 Débats de l'Assemblée nationale (20 December 1988) at 4377. The French reads: "Là, on veut nous faire croire que les libertés fondamentales des anglophones du Québec sont menacées parce que cinq juges majoritairement anglophones ont décidé qu'au Québec, le discours commercial, c'était comme les droits politiques, c'était comme les droits religieux, c'était comme les droits fondamentaux. Il ne faut pas chercher, Mme. la Présidente. Avec tout le respect que j'ai et que nous devons avoir pour les juges de la Cour Suprême, ce ne sont pas cinq papes qui viennent de se prononcer, ce ne sont pas cinq personnes infaillibles qui viennent de se prononcer. Ce sont cinq êtres humains qui vivent dans un contexte particulier, qui ont été élevées dans une société politique particulière et qui ont des préjugés comme les autres”.
153 See the speeches of MNA Claveau at Débats de l'Assemblée nationale (20 December 1988) at 4448-9, MNA Blais at Débats de l'Assemblée nationale (20 December 1988) at 4431-1; MNA Chevrette at Débats de l'Assemblée nationale (20 December 1988) at 4426-7.
imply that commercial speech is not protected by the *Charters*. Or was the argument that while commercial speech is protected, its importance does not warrant that it be as fiercely safeguarded as other rights such as equality or freedom of religion? In this latter case, the court’s error would be with its s. 1 jurisprudence which assigned a strictly uniform analysis to all *Charter* rights. To be sure, both the argument that commercial speech is not protected and the argument that it is only to be weakly protected have a basis both in the text of the *Charter* and in constitutional theory.154 However, a rushed discussion in a legislative assembly is probably not the best means for advancing these views.

Rather than looking at the legislators’ statements through the perspective of the argument from judicial error, it is likely more appropriate to analyze them by way of the argument from politics. In other words, instead of reading them as arguing for a mistake in the court’s analysis, the statements should be read as a rejection of the court’s deliberations. Such a reading would recognize the presence in this instance of the partnership dynamic. The court set the terms with respect to commercial speech and the legislature was then free to accept or reject them.

Similarly, a partnership dynamic can be seen in the speeches of the second group of MNAs. These speakers did not refer to the Court’s decision explicitly but their perspective was clearly informed by it. This group of MNAs spoke not about the rights analysis of the case, but about the limits analysis. They believed that unilingual signs were important to the preservation of the French culture in Quebec. Consider this statement by MNA Claude Filion (PQ):

> First a bilingual sign: Serveuse demandée. ‘waitress wanted’. What is the message that we are sending by this bilingual sign to the immigrant? The message that we are sending to the immigrant is. it is natural. it is normal. Good lord. why would you force yourself to learn French? We will put English on the sign and English already assures greater mobility in North America. It is evident that the immigrant will tend to integrate himself or herself into the anglophone community rather than the francophone community.’”

The idea of unilingual signs as a message to the public appears in the speeches of other members as well. Even though Filion's statement does not mention the Supreme Court decision and does not suggest that the latter made a mistake, his words were clearly informed by the decision. He responded to the court's finding that the need for unilingual signs was not proved. The disagreement between the court's view and the view of the legislators expressed in Filion's speech involved the need for social science evidence. The court looked to this in order to find a justification for why unilingual signs were necessary. Filion and other legislators, on the other hand, focussed on the idea of the "message" sent by unilingualism. This was exemplified by the immigrant who is looking for a job and who, presumably, only has the time, energy or ability to learn one language so that he or she must choose between English and French. The point of these legislators was that in order to send a message of pre-dominance, what was really required was unilingualism, since pre-dominant signs actually sent the message that assimilation into the anglophone community was possible. This analysis by legislators reflected the partnership approach because it was based on the court's terms, even if this was not explicitly acknowledged.

While this approach was informed by the court's decision and was thus respectful of the court, it still demonstrated the legislature's difficulty in engaging in a serious discussion about the meaning of the constitutional text. The idea that one should look at the "message" and not at the social science evidence is an interesting idea that should not be automatically dismissed. It provokes questions such as whether limiting freedom of expression in order to send a socio-cultural message could ever be "demonstrably justified" according to s. 1. Is the Oakes test really the best test in such a case, where what is at stake are notions such as culture and identity as opposed to social facts which can be expressed by data? If we do follow the Oakes test, is the sending of the "message" a "pressing and substantial" objective? If one connects the "message" idea to the argument made by some MNAs that commercial speech should not be protected as strictly as other rights, one could ask whether in the case of commercial speech, a rational connection between the means and the end will suffice and thus obviate the need for a minimal impairment. All of these questions are serious and important, and could have been thoroughly

156 See the speeches of Jacques Rochefort (an independent member) at Débats de l'Assemblée nationale (20 December 1988) at 4412-15: Jean-Guy Parent at Débats de l'Assemblée nationale (20 December 1988) at 4470-73;
discussed in light of the text of the Canadian Charter (and the Quebec Charter). However, none of these questions were addressed in the legislative debate.

This brings us to the third approach to the enactment of the Act to amend the Charter of the French Language. Unlike the first group which responded directly to the court’s decision and the second group which responded to it indirectly, the final approach appeared as if from a world where there are no constitutional texts and no judicial interpretations. This approach saw only a fight between anglophones and francophones in which the court’s decision as well its overriding by the legislature are just two strategic moves. Thus the third approach praised the fair compromise which it was claimed that the act had achieved. This approach can be found in the way Quebec Premier Robert Bourassa spoke of the bill:

[w]e have tried to find a formula that may precisely serve as a balance... when there are two fundamental values that clash, one must make a choice and strike a balance... There is an inevitable choice. Everywhere else in North America, the choice would have been on the side of individual rights... it was an extremely difficult choice. Party tradition, reason and heart have required us to try and preserve these individual rights to a maximum. We have thus tried, with a formula, to take both these values into account. However, finally, when we had to choose between fundamental liberties and collective rights, I chose collective rights by accepting to invoke the notwithstanding clause...

This approach emphasized the historical context of Bill 178, and saw it not as a legal instrument to be measured against rigorous legal norms, but rather as another chapter in the longstanding language struggle in Quebec. While this approach seemed to be the most prevalent in the debate, it is certainly one that cannot be used in an NIP based Constitution. This is because its

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Hubert Desbiens at Débats de l’Assemblée nationale (20 December 1988) at 4489-92; and Robert Thérien at Débats de l’Assemblée nationale (20 December 1988) at 4493-5.

17 Débats de l’Assemblée nationale (20 December 1988) at 4425. The French reads as follows: ...nous avons essayé de trouver une formule qui puisse précisément servir de point d’équilibre... quand il y a deux valeurs fondamentales qui s’affrontent, il faut faire un choix, rechercher l’équilibre entre les deux. Il y a un arbitrage inévitable. Partout ailleurs en Amérique du Nord, l’arbitrage aurait été du côté des droits individuels... c’était une décision extrêmement difficile. La tradition du parti, la raison et le coeur faisaient en sorte qu’on devait essayer de préserver au maximum ces droits individuels. Nous avons donc essayé, avec une formule, de tenir compte des deux. Mais, finalement, lorsqu’il a fallu arbitrer entre les libertés fondamentales et les droits collectifs, j’ai arbitré du côté des droits collectifs en acceptant d’appliquer la clause dérogatoire.

See also the rest of speech at Débats de l’Assemblée nationale (20 December 1988) at 4423-6.

18 See the speeches of Guy Rivard, Minister of Cultural Affairs (Lib) Débats de l’Assemblée nationale (20 December 1988) at 4371-75; Réjean Doyon at Débats de l’Assemblée nationale (20 December 1988) at 4383-85; Cécile Vermette at Débats de l’Assemblée nationale (20 December 1988) at 4385-88; Gil Rémillard, Minister of Justice, at Débats de l’Assemblée nationale (20 December 1988) at 4445-47; Claude Ryan at Débats de l’Assemblée
emphasis is political and not normative. It is not about the meaning of constitutional values but rather about the mediating of political needs. It does not denote a legislature which has its own reading of the Constitution and is acting either as a super court (the check on judicial error approach) or as a super legislature (the partnership approach). Rather, it reveals a legislature which has not read the Constitution since it has opted to survey the political landscape instead. Such an approach cannot be supported in a constitutional regime based on principle and is reflective of a compromised Constitution and, as the compromise approach to the NM holds, the remnants of legislative supremacy.

nationale (20 December 1988) at 4450-53; Christine Pelacht at Débats de l’Assemblée nationale (20 December 1988) at 4467-70; Marc-Yvan Coté at Débats de l’Assemblée nationale (21 December 1988) at 4555-8; Michel Gratton at Débats de l’Assemblée nationale (21 December 1988) at 4560-65. I use the phrase “seemed to be” because this statement is based on personal impression, and not on accurate counting. It is very difficult to measure which approach was the most prevalent, as many members combined the different approaches.

A more extreme version of this approach can be found in the speeches of some Parti Québécois opposition members, who believed that the compromise was not justified and constituted a surrender to anglophones. See, for example, the speech of MNA Cécile Vermette, who attacked the government for the concession regarding internal signs and supported the usage of the NM to protect the entire act. She stated: “What we are telling them is: Respect the majority that we form in Quebec. We are 86% of the population and that demands respect. To have respect we must stand up. We must have courage, and I think actually this government lacks it”. Débats de l’Assemblée nationale (20 December 1988) at 4386. The French reads as follows: “Ce qu’on leur dit, c’est: Respectez la majorité que nous formons ici au Québec. Nous sommes 86% de la population et cela demande le respect. Pour avoir le respect, il faut se tenir debout. Il faut avoir du cran et je pense qu’actuellement ce gouvernement, il lui en manque”. To the same effect, see Jacques Brassard at Débats de l’Assemblée nationale (20 December 1988) at 4419-4423; Guy Chevrette, Débats de l’Assemblée nationale (20 December 1988) at 4426-9; Francis Dufour at Débats de l’Assemblée nationale (20 December 1988) at 4484-87. In terms of protecting the commercial speech rights of anglophones, there is a significant difference between the less extreme version of the approach represented by Bourassa and the more extreme version represented by Vermette. Bourassa sought to create a fair compromise between respecting these rights and protecting French in Quebec while Vermette was not interested in respecting these rights at all. However, in terms of our inquiry, these approaches are identical - both sought the solution in the non-normative world of the language struggle in Quebec, and not in the normative world of rights and limits. For a criticism of a similar approach by Russell, see Chapter 4, Section 4(B) above, and Chapter 6, Section 4, below.
D. Conclusion: Is the Partnership Workable?

Unlike the debate about the Saskatchewan back to work law, the debate regarding Bill 178 in the Quebec National Assembly revealed that the judicial decision did indeed, as the NIP required, inform the legislative discussion about the use of the NM. While the discussion was lively and informed, it failed to reflect the idea of a partnership between the courts and the legislature. Rather, most of the debate focused on the political, and not on the normative, aspects of the sign law. The overriding of Ford was a golden opportunity for the NIP to be put into practice but it was not taken advantage of. Thus in the only situation so far in Canadian constitutional history where, as envisaged by the NIP, a legislature has opted to use the NM in order override a judicial decision, the partnership approach was not practiced.

Clearly, the political circumstances which underlay this debate were not conducive to a prudent discussion. In order to satisfy its constituency, the Liberal government wanted to offer a quick response to the court’s decision. In this rushed debate, the government was more fully engaged in the defence of the act against those who wanted a stronger response. It consequently did not spend as much energy explaining why it chose to override the Supreme Court’s decision.

Moreover, the legislative discussion concerning Bill 178 was, to a large degree, more spectacle than substance. The Quebec government had been considering the possibility of invoking the NM for months. During that period, Quebec officials “hinted strongly” that the decision about the “inside-outside” formula had already been taken. The only remaining question, it was intimated, was whether the language of the expected decision would render this solution constitutional, or whether the NM would have to be invoked. This meant that rather than practicing the idea of a partnership, wherein the legislature first learns of the court’s decision and then responds, the legislators already knew that irrespective of the decision, their already prepared response would be the same. This approach is extremely disrespectful towards the court since it renders the judicial proceeding meaningless.

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160 Cohen, supra note 57 at 196; Monahan, supra note 57 at 157.
161 See Monahan, ibid.
162 Ibid.
163 For a similar criticism of Russell and Weiler’s approach to another case, see Chapter 6, Section 2(C), below.
Perhaps a legislative assembly operating under less heated conditions would engage in a more principled debate. Perhaps also one should approach what happened from the federal-provincial perspective instead of from the rights protection perspective. Alternatively, perhaps the picture is less bleak than depicted. Perhaps when the Saskatchewan legislators approved the notwithstanding back to work law and when the Quebec legislators approved the notwithstanding sign law, they indeed approached the issue in terms of rights and limits. That is, they perhaps did think that the overridden rights were either not Charter rights, or that their overriding was justified under s. 1. According to this approach, one should not fixate on the rhetoric of the legislative debates, conducted by non lawyers, but rather at the legal results. Obviously, my understanding of the NIP expects a lot from legislators and is perhaps too optimistic.

The conclusion of this section can best be understood when compared with the previous section’s conclusion. The previous section did not deal with the practice of the NIP, i.e., with incidents where the NM was used in response to a judicial decision, but with the entire practice of s. 33 including the cases where it was used pre-emptively. The practice of s. 33 was analyzed from the perspective of the NM as a compromise between rigid constitutionalism and no constitutionalism. According to the compromise approach, the no abuse assumption was that the NM would not be used for tyrannical purposes. This assumption was proven right in the previous section. Unlike the compromise approach, however, the NIP requires that the NM will only be used in response to a judicial error (the check on judicial error approach) or after a serious deliberation informed by a court’s decision (the partnership approach). This assumption was not proven correct by the analysis in this section. While neither the back to work law nor the sign law represented tyranny, the legislative discussion regarding them was not reflective of the NIP.

The comparison between the no abuse assumptions of the compromise approach and of the NIP is helpful not only in terms of reliability but also in terms of accountability. According to the compromise approach, the no abuse assumption can be supported not only by legislative reliability, but also by legislative accountability. If the legislature abuses the NM, that is, according to the compromise approach, if it invokes it in a tyrannical way, the public will condemn it, as was the case with the Alberta sterilization bill. A similar argument can be made while discussing the practice of the NIP. If the legislature abuses the mechanism, that is, according to the NIP, if it invokes it not in response to a judicial error or after a serious
discussion informed by a court's deliberation, the public might condemn the legislature's use of the NM even if this invocation did not amount to tyranny. Can this latter argument be supported by the practice of the NIP? This is one of the questions that the next section will discuss.

5. The NM, Accountability, and Deterrence

A. Introduction

In two of the situations analyzed so far in this chapter, namely the Quebec sign law and the Alberta sterilization bill, members of the public responded negatively to notwithstanding acts in a way that had visible political consequences. But what was it that made the public respond negatively? Was it the very invocation of the NM? Was it the way in which it was invoked? Was it the specific policy enacted in the notwithstanding acts? Can these factors be isolated from each other? This inquiry can deepen our understanding into how public reactions can deter legislatures from abusing the NM. It can help us learn about the limits of the accountability argument, i.e., whether the public objects to a notwithstanding act only if it objects to the policy being promoted or whether the public would also object to the use of the mechanism in a situation where it supported the policy being enacted. In addition, it can help us answer the questions presented at the end of the previous section, i.e., whether accountability influences not only the legislative deterrence to the use of the NM, but also the way in which it is used. After analyzing the public response to these two pieces of legislation, I shall conclude by applying the various concepts already introduced in this chapter to another situation in Alberta in which the use of the NM was considered, namely the aftermath of the *Friend* decision. 164

B. The Quebec Sign Law

What was it that led to the Quebec government paying a price for the enactment of Bill 178? Was it the French only sign policy? Was it the usage of the NM? Or was it the overriding of a Supreme Court decision or the way in which the NM was invoked? If we look at the speeches and statements made by the politicians who opposed Bill 178, we find different answers to this question.

A first approach was exemplified by Herbert Marx, one of the four Ministers who resigned following the adoption of Bill 178 and who told the National Assembly:

I have always been against the suspension of fundamental civil liberties with a "notwithstanding" clause... In this bill, we suspend the freedom of expression. In fact, this freedom is suspended by two 'notwithstanding' clauses, one for the Québec charter, the other for the Canadian charter. It is for this reason that I cannot vote for this bill.\textsuperscript{165}

This statement emphasized the use of the NM. It did not mention the sign policy. As former Prime Minister John Turner put it. "If once Bourassa used the notwithstanding clause, \textit{although the language law was a different issue}, the climate immediately began to deteriorate".\textsuperscript{166}

An alternative viewpoint saw the sign law as the source of the anger among anglophones and non-Quebecers. This approach does not ignore the use of the NM since this was essential to the enactment of the sign law. However, the core problem was the language policy. Consider the following speech by MNA Joan Dougherty:

To invoke the notwithstanding clause... in order to escape our moral obligation to respect both of these charters and the judgement of the highest court in the land is unacceptable to me. The signed provisions of Bill 101 are inspired by the assumptions that in order to reinforce the language and culture of some, it is necessary to deny the rights of others. I have never subscribed to this reasoning. I think it is false and I think that it is even dangerous to any society, because a society which feels justified in denying or even reducing the fundamental rights of some of its people puts at risk the rights of all of its people.\textsuperscript{167}

While this statement begins with a reference to the NM, it is mentioned only to set the scene for a discussion of the rights violation which appears to be the main point Dougherty is concerned about. Similarly, when Gary Filmon, the Premier of Manitoba, announced the withdrawal of a resolution to ratify the Meech Lake accord, he did not even mention the NM, and referred only to the "decision made yesterday by the Government of Quebec to restrict minority rights in that

\textsuperscript{165} \textit{Débats de l'Assemblée nationale} (20 December 1988) at 4430-31. The first sentence in the passage was in English. The other 3 sentences were originally spoken in French, and read: "Dans cette loi, on suspend la liberté d'expression. En effet, celle-ci est suspendue par deux clauses 'nonobstant' l'une pour la charte québécoise et l'autre pour la charte canadienne. C'est pour cette raison que je ne peux pas voter pour ce projet de loi".

\textsuperscript{166} Cited in Cohen, \textit{supra} note 57 at 200-1 [emphasis added]. The same approach is expressed by David Peterson, the Premier of Ontario at the time: "The notwithstanding clause was a stake through the heart of Meech Lake". \textit{Ibid.} at 197.

\textsuperscript{167} \textit{Débats de l'Assemblée nationale} (20 December 1988) at 4379.
province”. This approach is even more vividly exemplified by the well known speech delivered in the National Assembly by Clifford Lincoln, one of the Quebec ministers who resigned because of the bill:

...we have applied a “notwithstanding” clause and that saddens me above all because for me, it is all that is contrary to my personal commitment to say that we have a liberty and for whatever the reasons might be, we restrain them, we withdraw them, we suppress them...

...rights are rights are rights. There is no such thing as inside rights and outside rights. No such thing as rights for the tall and rights for the short. No such things as rights for the front and rights for the back, or rights for East or rights for West. Rights are rights and will always be rights. There are no partial rights. Rights are fundamental rights...

Like Dougherty, Lincoln started by mentioning the NM and even suggested that this was what saddened him “above all”. But when he elaborated on his feelings, the rights violation were what he spoke of.

The view that the central problem with Bill 178 was that it violated anglophone rights was really a concern about judicially enforced constitutional rights. Lincoln obviously knew that his government had appealed to the Supreme Court of Canada a ruling of the Quebec Court of

168 See Manitoba, Legislative Assembly, Proceedings and Debates (19 December 1988) at 4184. Similarly, the two opposition leaders in Manitoba who supported the withdrawal of the resolution did not focus on the NM. NDP leader Gary Doer did not even mention it. and Liberal leader Sharon Carstairs mentioned it, but focused on the rights violation. Ibid. at 4184-5.

169 The first paragraph in the quoted passage was delivered in French. The original reads: “Là, nous avons appliqué une clause ‘nonobstant’ et cela me désole par-dessus tout parce que pour moi, c’est tout ce qu’il y a de contraire à mon engagement personnel de dire que nous avons une liberté et pour des raisons quelconques, quelles qu’elles soient, on les restreint, on les retire, on les soustrait.” (Débats de l’Assemblée nationale (20 December 1988) at 4417-8.)

170 Later in the speech, Lincoln says: “I will fight until my last breath for the right of some person to do something that society says he has the right to do and, in that case, that person, be he English or French or Chinese or whatever, has the right to paint that sign on the exterior of his building.” Ibid. The reference to a Chinese person obviously implied that the issue was not simply between anglophones and francophones but involved the idea of more general human rights.

A similar approach to the analysis of the events is taken by Patrick Monahan, a constitutional scholar who has also researched the story of Meech Lake. In his account of the aftermath of Bill 178, he focuses on the usage of the NM (Monahan, supra note 57 at 163-9), and writes that “the use of the notwithstanding clause by Premier Bourassa was the watershed event in the three-year struggle over the ratification of Meech Lake” (ibid. at 164). However, when he explained why, he stressed that “[t]he use of the notwithstanding clause touched a nerve among Canadians outside the province of Quebec... What was at stake was an important symbol of the nature of Quebec society and, by implication, the nature of Canadian society as a whole”. (Ibid. at 164).
Appeal which held that the signs provisions were unconstitutional. If "rights are rights are rights", that is, if the problem was with the rights violation which the language policy created, why did he allow his government to appeal and argue that such legislation was constitutional? Why did he not resign when the decision was made to launch the appeal? Similarly, Filmon obviously knew about the sign provisions prior to their being struck down by the Court. If they were objectionable enough to cause him to withdraw his government's support for the Meech Lake Accord, why did he not originally demand that they be repealed by the Quebec legislature as a condition for his support of the Accord? The answer must be that in order for the Charter of the French Language to be contrary to the idea that "rights are rights" and in order for it to represent something so egregiously unacceptable that Meech Lake negotiations could not continue, it had first to be declared unconstitutional by the Supreme Court. Only after such a final judicial decision could the rights involved receive their clear scope, limits and force, and only then would it be meaningful to talk about their violation. Indeed, in another paragraph of his speech, Lincoln made an explicit reference to the idea that Bill 178 contradicted judicially enforced rights protection:

...we have seized the power of the judges. by the judicial power. we have nullified the judgement of the Supreme Court that has just been handed down...
I cannot agree with this. nor with the principle that tomorrow. I have a house that will be taken away from me. I can go to court and plead that my house not be taken away and the court will tell me: Yes. you have a right to this house. And the day that the court tells me this. I am told: For whatever reasons. we are going to give you only the land. the house will come later. I find this inequitable. unacceptable...

Finally. aside from objecting to what Bill 178 did (violating rights. invoking the NM. overriding a Supreme Court decision) the bill was criticized for how it was passed. It was again Clifford Lincoln who criticized the government for overriding within 5 days a court's decision which had

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171 In fact. the government had to request leave to appeal. since the initial striking down of the legislation was undertaken by the Quebec Superior Court. The decision of the Quebec Court of Appeal was delivered on December 22. 1986 and the Supreme Court of Canada granted leave to appeal in April. 1987. See Quebec v. La Chaussure Brown's Inc. et al (1986). 36 D.L.R. (4th) 374 (Que. C.A).
172 Débats de l'Assemblée nationale (20 December 1988) at 4417-18. The original in French went as follows: "...on a saisi ce pouvoir des juges. par ce pouvoir juridique. on a nié ce jugement de la Cour Suprême qui vient d'arriver... Je ne peux pas être d'accord avec cela ni avec le principe que demain. j'ai une maison qu'on me retire. Je vais en cour plaida qu'on ne me retire pas ma maison. et la cour me dit: Oui. vous avez droit à cette maison. Et le jour que

...
taken five years to arrive at." This statement possibly suggests that the opposition to Bill 178 would have been lessened had the legislation been the product of a more serious discussion.

The conclusion to this discussion is that it is very difficult to isolate the different aspects of the public's response to any given piece of legislation which invokes a notwithstanding clause. We can not therefore know whether the public can be trusted to condemn the legislature for abusing the NM in cases where the public agrees with the policy protected by the NM. This point remains valid even in the context of the Alberta sterilization bill.

C. The Alberta Sterilization Bill and the aftermath of the Vriend Decision

What was it exactly that made the people of Alberta angry? Was it the violation of the victims' human rights or was it the use of the NM? Was it the way in which the NM was used? Justice Minister Havelock told the legislature that the government had "responded to the concerns that Albertans have made quite clear over the last day, that they felt the legislation was inappropriate primarily because of the use of the notwithstanding clause provision" [emphasis added]. Similarly, statements made by the Premier and other Conservative politicians suggested that the NM was the reason for the public outcry. Indeed, a significant portion of the
debate in the legislature and in the press was about the NM and not about the sterilization issue. However, one must remember that invocation of the NM was packaged together with the controversial limit on compensation to sterilization victims. In other words, the public’s objection to the use of the NM in the sterilization bill might have been the result of the public’s objection to the bill itself. The public debate concerning Bill 26 did not separate the issue of the NM from the issue of hurting sterilization victims. This situation provides no evidence regarding the public response to the use of the NM when the public supports – instead of objects to - the policy the invocation is seeking to assist. As Dale Gibson put it:

That heartening instance does not mean the public’s inherent sense of decency can always be counted on to guard against unjustified uses of the notwithstanding clause... [I]n real or perceived times of stress (war, civil unrest, etc.), when the need for constitutionally entrenched, judicially enforced, civil liberties protections for minorities is greatest, the public did not clearly distinguish between the merits of the legislation and the use of the NM. For a similar confusion, see infra note 179.

The same newspaper article later states that Labour Minister Murray Smith received “a flood of phone calls as well”, quoting the Minister to the effect that the calls were “mostly questioning the use of the notwithstanding clause” [emphasis added]. Ibid. The analysis regarding the rest of the phone calls which did not question the use of the notwithstanding clause is identical to the analysis of the 20 percent of the calls which the Premier's office received.

Moreover, we should perhaps be more skeptical about statements made by politicians to the effect that their constituents objected to the bill because of the use of the NM. Politicians have an incentive to decrease the amount of occasions where they are caught failing to represent their constituency. If a politician admits that her constituency objected both to the policy (in this case capping the amount sterilization victims could receive) and the means of pursuing the policy (in this case the use of the NM), she is admitting to having made two mistakes. If, on the other hand, she says that her constituency objected to the legislation because of the use of the NM, she is implying that she made only one mistake. In this latter scenario, the policy itself was representative of her constituency, but the means with which she chose to pursue it were not.

In an editorial published on the day after the bill was withdrawn, the Calgary Herald stated explicitly that “we do not oppose the use of the notwithstanding clause per se”. “Editorial: In Retreat” Calgary Herald (12 March 1998) A18.

A headline in the Calgary Herald amusingly demonstrates this point. Referring to the possible use of the NM after the Supreme Court ruling in the Vriend case (supra note 164), the headline reads: “Gays fear use of Bill 26 in Supreme Court case” [emphasis added]. Calgary Herald (12 March 1998) A3. Obviously, this headline is erroneous: the use of Bill 26 – the sterilization bill – in response to the Supreme Court’s Vriend decision would not make any sense. What the newspaper probably meant to say was “Gays fear use of the notwithstanding clause in Supreme Court case”. Substituting “Bill 26” for “the notwithstanding clause” demonstrates that the newspaper confused the two.

One columnist actually believed that this was the case with Bill 26. Lorne Gunter wrote that the Alberta public would have supported Bill 26: “[The government] might have convinced voters that $150,000 is a lot of money for something that happened upwards of 60 years ago. And it could have portrayed those lawyers who urged their clients to seek more as money-grubbing ambulance-chasers”. The public anger, according to Gunter, was “all because of the decision to use the notwithstanding clause”. See Lorne Gunter, “Alberta’s Santa Clause” Edmonton Journal (12 March 1998) A16. This view does not appear to have been supported by any of the others who analyzed the developments regarding Bill 26.
public would be likely to tolerate free-handed use of the notwithstanding clause... [E]ven in normal times, the anger with which the Alberta public greeted the sterilization Bill may be unique to situations in which Government is perceived as ganging up on minorities that everyone agrees are disadvantaged. Strong public demand, shortly after the sterilization controversy, that s. 33 be used to resist the Supreme Court of Canada's reading in of "sexual orientation" to Alberta's human right legislation... may well indicate that public attitudes can be as ugly in good times as in bad.181

Gibson makes two valuable distinctions here, one between the two kinds of pressures and another between two kinds of minorities. Gibson's first point reminds us that the discussion of the no abuse assumption - whether it be in the form of the reliability argument or in the form of the accountability argument - is ultimately a discussion about predicting the future. He is right to suggest that the behaviour of Albertans in times of peace cannot guarantee the same behaviour in times of stress. It may very well be that Albertans would be willing to put a strain on their economy and pay hundreds of millions of dollars out of their own pockets in order to safeguard rights but not be willing to do so when the price is less clear and is foisted upon them in vague and threatening terms such as "national security" or "the decline of family values". Fortunately, since the enactment of the Charter in 1982, Canada has not had to undergo such a period of extreme stress.

Gibson also makes a distinction between a minority that everyone agrees is disadvantaged, and one whose plight is not the subject of such a sympathetic consensus. Minorities of the latter kind. Gibson says, such as gay people, might be still be subordinate to an "ugly", i.e., tyrannical, use of the NM.

The case Gibson is talking about is Friend v. Alberta.182 But the lessons to be drawn from its aftermath might be different than Gibson suggests. In Friend, the Supreme Court of Canada held the Alberta rights protecting document – the Human Rights, Citizenship and Multiculturalism Act183 [hereinafter H.R.C.M.A.] to be unconstitutional to the extent that it failed

181 Dale Gibson, "Notwithstanding Notwithstanding: Seven Ways to Resist an Opt-out Under S. 33 of the Charter", on file with the author. Gibson's last sentence refers to the aftermath of Friend, supra note 164, which is analyzed later in this section.
182 Supra note 164.
to enumerate sexual orientation as a prohibited ground of discrimination in the private sector.\footnote{184} The court ruled that the H.R.C.M.A. was to be read as if it had included sexual orientation as a prohibited ground of discrimination.\footnote{184} This decision affirmed the same decision reached by the Alberta Court of Queen’s Bench\footnote{186} but overruled by the Alberta Court of Appeal’s decision\footnote{187} which justified the omission of sexual orientation under section 1. This issue had been on Alberta’s agenda for the 5 years between the original Alberta Court of Queen’s Bench decision in 1993 and the Supreme Court of Canada’s ruling in 1998. As the case rose through the courts, the idea of using the NM was raised by Alberta legislators. The Supreme Court of Canada decision in \textit{Vriend} was handed down on April 2, 1998, less than a month after the Bill 26 fiasco. Immediately after the Alberta government announced its withdrawal of Bill 26 on March 11, 1998, and in anticipation of the Supreme Court decision three weeks later, an opposition legislator took advantage of the Premier’s admission that the bill was a mistake, and demanded that he commit to not using the NM if the Supreme Court ruled against the province and introduced sexual orientation into the H.R.C.M.A.\footnote{189} The Premier refused to make such a commitment.\footnote{189} Instead, he set up a four-member ministerial committee to discuss the decision, its implications, and the possible legislative responses which were not to exclude the use of the NM.\footnote{189} After the Supreme Court decision was delivered on April 2, the Premier said that he accepted the ruling, but that the decision regarding the invocation of the NM lay with the Conservative caucus, the members of which would need a week to study the decision and consult

\footnote{184}The Canadian Charter does not apply to the common law governing interactions between private entities. See \textit{RWDSU v. Dolphin Delivery Ltd.}, [1986] 2 S.C.R. 573.
\footnote{185}\textit{Vriend, supra} note 164.
\footnote{188}See \textit{Alberta Hansard} (11 March 1998) at 817.
\footnote{189}He responded that the \textit{Vriend} case “is now under the contemplation of the Supreme Court of Canada, and I don’t think it would be appropriate to comment on what might or might not happen relative to that case”. \textit{Alberta Hansard} (11 March 1998) at 814. Later in the article, he is quoted as saying that: “I get a lot of mail on this particular issue. It is going to have to be something that will be decided by the caucus”, \textit{ibid.} at 817.
\footnote{190}See “Tories gear up for court ruling” \textit{Edmonton Journal} (30 March 1998) A1. See also \textit{Alberta Hansard} (30 March 1998) at 1195.
with their constituents.191 In the following days, members of the public and some columnists urged the use of the NM.192

This is the part of the story that Gibson focuses on. With reason, Gibson suggests that the public support for the invocation of the NM in opposition to gay rights might attest to the fact that the public’s condemnation of NM abuses cannot always be relied upon even when the government acts against minorities. But the story does not end there. What is left to recount is that the legislators did not rush to use the NM. On April 9, the Conservative caucus decided against using the NM.193 It is very reasonable to assume that in the aftermath of Bill 26, – with the strong views expressed at that time by members of the public and by legislators in addition to the media’s pre-occupation with the issue, the decision not to use the NM was the only viable political option.194

The significance of Bill 26 extends beyond Vriend. First, it placed the NM on Alberta and Canada’s agenda for weeks. Secondly, it made politicians realize that, because of its severity, the decision to invoke the NM should involve the public. Thus in explaining his party’s decision not to override Vriend, and in response to the criticism concerning the process, within the government and within the Conservative caucus, in which Bill 26 was approved, the Premier of Alberta told the Legislative Assembly:

overnight the seriousness and the power of this particular clause became abundantly clear to virtually every member of our caucus. It was a very powerful tool that has to be used in the context of the Constitution in a very judicious way. It was thought, after tremendous thought and contemplation, that this was not an appropriate place to use that particular clause... I can... give... this commitment: if the notwithstanding clause is ever...

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193 Alberta Hansard (9 April 1998) at 1485.
194 See Lorne Gunter, “Alberta’s Santa Clause”, supra note 180. See also M. Lisac, “Lack of respect for common decency” Edmonton Journal (12 March 1998) A16. Columnist Lisac further writes that “[t]he deeply conspiratorial theory is that Bill 26 was a test case and if it worked then human rights for homosexuals would be out the window next”. Ibid.
contemplated, indeed, there will be a tremendous amount of open and honest and public discussion.195

A year after Premier Klein made this statement, in April 1999, the Alberta legislature gave first reading to an amendment to the province's Constitutional Referendum Act, according to which a referendum must take place prior to any invocation of the NM.196

Klein's statement teaches us that he believed that part of the reason that the public reacted so negatively to Bill 26 was that the decision to use the NM was rushed and hasty. In other words, the public cared not only about the substance of the policy enacted with the NM, but also about the way in which this invocation was accomplished. Such an approach fits well with the partnership approach. It sees the use of the NM as an exceptional event, which should be marked as such in the political life of the community. It also highlighted the fact that the current practice of using express declarations is not sufficient to ensure that legislators are aware of the gravity involved in an invocation of the NM. As argued above, the NIP's requirement that there be a judicial decision prior to the invocation of a NM increases the chances for such awareness. Granted, this does not guarantee that the NM will not be used in a tyrannical way. For example, Klein has stated that if the Supreme Court attempts to force Alberta to recognize gay marriages, his government will invoke the NM.197 Not only does such a statement prior to a judicial decision on the matter reveal a lack of willingness to even listen to what the court has to say, such a use of the NM would seem to many to represent a tyranny of the majority. It is certainly possible that it

195 Alberta Hansard (11 March 1998) at 817. See also Alberta Hansard (16 March 1998) at 885-7. In an interview, Klein did not say whether such consultation would include public hearings (“Klein won’t rule out use of clause in Vriend case” Edmonton Journal (12 March 1998) A5.)
197 See “Klein bolsters Alberta's stand against gay marriage” The Canadian Press (December 3, 1999). The context for this statement was Klein's response to a plan by an MLA to introduce a bill which would provide that marriage in Alberta can occur only between people of the opposite sex. Klein believed that such a bill was unnecessary since “[w]e have said in this province if there is ever going to be a change to that law, then we would use the notwithstanding clause to prevent it”. In other words, Klein's view that the NM should be used in this context only after a judicial decision is not out of respect for the judiciary but arises out of the hope that the courts would make it unnecessary to invoke the mechanism. Probably related to the Alberta's government's view on gay marriage is the fact that s. 2.1(3) of the Constitutional Referendum Amendment Act, supra note 196, states explicitly that the referendum requirement does not apply to “a Bill or a provision of a Bill within the jurisdiction of the Legislature that relates to who may marry”. In other words, if a government in Alberta decides in the future to invoke the NM in order to prevent gay marriages, it would not have to go through a referendum which would surely provoke angry responses from Albertans and other Canadians.
would nevertheless be approved by the people of Alberta. But even in such a case, it is better that the decision be made in a way that makes politicians accountable and the public informed and involved.

**D. Conclusion**

The story of both the sign law and the sterilization bill provide lessons for legislatures as to when they should not use the mechanism. The Quebec story shows that using the NM can lead a legislature to win a battle but lose the war. The majority of Quebecers did not object to the use of the NM. However, the anglophone population of Quebec and of the rest of Canada found the bill to be very troubling, and its enactment by the Quebec government caused it to pay a high political price. In the Alberta case, the negative consequences were too severe for the government to continue and it decided to withdraw the NM invoking legislation.

My analysis demonstrated that, while in both cases the use of the NM was a significant factor in provoking the public’s outrage, it was definitely not the only factor. In both instances, the merits of the legislation were also attacked in addition to the decision-making process which had approved the introduction of the legislation. In both cases, objection to the NM was combined with objections to the other contents of legislation. None of the opponents of these pieces of legislation have suggested that they would have supported the legislation had it been introduced without a notwithstanding declaration. This finding is important. It supports the view that the public can be trusted to object to the use of the NM only when it is used to protect policies that the public already objects to. In such cases, the invocation of the NM makes the objectionable legislation more visible, and the public has a chance and a context within which to express its objections. In other words, the use of the NM provides for the opportunity for “sober second thoughts” since it forces the legislature to reconsider and possibly abandon objectionable policies. But one cannot anticipate the public’s reaction to notwithstanding legislation which provides for policy choices it supports. In such cases, it is not clear that the public will object to the legislation simply because it invokes the NM. In such cases, one can simply hope that the Canadian public and its legislatures will be respectful towards individual and minority rights.
6. Conclusion: A Practice of Non Practicing

The most important lesson of this chapter is to be found not in the few incidents it discussed, but in the many occurrences it did not. These are the many cases in which legislatures enacted legislation without even considering the use of the NM and the many cases where a court struck down legislation on Charter grounds but the idea of using the NM never even came up as a response. Indeed, the federal government has never invoked the mechanism, and only two provinces and one territory have ever used it. The Yukon notwithstanding act was never proclaimed and the Saskatchewan notwithstanding act proved unnecessary. So it is really only in Quebec, where 8 of the notwithstanding declarations are still in force, that there has been a significant use of the NM.

Legislative reluctance to use the NM can be inferred not only from the numbers, that is, from the very non-use of the NM, but also from situations where the idea of using the NM was suggested but not followed through. There were numerous judicial decisions which provoked such proposals by politicians and by members of the public. Four examples are R. v. Seaboyer,198 R. v. Daviault,199 RJR-MacDonald v. Canada.200 and R. v. Sharpe.201 While four examples cannot be the basis for a decisive conclusion, they can definitely suggest a pattern.

As for the 14 cases in which the NM was used, I have suggested two standards to judge them. One is the standard offered by the compromise approach to the NM and the other is that offered by the NIP. The compromise approach to the NM holds that this mechanism represents compromised constitutionalism. This approach will find a use of the NM to be abusive if it amounts to tyranny. According to this standard, Canadian legislatures have fared well. No tyranny has occurred as a result of invoking the NM. In the case of Alberta’s Bill 26, where a

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198 [1991] 2 S.C.R 577. For a proposal, made before the case was finally ruled on, that the NM should be invoked if the Supreme Court struck down the impugned legislation, see Canada, House of Commons, Standing Committee on Health and Welfare, Social Affairs and the Status of Women, Sub-Committee on the Status of Women. First Report, The War Against Women (Ottawa: June 1991) at 43.
199 [1994] 3 S.C.R. 63. For a proposal to override the ruling, see the comments of M.P. Deborah Grey, House of Commons Debates (3 October 1994) at 6439.
200 [1995] 3 S.C.R 199. For a proposal to invoke the NM to override the decision, see the comments of M.P. Bill Blaikie, House of Commons Debates (25 September 1995) at 14806.
group of innocent victims were about to lose their rights for the sake of saving the majority's money, the majority sent an angry message to their representatives not to harm the victims. In the aftermath of the Ford case, the other situation where a majority group sought to violate the rights of a minority, the angry message was also sent and political sanctions were inflicted, albeit from outside the jurisdiction. Moreover, what was at stake in that case were commercial signs, not more fundamental rights such as political speech, religion or equality.

The second standard for judging the uses of the NM described in this chapter was the NIP’s. This concept makes the legislature a participant in the interpretation of constitutional rights and limits. The legislature does so either by correcting judicial errors, or by rejecting the court’s deliberations. For the NIP, an abuse of the NM occurs when the majority acts without reference to the Constitution, even if this does not result in tyranny. According to this standard, Canadian legislatures did not do well. The use of the NM in the Saskatchewan back to work law was invoked in order to end a strike regardless of what the Constitution had to say on this topic. The Quebec sign law was enacted not pursuant to any deliberation about rights and limits, but rather as a result of a political need to ignore the Constitution by overriding it regardless of its interpretation.

The members of the Legislative Assembly of Saskatchewan and the Quebec National Assembly should not necessarily be condemned for using the NM in an inappropriate way since the current text of s. 33 allows for such an inappropriate use of the NM. Nothing in the text of the section limits the use of this legislative power to situations where the legislature wishes to adopt a certain interpretation of the Constitution. Rather, the legislature is allowed to invoke the mechanism “notwithstanding” Charter rights. No wonder, then, that the concept that the NM should be used in order to create exceptions to the constitutional order was clearly the view adopted by legislators, the media, and the public in Alberta, both before and after the Bill 26 incident.

The NIP requires legislators who invoke the NM to realize that they are doing so in order to foster a certain reading of the Constitution, and not in order to bypass the Constitution. While it is theoretically possible for the legislature to have such a discussion even without a judicial decision, my view throughout this work has been that a prior judicial decision is essential for the explication of the constitutional questions that different acts of legislation involve. In this
chapter. I took this point further. I argued that a prior judicial decision could serve as a moderating influence on public opinion. Such a decision could have made the public in Quebec aware of the 11 uses which were ignored there and it could have allowed the public in Alberta to realize that Bill 26 might not have been unconstitutional. In other words, a prior judicial decision can both increase or decrease the political difficulty of using the NM.

A prior judicial decision, however, is just the beginning of the story for the NIP. A prudent legislature operating according to the NIP would take the judicial decision seriously and either find a judicial error in it or reject its deliberation about the meaning of the Constitution after itself being informed by this deliberation. Such a dynamic would reflect a partnership between the courts and legislatures.

The Quebec legislature failed to observe the requirements of the NIP while overriding a Supreme Court decision. As such, this is the only incident directly relevant to the idea of the NIP as a partnership between the courts and the legislatures. Other Canadian legislatures have never had a chance to succeed or to fail in practicing the NIP, since they have never overridden a Supreme Court decision. Were there other cases in which Canadian legislatures could have used the NM in a partnership oriented way in order to override a judicial decision? This will be the subject matter of the next chapter where I will discuss four such cases.
Chapter 6

Four Test Cases

1. Introduction

The last chapter demonstrated that in the few cases where Canadian legislatures invoked the NM, they did not, as a general rule, follow the idea of partnership. Their invocation of the NM was based on political needs and not on any legislative reading of the Constitution. The analysis in the previous chapter, however, did not focus on the cases, it focused on the legislatures. This chapter, in contrast, does focus on judicial decisions. It analyzes four rulings which four advocates of the NIP suggest were appropriate for the use of the NM. These cases are: National Citizens' Coalition Inc. v. A.G. Canada,¹ which Peter Russell and Paul Weiler believed was a judicial mistake and so should have been overridden: Ford v. Quebec (A.G.),² the overriding of which by the Quebec National Assembly was supported by Russell and Weiler; R. v. Seaboyer,³ which Christopher Manfredi and Lois MacDonald believed should have been overridden by Parliament. and R. v. Askov,⁴ the aftermath of which, according to Manfredi, might have required the use of the NM.

Discussing these cases and the way these scholars analyzed, and proposed to override, them is a good way to demonstrate when a partnership oriented NIP should support the use of the NM. At the risk of being overly repetitive, I will again make note of the distinction between the two theoretical themes I have employed throughout this work: the idea of the NM as a means to correct judicial errors, and the idea of the NM as a means to reject judicial deliberation.

Chapter 3 introduced Weiler's check on judicial error approach. This approach suggests that the NM should be used whenever a court mistakenly strikes down legislation. Aside from the fact that this approach and the very justification for judicial review are not coherent, this

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approach makes it relatively difficult to support the use of the NM since it is only in a case where there is a judicial error that it can be used.

In contrast to this approach, Chapter 4 introduced the idea that the NM could be used otherwise than as a response to a judicial error. It could be used whenever the legislature did not accept the court’s deliberation on a certain issue even if this deliberation was not in error. The argument associated with this approach is the argument from politics, according to which some questions of constitutional interpretation do not have any single right answer. In the context of such questions, the reason for the existence of judicial review is that the quality of a court’s deliberation is likely higher than that of the legislature’s. Society should therefore be able to benefit from the court’s deliberation even if the court’s response to the constitutional question it discusses is not the only right answer. This approach makes it relatively easy to support the use of the NM in a given situation. One need only argue that the court’s answer was not the only reasonable one and that therefore the legislature should be free to invoke the NM in order to override the court’s decision and to allow its preferred reading of the Constitution to prevail.

The first two cases discussed in Sections 2 and 3 of this chapter are cases which allegedly involved judicial errors. Russell and Weiler believed that the National Citizens’ Coalition case contained a judicial error and MacDonald and Manfredi believed that the Seaboyer ruling was similarly flawed. However, these scholars’ analyses of the above cases failed to establish any such errors. All that their analyses revealed was that these scholars had different answers to the constitutional questions involved than did the courts. In other words, these rulings may very well have justified the use of the NM but only on the basis of the argument from politics, i.e., that the court’s answer was only one of a number of reasonable answers, and not on the basis of the argument from judicial error, i.e., that the court’s answer was wrong.

The fact that the advocates of the NIP failed to demonstrate any judicial errors is of importance to the debate concerning the NM. If those who introduced the argument from judicial error cannot point to any such errors, this basis of support for the NM is weakened. Granted, a lack of judicial errors in the past clearly does not mean that the court will never make any in the
future. However, it does mean that the need for a NM has, for now, not been sufficiently established empirically.⁴

This conclusion refers to the very fact that the advocates of the NIP did not prove the existence of any judicial errors. But there is something to be learned from the way in which they tried to establish such errors. The scholars did not fairly represent the judicial decisions, overcriticized the court, and used rhetoric - as opposed to actual arguments - in their attempts to convince their readers that the court had erred. Absent any analysis of where exactly the court made a mistake, the advocates of the NIP have created a phenomenon I describe as "the rhetoric of judicial vice". This finding has two implications. The first one is internal. To the degree that the advocates of the NIP subscribe to the notion of partnership,⁵ these scholars were inconsistent.

⁴ Note that the judicial errors I am referring to here are errors made by the Supreme Court of Canada (as opposed to errors committed by lower courts), which led the court to strike down a statute (as opposed to upholding legislation, or striking down regulations, or creating a common law rule). Only this type of error can establish the need for a NM. If an error is made by a lower court and then corrected by an upper court, this points to the judiciary’s fallibility. It does not, however, establish the need for a NM, since the final judicial decision is not erroneous and legislative finality is not needed for the correction of an error. See Chapter 4, Sections 6(C)(2), above. Similarly, if an error by the Supreme Court results in the striking down of an administrative regulation or in the changing of a common law rule, this does not establish the need for a NM since the legislature can override the decision simply by enacting as a statute the administrative regulation or the common law rule. See Chapter 4, Section 6(C)(3), above. Finally, when the Supreme Court’s mistake results in the upholding of legislation, there is obviously no need for the NM, since this mechanism is aimed at re-enacting legislation that was struck down.

⁵ Although Weiler’s concept of the NIP concerns judicial error, he suggested that the NM reflects “a new partnership between court and legislature”. Similarly, Russell and MacDonald refer to Weiler’s idea of partnership. See Chapter 4, text accompanying notes 3-4, above. In the beginning of Chapter 4, above, I asked how Weiler could be talking about a partnership if what the legislature does under the NM is supervise the court. I answered this question by introducing the notion of partnership as a practice. This notion suggests that even if one subscribes to the check on judicial error approach to the NIP, wherein the role of the legislature under a NM bearing constitution is to rectify judicial errors, these corrections can be accomplished in a partnership oriented way.

The idea of partnership as a practice was further elaborated on in Chapter 4, above, by way of an examination of the three elemental types of partnership necessary for the existence of a fully meaningful partnership between the courts and the legislatures. These three partnership elements are the partnership of respect, the partnership of benefit, and the partnership of last resort. The idea of a partnership of respect implies that the legislature invokes the NM out of respect for the constitutional text and for the court. Respect for the constitutional text means that the decision to invoke the NM is based on the legislature’s reading of the Constitution and not on the legislature’s political preference. Respect for the court means that the legislature’s decision to enact the legislation comes after it has at least become conversant with the court’s decision. If one believes that the NM is based on the argument from judicial error, then the decision to invoke the NM must be based on the detection of a judicial mistake. If one believes that the NM can be invoked not only in response to a judicial error but also as a legislative rejection of the court’s deliberation, then the legislature does not necessarily always have to find a judicial error. However, if the legislature is rejecting the court’s deliberation, its action must be informed by the judicial decision. This means that the legislature must be familiar with the entire decision and not just with its holding. Similarly, the notion of respect requires that the court’s decision be discussed fairly in the legislative debate and that the court be treated as a partner and not as an enemy. The notion of a partnership of benefit mandates that the legislature not use the NM until the country’s highest court has ruled on the matter. It is only after the highest court has issued its
They talked about the idea of partnership between courts and legislatures under the NIP, but, by treating the court disrespectfully, they failed (in the very papers in which this notion was introduced) to themselves implement the idea of partnership. Externally, given that academia plays some role in facilitating the public's ability to understand case law and respond to problematic judicial decisions or problematic invocations of the NM, unprincipled scholarly treatment of case law serves to endanger the project of partnership altogether.

Section 4 moves from the argument from judicial error to the argument from politics. It discusses the Ford case, which Russell and Weiler believed was rightly overridden not because the court got the answer wrong, but because the court’s answer was not the only right one. However, Russell and Weiler’s analysis of the case suffers from the same problem that the debate in the Quebec National Assembly suffered from. Rather than thinking about the problem in normative terms, Russell and Weiler addressed the issue in political terms. Analyzing Russell and Weiler’s discussion of Ford helps to make clear how the argument from politics should be invoked in the context of the NM. What this argument allows for is the overriding of court decisions in cases where there is no right answer. What it does not allow for is the overriding of court decisions in cases where there is a right answer which the court arrived at but which the political branch prefers to ignore.

Section 5 revisits the argument from judicial error. The Askov case involved such an error, as the court failed to understand the social science evidence it received. As a result, the decision that it can be said that the judiciary as a whole has dealt with the issue and that therefore the matter is now ready for legislative consideration. Similarly, the notion of a partnership of last resort means that if the legislature has at its disposal other means with which to achieve its goal, such as enacting different legislation, it should not use the NM. See Chapter 4, Section 6(C), above.

The reason that I use the phrase "to the degree that" in reference to the extent that Weiler, Russell and MacDonald subscribe to the idea of partnership, is that these scholars never explained what they meant by “partnership” and it could be that they saw the partnership as a “label” and not as a practice. See Chapter 4, Section 1, above. The notion of a partnership as a label refers only to the lack of judicial finality, and if these scholars in fact saw partnership in this way, they do not have to accept any framework, such as the notions of respect, benefit, and last resort, for the relationship between courts and legislatures. The fourth advocate of the NIP, Manfredi, did not refer to a partnership but talked about the legislature’s “equal responsibility to inject meaning” into the Charter. C.P. Manfredi, Judicial Power and the Charter - Canada and the Paradox of Liberal Constitutionalism (Toronto: McClelland & Stewart, 1993) at 205 [emphasis in the original]. As with the use of the term “partnership” by Weiler, Russell, and MacDonald, it is not clear whether Manfredi’s discussion about “equal responsibility” implies that the legislature has the final word but does not have to operate in any partnership oriented fashion, or whether with “equal responsibility” there also comes a framework within which the legislature must operate differently when invoking the NM as opposed to when it is simply enacting ordinary legislation.

7 See Chapter 5, Section 4(C), above.
court delivered a ruling which forced the widespread withdrawal of otherwise valid criminal charges and the loss of tens of millions of dollars. Askov, however, did not involve the striking down of legislation, and it was possible to correct the ruling's error with ordinary legislation. Aside from discussing the case itself, I also examine Manfredi's treatment of it. This treatment was the only instance of an advocate of the NIP undertaking an appropriate case analysis. It fulfilled the requirements of respect, benefit and last resort and demonstrated that the practice of partnership is possible.

2. National Citizens’ Coalition Inc. v. A.G of Canada

A. The Case

In National Citizens’ Coalition, the Alberta Court of Queen’s Bench struck down an amendment to the federal Elections Act that prohibited private interest groups from funding candidates or parties during election campaigns. The federal government not only did not invoke the NM to override the decision, but did not even take advantage of the opportunity for appeal that was available to it. This fact is enough to exclude the National Citizens’ Coalition from the list of cases that demonstrates why a NM is needed. Nevertheless, Russell and Weiler proposed to invoke the NM in the context of the decision both in the 1989 newspaper article by Weiler and Russell and in Russell’s 1991 law review paper. This proposal fails to follow the idea of a beneficial partnership, which would require the legislature to wait until the highest court has ruled. Russell and Weiler’s analysis of the case is still worth discussing since it also suffers from a lack of adherence to the partnership practice in addition to employing yet again the rhetoric of judicial vice.

The provisions that were struck down in National Citizens’ Coalition prohibited anyone who was not a candidate or a party (or someone working for either one or the other) from

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8 Supra note 1.
incurred expenses "for the purpose of promoting or opposing, directly and during an election, a particular registered party, or the election of a particular candidate". The court found that the provision infringed on s. 2(b) and could not be justified under s. 1 of the Charter. The court's finding that the provision constituted an infringement on freedom of expression was very succinct and was based on the mere fact that it limited a person's means to express her ideas. This finding was not disputed by Russell and Weiler, and therefore will not be discussed here. Most of the judicial energy, as well as Russell and Weiler's countervailing academic energy regarding this decision, was expended on the s. 1 analysis of the decision.

The government's s. 1 argument was that the limits on expenditures by candidates and parties, the validity of which was neither contested by the plaintiffs nor discussed by the court, were rendered meaningless by the lack of limits on third party spending. Rejecting this justification, the court said:

A limitation to the fundamental freedom of expression should be assessed on the basis that if it is not permitted then harm will be caused to other values in society... Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be [an] actual demonstration of harm or a real likelihood of harm... In my view it has not been established to the degree required that the fundamental freedom of expression need be limited. The limitation has not been shown to be reasonable or demonstrably justified in a free and democratic society.14

B. Russell's Criticism: The Rhetoric of Judicial Vice

In his 1991 law review paper, Russell expresses the view that the court's decision was flawed. He writes:

... Justice Medhurst's decision striking down the legislation shows little sensitivity to the complexity and importance of working out an appropriate legislative scheme for democratic elections. His decision fails to address the fairness or effectiveness of imposing spending limits on political parties which do not apply to interest groups. He does not carefully examine the evidence presented to him by the federal government showing actual harm. Nor does he provide any indication of the degree or nature of the harm which could justify a limitation...

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12 S. 2. of Canada Elections Act, cited in National Citizens' Coalition, supra note 1 at 439
13 Ibid. at 447, 451, 452.
14 Ibid. at 453.
One inherent weakness of the judiciary's treatment of rights issues under the Charter is a tendency to overlook or give insufficient weight to the ways in which private, non-governmental centers of power can adversely affect the freedom and equality of citizens. Judicially mandated deregulation of the election process could lead to a situation in which large accumulation of wealth can unduly affect election outcomes. We should not declare closure on legislative discussion and re-consideration of these issues just because a judge has spoken.\(^{15}\)

This passage is replete with expressions regarding the imperfection of the court's job: "little sensitivity", "fails to address", "does not carefully examine", "inherent weakness", "a tendency to overlook", "give insufficient weight", "just because a judge has spoken". Aside from the exercise in rhetoric, two statements by Russell exhaust his to-the-point criticism of the court. One is evidentiary: the judge "does not carefully examine the evidence presented to him by the federal government showing actual harm". The other is about bad reasoning, according to which the court does not "provide any indication of the degree or nature of the harm which could justify a limitation". The statement about the evidential finding is made, \textit{prima facie}, in the form that the argument from judicial error requires. Russell posits that judge Medhurst did not follow the formula he himself suggested. Had he examined the evidence appropriately ("carefully") he would have found "actual harm", which was, according to Medhurst's own formula, sufficient to justify the legislation he struck down. The statement about bad reasoning, for this account, supports the statement about the evidential finding: had judge Medhurst indicated the line between insufficient and sufficient evidence, he might have realized that the line had been crossed in this case.

However, this account by Russell is not a good example of how to prove a judicial error in a case. Both in terms of the \textit{quality} and the \textit{consequence} of examining the evidence, Russell does not support his argument. In terms of the quality of examining the evidence, he just says that it was not "careful" without saying how a "careful" examination would be executed. My own impression was that Justice Medhurst's opinion was comprehensive and carefully reasoned. It addressed the legislative history of the impugned legislation;\(^{16}\) referred to several reports or

\(^{15}\) Russell, \textit{supra} note 11 at 302-3.

\(^{16}\) \textit{Supra} note 1 at 444-450.
testimonies made by professors." and canvassed the relevant caselaw and comparative law. I am not saying that it is inconceivable that Medhurst did not do a careful job, but if Russell wants us to believe this, he should tell us what he means by "careful." To criticize Russell here, it is appropriate to paraphrase his own words regarding Justice Medhurst, and to say that he does not "provide any indication of the degree or nature" of carefulness required in examining this evidence. As for the consequence of examining the evidence, Russell's statement that the government showed "actual harm" is similarly not established. Here, Russell literally does what he criticizes the court for doing. He does not "provide any indication of the degree or nature of the harm which could justify a limitation". What Russell actually meant was that "the court did not find the evidence sufficient but I do".

How could Russell have demonstrated a judicial error? The starting point would have been the fact that Justice Medhurst's language in the passage quoted is indeed unclear. He says that the demonstration of the probability of the harm did not suffice because there was not even a "real likelihood" of harm and thus, there was no need to limit the right. But what element was not demonstrated to be sufficiently probable? Here, there are four possible options. The first is that it was not sufficiently proven that third parties will actually use their rights and launch...
personal campaigns. The second was that even if personal campaigns occurred, their harmfulness to fair elections was not sufficiently demonstrated. The third possibility is that both were not proven — neither that there would be personal campaigning nor that this would be harmful. The fourth is that some degree of private campaigning is clearly harmful, but it was not demonstrated that the private campaigning in Canada would reach this degree.

It seems that Russell understood "actual harm" as the first option, i.e., that it is not clear that interest groups would use their right to campaign. Because the evidence that the government presented was about actual incidents of private campaigning in Canada, this was sufficient for Russell to claim that there was actual harm. Justice Medhurst, on the other hand, seems to have adopted the fourth option, i.e., that there was no evidence of the probability of the type of massive campaigning that would justify limiting freedom of expression. In order to demonstrate a judicial error, one would have to elaborate on this lack of clarity in Medhurst's analysis and to explain why any interest group campaigning — as opposed to massive interest group campaigning — is harmful and therefore constitutes a sufficient reason to justify limiting freedom of expression. Russell indeed noticed this lack of clarity regarding what must be demonstrated ("[n]or does he provide any indication of the degree or nature of the harm"), but failed to note where he felt the

so the case does not contain an Oakes test analysis. For an Oakes test analysis of the case, see Hiebert, supra note 9 at 75-76.

21 That Justice Medhurst understood the insufficiency of evidence as a lack of evidence of expected massive campaigning can be deduced from his language in other sections of the judgment. First, all the evidence he reviews is evidence about third party campaigning (National Citizens' Coalition, supra note 1 at 446-447), which is relevant only given the assumption that private campaigning is harmful. Second, prior to reviewing the examples of private campaigns and while referring to the recommendation of the Chief Electoral Officer to enact the impugned amendment, Medhurst says: "[t]here was very little actual evidence of the abuses of s. 70.1(4) [the provision which prior to its amendment had allowed bona fide private campaigning]... to support the recommendation" to ban private campaigning (ibid. at 446). The reference to "little actual evidence of abuse" implies that the question is whether there would be enough private campaigning to create harm. Finally, in the case, when Medhurst refers to the American experience on the issue, he writes: "...[T]here has been reference to alleged mischief caused in the United States of America by groups called political action committees. These organizations... have expended large sums of money in opposing the election of certain candidates to the United States Congress. This could happen in Canada, it is contended, if the limitation were not in effect, and have a harmful effect on the system which is now in place for conducting federal elections". Ibid. at 451. Given that all Medhurst J. says about the U.S. experience is that there were some committees that expended large sums of money and not that they caused harm, and that he then moves on to refer to the claim that "this" could happen in Canada, it is probably safe to say that his use of the term "this" refers to the very existence of large campaigning, while the harmfulness of large campaigning is assumed.

(Although it seems that the fourth option is what Judge Medhurst meant, he also could have had the third option in mind. Since it has to be demonstrated both that it is probable that there will be private campaigning in Canada and that private campaigning is harmful, once the judge is not convinced of the first proposition, there is no need to go to the second).
court's view to be in error. Thus, although Russell did have a valid point in his criticism, he failed to elaborate on it and advance in its place a partnership oriented proposal to invoke the NM. His account is therefore merely a demonstration of the rhetoric of judicial vice.

It should be added that Russell's view alone hardly makes the National Citizens' Coalition case an appropriate occasion for invoking the NM. The flaws that Russell identifies in the decision—the impression that the evidence was not examined carefully, and the fact that the judge did not set a standard for sufficient evidence, and was then satisfied in saying that the evidence was not sufficient—are typical of lower courts' reasoning because they reflect very casuistic— as opposed to more general and principled—adjudication. This serves as yet another example of why the NIP requires, in my view, a ruling from the highest court. It is reasonable to assume that Russell's valid criticisms would have been addressed and clarified by the higher courts, had the government decided to appeal.

C. Russell and Weiler's Analysis of the Case: Examining the Court's Obedience

Russell supported the overriding of National Citizens' Coalition not only in his 1991 law review paper, but also in the newspaper article which he co-authored with Weiler in 1989. They wrote:

In the United States, the Burger Court held that constitutional freedom of speech precluded any legislative restriction on the amount of money which someone could spend in an election campaign. The principle of that decision has been followed in this country by a lower court judge who struck down a similar feature of the Canadian Elections Act. Having just experienced in the last federal election the wave of private election advertising, American-style, we would strongly endorse the use of Canada's override procedure if our Supreme Court were so to interpret "freedom of expression" in the Charter.

This language represents a better analysis of the case than that contained in Russell's 1991 law review paper since it actually might establish the presence of a judicial error. Unlike the language in Russell's 1991 paper which simply denounced the court, the quoted passage describes something new: the experience of the 1988 general election. The fact that there was a "wave of

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22 See Chapter 4, Section 6(C)(2), above.
23 Russell and Weiler, supra note 10.
private election advertising\textsuperscript{24} shows that there was "actual harm" and therefore the decision should be revoked.\textsuperscript{25} When given a closer look, however, Russell and Weiler's proposal does not establish the need for the use of the NM. The new evidence regarding the wave of interest group campaigning can imply one of two things. One is that the court made a mistake in not predicting this wave, in which case it is the argument from judicial error. Yet Russell and Weiler said nothing about the analysis in the case, and, as mentioned earlier, Russell's attempt to show such a mistake in his 1991 paper did not succeed.

The other explanation of what Russell and Weiler's aim is in mentioning the wave of private campaigning is that although it was reasonable for the court not to predict the wave, once it occurred the decision was no longer correct. This would represent the argument from policy making which is discussed in Chapter 3 in the context of Manfredi's work. One of the attributes that Manfredi believes hampers the court from prudent policy making is its inability to review its decisions after they have been delivered in order to see how they work in the real world. According to this argument, if new evidence renders an older court's decision obsolete, the legislature should use the NM to update it.\textsuperscript{26} In my discussion of the idea of partnership of last resort, however, I argued that the legislature should avoid using the NM in such a case. Rather, it should re-enact the act without a notwithstanding declaration, making it possible for the court to examine the new evidence.\textsuperscript{27} Thus Russell and Weiler's proposal here encourages the legislature to use the NM when other avenues are still open.

Earlier, I suggested that the cause of the flaws identified by Russell in National Citizens' Coalition stemmed from the fact that it was a lower court decision, a point that Russell did not refer to in his 1991 paper when he stated that the government should have overridden the decision with the NM. However, in their 1989 newspaper article, Russell and Weiler did not say that the NM should have been invoked immediately. Instead, they acknowledged the fact that the

\textsuperscript{24} For a more detailed description of interest group campaigning in these elections, see Hiebert, supra note 9 at 79-81.

\textsuperscript{25} This demonstrates that, unlike what seems to have been Russell's understanding in 1991 (see supra text accompanying note 21), Russell and Weiler's understanding in 1989 was that what the court meant in ruling that the evidence was not sufficient to justify limiting the right was that there was no evidence of massive campaigning (the fourth possibility). Otherwise, the wave of private campaigning is irrelevant.

\textsuperscript{26} See Chapter 3, Section 5(B), above.

\textsuperscript{27} See Chapter 4, Section 6(C)(3), above.
decision was a lower court decision, and claimed that they "would strongly endorse the use of Canada's override procedure if our Supreme Court were so to interpret 'freedom of expression' in the Charter". This sentence reflects an alarmingly disrespectful approach towards the judiciary.

In explicating the notion of beneficial partnership, I suggested that the legislature has to wait until the highest court deals with the issue. The reasons for this were: the need to let the judiciary produce its best product and to provide the highest court with an opportunity to convince the legislature that the lower court's decision was correct, or to posit an alternative solution. Russell and Weiler do want to wait for the Supreme Court to rule, but their motivation is not to listen to it, but rather to examine its obedience. They appear to have already decided that only a certain decision would be acceptable. They do not want the legislature to consider what the court has to say. They want the court to obey their, or the legislature's, dictation. This is not the way the legislature should treat its respectful partner. This disrespectful attitude towards the judiciary surpasses even the view that the legislature need not wait until the highest court speaks.

Above I suggested that not waiting was perhaps appropriate in cases where serious harm could be caused by a judicial decision - at least judicial energy is not wasted and the court does not feel threatened or forced to reach a certain decision. According to Russell and Weiler's directive, it would.

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24 See Chapter 4, Section 6(C)(2), above.
25 Ibid.
30 There is another problem with Russell and Weiler's language in the above quoted passage. As part of their attempt to "sell" the NM, they panderm to Canadian patriotism by noting that "nothing is quite so American as absolute judiciary supremacy" and "nothing in our Constitution is so distinctively Canadian" as the NM. Russell and Weiler, supra note 10. Correspondingly, as part of their "selling" of the need to override the National Citizens' Coalition decision, supra note 1, they suggest invoking the NM should the Supreme Court of Canada adopt the American system of regulating political campaign financing. However, their analysis is inaccurate with respect to both the American and Canadian law regarding campaigning by interest groups.

Regarding the American treatment of interest group campaigning, Russell and Weiler write that the caselaw in the United States holds that restrictions "on the amount of money which someone could spend in an election campaign" is unconstitutional. This is inaccurate. What the American caselaw does say is that restrictions on campaign expenditures by candidates are unconstitutional. Campaign financing by interest groups (the equivalent American term is PACs - "Political Action Committees") resembling the National Citizens' Coalition can be restricted in the U.S. This is due to the characterization of the financing as a contribution to a candidate and not as political speech.

The above error committed by Russell and Weiler caused them to reach another inaccurate conclusion. With respect to the comparison of American and Canadian law regarding interest group campaigning, Russell and Weiler imply that while the Alberta Court of Queen's Bench's decision followed an American principle, the
D. Conclusion

One could suggest a reason for Russell and Weiler's lack of success in demonstrating that the *National Citizens' Coalition* ruling contained a judicial error. The issue of campaign financing is a contested issue which has been debated in Canada and in other legal systems for many years. Each of the different approaches introduced has a reasonable basis, and none can be dismissed as obviously "wrong." In such a case, a partnership oriented approach to the NIP encourages one to say "I prefer the other view," rather than "this view is wrong."

The next section further demonstrates this point. The issue of the relevance of a complainant's past sexual history in sexual assault cases is very contested and has been discussed for decades in Canada and elsewhere. It involves the balancing of two rights: the right of the accused to a full defence and the right of the complainant not to be humiliated or exposed to myths and stereotypes. The legislature arrived at one way of balancing these two rights. The Supreme Court of Canada, in *Seaboyer*, came up with another solution. MacDonald preferred the view that was adopted by the Supreme Court's minority judgment, but insisted on showing that the majority of the court was wrong. As with the analyses of *National Citizens' Coalition*, the result is not a demonstration of judicial error but rather a demonstration of the rhetoric of judicial vice.

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legislation it struck down did not. In reality, however, it is the legislation which followed an American principle, namely the distinguishing between "issue advocacy" and "express advocacy." The source of the distinction is to be found in *Buckley v. Valeo*, 424 U.S. 1 (1976). This distinction attempts to separate the expression of an opinion concerning an issue (which is pure political speech that cannot be limited in the United States) from the endorsement of a particular candidate (which is viewed as a contribution to a candidate and can thereby be limited). (Since the line between "express advocacy" and "issue advocacy" is often hard to delineate, one ruling which followed *Buckley* suggested a more flexible test whereby the courts would look to the "essential nature" of the advocacy. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) at 249.) The impugned legislation in *National Citizens' Coalition* adopted the *Buckley* principle. It did not forbid interest groups from campaigning on issues but it did forbid them from campaigning in support of, or in opposition to, particular candidates or parties. Thus, the striking down of the legislation represented the overruling of an American principle and not its adoption.
3. R. v. Seaboyer

A. The Case

In Seaboyer, a majority of the Supreme Court struck down s. 276 of the Criminal Code, which limited, except in certain circumstances, the admissibility of evidence relating to the prior sexual conduct of the complainant. The Canadian Parliament enacted s. 276 as a means of preventing, among other things, the exposure of victims of sexual assault - almost always women - to humiliating questions posed by defence counsel regarding their prior sexual behavior. The legitimate objectives of the legislation, as summarized by the Court, included: preserving the integrity of the trial by eliminating evidence which has little probative value but is unduly prejudicial to the complainant; encouraging the reporting of crime by eliminating elements of the trial which cause embarrassment or discomfort to the complainant; and protecting the complainant's privacy. The majority ruled that s. 276 infringed on s. 7 of the Charter, which guaranteed that the liberty of the accused was only to be deprived in accordance with the principles of fundamental justice, and on s. 11(d) of the Charter which guaranteed an accused a fair trial. These rights were infringed because s. 276 denied trial judges, in an absolute and sweeping manner, discretion as to the relevance of evidence. It was not justified under s. 1 because the legitimate purpose of protecting sexual assault victims can be achieved by means that would be less restrictive of the accused's right to a fair trial. The Court struck down s. 276 while prescribing less drastic restrictions to govern the rule of admissibility. It held that consent to past sexual encounters could not be used to infer that there was any greater probability of consent during the situation in question. Such evidence could only be used for purposes other than inferences relating to the consent or credibility of the complainant and where its value was

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31 Supra note 3.
32 See the references which appear in Seaboyer, supra note 3 at 648-649.
33 Ibid. at 604.
34 Ibid. at 605.
35 Hereinafter "s. 7".
36 Hereinafter "s. 11(d)".
37 Seaboyer, supra note 3 at 612-623. The same claim regarding s. 277, which prohibited the admission of evidence of sexual reputation for the purpose of challenging the credibility of the complainant, was rejected both by the majority and the minority. See ibid. at 612-613 (majority) and 683 (minority). I do not discuss this part of the judgment.
not outweighed by the resulting prejudice to the complainant. (I shall refer to this new rule of admissibility later.) The fear that evidence of the latter kind would be misunderstood by judges and thereby subject women to myths and stereotypes about the connection between past sexual behavior and consent is calmed because those ideas are "discredited" in our society and the trial judges can deal with the matter sensitively.\textsuperscript{36}

The dissent did not agree that rights guaranteed under s. 7 were infringed by s. 276. The evidence excluded by s. 276, according to them, was not relevant.\textsuperscript{39} Moreover, sexual assault victims as a group are discriminated against once prior sexual conduct is raised in the trial. Fearing embarrassment, women would be more reluctant to report a sexual assault. Therefore, s. 7 was not the only Charter section involved: so too were s. 15 (equality rights) and s. 28 (gender equality).\textsuperscript{41} But even if the excluded evidence is relevant, and s. 7 rights are infringed, the dissent goes on to say that the legislation was justified under s. 1 because less drastic means did not in the past, and cannot now, achieve the goal of protecting female victims of sexual assault. The less drastic means that were offered by the majority would not achieve this goal because trial judges are not free from prejudices, myths, and stereotypes about women's sexuality and sexual conduct.\textsuperscript{42} Following the striking down of the legislation, Parliament amended the Criminal Code in light of the principles set down by the Court.\textsuperscript{43}

**B. MacDonald’s Treatment of the Case: The Rhetoric of Judicial Vice**

The first part of MacDonald's analysis of Seaboyer reflects the argument from politics and as such is an example of a partnership oriented proposal to invoke the NM. She accepts the idea that the case deals with a question that does not have a right answer. Referring to the 1983

\textsuperscript{38} Ibid. at 626-627.
\textsuperscript{39} Ibid. at 634. The exact words are: "the judge must assess with high sensitivity whether the evidence proffered by the defence meets the test of demonstrating a degree of relevance which outweighs the damages and disadvantages presented by the admission of such evidence". Such a statement obviously assumes that judges are at least capable of dealing with the matter in a sensitive way.
\textsuperscript{40} Ibid. at 681-694.
\textsuperscript{41} Ibid. at 698-702.
\textsuperscript{42} Ibid. at 702-712.
\textsuperscript{43} An Act to Amend the Criminal Code (Sexual Assault), S.C. 1992, c. 38, s. 2. For the description of the political developments prior to this legislation, see K. Roach, Due Process and Victims' Rights: The New Law and Politics of Criminal Justice (Toronto: University of Toronto Press, 1999) at 167-175.
amendments to the *Criminal Code*, which included the impugned legislation. She suggested that "in drafting the rules of evidence relating to past sexual history. Parliament had clearly recognized that the privacy rights of the complainant had to be balanced against the accused’s right to a proper defence". While the mere fact that a case involves balancing does not necessarily mean that no right answer exists. she writes:

The *Seaboyer* decision illustrates that there is no consensus amongst the members of the bench as to the values to be protected in cases involving balancing of competing rights. Invoking the legislative override in this situation would not have been an instance of the domination of majoritarian interests since women are not significantly endowed with political power. This passage reflected the argument from politics. MacDonald implied that if there was "no consensus" then both the majority’s view, which favoured the accused, and the minority’s view, which favoured the victim, were legitimate. This fits with the idea of no right answers which is the basis for the argument from politics. In such a case, MacDonald suggested, it was appropriate to leave the last word to the legislature since its decision regarding the constitutional question could not be wrong. In addition to the argument from politics, MacDonald also made a point about the idea that use of the NM was not likely to result in legislative tyranny. If two judges upheld the legislation, it cannot be said that this legislation represented tyranny. Moreover, MacDonald argued, even if the legislation did result in political power for women, this could not be tyranny because, generally speaking, in society, women are not politically powerful.

Were MacDonald’s arguments concerning *Seaboyer* to be exhausted at this stage, her view that *Seaboyer* should have been overridden would have been partnership oriented. But MacDonald was not satisfied with first introducing the issue as political, and then concluding with a rejection of the majority opinion in favour of the minority opinion. Referring to the merits and to the text of the majority judgment, she argued that they "largely ignored" women’s rights. By showing that the court did not strike a balance between the rights of the accused and the
rights of the victims, but rather preferred one of them entirely and just paid "lip service"\textsuperscript{47} to the other, she argued that her problem with the decision was not that the result of the court's balancing was different than the dissent's and hers (the argument from politics), but rather that the majority's reasoning was flawed (the argument from judicial error). The way MacDonald supports her argument is an example of how not to practice the idea of partnership between courts and legislatures. Reviewing MacDonald's reference to the majority opinion reveals that she misrepresented the majority opinion primarily by extracting quotations from the opinion and preceding or succeeding them with adjectives or adverbs, thus creating the impression that the court ignored, rather than considered, women's rights.

MacDonald wrote that:

(1) Because the case involved criminal law, the majority characterized it as "a contest between the state and the accused", thus largely ignoring competing group interests. (2) Consequently, it is questionable that the majority opinion, under the pen of Madam Justice McLachlin, analyzed the competing rights at issue in any meaningful manner. For it was clearly stated that "all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event". (3) It is therefore not surprising that the majority, while paying lip service to the view that "the principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns," strongly tilted the scales of those principles in favour of the rights of the accused, with little regard to the effects on the complaint's rights under section [sic] 15 and 28 of the Charter: "[I]mportant as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in this conflict." [emphasis added]\textsuperscript{48}

The majority's balancing was improper according to MacDonald because it was flawed. It ignored group interests, or it analyzed them in a way which was of doubtful meaningfulness, and it only paid lip service to the concerns of women. MacDonald is obviously trying to tell us that not only does she agree with the dissent, but also, as she explicitly says later in her paper, that "the court's balancing of the competing interests was wrong" [emphasis added].\textsuperscript{49} MacDonald published her paper after new legislation, which was enacted following Seaboyer's striking down

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid. [footnotes omitted; emphasis added]. The numbers at the beginning of the three sentences have been added to facilitate future reference to individual sentences.
\textsuperscript{49} Ibid. at 18. This quotation is not taken from the second section of MacDonald's paper, where she refers to the text of the decision, but from the third section where she suggests that the NM should have been invoked after Seaboyer.
of the old legislation, was already in force. She argues that *Seaboyer* was so wrongly decided that, in order to avoid any negative consequences for women, the NM should have been invoked for the period of time (almost a year) between the striking down of the old law and the coming into force of the new legislation.  

In reading *Seaboyer*, one can see that MacDonald’s accusation that the court found the rights of the accused to take precedence over the rights of the complainant is not accurate. In sentence 2, MacDonald writes that the court “clearly” stated that “all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event”. Here, however, is the fuller picture delivered in the majority’s own words:

> It has been suggested that s. 7 should be viewed as concerned with the interest of complainants as a class to security of person and to equal benefit of the law as guaranteed by ss. 15 and 28 of the Charter... Such an approach is consistent with the view that s. 7 reflects a variety of societal and individual interests. *However*, all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event [emphasis added].

MacDonald does not tell her readers that, immediately prior to the statement about the supremacy of the accused’s right to present a full and fair defence, there is an explicit reference to the complainant’s rights. What MacDonald quotes as an independent statement starts with the adverse conjunction “however”. This signals the fact that something else was considered. This inconsistency is subtle, but it reflects the difference between considering the two interests and balancing between them, which is what the court did, and preferring one of them while ignoring the other, which is what MacDonald says the court did. Moreover, in sentence 3, MacDonald wrote that the court “strongly tilted the scales” in favor of the accused’s rights, “with little

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90 See *supra* note 43.


92 *Seaboyer, supra* note 3 at 603-604 [emphasis added].

93 An additional rhetorical effect can be detected in the divergence between MacDonald’s quotation of the court’s language and the language itself. Although MacDonald says that the court referred to “a spectrum of interests, from the rights of the accused to broader societal interests”, the court actually referred explicitly to “ss. 15 and 28 of the Charter”. MacDonald’s implication that the court considered women’s rights under the rubric of “social interests”, whereas the court used the more concrete language of *Charter* sections, further contributes to the message that the court ignored - rather than balanced - women’s rights.
regard" to women's ss. 15 and 28 rights. To support this assertion. MacDonald quotes the court's statement:

[I]mportant as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in this conflict.**

Let us look again at the full citation:

Finally, the justification of maintaining the privacy of the witness fails to support the rigid exclusionary rule embodied in s. 276 of the Code. First, it can be argued that important as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in this conflict. As Doherty puts it...

Secondly, s. 276 goes further than required to protect privacy because it fails to permit an assessment of the effect on the witness of the evidence - an effect which may be great in some case and small in others - in relation to the cogency of the evidence [emphasis added].***

In other words, while MacDonald's representations of various statements made by the Court are accurate, the Court wrote more than MacDonald took note of in her article. The Court explicitly gave a second reason for its decision, which was based on the assumption that the privacy of the witness ought take precedence over the rights of the accused. Since MacDonald wants the reader to believe that the majority "largely ignored" women's rights, she does not discuss this alternative basis which, far from ignoring women's rights, actually has them taking precedence.****

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** MacDonald, *supra* note 44 at 12.
*** Seaboyer, *supra* note 3 at 617-618.
**** In addition to misrepresenting the majority's view as one which ignored women's rights as opposed to one which balanced these rights and the rights of the accused, there are some other representation problems in MacDonald's paper. The first problem with MacDonald's description of the majority opinion regards the alleged characterization of the case, by the majority, as one that did not involve competing group interests. From sentences numbered 1 and 2 in the passage quoted *supra* in the text accompanying note 48, the reasonable reader must conclude that the court understood the case as one that definitely ("characterized it as") did not involve competing groups. Now consider the full citation from which MacDonald provides only a partial quotation. The context of this quotation is the s. 1 analysis of the case wherein McLachlin J. discusses whether s. 276 is the least drastic means to achieve the legislation's legitimate goal of protecting female sexual assault victims. McLachlin J. says:

It has been suggested that legislatures must be given some room to maneuver, particularly where the legislation is attempting to fix a balance between competing groups in society [reference to the Irwin Toy decision]. Assuming that this case, although criminal and as such a contest between the state and the accused, might fall into this class, it still cannot be said that the degree of impairment effected by s. 276 is appropriately restrained. (*Seaboyer*, supra note 3 at 626 [emphasis added]).

That is, MacDonald's message of definitive characterization is inaccurate. In the very paragraph from which MacDonald wants us to learn that the court characterized the case as a contest between the accused and the state, the
court also explicitly states that it is willing to assume that the case might involve competing groups in society. In fact, in the context of this specific paragraph, the court explicitly states that its decision would be the same even on the assumption that the case might involve competing group interests.

The second problem with MacDonald’s presentation of the majority opinion regards the nature of the connection between the case being criminal and the court’s alleged failure to consider the interests of other groups. In the sentence numbered 1, MacDonald says that “because the case involved criminal law, the majority characterized it as a contest between the state and the accused. Thus largely ignoring competing group interests”, and in the second sentence, she says that “consequently”, the court analyzed the competing rights in a manner which was of questionable meaningfulness. The use of “because” and “consequently” reasonably - although not obligatorily - leads the reader to believe that the Court first characterized the case as a contest between the state and the accused, and only then, and because of this characterization, failed to consider the interests of the different groups. The reality is, however, that the order was opposite. The Court first dealt with the issue of the different rights involved. Only later, at the very end of its analysis, in the discussion of the s. 1 examination, did it mention that the case was criminal. The issue of whether the case was criminal or whether it represented a contest only between the state and the accused was never mentioned when the Court dealt with the rights analysis.

(MacDonald could respond that these two points - the definitiveness of the characterization of the case as one that did not involve group interests and the nature of the connection between this characterization and the alleged failure to consider group rights - do not matter. She might argue that once the court has said that the case is criminal, even if it said it at a later point in the decision, and even if it says that it is willing to consider the case as involving competing group interests, she is right (or at least has the right) to assume that this conception of criminality pertains to the decision as a whole. Even if this response were true, MacDonald should have expressed her assumption more clearly for her readers. As I said before, MacDonald’s task in this part of her paper is to show where the court erred by ignoring women’s rights. But she did not provide her reader with such necessary information as: (1) the court was not definite in its characterization of the case as not involving competing group interests; (2) the statement about the case being criminal came much later; and (3) she - and not the court - makes the connection between this unclear characterization of the case and the court’s s. 7 analysis. It is by unfairly omitting this information that MacDonald causes her readers to be susceptible to the view that the majority “largely ignored” women rights.)

The quoted passage (see supra text accompanying note 48) concludes the first paragraph of MacDonald’s discussion of the majority opinion. The second paragraph moves on to summarize the majority’s view about the ability of trial judges to evaluate the relevance of evidence regarding past sexual conduct, and also includes problems of unfair representation. Despite its descriptive style, MacDonald overstates her case. At the end of the paragraph, she conveys the message of a “bad” court, again, in a subtle way. When she refers to the list of circumstances introduced by the majority as examples of the new rule of admission prescribed to substitute for s. 276, she writes:

"The majority presented guidelines to assist the courts in determining the type of evidence of past sexual history that would be relevant. While acknowledging that invalid inferences drawn from sexual conduct “have no place in our law” and that such evidence is not admissible “solely to support the inference that the complainant is more likely to have consented or less worthy of belief,” the majority’s list of circumstances in which the past sexual history could be relevant - mistaken belief as to consent, motive to fabricate, and similar fact evidence - eerily conjures up the image of the stereotypical inferences of credibility and consent.” (MacDonald. supra note 44 at 13.)

Note the language in the last part of this paragraph, starting with the words “the majority’s list”. MacDonald cites only three of the five kinds of situations where the majority ruled that sexual history could be relevant. The two that she does not cite are the first- evidence tending to prove someone else caused the physical consequences of the alleged rape (Seaboyer. supra note 3 at 635), and the last. evidence rebutting proof introduced by the prosecution (ibid. at 636). It is true that these two sorts of situations were already included in s. 276’s original list of exceptions, and therefore cannot be a part of the justification for striking down the section. But MacDonald should have mentioned “those circumstances in the majority’s list that were not already included in s. 276’s list of exceptions”. In addition to being inaccurate, the language refers to “the majority list” as a whole, without distinguishing the five items. This gives the reader the impression that the whole list is flawed, that nothing in it makes sense. rhetorically
One statement made by MacDonald does provide some additional insight, and perhaps support to, an argument concerning judicial error. MacDonald states that fewer women reported sexual assaults in the aftermath of the decision. This could have been a demonstration of judicial error if the majority indicated that it did not believe that the rate of reports was likely to be influenced by the striking down of the legislation. However, the majority did refer to the issue of reporting and rejected it as a justification for the impugned legislation for two reasons. First, because "it is counter-productive to encourage reporting by a rule which impairs the ability of the trier of fact to arrive at a just result". Secondly, because categorically excluding what might be persuasive evidence for the defence in order to encourage reporting implies either "that we assume the defendant's guilt" or "that the defendant must be hampered in his defence so that genuine rapists can be put down". Neither of these two possibilities "conforms to our notions of fundamental justice". At any rate, this argument does not depend on reporting so MacDonald's new information would not affect it. It could be argued that rejection of the reporting point was wrong, as per the argument from judicial error, or that she did not agree with this rejection, as per the argument from politics. Such an argument might have demonstrated a judicial error in Seaboyer.

MacDonald's treatment of the Seaboyer dissent suffers from the same flaws as her treatment of the majority opinion. She quotes from the language of the dissent, and this time describes it in a positive, rather than in a negative, light. She uses the expressions "significantly more contextualized and reality-based approach", "broader social context", and "focusing more attention". Aside from this grading exercise, she does not suggest any additional support for the dissent that was not already suggested by the dissent itself. Nevertheless, I do not criticize speaking, and in terms of the reader's susceptibility to the idea of the court being guilty of "ignoring" important issues, this difference is not trivial.

5 MacDonald, supra note 44 at 23. This statement is based on a comment by a Rape Crisis Centre worker on a radio show. Ibid. at note 105.
64 Seaboyer, supra note 3 at 617.
65 MacDonald, supra note 44 at 14.
66 There are three sentences in MacDonald's analysis of the dissent that appear to be her contribution to the understanding of the difference between the majority and the dissent:

In fact, one of the fundamental distinctions between the two opinions involved the appropriate focus on "relevance". If the rules of evidence relating to past sexual history are viewed as reflecting a political move to exclude what otherwise would be relevant probative evidence, the majority opinion perhaps appears plausible. However, if the rules are characterized as excluding evidence which is worthless and capable of
MacDonald for her unsupported preference of the dissent over the majority. The argument from politics, i.e., that some questions of constitutional interpretation do not have a right answer, makes it legitimate to say that one prefers one answer simply because one finds it more convincing. What I do criticize MacDonald for is exactly the opposite: for not being satisfied with the argument from politics, and for trying to demonstrate a judicial error by the majority. I demonstrated that this attack collapses into overcriticism and misrepresentation of the majority opinion, and thus it is contrary to the partnership idea of the respectful treatment of judicial decisions. The next section deals with another advocate of the NIP who argued that *Seaboyer* contained a judicial error. His attempt, like MacDonald’s, was unsuccessful.

**C. Manfredi’s Analysis of the Case**

Like MacDonald, Manfredi agrees with the dissent in *Seaboyer* and supports the overriding of the decision. Unlike MacDonald’s, however, Manfredi’s proposal to override *Seaboyer* does not mention a judicial error, but rather focuses on the no abuse assumption, whereby the legislature can be trusted not to operate the NM in a tyrannical way:

> The Criminal Code provisions that were struck down in *Seaboyer* were not the ill-considered products of a tyrannical majority operating under the influence of momentary hysteria. Quite to the contrary, they were a thoughtful and a serious attempt to deal with what informed observers had identified as a considerable weakness in the administration of criminal justice... By invoking section 33 to uphold the existing legislation, however.

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This statement, however, adds nothing to our understanding. What MacDonald tries to do here is to point out a dichotomy that lies at the base of the disagreement between the majority and the dissent. One possibility for this dichotomy is that the rules of evidence discussed in *Seaboyer* “exclude what otherwise would be relevant probative evidence” (in which case the majority might be right) and the other is that these rules exclude evidence which is “worthless and capable of distorting the fact-finding process” (in which case the dissent is right). Yet this dichotomy is precisely what the majority and the dissent explicitly disagree about: whether the evidence excluded by the legislation discussed in *Seaboyer* is relevant or not. So MacDonald does not show how the disagreement between the majority and the dissent is rooted in a more basic dichotomy. Instead, she simply repeats the disagreement by way of a different choice of words. (Note the following distinction in MacDonald’s language: if the first possibility of the dichotomy is correct, then the majority opinion “perhaps appears plausible” - two modifiers are used. If the second possibility is correct, then the minority opinion reflects a “significantly more contextualized and reality-based approach” - no modifiers used. In other words, the maximum potential legitimacy of the majority opinion is that it is “perhaps” “plausible”, unlike the minority opinion which might actually be “reality-based”).

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"See Chapter 3, Section 2(E), above."
Parliament could have simultaneously accomplished two important objectives: reinstate an important policy measure and assert its equal authority to interpret the Charter.\(^{62}\)

Aside from not using the language of judicial error, Manfredi invokes an argument that MacDonald ignores. This is the argument from judicial bias.\(^{63}\) Manfredi writes:

Justice McLachlin implicitly asserted in *Seaboyer* that Parliament could not, as a matter of policy, relieve courts of their traditional power to determine the relevance and reliability of evidence. Nowhere, perhaps, is the paradox of liberal constitutionalism more apparent than in this conclusion by the *Seaboyer* majority. According to McLachlin, once the concept of a “fair trial” becomes constitutionally entrenched, only judges are capable of determining, both generally and in specific cases, what constitutes fairness. In essence, the Court has effectively used the *Charter* to amend the Constitution Act, 1867 in a manner that removes Parliament’s legislative power over criminal procedure that section 91(27) of the Act originally contained.\(^{64}\)

Manfredi’s first point is well taken. At issue in *Seaboyer* were not only the rights of the accused and the rights of victims, but also the powers of the judiciary. The legislation took away the power of trial judges to exercise discretion of a certain type (regarding the relevance of past sexual behaviour) and the Supreme Court decision reinstated it. This makes *Seaboyer* appropriate for overriding from the perspective of the argument from judicial bias.

But Manfredi further suggests that *Seaboyer* “in essence” amended the Constitution. This sounds like a very strong and attractive point. As an advocate of the NIP who subscribes to the argument from judicial error, Manfredi has to show that the NM is needed in order to remedy erroneous interpretations of the Constitution. Whether one accepts this argument or not, it is clear that when interpreting the Constitution, the court performs its job. The picture is different if what the court does is not only interpreting the Constitution, but also amending it. If this is the case, the judicial error is especially worrisome. It is not that the court exercises its duty in an incorrect way, it is that the court exceeds its powers and does something it has no business doing since responsibility for amendments to the Constitution rests with the constituent assembly. The case for a NM is stronger, then, if it saves us from judicial amendments of the Constitution, and not

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\(^{62}\) Manfredi, *supra* note 6 at 204. The *Askov* case is the subject of the next section.

\(^{63}\) See Chapter 3, Section 3(C), above.
only from incorrect judicial interpretations of the Constitution. If Manfredi were able to support the "amendment in essence" point, his argument would be more convincing.

However, the assertion that Seabooyer in essence amended the Constitution by removing Parliament's power over issues of criminal procedure is false. Parliament is still allowed to enact in this area, as long as its legislation complies with the Charter. This power of Parliament is not affected at all by Seabooyer. There is no difference, in this regard, between criminal procedure and any other issues. Take, for example, the issue of the "establishment, maintenance and management of reformatory prisons". If Manfredi is right, it means that because legislation regarding prisons must comply with the Charter, the powers of provincial legislatures under s. 92(6) of the Constitution Act do not exist anymore. This is obviously an absurd claim. Indeed, limiting the powers of enactment authorized by the Constitution is precisely what Bills of Rights are about, and imposing these limits on the legislature is not amending the Constitution, but enforcing it. Of course, while enforcing these limits, the court can make a mistake. Such a mistake, however, would lie in the interpretation of the Constitution and not in its amendment. The amendment in essence point, then, is not established by Manfredi. His argument is founded only on the same imprudent overcriticism of the court identified in the works of Weiler, Russell, and MacDonald.

D. Conclusion

National Citizens' Coalition and Seabooyer are not examples of judicial error. If anything, they are examples of academics trying hard to demonstrate a judicial error. These two cases are more appropriate for the argument from politics. Both represent a true dilemma of rights and limits, and if one supports the use of the NM in order for the legislative view to prevail, one is better to support their argument by suggesting that the court's answers to the questions in these cases were not mistakes but neither were they the only reasonable responses.

This seems to be how Russell and Weiler expressed their support for the overriding of the Ford decision which forms the subject matter of the next section. Even if not stated explicitly.

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Manfredi, supra note 6 at 164. This is not taken from the point in his book where Manfredi proposes the overriding of Seabooyer, but from his general discussion about the court’s inability to deal with policy issues. I discussed this part of Manfredi’s work in Chapter 3, Section 5, above.
their argument concerning Ford appeared to be that its overriding by the Quebec National Assembly was justified since the ruling dealt with a political question. In that sense, Russell and Weiler's support for the use of the NM to override Ford was an example of what a partnership oriented proposal to invoke the NM should look like. In another sense, however. Russell took the argument from politics too far, and suggested that Ford should have been overridden not because it was not the right answer but because of political constraints. This approach is not compatible with the NIP.

4. Ford v. A.G. Quebec

In Ford, the Supreme Court of Canada struck down provisions in Quebec's language legislation which required that public signs and firm names be in French only. The Court ruled that these provisions violated freedom of expression. The court held that the right to advertise in one's language of choice fell under the protection of s. 2(b)'s freedom of expression guarantee, and therefore the legislation limited freedom of expression. The legislation did not survive the Oakes test: although the legislative purpose of preserving the predominance of the French language in Quebec was legitimate. it was not demonstrated that this goal could not be achieved by other less drastic means such as by requiring predominantly French public signs.

As with National Citizens' Coalition. Russell and Weiler expressed their support for the overriding of Ford in their 1989 newspaper article and Russell reiterated this view in his 1991 law review article. Appropriately, they do not focus on criticizing the court, but rather on supporting the legislature:

From our perspective in Toronto, this conclusion seems reasonable. Certainly, we find it hard to believe that the survival of the Quebeois would be at risk if English was permitted a subordinate position on commercial outdoor signs, rather than relegated to a spot inside the store or office. But we must exhibit the same sense of proportion about the contrary judgment reached by the elected government in Quebec...

65 Ford, supra note 2.
66 For a discussion of the case and its aftermath, see Chapter 5, Sections 3(D), 4(C) and 6(B), above.
67 Ibid. at 779-780.
This language reflects the argument from politics since it implies that neither the legislature nor the court were either right or wrong. In the paragraphs that follow, Russell and Weiler demonstrate the point that Canadian legislatures are trustworthy with regard to rights protection. They recall that the case deals with commercial advertisement which is, in their view, "not fundamental" in the same sense that political speech is. This corresponds with Russell's argument that most Charter cases are about the margin of rights and not about their core, such that leaving the last word with the Quebec National Assembly does not result in a severe rights violation.

Russell and Weiler's approach in their newspaper article reflects the partnership as a practice, since their proposal to invoke the NM is informed by the judicial decision and is connected to the constitutional text. They introduce the question that the court dealt with, and suggest that the answer it gave was not necessary. Since this question concerned the application of s. 1 in a given case, this analysis is necessarily connected to the constitutional text. In contrast, Russell's treatment of Ford in his 1991 paper ignores the point of the case and is disconnected from the constitutional text. He says:

The key question to ask in the contest [sic] of the Quebec sign case is not whether the Supreme Court or the Quebec National Assembly reached the right decision on the issue at stake, but whether this type of question is one on which the judiciary ought to have the last word...

The legitimacy of the override in the context of this case depends on whether or not one believes that Quebec's National Assembly should continue to have any decision-making role on the question of what kind of sign is required after the Supreme Court has spoken on the matter.

In my view this question should be answered in the affirmative. The sign case poses a fundamental issue of political justice concerning the relationship of the rights and interests of two minorities. On the one hand there is the minority of Quebeckers who are not French and their right to express themselves in their own language, and on the other the Francophone Quebeckers who are a vulnerable cultural minority in North America and their right to preserve their distinct culture. Working out an appropriate balance between these two concerns about minority rights is a profound challenge not only for Quebeckers but for all Canadians. This is not an issue which we Canadians either have
withdrawn or should withdraw from consideration by Quebec's legislature for ultimate determination by the Supreme Court [emphasis in the original].

Russell ignores the main point of the court's decision. The court suggested that it is possible to protect both the rights of the francophone minority in Canada and the rights of the anglophone minority in Quebec. In another words, there was no need to balance between the different rights involved. One could respond that fully protecting the francophone group rights would necessitate no English on the signs at all. That is, the court did not really succeed in protecting the rights of both groups fully, but rather prescribed the degree to which the two rights should be respected vis-à-vis each other. This is a situation where there was the need for the choice of one balancing formula and where there were many other reasonable formulas available. The court's reply to the question of the necessity of French only signs, then, is not the only answer - hence the argument from politics. The problem with this response is that it would require a very broad definition of the notion of minority rights, encompassing the "right" to suppress other minority group's rights.

Arguably, this criticism of Russell misses the whole point of legislative participation in constitutional interpretation. This is because it assumes a judge-made Oakes inquiry to be the only way to analyze the case. It therefore expects Russell to address the issue in the same way as the court did, and to suggest that the court's answer to the necessity of French-only signs was either wrong (the argument from judicial error) or not necessarily right (the argument from politics). However, this assumption is wrong, since Russell - or the Quebec legislature - does not have to address the issue through the perspective of Oakes, but rather through the perspective of anglophone rights and francophone rights.

This objection is right in suggesting that the argument from politics enables an issue to be addressed in terms different from those of the court's. Unlike the argument from judicial error, which requires a demonstration of the court's mistake in interpreting the Constitution, the argument from politics enables the legislature to suggest its own interpretation of the

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71 Russell, supra note 11 at 304-5. I analyzed this passage when I discussed the argument from politics generally. See Chapter 4, Section 4(B), above. Here, I refer to the merits of Russell's point regarding the rights involved.
Constitution. But Russell's analysis does not reflect such an alternative since it fails to be connected to the constitutional text, and thus is not respectful of the text. Russell suggests that the Ford decision balances two rights, neither of which is protected by the text of the Charter. Freedom of expression is a Charter right; minority language educational rights are Charter rights; but "minority rights", generally speaking, are not protected. Therefore, textually speaking, there are no "anglophone rights" and "francophone rights". For the Charter and section 1 to operate, the right infringed upon by the government must be a Charter right (whether the limitation on this right represents another right or represents some interest which is not a right). Russell's analysis takes a question from the constitutional interpretation arena and transplants it in a purely political arena. This leads to the contradiction of the idea that the NIP symbolizes legislative participation in the explication of constitutional values.

The reason why Russell's analysis fails to adhere to the structure of the partnership as a practice is because his analysis is based on an illegitimate version of the argument from politics. As I noted in Chapter 4, one must not confuse the notion that the NM can be used in a situation where there is no right answer with the argument that the NM should be used in a situation where it doesn't matter what the right answer is. The acceptable version of the argument from politics is that some questions of constitutional interpretation do not have right answers. This version of the argument from politics is acceptable because it reflects a partnership between courts and legislatures whereby legislatures can enact at their discretion where there is no right answer to a legal question. Conversely, the version of the argument from politics whereby some questions of constitutional interpretation may have right answers that do not matter because of extra-constitutional considerations, is illegitimate because rather than reflecting a partnership, it represents a re-assertion of legislative supremacy. But this latter version of the argument from politics is precisely the point behind Russell's analysis. If we read the above quoted passage

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72 The other point Russell would have to address is whether the theory of two minorities can really be applied to the Quebec National Assembly where francophones enjoy a clear majority. Since, however, the purpose of my analysis is not to discuss the merits of the language dispute, I will not deal with this point here.

73 As Russell himself wrote, in his and Weiler's 1989 newspaper article, that "[t]he rights of minority language groups which are truly fundamental under our Constitution and which continue to be enjoyed more fully in Quebec than anywhere else in Canada relate to the realm of education and government, not commercial signs"; Russell and Weiler, supra note 10.


75 See Chapter 4, Section 4(B), above.
carefully, we see that what Russell says is not that the question of balancing francophone and anglophone rights in Quebec is the central question in Ford. Rather, what he says is that the answer to this question, and not the answer to the question posed by the case, is what matters. In other words, the struggle between these two groups is what matters, not the rights of the individual which were discussed by the court.\textsuperscript{76}

Indeed, the remainder of Russell’s article reveals that his support for the overriding of Ford is not rooted in a notion of a partnership, but in succumbing to current (or longstanding) political winds. Russell writes that judicial finality in the Ford case would detract too much from the responsibility of Quebeckers and other Canadians for participating in the resolution of a question fundamental to the political justice of the political community they share. I would add that it is extremely doubtful that the unity of Canada could survive an insistence by the rest of Canada that Quebec’s legislature be denied a continuing role in deciding what is necessary to preserve Quebec’s French character.\textsuperscript{77}

The two obvious questions are: what does the unity of Canada have to do with rights protection? And why should we consider only the Quebec legislature’s role in language policy? If the matter concerns all of Canada, should not the other Canadian legislatures be involved? Should not the matter be discussed at the constitutional level? The conclusion must be drawn that although Russell uses the language of balancing two rights, he is essentially concerned with political power, and not with Charter interpretation or with the roles of institutions under the Charter. In fact, he actually admits to be willing to sacrifice rights for the unity of Canada. This conclusion is legitimate, especially in light of the Quebec government’s argument that the Charter was adopted without its consent, such that Charter based rights protection is not necessarily a given in Quebec. However, even if these considerations of political constraints are important and should be followed, this language is not a language of theoretical justification: it is again, a language of compromise.

At the end of the previous chapter, I showed that the discussion in the Quebec National Assembly prior to overriding Ford was not partnership based, and was focussed rather on the

\textsuperscript{76} For the expression of the same approach in the Quebec National Assembly debates following Ford, see Chapter 5, Section 4(C), above.
\textsuperscript{77} Russell, supra note 11 at 305.
power struggle between anglophones and francophones. As a leading political scientist, Russell could have shown by example what a partnership oriented discussion of Ford should look like. Instead, Russell’s analysis adopted the same power oriented approach practiced by the National Assembly.78

78 As with MacDonald’s analysis of Seaboyer, Russell and Weiler’s analysis of Ford does not represent the content of the ruling in a fair way. In describing the court’s limits analysis, they say:

[1] In one short paragraph in a nearly 100-page decision, the court concluded that the latter objective [maintaining the French character of Quebec] would be adequately served by a law requiring signs predominantly, not exclusively, in French. (Russell and Weiler, supra note 10.)

In this terse summary of the court’s decision, Russell and Weiler appear to hint at either the insufficient judicial process of Ford, or at the insufficient nature of the judicial process generally. They begin with a numerical figure, letting the reader know that out of such a long decision (“nearly 100-page”), the crux of the case - the possibility of maintaining the French character of Quebec by less drastic means - was dealt with in only “one short paragraph.” What should the reader conclude from these figures? The obvious answer is to assume that the court’s determination was not the product of a serious intellectual exercise. Russell and Weiler hint that the reasoning appears to be superficial and non-analytic. (Needless to say, Russell and Weiler intended to specifically mention this figure. Firstly, information about lengths of judgments are rare in case comments. Secondly, in a newspaper article, where there are severe length restrictions, words are carefully edited.)

This reference to the page length looks either like the argument from politics or like the argument from judicial error. If Russell and Weiler wanted to convey that the process in Ford was not serious, then this comment attempts to hint at the argument from judicial error. The authors imply that had the court only worked harder, it might have reached a better conclusion. However, this hint has only the appearance of the argument from judicial error, because invoking the argument from judicial error requires a demonstration of an actual error. Insufficient page length does not amount to an actual error. The other possible interpretation of Russell and Weiler’s comment about the shortness of the crucial paragraph against the background of the length of the decision is that the reader should know that this is how courts sometimes work, or work generally. They often deal with important issues in a succinct and unsatisfactory way. If this is what they mean, their argument sounds like the argument from politics - judicial decisions about constitutional interpretation are arbitrary and subjective, and come down to “in my opinion” statements, which do not take much space. If we look at the text of the case, however, we shall see that both Russell and Weiler’s summary of the court’s decision and, consequently, their implied criticism of the length, are false. Russell and Weiler summarize Ford by reasoning that the court “concluded” that the objective of maintaining the French character of Quebec “would be adequately served” by the less drastic means of allowing predominantly French signs. This is the language of a positive finding. Indeed, there were short positive findings in the case. The court did say that:

French could be required in addition to any other language or it could be required to have greater visibility than that accorded to other languages. Such measures would ensure that the “visage linguistique” reflected the demography of Quebec: the predominant language is French (Ford, supra note 2 at 780).

However, this “one short paragraph” is part of a very long paragraph. This long paragraph illustrates why the tacit criticism is false. This paragraph is dedicated solely to showing the negative determination of the court, to underscoring the lack of evidence going to support the assertion that the French only rule is the least drastic means: The section 1 and s. 9.1 materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the material. Indeed, in his factum and oral argument the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French. He concentrated on the reasons for the adoption of the Charter of French Language and the earlier language legislation, which as was noted above, were conceded by the respondents...
The final case I discuss in this chapter takes us back to the argument from judicial error. It demonstrates that Askov did indeed contain such an error, and it shows that Manfredi’s treatment of that case did not suffer from the same problems that were introduced with respect to the works of Russell, Weiler and MacDonald.

5. R. v. Askov

Although Manfredi, unlike Weiler, Russell and MacDonald, does not mention the term “partnership”, his analysis of Askov and his proposal to override it are an example of the partnership in practice. First, Manfredi’s analysis of the case explains in detail what is wrong with the decision. Moreover, his treatment of the case is respectful, perhaps even too respectful. Although it seemed that Askov did indeed contain a judicial error, Manfredi never used this term. Second, Manfredi adhered not only to the idea of a partnership of respect, but also to the idea of a partnership of last resort. This idea required that the legislature not use the NM even in the case of judicial error if other avenues of redress were open to it. Since Askov did not involve the striking down of legislation, Manfredi proposed that Parliament respond to that mistake by

In the opinion of this court it has not been demonstrated that the prohibition of the use of any language other than French... is necessary to the defense and enhancement of the status of the French language in Quebec or that it is proportionate to that legislative purpose... Whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting a French “visage linguistique” in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been justified (Ibid. at 779-780).

The difference between the court’s negative emphasis (that it was not demonstrated to the court that the French-only rule was necessary) and Russell and Weiler’s positive emphasis (that the court actually ruled that the predominantly French rule was sufficient) is not a minor issue. It concerns the burden of proof under the Charter. The rule prescribed by the Oakes decision is that once an individual proves an infringement of her right, it is the government that must prove the infringement to have been justified (Oakes, supra note 20 at 136-137). Therefore, once the Attorney General of Quebec failed to demonstrate - as the court said, did not even try to demonstrate - that the predominantly French rule would not achieve the goal of maintaining the French character of Quebec, the French-only rule must be struck down. It was in this context - and not as its central finding - that the court added its belief that the predominantly French rule would achieve the desired goal. Ignoring the court’s explicit negative finding that the government did not prove that the limitation was justified, and emphasizing the need of the court to better establish its positive finding, actually means that it is the right holder who bears the onus of proof that the limitation was not justified. While one does not expect Russell and Weiler to elaborate on the issue of the burden of proof in Charter cases in a short newspaper article, their decision to present the ruling as a positive decision and not as a negative decision amounts to a misrepresentation which runs contrary to the idea of a partnership of respect.

79 Supra note 4.
80 For the idea of a partnership of respect, see Chapter 4, Section 6(C)(1), above.
81 See Chapter 4, Section 6(C)(3), above.
enacting an ordinary act. Only if the court struck down this act, Manfredi believed, should Parliament consider using the NM.

The *Askov* case dealt with the issue of the definition of the *Charter*’s s. 11(b) right to a trial within a reasonable time. Mr. Askov had to wait 34 months between his first appearance in court and the day the charges against him were dismissed (11 months in Provincial Court before his committal and 23 months in the District Court afterwards). His claim focused on the last 23 months, because it was this period that constituted a delay not caused by the Crown or the defense, but rather by the court system. He asked the court to rule that such a delay was unreasonable. While discussing the different criteria for what constitutes unreasonableness, Cory J. said:

[A] period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable.82

What followed was a massive staying or withdrawing of criminal charges (51,791 in Ontario in the first 13 months after the decision).83 The Ontario government had to spend $39 million to appoint more judges and hire more attorneys.84 In *R. v. Morin,*85 the court modified the six to eight months reasonable period to an eight to ten month period in the provincial courts, which could sometimes even cover a fourteen and a half month delay.86

This is how Manfredi explains the consequences of the case:

Although Cory intended [the] lower courts to apply this general balancing approach on a case-by-case basis rather than to follow the six-to-eight-months standard strictly, lower courts missed this message and began automatically to stay proceedings that exceeded the eight-month limit. In unprecedented public comments on the unanticipated consequences of *Askov*, Justice Cory expressed the court’s “shock” [at] the “rigidity of the interpretation” given to *Askov* by some lower courts. According to Cory, the justices were unaware of how extensive the impact of the decision would be...

What might account for the initial miscommunication between the Supreme Court and lower trial courts? To some degree it reflects different perspectives toward the criminal justice process. The Supreme Court, which processes approximately 100 to 120 cases per

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82 *Askov*, supra note 4 at 1240.
84 Ibid. at 114. See also ibid. at note 97.
86 Baar, supra note 83 at 322.
year and is under no constitutional obligation to complete its deliberations expeditiously, enjoys the luxury of sufficient time in which to balance complex factors on a case-by-case basis. Criminal trial courts, to which Askov applies, face far different pressures. For example, between 1982 and 1989 Ontario criminal courts processed, on average, about 410 jury and non-jury trials per week. Under these conditions, it is simply not feasible for them to engage in the case-by-case balancing of relevant factors called for by justice Cory. Given their workloads and resource constraints, the rational decision for judges in these courts was to err on the side of caution and follow that aspect of Cory's judgment - the eight-month rule - with which it is easiest to comply. As a result, Justice Cory's concluding assertion that stays of proceedings "will be infrequently granted" as remedies for "unreasonable" delays proved to be a hollow one [emphasis in the original].

Manfredi never blames Cory for making a mistake. He talks about a "miscommunication". Indeed, the passage quoted here is not taken from Manfredi's discussion of the NM, but from his discussion of the issue of the inability of courts to initiate policy review, and the difficulties in communicating and implementing judicial decisions.

But Manfredi's explanation for Cory's six-to-eight month formula is weak. First of all, he assumes that a Supreme Court judge was either unaware of the caseload of trial courts, or was unaware of the way trial judges operate given this workload. Both assumptions seem unreasonable because Supreme Court judges are generally appointed from the bench or from the bar. Indeed, Justice Cory himself served as a trial judge for seven years. Second, even if Cory did expect trial courts to "engage in the case-by-case balancing of relevant factors" and although he envisioned some exceptions, he still meant that the general rule held at six to eight months and that the longer the delay was, the smaller the chance, even given other factors, that it would be considered reasonable. However, as Michael Code points out, it was explicitly stated in the affidavit submitted to the court by Deputy Minister of Justice Chaloner that 26,977 cases - 69 per cent of all Provincial court trials - were delayed by 12 or more months in the six worst jurisdictions in Ontario. It is highly unlikely that Justice Cory expected that in all of these cases there would be special circumstances that would justify such a deviation from the six-to-eight month general rule.

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87 Manfredi, supra note 6 at 173.
89 Code, supra note 83 at 111.
Although not using the language of a judicial error, Carl Baar, whose affidavit was also submitted to the court in Askov, and Code, who was Askov’s attorney, demonstrate very convincingly that the court in Askov either did not understand, or ignored, the social science data that was submitted to it. They show that the numbers both in the appellant’s and the Crown’s affidavits predicted what would happen if a rule of six to eight months was adopted. Apart from the numbers in the last paragraph, it was clearly stated by a Supplementary Factum submitted by Mr. Askov that 40 per cent of Ontario courts could not provide for a trial within six months. In addition to the error that the court made in failing to look at the data before it, Baar also demonstrates the mistake that the court made by creating the six to eight months formula on the basis of data from Quebec which the parties never presented to the court. Cory examined three jurisdictions in Quebec, and found out that their delays were 82.5, 90.5, and 91.5 days. Then, by “more than doubling the longest waiting period to make every allowance for the special circumstances” in the jurisdiction where Askov’s trial took place (Brampton, Ontario), he arrived at the six to eight month rule. Baar explains why this method is unreliable. First, the size of the sample from Quebec was too small. Second, it was problematic to infer from the period of the average delay to the period required by the long delayed cases:

In contrast to the analyses of the Court decisions that I have examined so far in this chapter, Manfredi is insufficiently critical, rather than being overcritical, of the court. He chooses not to blame the court for a judicial error when the court is in fact blameworthy.

Unlike Weiler, Russell and MacDonald, Manfredi treats Askov in light of the partnership model. He writes:

By amending the Criminal Code to define its understanding of what constitutes “unreasonable” trial delays. Parliament could have removed from the Supreme Court the burden of correcting the unintended, and unanticipated, consequences of the Askov decision... if the Court were to nullify this definition of unreasonableness, and if the consequences were as negative as those that followed Askov. Parliament would be justified in invoking section 33.\(^1\)

\(^0\) Ibid. at 111-112; Baar, supra note 83 at 317-318.
\(^1\) Askov, supra note 4 at 1249.
\(^2\) Baar, supra note 83 at 315-316. This is assuming that the numbers cited by Cory refer to the average. Cory did not address that issue but Baar thinks, justifiably, that this is what he meant. Baar criticizes Cory for not elaborating on how this average was calculated, i.e., whether by using a mean, median or mode. Ibid. at 315.
This proposal by Manfredi follows the partnership model in two ways. First, it reflects the idea of a partnership of last resort. Although the court made an error, Manfredi suggests that Parliament should not use the NM until it first tries ordinary legislation. Second, it demonstrates a willingness to listen to the Court. Unlike Weiler and Russell who suggested that the NM should have been used if the Supreme Court did not overrule National Citizens’ Coalition. Manfredi wants to hear what the Court has to say about the new legislation, wants to give it a chance to re-visit the issue and suggests that only if the new decision has negative results, should it have been overridden.

6. Conclusion

The last chapter ends with my criticism of the members of Quebec’s National Assembly for failing to engage in a normative discussion regarding the overriding of Ford, and instead engaging in a discussion about power. This chapter reveals that, in one sense, their discussion of Ford was better than the scholarly analysis. The Quebec legislators did, for the most part, center their speeches around the court decision which they at least, and in contrast to some academics, did not misrepresent.

One purpose of the analysis in this chapter was to examine the appropriateness of using the NM to override some selected judicial decisions through the perspective of partnership. The main point of the chapter was this: one should be very careful not to confuse the argument from politics with the argument from judicial error. Many Charter cases deal with contested issues which do not necessarily have a right answer. In such cases, the partnership model of the NM holds that the role of the court is to deliberate and not to check, and that the legislature is at liberty to reject the court’s deliberation by using the NM. This is the argument from politics. A quite different argument is the argument from judicial error. This argument does not apply to cases where there are no right answers but rather to cases where the court failed to arrive at the correct answer. Here, the task of the legislature which overrides the decision, or of anyone who supports or proposes this overriding, is much more difficult. It is not enough to say: “I do not accept the court’s deliberation”. What is needed is a demonstration of actual judicial error.

93 Manfredi, supra note 6 at 204-205.
94 See Section 2(C), above.
A second purpose of the analysis in this chapter was empirical. Weiler, Russell and MacDonald have failed to demonstrate judicial errors in Charter adjudication. In fact, the only prudent advocate of the NIP who came close to proving a judicial error was Manfredi in his analysis of the Askov case and even he did not actually pick up on the error in the decision. As noted above, because the Askov decision did not strike down any legislation, correcting it could be accomplished through ordinary legislation. Indeed, Manfredi suggested that precisely this be done. Thus in terms of empirical findings, the advocates of the NIP did not point to any judicial error that might justify a NM. Of course, the fact that the mechanism has not been proven necessary thus far does not imply that it will be unnecessary in the future. However, this point must be remembered when the benefits of the mechanism’s existence are weighed against its drawbacks. The works discussed in this chapter were published between 1988 and 1994 (Russell and Weiler’s newspaper article in 1988, Russell’s law review article in 1991, Manfredi’s book in 1993, and MacDonald’s article in 1994). Since then, I have not come across any serious academic proposals to use the NM in a particular case.9

The analysis in this chapter revealed something not only about the cases it examined, but also about the academic works it discussed. It was shown that Russell and Weiler failed to demonstrate that National Citizens’ Coalition was rooted in bad adjudication, that MacDonald unsuccessfully attempted to show that Seaboyer was a mistake, and that Manfredi made the erroneous criticism that Seaboyer was an “amendment in essence” to the Constitution. These scholars over-criticized the court and misrepresented its statements or actions. Was their misguided analysis merely coincidental or is there a pattern here that requires explanation? It is difficult to answer this question definitively. On the one hand, these works reflect the thoughts of four individuals. On the other hand, these four scholars are the only ones who have offered theoretical support for the argument from judicial error. Moreover, the nature of what is problematic with their analyses is very similar. Independent of whether these misguided analyses indeed constitute a pattern, there are conclusions that can be made.

If, in fact, the imprudent language of these scholars is not part of some larger analytical subjectivity, then the purpose of the chapter’s analysis is to criticize Weiler, Russell, MacDonald

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9 See supra note 5. For non-academic proposals, see Chapter 5, Section 6, above.
and Manfredi for their respective lack of consistency. These very scholars who envisioned a partnership between the court and the legislature, and who viewed judicial decision-making as a starting point in this partnership, have ironically failed to practice that partnership in the very papers where they suggested it.96

In contrast, if there is indeed a pattern in these individual analyses, it indicates that there is some connection between the view that the NM is justified based on the argument from judicial error and a tendency to disrespect the court. These connections may be manifested in two ways. The first regards the attractiveness of the argument from judicial error; the second regards a general academic hostility against the court’s playing a prominent role in society.

The first explanation may be that the aforementioned scholars, inspired by the attractiveness of the argument from judicial error, made a valiant effort to uncover a “bad” court replete with judicial errors. In contrast to the other arguments that can be invoked in support of the NM, i.e., the argument from politics and the argument from judicial bias, the argument from judicial error appears to be both the strongest and the most convincing. The argument from judicial error preserves an image of law as distinct from politics. Furthermore, it attempts to justify the NM on the very grounds that judicial review is justified without using external terms like “politics”, and “bias”.97 The argument from judicial error is seemingly attractive even to those who believe in judicial objectivity. In an attempt to be persuasive, these advocates of the NIP prefer attractiveness to caution and prudence.

The second explanation for both the over-criticism of the court and the usage of imprudent language is the general hostility towards a greater role for the judiciary. This theme is prevalent within a number of academic schools of thought. This second explanation has little to do with the NM and the NIP, but more to do with constitutional adjudication in general. A review of the literature on the Charter in Canada over the last decade demonstrates a considerable academic hostility towards judicial decision-making under the Charter and even

96 But see supra note 7.
97 Indeed, as suggested in Chapter 2, above, this is the reason for the incoherent nature, in terms of constitutional theory, of the argument from judicial error.
(consequently) towards the *Charter* itself. The same conclusion can be reached when one looks at editorials and columns in Canada's largest newspapers. Some scholars view the "trashing" of the court as a task they should engage in, even if it means abandoning an element of academic integrity. Although the aforementioned scholars maintain that they support judicial review and oppose only judicial finality, these statements represent -- to use MacDonald's language regarding the court -- "lip service". According to this approach, these commentators do not actually respect the court. Instead, they believe judicial review to be an exercise of political power and so they seek to undermine the court's integrity and image within the academic community and the public domain by "demonstrating" how "bad" it is.

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99 MacDonald, *supra* note 44 at 12.

100 An example of an unfair depiction of a "bad" court can be found in Russell's analysis of *Wilson v. Medical Services Commission of British Columbia* (1988), 53 D.L.R. (4th) 171 (B.C.C.A.) [hereinafter *Wilson*] where he says:

In *Wilson*, for example, the British Columbia Court of Appeal, in upholding the "liberty" of new doctors to practice their profession at public expense wherever they wish in the province, did not consider the possible inequity in not extending a similar liberty to other newly graduated professionals in that province or the impact of this decision on the financing of other social programs. (*Russell, supra* note 11 at 308; footnote omitted.)

Russell thus implies that the Court ignored, or did not understand, or did not care, that the measures it struck down saved taxpayers a lot of money. According to Russell, this decision - mentioned alongside none other than the infamous *Lochner* decision - demonstrates that the court failed to protect "vulnerable groups in Canadian society", in this case, the people living in the area where the new doctors were needed. But this depiction of a "bad" court is flawed.

The provincial regulations struck down in *Wilson* were designed to allocate new doctors to areas of the province where they were most needed. The legislation and regulation discussed changed the system of allocating practitioner numbers to British Columbia doctors. It gave the Medical Services Commission discretion in issuing practitioner numbers which were required in order to bill the provincial insurance plan and therefore were essential to earning a livelihood. The new arrangement required all new doctors to apply to practice in a certain area. The Commission had the power to impose conditions regarding time and place, depending on the need for particular medical services in a given area. These restrictions did not apply to established doctors who had been practicing for two years prior the arrangement coming into force. *Wilson, ibid.* at 175-176. The court found the system to be unconstitutional. A person's right to liberty under s.7, the court said, included not only the right to choose one's occupation and pursue it but also one's freedom of movement. *Ibid.* at 182-188. Therefore the new system has to be "in accordance with principles of fundamental justice" as s. 7 requires. It is in this context that some citations from the court's language can be illuminating. Referring to the procedural aspect of the new system, the court said:

The scheme is administered by a commission composed of one man appointed by the government. He is not obliged to hold any hearings, or give any reasons for his decision or lack of decision on any application...

No system is established for dealing with any particular application; and the commission does not have a duty to decide, although by the Act the applicant is denied the opportunity to practice until there is a decision in his or her favour...
The discussion about Askov demonstrated how difficult it was to seriously establish a claim of judicial error. Baar and Code required long pages and complicated calculations to show such an error.\footnote{The fact that it is very difficult to demonstrate an error is but an expression of the incoherent nature of the argument from judicial error. This lack of coherence, as shown throughout this work, stems from the fact that the very justification for judicial review is rooted in the court's superior ability to reach the right answer in rights cases. The idea therefore that the...}

There appears to be no way in which an applicant can ascertain in what area a practitioner number may be available. Applicants are left to guess where a need arises. There is no means by which an applicant can ascertain if her or his application is being considered, or if it is being considered then on what evidence it is being considered. There is no means by which an applicant can ascertain whether a hospital in any area has or is prepared to demonstrate a need for the applicant's service. The persons who are in a position to do so, may be the competitors of the applicant, and there is no means by which the applicant has an opportunity to contradict the opinions which may be expressed by those competitors. A practitioner with an unrestricted number can move into any area of the province and thus erase a demonstrated need for an applicant's services. In short, the "outs" (those applying for a practitioner numbers) are at the mercy of the "ins" (those "grandfathered" practitioners with unrestricted practitioner numbers) and have no means to protect themselves...

There is evidence before us not only of potential for abuse of the system, but of actual abuse... the scheme... is based on the application of vague and uncertain criteria, which combined with areas of uncontrolled discretion, leaves substantial scope for arbitrary conduct... (at 195-196)

Does Russell really believe that such a system should not be struck down, even if the court was wrong in its s. 7 analysis? Moreover, Russell accuses the court of not considering the impact of its decision on "the financing of other social programs". This accusation is not established. Although using more prosaic language, preferring "cost control" (both terms simply refer to "taxpayer money"), the court did refer to this issue. First, it says that there are other means to achieve the goal:

Cost control is admittedly a worthy purpose and a legitimate responsibility for the government. Provincial governments have considered and implemented various ways of reducing these costs including reducing the percentage paid of the medical service rendered, excluding certain services from coverage, instituting user fees for certain services, limiting the amount which will be paid for particular services, and increasing premiums... (at 188)

Second, the court said that the formula prescribed by the plan in the context of cost control was arbitrary:

The Act distinguishes between established physicians and new or out of province physicians without regard to qualifications, infirmity, ability etc... There is no evidence whatsoever and no rational reason for assuming that it is the new or out of province physicians who are responsible for increasing health care costs any more than the established ones: however, it is they who bear the full burden of the law. (Ibid. at 197. This passage is taken from two of the appellants' submissions, which the court cited and agreed with.)

The British Columbia government did not even try to justify the measures in Wilson under s. 1. Ibid. at 198.

It seems to me that even if Russell is right that s. 7 rights should not be interpreted as including "the right to pursue a livelihood or profession" (ibid. at 187). Wilson actually serves as an especially bad example of "bad" judicial decision making. If anything, it is an example of bad legislation that should not have been enacted in the first place.

\footnote{As mentioned above, Code was Askov's attorney (see Code, supra note 83 at iii). Baar worked with Code (see Ibid. at iv-v) and submitted one of the affidavits that the court cited from (see Askov, supra note 4 at 1238-1240).}
legislature will properly re-correct judicial corrections of other courts' mistakes is theoretically incoherent. The fact that Weiler, Russell and MacDonald failed to establish the presence of any judicial errors is probably strong evidence for the conclusion that indeed the court was in most cases right, as the justification for judicial review would suggest.

However, the argument from judicial error is not the only one available to those who support a usage of the NM. The argument from politics is also available and is easier to invoke. One can do so merely by suggesting that the court's answer to the constitutional question is not the only reasonable answer. The argument from politics can apply in many cases since it is not difficult to suggest that there is another reasonable answer in addition to the court's. However, this argument was invoked in only two out of the four cases discussed in this chapter. Even in these two cases, scholars who discussed the cases either did not invoke the argument from politics properly or got carried away and invoked the argument from judicial error as well. Thus instead of simply suggesting that the court's answer to the constitutional question in Ford was not the only reasonable answer, Russell argued that it did not matter whether the court got the answer right. Similarly, instead of simply arguing that the majority's decision in Seaboyer was not the only reasonable one possible, MacDonald argued that this decision was a judicial error. To demonstrate this argument, MacDonald resorted to the rhetoric of judicial vice.

-Seaboyer could exemplify a case in which both the argument from politics and the argument from judicial bias apply. Similar to the argument from politics, one does not need to point to an actual error in order to support the use of the NM on the basis of the argument from judicial bias. The only requirement is a suggestion that the court's answer might be based on self-interest, even if it is not a mistake. Seaboyer is such a case because it deals with judicial power, namely the power of trial courts to decide on certain types of evidence. However, only one of the writers who commented on the case - once again, Manfredi - mentions this point. MacDonald, who also commented on the case, attacked the court for its "mistake", resorted to the rhetoric of judicial vice, but failed to identify the judicial bias involved.

If the finding regarding the failure to demonstrate judicial errors serves to question the need for a NM, the academic failure described in this chapter questions the workability of the NIP. The NIP may have been built as a check on judicial error or on the idea that the role of the court is to deliberate. Either way, it is clear that both the legislators and the public must
understand the constitutional issues as well as possible. For the check on judicial error approach, such an understanding is necessary because legislators need to decide that they disagree with what the court has to say. For the judicial deliberation approach, such an understanding is necessary to enable a reasoned public discussion about the merits of the matter. Without elaborating on the role of academics in this scheme, it is at least clear that they help the media and the public to understand complicated constitutional issues. It is fair to assume that the legislature would, at a minimum, listen to academic responses to judicial decisions. Academic help is not always available, however, and sometimes legislators have to act quickly without waiting for guidance. But the analysis in this chapter reveals that even when available, academic advice might be of no use. If the academic responses to judicial decisions are irresponsible and disrespectful towards the court, the chances of the legislature acting in an irresponsible way increase.

The same result is true with respect to the public response to legislative action. The media sometimes consult academics regarding constitutional issues. Indeed, one of the essays discussed in this chapter was written by two professors, Weiler and Russell, but was published in a daily newspaper rather than in a legal periodical. The more imprudent academics are when criticizing judicial decisions, the greater the chances are that the public will not be able to clearly understand what is at stake.

At one point in his writings in support of the NM, Russell made a statement which succinctly captures this problem. Responding to Whyte's fear of legislative tyranny, Russell wrote: "A reading of legislative debates on justice issues such as capital punishment, criminal procedure, aboriginal rights, and language rights does not find legislators simply pandering for popularity". While Russell might be generally correct on this point, he was certainly wrong with respect to the legislative debate on language rights held in the Quebec National Assembly regarding Bill 178. This debate, as the previous chapter demonstrated, was mainly about "pandering for popularity". Russell's statement is revealing also for another reason. It demonstrates that academics cannot always be relied upon to accurately assess legal

102 Russell, supra note 11 at 301.
developments or to comment upon them appropriately. With these thoughts in mind, I will now move on to the conclusion of this dissertation.
Chapter 7

Conclusion: The Future of the Notwithstanding Mechanism

Many years ago, the book of Ecclesiastes taught us:

Two are better than one; because they have a good reward for their labour. For if they fall, the one will lift up his fellow: but woe to him that is alone when he falleth; for he hath not another to help him up.¹

These words of King Solomon can be interpreted optimistically or pessimistically. The pessimistic interpretation would see a statement about fallibility. Since any person is capable of failing, we are better off together. Otherwise, "woe" is certain to befall us. The optimistic view sees this as a statement about co-operation. The "labour" mentioned in the passage is not the separate work of each individual with which another can assist in times of trouble. Rather, it is "their labour". Co-operation does not result in separate rewards. Instead, together "they" receive one good reward.

Like the two readings of Ecclesiastes, this dissertation suggested that the interaction between courts and legislatures can be viewed through a pessimistic or an optimistic light. The pessimistic view focuses on fallibility, i.e. on the fact that courts can err. In order to avoid the "woe", the legislature should have the last word. As Weiler puts it, both the courts and the legislatures are "only too frail human institutions": This leads to the argument from judicial error, which believes that judicial review is there to "lift up" the legislature when it falls, and that the NM is there to "lift up" the court when it fails. The second way in which to view the interaction between courts and legislature under the NIP is more optimistic. While acknowledging that both courts and legislatures are capable of falling, it chooses to focus on their co-operation, "their labour" and "their reward". This is the partnership approach. As Weinrib puts it, the NM "melds the best" of courts and legislatures into "something new and better".¹

¹ Ecclesiastes, 4:9-10. The book of Ecclesiastes is traditionally ascribed to King Solomon. The first verse of the book reads: "The words of the Preacher, the son of David, king in Jerusalem". Ibid., 1:1.
² P.C. Weiler, "Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?" (1980-81) 60 Dalhousie Rev. 205 at 235.
³ L. Weinrib, "Learning to Live With the Override" (1990) 35 McGill L. J. 541 at 564.
The difference between the check on judicial error approach and the partnership approach is very clear in terms of theory and constitutes the theoretical skeleton of this work. The check on judicial error approach adds a further check on the checking power of the court. Instead of no judicial review, and instead of final judicial review, it creates a system of judicial review with legislative finality. Such an approach, however, is bound to become unprincipled since the very reasons for judicial review contradict support for legislative finality. The partnership approach solves this problem by holding that the real purpose of judicial review is not supervision but deliberation and that this purpose is not inconsistent with support for legislative finality. This approach represents an innovation in constitutional theory.

Whether one has an optimistic or a pessimistic approach to Ecclesiastes’s depiction of the two people working together, one must deal with the fear that one of the parties will refuse to be lifted up and will instead drag the other down. Both the check on judicial error approach and the partnership approach must deal with the danger of legislative abuse of the mechanism. With respect to this fear, simply talking about the theoretical ideas of “a check” or “a partnership” is not very helpful. An analysis of the actual use of the NM in Canada is essential.

Chapter 5 examined the history of the NM in Canada both in terms of its use and its non-use. The non-use demonstrates that Canadian legislatures use the mechanism very rarely. The history of the use of the mechanism seems, at first glance, to be more troubling. First, the omnibus use of the mechanism in the Quebec Act Respecting the Constitution Act, was a brilliantly cynical use of a legal tool. Moreover, of the 14 other uses of the NM, 12 were entirely ignored by the public and hardly discussed by the legislature. It should be noted, however, that of these 15 uses, the Quebec omnibus use and the 14 other uses, only one, the Quebec sign law was undertaken in response to a Supreme Court decision. Even in that case, the government did not renew the notwithstanding declaration after five years but instead amended the Charter of the French Language to comply with the Supreme Court of Canada’s decision in Ford. Had a prior Supreme Court decision been required before the NM could be invoked, as the NIP model of partnership introduced in Chapter 5 advocates, the use of the NM in Canada would have been reduced from one omnibus use and 14 specific uses to one specific use which is no longer in force. In other words, the NIP, which requires a prior judicial decision, would result in less worrisome results than the NM model which does not require a prior ruling.
While there has only been one case in which a Canadian legislature has responded to a Supreme Court decision by invoking the NM, scholarly analysis of this single instance points at the problematic nature of the check on judicial error approach. Patrick Monahan, who supported the NM in 1987 based on the argument from judicial error, changed his mind following the enactment of Bill 178. He stated that Premier Bourassa was not responsible for the enactment of Bill 178 but rather that it was the fault of "the notwithstanding clause itself." Since no Quebec Premier "can afford to be seen to be half-hearted in his or her defence of the French language in Quebec," it was clear that at some point a Quebec Premier would use the mechanism to frustrate anglophone rights. Monahan further stated that "the political dynamic created by the existence of the notwithstanding clause was an accident waiting to happen" and concluded that "the inclusion of the notwithstanding clause in the 1982 constitution was clearly a very serious mistake."

Monahan's support for the NM in 1987 was the result of his support for the argument from judicial error. His change of heart in 1991 can also be seen in terms of that argument. Monahan believed that Ford was correctly decided and that overriding it was a legislative mistake. Monahan also implied that the aftermath of the Ford decision disproved the no abuse assumption which is inextricably linked to the argument from judicial error. While the no abuse assumption suggests that the public will protest an abuse of the NM, the behaviour of the Quebec public following Ford demonstrated that the public sometimes might actually encourage the legislature to invoke the NM inappropriately. Since it was not an argument about judicial error which led the Quebec National Assembly to use the NM and since the Quebec reality did not reflect the no abuse assumption, Monahan changed his view of the NM.

Another supporter of the argument from judicial error, Christopher Manfredi, agreed with Monahan's analysis but not with his conclusion. While also using the metaphor of an "accident," he nevertheless arrived at an opposite view. He argued that one of the reasons why "the political

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5 Ibid. at 167.
6 Ibid. at 168.
7 Ibid. at 169.
legitimacy of s. 33 is so weak” and why Monahan changed his mind after Bill 178 is “an accident of history”. Manfredi stated that “Canadians experienced a use of the notwithstanding clause they found outrageous before they experienced a Supreme Court decision of equivalent political unpopularity”. He went on to discuss Askov and Seaboyer as decisions which justify the existence of the NM. In other words, Manfredi agreed that Ford was rightly decided and wrongly overridden, but does not think that this implied that either the judicial error or the no abuse assumption were wrong.

The fact that two scholars can look at the same set of facts and arrive at opposite conclusions regarding the desirability of the NM reflects the fact that any discussion concerning the argument from judicial error and the no abuse assumption is doomed to be theoretically incoherent. What further symbolizes this fact is that both Monahan and Manfredi used the metaphor of an “accident” which implied a lack of predictability and consistency. Monahan used the deliberate oxymoron of “an accident waiting to happen” to imply that the no abuse assumption was false even in 1982. Manfredi’s way of dealing with an incident that does not fit neatly into his argument is to characterize it as “an accident of history”.

In keeping with my approach throughout this work, my focus is not on accidents and errors. My focus in discussing the debate in the Quebec National Assembly was not on whether Ford was right or wrong. Indeed, I believe that the view that commercial speech should not be protected in Canada is worthy of considerable respect. My concern with the invocation of the NM after the Ford decision relates to the process by which it was adopted as opposed to the result that it achieved. I showed that rather than being the product of a prudent legislative discussion, the invocation of the NM was the result of an unprincipled, power oriented discussion concerning the linguistic struggle in Quebec. In Chapter 6, I demonstrated that the academic scholarship on this issue neither set an example nor provided much assistance to Canadian legislatures.

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9 Ibid. at 204.
10 Ibid.
In his discussion of the overriding of *Ford*, Monahan uses the forbidden fruit metaphor. He suggests that “any politician who touches or tastes the NM will be banished from the garden”\(^{11}\) and that it will therefore become “untouchable”\(^{12}\) by politicians. Despite being very illuminating, Monahan’s use of the forbidden fruit metaphor is inaccurate. It is inaccurate since God never told Adam not to *touch* the fruit of the tree of knowledge. Adam was told simply not to *eat* it. But this inaccuracy itself is also illuminating since it suggests that Monahan overestimates the power of the punishment argument. Monahan’s prediction was indeed proven wrong seven years after he made it and ten years after Bill 178. Alberta Premier Ralph Klein was not so intimidated that he refused to touch the fruit nor to taste it. It tasted so bitter, however, that he did refuse to eat it.

Monahan’s overstatement is very similar to Eve’s overstatement. Although God admonished that Adam and Eve “shall not *eat* of”\(^{11}\) the fruit, Eve told the serpent that “God hath said, Ye shall not *eat of* it. *neither shall ye touch* it”.\(^{14}\) The *Midrash Rabbah*\(^{15}\) suggests that it was due to this addition that the serpent was able to convince Eve to eat the fruit. It says that the serpent pushed Eve against the tree and said: “Have you then died?... just as you were not stricken through touching it, so will you not die when you eat it”\(^{16}\). In other words, Eve’s de-legitimating of the supposed no touching rule resulted in her actually eating the fruit. One hopes that other politicians do not infer from Klein’s survival after touching the tree that they too can taste the fruit and survive.

It seems that Mark Tushnet also agrees that the NM is now “untouchable”. He also suggests that the consistent reluctance to use the NM in Canada is unfortunate since once the NM ceases to be a political option, the problem of “democratic debilitation” returns. This is the problem of the public not discussing constitutional values because they trust the court to do this

\(^{11}\) Monahan, *supra* note 8 at 169. See in the same spirit, Marfredi, *supra* note 8, at 203.

\(^{12}\) Monahan, *ibid*. [emphasis added]. The full quote is: “The notwithstanding clause will become the forbidden fruit of the Canadian constitution: any politician who touches or tastes it will be banished from the garden. Indeed, the notwithstanding clause may already have become a dead letter outside of Quebec. Its association in the public mind with the Quebec sign legislation may well be sufficient to render it politically untouchable”.

\(^{13}\) Genesis 2:17.

\(^{14}\) Genesis 3:3.

\(^{15}\) *Midrash Rabbah* is a rabbinical compilation of scriptural interpretation from the 3rd and 4th century.

\(^{16}\) *Midrash Rabbah*, Genesis, 19:3.
for them. I disagree. In my view, the NM remains capable of being touched but is at its best when it is not used. On the one hand, the existence of the NM legitimizes judicial review and encourages judges to judge. On the other hand, the political hardship of using the NM is likely to prevent legislative tyranny. The fact that the more rarely the NM is used, the harder it is for legislatures to do so is actually fortunate since it supports the idea that the NM is there to "hold politicians accountable." Indeed, the first thing that happened to Adam and Eve after eating the fruit was that their eyes were opened "and they knew that they were naked." This is how the legislature should feel after it uses the NM.

Both the check on judicial error approach and the partnership approach seem to be resting upon new developments in constitutional thought and as such they pose a challenge to future deliberations. The first development was the demise of tyranny. The disputes at the heart of many constitutional cases represent two legitimate views of political morality. As a rule, they no longer showcase one tyrannical view opposed to one view representing liberty. A related development is that, in many countries, the legislature is no longer conceived of as the villain and the courts are no longer viewed as the heroes. These two developments mean that legislatures and legislators will increasingly engage in the interpretation and explication of constitutional values. This invites the development of theories concerning the constitutional interpretations of legislatures and legislators. In an era when there is a shift from discussing the clashes between the courts and the legislatures towards discussing the partnership between courts and legislatures, the legislatures must develop ways to become more capable of principled deliberation. While the Quebec sign case did not reveal a legislature that seriously discussed constitutional issues, this hope nevertheless remains a possibility.

A legislature deliberating according to principle will not entirely solve the theoretical problems with the argument from judicial error. Neither will it end the fear of legislative tyranny which both the check on judicial error approach and the partnership approach share. Such enlightened legislative discussion might, however, significantly ease these concerns. In this

19 Genesis 3:7.
sense, too. Monahan’s brilliant metaphor is very telling. Aside from the tree of knowledge, there was another tree in the Garden of Eden, namely the tree of life. The reason why Adam and Eve were banished from the garden was not to punish them, but to prevent them from eating from the tree of life “and liv[ing] forever”.29 If Canadian legislatures are interested in eating the forbidden fruit, they should at least be able to do so in a principled way and thereby eat from the tree of life. This would not absolve their sin, but their punishment would not be the same. The Canadian people, I suspect, will give their legislatures that chance and not banish them from the garden.

29 Genesis. 3:22.
Appendix 1

H.C. 4676/94 Meatrel v. The Knesset of Israel. 50(5) P.D. 16 (1997)

THE PRESIDENT A. BARAK:

Basic-Law: Freedom of Occupation includes an "override clause" (section 8). According to it, an Act that infringes on Freedom of Occupation, that was accepted by a majority of the Knesset members and that stated explicitly that it is valid notwithstanding what is said in Basic-Law: Freedom of Occupation (a "deviating act" in the language of the title of the override clause) is valid, despite the fact that it is not in accordance with the limitation clause (section 4) in Basic-Law: Freedom of Occupation. Against this background, two questions present themselves. First: does the override clause protect a deviating act that infringes the fundamental principles that are mentioned in the principles clause (section 1) and the purposes clause (section 2) in Basic-Law: Freedom of Occupation? Second: what is the legal position if a deviating act infringes on human rights that are protected in Basic-Law: Human Liberty and Dignity? Is the constitutionality of such a deviating act subject to examination in light of Basic-Law Human Liberty and Dignity, in light of the fact that there is no override clause in Basic-Law Human Liberty and Dignity? The examination of these two questions arises in the petition before us.

THE FACTS

1. Importation of frozen meat has been carried out since the establishment of the State of Israel by the state itself, i.e., by the board of governmental commerce. At some point in time, Israel’s government officially decided to terminate government importation (decision 132 from 8. 9. 92). The decision prescribed that such importation would be carried out by private and commercial agents only, without quotas and without need of an import license. According to the government’s decision, a general managers’ committee was established. Its duty was to develop ways to implement the decision. The committee submitted its recommendations (on 11.3.93). The government started to discuss the recommendations, but postponed their implementation indefinitely. Petitioner number 1 – whose business is the importation of meat into Israel - and others submitted petitions in this matter (HC 2015/91. 1775/93). The Supreme Court ruled (on 24.5.93) that subject to the power of the government to make another decision, “the state must apply its aforementioned decisions within a reasonable time, which we proscribe as a period of four months”.

2. After this judgment, the matter was discussed several times in the government. It made (on 8.8.93) an additional decision. According to it, the privatization of meat importation would be regulated by way of legislation. Until then, the situation would stay as is, that is, the state would be the exclusive importer of meat. The basis for the change in the government’s position was its apprehension that, absent legislation that forbids it, there was a potential for extensive importation of non-kosher meat. In order to prevent any affront to the feelings of the religious public and in order to fulfil a coaltional commitment in this matter made to one of the [political] parties in the government’s coalition, the aforementioned decision was taken by the government. Arguing against the legality of this decision - maintaining the status quo until the regulation of the issue by way of legislation - petitioner number 1 submitted a (second) petition to this court.
The court turned the decree nisi to a decree absolute. It decided that the government's considerations were irrelevant to the power to grant import licenses by virtue of the Import and Export Ordinance. It ordered the issuance of import licenses to the petitioner as requested (HC 3872/93 Meatrael v. The Government of Israel. PD 47(5) 485). As to the legislation by which the government sought to regulate the issue. Judge Or commented. in passing, that such legislation must be accepted by a qualified majority of 61 Knesset members.

3. After delivering the judgment in the second petition, the petitioner appealed to the Ministry of Commerce and Industry. It asked permission to import frozen beef in the range of 37,000 tons. The Ministry advised the representative of the petitioner that, in a license regime, it is impossible to authorize one applicant [to import] a quantity identical to the [total] annual import of the State of Israel. Against this position of the government, the petitioner applied for the third time to this court (HC 7198/93 Meatrael v. The Minister of Commerce and Industry. PD 48(2) 844). It asked that the court order the government. inter alia. to enable private agents to import meat in any quantity that they want and without import licenses. It also asked, alternatively, that licenses to import frozen beef in any amount desired be granted to it immediately. In the course of the trial (on 8.3.94) it was stated. on behalf of the state, that the license regime would be canceled within six months. In light of this statement, the first ground of the petition was rejected (by the majority opinions). As to the second ground of the petition, it was submitted to the court that the petitioner received licenses to import close to 5,000 tons of meat. The court did not find any fault with the government's decision not to permit the petitioner to import the meat quota it asked for. The petition was rejected. therefore, on its two grounds.

4. As we saw, the government committed itself to cancel the licensing regime within six months. Indeed, on 3.8.94 the Free Import Order (Amendment). 5754-1994 was promulgated. The requirement of a license for frozen meat [import] was indeed canceled by this amendment. From this time forward, every importer was allowed to import frozen beef meat according to its circumstances, without need of import licenses. as long as it satisfied the required veterinary conditions.

**FROZEN MEAT IMPORT ACT. 5754-1994**

5. On account of the judgment in the second petition of the petitioner, a bill entitled Frozen Beef Meat Import Act. 5754-1993 (HH 2228. 5754. at 132) was tabled in the Knesset (on 13.12.93). The bill stipulated that "notwithstanding any law. licenses for the import of frozen beef meat will not be issued; the import of such meat will be carried out by the government only, as was the practice until 9 of Elul 5752 (September 7. 1992)". After less than two months. (on 31.1.94) the government submitted a new bill. the Frozen Beef Meat Import Act. 5754-1994 (Second Bill). The bill was accepted with some changes. The Frozen Beef Meat Import Act, 5754-1994 (hereinafter - Frozen Meat Import Act) stipulated. inter alia:

2. Notwithstanding any law. and subject to section 3, a person shall not import meat unless possessed of a kashrut* certificate. (* - In Hebrew: "koshernes"; the requirement that food is kosher. i.e.. permissible for consumption by Jews according to laws relating to the type of animal and the method of slaughter.)
3. The Minister of Commerce and Industry may approve meat import licenses, with regard to which a kashrut certificate was not provided, in the same format and in the same cases as it was accustomed to do until 12 of Tamuz 5752 (July 13, 1992).

4. Nothing in this Act detracts from the right of the government to import frozen meat itself or by others on its behalf including [importation] for the purpose of emergency stockpiling, providing that a kashrut certificate is provided.

5. The provisions of this Act do not detract from any license to import meat that was given before the passage of this act.

By virtue of this legislation, the licenses of the petitioner to import 5.000 tons of frozen beef meat were preserved. The Act’s provisions were applied only to the importation of frozen meat (it was stipulated in section 1 to the Act that “meat” means frozen meat”). The required kashrut certificate is a certificate authorized by the Counsel of the Chief Rabbinate. It is the legality of this Act that the petition before us challenges. To complete the picture, it was noted that after the submission of the petition, the Frozen Meat Import Act (Amendment), 5755 - 1995 was enacted. In this Act, among other things, the definition of “meat” was amended. It was extended to “all kinds of meat and its products for human consumption, including meat and poultry”. The name of the Act was changed and it was now called Meat and Meat Products Act, 5754-1994.

Basic-Law: Freedom of Occupation

6. As we saw, in the second petition of petitioner number 1, the court stated (through Judge Or) in an obiter passage of the judgment, that legislation that requires that only kosher meat be imported limits the freedom of occupation and does not conform to the limitation clause. Such legislation must be accepted by a majority of 61 Knesset members. The question raised is this: how is it possible to enact the Frozen Meat Import Act without encountering the claim that it unlawfully infringes Basic-Law: Freedom of Occupation? Several responses were proposed. Eventually it was determined that Basic-Law: Freedom of Occupation would be amended in a manner to permit enactment, under certain conditions, of an act that infringes on freedom of occupation and that does satisfy the requirements of the limitation clause. This amendment was combined in the framework of additional changes to the Basic-Law: Freedom of Occupation that were needed without connection to the enactment of the Frozen Meat Import Act (see the explanatory notes to the Bill of Basic-Law: Freedom of Occupation (Amendment) HH 2227, 5754, at 128). Some of these changes responded to the need to match the formulation of Basic-Law: Freedom of Occupation to that of Basic-Law: Human Liberty and Dignity. Other changes were directed to extending for an additional two years the provisionary section (section 6 to the original Basic-Law: Freedom of Occupation), which provided constitutional shelter to the previous law and which was about to expire. Thus the Knesset accepted a change that enabled it to override the non-constituionality of an Act that infringed freedom of occupation and did not satisfy the requirements of the limitation clause. In effect, an “override clause” (section 8) was inserted into the new Basic-Law: Freedom of Occupation (in force 10.3.94) such that a provision in an Act that infringed on freedom of occupation and did not satisfy the requirements of the
limitation clause — a deviating Act in the language of the title of the override clause — would be valid if included in an Act that was accepted by the majority of Knesset members. in which it was stated expressly that it was valid notwithstanding Basic-Law: Freedom of Occupation. The override clause further stipulated that the validity of an Act that included a “notwithstanding” clause would expire after four years from its coming into operation, unless an earlier time was stipulated. A parallel provision does not exist in Basic-Law: Human Liberty and Dignity.

Back To Frozen Meat Import Act, 5754-1994

7. The Frozen Meat Import Act was enacted about two weeks after the new Basic-Law: Freedom of Occupation came into operation. To endow constitutional protection to the Frozen Meat Import Act, the Act had to satisfy the stipulations of the override clause. Accordingly, the Frozen Meat Import Act was accepted by a majority of Knesset members. A provision of the Act stipulated:

“this Act operates notwithstanding Basic-Law: Freedom of Occupation”

According to the override clause, the Frozen Meat Import Act will expire four years from its coming into operation. As stated, the Frozen Meat Import Act was amended by the Frozen Meat Import Act (amendment) 5755-1995. This amendment was also accepted by a majority of Knesset members. It also included a provision (section 5) stating that “This Act operates notwithstanding Basic-Law: Freedom of Occupation”.

THE PETITION

8. On the eve of the enactment of the Frozen Meat Import Act the petitioners dealt with the import of all kinds of frozen meat. Their main occupation was importation of non-kosher meat. According to the petitioners’ claim, with the enactment of the Frozen Meat Import Act, the value of the shares of petitioner number 1 drastically decreased. On account of the Act, a foreign firm withdrew from an agreement signed (on 18.10.93) with petitioner number 1 and petitioner number 2 and, as a consequence, a steep decrease in the share value occurred. Moreover, following the privatization decision of the government, and due to the extension of the non-kosher meat import business, petitioners number 3 and 4 expanded their business. They replaced old offices with new ones. They hired workers, acquired vehicles and rented a special refrigeration house for four years. This investment and others are destined to fail. According to the claim of the petitioners number 3 and 4, because of the Frozen Meat Import Act their activity will decrease in the future by 50 percent.

9. In their petition, the petitioners raised two main claims. First: the nullification of the Frozen Meat Import Act due to defects in the process of its enactment. Second: the nullification of the Frozen Meat Import Act as contrary to constitutional principles anchored in Basic-Law: Freedom of Occupation and in Basic-Law: Human Liberty and Dignity. Responding to our recommendation, the petitioners withdrew the first claim. Thus the whole petition revolves around the questions that are connected to the Basic-Laws. Regarding this matter, we permitted amendment of the petition so as to deal both with the constitutionality of the Frozen Meat Import Act and the constitutionality of the amendment that extended the provisions of this Act to all

10. The petitioners submit two claims with regard to the relation between the Frozen Meat Import Act and the constitutional principles that are anchored in Basic-Law: Freedom of Occupation and Basic-Law: Human Dignity and Liberty. The first claim is this: the override clause protects the Frozen Meat Import Act from constitutional review under the limitation clause. The override clause does not protect the act from constitutional review, under the fundamental principles of section 1 of Basic-Law: Freedom of Occupation. According to the petitioners' claim, "the override clause was aimed and can indeed help the legislature to deviate, out of immediate necessity, from a certain provision in the constitution (that is, section 4 of Basic-Law: Freedom of Occupation), but it does not enable it to totally break the framework". The second claim is this: The Frozen Meat Import Act infringes not only on freedom of occupation. This Act infringes on several liberties that are anchored in Basic-Law: Human Dignity and Liberty, without satisfying the requirement of the limitation clause that is prescribed in Basic-Law: Human Dignity and Liberty. According to the petitioners' claim, the Frozen Meat Import Act infringes on the freedom of religion and conscience. This freedom constitutes, according to the petitioners' claim, a part of the constitutional protection of Human Dignity and Liberty (sections 2 and 4). These rights are infringed by the Frozen Meat Import Act in that it precludes any individual choice to purchase non-kosher meat and it coerces individuals, for religious reasons, to only consume kosher meat. Thus, it infringes on the freedom of religion and conscience of all individuals (whether Jews or non-Jews). This infringement is not according to a proper purpose and it is beyond what is required. Moreover, according to the petitioners' claim, the Frozen Meat Import Act infringes on the equality principle. Equality is protected, according to the petitioners' claim, as part of the protection of human dignity (sections 2 and 4). The infringement on equality is illustrated by the fact that a Jewish consumer would only be able to buy imported frozen meat with a kashrut certificate from the Rabbinate. In contrast, a Muslim consumer would be able to buy imported frozen meat without any certificate. Similarly, non-kosher imported meat is cheaper than imported kosher meat or fresh, non-imported meat. Preventing the importation of non-kosher meat effects discrimination between the rich and the poor. This infringement of the equality principle is not for a proper purpose and it is beyond what is required and therefore, it does not satisfy the requirements of the limitation clause in Basic-Law: Human Dignity and Liberty. Finally, the Frozen Meat Import Act infringes on the property of the petitioners. The property is protected in Basic-Law: Human Dignity and Liberty (section 3). The property right of the petitioners is infringed by the Frozen Meat Import Act, in that the value of the shares [of the company of] petitioner number 1, a part of which are owned by petitioner number 2 -- drastically decreased. Likewise, the property [right] of petitioners number 3 and 4 was infringed in that their [commercial] activity is forecast to fall by 50% because of the ban against non-kosher meat importation. It is also expected that the investment in their business undertaken in the expectation of full privatization of the importation of all kinds of frozen meat will be lost. This infringement on property is not for a proper purpose and is beyond what is required. It does not satisfy, therefore, the stipulations of the limitation clause in Basic-Law: Human Dignity and Liberty. In this context, the petitioners point out that the Frozen Meat Import Act does not include any provision concerning monetary compensation for the monetary damage that was incurred.
11. The respondents rely on the override clause. As to the first claim of the petitioners, the respondents' view is that the limitation clause constitutes a barrier for judicial review as far as the Basic-Law: Freedom of Occupation is concerned. As to the fundamental principles clause, it is not an independent source of rights in Israel. Its duty is only interpretive. It contributes to the understanding of the human rights that are acknowledged in the Basic-Law. It is not a source of rights. Moreover, even if the fundamental principles clause does constitute an independent source of human rights, that does not matter because the claim before us is a claim of infringement of freedom of occupation and it is at this infringement that the override clause is aimed. As to the second claim of the petitioners, the respondents' view is twofold: first, they seek to show that freedom of conscience and religion was not infringed, and in any case, it does not amount to an infringement on the aspect of freedom of conscience and religion that is derived from human dignity. Similarly, the Frozen Meat Import Act does not infringe on equality. Every person is free to consume non-kosher meat, as it is available in the market, and the Act does not create any distinction between consumers. Thus, there is no need to decide the question whether the equality principle is included in Basic-Law: Human Dignity and Liberty. Anyway, the lack of economic equality cannot be considered to infringe on human dignity. Finally, the Frozen Meat Import Act does not infringe the property of the petitioners. Their property was not confiscated. The economic potential that is open to them increased, in light of the permissibility of meat import without a license. The second answer of the State -- and it is an alternative to its first answer -- assumes that the human rights that are anchored in Basic-Law: Human Dignity and Liberty are infringed by the Frozen Meat Import Act. This answer also assumes that the infringement of the human rights that are anchored in Basic-Law: Human Dignity and Liberty does not satisfy the requirements of the limitation clause in this Basic-Law. The State's claim is that the infringement on the human rights that are anchored in Basic-Law: Human Dignity and Liberty is totally and solely derived from the limits on freedom of occupation. This is a specific and special arrangement that exists within Basic-Law: Freedom of Occupation, and that was entrenched by the override clause. In these circumstances, the arrangement is not any more open to additional constitutional review within Basic-Law: Human Dignity and Liberty. According to the respondent's claim, any other interpretation will empty the override clause of any meaning, since any limit on occupation encompasses an infringement on property also. Indeed, the State points out in its answer that "we do not seek to claim that generally the 'override' clause that endows entrenchment from constitutional review by virtue of Basic-Law: Freedom of Occupation entrenches the Act from the point of view of Basic-Law: Human Dignity and Liberty. However, the claim of the State is that in the present situation, where all that is involved is limiting a sphere of occupation, infringements on other rights have to receive constitutional protection."

THE OVERRIDE CLAUSE

12. At the core of this petition stands the override clause. This is the language of the clause (section 8):

The validity of a deviating Law

A provision of a Law that infringes on freedom of occupation shall be valid, even though not in accordance with section 4, if it has been included in a Law passed by a majority of the Knesset members, which expressly states that it shall be valid notwithstanding this
Basic-Law: the validity of such a Law shall expire four years from the day of its commencement, unless an earlier date has been stated therein.

A similar provision is not included in Basic-Law: Human Dignity and Liberty. The inspiration for this provision came from a parallel provision that exists in the Canadian Charter of Rights and Freedoms (see DK 133. 5754. at 5412). The Canadian provision is named the override, and it exists in section 33 of the Canadian Charter. This is its language.

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

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

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

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

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

Comparing the two provisions indicates that in some matters there is a considerable similarity between the two clauses, and in other matters there is a substantial difference between them. We talked about the similarities and differences elsewhere (see A. Barak. Interpretation in Law. 63 (3rd part. 1994)).

13. The purpose of the limitation clause is to enable the legislature to fulfil its social and political goals, even if they infringe on freedom of occupation and the infringement does not satisfy the requirements of the limitation clause (section 4), that stipulates:

There shall be no infringement on freedom of occupation except by a Law befitting the values of the State of Israel enacted for a proper purpose and to an extent no greater than is required, or according to such a law by virtue of express authorization by it.

Indeed, the override clause enables the legislature to fulfil political and social goals through legislation without any apprehension that this legislation, if challenged, will be found unconstitutional and therefore void (see HC 796/94 Klab Insurance Co. Ltd. v. The Minister of Treasury. PD 48(5) 441. 482). By means of the override clause, the status of Basic-Law: Freedom of Occupation as a constitutional super-legislative provision is preserved, and yet the power of the legislature to infringe on freedom of occupation without satisfying the provisions of the limitation clause is acknowledged, and all that without any need to change the Basic-Law itself. The Canadian arrangement won praise from one side and poignant [harsh] criticism from the other (see Weinrib. "Learning to Live with the Override". 35 McGill L. J. 541 (1990); Russell. "Standing Up for Notwithstanding". 29 Alta. Law Rev. 293 (1991); White, "On Not

The Override Clause, Deviating Act, and Basic-Law: Freedom of Occupation

14. An Act that includes a clause that this Act is valid notwithstanding Basic-Law: Freedom of Occupation -- a “deviating Act” in the formulation of the Basic-Law -- does not change the Basic-Law: Freedom of Occupation. It was prescribed in the Basic-Law that “this Basic-Law shall not be changed except by a Basic-Law that was accepted by the majority of the Knesset members”. Therefore, there was no change in freedom of occupation as a constitutional super-legislative right, because of the existence of a provision in an Act that it is valid “notwithstanding” the Basic-Law. The effect of a deviating Act is that this Act entrenches itself from judicial review by virtue of Basic-Law: Freedom of Occupation. What is the range of this entrenchment? The petitioners before us are claiming that this entrenchment is limited only to the examination of the question whether this deviating Act satisfies the requirements of the limitation clause (that is prescribed in section 4). In their petition, the infringement does not apply to the examination of the question whether this Act satisfies the requirements of the fundamental principles clause (section 1), that stipulates:

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of his life and his freedom, and they shall be respected in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

According to the claim of the petitioners. Basic-Law: Freedom of Occupation does not entrench any deviating Act. The deviating Act is valid -- despite the fact that it does not satisfy the requirements of the limitation clause -- only if it satisfies the requirements of the fundamental principles clause. The petitioners stress that their claim has a linguistic basis. since it was stipulated in the override clause that “a provision in an Act that infringes on freedom of occupation shall be valid even though it is not in accordance with section 4” -- it was not said in the override clause that this provision will be valid even though it is not in accordance with section 1. A similar claim was raised in Canada. It was claimed there that an Act that made use of the override is not immune from review as to whether the Act does contradicts the fundamental principles of a democratic state (see Slattery. “Override Clauses Under Section 33”, 61 Can. Bar Rev. 391 (1983); Arbess. “Limitations on Legislative Override”. 21 Osgoode Hall L. J. 113 (1983)).

15. The override clause stipulates the conditions of its exercise. Part of this stipulation is of a “formal” character: the Act has to include in it an explicit provision according to which it is valid notwithstanding Basic-Law: Freedom of Occupation: the Act has to be accepted by the majority of the Knesset members. Another part of the stipulation is of substantial character: the provision in the Act “infringes” on freedom of occupation. The override clause cannot be used -- and the same case applies with regard to the limitation clause -- to give force to an Act that negates or totally abolishes freedom of occupation as a constitutional right in Israel. The negation of
freedom of occupation as a constitutional right can be done only by means of changing the Basic-Law itself, i.e., "in a Basic-Law that was accepted by the majority of the Knesset members" (section 7). This consequence cannot be achieved by the override clause. Indeed, the override clause acts within the framework of Basic-Law: Freedom of Occupation and legislation that changes the Basic-Law cannot be enabled by virtue of it.

16. As we saw, the override clause endows constitutional force to a deviating Act, even if this Act is not in accordance with the limitation clause. An Act might not be in accordance with the limitation clause, inter alia, if it does not befit the values of the State of Israel. These values we take, inter alia, from provisions with regard to fundamental principles (section 1) and the purposes of the Basic-Law (section 2). Therefore, by virtue of the override clause, a deviating Act is valid in spite of the fact that it does not befit the values of the State of Israel as a Jewish and democratic state (values that are mentioned in section 2) and in spite of the fact that it infringes as a result on the fundamental principles (that are mentioned in section 1). The question is -- and it is the one mentioned in the basis of the claims of the petitioners -- whether there is identity between "the values of the State of Israel" that are mentioned in the limitation clause (section 4) and the fundamental principles and the values that are mentioned in the fundamental principles clause (section 1) and the purpose clause (section 2). This is a nice question. Yet we come to the conclusion that we need not decide it. Even if we assume - without deciding - that there are fundamental principles and purposes that a deviating law cannot infringe, these are certainly fundamental principles and purposes upon which our whole constitutional structure, including the Basic-Laws themselves, is built. and that their infringement is substantive and harsh (compare: ...Yardor v. The Elections Committee of the Sixth Knesset... : Tnuat Laor v. The Knesset's Speaker) otherwise the override clause is emptied of its main content. This is not the case before us. The infringement on freedom of occupation is of a limited nature since it remains open to the petitioners to import kosher meat, and to do so is in contrast to the situation before the change in government policy [the decision to privatize the meat market] with no need of import licenses. The infringement on property, freedom of occupation and equality - as much as it is hidden among the folds of the law - does not amount to infringement on the fundamentals of our constitutional regime. For these reasons, the first claim of the petitioners is to be rejected.

The Override Clause, Deviating Act, and Basic-Law: Human Dignity and Liberty

17. An override clause exists in Basic-Law: Freedom of Occupation. It provides that a deviating Act, i.e., an act that infringes on the Freedom of Occupation by a majority of the Knesset members and explicitly states that it is valid notwithstanding Basic-Law: Freedom of Occupation -- is valid although not in accordance with the limitation clause in Basic-Law: Freedom of Occupation. As we know, the Basic-Law: Human Dignity and Liberty does not include an override clause. What is the legal status of a deviating Act that infringes on a human right that is anchored in Basic-Law: Human Dignity and Liberty, and that does not satisfy the requirements of the limitation clause (section 8) in this Basic-Law? The petitioners' claim is that the constitutional protection that the deviating Act acquires is limited only to the "four Amas"* of Basic-Law: Freedom of Occupation ("Ama"* is talmudic measuring unit - approx. 60 cm. The expression means "within the immediate ambit of")]. whereas to the matter of Basic-Law: Human Dignity and Liberty the force of the deviating Act will be proscribed according to the stipulations of its limitation clause. Therefore, if the deviating Act does not satisfy its
stipulations, it is not valid for this reason. According to the petitioners' claim, this is the fate of the *Frozen Meat Import Act*. This Act is a deviating Act. It secures constitutional protection within *Basic-Law: Freedom of Occupation* by virtue of the override clause in this *Basic-Law*. The *Frozen Meat Import Act* infringes, according to their claim, not only on freedom of occupation, but also on the freedom of conscience, equality and property that are protected in *Basic-Law: Human Dignity and Liberty*. It does not satisfy the requirements of the limitation clause in *Basic-Law: Human Dignity and Liberty*. Therefore it is not valid. What is the validity of this claim? To examine this claim we will make all the assumptions that are subsumed in the petitioners' view: we will do this, of course, without expressing agreement with these claims and without ruling on them. We will, therefore, make these three assumptions: first, that the *Frozen Meat Import Act* infringes on freedom of conscience, equality and property; second, that *Basic-Law: Human Dignity and Liberty* protects not only property (section 3) but also freedom of conscience and equality as part of the general protection on human dignity (sections 2 and 4); third, that the *Frozen Meat Import Act* does not satisfy the requirements of the limitation clause in *Basic-Law: Human Dignity and Liberty*. With the background of these three assumptions -- which we assume, without ruling on them -- what is the validity of the petitioners' claim?

18. The interpretive question that stands before us is this: in what circumstances, if any, does the constitutional protection that *Basic-Law: Freedom of Occupation* endows a deviating Act with apply against infringing on freedom of occupation but also against infringement on human rights that are anchored in *Basic-Law: Human Dignity and Liberty*? In the solution to this interpretive problem one should set forth, on the one hand, on the basis of principle -- and in this matter there is complete agreement between the representatives of the petitioners and the representatives of the respondents -- that a deviating Act gains constitutional protection within *Basic-Law: Freedom of Occupation*. For that reason alone, it does not acquire constitutional protection within *Basic-Law: Human Dignity and Liberty* too. Therefore, situations can arise where a deviating Act, that is valid with regard to the matter of *Basic-Law: Freedom of Occupation* -- will be found not valid with regard to *Basic-Law: Human Dignity and Liberty*. On this basis, it should be stipulated that absence of an override clause in *Basic-Law: Human Dignity and Liberty* has constitutional meaning. *Basic-Law: Human Dignity and Liberty* should not be interpreted as if it includes an override clause. This *Basic Law* should be endowed with its constitutional meaning while considering the constitutional fact that this *Basic-Law* does not include an override clause.

19. On the other hand, it should not be forgotten that *Basic-Law: Freedom of Occupation* -- and its override clause -- is a part of the *Basic-Law* structure of the state. It constitutes a central component of the constitutional arrangement with regard to human rights in Israel. An appropriate interpretive conception of constitutional arrangements -- even if they exist in separate documents -- should aspire to constitutional harmony. The constitutional norm does not stand alone. It is a part of the constitutional system. It is one component in an overall constitutional structure (see HC 428/86 Barzilay v. The Government of Israel - PD 40(3) 505. 595). Every constitutional provision has influence on its constitutional environment. One who interprets one constitutional provision, interprets the totality of constitutional provisions. The specific constitutional provision influences the understanding of the constitutional totality, and the constitutional totality influences the interpretation of the specific provision that is combined in it.
Judge Larner pointed this out in one Canadian case that interpreted the Canadian Charter of Rights and Freedoms:

our constitutional Charter must be construed as a system where every component contributes to the meaning as a whole, and the whole gives meaning to its parts ... The courts must interpret each section of the Charter in relation to the others. ([Dubois v. R. [1985] 2 S.C.R. 350, 356).

In a similar spirit the German Constitutional Courts wrote in one case:

The specific constitutional provision cannot be interpreted as a singular and unconnected provision. The constitution has internal unity, and the meaning of each part is connected to the meaning of the other parts. As a unity, the constitution reflects super principles and basic decisions, that every provision in it is bound to them. (in the case of 1 Bverf. GE 14.32).

Indeed, constitutional interpretation should aspire to integrate different constitutional provisions -- whether they are in one document or they are in different documents -- into each other and advance constitutional unity and harmony. We made this point in one of our cases, stating:

Constitutional interpretation must be based on constitutional unity and not on constitutional disharmony. It looks on the role of the constitutional text in the structure of the regime and the society. It endows it with meaning that enables it to sustain its role in the present and in the future in the most proper form” (CA 6821/93 Bank Hamizrahi Hame'uchad v. Migdal Kfar Shitufi (yet to be published. paragraph 86 to my judgment)).[hereinafter the Gal judgment].

It is found, then, that the constitutional existence of the override clause in Basic-Law: Freedom of Occupation has an interpretive inference. not only within this Basic-Law. but also within the constitutional arrangement generally. and the Basic-Laws with regard to human rights particularly.

20. Indeed, appropriate constitutional interpretation has on the one hand to consider that the override clause exists in Basic-Law: Freedom of Occupation and does not exist in Basic-Law: Human Dignity and Liberty. On the other hand, it has to consider that the existence of the override clause in Basic-Law: Freedom of Occupation -- has implications on Basic-Law: Human Dignity and Liberty as part of the totality of the constitutional norms. We are dealing, therefore. with the need to adopt an interpretive approach that balances properly these interpretive facts and that blazes a proper trail through this interpretive tension. What is this interpretive approach? In what circumstances would constitutional protection be given to a deviating Act that infringes not only on freedom of occupation but also on the rights that are anchored in Basic-Law: Human Dignity and Liberty?

21. It seemed to us that proper interpretation should endow constitutional protection to a deviating Act that infringes not only on freedom of occupation but also on rights that are
anchored in *Basic-Law: Human Dignity and Liberty*. if these three cumulative conditions are satisfied: first, the infringement on the other human rights is a natural consequence that follows from the infringement on freedom of occupation; second, the infringement on freedom of occupation is the main infringement, whereas the infringement on the other human rights is secondary. Third, the infringement on the other human rights, of itself, does not produce a serious effect. In satisfying these three conditions, the interpretation that views the constitutional provisions as a unity and that seeks to ensure constitutional harmony, that endows the deviating act with constitutional force beyond *Basic-Law: Freedom of Occupation*, is compelled. Any other interpretive approach would empty the override clause of its contents and sidestep its effective use. A proper interpretation must prevent this consequence. The proposed interpretation nonetheless sustains the proper boundaries of *Basic-Law: Human Dignity and Liberty*. It acknowledges the fact that it does not include an override clause, while preserving the human rights that are anchored in it from a primary infringement that arises incidentally with the enactment of the deviating Act.

22. The first condition prescribes that constitutional immunity is given to a deviating Act that infringes on a human right, which is anchored in *Basic-Law: Human Dignity and Liberty*, if such an infringement is only a natural consequence that follows from the infringement on freedom of occupation. Indeed, infringement on freedom of occupation often intertwines with it infringement on equality or property as a natural adjunct consequence. A ban on people of kind X from carrying on an occupation that is allowed to people of kind Y is often, by its nature and kind, connected to infringement on the property and equality rights of the people that belong to kind X. In this state of affairs, the constitutional protection of the freedom of occupation that is given in the override clause compels also constitutional protection of the infringement on property and equality, otherwise the override clause will be empty of its normative power. The second condition prescribes that the main infringement has to focus on freedom of occupation, whereas the infringement on the other human rights has to be secondary. The main should not be confused with the secondary. Indeed, if the consequence of the deviating Act is that its main infringement is not on freedom of occupation but rather on human rights that are anchored in *Basic-Law: Human Dignity and Liberty*, this infringement should not be given constitutional protection. The existence of an override clause in *Basic-Law: Freedom of Occupation* is not enough to endow constitutional protection in the case, where the main infringement of the deviating Act is beyond the scope of *Basic-Law: Freedom of Occupation*. The third condition prescribes that the infringement on the other rights -- when it is examined for itself, without a comparison to the infringement of freedom of occupation -- has to be of marginal power. A substantial and harsh infringement on a human right that is anchored in *Basic-Law: Human Dignity and Liberty* should not be permitted incidentally by an infringement of freedom of occupation. The "indirect" implications of the override clause in *Basic-Law: Freedom of Occupation* can "cover" infringements that are not substantial or primary encroachments on the human rights that are in *Basic-Law: Human Dignity and Liberty*.

23. Exercising these interpretive standards on the matter before us, according to the assumptions that we assumed in our discussion, we think that the three conditions that are required to give an effect to the override clause beyond the scope of *Basic-Law: Freedom of Occupation*, are satisfied. The infringements on freedom of conscience, equality, and property of the petitioners -- assuming that these rights are indeed infringed -- are natural adjunct
consequences of the infringement on their freedom of occupation. These are not independent consequences that stand on their own. These are derivative consequences that naturally follow from the very infringement of freedom of occupation. The main infringement is on freedom of occupation. The infringement on the other rights are adjunct and are not substantial. As to the possible infringement on freedom of conscience, it should be remembered that anyone who wants to is able to purchase non-kosher meat in Israel. There is no coercion to eat only kosher meat. There is no doubt that the main infringement is on freedom of occupation. The infringement on the other rights are adjunct and are not substantial. As to the possible infringement on freedom of conscience, it should be remembered that anyone who wants to is able to purchase non-kosher meat in Israel. There is no coercion to eat only kosher meat. There is no doubt that the main infringement is on freedom of occupation. As to the possible infringement on equality, the claim of the petitioners is that equality is infringed by the fact that a “Kashrut” certificate of the Rabbinate is required and a “Kashrut” certificate of a Muslim authority is not required, and thereby there is an infringement on equality between Jews and Muslims. Even if we see this as an infringement on equality, it is certainly secondary to the infringement on freedom of occupation, and it is not of substantial importance. As to the possible infringement on freedom of property, it is secondary to the infringement on freedom of occupation, and is not of itself of substantial importance. Given the satisfaction of these three conditions, the necessary interpretive conclusion is that the Frozen Meat Import Act should be given constitutional protection, not only within the scope of Basic-Law: Freedom of Occupation, but also within the scope of Basic-Law: Human Dignity and Liberty.

24. We have arrived at the conclusion that even if the legal assumptions of the petitioners with regard to the infringement of the Frozen Meat Import Act, on rights that are anchored in Basic-Law: Human Dignity and Liberty are correct, it does not suffice to undermine the constitutional protection the Frozen Meat Import Act deserves from the override clause. In light of this conclusion, we need not decide the correctness of the petitioners’ assumptions. Therefore, as said, we need not resolve in this petition the question of whether the Frozen Meat Import Act infringes on freedom of conscience, equality and property. Likewise, we do not resolve in this petition the question whether freedom of conscience and equality are constitutional rights that are anchored in Basic-Law: Human Dignity and Liberty. Finally, we do not decide in this petition whether or not the Frozen Meat Import Act satisfies the requirement of the limitation clause in Basic-Law: Human Dignity and Liberty. These questions are important. Some of them were discussed in obiter dicta in the rulings of this court in the past. Deciding them is not necessary to the solution of the conflict before us. We will therefore not pronounce upon them incidentally in rejecting the petition.

THE PRESIDENT

The Vice President S’ Levin: I agree.
Judge T’ Or: I agree.
Judge E’ Goldberg: I agree.
Judge M’ Hashin: I agree.
Judge Y’ Zamir: I agree.
Judge T’ Shtrasberg-Cohen: I agree.
Judge D’ Dorner: I agree.

Decided as said in the judgment of the president. Delivered today 14 of Kislev 5757 (25.11.96).
### Appendix 2

#### Table 1: Pieces of Legislation in Which Notwithstanding Declarations Were Included

<table>
<thead>
<tr>
<th>#</th>
<th>Act in which notwithstanding declaration appears</th>
<th>What is deviating?</th>
<th>Section of Canadian Charter deviated from</th>
<th>Section of provincial Charter deviated from</th>
<th>Initial enactment</th>
<th>First re-enactment</th>
<th>Second re-enactment</th>
<th>Third re-enactment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>An Act Respecting the Pension Plan of Certain Teachers, s. 62</td>
<td>&quot;The provisions of this Act&quot;</td>
<td></td>
<td></td>
<td>&quot;A&quot; An Act respecting the Pension Plan of Certain Teachers and amending various legislative provisions respecting pension plans in the public and parapublic sectors, 1991</td>
<td></td>
<td></td>
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<tr>
<td>2</td>
<td>An Act Respecting the government and Public Employees Retirement Plan, s. 223.1</td>
<td>Specific provisions concerning pension eligibility</td>
<td>s. 15</td>
<td>s. 10</td>
<td></td>
<td></td>
<td>&quot;C&quot; An Act to amend the Charter of human rights and freedoms and other legislative provisions, 1996</td>
<td></td>
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<tr>
<td>3</td>
<td>An Act Respecting the Teachers Pension Plan, s. 78.1</td>
<td>Specific provisions concerning pension eligibility</td>
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<tr>
<td>4</td>
<td>An Act Respecting the Civil Service Superannuation Plan, s. 114.1</td>
<td>Specific provisions concerning pension eligibility</td>
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<tr>
<td>5</td>
<td>An Act Respecting the Conseil Supérieur de l'Éducation, s. 31-32</td>
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<tr>
<td>6</td>
<td>The Education Act for Cree, Inuit and Naskapi Native persons, ss. 720-721</td>
<td>&quot;The provisions of this Act which grant rights and privileges to a religious confession&quot;</td>
<td>s. 2(a)</td>
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<tr>
<td>7</td>
<td>An Act Respecting the Ministère de l'Éducation, ss. 17-18</td>
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<tr>
<td>8</td>
<td>Education Act, s. 726-7</td>
<td>&quot;The provisions of this Act which grant rights and privileges to a religious confession&quot;</td>
<td>s. 2(a)</td>
<td>s. 15</td>
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<tr>
<td>9</td>
<td>An Act Respecting School Elections, s. 283-4</td>
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<tr>
<td>10</td>
<td>An Act Respecting Private Education, ss. 175-6</td>
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<td></td>
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</tr>
</tbody>
</table>

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**Quebec**

1. An Act Respecting the Pension Plan of Certain Teachers, s. 62
2. An Act Respecting the government and Public Employees Retirement Plan, s. 223.1
3. An Act Respecting the Teachers Pension Plan, s. 78.1
4. An Act Respecting the Civil Service Superannuation Plan, s. 114.1
5. An Act Respecting the Conseil Supérieur de l'Éducation, s. 31-32
6. The Education Act for Cree, Inuit and Naskapi Native persons, ss. 720-721
7. An Act Respecting the Ministère de l'Éducation, ss. 17-18
8. Education Act, s. 726-7
9. An Act Respecting School Elections, s. 283-4
10. An Act Respecting Private Education, ss. 175-6
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<th>Second re-enactment</th>
</tr>
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<tbody>
<tr>
<td>11</td>
<td>An Act to Amend the Act to promote the Development of Agricultural Operations, s. 16&lt;sup&gt;aa&lt;/sup&gt;</td>
<td>&quot;The distinction based on age&quot; in certain provisions&lt;sup&gt;aa&lt;/sup&gt;</td>
<td>s. 15 (equality)</td>
<td>---</td>
<td>1986</td>
<td>Repealed in 1987&lt;sup&gt;bb&lt;/sup&gt;</td>
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<tr>
<td>12</td>
<td>An Act to Amend the Charter of the French Language, s. 10&lt;sup&gt;ab&lt;/sup&gt;</td>
<td>Two specific provisions regarding French-only signs and firm names&lt;sup&gt;dd&lt;/sup&gt;</td>
<td>s. 2(b) (freedom of expression) and s. 15 (equality)</td>
<td>s. 2 (fundamental freedoms, including freedom of expression) and s. 10 (equality)</td>
<td>1988</td>
<td>Repealed in 1993&lt;sup&gt;ee&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Land Planning and Development Act, s. 39(1)&lt;sup&gt;ff&lt;/sup&gt;</td>
<td>&quot;The provisions of this act relating to the nomination of persons of the [planning] board or committees by the Council for the Yukon Indians&quot;</td>
<td>s. 15 (equality)</td>
<td>---</td>
<td>1982</td>
<td>The act was never brought into force or repealed</td>
<td>---</td>
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<tr>
<td>14</td>
<td>An Act to provide for Settlement of a Certain Labour-Mangement dispute between the Government of Saskatchewan and the Saskatchewan Governments' Employees Union, s. 988</td>
<td>&quot;This Act&quot;</td>
<td>s. 2(d) (freedom of association)</td>
<td>&quot;The Saskatchewan Human Rights Code, particularly section 6 [freedom of association] of that Act&quot;</td>
<td>1986</td>
<td>---&lt;sup&gt;hh&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Bill 26, Institutional Confinement and Sexual Sterilization Compensation Act&lt;sup&gt;gg&lt;/sup&gt;</td>
<td>&quot;The provisions of this act&quot;</td>
<td>All available Charter rights</td>
<td>The entire Alberta Bill of Rights</td>
<td>Tabled 1998. Never passed.</td>
<td>---</td>
<td></td>
</tr>
</tbody>
</table>

**Yukon**

- **Land Planning and Development Act**, s. 39(1): "The provisions of this act relating to the nomination of persons of the [planning] board or committees by the Council for the Yukon Indians". Initial enactment: 1982. The act was never brought into force or repealed.

**Saskatchewan**


**Alberta**

This is relevant only regarding the Canadian Charter. the NMIs in the provincial rights protecting documents do not include a sunset mechanism.


c S.Q. 1986 c. 44. ss. 62, 87, 97 and 105. S. 62 enacted the notwithstanding declaration in the Act Respecting the Pension Plan of Certain Teachers (act no. 1); s. 87 enacted the notwithstanding declaration in the Act Respecting the Government and Public Employees Retirement Plan (act no. 2); s. 97 enacted the declaration in the Act Respecting the Teachers Pension Plan (act no. 3), and s. 105 enacted the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

d S.Q. 1991 c. 14. ss. 1, 29, 37 and 43. S. 1 renewed the declaration in the Act Respecting the Pension Plan of Certain Teachers (act no. 1); s. 29 renewed the declaration in the Act Respecting the Government and Public Employees Retirement Plan (act no. 2); s. 37 renewed the declaration in the Act Respecting the Teachers Pension Plan (act no. 3); and s. 43 renewed the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

e S. Q. 1996 c. 10. ss. 5-8. S. 5 renewed the notwithstanding declaration in the Act Respecting the Pension Plan of Certain Teachers (act no. 1); s. 6 renewed the declaration in the Act respecting the government and Public Employees Retirement Plan (act no. 2); s. 7 renewed the declaration in the Act Respecting the Teachers Pension Plan (act no. 3); and s. 8 renewed the declaration in the Act Respecting the Civil Service Superannuation Plan (act no. 4).

f R.S.Q. c. R-10.

g The notwithstanding declaration (s. 223.1) refers to ss. 98 and 115.4.

h R.S.Q. c. R-11.

i The notwithstanding declaration (s. 78.1) refers to ss. 28, 32 and 51.

j R.S.Q. c. R-12.

k The notwithstanding declaration (s. 114.1) refers to ss. 56, 84. the first paragraph of s. 90. the ninth paragraph of s. 96.

l R.S.Q. c. C-60.

m This is the text of all the notwithstanding declarations. Act 10 uses the term "a religious denomination" as opposed to "a religious confession".

n S.Q. 1986 c. 10. ss. 10-12. S. 10 enacted the notwithstanding declaration in the Act Respecting the Conseil Superieur de l'Éducation (act no. 5); s. 11 enacted the declaration in The Education Act for Cree, Inuit and Naskapi Native Persons (act no. 6); s. 12 enacted the declaration in the Act Respecting the Ministère de l’Éducation (act no. 7).

o S.Q. 1988 c. 84. ss 571-2. 655-6, and 662-3. Ss. 571-2 re-enacted the declarations in the Act respecting the Conseil Superieur de l'Éducation (act no. 5); ss. 655-6 enacted the declarations in The Education Act for Cree, Inuit and Naskapi Native persons (act no. 6); ss. 571-2 enacted the declarations in the Act Respecting the Ministère De L'éducation (act no. 7). Aside from renewing the notwithstanding declarations. the declaration in each act was split into two sections - one regarding the Canadian Charter and one regarding the Quebec Charter. This explains why each renewal was done in two sections and why I use "declarations" instead of "declaration".
The reason that the declarations were re-enacted after two years rather than five is that some of the education acts underwent reform. (This explains why act "D" is entitled "An act to amend the Education Act" while act "E" is entitled "Education Act"). The content of the declarations was not changed. The text of the declarations was technically changed from "[T]his act. as far it grants rights and privileges..." to the current text of "[T]he provisions of this Act which grant rights and privileges..."

P S.Q. 1994, c-11. Unlike the enactment and first re-enactment of the declarations (in act "D" and "E"), the second and third re-enactment (in acts "F" and "G") were accomplished by one single section which applied to all five declarations.

q Acts 8 and 9 were enacted in 1988 and 1989, such that the 1994 re-enactment not their second re-enactment but is rather their first.


v R.S.Q. c. E-2.3.
w S.Q. 1989 c. 36.
y S.Q. 1992 c.68.
z S.Q. 1986 c. 54.

aa The provisions that the notwithstanding declaration refers to are ss. 3 and 5.

bb The notwithstanding declaration was not explicitly repealed. The entire Act to Promote the Development of Agricultural Operations was replaced by the Act Respecting Farm Financing. S.Q. c. 86. s. 153. The replacement act did not include a notwithstanding declaration.

c c S.Q. 1988 c. 54.

d d The notwithstanding declaration (s. 10) refers to the entire Act to Amend the French Language. However, this acts amends only two of the provision of the Charter of the French language itself. namely s. 58-62 (regarding signs) and s. 68-69 (regarding firm name).

ee The notwithstanding declaration was not explicitly repealed. Sections 58 and 68, to which the declaration refers. were amended such that there was no need for the legislature to declare itself anew of the issue of deviation.

ff S.Y. 1982. c. 22.

gg S.S. 1984-85-86. c. 111.

hh Since the purpose of this act was to settle a specific labour dispute. there was no need to renew it.

### Table 2: Quebec Multi-Notwithstanding Declarations Technique

<table>
<thead>
<tr>
<th>Act No.</th>
<th>Number of declarations enacted</th>
<th>Number of enactments</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4</td>
<td>12 (Each of four acts was enacted once and renewed twice (4 x 3))</td>
<td>3 (Acts “A”-“C”)</td>
</tr>
<tr>
<td>5-9</td>
<td>17 (Acts no. 5-7 were enacted once and renewed three times (4 x 3): Act no. 8 was enacted once and renewed twice (3): Act no. 9 was enacted and renewed once (2))</td>
<td>5 (Acts “D”-“H”)</td>
</tr>
<tr>
<td>10</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>11</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>31</td>
<td>10</td>
</tr>
</tbody>
</table>
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L.G. MacDonald, "Promoting Social Equality through the Legislative Override" (1994) 4 N.J.C.L. 1.


K. Roach, "Editorial - When Should the Section 33 Override be Used?". (1999) 42 C.L.Q. 1.at 2


P.C. Weiler, In the Last Resort - A Critical Study of The Supreme Court of Canada (Toronto: Carswell/Methuen, 1974).


