

LEGAL AUTHORITY IN CANADIAN CONSTITUTIONALISM

MODELLING THE FORMAL DIVISION OF LEGAL AUTHORITY IN
CANADIAN CONSTITUTIONALISM

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Lay Abstract

Democratic governance was traditionally thought to require a choice between *parliamentary sovereignty*, with no restrictions on legislative power, and *judicial supremacy*, with restrictions on legislative power in the form of a judicially enforced, written constitution containing a bill of rights. Recently, scholars noting that Canada’s legal system includes elements of both traditional systems have proposed new ways of understanding the “sharing” of legal authority between courts and legislatures. These “new models” incorporate a bill of rights but allow legislatures to ignore or override these rights, thus preserving an element of parliamentary sovereignty. However, these new models fail to capture the division of lawmaking power that is formally entrenched in section 33 of the *Canadian Charter of Rights and Freedoms*. A new “hybrid” model accurately reflects this formal division of legal power and raises new challenges to the other new models of constitutionalism.

Abstract

Traditionally, systems of constitutional democracy fell into two categories: *parliamentary sovereignty*, characterized by the omnipotence of Parliament and the absence of any substantive limitations on its power; and *judicial supremacy*, characterized by the presence of restrictions on legislative power in the form of a judicially enforced, written constitution containing a bill of rights. Recently, scholars have noted that Canada's *Charter* regime includes elements of both traditional systems and have proposed new ways of understanding the apparent "sharing" of legal authority between courts and legislatures in Canada. These "new models" incorporate several key features of the traditional models but purport to be distinctive, and more accurate, accounts of how legal authority is allocated. Key features of the new models include a bill of rights, judicial review of legislation, and the preservation of legislative finality over the bill of rights through an "override" mechanism. However, these new models fail to capture the division of lawmaking power that is formally entrenched in section 33 of the *Canadian Charter of Rights and Freedoms*. In addition, they do not provide an adequate account of how the legislative finality provided through the "override" mechanism distinguishes the new models from legislative supremacy. A proposed "hybrid" model accommodates the formal division of legal power in the *Charter* and raises new questions about the extent of legislative finality in Canadian constitutionalism. The hybrid model also explains Canada's supposed lapse into *de facto* judicial supremacy as an indication of a nuanced and compartmentalized form of legislative supremacy.

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Part I: Models of Canadian Constitutionalism

For many years, parliamentary sovereignty and judicial supremacy were seen as mutually exclusive options for models of constitutionalism. A nation could either reject any limitations on the powers of self-government and operate under an omnipotent legislative assembly, or opt for judicial supremacy with a view to avoiding the ills of unbridled majority rule. But more recently, two new models of constitutionalism have arisen that are purported to improve upon the old systems and describe Canada's constitutional democracy more accurately.¹ These models portray lawmaking as a shared enterprise between courts and legislatures rather than having one or the other as the supreme legal authority. Both include features that the old models lack and there are strong reasons to think that these new models provide better mechanisms for protecting rights than either parliamentary sovereignty or judicial supremacy. The new models have received much attention and have gained considerable support precisely because they are thought to retain the benefits of the old models while avoiding their shortcomings.

The first of these new models, termed the “dialogic model” or the theory of “dialogic judicial review” (DJR), depicts the interplay between courts and legislatures as a productive “dialogue” on constitutional issues. In this model the legislative and judicial branches both have opportunities to respond to each other's actions. Through a continuous process of raising and revisiting constitutional issues the legislature can attempt to achieve its legislative objective; the court is able to fulfill its goals of

¹ This paper will focus on the legal system of Canada, which has been a leader in constitutional innovation and is the focus of much of the academic work surrounding these new models. Some of my conclusions can be applied to other “new model” systems but I will not examine this possibility here.

protecting rights and upholding principles of justice and fairness; and both institutions are made aware of, and are able to respond to, the other's views and decisions.

The other new model is the New Commonwealth Model (NCM) of constitutionalism, proposed and described by Stephen Gardbaum most thoroughly in his recent book.² Somewhat more narrowly defined than dialogic judicial review, the NCM depicts the relationship between the court and the legislature in a series of defined stages, with specific actions required and specific powers enabled at each successive phase. Every step in the process of evaluating a piece of legislation for rights compliance gives the appropriate body – either the court or the legislature – the opportunity to assess the decision made by a different body at the previous stage and to make revisions as is deemed appropriate. Despite some obvious similarities between these two models, Gardbaum resists characterizing the NCM as a “dialogic” theory of constitutionalism, mostly for semantic reasons.³

Prominent in the writings of NCM and DJR theorists is the assertion that these new models are superior to the old, and that the old models ought to be rejected as models of Canadian constitutionalism for that reason. The new models are no doubt superior in that they are better able to account for many of the defining features of Canada's legal system. However, I argue in this paper that both of the new models are flawed because they rest on a mistaken characterization of how legal authority is shared between Canadian courts and legislatures. I will defend a “hybrid model”⁴ of constitutionalism,

² Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (New York: Cambridge University Press, 2013).

³ *Ibid.*, 13-15.

⁴ Many thanks to Dr. Wil Waluchow for suggesting this term.

which I claim is a viable and accurate option for understanding the division of legal powers between Canadian courts and legislatures. While I will at times treat the hybrid model as a distinct type of constitutionalism for the purposes of this paper, it can also be understood as a modified version of the new models, rather than an outright alternative. Still, I aim to demonstrate how the four existing models – legislative supremacy, judicial supremacy, the New Commonwealth Model, and dialogic judicial review – each fail to capture certain critical elements of Canada’s legal system, and how the hybrid model avoids this shortcoming.

Part I of this paper outlines the key features of the four existing models of constitutionalism and describes some of the unique challenges that face each model. I first examine the old models of parliamentary sovereignty and judicial supremacy and point to some significant deficiencies in their ability to portray Canada’s legal system. This section will also explain the important concepts of legislative supremacy, which is sometimes mistakenly equated with parliamentary sovereignty, and constitutional supremacy, which is sometimes mistakenly equated with judicial supremacy. I then outline the key features of the new models and briefly explain how they resolve some of the issues facing the old models. I will focus on the element of legislative finality that is a vital component of both models, and will show how new model accounts leave the scope of legislative finality insufficiently explained, producing two possible interpretations of the new models.

Part II will explain why the first of these interpretations – which I term the “comprehensive legislative finality” reading – ought to be rejected as a descriptive

account of Canadian constitutionalism, and the second – the “compartmental legislative finality” reading – is a more accurate understanding of how legal power is divided in Canada. The “compartmental” reading of the new models is then developed into a “hybrid” model of constitutionalism. I argue that the mechanism put in place to preserve a degree of parliamentary supremacy in Canadian constitutionalism – the section 33 “notwithstanding” clause of the *Canadian Charter of Rights and Freedoms* – marks out a clear division of legal authority over rights-related issues rather than the “sharing” of power that is supported by new model theorists. I maintain that the hybrid model is better suited than any of the existing models to accounting for the Supreme Court decisions that directly engage the question of constitutional authority and that it is consistent with the fundamental doctrine of constitutional supremacy that is at the core of Canadian constitutionalism. The descriptive accuracy of the hybrid model, and comparative inaccuracy of the new models, will also be shown to weaken the effectiveness of the new models as responses to the so-called “anti-democratic” and “judges-as-politicians” objections to judicial review.

In addition, I discuss the frequently made suggestion that Canada has lapsed into judicial supremacy despite the constitutional features that were meant to preserve a degree of legislative supremacy. I examine the “normative constraints”⁵ on legislative authority that are thought to separate legislative finality from parliamentary sovereignty in order to demonstrate that this distinction is untenable in the context of Canadian constitutionalism. I argue that the nature of these “normative constraints” means that the

⁵ Gardbaum, 94.

hybrid model is able to explain the *apparent* presence of judicial supremacy in Canada without conceding that Canada has *actually* lapsed into judicial supremacy. Though not fully conclusive, this argument will strongly support my claim that the hybrid model is an accurate depiction of Canada's legal structure and practices.

Generally, I use “new models” to refer to the New Commonwealth Model of constitutionalism and the dialogic theory of judicial review. Where “new model” is used, context indicates which of these two models is under consideration. “Dialogic judicial review” and “dialogue theory,” along with a few minor variations, are used synonymously. Any use of “courts” or “the court” refers to the judiciary in general, while “the Court” is used as a specific reference to the Supreme Court of Canada. Similarly, “legislatures” and “parliament” will refer to legislative bodies in general, while “Parliament” will be used to refer to the federal legislature of Canada or the United Kingdom, depending on context. The “*Charter*” refers specifically to the *Canadian Charter of Rights and Freedoms*, while “charter” and “bill” are used to refer in general to entrenched documents enumerating some basic rights. Lastly, I will be using the phrase “rights-related issues,” along with several minor variants, to refer to political and legal matters that engage *Charter* rights, and “constitutional issues” to refer to political and legal matters that engage all issues of constitutional law, including rights-related issues.

The Old Models

Before examining the new models it is important that we have a clear picture of what is meant by *parliamentary sovereignty* and *judicial supremacy*. These traditional models of constitutionalism have informed academic study of democratic systems for centuries and are foundational to the later discussions and arguments in this paper. The treatment given here of these “old” models of constitutionalism is intentionally brief; the main purpose is to give a general sense of some of the defining features of the traditional models of constitutionalism so they can easily be distinguished from the new models.

Parliamentary Sovereignty

The doctrine of parliamentary sovereignty has long been identified with the legal system of the United Kingdom as it was prior to the enactment of the *Human Rights Act 1998* and the permanent establishment of the European Court of Human Rights.⁶ This system of constitutionalism was most clearly and thoroughly defined by A.V. Dicey, who wrote that parliamentary sovereignty “means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised... as having a right to override or set aside the legislation of Parliament.”⁷ Roughly, in this type of constitutional system the sovereign legislative body is solely and exclusively empowered to define what is valid law. There are no legally enforceable substantive constraints on the contents of

⁶ These developments are thought to have subordinated the UK Parliament to European law, which challenges the applicability of the doctrine of parliamentary sovereignty.

⁷ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: The MacMillan Press Ltd., 1975): 39-40; also see 68-70, 88-91, and 145.

the laws that the legislature might enact and nothing is outside of its competence to legislate through its normal procedures.⁸

In the context of English law this doctrine meant that the Queen (or King) in Parliament was empowered to make or unmake any law, meaning that this power rested in the assemblies of the House of Lords and the House of Commons, following the appropriate procedures as developed through tradition and convention, and subject to the consent of the Crown.⁹ Almost paradoxically, this unlimited legislative power also meant that parliament had the ability to relinquish part or all of its legal authority; to establish subordinate administrative entities and delegate some legal powers to those entities; and even to abolish itself. However, a sitting parliament would not be able to bind later parliaments, and any legislation that conflicts with pre-existing law automatically supersedes such pre-existing legislation to the degree of the inconsistency.¹⁰

These are only some of the important aspects of parliamentary sovereignty, and they have all been explored, challenged, and defended by academics for decades. I mention these features of parliamentary sovereignty because they include some of the key elements that distinguish this system of constitutionalism from judicial supremacy and from the new models of constitutionalism. There is a large body of work dedicated to

⁸ There are some elaborations on this statement that are not significant or relevant to the current discussion; see Dicey, *passim*, but particularly 60, 76-81; also comments by Gray, Dicey and Wheare summarized in Paul Cavalluzzo, “Judicial Review and the Bill of Rights: Drybones and Its Aftermath,” *Osgoode Hall Law Journal* 9, no. 3 (1971): 513-4, 517; also Hamish Gray, “The Sovereignty of Parliament Today,” *The University of Toronto Law Journal* 10, no. 1 (1953): 54-58; R. Elliot, “Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values,” *Osgoode Hall Law Journal* 29, no. 2 (1991): 215; and Pavlos Eleftheriadis, “Parliamentary Sovereignty and the Constitution,” *Canadian Journal of Law and Jurisprudence* 22 (2009): paras. 10-22.

⁹ Dicey, *passim*, but especially 145.

¹⁰ *Ibid.*, *passim*.

explaining the historical development of parliamentary sovereignty and reconciling some of its apparent inconsistencies, but for my purposes it is not necessary to explore these at length. For my argument, suffice it to say that the doctrine of parliamentary sovereignty applies to and describes systems where the elected legislative body is empowered to define what is valid law through its normal procedures and is constrained only by electoral accountability and the attitudes of the members of parliament toward any new legislative proposals.¹¹

This means that there is no codified and binding bill of rights; no “superior” law that can resist regular majoritarian amendment or rescindment; no judicial power to invalidate legislation; and no legally enforceable limitation on the contents of regular acts of legislation. Parliament is not just the final authority: it has and exercises exclusive and unlimited authority over the creation of valid law.¹² Most importantly, there are no legal constraints on parliament; that is, there is no remedy available through litigation in court if the legislature passes a law that is perceived to infringe rights or violate conventional norms. The only constraints on the legislature’s exercise of its unlimited power are a) political accountability through regular elections, which is an *ex post* restraint that corrects any misalignment between the public will and the legislature’s actions, and b) the internalized norms arising from customs, traditions or conventions that form the attitudes of the legislators, which provide *ex ante*, socially-established guidelines for acceptable legislative action. Neither of these constraints is considered a legal constraint because neither is enforceable by application to a court.

¹¹ This succinct definition is derived from Eleftheriadis, paras. 1-4; also see Dicey, *passim*.

¹² Dicey, 61, 68-70.

It is important to note that parliamentary sovereignty is not threatened with the existence of two key apparent restrictions on the passage of valid law. First, the requirement that a parliament follow particular procedures for the passage of valid law does not negate the principle of parliamentary sovereignty.¹³ While there is some debate over whether these procedural restrictions can impose *de facto* substantive restrictions on the legislature, there is usually a meaningful distinction to be made between procedural and substantive restrictions on the passage of valid laws.¹⁴ At any rate, the existence of procedural requirements – such as the conventional practice in the United Kingdom that a bill be read three times in both Houses before being passed – does not place any substantive restrictions on the content of legislation.

Second, while parliamentary sovereignty involves legislative power without any substantive constraints, in exercising its unlimited legislative power parliament might choose to enact a bill of rights or to establish a subordinate administrative committee that is empowered to examine the compatibility between new laws and existing common law principles, much like a constitutional court would. At first glance this might seem like a contradiction: parliament is not sovereign in its legislative power if that power is limited in some way.¹⁵ The saving grace here is that parliament is not actually restrained in its legislative power: it retains the power to rescind or ignore such a bill of rights and to

¹³ Cavalluzzo, 513, 517.

¹⁴ Elliot, 230.

¹⁵ Jamie Cameron, “The Charter’s Legislative Override: Feat or Figment of the Constitutional Imagination?” *Supreme Court Law Review* 23 (2004): 151.

ignore or decommission such an administrative body.¹⁶ In addition, parliamentary sovereignty still applies so long as a) parliament holds the power to enact whatever legislation it chooses through its normal procedures; b) new legislation is presumed to be valid despite any conflicts with existing rights provisions; and c) the rights provisions can be ignored and rescinded at any time through a normal act of parliament. Parliament's choice to establish a bill of rights or a committee that helps to remind the legislators of their commitment to respecting certain rights does not bind future parliaments, nor does it affect the legal validity of any conflicting future legislation. These provisions would only be meaningful if parliament chose to respect them on an ongoing basis; otherwise, they are of no legal significance. Under these conditions, the existence of these self-restraints does not challenge Dicey's definition of parliamentary sovereignty.¹⁷

It is also worth noting that there is some disagreement over the scope of Dicey's definition. E.C.S. Wade describes three methods of studying Dicey's work in constitutional law. The reader of Dicey can accept his principles of English constitutionalism as only applicable in his time; can see those principles as only partially applicable then, and not applicable today; or can accept these principles as applicable today and try to fit them into modern law. According to Wade, most critics of Dicey adopt the second approach, and most supporters take the third.¹⁸ This means that there may be room to argue that parliamentary sovereignty can be applied even in democratic

¹⁶ See Dicey, 156. While his comments are somewhat oblique they communicate the same point given here: that Parliament has authority over the English courts which, though possessing limited law-making authority, are still subject to the will of the legislature.

¹⁷ J. Grant Sinclair, "The Queen v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights," *Osgoode Hall Law Journal* 8, no. 3 (1970): 603-4.

¹⁸ See E.C.S. Wade's introductory comments in Dicey, *Introduction to the Study of the Law of the Constitution*, at xxviii.

states that do not have all of the features that Dicey considers essential to that system. In support of this view, it is relevant Dicey specifically notes that the label “parliamentary sovereignty” applies to the England *of his day*, and he does not claim that his description of constitutional law in England is forward-looking.¹⁹ Wade acknowledges that these observations may support a reading of Dicey that restricts the applicability of his definition to England in the late 19th and early 20th centuries.²⁰

Thus, one might view Dicey’s definition as dated, and adopt a revised understanding of parliamentary sovereignty that is more in line with what we would normally term *legislative supremacy* – the doctrine that parliament is supreme in its power to define what is valid law, but not exclusive in its ability to contribute to deliberation on what *ought* to be valid law. That is, *legislative supremacy* might be used to refer to systems where the legislature has final authority over the law but where there are other institutions or instruments that contribute to legal discourse and that cannot be easily decommissioned or rescinded through a normal act of parliament. For example, parliament might establish a constitutional court that has authority to question the constitutionality of new law, and might also relinquish its authority to disestablish this court. While such an action would eliminate parliament’s *sovereignty*, it would not threaten parliament’s *supremacy*, so long as parliament retained the ability to enact law notwithstanding the declarations of such a court. That is, if parliament cannot “un-create” the court through a normal act of legislation, but can disregard the court’s rulings when

¹⁹ See Dicey, *passim*, but especially 14, 39-40, 61, 70-1, 73, 88, 91, and 145.

²⁰ See E.C.S. Wade’s introductory comments in Dicey, *Introduction to the Study of the Law of the Constitution*, at xxxiii.

considering a bill, then parliament has given up its sovereignty – because it no longer has sole authority to determine what is valid law – but it has not given up its supremacy – because it can enact “unconstitutional” laws by ignoring the court.

I do not think that this “modernized” take on Dicey is a tenable reading of his work, but it is still worth examining both traditional parliamentary sovereignty and this updated version, which I will hereafter call *legislative supremacy* to distinguish it from *parliamentary sovereignty*. The range of options available under legislative supremacy is restricted only by the requirements that the legislature retain the legal power of the final word over the law and that this power not be constrained in any way, other than by the normal constraints that characterize parliamentary sovereignty. As we shall see, new model theorists tend to address Dicey’s definition directly when commenting on parliamentary sovereignty, and they frequently gloss the distinction between parliamentary sovereignty and legislative supremacy. However, it will shortly become clear that even this expansive view of legislative supremacy does not accurately describe Canada’s constitutional system.

Judicial Supremacy

Dicey’s work has provided a useful lens for comparing the system of parliamentary sovereignty with the American system of judicial supremacy. Unlike the United Kingdom, America’s legal system espouses the supremacy of the written constitution rather than the supremacy of the legislature; it assumes a separation of law-making powers between the branches of government rather than the more unitary law-

making power of Parliament; and it accepts the authority of the courts to interpret the constitution and rule on the validity of law, rather than the sole authority of the legislature to do so.²¹ Together, the two contrasting systems of parliamentary sovereignty and judicial supremacy are the backdrop that frames the new models of constitutionalism.

Judicial supremacy is generally said to have originated in the United States with the landmark *Marbury v. Madison* decision,²² and was popularized in the post-WWII era in large part because of the rampant rights abuses that occurred during that conflict.²³ Put simply, in systems of judicial supremacy there is a codified supreme law that limits legislative power and is interpreted and upheld by an independent, unelected, non-political judicial branch of government.²⁴ Typically there is a written and entrenched charter or bill of rights that is forms part of the supreme law and supersedes any later conflicting statutes. This supreme law cannot be changed or abridged through a normal act of the legislature. The courts have the power to invalidate laws that are inconsistent with existing constitutional provisions, and typically there is a Supreme Court that acts as the final court of appeal and has supreme authority to decide the constitutional validity of legislation.²⁵ In short, “[w]ithin [judicial supremacy]... at least some rights are enforceable by courts as higher, not ordinary, law and are therefore not changeable by normal political means.”²⁶ Naturally, entrenched rights can always be changed through a

²¹ Dicey, 139-40, 144.

²² *Marbury v. Madison*, 5 U.S. 137 (1803); Adam M. Dodek, “A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review,” *Osgoode Hall Law Journal* 47, no. 2 (2009): 295-6.

²³ See Gardbaum, ch. 2, *passim*; Alan C. Cairns, “The Charter: A Political Science Perspective,” *Osgoode Hall Law Journal* 30, no. 2 (1992): 616.

²⁴ Gardbaum, 2.

²⁵ *Ibid.*

²⁶ *Ibid.*, 23.

constitutional amendment or similarly drastic measures, and is unclear, in the context of the quoted material above, what counts as a “normal” political process. Still, it is safe to say that if the legislature has the power to override or rescind all of the rights provisions contained in the supreme law of the land then such a system would not be one of traditional judicial supremacy. Judicial supremacy requires that the supreme law of the state sits beyond the regular power of the legislature to alter, and that it requires extraordinary measures, unique procedures, and great effort to change.

One example of these extraordinary measures is the “7/50 formula” required for some types of amendment to the Canadian constitution. Amendments under this formula require approval from the federal legislature and 7 of the 10 provincial legislatures, which together contain at least half of the population of the country.²⁷ While it may be said that the 7/50 formula is majoritarian in a sense, it requires a supermajority of legislative bodies to agree to the amendment, and any amendments to the constitution that are proposed under this formula are extraordinarily difficult to pass.²⁸ I do not wish to parse out the precise differences between “normal” and “extraordinary” political measures here. For my purposes, it is sufficient to stipulate that a simple majority vote of a legislature that is constituted by the usual means of election is a “normal” political measure for achieving a given objective, while a constitutional amendment requiring a special majority is an “extraordinary” measure.

²⁷ *Constitution Act 1982*, 38(1).

²⁸ The failed Meech Lake Accord and Charlottetown Accord, both of which were attempts to make changes to the Canadian constitution, are testament to the difficulty of passing constitutional amendments.

It is important to note the distinction between *judicial* supremacy and *constitutional* supremacy, though the two terms are sometimes used interchangeably in the literature.²⁹ *Constitutional supremacy* refers to the superiority of the constitution over other law. In systems with a written constitution that is considered superior law, *constitutional supremacy* refers to the legal validity of the written constitution over conflicting statutes, which means that courts will uphold the written constitution and overturn conflicting statutes. In such systems, constitutional supremacy is incompatible with legislative supremacy because the former holds the written constitution to be supreme over normal acts of legislation, while the latter holds legislative power to be supreme and unrestricted.

However, in systems of parliamentary sovereignty, which typically lack superior constitutional laws, there is no distinction between “superior” and “inferior” law. Here, constitutional supremacy refers to the supremacy of the doctrine of parliamentary sovereignty over other principles of law,³⁰ which means that courts will uphold any new law that conflicts with existing laws. *Constitutional supremacy* is an odd descriptor to use in the context of a state espousing parliamentary sovereignty because we typically associate “constitution” with a written document, following the American tradition. Thus, while it is possible to use *constitutional supremacy* to refer to the traditional form of parliamentary sovereignty,³¹ such use requires some difficult terminological contortions

²⁹ This point is strongly emphasized in Noel Lyon, “An Essay on Constitutional Interpretation,” *Osgoode Hall Law Journal* 26, no. 1 (1988): 99.

³⁰ Dicey, 89.

³¹ This terminology can be applied once it is understood that the “constitution” of a system of parliamentary sovereignty is precisely that set of doctrines that upholds parliamentary sovereignty. In the

and will not be used here. *Constitutional supremacy*, for our purposes, refers to the superiority of a written constitutional document over other sources of law.

Judicial supremacy, on the other hand, refers to systems of constitutional supremacy where the judicial branch is responsible for upholding constitutional law and is empowered to invalidate conflicting statute law. There are other versions of constitutional supremacy in which the judicial interpretation of the constitution is not supreme; for example, in the theory of coordinate construction the legislature's interpretation of the constitution is considered equal in validity and importance to that of the judiciary, and the legislature is entitled to act on its own interpretation of the constitution. However, in systems of judicial supremacy the judicial interpretation of the law is legally binding and supreme over the interpretations of other institutions, including the legislature.³² While judges in systems of parliamentary supremacy are able to create some aspects of law by applying established principles of legal interpretation,³³ their legal inability to invalidate duly enacted legislation distinguishes the judicial function in a parliamentary sovereignty from that function in a system of judicial supremacy. In brief, judicial supremacy is a type of constitutional supremacy in which the written constitution trumps other laws and the judiciary is the authoritative interpreter of the constitution.

United Kingdom, for example, one can say that the constitution consists of an unwritten set of principles that includes the omnipotence of the Queen in Parliament and the supremacy of new law over existing law.

³² This distinction is clearly illustrated in Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisited" [sic]," *Osgoode Hall Law Journal* 45, no. 1 (2007): 144. Mathen argues that suspended declarations of invalidity are essentially judicial suspensions of the Constitution, suggesting that judicial supremacy can in some circumstances trump constitutional supremacy.

³³ Dicey, 60.

Canada's legal system is said to espouse *weak-form* judicial review, which is quite different from traditional judicial supremacy in that it preserves an element of legislative finality. The distinction between Canada's weak-form system of judicial review and the strong-form style of judicial review that characterizes American-style judicial supremacy will be clearer when we turn to the new models.

The Inapplicability of the Old Models

Two key points should be clear from the foregoing examination of the old constitutional models. First, while there may be a range of options that fall within the parliamentary sovereignty camp, all of these options retain supremacy of the legislature over all areas of law. According to Dicey, parliamentary sovereignty is fundamentally incompatible with judicial review of legislation and with the existence of a codified and entrenched constitutional document. Even if we expand Dicey's definition and allow for a system of legislative supremacy to include judicial review under a written constitution, such a system can only qualify as one of legislative supremacy if the legislature retains the power to ignore the court in any normal legislative act. If there are formal legal restrictions on the powers of parliament – restrictions that are enforceable in court and that pose a substantial barrier to the legislature's exercise of power – then the system is not one of parliamentary sovereignty.

Second, it is clear upon reflection that the traditional models do not provide accurate pictures of Canada's legal system. Canada is immediately disqualified as a system of Dicey's parliamentary sovereignty because it has a written constitution that is

upheld through judicial review of legislation. Judges in the Supreme Court of Canada are empowered to invalidate legislation on the grounds that its content violates entrenched constitutional rules, including the rights provisions written in the *Charter*.³⁴ Thus, the legislature is formally constrained in the nature and content of the laws that it can pass. Moreover, Canada does not qualify as a legislative supremacy because the legislature does not have a general power to ignore judicial rulings on all constitutional issues, but only on a select few rights-related matters.

In addition, the existence of the section 1 “reasonable limits” clause – which allows the government to limit *Charter* rights provided that these limits are “reasonable” and can be “demonstrably justified in a free and democratic society”³⁵ – and the section 33 “notwithstanding” clause of the *Charter* – which permits federal and provincial legislatures to declare that an Act “shall operate notwithstanding a provision included in section 2 or sections 7 to 15” of the *Charter*³⁶ – allows the legislature to respond to and even overrule some types of judicial decisions in a way that is not compatible with traditional judicial supremacy. Though the legislature has a limited ability to override judicial opinions using section 33 of the *Charter*, this clause only applies to sections 2 and 7-15 of the *Charter*. The legislature cannot simply set aside Supreme Court rulings on *Charter* provisions that are not covered by section 33. Conversely, on those areas that *are* covered by the override clause, the judiciary can do little but accept parliament’s decision to enact a law notwithstanding the provisions of the *Charter*, so it is unable, for a

³⁴ Dicey disqualifies Canada as a parliamentary sovereignty because it is a federal state, which necessarily places restrictions on the powers of the federal legislature by placing certain areas of law beyond its competence; see his comments at 139-57.

³⁵ *Canadian Charter of Rights and Freedoms*, s. 1.

³⁶ *Ibid.*, s. 33(1).

time, to exercise the kind of power that characterizes a system of judicial supremacy. Thus, on many, but not all, areas of law under Canada's constitution, the judiciary is empowered to define what constitutes valid law and to invalidate any statutes that conflict with the Constitution; and on some, but not all, areas of law, the legislature is empowered to enact laws that violate even the entrenched rights provisions of the written constitution. The legislature is not sovereign *or* supreme over all aspects of law; nor is the judicial interpretation of the Constitution final and authoritative.

The New Models

The new models have many similarities, leading some theorists to claim that they are essentially identical.³⁷ I differentiate them for now to illustrate some of the subtle and unique features that make them distinct, but much of my discussion in Part II will treat them as one theory. I take this approach because the models share the features that, I argue, make them inaccurate reflections of Canada's legal system and make both models inferior to the "hybrid" model. The summaries that I provide here are meant only to canvass those aspects of the theories that are most relevant to my argument, so I will not delve too deeply into the wide-ranging contemporary debates on these models.

³⁷ Gardbaum goes to great lengths to distinguish the two, but admits that they are very similar and that his dislike of dialogic judicial review is largely semantic rather than substantive.

Dialogic Judicial Review

Usage of the dialogue metaphor in Canadian academic work traces back to a 1997 article written by Peter Hogg and Alison Bushell.³⁸ In that article the authors describe the relationship between Canadian courts and legislatures as a “dialogue” in which the elected bodies of government have an opportunity to respond to the opinions of the judiciary. Described as a “productive reconciliation”³⁹ of legislative supremacy and judicial supremacy, the dialogic model attempts to strike a healthy balance between the old models of constitutionalism by sharing law-making power between the judicial and legislative branches of government.⁴⁰

The dialogue metaphor relies heavily on several features that are distinctive of the law-making process in the Canadian legal system. First, a federal or provincial legislative body passes an act, usually after some preliminary consideration of the impact the legislation might have on rights. Inevitably, some laws will engage *Charter* rights. Canadians who feel that their rights have been violated can plead their case through the judicial system and fight for the law to be overturned. Courts at any level of the judicial system can declare the law to be invalid, but such a declaration will usually induce the government to appeal the decision to a higher court. Cases that are litigated up to the level of the Supreme Court end with definitive rulings on the constitutionality of the law in

³⁸ Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn’t Such A Bad Thing After All),” *Osgoode Hall Law Journal* 35 (1997): 75. See also an early response in Christopher P. Manfredi and James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell,” *Osgoode Hall Law Journal* 37, no. 3 (1999): 513-527.

³⁹ Kent Roach, “Dialogic Judicial Review and Its Critics,” in *Law and Morality (3rd ed.)*, ed. David Dyzenhaus, Sophia Moreau, and Arthur Ripstein (Toronto: University of Toronto Press, 2008): 589.

⁴⁰ Daniel J. Arbes, “Limitations on Legislative Override under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values,” *Osgoode Hall Law Journal* 21, no. 1 (1983): 116-7; also see Brian Slattery, “A Theory of the Charter,” *Osgoode Hall Law Journal* 25, no. 4 (1987): 705-6.

question, and the Court is empowered to “strike down” legislation, thus rendering it as though the law had never been passed. “Reference” cases occasionally grant the Court an opportunity to rule on the constitutionality of legislation before it is enacted. This judicial response to a legislative enactment is the first responsive aspect of the “dialogue”.⁴¹

The legislature then has a chance to respond to the judicial decision. This might mean revising the original act to bring it into accordance with the judicial ruling; allowing the act to be struck down; proposing a new piece of legislation that achieves a similar purpose to the original but circumvents or addresses the Court’s concerns; or enacting the original legislation notwithstanding any conflicts with rights by invoking the “notwithstanding clause” of the Charter.⁴² In Hogg and Bushell’s version of the dialogic model these responses are all considered part of a “dialogue” between the court and the legislature. The legislature acts; the court replies; the legislature responds. In theory this back-and-forth process could continue with successive acts of the legislature on the same issue being addressed by further opinions of the Court and then reviewed by the legislature once again, though there are few examples of legislative responses being reviewed by the Court.⁴³

The possibility of these legislative responses is what characterizes Canada as a system of “weak-form” judicial review and distinguishes it from American-style “strong-form” judicial review. While the judiciary is empowered to rule on the constitutionality of

⁴¹ The diversity of views on what counts as “dialogue” is examined later, but as one example of the controversy on this point, there is considerable disagreement over whether or not the judiciary is actually “dialoguing” with the legislature when it hands down judgments, or is just issuing orders. See Roach, “Dialogic Judicial Review and Its Critics,” 591.

⁴² Hogg and Bushell, “The Charter Dialogue,” *passim*.

⁴³ Manfredi cites *Sauvé* as one such example; see Christopher P. Manfredi, “The Day the Dialogue Died: A Comment on *Sauvé v. Canada*,” *Osgoode Hall Law Journal* 45, no. 1 (2007): 108.

new laws and to invalidate legislation that is inconsistent with the *Charter*, the legislature is still able to respond to the judicial ruling in a variety of ways and thus, is often able to achieve its objective despite the ruling of the Court. It is the preservation of the legislature's legal power of the "final word" that qualifies Canada's as a system of weak-form judicial review.⁴⁴

While there is widespread agreement that at least some forms of legislative response to judicial action are usefully considered dialogic, there is considerable disagreement over the extent and complexity of this dialogue.⁴⁵ Hogg and Bushell propose a broad form of dialogic judicial review in which "any legislation is dialogue"⁴⁶ and where the dialogue metaphor merely refers to the possibility of legislative sequels to judicial decisions.⁴⁷ However, they acknowledge that there may be disagreement over what counts as dialogue. For instance, if the legislature simply accepted a revision proposed by the judiciary to make the legislation compatible with pre-existing rights provisions, this acceptance might not be considered "dialogue" because the legislature is not actively engaging in rights deliberation in its response – it is merely acquiescing to the judiciary. Hogg and Bushell note these criticisms but suggest that discounting these as instances of dialogue makes for too narrow an understanding of dialogue, and they insist

⁴⁴ Peter W. Hogg, Allison A. Bushell Thornton, and Wade K Wright, "A Reply on "Charter Dialogue Revisited"," *Osgoode Hall Law Journal* 45, no. 1 (2007): 194, 199-200.

⁴⁵ See, for example, Mathen, *passim*; and Manfredi, "The Day the Dialogue Died," 113-4.

⁴⁶ Hogg and Bushell, "The Charter Dialogue," 98.

⁴⁷ Hogg, Thornton, and Wright, "A Reply on "Charter Dialogue Revisited"," 194.

that *any* response to a judicial decision – even non-action on the part of the legislature – can be viewed as a “legislative response”.⁴⁸

On this broad conception, the dialogue metaphor could be used to defend any judicial involvement in the democratic process against the so-called “anti-democratic objection” to judicial review – which will be examined more closely in Part II – because the legislature is formally given an opportunity to overrule the judiciary, even if it is politically impossible for the legislature to pursue this course of action.⁴⁹ Critics like Christopher Manfredi argue that dialogic theory is not a very compelling response to the anti-democratic objection because it is not clear how a non-responsive legislature is ensuring that the majoritarian view is being realized in the face of “anti-democratic” judicial rulings. The fact that the legislature is given a *formal* opportunity to respond might not mean that this gives legislators a *meaningful* opportunity to respond. Any number of factors might force the legislature to accept a judicial ruling, including the simple fact that the legislative agenda is limited and might not be able to accommodate a protracted debate on the merits of overriding a judicial invalidation. There is considerable debate over whether or not “dialogue” is even an appropriate metaphor to use in instances where there is no legislative response.⁵⁰ For instance, in this view a judge “reading in” to the text of legislation – that is, adding words to the text to make the legislation

⁴⁸ Hogg and Bushell, “The Charter Dialogue” 8; Peter W. Hogg and Allison A. Thornton, “Reply to ‘Six Degrees of Dialogue’,” *Osgoode Hall Law Journal* 37, no. 3 (1999): 530-2, 534.

⁴⁹ Note Richard Haigh and Michael Sobkin, “Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts,” *Osgoode Hall Law Journal* 45, no. 1 (2007): 70, though these authors point out that this possibility is not a problem for Hogg and Bushell’s version of dialogic judicial review. See also Mathen, 130-1.

⁵⁰ Roach, “Dialogic Judicial Review and Its Critics,” 590-1; Manfredi and Kelly, 524; Jeremy Waldron, “Some Models of Dialogue Between Judges and Legislators,” *Supreme Court Law Review* 23 (2004): 9.

constitutional – subverts the normal process of enacting legislation and undermines the legislature’s ability to respond meaningfully, which is usually seen as a necessary condition for true dialogue.⁵¹

Manfredi and Kelly adopt a narrow interpretation of dialogue theory in their response to Hogg and Bushell’s article. Narrow DJR holds that dialogue only occurs in some instances of legislative sequels and that there are particular features of the discourse between the legislature and the court that are characteristic of “true” dialogue. In Manfredi and Kelly’s version of narrow dialogue theory, legislative sequels must be “positive” – they must at least involve minor amendments to legislation in response to judicial opinions, and genuine engagement with the differing constitutional interpretation of the judiciary.⁵² In this particular version of dialogue theory, “[g]enuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation.”⁵³ Non-dialogic actions include significant judicial amendment of part or all of the legislation; pre-emptive use of the override to bar judicial involvement;⁵⁴ repeal of the offending act or sections of the act by

⁵¹ Manfredi and Kelly, 516. Manfredi and Kelly agree with Mark Tushnet that anything more than “minimal” judicial review has a tendency to distort the legislative interpretation of the constitution. See Mark Tushnet, “Weak-Form Judicial Review: Its Implications for Legislatures,” in *Law and Morality: Readings in Legal Philosophy, 3rd edition*, ed. David Dyzenhaus, Sophia Reibetanz Moreau, and Arthur Ripstein (Toronto: University of Toronto Press, 2008): 522. Their ideal is evidently the establishment of courts and legislatures as equals when it comes to constitutional interpretation, though the precise indicators that this goal has been achieved are left unidentified.

⁵² Manfredi and Kelly, 520-1.

⁵³ *Ibid.*, 524.

⁵⁴ Mathen, 139; also Christopher P. Manfredi, “The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003,” *Supreme Court Law Review* 23 (2004): 123.

the legislature without debating the merits of such a repeal or of the judicial ruling; or legislative inaction in response to judicial invalidation.⁵⁵

Manfredi and Kelly also note that Hogg and Bushell primarily consider the rulings of the Supreme Court of Canada in their investigation, but that this sort of action is giving way to other methods of judicial involvement in political rights deliberation.⁵⁶ The dialogue that appears to be happening in Canada mostly occurs between legislatures and various trial and appeals courts, rather than between legislatures and the Supreme Court, because most legislative sequels are enacted in response to decisions made at lower levels in the court system and before the case makes its way to the Court.⁵⁷ These legislative sequels may then be subject to further judicial review, but so are the decisions of the inferior courts. At any rate, the dialogue contemplated by Hogg and Bushell is more complex and nuanced than they originally suggested, and as a result the effectiveness of dialogic judicial review as a response to the anti-democratic objection is still questionable.⁵⁸

Given the breadth of views encompassed under the term “dialogue” it can be difficult to analyze the metaphor in a meaningful way. However, there is one key feature

⁵⁵ Manfredi and Kelly, 520. Included in non-dialogic legislative actions are instances where officials repeal or replace legislation in response to judicial opinion because the legislature is “simply complying with judicial decisions” which “undermines the establishment of an equal relationship between judges and legislators” (521). Manfredi and Kelly claim that this establishes a “hierarchical relationship that limits genuine dialogue,” and while it is debatable whether their definition of ‘genuine’ dialogue is acceptable, there is certainly a marked and substantial distinction between conscious legislative deliberation on constitutional interpretation and simple acquiescence to a judicial opinion. See also Cameron, 150-1 for a discussion on how pre-emptive use of section 33 threatens the dialogic view of the relationship between courts and legislatures.

⁵⁶ Manfredi and Kelly, 515. Superior courts sometimes even render their judgments after the legislative sequel to the inferior court decision, suggesting that the court is not viewing the legislature as a legitimate partner in constitutional interpretation; see 522-3.

⁵⁷ *Ibid.*, 517-9, 521.

⁵⁸ *Ibid.*, 519-20.

of the most prominent dialogue theories that will be the focus of my critiques in Part II. Dialogic judicial review, generally speaking, requires some capacity on the part of the legislature to respond to judicial rulings on the constitutionality of legislation. Regardless of whether or not the legislature chooses to act on its ability to respond to the judiciary, DJR requires that this ability exist. As we will see, Canada's constitution formally guarantees this option in a limited way over rights-related issues. The legislature has the opportunity to try to justify rights infringements to the Court under section 1 of the *Charter* and, if all else fails, to disregard the Court's decisions on certain types of issues using the section 33 override. Whether or not this *formal* opportunity to respond is a *meaningful* opportunity will be examined shortly. First, we will turn to the New Commonwealth Model of constitutionalism, where we will begin to see the crucial distinction between *comprehensive* and *compartmental* legislative finality that will be central to the development of the hybrid model.

The New Commonwealth Model

Stephen Gardbaum's New Commonwealth Model of constitutionalism is meant to be both a descriptive account of historical developments in certain Commonwealth countries as well as a normative model for improved protection of rights within a constitutional democracy. Though it is similar to dialogic judicial review in that it emphasizes the importance of legislative responses to judicial invalidations, the NCM focuses on several other unique structural elements of Canada's legal system to distinguish itself from the old models of constitutionalism. Gardbaum's account of the

defining features of the new model varies slightly throughout the book,⁵⁹ but there are a few core elements that are considered “essential institutional features”⁶⁰ for the new model. The first element, a codified bill of rights, guides the process of deliberation through the other three: pre-enactment rights review by the legislature or the executive; weak-form judicial review by the courts; and post-review legislative response.⁶¹ Of these, the most prominent features that are unique to the model are mandatory pre-enactment rights review and weak-form judicial review. These features are unique because they do not appear in systems of legislative supremacy or judicial supremacy, and they are important because they contribute to the protection of rights and maintain the legislature’s final legal authority.

Pre-enactment rights review is said to make the NCM distinct because in the old models such review is “ad hoc, voluntary and unsystematic.”⁶² This feature comprises an evaluation of draft legislation by either the executive or the legislative branch, with a view to noting and resolving any potential conflicts between the legislation and pre-existing rights provisions. Weak-form judicial review, the other unique feature of the NCM, allows for the incorporation of judicial review in the process of evaluating legislation for constitutional compatibility but maintains the legislative supremacy tradition of granting the final word to the legislature.⁶³ As noted above, judicial review is

⁵⁹ For example, at times the four elements of a codified bill of rights, mandatory pre-enactment rights review, weak-form judicial review, and legislative final word are described as “jointly necessary and sufficient conditions” (30-31); at other times the new model is distilled down to only the first and third of these elements (25).

⁶⁰ Gardbaum, 30-1.

⁶¹ *Ibid.*, 30-1, 34.

⁶² *Ibid.*, 25-6.

⁶³ *Ibid.*, 2, 25.

considered “weak” when it is not part of a judicial supremacy regime; that is, when the judicial opinion is not final because the legislature has a chance to respond to a judicial decision through reply legislation or an override power.

Both of these elements are said to contribute to a “sharing” of the duty to protect rights.⁶⁴ The legislature is tasked with bringing political considerations to bear on a rights-related question prior to enactment and after any judicial decisions, and the judiciary is responsible for giving its interpretation of the compatibility or conflict between existing rights provisions and legislation. The legislature has the final authority to make law but is informed by, and presumably responsive to, the legal opinion given by the courts. The NCM thus presents a similar interplay between the court and the legislature to that of the dialogic model. It also provides a response to the anti-democratic objection to judicial review by preserving legislative finality over rights-related issues.

It is quite clear that the unique features of the NCM distinguish the model from judicial supremacy. As noted above, traditional judicial supremacy describes systems where the court has the power to invalidate unconstitutional laws and the legislature has no legal power to overrule such invalidation through its normal mechanisms. This is undoubtedly different from the weak-form judicial review that characterizes the new model in the Canadian context. This distinction is more than a mere incidental structural variation: the difference between the new model’s weak-form judicial review and traditional judicial supremacy’s strong-form review is in which institution has final authority over rights-related decisions. Whereas the new model espouses a form of

⁶⁴ *Ibid.*, 2.

constitutional supremacy where the judiciary does not always have the final word, traditional judicial supremacy presents exactly the opposite state of affairs.

The distinction between the NCM and traditional parliamentary sovereignty is equally clear. As noted earlier, parliamentary sovereignty does not include judicial review or a codified bill of rights, both of which are indispensable features of the NCM. It is still difficult to distinguish the new model from systems of legislative supremacy,⁶⁵ but the sort of structure that is said to typify the NCM is certainly a far cry from traditional parliamentary sovereignty. At the very least, Gardbaum has developed a theory of constitutionalism that incorporates elements of both of the traditional models and is, at the same time, distinct from them.

The NCM treats the legislative and judicial branches as “joint or supplementary rather than alternative exclusive protectors and promoters of rights”⁶⁶ because each institution is expected, at the very least, to consider the impact that a piece of legislation has or might have on rights. Gardbaum claims that the new model “provides novel, and arguably more optimal techniques for protecting rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater

⁶⁵ Gardbaum admits that if granting the final word to the legislature makes a system one of legislative supremacy then the new model is in fact part of that camp. There is considerable support for the view that finality is equivalent to sovereignty; see Ming-Sung Kuo, “Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?,” *Canadian Journal of Law and Jurisprudence* 26 (2013): paras. 5, 55-6. However, it is possible – as is arguably the case in Canada – to have a strong constitutional prohibition on abolishing the court and on overriding its decisions, which is sufficient to draw a distinction between parliamentary sovereignty and legislative finality. As suggested earlier, finality and sovereignty can be distinguished if a legislature that enjoys formal legal finality is nonetheless powerless to abolish the court. However, finality and supremacy are not so easily distinguished.

⁶⁶ Gardbaum, 2.

balance than under either of these two lopsided existing models.”⁶⁷ In his view, the old models place all of the power in the hands of the courts or in the hands of parliament. The NCM is superior to these models because it balances power between the two institutions.

The NCM has been criticized for its tendency to lapse into either legislative supremacy or judicial supremacy,⁶⁸ and the cases made for these claims are based on compelling empirical observations.⁶⁹ It is important to consider these arguments because they contribute significantly to the debate over the stability of the NCM. However, I will leave this question aside for now, as my intent here is not to survey the fates of supposed new model systems, but to examine the arguments in favour of viewing the NCM as an alternative to traditional constitutional models and to determine whether Gardbaum’s presentation of the NCM is an accurate depiction of Canada’s legal system.

I should note that Gardbaum uses “constitutional supremacy”, “judicial supremacy”, and “legal constitutionalism” synonymously throughout his book on the NCM, and he does the same with “parliamentary sovereignty”, “legislative supremacy”, and “political constitutionalism”.⁷⁰ In his view, the first set of terms refers to systems of strong-form judicial review in which the judiciary has the final word with respect to the validity of any particular law.⁷¹ The second set refers to systems of traditional

⁶⁷ *Ibid.*, 1.

⁶⁸ Gardbaum dedicates much of the book to refuting these challenges, though he openly acknowledges that many of the examples he cites as instances of the new model have fallen into one of the two categories. See, for example, at 101, where he admits that judicial supremacy is the “default position” in Canada, and similar comments at 43 and 225. Also see Robert Ivan Martin, *The Most Dangerous Branch* (Quebec City: McGill-Queen’s University Press, 2003): 6-7; Mathen, 144-5; and Kuo, paras. 5-6, 25.

⁶⁹ Gardbaum admits that the countries listed in the book are imperfect examples of the new model. See also Grant Huscroft, “Constitutionalism from the Top Down,” *Osgoode Hall Law Journal* 45, no. 1 (2007): 95-7.

⁷⁰ Gardbaum, 16.

⁷¹ *Ibid.*, 23, 28, and 35.

parliamentary sovereignty as described above: democracies in which a sovereign and omnipotent legislature is the sole authority on the creation of valid law.⁷² There are some issues with these equivocations that should be clear from the distinctions made earlier between parliamentary sovereignty and legislative supremacy, and between judicial supremacy and constitutional supremacy.⁷³ Some of the flaws in the NCM that I point to later can be traced back to this equivocation.

Conclusions from the New Models

Both the dialogic model and the NCM are taken by their respective proponents to be more accurate descriptions of the way in which Canada's constitutional democracy functions than either of the old models. The other noteworthy consensus among new model proponents is that the new models are normatively superior to the old models; that is, they are models of legal structures and processes that *ought* to be followed because they preserve legislative finality – and thus solve the anti-democratic objection – while at the same time helping to ensure that rights are better protected than in systems of parliamentary sovereignty. Thus, there are three main conclusions to be drawn from the literature on these models: each model is said to be 1) distinct from the traditional models of legislative supremacy or judicial supremacy, 2) a more accurate description of the way in which certain constitutional systems have developed, including Canada's, and 3) a compelling normative theory of how constitutional democracies ought to function.

⁷² The manner in which authority is held accountable is one of the features that distinguishes political and legal constitutionalism. See Adam Tomkins, "The Role of the Courts in the Political Constitution," *The University of Toronto Law Journal* 60, no. 1 (2010): 2.

⁷³ The importance of clarifying this terminology is also underscored in Richard Albert, "Nonconstitutional Amendments," *Canadian Journal of Law and Jurisprudence* 22 (2009): paras. 82-8.

As we have already seen, the first of these conclusions is almost unassailable. The features that define these models unquestionably distinguish them from the traditional models of constitutionalism and it is difficult, if not impossible, to reconcile these differences without fundamentally altering one of the models. The third conclusion is fairly compelling but still debatable. It is certainly reasonable to think that a better balance between majoritarian interests and rights protection has been achieved in new model systems like Canada and the United Kingdom than might have been possible had these nations adhered more closely to the traditional models. On the other hand, there is also evidence to suggest the contrary. This is an important question to consider but it will not be explored here.

In the remainder of this paper I will focus on the second conclusion: that the new models provide a more accurate account of the way in which the Canadian legal system has developed. I will argue that while the NCM and DJR note some key developments in legal procedures, the proponents of these models have made a mistake in identifying the new models as systems of *shared* legal authority in which legislative supremacy and judicial supremacy are mixed. Rather, I will argue that the new models are partial reflections of the “hybrid” system of constitutionalism that has developed in Canada, in which there is a *division* of legal authority into distinct, non-overlapping areas of judicial and legislative control.

Interpreting the Descriptive Accounts of the New Models

Before getting to the core of my argument it is important to dispense with an interpretive issue that is present in the most prominent accounts of the new models. The new models rely heavily on the preservation of some degree of legislative finality over rights-related questions but the scope of this final legal authority is not always clear. Understanding the claims that new model proponents make regarding legislative finality will show the models to be inadequate reflections of Canada's constitutional system. However, I will suggest that the new models can be revised so that they align more closely with the formal structure of legal authority in Canada. Such a revision will lead to the development of the hybrid model of constitutionalism.

The New Commonwealth Model

As part of his substantive account of the new model, Gardbaum writes that “one of the defining features of the [new model] is that it grants the legal power... of the final word to the legislature.”⁷⁴ The framework of the new model means that “the legislature and not the judiciary has de jure finality, the legal power of the final word with respect to the specific law at issue,”⁷⁵ and the legislature also has discretion over whether or not to use this power.⁷⁶ As I briefly alluded to earlier, part of the problem with Gardbaum's depiction of the traditional models is that he equates the traditional models with the traditional *forms* of those models. He correctly notes that the NCM is distinct from the

⁷⁴ Gardbaum, 27.

⁷⁵ *Ibid.*, 28.

⁷⁶ *Ibid.*, 2, 27. However, Gardbaum also notes that the new model “distinguishes between formal allocation of power to the legislature and normative constraints on when the legislature is entitled to use it.” (94). The implications of this claim are explored later.

traditional form of legislative supremacy, which was defined earlier using Dicey’s portrayal of parliamentary sovereignty. However, the NCM is not always so clearly distinct from legislative supremacy. In fact, Gardbaum admits that if “legislative supremacy” simply refers to who has the final say with respect to constitutional issues then his model is simply an instantiation of this old model.⁷⁷ While I do not take legislative supremacy to connote only with this simplistic form of legislative finality, these observations provide lend support to the argument that NCM might be identical with some non-traditional form of legislative supremacy. Later, I will argue that legislative finality *is* indistinguishable from legislative supremacy if certain conditions are met regarding the “normative constraints” that limit the legislature’s exercise of its supreme authority.

A key reason why Gardbaum’s distinction between the NCM and legislative supremacy is difficult to sustain at first glance is that he equivocates between legislative supremacy, parliamentary sovereignty, and political constitutionalism. It is true that traditional parliamentary sovereignty excludes the possibility of substantive input on rights-related issues from non-legislative bodies and restrictions on legislative action in the way that the NCM does. However, political constitutionalism encompasses more than just this extreme form of parliamentary sovereignty. Broadly speaking, political constitutionalism refers to systems where constitutional constraints on government power are predominantly or exclusively political.⁷⁸

⁷⁷ *Ibid.*, 44. This admission comes in the midst of a series of rejections of other constitutional models. Among them is the dialogic model, which Gardbaum characterizes as over-inclusive. Gardbaum strongly denies that legislative supremacy is equivalent to legislative finality.

⁷⁸ *Ibid.*, 22. Political constraints include, most prominently, electoral accountability.

The key to Gardbaum’s claim that the new model is distinct from traditional parliamentary sovereignty is the fact that the legislature is constrained, in some way, by a charter or bill of rights which it is powerless to amend. This depiction of political constitutionalism will naturally distinguish the NCM from legislative supremacy, since NCM systems necessarily include entrenched constitutional documents. However, the existence of codified rights in a constitutional document does not necessarily mean that the legislature is unable to achieve its aims in the face of these established rights provisions, nor does it necessarily mean that the constraints on government power cease to be predominantly – or even exclusively – political in nature. If the legislature is constrained by an entrenched constitution but still has the “final say” with respect to all rights-related issues – that is, if the legislature’s power is effectively unrestricted because of a legally recognized ability to override or ignore all of the entrenched rights provisions of the constitutional document – then the system is fully consistent with the requirements of the new model but can still be described as a form of political constitutionalism, or the sort of modified legislative supremacy described to earlier. As Gardbaum notes, in NCM systems the legislature has exactly this level of discretion over constitutional issues: the decisions of the judges are subject to review by “ordinary legislative majority,”⁷⁹ and the legislature has the legal power of the final word.⁸⁰

The confusion that results from Gardbaum’s equivocation is most evident when he writes, “legislative and judicial supremacy thus describe not only which institution has

⁷⁹ *Ibid.*, 26-7.

⁸⁰ Wayne A. MacKay, “Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the Charter of Rights,” *Osgoode Hall Law Journal* 21, no. 1 (1983): 57-8.

the final word on any constitutional issue, but also which institution is *primarily entrusted* with the tasks of declaring and protecting citizens' rights and liberties."⁸¹ This statement could be taken to mean that in the old models, "supremacy" refers to the institution that is formally tasked with all matters pertaining to rights – that is, the body of government that, at all times, has legal authority to declare and protect (or fail to protect) rights. If this is what the "primarily entrusted" statement means, then this statement should be taken as a strong indication that Gardbaum is equating legislative supremacy with parliamentary sovereignty, and judicial supremacy with strong-form judicial review. This is because these traditional systems place supreme legal authority in the hands of one or the other institution, granting that institution the definitive say over the validity of laws and final responsibility for the protection of rights.

The other possibility is that Gardbaum is referring to which institution is *generally* or *usually* responsible for the protection of rights. By weakening the concept of legal authority in this way, Gardbaum leaves open the possibility that "supremacy" in the traditional models refers merely to which institution is responsible for protecting the bulk of rights, while leaving the remainder to the other branches of government. This interpretation connects legislative supremacy more closely with political constitutionalism, and judicial supremacy with legal constitutionalism, because it puts an emphasis on the types of constraints that exist on the government's legal authority without identifying one or the other branch as an exclusive and supreme authority over rights. This reading opens up the possibility that both the legislature and the judiciary are,

⁸¹ Gardbaum, 7. Emphasis added.

jointly and to some extent equally, responsible for the protection of rights, which is anathema to the traditional models of constitutionalism. As I will argue in Part II, this is precisely the scenario in Canada, where the legislature has final authority over certain rights-related issues and the judiciary has final authority over others. This interpretation also aligns well with Gardbaum's definition of the new model, in which the legislative and judicial branches "share" responsibility for protecting rights.

However, Gardbaum is certainly not conceding that Canada is operating under a system of judicial or legislative supremacy; one of the main purposes of his book is to argue that Canada is operating under a new constitutional system! Rather, his "primarily entrusted" statement should be taken to mean that "supremacy", in the context of the traditional models, refers to the institution that has final, formal, and total authority over the creation of valid law and the protection of rights.

Clarifying this interpretive ambiguity is important because Gardbaum defines the NCM as a system espousing legislative *finality* but he denies that the NCM is simply a form of legislative *supremacy*. This confusion is compounded because Gardbaum appears to deny even the conceptual possibility of a legislative supremacy in which the legislature is *meaningfully* bound by codified rights restrictions but has *meaningful* discretion to override any codified rights.⁸² However, this is precisely the criterion that the NCM requires in order to function: the existence of an entrenched, rights-bearing document that provides normative restraints to legislative action, but that can nevertheless be overridden by a normal act of the legislature. In Part II I will defend the position that there can be

⁸² *Ibid.*, 7.

meaningful restrictions on the legislature despite its meaningful discretion to exert its supreme authority, though this will not help Gardbaum's case so much as establish the viability of the hybrid model.

What is more immediately relevant for now, and is problematic for Gardbaum's account, is that the principle of legislative finality does not apply, in formal terms, to Canada's entire constitutional system. The legislature has numerous options for responding to judicial opinions and it can exercise final legal authority over a range of rights-related issues through use of the section 33 "override" clause. However, section 33 does not apply to all of the rights enumerated in the Charter: its use is restricted to sections 2 and 7-15.⁸³ On all other rights provisions, and on other matters of constitutional interpretation, it is judicial finality that seems to apply. Any legislative response to judicial decisions on rights issues to which section 33 does not apply is potentially subject to review and invalidation by the Court through the regular process of rights litigation. I will pick up on this line of thought again in my defence of the hybrid model in Part II.

The issue that this poses for Gardbaum is that his case for the NCM seems to require precisely the kind of legislative finality that he identifies with legislative supremacy, and from which he wishes to distinguish his new model. As noted earlier, the NCM "grants the legal power... of the final word to the legislature,"⁸⁴ which enjoys "de jure finality"⁸⁵ with total discretion over the use of this power.⁸⁶ Thus, in purely formal terms, the division created by the provisions of section 33 between rights that can be

⁸³ *Canadian Charter of Rights and Freedoms*, s. 33.

⁸⁴ Gardbaum, 27.

⁸⁵ *Ibid.*, 28.

⁸⁶ *Ibid.*, 2, 27.

overridden by the legislature and those that cannot means that Gardbaum's requirement of legislative finality does not entirely apply in the Canadian context.

To be fair, the NCM also “distinguishes between formal allocation of power to the legislature and normative constraints on when the legislature is entitled to use it,”⁸⁷ suggesting that noting the formal structure of the Canadian legal system will not suffice to explain the actual allocation and operation of legal authority. This means that the *possibility* of legislative finality over the creation of all valid law, accompanied by “normative constraints” on the use of this power, is what characterizes NCM systems. Still, what is not clear is how broad the scope of the legislature's legal authority must be in order for the NCM to remain distinct from the traditional models *and* purport to describe Canada's legal system accurately. It is not obvious how legislative finality is easily distinguishable from legislative supremacy because is it not clear how the “normative constraints” on the legislature's exercise of its legal authority differ from the constraints of electoral accountability and internalized norms that characterize parliamentary sovereignty. In formal terms Canada does not have legislative finality on all matters of law: there are large areas of constitutional law that, if anything, are best understood as operating under judicial supremacy. Even when we go beyond the formal allocation of power, we need a clearer account of how the constraints on legislative authority distinguish the new model from legislative supremacy.

We can resolve this issue in part by conceding either that a) the NCM requires “comprehensive” legislative finality – that is, the possibility of legislative finality on over

⁸⁷ *Ibid.*, 94.

all areas of law – and Canada is an imperfect example of the model, or b) that the NCM does not require legislative finality over the creation of valid law, but a sharing or a division of legal finality between the legislature and the courts, which I will term “compartmental” legislative finality. The first option raises three key issues for the NCM. First, it still requires an account of how a system with comprehensive legislative finality is clearly distinguishable from legislative supremacy. Second, it needs a robust explanation of how the “normative constraints on when the legislature is entitled to use [its power]”⁸⁸ are different from those that are normally characteristic of parliamentary sovereignty. Lastly, it must be conceded that this model, though derived from Canada’s novel constitutional design in the post-*Charter* era, simply does not apply to Canada. Gardbaum presents responses for the first and third of these problems, though he does so by conceding that Canada is an imperfect new model system. However, the lack of a robust accounting of the “normative constraints” on legislative authority will prove to be a more serious problem. I think that there can be a response to this challenge, but this response will not address the formal incongruity between the NCM and the formal structure of Canada’s legal system: at best, it will resolve some of the outstanding concerns about the non-formal forces that guide the exercise of legal authority in Canada.

The second option can preserve both the applicability of the NCM to Canada’s system and the distinction between the NCM and the old models, but it flatly contradicts Gardbaum’s presentation of the NCM. Given that the NCM is also said to describe legal systems where there is the type of all-encompassing legislative finality that is necessary

⁸⁸ *Ibid.*

in the NCM,⁸⁹ it seems unlikely that we can coherently sustain a singular conception of constitutionalism that can apply to all of the jurisdictions that Gardbaum includes in his model. Instead, I will later argue that the division in the Canadian constitution created by the limited scope of section 33 makes a hybrid model, in which there is a *division* of final authority between the legislature and the judiciary, more useful and accurate in describing the formal aspects Canada's constitutional system than the NCM. This hybrid model will also accommodate the "normative constraints" account that is needed by the NCM to explain the conventions that influence the exercise of legal power in Canada and that are not formally enshrined in the written constitution.

It is important to note that, in broader terms, both of these readings preserve the distinction between the NCM and parliamentary sovereignty. The NCM is primarily addressed to issues that engage citizens' rights, while parliamentary sovereignty is a doctrine of legal authority over all areas of law. There is no doubt that Canada's system is *not* one of parliamentary sovereignty, or even of comprehensive legislative supremacy. Canada's Supreme Court is responsible for interpreting the law on a number of issues that do not, in any obvious way, engage rights. For instance, the separation of powers between the federal and provincial governments and the accompanying doctrine of federal paramountcy are features of our constitutional system that fall squarely within the authority of the judiciary. These are matters over which the legislative branch of government has no authority to set aside the Court's decisions.

⁸⁹ Most notably, New Zealand, which preserves legislative finality by having a constitutional court that is empowered to make declarations of incompatibility between legislation and existing rights provisions, but is not empowered to strike down offending legislation.

For this reason, many of my comments challenging the new models may seem strange. To take one example: the first of the two possible interpretations of the NCM given above – the “comprehensive” legislative finality interpretation – is simply incoherent given the formal structure of Canada’s legal system. However, for the purposes of this paper I will maintain an artificial understanding of our constitutional system in which *all* of Canadian law is presumed to be describable by the various models on the precise terms that they use, for three reasons. First, it is not always clear beforehand whether or not a legal issue engages rights. While it is probably a stretch to think that a dispute between Parliament and one of the provincial legislatures on which level of government has authority over, say, taxation could engage a *Charter* right, it is certainly true that issues that were previously thought to be resolved can sometimes later be seen to engage *Charter* rights in unexpected ways. For this reason, it may be the case that the legislative finality contemplated in section 33 of the *Charter* covers a much larger area of constitutional law than might be suspected at first glance. Second, the case forwarded by Gardbaum and, as we will see shortly, by NCM proponents, does not make a consistent explicit distinction between rights-related constitutional issues and non-rights-related constitutional issues. Taking the same approach in my challenges to the new models will, if anything, strengthen their case against my critiques. Lastly, my main argument is that the most charitable reading of the new models is one in which there is judicial supremacy over all non-rights-related constitutional issues and legislative supremacy over all rights-related issues, but this reading presents an inaccurate depiction of Canada’s legal system under the *Charter*. This means that even if we were to concede

that the new models only claim to apply the principle of legislative finality to rights-related issues, they would still be inferior to the hybrid model as descriptions of Canada's legal system, which includes only partial, compartmental legislative finality.

In sum, there are some significant but surmountable issues facing Gardbaum's model; surmountable, at least, on a charitable reading that is dedicated to preserving the distinctness of the new model and its applicability to NCM jurisdictions aside from Canada. His equivocation of political constitutionalism, parliamentary sovereignty, and legislative supremacy, and of judicial supremacy, constitutional supremacy, and legal constitutionalism, is misleading because it produces a mischaracterization of systems that have a mix of legislative and judicial input on rights-related issues and blurs the important distinctions between *finality*, *supremacy* and *sovereignty*. Gardbaum claims that the terms *legislative supremacy* and *judicial supremacy* refer to which institution has the final word on rights-related issues as well as which institution is primarily entrusted with protecting rights,⁹⁰ but this depiction of the old models confuses rather than clarifies the distinction between the NCM and the old models. Still, all of Gardbaum's specific claims about legislative sovereignty are true because he equates legislative supremacy writ large with traditional parliamentary sovereignty,⁹¹ and he successfully distinguishes his new model from this traditional form of constitutionalism. The new model shares the opportunity to help protect rights between the legislature and the judiciary, while the ultimate power that is granted to the legislature means that it has the supreme word on rights-related issues

⁹⁰ *Ibid.*, 7.

⁹¹ See, for instance, Gardbaum, at 10, 12, 23, 25, 33, and 35. These sections all seem to make the same distinctions that I make here between legislative supremacy and parliamentary sovereignty.

and, as a result, bears the ultimate responsibility for ensuring that rights are protected. Still, this description can only be said to apply to Canada on an unpalatable reading that assumes that Canada's system is not a good example of an NCM system. A model that avoids these issues of interpretation and application would, no doubt, be a better account of the structure of legal authority that exists under Canada's constitution.

Dialogic Judicial Review

I now turn to dialogic theory to address a few similar preliminary issues. Kent Roach has helpfully summarized the key points of dialogue theory in his article, "Dialogic Judicial Review and Its Critics." My comments in this section will focus on his presentation of DJR because he canvasses a wide variety of related theories that all fall under the "dialogue" label. Given the wide range of options available in the DJR camp it is difficult to provide a comprehensive examination and critique of the dialogue metaphor. However, there is a settled core of features that are present in the most important and interesting accounts of the dialogue model, and these features will be the subject of my examination here. If the dialogue metaphor is not meant to be more than the simple observation that there is *some sort* of interplay between courts and legislatures in Canada then my criticisms will fall flat, but only because DJR ceases to be a remarkable account of constitutionalism.

Roach presents several claims about DJR throughout his article that, at first glance, seem to conflict with each other and with the claim that DJR is an intermediate model that avoids the extremes of legislative and judicial supremacy. First, he writes that

dialogic judicial review is a “political or constitutional theory about how both courts and legislatures can contribute to debates about controversies about rights and freedoms.”⁹²

This statement does not immediately set DJR up as an alternative to either of the old models because, as noted above, even Dicey’s definition of parliamentary sovereignty can be compatible with a judicial *contribution* to constitutional debate. However, DJR is meant to be an alternative to any constitutional model where either the legislature or the judiciary has *exclusive* authority over rights-related questions.

Roach later states that dialogue theory may simply be a procedural means of “placing important and uncomfortable issues on the legislative agenda.”⁹³ This claim again does not immediately distinguish DJR from parliamentary sovereignty, but it does differentiate the theory from judicial supremacy and hint at the idea of non-legal “normative constraints” on the exercise of legislative authority, like those that were suggested in Gardbaum’s NCM. Since traditional constitutional models offer little detail in terms of procedure, even if DJR were unsuccessful in providing a novel account of constitutional authority there may be some benefit to examining it as a constitutional theory that provides procedural guidance, particularly if that guidance helps to improve rights protection through informal means of normative guidance. However, here my aim is to address directly the idea that DJR offers a distinct account of how constitutional authority is “shared” in Canada’s legal system, so I will focus on those aspects of the theory that purport to distinguish it from the traditional models of constitutionalism.

⁹² Roach, “Dialogic Judicial Review and Its Critics,” 591.

⁹³ *Ibid.*, 593. At a minimum, it is clear that DJR procedures accomplish this; see Beverley McLachlin, “The Charter 25 Years Later: The Good, the Bad, and the Challenges,” *Osgoode Hall Law Journal* 45, no. 2 (2007): 368.

Roach claims that proponents of dialogic judicial review must “explain why legislatures, as well as courts, are important and legitimate interlocutors in societal dialogues about rights,”⁹⁴ suggesting a genuine sharing of the responsibility for protecting rights and an image of the judiciary and the legislature as equally authoritative interpreters of the constitution. These features both distinguish DJR from the traditional models of constitutionalism. More explicitly, he writes that “[d]ialogue theorists must defend a vision of constitutional democracy that avoids either judicial or legislative supremacy.”⁹⁵ This clearly situates DJR as an alternative to the old models, which is a stark contrast from his concession that “dialogue” might just be a procedural means of alerting the legislature to important rights-related issues. This version of DJR as an alternative view of constitutional authority, not the merely procedural version, will be my focus for the remainder of this paper.

Though not explicitly listed by Roach in the way Gardbaum enumerates them, the Canadian version of dialogic judicial review includes several of the key features of the NCM. For instance, both models involve weak-form judicial review, a codified and entrenched charter of rights, and some degree of legislative finality over rights-related issues. This is perhaps unsurprising given that they are both based on observations of Canada’s legal system, but it is important to emphasize that these are essential components of DJR if we are to examine the model in a way that goes beyond the aphorism “dialogue happens.” But what most significantly defines DJR is its portrayal of the legislature and the judiciary as jointly engaged in the practice of working out the

⁹⁴ Roach, “Dialogic Judicial Review and Its Critics,” 594.

⁹⁵ *Ibid.*

proper balance between rights and legislative objectives and empowered to assert their respective views on how best to achieve this balance.

The section of Roach's paper that immediately follows his statements about the distinctness of DJR already presents some issues for dialogue proponents who defend this substantive version of DJR as a novel theory of constitutionalism. Roach writes that dialogic judicial review "refers to any constitutional design that allows rights... to be limited or overridden by the ordinary legislation of a democratically enacted legislature."⁹⁶ His subsequent claim that dialogic judicial review "focuses on... the constitutional rejection of both judicial and legislative supremacy"⁹⁷ is then confusing, given our earlier examination of similar statements made by Gardbaum in his case for the NCM. These statements about the nature of legislative finality in systems of dialogic judicial review make it difficult to determine how DJR is distinct from legislative supremacy. In a similar vein, Peter Hogg and Allison Bushell write that section 33 of the Charter, one of the key features that is said to be indicative of weak-form judicial review and a central element of DJR, was included in "for the very purpose of preserving parliamentary sovereignty on rights issues"⁹⁸ without making the important distinction between "rights issues" over which the legislature has final authority, and those over which the judiciary has final authority. Thus, dialogic judicial review seems to include precisely those conditions that made it difficult to distinguish the NCM from legislative

⁹⁶ *Ibid.* Emphasis added.

⁹⁷ *Ibid.*

⁹⁸ Hogg, Thornton, and Wright, "A Reply on "Charter Dialogue Revisited"," 201. Emphasis added.

supremacy. The final and authoritative power of the legislature over rights-related issues is a defining feature of systems of legislative supremacy and dialogic judicial review.

If, as Christopher Manfredi claims, “[t]he functional essence of this dialogue is the ability of legislatures to reverse, modify, or avoid judicial nullification through the enactment of alternative statutes,”⁹⁹ and if this power is taken to be comprehensive over all rights-related issues, then it will be difficult to distinguish DJR from legislative supremacy and the new model will prove to be an inaccurate portrayal of Canadian constitutionalism. The distinguishing features of DJR seem to be weak-form judicial review under a codified and entrenched constitution along with the possibility of legislative finality. However, these features are subject to the same criticism that initially faced the NCM. If legislative finality is always an option then we need a more compelling account that distinguishes between legislative supremacy and legislative finality in order to justify characterizing DJR as a new model. This argument will also need to explain how the “normative constraints” on the use of the legislative override to which Gardbaum alludes are different from the regular pressures of political accountability and internalized norms that, as we saw earlier, are central characteristics of parliamentary sovereignty. This latter requirement is particularly problematic for broad versions of DJR because they allow any legislative action *or inaction* to qualify as an expression of the legislature’s will, meaning that the legislature is entitled to decline to use its power of the “final word,” and its decision to do so does not mean that such power has been voided or abandoned.¹⁰⁰

⁹⁹ Manfredi and Kelly, 514.

¹⁰⁰ Similar comments can be found in Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001): 226, though Roach’s focus is on instances where the legislature allows the judiciary to have the final word.

Thus, the fact that the legislature does not regularly exercise its override power in Canada is not sufficient to demonstrate that there are any “normative constraints” restricting the use of the override that are different from those that guide parliament under the doctrine of parliamentary sovereignty.

On the other hand, if all that is required is *occasional* deference to the judiciary, or *general* responsibility for rights being vested in the legislature, then our understanding of weak-form judicial review needs to change to include a clear account of how legal authority is shared between the legislative and judicial branches. Dialogic judicial review sometimes seems to require that some significant portion of rights protection is entrusted to the legislature and the remainder is in the hands of the judiciary, but this division is left undefined in DJR accounts. In the next section I examine this separation of power over rights-related issues in greater depth. I argue that staying true to the accounts of DJR that are given by its proponents makes it difficult to reconcile the theory with Canada’s constitutional scheme. The hybrid model, which accounts for the division of legal power under section 33 of the *Charter*, is a better option for understanding the formal division of constitutional authority in Canada.

Part II: Developing the Hybrid Model

Earlier, we saw that among the four features listed as indicative of an NCM system, two of them – a codified bill of rights and judicial review – are incompatible with parliamentary sovereignty,¹⁰¹ and the other two – pre-enactment political rights review and legislative finality – are thought to preserve just a small degree of political constitutionalism within a system that rejects the extreme of legislative supremacy. Similarly, dialogic judicial review is thought to preserve some degree of legislative finality within a lawmaking system that is markedly different from parliamentary sovereignty. The difference between DJR systems and legislative supremacy is, like in the NCM, attributed to the role that the judiciary plays in the lawmaking process and the presence of a codified and entrenched charter or bill of rights. The distinction between legislative finality and legislative supremacy is attributed to “normative constraints” on the legislature’s use of its supreme law-making power.

To this point I have dispensed with some of the minor interpretive problems that face the new models and focused in on a major issue facing both the NCM and DJR: a lack of clarity over what the requirement of legislative finality actually entails. There are two ways to interpret the models in order to address this issue. Either the new models require legislative finality over all rights-related areas of law, in which case the new models are difficult to distinguish from legislative supremacy and may not apply to Canada; or the new models only require legislative finality over some areas of law, in

¹⁰¹ See, for example, Sinclair’s comments on the Canadian Bill of Rights in “The Queen v. Drybones,” 602.

which case the new model accounts ought to be revised to explain this feature more explicitly. For now I will focus on the first option.

I examine this version of the new models in greater depth in order to demonstrate that, while this is the more accurate reading of the new models, it is difficult to distinguish this account from legislative supremacy and, thus, difficult to justify rejecting the old models of constitutionalism in favour of the new models. In particular, I draw attention to legislative supremacy's capacity to account for the four "essential institutional features"¹⁰² of the NCM and the analogous features of dialogic systems. This argument will demonstrate that the most unique features of Canadian constitutionalism are not necessarily indicative of a new model system espousing comprehensive legislative finality and, therefore, that the presence of these features does not decisively indicate that legislative supremacy is inapplicable as a doctrine of constitutional authority. Though new model theorists have some responses available to them on this point, my argument will lend support to the claim that the second version of the new models – the version which only requires legislative finality over a *significant portion* of law – is a better reflection of Canada's legal system because it more accurately depicts the formal constraints on the legislature's authority. I will state throughout the following sections that the new models ought to be *rejected* in favour of my proposed "hybrid" model, though it is reasonable to think that the new models could be *revised* to be more similar to the hybrid model and to address my challenges.

¹⁰² Gardbaum, 30-1.

The most difficult new model feature for legislative supremacy to account for is the existence of an entrenched bill of rights. As we saw earlier, there is nothing inconsistent between legislative supremacy and a *codified* bill of rights if the bill is amendable by an ordinary act of Parliament and is subordinate to any future inconsistent act.¹⁰³ An *entrenched* bill of rights, on the other hand, cannot be so amended and is presumed to take priority over inconsistent legislation – both clear violations of the principle of legislative supremacy.

However, new model systems are distinct from American-style, strong-form judicial review precisely because they preserve the legislature’s finality in the face of a judicial ruling. Weak-form judicial review allows the legislature to enact legislation notwithstanding any incompatibility with existing rights provisions. The effect of this feature is that the legislature is not functionally bound by the constraints of the bill of rights, since it is free to disregard these rights at any time through a normal legislative act. An entrenched bill of rights that can be overridden by a normal act of parliament is functionally equivalent to an un-entrenched bill of rights, though not equivalent in nature. Under parliamentary sovereignty, recall, new legislation is held to be legally valid over any conflicting existing statutes, to the extent of the inconsistency. Thus, new legislation would be valid over any non-entrenched bill of rights, such as a statutory bill of rights. Under an entrenched bill of rights, conflicting legislation is legally invalid. However, if

¹⁰³ See Cavalluzzo, 517-8 for related notes on the Canadian Bill of Rights (CBOR); also Sinclair, 602, and Gary Murray Keyes, “Civil Liberties and the Canadian Constitution,” *Osgoode Hall Law Journal* 1, no. 2 (1959): 33. For a more detailed discussion of exceptions to this subordination see Gray, 65-7, though these exceptions are not important for the present discussion. There is some additional support from Tomkins, 4-5, though Tomkins does allow compatibility between political constitutionalism and protected rights, albeit on narrow grounds.

the legislature has the legally recognized power to enact such “invalid” legislation *notwithstanding the entrenched rights provisions* then the effect is that the conflicting and otherwise presumptively invalid new legislation is considered valid law. These laws may be *perceived* to be “unconstitutional” because they conflict with entrenched rights provisions, but they are not unconstitutional *in fact* because they are enacted using the recognized legal authority that is granted to the legislature under the constitution. Thus, the *existence* of an entrenched bill of rights is not an immediate indication that parliamentary supremacy has been abandoned.¹⁰⁴

What the legislature cannot change in these circumstances is the text of the entrenched provisions of the bill of rights. While this limitation is certainly a plain violation of the traditional doctrine of parliamentary sovereignty, it is in keeping with the spirit of legislative supremacy to say that this limitation is insignificant and this objection easily dismissed. A legislature cannot amend the text of an entrenched bill of rights, but under the tenets of the new models it can enact law *as though such a bill did not exist*. The legislature’s inability to change the words of the entrenched rights-bearing document, in such a context, is a technical but functionally ineffectual violation of the principle of legislative supremacy. Thus, it is possible for the constitutional model of legislative supremacy to accommodate a bill of rights that contributes to rights-related discourse but over which the legislature retains supreme authority.

Similarly, judicial review is not necessarily an indicator of a novel theory of constitutionalism. Theorists point to the presence of judicial review as an indication that

¹⁰⁴ MacKay, 57-8, 66. See Cavalluzzo, 517-8 for notes on CBOR that are applicable to the Charter.

parliament is not supreme, since judges are able to declare legislation “unconstitutional” and thus increase the political costs of enacting or upholding that legislation.¹⁰⁵ While it is true that traditional parliamentary sovereignty excludes judicial review, legislative supremacy is not incompatible with judicial review. As long as the supreme power to enact laws despite their incompatibility with existing rights provisions is retained by the legislature, the possibility of a judicial contribution to deliberation on the issue does not challenge the applicability of the doctrine of parliamentary supremacy.

In fact, the influence that judicial review is thought to have on rights-related political deliberation in Canada can be understood to be strongly indicative of a robust system of parliamentary supremacy. The literature on dialogic judicial review claims that weak-form judicial review helps to raise the political costs of enacting legislation that appears to conflict with existing rights provisions in the Charter. That judicial opinions are accompanied by written reasons is only one of many reasons why the courts are seen to be trustworthy determinations of the proper balance between legislative objectives and individual rights. Add to these features the politically and emotionally charged language that often accompanies discourse on rights-related issues and it is not surprising that citizens might pay close attention to a calm and reasoned legal opinion on a particular Charter issue and might be easily inclined to support the conclusions of such an opinion.¹⁰⁶ Public support for the judiciary places greater pressure on the legislative

¹⁰⁵ Huscroft, 99; also Kuo, para. 17, commenting on the views of Huscroft and Risworth.

¹⁰⁶ Rainer Knopff and Andrew C. Banfield, ““It’s the Charter, Stupid!”: The Charter and the Courts in Federal Partisan Politics,” *Supreme Court Law Review* 45 (2009): 39-41.

branch of the government to comply with existing rights provisions by engaging the electorate and provoking citizens to a higher level of rights consciousness.

Despite appearances, the scenario depicted above is not necessarily indicative of a mixed system of constitutionalism. Political accountability is a hallmark of parliamentary sovereignty. The introduction of novel procedures that are not authoritative or final, but that add to the quality of deliberation on rights-related issues, is compatible with legislative supremacy. In fact, the preservation of the legislative override in weak-form judicial review systems increases the plausibility of any constitutional model that preserves the doctrine of parliamentary supremacy. As long as the legislature formally retains the legal power of the final word, judicial review is not incompatible with legislative supremacy. The fact that judicial opinions galvanize the public to higher degrees of political engagement is hardly an indication that political constitutionalism has been abandoned.

An argument could still be made that while legislative supremacy can provide an explanation for the essential features of the new models, it does not provide an equally persuasive one to that of the new models. One of the primary characteristics for which the new models are lauded is the propensity they have for increasing awareness of rights among legislators and the general public and for holding the legislative branch accountable for its decisions when they affect rights. A codified bill of rights and judicial review especially are viewed as prominent means for engaging the public in more robust discourse over both the proper balance between short-term objectives and long-term rights protections and over the proper balance between conflicting rights provisions.

Furthermore, the potential for judicial invalidation and rights litigation is thought to spur legislatures to greater levels of concern for rights. While legislative supremacy can *accommodate* these features, it would perhaps be surprising to see a system of legislative supremacy *producing* these features. A legislature is unlikely to create any self-imposed restraint on the exercise of legislative power – such as an entrenched bill of rights – because the very existence of these self-restraints might increase the possibility of a negative public reaction to legislative actions that conflict with these codified restrictions and, thus, increase the likelihood that a government face more hurdles to getting re-elected than it might absent such rights provisions. The unique features of Canadian constitutionalism may not debunk legislative supremacy but, absent any more persuasive challenges to the new models, legislative supremacy may still be unable to account for the development of these unique features.

We do not need to point to instances where legislators have actually opted to impose such self-restraints in order to support the idea that parliamentary sovereignty is able to account for the development of things like entrenched bills of rights. Such empirical evidence would be compelling, but we only need a more developed understanding of how legislative action is constrained under the doctrine of parliamentary sovereignty in order to account for the development of entrenched rights provisions. Under Dicey's definition, legislative action in systems of parliamentary sovereignty is held in check by the regular threat of electoral defeat and by the internal character of the legislature itself. This internal character is the product of the facts that the legislators are themselves citizens and that they are meant to represent, to some degree, the views of

their constituents. According to Dicey, one of the primary purposes of representative government is to ensure that the views of the public are reflected in the actions of the legislature by aligning the internal, personal views of the legislators as closely with public approval of the laws that are enacted as is possible.¹⁰⁷ Dicey notes that “the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors.”¹⁰⁸ By this reasoning, if the public held certain rights to be of great importance, and over the long term valued the preservation of these rights over the achievement of minor, short-term legislative objectives, it would not be surprising to see these views reflected in the legislature.

Thus, in a system of legislative supremacy in which the public is concerned with the impact that legislation has on their rights it should not be surprising that legislators deliberately take an interest in protecting rights and engaging in meaningful, substantive debate on rights-related issues, precisely because they are operating in a system of legislative supremacy and have a strong interest in accurately reflecting the will of the general public.¹⁰⁹ It may, of course, be difficult to define what particular rights the public might be concerned about if these are not already codified in a written bill, but it is certainly not difficult to think of a few areas of life over which citizens would want to have some degree of protection from government interference. Indeed, if the public were so inclined, it would be surprising if the legislature did *not* exercise some self-restraint in its actions, perhaps even by entrenching a bill of rights and establishing a process of

¹⁰⁷ Dicey, 82.

¹⁰⁸ *Ibid.*, 83.

¹⁰⁹ Vanessa A. MacDonnell, “The Constitution as Framework for Governance,” *University of Toronto Law Journal* 63, no. 4 (2013): 649-50.

judicial review, while maintaining the legal power to override or ignore these provisions whenever it was deemed necessary.

In contrast, the new model approach to understanding the normative restraints on legislative action is to assume that the constitutionality of law and its consistency with existing rights provisions is outside of the legislature's concern except insofar as it might initiate inconvenient and embarrassing *Charter* litigation.¹¹⁰ These theories separate “regular” legislative issues from “higher order” constitutional issues and place rights squarely in the latter category. To use one example, Kahana writes that “[h]igher law issues, or constitutional issues, are issues of higher importance than ordinary political issues.”¹¹¹ However, it is reasonable to think that concern for the compatibility of legislation with existing rights provisions is one of the legislature's primary interests, rather than being a “higher order” matter that is outside of the legislature's normal considerations. Certainly, if Canadian legislatures were unconcerned with the rights they would be doing a poor job of representing some important majority interests,¹¹² since there is broad public support for the *Charter* and many people view it as an integral part of Canadian identity.¹¹³

This response is even more compelling because it is reasonable to think that the general public is, on the whole, more interested in rights than it was in the past, and more

¹¹⁰ See Tsvi Kahana, “What Makes for a Good Use of the Notwithstanding Mechanism?,” *Supreme Court Law Review* 23 (2004) and Tsvi Kahana, “Understanding the Notwithstanding Mechanism,” *The University of Toronto Law Journal* 52, no. 2 (2002) for a review of the most prominent of these theories.

¹¹¹ Kahana, “What Makes for a Good Use,” 201-2. See also the discussion of Weiler's, Weinrib's, and Slattery's views on uses of the override in Kahana, “Understanding the Notwithstanding Mechanism,” particularly 228-9.

¹¹² Some support comes from Kahana, “What Makes for a Good Use,” 202 though, as mentioned Kahana maintains a marked distinction between higher- and lower-order legal issues, which challenges the connection made here between public support for rights protection and constraints on use of the override.

¹¹³ Knopff and Banfield, 39.

willing to balance immediate policy preferences with robust protection of rights. Given that the unique institutional features of Canada's post-1982 constitutional system were thought to be productive of a greater degree of rights consciousness among average Canadians, it should not be surprising that they have done so.¹¹⁴ The development of an entrenched charter of rights; the initiation and popularization of judicial review with the power of invalidation under the *Charter*; and the widely publicized legislative power of constitutional override are all frequently cited as novel features that encourage debate among citizens and legislators about the proper role of *Charter* rights in Canadian society.¹¹⁵ That these features developed is an indication that Canadians valued the protection of rights, so much so that it was deemed important to enshrine some rights in the constitution. If the Canadian public is concerned with protecting rights in addition to achieving particular social objectives, then it should not be surprising to see these attitudes reflected in their elected representatives and made manifest in legislation that shows greater deference to individual rights, even while the legislature retains the power to override these rights provisions.

This portrayal of the Canadian political landscape is capable of producing the same picture given by new model proponents: a rights-conscious legislature that is motivated to engage in pre-enactment political rights review and empowered to override an otherwise publicly supported judicial invalidation only when such override is strongly felt to be of considerable importance. The doctrine of legislative supremacy is even more appealing on this count than the new models because it portrays the legislature as

¹¹⁴ MacDonnell, 624-37. Also see Cavalluzzo, 523-4 for comments that suggest this conclusion.

¹¹⁵ Roach, *The Supreme Court on Trial*, 218.

genuinely engaged in deliberation over the proper balance of rights and legislative objectives, rather than grudgingly undertaking the task of pre-enactment rights review in order to shield legislation from judicial invalidation.¹¹⁶

Perhaps this is an overly optimistic view of the Canadian public and Canadian legislatures. However, I am not arguing that there actually is a greater degree of rights consciousness among Canadians or that the legislators are genuinely concerned with balancing rights and legislative objectives, though this is a strong possibility;¹¹⁷ I am only arguing that it is plausible to think that historical developments in Canada's legal, social, and political spheres have had this effect. If one accepts that a greater degree of rights consciousness in modern Canada is a likely result of changes like the adoption of the Charter then it is reasonable to think that this consciousness is reflected in greater legislative deference to, and consciousness of, rights, even if the legislature is not legally required to show such deference. The plausibility of this claim shows that the institutional features that are presumed to be indicative of a new model of constitutionalism are compatible with legislative supremacy.

This argument demonstrates that the new models do not provide a compelling account of the formal restrictions on legislative action that is different from the account

¹¹⁶ Janet L. Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review," *Supreme Court Law Review* 58 (2012): 95-6.

¹¹⁷ This possibility gains some support from Donald R. Songer, Susan W. Johnson, and Jennifer Barnes Bowie, "Do Rights Really Matter?: An Examination of Court Change, Judicial Ideology, and the Support Structure for Rights in Canada," *Osgoode Hall Law Journal* 51, no. 1 (2013): 300, where it is pointed out that constitutional rights provisions can only be effective if governments are willing to abide by judicial rulings; and at 303, where increased rights protection is attributed to changes in prevailing social attitudes. See also Keyes, 23-4, where robust protection of rights is attributed to public sentiment; and Kathryn Moore, "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study," *Osgoode Hall Law Journal* 30, no. 3 (1992): *passim*, for compelling evidence that the protection of constitutional rights even in a judicial supremacy is subject to the will of the executive branch. See also Dicey, 76-9, 82-3.

furnished by legislative supremacy. The presence of an entrenched charter of rights and substantive judicial review of legislative action is not sufficient to annul the applicability of the principle of legislative supremacy to Canada's legal system. These features are also not sufficient to distinguish the "normative constraints" on legislative action in the new models from the normative constraints that operate in systems of parliamentary sovereignty. For this reason, the "comprehensive" legislative finality version of the new models must be abandoned. This reading of the new models is not only a poor reflection of the formal structure of Canada's division of legal power under section 33 of the *Charter*; it also relies on "normative constraints" on legislative action that ought to be, but are not, distinct from the normative constraints on the legislature under the doctrine of parliamentary sovereignty.

The "Hybrid" Model of Constitutionalism

Thus far, I have claimed that the new models of constitutionalism face some serious difficulties in distinguishing themselves from the traditional models and, even if they succeed in this respect, face further challenges to their accuracy as descriptions of Canada's legal system. As we saw in the last section, the requirement of comprehensive legislative finality compounds these issues, as it hangs the distinctiveness of the new models on ill-defined "normative constraints" on legislative action. I have already briefly mentioned that a revised version of the new models might withstand these challenges that I have raised to the new model accounts. Here, I will argue that such a revised version – or, if we wish, a new model – termed the "hybrid" model presents a better picture of how

legal authority is divided in Canada between the legislature and the judiciary. This model is purely descriptive; it simply reflects the way in which the Canadian legal system is structured under the *Charter*. The hybrid model does not resolve the anti-democratic objection to judicial review, as the new models claim to, nor do I suggest that it is a superior normative account of constitutionalism. However, it does avoid many of the critiques that I have already levelled at the new models because, rather than attempting to resolve the problems that are thought to be inherent in the old models, it embraces the features that bring about these problems by separating rights-related legal issues into distinct, non-overlapping areas of legislative and judicial supremacy.

As we saw earlier, one of the issues facing most new model accounts is that they required comprehensive legislative finality over the creation of valid law. This is an issue because it simply does not reflect Canada's formal constitutional structure, which rejects comprehensive legislative finality. Even when we allowed our focus to be narrowed to only those constitutional issues that concern *Charter* rights, we saw that the division created by section 33 separates areas of legislative finality from areas of judicial finality.

A new model theorist may try to refine the theory and sidestep this objection by developing the following argument. One might agree that the new models include an *element* of legislative supremacy and yet disagree that they require comprehensive legislative supremacy – that is, legislative finality over *all* rights-related questions of law. One would thus repair the new models by embracing a “compartmental” legislative supremacy, where legislative finality is required over *some significant portion* of rights-related issues, but not all. This approach affirms the new model theorist's claim that the

Canadian legal system sits outside of the legislative supremacy camp. This hybrid model preserves legislative finality over some rights-related issues while leaving the remainder of rights issues, as well as the balance of non-rights-related constitutional law, in the hands of the judiciary.

As noted above, the hybrid model is a more accurate depiction of Canadian constitutionalism than the new models because it reflects the formal division of legal supremacy found in the section 33 “override” clause of the *Charter*. While Canadian legislatures have the final word with respect to many constitutional issues through the power of the notwithstanding clause, there are many rights-related constitutional provisions that are exempt from the override. Section 33 only allows for legislative supremacy on questions that fall under sections 2 and 7-15 of the Charter, which include the fundamental freedoms, legal rights, and equality rights with which many Canadians are familiar.¹¹⁸ On other rights-related issues – such as the section 3 voting rights – the Supreme Court has more than just the advisory role that it would have if Canada’s were a system of legislative supremacy. Instead, the legislature must justify any proposed limitations on rights that do not fall within the ambit of section 33 through the provisions of section 1,¹¹⁹ which justification is itself subject to judicial approval or disapproval. Canada is not a legislative supremacy, nor does it have the sort of legislative finality required by the new models. Legal power is best described as divided on a subject-by-subject basis, rather than “shared” between the legislature and the judiciary.

¹¹⁸ *Canadian Charter of Rights and Freedoms*, s. 33 (1).

¹¹⁹ *Ibid.*, s. 1. The section 1 “reasonable limits” clause 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.”

If the formal division of legal power that in the *Charter* were as clearly present as I have laid it out here then the hybrid model would almost certainly be accepted as a superior descriptive model of Canada's constitutionalism without controversy. Of course, things are never so clear. There are two key arguments that work to counter the hybrid model by suggesting that Canada's legal system, if it was ever correctly described using a new constitutional model, is by nature or in practice more like a judicial supremacy. The first of these arguments notes the fact that section 33 has rarely been used to suggest that it is no longer a meaningful provision of the *Charter*. The second argument emphasizes the time limit on legislative overrides under section 33 to suggest that, ultimately, it is still the judiciary that decides on the constitutionality of legislation.¹²⁰

If correct, these claims would undermine the plausibility of the hybrid model as a description of Canada's legal system because they eliminate the small remaining element of legislative finality. Significantly, these observations also undermine the cases made for the new models, which rely on the preservation of some degree of legislative finality. However, if these arguments can be countered effectively then the hybrid model will have avoided two major challenges facing its applicability to Canadian constitutionalism and. In the following examination I first develop the arguments against the hybrid model in more depth. Then I point to some prominent Supreme Court decisions to illustrate how the formal division of legal authority has been reinforced by the Court numerous times, and how the two challenges listed above have been rejected by the Court. Once again,

¹²⁰ Section 33 (3) of the *Charter* reads, "(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." The legislature must also "expressly declare" that it is invoking the override; see *The Canadian Charter of Rights and Freedoms*, s. 33 (1).

though not fully conclusive, these observations will support my claim that the hybrid model is a viable option for understanding Canadian constitutionalism.

The Supreme Court and the Override

The first question to resolve is whether or not Canadian legislatures have the ability to use their final authority over the provisions that are subject to the override. Many theorists have seen the general disuse of section 33 in recent years as an indication that there now exists a convention against overriding rights, and a few have deemed it essentially dead letter in the Charter.¹²¹ In addition, the language in which the override clause is framed contributes to a strong distaste for its invocation. Use of the override requires the legislature to pass a law “notwithstanding a provision”¹²² of the *Charter* rather than, for example, notwithstanding a *judicial interpretation* of a provision of the *Charter*. Use of the override might therefore be perceived as expressing legislative misgivings about rights, rather than legislative disagreements with judicial views on rights.¹²³ Few politicians want to be thought to be outright infringing rights or violating the *Charter*! If the very provision that would establish compartmental legislative supremacy is unusable by the legislature, it seems more accurate to say that if DJR and the NCM are not the correct models to describe the Canadian constitutional system, then it is judicial supremacy that is at play rather than the hybrid model.

¹²¹ Huscroft, 95-6. See also Miguel Schor, “Judicial Review and American Exceptionalism,” *Osgoode Hall Law Journal* 46, no. 3 (2008): 559-60, where s. 33 is described as a “failure”.

¹²² *Canadian Charter of Rights and Freedoms*, s. 33 (1).

¹²³ See Hogg, Thornton, and Wright, “A Reply on “Charter Dialogue Revisited,”” 35; and Waldron, “Some Models of Dialogue,” 35.

Fortunately, there have been a few uses of the override since the passage of the *Charter*, and looking to the Court's responses to these overrides and its additional comments on the override provision can alleviate some of the concern about the usability of section 33. At the very least, we can firmly establish the *formal* or *legal* capacity that the legislature has to exercise its supremacy over some rights. If we were to find judicial approval of any use of the override that does not blatantly contravene the manner and form requirements laid out in the text of section 33, then this can be taken as a strong indication that the legislature's ability to use the override is still a formally recognized legal power. Conversely, if the Court was exercising authority over the validity of using the override by disallowing its use on substantive grounds then this could be taken as a strong indication that this remnant of legislative supremacy no longer exists. More broadly, if Supreme Court decisions can preclude some types of legislative action entirely then we might suspect that legislative supremacy has been seriously eroded in Canada; but if judicial decisions "rarely preclude a legislative sequel"¹²⁴ then it will be important to examine the circumstances under which such action is precluded to determine if the principle of legislative supremacy still applies. If judicial decisions do not preclude legislative sequels or use of the override then we can consider this as evidence that the legislature still has formal legal authority over some aspects of rights-related law.

Theorists have speculated that use of s. 33 might be subject to interpretation under the "reasonable limits" clause of the Charter, which would seriously curtail the power

¹²⁴ Hogg and Thornton, "Reply to "Six Degrees of Dialogue"," 535.

granted to the legislature under the override clause.¹²⁵ There has also been much speculation that pre-emptive use of the override – invocations of the override clause that occur before a Charter issue has been litigated – might be unconstitutional; that *omnibus* uses of the override – appending the notwithstanding clause to a large body of law without specific consideration of each piece of legislation – might be unconstitutional;¹²⁶ that uses of the override that do not specifically name the rights that are being infringed, but only list the sections that are being overridden, might be unconstitutional;¹²⁷ and, generally, that use of section 33 can be monitored by the judiciary so that it does not give the legislature an absolute override on Charter rights.¹²⁸

There have been several opportunities for the Court to rule on the validity of invocations of section 33, and the Court’s opinions in these cases have delegitimized the aforementioned speculation over uses of the override. To be sure, the Court has held that “either an unconstitutional purpose or an unconstitutional effect can invalidate legislation,”¹²⁹ and therefore that legislation that results in the total negation of a right, rather than a mere limitation, is unconstitutional and cannot possibly be saved under section 1.¹³⁰ Moreover, the Court has upheld the five-year limitation on uses of the

¹²⁵ Arbess, 121-2.

¹²⁶ *Alliance des Professeurs de Montréal v. Procureur General du Québec*, [1985] C.A. 376.

¹²⁷ *Ford v. Quebec (A. G.)*, [1988] 2 S.C.R. 712; A. Wayne MacKay and Dianne Pothier, “Developments in Constitutional Law: The 1988-89 Term,” *Supreme Court Law Review* 1 (1990): 171.

¹²⁸ Arbess, 117. For a more detailed discussion of all of these suggestions, see Kahana, “What Makes for a Good Use,” *passim*.

¹²⁹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para 80.

¹³⁰ *Ibid.*, para 84; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, para. 352-3.

override,¹³¹ has maintained the plain text meaning of the clause and held that section 33 does not apply to any section of the *Charter* beyond sections 2 and 7-15,¹³² and has ruled that using the override retroactively to halt ongoing litigation is illegitimate.¹³³ The Court has also joined theorists in claiming that “the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy” by the introduction of the *Charter*,¹³⁴ which is a slight misnomer given that Canada was never accurately described as a parliamentary supremacy,¹³⁵ but is understandable in the context of the changes brought about by the introduction of the *Charter*. These statements and rulings all support the view that legislative supremacy is a doctrine that no longer applies to Canadian constitutionalism in any way.

However, the Court has also ruled – or, perhaps more accurately, observed – that the government’s use of the override does not need to pass constitutional muster under section 1,¹³⁶ nor is the legislature limited in the timing and scope of its use of the override: pre-emptive, omnibus, and non-specific uses of the notwithstanding clause that

¹³¹ *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, para. 22; *Corp. Professionnelle des Médecins v. Thibault*, [1988] 1 S.C.R. 1033, para. 28; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, para. 15.

¹³² *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, para. 148; *Opitz v. Wrzesnewskyj*, [2012] 3 S.C.R. 76, 2012 SCC 55, para. 29; *Divito v. Canada (Public Safety and Emergency Preparedness)* [2013] 3 S.C.R. 157, 2013 SCC 47, para. 28; *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519, 2002 SCC 68, paras. 11, 14, 36, 44; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, p. 363; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 65; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, para. 79; *Attorney General of Quebec v. Quebec Association of Protestant School Boards et al.*, [1984] 2 S.C.R. 66, p. 87. In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para. 94, Rothstein J. objected to the majority’s apparent assumption that some unwritten rights are exempt from the override. This issue was left undecided, though the Court seems to have assumed that there are some absolute rights that are not explicitly listed in the Charter; that these rights may not be subject to override; and that access to the courts is one such right.

¹³³ *Ford v. Quebec (A. G.)*, [1988] 2 S.C.R. 712, para. 36.

¹³⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 72.

¹³⁵ Dicey, 166-7.

¹³⁶ See, for example, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, para. 119.

do not explicitly list the rights being infringed are all constitutionally legitimate.¹³⁷ While an unconstitutional purpose or effect might preclude use of section 1 to *justify* rights infringements, it does not limit the legislature’s ability to *override* rights provisions. Furthermore, use of section 33 is not subject to judicial review on substantive grounds.¹³⁸ The Court has consistently held that the override clause “insulates” legislation from judicial review.¹³⁹ Section 33 is undoubtedly a constitutionally legitimate method for limiting rights and freedoms, despite the fact that it preserves an area of law that is exempt from judicial review.¹⁴⁰ The Court’s recognition of this power at precisely those moments when it might have been eroded is a strong indication that the legislature retains its formal supremacy over some areas of rights-related law.

The Court’s interpretation of section 33 thus presents us with two important observations. First, it should be clear that the legislature has final legal authority over the rights-related issues falling under the ambit of the override clause, though more than one theorist has contended this point.¹⁴¹ The Court has, on several occasions, remarked that the notwithstanding clause “establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts...”¹⁴² and that it “gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation

¹³⁷ *Ford v. Quebec (A. G.)*, [1988] 2 S.C.R. 712, para. 35; MacKay and Pothier, 171-3.

¹³⁸ MacKay and Pothier, 171-3.

¹³⁹ *R. v. Hess ; R. v. Nguyen*, [1990] 2 S.C.R. 906, p. 926.

¹⁴⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 63; Knopff and Banfield, 42.

¹⁴¹ There is some contention on this point in Cameron, 148 (note 64). Cameron also considers the “manner and form” requirements of section 33 to be limitations on the supremacy of the legislature, which is a view that the Court appears to have rejected.

¹⁴² *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para 137.

of the [enumerated] provisions of the *Charter*.¹⁴³ The Court views its rulings as normally binding on the legislative branch except in cases where section 33 is invoked, and has maintained that even pre-emptive use of the override to block judicial involvement, while perhaps distasteful, is not unconstitutional.¹⁴⁴ This view of legislative authority under the Charter was stated most clearly by Iacobucci J. in *Vriend v. Alberta*: "...the legislators can *always* turn to s. 33 of the *Charter*, the override provision, which in my view is the ultimate "parliamentary safeguard".¹⁴⁵ Chief Justice McLachlin has also noted that "the Charter contains the notwithstanding clause which permits Parliament and the legislatures to override judicial decisions for a five year term, *in perpetuity if necessary*."¹⁴⁶

Second, the Court evidently views the five-year limitation and "express declaration" restrictions of section 33 as mere "manner-and-form" requirements, not as substantive limitations on legislative power.¹⁴⁷ The manner and form requirements of section 33 are fairly simple. A valid use of the override requires that the legislature "expressly declare" that it is enacting a law notwithstanding one or more of the rights provisions in section 2 and 7-15 of the Charter.¹⁴⁸ Such declaration will remain in effect for five years or until revoked by the legislature, whichever occurs sooner.¹⁴⁹ After such time the override lapses and the legislature has the option to re-invoke the override and

¹⁴³ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 47.

¹⁴⁴ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para 159; *Alberta v. Hutterian Brethren of Wilson Colony* [2009] 2 S.C.R. 567, 2009 SCC 37, para. 184.

¹⁴⁵ *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para 178. Emphasis added.

¹⁴⁶ McLachlin, 369. Emphasis added.

¹⁴⁷ *Ford v. Quebec (A. G.)*, [1988] 2 S.C.R. 712, paras. 31-3; Gérald-A Beaudoin, "Dynamic Interpretation of the Charter," *Supreme Court Law Review* 19 (2003): 177, 196.

¹⁴⁸ *Canadian Charter of Rights and Freedoms*, s. 33(1).

¹⁴⁹ *Ibid.*, s. 33(2).

shield the legislation for another five years, barring which the legislation will once again subject to judicial scrutiny.¹⁵⁰

Given that legislation must normally be promulgated, it is hard to argue that the requirement that the legislature “expressly declare” its use of the override is anything but a manner-and-form requirement. But what of the five-year limitation? This restriction, along with the judicial power to invalidate legislation that is not protected in perpetuity by sustained use of the override, certainly seems to alter the default nature of legislation, from presumptively valid because correctly enacted to presumptively invalid unless sustained by legislative declaration.

An argument could be made that the five-year limitation does not threaten parliamentary supremacy over sections 2 and 7-15 of the Charter because it does not change the fact that the sole restraint on re-enactment of the override is a political one. To say that legislative supremacy has been eliminated in Canada by virtue of the fact that a legislative action can only be sustained by ongoing popular support is to adopt a peculiar way of separating the doctrine of parliamentary supremacy and the theory of political constitutionalism. This view places a strong emphasis on the mantra of parliamentary sovereignty that “nothing is beyond the power of the legislature to enact”¹⁵¹ but mistakenly downplays the equally important aspect of political accountability.¹⁵² While

¹⁵⁰ *Ibid.*, s. 33(4).

¹⁵¹ This version of parliamentary sovereignty is paraphrased from Dicey. For some useful discussion on the limitations of this principle see Gray, 54-58, and Eleftheriadis, *passim*.

¹⁵² This aspect of parliamentary sovereignty is also recognized in Cavalluzzo, 513. Dicey does acknowledge the importance of this doctrine but focuses heavily on the omnipotence of Parliament. See Gray, 54-8, 61-2 for a useful (if somewhat dated) discussion on this point; and Eleftheriadis, paras. 22-5 and 49, for a discussion on the logical limits on parliamentary supremacy, which challenge a simplistic interpretation of the omnipotence of Parliament in a parliamentary supremacy.

this argument alone might not fully vindicate legislative supremacy in the face of the five-year limitation, we at least have a compelling reason to think that the five-year limit does not threaten the principle of legislative supremacy under section 33. This limitation does not impose any substantive restrictions or create any normative pressures aside from those that regularly operate in systems of parliamentary sovereignty.

Formal recognition of compartmental legislative finality is one thing; exercise of this power is certainly another. The disuse of section 33 in recent decades has led many to believe that the power to use the override no longer exists. Certainly, the establishment of a constitutional convention against using the override would threaten the viability of the hybrid model as a theory of Canadian constitutionalism. While the hybrid model is an accurate representation of the *formal division* of legal power between courts and legislatures under the *Charter*, if this division is not reflected in the actual exercise of legal power then the hybrid model will not be useful in describing the application of constitutional authority in Canada.

There are two responses available to this challenge. First, as I noted earlier in my distinction between parliamentary sovereignty and legislative supremacy, the imposition of self-restraints by the legislature should not be taken as an indication that legislative supremacy has been abandoned. This means that, so long as the legislature retains the legal power of the final word – as it does in our “compartmental” version of legislative finality – the initial presumption ought to be that the legislature’s failure to make use of its supreme authority is an expression of its desires regarding the use of that authority, rather than an indication that its authority has been abandoned. Again, this argument

merely points to the formal structure of legal power under the *Charter*, but it places the burden of demonstrating that there is a constitutional convention against using the override in the hands of those who might want to demonstrate that “compartmental” legislative finality is not a feature of constitutionalism in Canada. The formal structure of legal authority under the *Charter* should be taken as our starting point for understanding the actual exercise of legal authority.

Second, the disuse of section 33 should not immediately be taken as an indication that the legislature is unable to use the override. As Hogg and Bushell note, when responding to judicial rulings “the legislature nearly always has a range of choice,” and “it is difficult to maintain that the legislature is not exercising any of that choice when it implements the court's decision.”¹⁵³ A decision not to use the override does not negate the legislature’s legal power to do so; it merely indicates that the legislature does not wish to expend the requisite political capital to sustain that particular piece of legislation in the face of a judicial invalidation, and is not prepared to justify using the override.¹⁵⁴

More significantly, it is difficult to see how a convention against using the override is different from the regular “normative constraints” that guide the legislature in a system of parliamentary sovereignty. There are, to be sure, constitutional conventions in Canada that are not easily accounted for under the doctrine of parliamentary sovereignty. For instance, the convention in Canada that the Queen through the Governor General will always give assent to a duly passed bill is difficult to explain as an obligation under the

¹⁵³ Hogg and Thornton, “Reply to “Six Degrees of Dialogue”,” 536.

¹⁵⁴ Kent Roach, “The Myths of Judicial Activism,” *Supreme Court Law Review* 14 (2001): 324, 327; Kent Roach, “A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci’s Substantive Approach to Dialogue,” *The University of Toronto Law Journal* 57, no. 2, (2007): 464.

pressures of a) electoral accountability, since the Governor General is not elected; or of b) the internal makeup of the legislature, since the Governor General is not a member of the legislature. This convention seems to continue out of tradition and international pressure rather than the internalized norms of the legislature. The Queen's representative in Canada would hardly want to create the sort of constitutional crisis that would undoubtedly result were they to refuse assent to a Canadian bill!

In contrast, the supposed convention against using the override can be explained by the “normative constraints” that characterize parliamentary sovereignty. As we saw earlier, the pressures of political accountability and internalized norms that characterize parliamentary sovereignty are capable of explaining a legislature's decision to adhere to self-imposed limitations even when these limitations can be ignored or lifted. The disuse of section 33 can be explained in a similar way. The fact that Canadian legislatures have declined to use the override clause for several decades can be understood as an indication that legislators are genuinely interested in protecting rights; that they view the protection of rights as an important long-term objective that usually trumps conflicting short-term objectives; that they expect others to hold these views; and that they understand the public's support for protecting rights and fear electoral defeat should they act in a way that conflicts with this public opinion.

These arguments support two key assertions that are central to my main argument in support of the hybrid model. First, the existence of section 33 of the *Charter* preserves a formal power of legislative finality over significant aspects of rights-related constitutional law by allowing the legislature to ultimately achieve its objective despite

the existence of entrenched rights provisions and the normal process of judicial review.¹⁵⁵ Second, the legislature's disuse of section 33 does not necessarily mean that the country has lapsed into a judicial supremacy or that the legislature has relinquished its override power.¹⁵⁶ Legislators may rightly think that they cannot use the override without facing negative political consequences,¹⁵⁷ but this perception is an example of a normal political process controlling the legislature's exercise over its domain of rights-related constitutional law, and so does not negate the legislature's supremacy over those aspects of law that are subject to the override.

On this view, far from being subject to a form of judicial supremacy, the legislature is simply declining to use its power out of fear of upsetting a rights-conscious public and being punished at the polls as a result. The disuse of section 33 is not necessarily an indication that legislative supremacy has been abandoned or eroded, but can be viewed as an indication that parliament is balancing short-term objectives with long-term values and showing deference to the widely held opinion that rights are important and should only be infringed in exceptional circumstances. It is just as reasonable to draw this conclusion from the disuse of section 33 as it is to say that Canada is operating under a *de facto* judicial supremacy, as some authors have concluded.¹⁵⁸ Given that both of these interpretations are equally plausible, one cannot immediately

¹⁵⁵ Mathen, 138.

¹⁵⁶ Mark Tushnet seems to support this view in "Weak-Form Judicial Review," though he may be suggesting that the collapse into *de facto* judicial supremacy is probable or even inevitable.

¹⁵⁷ See Hiebert, "Parliamentary Engagement with the Charter," 89, 92.

¹⁵⁸ Rory Leishman, *Against Judicial Activism* (Kingston: McGill-Queen's University Press, 2006), 3; Kahana, "Understanding the Notwithstanding Mechanism," 223.

conclude that the disuse of section 33 indicates that legislative supremacy is completely inoperative in Canada.

Earlier, I noted that there are compelling reasons for thinking that the new models – the NCM in particular – have lapsed into judicial supremacy in Canada because of the disuse of section 33.¹⁵⁹ At that time I focused on providing a theoretical justification for thinking that this is not the case, and I set aside the question of what the empirical evidence might show. Now, I will examine this evidence briefly in order to demonstrate that it is inconclusive about the existence of a constitutional convention against using the override. This argument challenges the view that the new models and the hybrid model fail to capture the reality of how legal authority is exercised in Canada, because it demonstrates that the evidence fails to indicate clearly that the formal structure of legal authority is not being followed in practice. The argument also challenges the view that there are “normative constraints” against using the legislative override that differ from the “normative constraints” of parliamentary sovereignty because, as we will see, what evidence there is to suggest that the override cannot be used is adequately described as an indication that the normal force of political accountability is responsible for the legislature’s failure to make use of section 33.

If we do examine what little empirical evidence is available it is unclear whether or not a convention against using section 33 has been established. In support of the view that there is no such convention, we might note that governments that have invoked the

¹⁵⁹ Gardbaum admits that the countries listed in the book are imperfect examples of the new model. See also Huscroft, 95-7.

override have not had any difficulty getting re-elected.¹⁶⁰ In addition, the provincial legislature of Saskatchewan has, as recently as this year, contemplated using the override to uphold back-to-work legislation for some “essential” public sector services.¹⁶¹ Even a cursory look through recent news will reveal several instances of federal legislators contemplating use of the override to uphold legislation on assisted suicide and prostitution. The fact that use of the override is contemplated is at least weakly indicative that legislatures believe it to be possible to use this power.

On the other hand, actual uses of the override are vanishingly few and have all but disappeared in the 21st century. Furthermore, some politicians have promised never to use the override,¹⁶² and at one time the federal Liberal party indicated that it would be prepared to amend the *Charter* to remove the override provision in order to better protect rights.¹⁶³ These facts give support to the idea that there is a convention against using the override, and that the threat of its use is an empty one. Given these conflicting data it is difficult to come to any determination over the existence or nature of a convention against using section 33.

¹⁶⁰ Roach, *The Supreme Court on Trial*, 7, 192.

¹⁶¹ See Mike McKinnon, “Wall Open to Overriding SCOC Labour Decision,” *Global News*, February 5, 2015, accessed March 10, 2015, <http://globalnews.ca/news/1812396/wall-open-to-overriding-scoc-labour-decision/>, and related reports.

¹⁶² See Leishman, 114; Knopff and Banfield, 39-45.

¹⁶³ See “Liberal Platform Doesn’t Include Notwithstanding Clause Ban,” *CBC News*, January 11, 2006, accessed May 25, 2015, <http://www.cbc.ca/news/canada/liberal-platform-doesn-t-include-notwithstanding-clause-ban-1.585843>, and related reports.

However, it is significant that legislative decisions not to use the override are frequently accompanied by public declarations to that effect.¹⁶⁴ This is an important observation because it suggests that if there is a convention against using the override, it is of a very different nature from many other constitutional conventions. Most constitutional conventions are observed without notice or comment; to take an earlier example, the convention that Queen's representative will always assent to a duly passed bill of the Canadian Parliament is not met with any fanfare. While the refusal of assent would be somewhat of a constitutional crisis for Canada, the regular act of giving assent is so firmly established by convention that it does not merit mention. In contrast, while the use of section 33 would no doubt engage the public quite dramatically, the legislative branch also engages the public by making widely publicized announcements that it is *observing* this purported convention by *not* invoking the override clause. If there were a widely recognized convention against using the override we might expect observation of this convention to pass without notice. The fact that the possibility of using the override is frequently raised by pundits and politicians may be an indication that this is a different sort of convention; or it may be a sign that there is no convention at all against using the notwithstanding clause. At the very least, there are few conclusions that we can draw from the admittedly sparse empirical evidence surrounding use and disuse of the override. At best, we can speculate on the importance of its use and the possibility that a

¹⁶⁴ There are, for example, numerous reports drawing attention to the federal government's decision not to use the override to uphold legislation that was struck down in *Carter v. Canada (Attorney General)*, 2015 SCC 5, and in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

convention exists, and we can point to the formal structure of Canada's constitutional system for some guidance as to the allocation of legal authority.

It is worth noting that the legislature's fear over using section 33 is probably not well founded.¹⁶⁵ As noted above, legislators appear to be concerned that use of the override will be seen as a breach of constitutional law and a violation of rights. However, it is not necessarily the case that public opinion would automatically turn against a party that exercised its section 33 powers, even if we accept the view that the Canadian public has a strong interest in protecting rights. In instances where there is disagreement over the appropriate balance between conflicting rights, the public might side with either the legislature or the judiciary in their interpretation of the *Charter*. As noted earlier, this is one interpretation of the expressive act of the legislature when contemplating use of section 33; the legislature is expressing *disagreement* with the Court's interpretation of rights provisions rather than *misgivings* over the existence of those provisions.¹⁶⁶ Citizens will tend to take sides with either the legislature or the judiciary in such instances of disagreement over rights.¹⁶⁷ Reasonably well-informed people might not necessarily side with the Supreme Court and approve of its interpretation of the *Charter*; rather, it is likely that "the extent to which Canadian support what the Court has been doing in recent years depends very much on whether they agree with the results the Court has reached in its

¹⁶⁵ See Roach, *The Supreme Court on Trial*, 192.

¹⁶⁶ There is significant disagreement over which of these is the correct interpretation of the expressive act of overriding Charter rights, though the text of section 33 suggests that the legislature is expressing "rights misgivings" in using the override, which as noted earlier may have contributed to its hesitance to invoke the override. See Rainer Knopff, "How Democratic Is the Charter? And Does it Matter?," *Supreme Court Law Review* 19 (2003): 213; Waldron, "Some Models of Dialogue," 36-7.

¹⁶⁷ Roach, "A Dialogue About Principle," 465.

decisions.”¹⁶⁸ I expect that, where the issue is clear and the public agrees with the legislature’s interpretation of the *Charter* and its determination of how best to balance rights with short-term legislative objectives, the legislature would receive support from the public for using section 33.¹⁶⁹ In the reverse case, if the legislature were clearly seen by a majority of voters to be unduly infringing rights, it is quite likely that they would fail to receive support for using the override and they would likely be voted out of office.

However, the connection between use of section 33 and electoral success or failure is still not as clear as I have portrayed it here. Voters, if they are aware of the circumstances surrounding the legislature’s use of section 33, are likely to consider both the exercise of the override power and the product of that exercise independently,¹⁷⁰ alongside the many other issues that they consider when voting. The result is that it would be virtually impossible to determine whether use of the override was causally linked with success or failure in an election. While some pundits would attribute the results of the election to use of the override, in reality the connection would be far less clear.

These comments about the empirical evidence surrounding use of the override and the possibility that a convention against such use exists are largely speculative, but they serve an important purpose in my examination of the new models. The possibilities given above regarding public reaction to use of the override, legislative motivations for using or

¹⁶⁸ Martin, *The Most Dangerous Branch*, 8; Leishman, 195. Chief Justice McLachlin makes a similar point in “The Charter 25 Years Later” at 370. Cavalluzzo also hints at this conclusion at 530.

¹⁶⁹ Though his overall focus is slightly different, the claim that section 33 is still viable is supported in Leishman, 263. See also MacDonnell, 653. Manfredi makes the more forceful point that the Court cannot risk losing its preferred status as constitutional interpreter by upsetting the legislature and instigating an exercise of the override; see Christopher P. Manfredi, “Judicial Power and the Charter: Three Myths and a Political Analysis,” *Supreme Court Law Review* 14 (2001): 338.

¹⁷⁰ Some short comments on this distinction can be found in Tushnet, 230.

not using the override, and alternative explanations for the disuse of section 33 all support the view that the doctrine of legislative supremacy is a viable explanation for how legislative power is exercised within the limited range of rights-related issues over which the legislature has authority on the “compartmental” understanding of legislative finality. These observations and speculations provide alternative, and equally plausible, accounts of the division of legal authority in Canada, while explaining the apparently inconsistent features that, some suggest, indicate the presence of strong-form judicial review or, at least, the absence of any meaningful degree of legislative finality.

Objections to Judicial Review

One of the primary motivations behind the development of DJR was an attempt to resolve the “anti-democratic objection” to judicial review and, thus, to address the “undemocratic” nature of judicial supremacy.¹⁷¹ The success or failure of the new models as adequate descriptors of Canadian constitutionalism will help to determine whether or not they succeed at responding to these objections. As demonstrated earlier, the formal structure of the Canadian legal system is best reflected by the hybrid model, which will be shown to make the new model responses to the anti-democratic objection unsuccessful. As a result, the new models lose one of the most compelling reasons to prefer them as theories of Canadian constitutionalism. My comments will at times centre on DJR

¹⁷¹ Hogg and Thornton, “Reply to “Six Degrees of Dialogue”,” 529; Hogg and Bushell, “The Charter Dialogue,” 75, 77; Haigh and Sobkin, 69. The democratic legitimacy of judicial review has been a central question in jurisprudence, particularly in the United States; see Dodek, 295-300. Also note Dodek’s comments on the section 33 override provision at 303, where he notes that the notwithstanding clause is thought to resolve the anti-democratic objection.

because most of the debate on this issue has focused on this theory, but they are applicable to the NCM as well.

A common, if oversimplified, version of the anti-democratic objection is that through judicial review judges are violating the principles of majority rule and the right to self-governance that underpin democracy in general and legislative supremacy in particular.¹⁷² A more extreme version depicts the judiciary as an out-of-touch élite class of intellectuals whose job consists in subverting the democratic will and promoting elitist ideologies under the pretext of neutrality.¹⁷³ While this may be an unfair characterization of most judges, it is not unfair to say that the very purpose of the judicial branch in systems of judicial supremacy is to prevent the majoritarian legislature from freely exercising legislative power. In systems that espouse judicial review with the power of invalidation, the judiciary “[holds] legislative decisions up to scrutiny against a higher constitutional standard,” and is empowered to decide sometimes “that *no* level of government can legislate in a given area.”¹⁷⁴ These sorts of objections to judicial review, which come from of a majoritarian conception of democracy, are well documented and do not need to be reiterated at length here.¹⁷⁵ In general, these objections point to the *prima facie* conflict between a simple majoritarian conception of democracy on one hand and the judicially-enforced protection of civil liberties contained in an entrenched constitutional document on the other.

¹⁷² See Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press Inc., 1999), *passim*.

¹⁷³ Robert Martin, “Ideology and Judging in the Supreme Court of Canada,” *Osgoode Hall Law Journal* 26, no. 4 (1988): 799-800; Leishman, *Against Judicial Activism*, 9, 14-5.

¹⁷⁴ Pamela A. Chapman, “The Politics of Judging: Section 1 of the Charter of Rights and Freedoms,” *Osgoode Hall Law Journal* 24, no. 4 (1986): 867.

¹⁷⁵ See Waldron, *Law and Disagreement*, *passim* for a review of these objections.

Responses to these objections, also well documented, typically focus on legitimating the anti-democratic role of judges without changing the nature of their role.¹⁷⁶ For instance, Wil Waluchow’s “common law” theory of judicial review describes how judges interpret and apply the law in light of the “community’s constitutional morality”¹⁷⁷ – a concept identified as a “subset of the wider community morality that includes norms and conventions which lack legal recognition.”¹⁷⁸ This “constitutional morality” is latent in the structures and instruments that form the legal system; it consists in “the political morality presupposed by the laws and institutions of the community.”¹⁷⁹ In applying this public morality, judges are “respecting the community’s *authentic* wishes and commitments”¹⁸⁰ and upholding these “true moral commitments” against the community’s transient “mere moral opinions.”¹⁸¹ Rather than subverting the majority will, judges are discerning society’s *true* commitments and applying these in their interpretive and adjudicative practices.

At the same time, the practice of judicial review has been subjected to another challenge, which I will call the “judges-as-politicians” problem. Those who forward this objection point to the increasingly politicized rhetoric of judicial rulings; the overt political impacts of courts’ decisions; and the increasingly blurred line between constitutional supremacy and judicial supremacy, to argue that modern judiciaries are

¹⁷⁶ Chapman, 868; also see Claire L’Heureux-Dubé, “The Dissenting Opinion: Voice of the Future?,” *Osgoode Hall Law Journal* 38, no. 3 (2000): 496, 503, and 510-2.

¹⁷⁷ W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2009), 161, 227-31.

¹⁷⁸ *Ibid.*, 227.

¹⁷⁹ *Ibid.*, quoting Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 126.

¹⁸⁰ Waluchow, 230. Emphasis in original.

¹⁸¹ *Ibid.*, 223. Emphasis removed from original.

corrupting their original function by expanding the judicial role and making it more political.¹⁸² On this view, the Court’s commitment to interpreting law as the legislature intended it to mean can leave Justices free to produce a range of opinions, labelling their interpretations as “progressive” and “purposive” to justify tampering with the democratic will of the majority.¹⁸³ Opponents of DJR have suggested that the dialogue metaphor itself might be co-opted by the judiciary to justify judicial activism and intervention in political issues,¹⁸⁴ and even proponents have noted concern over this possibility.¹⁸⁵

Historically, in systems of parliamentary sovereignty the judicial role was one of interpreting the law according to parliament’s intentions and, in federal states, resolving questions of jurisdiction under the principles of federalism.¹⁸⁶ Though the judiciary possessed a limited power to “create” law by applying established doctrines of interpretation, real lawmaking power was vested in the legislature.¹⁸⁷ However, the “judges-as-politicians” objection raises the concern that courts operating in systems of legislative supremacy have begun taking on substantive review of legislation under more

¹⁸² See, for example, comments in Knopff and Banfield, 37-8, and Kent Roach, “Constitutional and Common Law Dialogues Between The Supreme Court and Canadian Legislatures,” *Canadian Bar Review* 80 (2001): 493-5.

¹⁸³ Richard F. Devlin, “Ventriloquism and the Verbal Icon: A Comment on Professor Hogg’s “The Charter and American Theories of Interpretation,”” *Osgoode Hall Law Journal* 26, no. 1 (1988): 11-12.

¹⁸⁴ Hogg, Thornton, and Wright, “A Reply on “Charter Dialogue Revisited,”” 194, 196-7; Manfredi, “The Day the Dialogue Died,” 115-7.

¹⁸⁵ Haigh and Sobkin, 72, 77, 80-1.

¹⁸⁶ See F.E. LaBrie, “Canadian Constitutional Interpretation and Legislative Review,” *The University of Toronto Law Journal* 8, no. 2 (1950): 299-303, 309, though LaBrie notes toward the end of the article that the Supreme Court of Canada has considerable discretion over invalidation on the basis of the principle of federalism.

¹⁸⁷ Dicey, 60; Arbess, 115; Bruce A. Ackerman and Robert E. Charney, “Canada at the Constitutional Crossroads,” *The University of Toronto Law Journal* 34, no. 2 (1984): *passim*, but especially 133 for comments on how federalism created difficulties for patriation of the constitution.

expansive modern conceptions of phrases like “fundamental justice”.¹⁸⁸ Some theorists argue that several constitutional democracies have rejected the presumption that law and politics are separate spheres and have begun to recognize the courts as political actors.¹⁸⁹ While this can be seen as a way to “optimize” judicial independence by making judges more politically accountable,¹⁹⁰ these trends have been criticized for blurring the distinction between political and legal issues, and turning law into another “arena for political and ideological struggle.”¹⁹¹ This “judges-as-politicians” objection notes that unelected judges are at times acting as politicians by opening up political disputes under the guise of resolving legal issues.¹⁹² Complaints about activist judges; concerns over judicial appointments; and the possibility of predicting how particular judges will decide particular cases all help to reinforce this objection.¹⁹³

Dialogic judicial review attempts to resolve the first of these objections to judicial review in a fundamentally different way from the approach taken by theorists like Waluchow. Instead of explaining how judges are simply getting the heart of the majority’s *true* wishes and commitments, DJR solves the anti-democratic objection by re-inserting the majority voice after the judiciary has had its say and, in some versions of the theory, attempting to place the legislature and the judiciary on equal footing when it

¹⁸⁸ Even the elements of DJR that are thought to promote dialogue might be contributing to substantive judicial review of legislation; see Manfredi, “The Day the Dialogue Died,” 114-6. See also Peter W. Hogg, “Interpreting the Charter of Rights: Generosity and Justification,” *Osgoode Hall Law Journal* 28, no. 4 (1990): 823. Sinclair notes that this trend was developing already under the *Canadian Bill of Rights* in “The Queen v. Drybones,” 607.

¹⁸⁹ Schor, 537-9.

¹⁹⁰ *Ibid.*, 551.

¹⁹¹ Devlin, 3.

¹⁹² *Ibid.*, 12.

¹⁹³ Schor, 544-6, 551.

comes to constitutional interpretation.¹⁹⁴ DJR preserves “the ability of legislatures to reverse, modify, or avoid judicial nullification through the enactment of alternative statutes,”¹⁹⁵ showing that it is far too simplistic to think that judges are having the final say on rights-related constitutional issues.¹⁹⁶ Even Chief Justice McLachlin has supported the view that DJR resolves the anti-democratic objection, writing, “it is... true that a constitutional bill of rights subjects legislation to judicial review and that sometimes courts set aside or modify laws adopted by the legislative branch. However... this does not mean that the legislative branch is rendered powerless,” because there is always a chance for a legislative response.¹⁹⁷ In most cases, the unconstitutional elements of the legislation can be removed or revised and the legislation made compatible with the rights provisions of the constitution while still preserving the main original goals of the legislature.¹⁹⁸ Thus, though the judiciary might seem to be anti-democratic in its function, its influence on government policy can be minimized or eliminated through legislative responses. The NCM uses the same structural feature to sidestep this objection by putting final authority in the hands of legislators.

The new models also help to address the “judges-as-politicians” objection to judicial review. Justices often take a broad and liberal approach to interpreting law, but

¹⁹⁴ Hogg and Bushell, “The Charter Dialogue,” 80. This treatment of the legislature is akin to the theory of coordinate interpretation, in which each branch of government is recognized as a legitimate interpreter of the Constitution and is entitled to make its decisions based on its own interpretation.

¹⁹⁵ Manfredi and Kelly, 514.

¹⁹⁶ Peter W. Hogg, “The Charter of Rights and American Theories of Interpretation,” *Osgoode Hall Law Journal* 25, no. 1 (1987): 88-9; McLachlin, 372; Knopff, 212.

¹⁹⁷ McLachlin, 368.

¹⁹⁸ Hogg and Bushell, “The Charter Dialogue,” 81.

with a view to carrying out the intentions of the legislature.¹⁹⁹ The structure required by the new models is meant to preserve the intended roles of the legislature and the judiciary by allowing the judiciary to provide robust protection of rights, secure in the knowledge that they are not subverting the democratic will because the majoritarian legislature ultimately has the final say. Ideally, the legislature deliberates on the wisdom of proposed legislation in comparison to alternatives and the judiciary merely determines the legal validity of the legislature's chosen means of achieving its objective.²⁰⁰ The design of the new models is thought to constrain judicial interpretation so that the boundary between law and politics is maintained.²⁰¹ Thus, the new models aim to de-politicize the judicial role by firmly committing to legislative finality, freeing judges from the concern that their rulings will be final and enabling them to commit to protecting rights vigorously.

There has been some debate over the adequacy of DJR at resolving the objection, and those engaging in the debate seem to have assumed that any inadequacies in the response that DJR provides are a result of deficiencies in the way the dialogue operates, rather than descriptive inaccuracies in the model itself. Manfredi and Kelly, for example, note that judicial review in Canada does not appear to be functioning in a way that gives the legislature a meaningful opportunity to respond, which undermines the claim that Canadian constitutionalism includes the sort of legislative finality that would provide a solution to the anti-democratic objection.²⁰² Presumably, if courts were to cease “un-

¹⁹⁹ Devlin, 5; Patrick J. Monahan and Andrew Petter, “Developments in Constitutional Law: The 1985-86 Term,” *Supreme Court Law Review* 9 (1987): 70, 73, 83.

²⁰⁰ McLachlin, 373.

²⁰¹ Devlin, 5.

²⁰² See Manfredi and Kelly, 516-9, 524. Hogg and Bushell concede that, given Manfredi and Kelly's narrow conception of “dialogue,” the metaphor does not provide as decisive a response to the anti-

dialogic” actions like “reading in” to statutory texts, Manfredi and Kelly would concede that the metaphor provides at least a modestly adequate rejoinder to the anti-democratic objection.

However, these criticisms assume that DJR is an accurate depiction of the formal structure of Canadian constitutionalism. Given what we have already seen regarding the descriptive inaccuracy of the new models, it should be clear that the responses they furnish to the anti-democratic objection are even weaker than has been contemplated. Not only are there operational realities – like those noted by Manfredi and Kelly – that might be eroding legislative finality; there also is a structural barrier to the ability of the legislature to respond to judicial opinions on many types of rights-related issues. The division created by section 33 of the *Charter* means that the legislature’s ability to respond to the judiciary on some rights-related issues is restricted to a section 1 justification, which itself is subject to judicial interpretation. The legislature simply cannot have the “final say” on numerous rights-related issues over which the override power does not apply. Thus, the structural “fix” contemplated by DJR through the possibility of legislative finality does not resolve the anti-democratic objection on all matters of rights-related law. At best, it can provide a response to those areas that are covered by the override.

One might argue that the opportunity to provide a justification under section 1 *does* provide the legislature with the kind of finality that is required to sustain the new model response to the anti-democratic objection in its full forces. If, as Hogg and Bushell

democratic objection as they suggested; see “Reply to “Six Degrees of Dialogue”,” 524. However, they maintain that dialogic judicial review provides at least some response.

claim, “judicially-imposed constitutional norms rarely defeat a desired legislative policy” because the legislature is able to achieve its objectives by making only minor changes of “process, enforcement, and standards,”²⁰³ then there is good reason to think that legislative finality might be in operation *de facto*, if with great subtlety. This argument would help to revive the new model response to the anti-majoritarian objection by explaining how the majority’s views are being recognized in law, albeit with some minor tweaks to align the objective with existing rights provisions.

However, this response downplays the significance of the fact that section 1 justification is itself an appeal to the judiciary to adjudicate on the constitutionality of a law. While section 1 justifications or reply legislation may allow the legislature to achieve its broader objective, this is only accomplished because of either a) agreement by the judiciary that the resulting legislation is constitutionally valid or b) acquiescence by the judiciary to the majority view in the face of a clear legislative preference for a particular policy option. The second option depicts the judiciary as more politically responsive than it is usually thought to be, given its relative insularity from political forces, and is an uncharitable view of the judiciary’s ability to withstand public criticism for ruling against the legislature. The first option seems the most charitable to what the judiciary takes itself to be doing; after all, a judge is not meant to be engaged in catering to majority preferences or submitting to the legislature, but ought to be making a good-faith effort to resolve conflicts between laws and the *Charter*. Judges are not infallible and may be mistaken in their initial interpretation of the law, or they may be presented new and more

²⁰³ “Reply to “Six Degrees of Dialogue”,” 534.

compelling arguments in a “second look” case of assessing reply legislation than were presented in the “first look” case that initially raised the issue. Reply legislation may also be constitutionally valid in a way that the original legislation was not. These observations do not necessarily support the idea that the legislature is having the “final say”; rather, they strongly suggest that the legislature is successfully tailoring its laws in a way that convinces the judges that those laws are constitutionally valid.

This argument rests on a claim that is similar to the one made by new model theorists: that declining to use a legal power does not negate that power.²⁰⁴ This concept was applied in the new models to support the claim that the disuse of section 33 is not necessarily an indication that it has become unusable or that legislative finality no longer applies. Here, the same concept can be used to show that a ruling in favour of the constitutionality of reply legislation under a section 1 justification is not an indication that section 1 confers legislative finality. In other words, the fact that the judiciary declares a law to be constitutionally valid under section 1 means that it is the judiciary that is having the final say, not the legislature. Declining to strike down legislation is not an indication that the power to strike down legislation is gone, but an indication that the legislature has got it right. The decisive word on the constitutionality – and, hence, the validity – of a law is still in the hands of the judges. Thus, section 1 does not confer legal supremacy on the legislature. What it does is allow the legislature an opportunity to present its case before the judges, whose decision on the constitutional validity of the law is authoritative.

²⁰⁴ See Roach, “The Myths of Judicial Activism,” 324, 327; Roach, “A Dialogue About Principle,” 464.

Briefly, it is important to note that the new model response to the “judges-as-politicians” objection is also weakened by the descriptive inaccuracy of the new models. Given that legislative finality is not a possibility on all rights-related issues, there is no structural failsafe on which judges can rely as reassurance that their rulings do not ignore or offend majoritarian views too much. Absent this legislative finality, new model accounts will have difficulty explaining how judges can avoid politicizing the judicial role by being activist or acquiescent. This is not to say that judges can or will fall into this trap; only that the new model response to this objection fails, because it relies on the presence of comprehensive legislative finality when the Canadian legal system only contains compartmental finality.

Of course, these issues also face the hybrid model. Acknowledging the existence of compartmental legislative finality in Canadian law means that the hybrid model will struggle to find a response to the anti-democratic and judges-as-politicians objections to judicial review that is in line with what proponents of the new models offer. The hybrid model, if it is to provide a response to these objections, will need to rely on ideas like Waluchow’s “community’s constitutional morality” to explain how judges are not serving an “undemocratic” function when providing authoritative rulings on rights-related issues that are not subject to the legislative override.

Conclusion

Both the NCM and the theory of dialogic judicial review take note of two important positive developments in Canadian constitutionalism: the advent of a multi-

staged procedure for reviewing rights-related legislation, and an increase in legislative and public concern for protecting rights. The novel procedures described and supported by new model theorists can serve to ensure that important issues are placed on the legislative agenda and can add to the quality of rights-related political deliberation.²⁰⁵ There is also a strong case to be made that the new models are better normative accounts of constitutionalism, and that the presence of legislative self-restraints in the form of weak-form judicial review under an entrenched bill of rights can help to ensure that rights are better protected than under systems of legislative supremacy.

However, both of these new models have been shown to be defective descriptions of how legal authority is divided in Canada between the legislative and judicial branches. My examination of constitutional models in this paper calls into question many of the assertions that proponents of the new models have made. The New Commonwealth Model of constitutionalism points out one way in which a healthy constitutional system might be designed, but it fails to explain how the normative constraints on the legislature's use of its "compartmental" legal finality differ from the normal constraints that restrict legislative power in systems of parliamentary sovereignty, making it difficult to separate Gardbaum's account from the traditional models in some of the key ways in which they ought to be distinct. Similarly, the theory of dialogic judicial review relies on legislative finality in a way that makes it difficult to distinguish key components of the theory from the model of legislative supremacy. Furthermore, it is not clear that legal authority is "shared" between Canadian courts and legislatures. Rather, based on the

²⁰⁵ McLachlin, 368.

formal structure of the *Charter*, it seems that there is a *division* of authority over the Canadian legal landscape.

One of the major benefits of the new models is their ability to draw attention to the distinction between changing the constitution to achieve the legislative objective, and achieving the legislative objective without changing the constitution.²⁰⁶ The implicit judgment on the constitutionality of a law that this distinction carries with it is one key difference between the power to enact legislation *absent* an entrenched bill of rights and the power to enact legislation *notwithstanding* an entrenched bill of rights. In both cases, the law that is enacted is legally authoritative; but while in the former case this is the end of the story, in the latter case the law may still offend the sensitivities of the public and be seen, by some, as a violation of the more fundamental principles that underpin life in Canadian society. Some versions of dialogic judicial review assume that the judiciary is the authoritative legal interpreter of the constitution,²⁰⁷ so any exercise of the legislative override is a matter of sustaining “unconstitutional” law in force by fiat, rather than by legitimate engagement with the substantive issue of balancing rights protections with legislative objectives. These versions of DJR typically include strong criticisms of section 33 and are often accompanied by recommendations for its abolishment or revision.²⁰⁸ Other versions treat the legislature and the judiciary as equal partners in constitutional

²⁰⁶ Roach, 481.

²⁰⁷ Hogg and Bushell, “The Charter Dialogue,” 79.

²⁰⁸ Both proponents and opponents of dialogue theory have suggested such amendments; see Janet L. Hiebert, “Is it Too Late to Rehabilitate Canada’s Notwithstanding Clause?” *Supreme Court Law Review* 23 (2004): 186, commenting on Manfredi’s proposal to change section 33; and Kahana, “What Makes for a Good Use,” *passim*, for a discussion of several proposals to change section 33 or restrict its use.

interpretation,²⁰⁹ and adopt a theory of coordinate construction in which courts and legislatures are jointly engaged not only in the exercise of constitutional power and the protection of rights, but also in the practice of broader constitutional interpretation.²¹⁰

What these versions of DJR share is a recognition that while Canadian legislatures can, in theory, override judicial decisions in order to achieve their objective on many rights-related issues, they cannot change the constitution without significant and extraordinary effort and they *will not* quickly opt to ignore or override the rights provisions of the *Charter*. These observations challenge the assertion that Canadian constitutionalism is best described using the model of legislative supremacy, but they also challenge the version of dialogic theory that most scholars have proposed and undermine some of the main claims made in support of the NCM. There is, to be sure, an ongoing and valuable constitutional dialogue over constitutional interpretation, and this dialogue includes the legislature and the judiciary, as well as the general public.²¹¹ But insofar as constitutional models purport to describe the system of constitutional authority that is currently in place in Canada; the allocation of legal power under our system of constitutional supremacy; and the way in which constitutional issues are resolved, the four existing theories suffer deficits that the hybrid model does not.

²⁰⁹ See, for example, Barry Friedman, “Dialogue and Judicial Review,” 91 *Michigan Law Review* (1993): 577, 1993.

²¹⁰ Huscroft, *passim*, but especially 101. See also Slattery, 706-8. Roach critiques this view of the legislature’s role in constitutional interpretation in “Constitutional and Common Law Dialogues,” 493. Naturally, a theory of coordinate construction will validate legislative overrides; if the legislature is an authoritative interpreter of the constitution on a par with the Court, then the legislature can merely interpret its statutes in a way that makes them consistent with rights provisions.

²¹¹ Friedman, 577; see also some supportive comments in Lyon, 123; Slattery, 709; Schor, 550-1, 561; Roach, *The Supreme Court on Trial*, *passim*, and in Wade K. Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada,” *Supreme Court Law Review* 51 (2010): 628.

One last significant implication of this thesis, I think, is that Canadians appear to have more direct control over the balancing of rights with legislative objectives than do citizens in systems of strong judicial review. The fact that the legislature has the power to override judicial interpretations of some of the rights provisions of the *Charter* means that normal Canadians can express their views on rights-related issues through the simple action of voting. While there is inevitably some uncertainty over whether representative legislators can accurately represent the views of their electors, primarily because it is rare to have a clear understanding of the public's motivations for electing a particular party or politician, it is nevertheless the case that Canadians are formally able to express clearly their views on constitutional interpretation and the balancing of Charter rights through the *ex post* safeguard of electoral accountability. The legislature, accountable to the public through the normal electoral process, is able to achieve its objectives formally unimpeded by judicial interpretation and subject only to a few manner-and-form requirements, the pressures of political accountability, and the guidance of their own views as members of the electorate themselves. There is nothing extraordinary, abnormal, or new about the components of this system of authority or about the structure of Canadian constitutionalism. What is new, and what is most unique about the new models, is the observation that increasing the number of opportunities for input on rights-related issues from a variety of different perspectives can, and often does, result in better rights protection.

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