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### **The Canadian Constitution and the World**

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The Oxford Handbook of the Canadian Constitution

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### **Abstract and Keywords**

This chapter examines the influence of elements of Canada's constitutional model abroad, in three areas: (1) the Canadian Charter of Rights and Freedoms as an innovative way to institutionalize the relationship among legislatures, executives, and courts with respect to the enforcement of a constitutional bill of rights, as justified by "dialogue theory", that contrasts starkly with its leading alternatives, the American and German systems of judicial supremacy; (2) Canada's plurinational federalism as a strategy to accommodate minority nationalism and dampen the demand for secession and independence within the context of a single state, by divorcing the equation of state and nation; and (3) the complex interplay between a constitutional bill of rights and minority nation-building, as reflected in the constitutional politics surrounding the recognition of Quebec's distinctiveness, and the role of the Supreme Court of Canada in adjudicating constitutional conflicts over official language policy arising out of Quebec.

Keywords: Canadian Charter, Constitution of Canada, constitutional amendment, dialogue, federalism, language, legislative override, nationalism, secession, Canadian Supreme Court

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# 1. Introduction

\*Canadian constitutional discourse—scholarly, legal, political—has been receptive to comparative influences since its very inception. Our openness to comparative engagement, I would suggest, is a product of the constitutional pluralism that defines the Canadian constitutional order. Canada’s constitutional framework is a *métissage* arising from English, French, and Indigenous legal traditions, and from a variety of sources—constitutions, statutes, common law, convention, custom, and treaty—within each of those traditions. Canadian constitutional argument consists not just of arguing *within* discursive frameworks, but reasoning and justifying *across* them. Integrating the diverse lineaments that are the constitutive elements of Canadian public law is at the very heart of our constitutional project. It is only natural that Canadians would instinctively look beyond our legal borders to comparative experience from other countries as a source of lessons learned, models to be followed, and dangers to be avoided.

In this chapter, I examine the corollary to Canada’s comparative engagement—the influence of elements of Canada’s constitutional model abroad, in three areas: (1) the *Canadian Charter of Rights and Freedoms* as an innovative way to institutionalize the relationship among legislatures, executives, and courts with respect to the enforcement of a constitutional bill of rights, as justified by “dialogue theory”, that contrasts starkly (p. 1076) with its leading alternatives, the American and German systems of judicial supremacy; (2) Canada’s plurinational federalism as a strategy to accommodate minority nationalism and dampen the demand for secession and independence within the context of a single state, by divorcing the equation of state and nation; and (3) the complex interplay between a constitutional bill of rights and minority nation-building, as reflected in the constitutional politics surrounding the recognition of Quebec’s distinctiveness, and the role of the Supreme Court of Canada in adjudicating constitutional conflicts over official language policy arising out of Quebec. The first two mark well-trodden terrain, whereas the third, less so, although it bears careful attention for countries interested in learning how the different pillars of the Canadian constitutional model interact.

The vectors of Canadian influence are not those that characterize the leading global constitutional models—the first post-colonial, republican constitution adopted by a country that emerged as the world’s leading economic and military superpower (United States); metropolitan constitutions that still held appeal during the process of decolonization (France, United Kingdom); the distinct attraction of post-authoritarian, dignity-protecting constitutions that resonate with countries underdoing similar transitions, especially after the fall of Communism (Germany); and the growing importance of constitutional models from the global south that are attuned not only to the need to constrain public power, but to mandate and channel its exercise in the service of human development in the context of deeply entrenched socio-economic inequality (India, South Africa). Rather, Canada’s global constitutional footprint is rooted in our “soft power”—that is, the attractiveness of our example as a rights-protecting liberal

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democracy characterized by multiple forms of diversity (immigrant, Indigenous, plurinational) that is remarkably prosperous, peaceful, and stable, and deeply committed to the rule of law.

While the focus of this chapter is contemporary, this should not imply that foreign interest in Canada's constitutional model is only recent, especially in the Commonwealth. For example, as Peter Oliver has taught us, Canada, along with Australia and New Zealand, in the process of achieving independence within the imperial constitutional order, had to wrestle with the central puzzle of constituent power in the face of the competing imperatives of legal continuity and parliamentary supremacy, on the one hand, and on the other, the democratic pressure for an autochthonous source of constitutional title in newly democratic states. How each country approached this issue was of great interest to the others.<sup>1</sup> More prosaically, the doctrines of Canadian federalism—such as pith and substance, and double aspect—have become important tools of judicial interpretation in other Commonwealth federations, such as Australia, India, and South Africa, and even in the United Kingdom with respect to the scheme of devolution created by the *Scotland Act*. The Canadian recognition of common law aboriginal title in *Calder* in the early 1970s was a harbinger for the recognition of similar rights across the Commonwealth in the following decades, in Australia, Belize, (p. 1077) Botswana, Malaysia, New Zealand, Papua New Guinea, and South Africa. Indeed, as David Law and Mila Versteeg have highlighted, the *Charter* resembles most closely bills of rights in other Commonwealth jurisdictions.<sup>2</sup> We can extend their observation to suggest that the combination of shared legal tradition, language, colonial history, and constitutional text creates a dense legal platform for the migration of constitutional ideas among Commonwealth jurisdictions, both with respect to constitutional design not only of bills of rights, but also federalism and the status and powers of Indigenous peoples, as well as the judicial interpretation of those provisions.

Canadian scholars have figured prominently in transnational debates about bills of rights and the constitutional accommodation of minority nationalism. What bears special attention is that there is an important domestic politics to our foreign interventions. Interest in elements of the Canadian constitutional model abroad coincided with intense controversy over precisely those elements at home. International engagement with the Canadian alternative to judicial supremacy with respect to constitutional bills of rights took place at a time when the Supreme Court of Canada came under sustained attack for engaging in judicial activism and asserting its supremacy over the other branches of government, which appeared to place a core feature of that model in question. The rise and promotion of the Canadian model of plurinational federalism, in parallel fashion, occurred during the constitutional crisis of the mid-1990s over Quebec secession, which that very model was designed to prevent. Canadian experts promoted elements of the Canadian constitutional model abroad, in part, to enhance their political attractiveness and success domestically.

# 2. Dialogue Theory and the Canadian Alternative to Judicial Supremacy

Anxieties over judicial review under a constitutional bill of rights were an important element of the debates preceding adoption of the *Charter*, because of the new element it introduced into Canada's pre-existing system of constitutional supremacy, hitherto confined to the federal division of powers. The experience of the United States—especially the constitutional crisis over the New Deal, and the liberal legal agenda championed by the Warren Court—loomed large, especially to Canadian legal elites who increasingly receive their graduate training in the United States.<sup>3</sup> The federal government's proposals were clearly alert to the risks that judicial review under the *Charter* posed, no more so than with section 7.<sup>4</sup> That provision was drafted to prevent the libertarian legacy of the (p. 1078) *Lochner* era from coming to Canada, by excluding "property" and substituting it with "security of the person", with the goal of orienting the provision around corporeal interests and protecting the redistributive, regulatory state from constitutional challenge. It was also designed to preclude the activist legacy of *Lochner*, rooted in the doctrine of substantive due process, by requiring that the deprivation of protected interests accord with "the principles of fundamental justice", not "due process", ironically in order to limit the scope of the provision to procedural fairness.

But the biggest constitutional concession to the fears of the growth in judicial power under the *Charter* was the inclusion of the legislative override or notwithstanding clause, section 33. That provision allows the federal Parliament and provincial legislatures to enact laws that would otherwise be unconstitutional because they unjustifiably limit certain *Charter* rights—the fundamental freedoms, legal rights, and equality rights—but not the democratic rights, mobility rights, or language rights. An exercise of the override expires at the end of five years. The override is a distinctive, made-in Canada constitutional innovation, and is at the heart of the global interest in the *Charter*, because it combines a form of judicial review of legislation with the retention of ultimate legislative supremacy. Mark Tushnet has helpfully termed the Canadian model of rights-based judicial review "weak-form", to contrast it with "strong-form" judicial review built around judicial supremacy, whether wielded by a generalist apex court (as in the United States) or a specialist, Kelsenian constitutional court (as in Germany and most countries).<sup>5</sup> It offers a "third way" in between legislative supremacy and judicial supremacy that broadens the scope for constitutional choice, and in particular, another option for countries with legislative supremacy that wish to adopt judicial review but which have misgivings about it.

However, because the override was added to the *Charter* during the final, closed-door round of negotiations in November 1981, there is little in the way of a contemporaneous legislative record that sets out the justification of constitutional actors for its adoption—unlike for section 7, for example. What is indisputable is that the override was a political

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compromise that enabled nine provinces (not Quebec) and the federal government to come to agreement over the 1982 constitutional package, which included the *Charter*, the Aboriginal rights provisions of the Constitution, and domestic procedures for constitutional amendment. In the years since its enactment, two main theoretical justifications for the override have emerged, which I term the *negative* and *positive* justifications. The negative justification is that the override provides a constitutional safety-valve in the event of prolonged conflict between the courts, on the one hand, and executives and legislatures, on the other.<sup>6</sup> In the absence of an override, the political branches would eventually prevail over the courts, through abusing the power of judicial appointment (court-packing) and/or publicly attacking the court (court-bashing), which could severely damage and perhaps destroy the institution of judicial review itself. The (p. 1079) override is an institutional mechanism for channelling this disagreement into a transparent, public process governed by the rule of law through a self-terminating legislative enactment that must be express in its intention to set aside the *Charter*. It thereby preserves the institution of judicial review while allowing the political branches to ultimately prevail. The override, on this view, is a constitutional conflict avoidance mechanism designed to provide a means to avert a crisis such as the one that occurred in the United States on the constitutionality of the New Deal.

The negative justification of the override suggests this mechanism's principal target is the behaviour of political institutions; it is noticeably silent on the impact that the override could have on how courts conceptualize and execute judicial review under the *Charter*. By contrast, the positive justification for the override offers such an account.<sup>7</sup> The most fully-worked out theory has been offered by Stephen Gardbaum, initially in an article published in 2001.<sup>8</sup> Gardbaum argued that the override lies at the heart of a constitutional model of rights-protection whereby judges and legislatures perform distinct functions or roles. Judges should interpret bills of rights without fear of the consequences of judicial over-enforcement, because judges are not supreme. The reasons for deference that arguably follow from judicial supremacy no longer exist. Judges can interpret rights broadly, and apply every stage of the proportionality analysis in a stringent manner to impose a very high burden of justification. Should a court hold that legislation contravenes rights in a manner that cannot be justified, the legislature could disagree and respond to the court by re-enacting its previous legislation.

What judicial review coupled with an override adds to a system of pure legislative supremacy is a mechanism to correct several well-known defects in the legislative process: the failure to anticipate the consequences of general legislation which sets out abstract standards when applied to individual cases, especially in circumstances where the legislature lacks representation by the socially disadvantaged or marginalized who would have been alert to the disproportionate impact of legislation on their rights (e.g., women, the poor); the discounting of the rights of those who completely lack the political power to protect themselves in the political process (e.g., non-citizens, children); the prejudice or indifference toward the rights of discrete and insular minorities who may

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wield the right to vote and who—in Jeremy Waldron’s helpful formulation—are not just topical, but decisional minorities because they are persistently on the losing side of legislative votes and rights-violating political decisions;<sup>9</sup> the making of decisions under panic in response to concerns about national security, and so on.

One or more of these pathologies serve as a basis for most contemporary justifications of strong-form judicial review, which presuppose that courts are less likely than legislatures to fall prey to them. However, strong-form review is subject to two well-known democratic objections: that it debilitates democracy by dulling the habits of self-government

(p. 1080) through the removal from the political agenda of the most controversial and important questions of political morality, and that it distorts policy choices because political institutions must work within the constitutional framework laid down by the court, either *ex post* (if a law is struck down), or *ex ante* (in anticipation of a finding of unconstitutionality). At its heart, weak-form review aspires to capture some of the upsides of judicial review while lowering the risk of the downsides. The principal role of a court under weak-form review is to serve as an institutionalized forum for highlighting rights-based issues to lower the risk they will be ignored in subsequent legislative debates.

The task of legislatures in responding to court judgments under weak-form review is not simply to recapitulate the exercise engaged in by the reviewing court—that is, not to re-run the legislative process but to give concerns about rights priority over all other competing considerations. Rather, the role of legislatures is to make an *all-things considered* judgment in which rights-related considerations occupy an important and perhaps even a central place, but are by no means the only relevant or most important factor on the table. If the legislature sets aside the court’s judgment, and either proceeds with its initial course of action or modifies it to adopt measures that impair the right to a lesser extent but which are not necessarily the least rights-infringing measures, this disagreement does not mean that the legislature has made a legal error in interpreting and applying the bill of rights. Rather, it reflects the legislature’s judgment that a broader range of considerations can outweigh the rights-related reasons advanced by the court that may be entirely correct on their own terms. The value of judicial review is that it forces the legislature to reconsider the legislation in light of the views of a body expert in questions of rights-protection, as expressed through a thoughtful, detailed judgment, to respond to those views, and to be held politically accountable for any decisions to disagree. Judicial review with an override neither debilitates democracy nor distorts policy choice. On the contrary, it enhances both.

It is the positive case for the override that has captured comparative attention. Canadian scholars have been central participants in this global conversation, although their preoccupations have been domestic, and have arisen out of local concerns over judicial activism. Canadian debates about judicial activism have in fact come in waves. The first critics of the *Charter* came principally from the Left, and focused on the concern that notwithstanding the exclusion of rights of contract and property from the *Charter*, the courts would erect constitutional obstacles to the interventionist, regulatory state.<sup>10</sup> Oddly, the override was absent from these debates, despite its origins precisely as a

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means to equip legislatures to check the rise of this kind of jurisprudence. (p. 1081)

Instead, Canada's constitutional Left trained its fire at the Court's broad interpretation of rights, and the demanding version of the proportionality test it adopted in *Oakes*. The Supreme Court responded to these criticisms not, as it could have, by insisting on the use of the override, and maintaining its stringent approach to justification under section 1. Rather, it crafted a series of doctrines of deference that made it far easier for governments to meet the burden of justification under section 1.<sup>11</sup>

The mantra of judicial activism in Canada was then taken up by the Right, who charged that under the cloak of judicial review, the Supreme Court was foisting a left, progressive political agenda upon the Canadian public, especially on questions of same sex rights, gender, and criminal justice. The most prominent right-wing academic critics were Ted Morton and Rainer Knopff, whose views gained great currency in the Reform Party, a right-wing political party (which later merged with the Progressive Conservative Party to form the Conservative Party of Canada, which for nearly a decade governed Canada led by Stephen Harper).<sup>12</sup> The central response to this critique from Canadian legal scholars is "dialogue theory", which captures distinct yet related *institutional* and *interpretative* claims. The *institutional* claim is that the Supreme Court does not in fact have the "last word", because its judgments finding laws unconstitutional are in many cases followed by legislative "replies" that largely achieve the same objectives, albeit by different means. However, one of the notable features of Canadian constitutional practice is that these legislative replies are enacted without the use of the override. Rather, as Peter Hogg and Alison Bushell—the academic originators of dialogue theory—explained, the principal mechanism of "dialogue" is section 1, whereby legislation is usually struck down because it fails to use the least restrictive means, as opposed to pursuing an illegitimate goal.<sup>13</sup> The ability to pursue the same goal through modified means signifies that to characterize the balance of judicial and legislative power under the *Charter* as judicial supremacy tout court is an over-simplification. Thus, the response to the right-wing critics of the *Charter* was to mobilize empirics to throw into question the inference of judicial *domination* of the political branches from the institution of judicial *supremacy*. The Hogg and Bushell article was highly influential, not only as a piece of scholarship, but as a domestic political intervention that reconfigured debates in Canada over the Supreme Court. Dialogue quickly emerged as the dominant metaphor in scholarly, legal professional and political discourses for conceptualizing judicial review in Canada and to contrast it with judicial supremacy, especially in the United States. Notably absent from Hogg and Bushell's analysis is the override, which for them played only a minor role in dialogue. This was likely due to the fact that the (p. 1082) override has been sparingly used in Canada—approximately a dozen times—arguably because it was delegitimized through its use by Quebec in the late 1980s to protect legislation mandating French commercial signage after the Supreme Court's decision in *Ford*.<sup>14</sup> Nonetheless, dialogue in a different form has emerged, through section 1.

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Kent Roach extended the institutional claims of dialogue theory considerably in a manner that linked up Canada to transnational discussions of the Commonwealth constitutional model.<sup>15</sup> Institutionally, Roach analogized between judicial review under the *Charter* and statutory interpretation against the backdrop of common law rights, which could be overridden through express statutory language. These so-called clear statement rules anticipate weak-form judicial review, as legislatures must expressly override rights that apply presumptively; however, the absence of a proportionality analysis applicable to such statutory derogations of common law rights makes the analogy imperfect. Nonetheless, as a rhetorical matter, Roach's linkage of the *Charter* and its common law antecedents had the effect of tying Canada to debates over the establishment of rights-based review of legislation in the United Kingdom and New Zealand, which he also saw as growing out of the common law tradition of rights-protection. For Roach, what these systems shared is that, like the common law, legislative supremacy was retained. To be sure, there are important differences among these systems; the *New Zealand Bill of Rights Act* only creates an interpretative obligation for legislation that can be overridden by clear legislation, and therefore represents the least of a break from the common law; the United Kingdom *Human Rights Act* incorporates the *European Convention of Human Rights* into domestic law, and grants courts both an interpretative power and the authority to issue declarations of incompatibility for legislation but not invalidity; the *Charter* alone among these three instruments grants courts the power to strike down legislation for unconstitutionality, along with interpretive authority. But there is a clear domestic politics to Roach's argumentative move. On his account, the *Charter* is not a constitutional revolution; rather, it is an incremental development from Canada's common law constitutional past, which combined judicial rights-protection with legislative supremacy—as does the *Charter*. Moreover, by grouping the *Charter* with systems of weak-form review in other advanced industrial democracies within the Commonwealth with which Canada shares a common law tradition and fidelity to Parliamentary democracy, and which provide for a lesser degree of judicial power and a greater degree of legislative supremacy than does the *Charter*, Roach further sought to deflect domestic political criticism.

What does dialogue theory say about the *interpretative* question of how the different branches of government should conceptualize their relationship to, and functions under, a constitutional regime of rights protection, such as that established by the *Charter*? This first question arose with respect to the courts, in the narrow context of *Charter* challenges to legislative replies that do not strictly conform to the court's prior judgment. Under (p. 1083) a system of strong-form review, such legislation should be unconstitutional. Courts could approach this kind of situation in precisely the same way under the *Charter*, compelling the use of the override, even if the deviation from the prior judgment is minor, thereby forcing a public debate and democratic accountability for this legislative decision. Judicial practice under the *Charter*, however, has been inconsistent. The Supreme Court has asserted the supremacy of its interpretations of the *Charter* in *Sauvé (2)*, whereas seemingly allowing Parliament to overrule it without recourse to the override in *Mills, Hall, and JTI MacDonald*.<sup>16</sup> Arguably, *Mills* can be explained on the basis

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that the reply legislation overruled a prior common law ruling of the Court, *O'Connor*, and that the Court merely showed deference to a statute which itself had not sought to re-enact a legislative provision previously struck down. The rationale for *Hall* and *JTI MacDonald* could possibly be that Parliament adduced new social science evidence to justify the reply legislation at issue in both cases, shifting the minimal impairment analysis under section 1 to uphold measures it had previously struck down because of a lack of an evidentiary foundation. Neither rationale would distinguish the *Charter* from strong-form judicial review. But the Court—and Canadian legal scholars who advocate dialogue theory—have thus far failed to offer a coherent account of these cases, which should be rooted in an underlying account of how courts should orient themselves to reply legislation.

Political scientists, notably Janet Hiebert, have taken up this task, by arguing that dialogue theory should be extended to embrace coordinate construction by Parliament with respect to the interpretation and application of rights.<sup>17</sup> She later broadened this research agenda comparatively, initially to the United Kingdom<sup>18</sup> and more recently, in collaboration with James Kelly, to New Zealand.<sup>19</sup> This comparative turn served as the basis for the original and more radical claim that bills of rights in Westminster-style parliamentary democracies (including Canada) disperse responsibility for rights protection beyond courts to the Executive and to the legislature. As a consequence, instead of taking place only during the process of judicial review, rights review takes place at three different stages: (1) pre-enactment political rights review of primary legislation by the Executive and the legislature, (2) judicial rights review, and (3) legislative reconsideration of court judgments which have held primary legislation to be inconsistent with the bill of rights. These claims about interpretative authority have important institutional implications. In addition to recasting the relationship between courts, on the one hand, and executives and legislatures, on the other, they also reconfigure the relationship between the legislature and the Executive—or more precisely, the government (p. 1084) backbench and Cabinet. Clothing the legislature with the responsibility to engage in rights-review has the goal of empowering the government backbench relative to the Cabinet, in alliance with opposition MPs, by providing it with a legal tool to challenge party discipline in limited yet important circumstances involving rights-infringing legislation. Gardbaum's most recent work has taken on board these claims.<sup>20</sup>

This most recent turn in dialogue theory—encompassing in Canada, the United Kingdom, and New Zealand—is a significant departure from its initial formulation, which conceptualized courts and legislatures as performing distinct functions within a system of rights-protection. It squarely raises the empirical question of how political institutions actually reason with rights. In dialogue theory's first iteration, pre-enactment review takes the form of legal risk management in the shadow of constitutional doctrine, whereas post-judgment legislative replies are rooted in all-things-considered judgments where rights are one consideration among others. In its second iteration, dialogue theory posits that political institutions have the opportunity and perhaps even the responsibility to offer their independent good faith interpretations and applications of bills of rights,

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which at times may be at odds with those of the courts, at both the pre-enactment and post-judgment legislative stages. However, the facts do not fit the theory. Kelly has shown that prior to the introduction of legislation, internal analysis by federal and provincial government legal advisors in Canada is largely confined to risk analysis.<sup>21</sup> Hiebert and Kelly have recently extended this observation to the United Kingdom and New Zealand. Moreover, they also show that the anticipated impact on backbench behaviour has not materialized either in Canada, the United Kingdom, or New Zealand. This is true even in the United Kingdom, where the Joint Committee on Human Rights of the UK Parliament has special responsibility to scrutinize legislation for compliance with the *Human Rights Act*, making the United Kingdom the most highly developed and transparent system of pre-enactment political rights review in the Commonwealth. However, the Committee's reports consist largely of highly sophisticated legal analysis of European Court of Human Rights and United Kingdom Supreme Court jurisprudence, as opposed to counter-interpretations of the *Human Rights Act*. Although there have been important exceptions, the Committee has rarely frontally challenged the government and forced it to change course. In New Zealand, electoral reform (shifting from first past the post to mixed member proportional) has enhanced the power of political parties relative to MPs, dampening the potential for legislative accountability for rights-protection even further.

The empirics do not match the normative ambitions of the most recent version of dialogue theory. Why is this the case? Hiebert and Kelly argue that two of the core features common to Westminster democracies—cabinet dominance of the legislature in situations of majority government, and strongly disciplined political parties which do not provide much scope for legislators to stray from party positions—are so deeply rooted that the dispersal of authority for rights protection, even with creative institutional design, (p. 1085) cannot overcome them. By situating Canada comparatively, their analysis gains considerable power by highlighting explanatory factors shared with New Zealand and the United Kingdom. The next move in this global scholarly conversation should be to bring it full circle back to its origins in Canada, as a further spur to comparative reflection. If the original version of dialogue theory is the more realistic one, it is important to ensure that judicial decisions holding that legislation contravenes bills of rights do in fact receive a legislative response. A large factor is which institution bears the burden of legislative inertia. In cases where courts possess the power to issue a declaration of invalidity (Canada), or to interpret legislation to be compatible with rights (Canada, New Zealand, and the United Kingdom), a judicial ruling stands absent a legislative response. The legislation is thrust back onto the legislative agenda, and the legislature must affirmatively act if it is to have the final say, which increases the likelihood that there will be a political debate on how to respond to the court's judgment. Of these two, a declaration of invalidity is more transparent and hence the best tool for cuing political debate and accountability. In the United Kingdom, the practice of legislative replies to declarations of invalidity is almost entirely a function of the contingent fact that cases under the *Human Rights Act* may ultimately come before the European Court of Human Rights, which has the power to issue legally binding judgments to which the United

Kingdom Parliament must respond. As a matter of institutional design, the Canadian version of weak-form review has comparative advantages over its counterparts in New Zealand and the United Kingdom.

However, the development of a rich jurisprudence of doctrines of deference under section 1 has had the effect of diminishing the need to deploy the override, and undermined the potential of the uniquely innovative aspect of Canada's constitutional design. Those doctrines are far more developed in Canada than in the United Kingdom or New Zealand. What is striking is that these doctrines—which have generated an immense jurisprudence that cuts across particular rights under the *Charter*, and has been a flashpoint of conflict on the Supreme Court—read as if the *Charter* created a system of judicial supremacy, and that it therefore falls to the Court to calibrate the intensity of judicial review. The override is entirely absent from the Court's conceptualization and doctrinal operationalization of the idea of deference. What needs to occur is the integration of institutional and interpretive analysis. In its purest form, dialogue theory posits that courts should not defer under section 1, because of the possibility of the override. An alternative would be to differentiate among different kinds of *Charter* violations, requiring only some to trigger the use of the override. I defer the full elaboration of this argument for another day.

### 3. The Canadian Model of Plurinational Federalism

The Canadian model of plurinational federalism is another dimension of our constitutional regime that has garnered considerable global interest, and is of central importance (p. 1086) to international debates over how constitutional design can and should respond to the relation between constitutionalism and nationalism.<sup>22</sup> The context in which this issue arises is the plurinational state. The constitutional problems of plurinational states arise because modern states necessarily engage in a process of nation-building, which is designed to produce a degree of common identity, shared by all its citizens, across the entire territory of the state. The means to do so include policies centered on language, and culture, and on the centralization of legal and political power. The goals of nation-building are diverse, and include providing the necessary motivational element missing from liberal accounts of political legitimacy to induce individuals to make a particular set of liberal democratic institutions work and accept their demands; providing a mobile work force, literate in a common language that can pursue economic opportunity across an integrated national market; and ensuring that citizens can communicate directly with government officials.

But many states also contain national minorities whose members once formed complete, functioning societies on their territory, endowed with a considerable degree of self-rule, prior to their incorporation into the larger state through conquest and empire or voluntary federation or union. Consequently, many national minorities will resist nation-

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building efforts, and respond by conceiving of themselves as nations and making constitutional claims designed to both protect themselves from the majority's nation-building project and to enable them to engage in a parallel process of nation-building focused on the territory around which they constitute a majority. There are many plurinational states around the world—Canada, the United Kingdom, Belgium, Spain, Russia, Sri Lanka, Iraq, and India—just to name a few. In these states, constitutional design matters a great deal, as constitutions are the principal sites for majority nation-building as well as for national minorities' resistance to the overarching process of nation-state consolidation. Canada is a conspicuous example of how constitutional design can accommodate competing nation-building agendas within a single state. Put simply, the Canadian exemplar responds by challenging the equation of nation and state that underlies not only majority nation-building but also the defensive response of minority nations, for which the logical response is to resist incorporation into the majority nation and demand states of their own.

Federalism is the feature of the Canadian constitutional model that addresses this issue most directly. Canada is a plurinational federation because the boundaries of the province of Quebec were drawn so that francophones would constitute a majority therein and could not be outvoted by the anglophone majority in Canada as a whole. This remains true today—indeed, the territorialisation of linguistic communities across Canada is greater now than when Quebec was created. Moreover, Quebec was granted a mix of concurrent and exclusive jurisdiction over a wide range of policy areas that gives it the tools to ensure the survival of a francophone society by creating a complete set of (p. 1087) institutions that operate in French across the economy, politics and public administration, and education. Inasmuch as language is the driving force behind Quebec's claims for political autonomy, the Canadian model blunts its force by implying from jurisdiction over certain institutions or relationships the power to set the language in which those institutions operate or relationships occur. In exercise of this authority, Quebec enacted the *Charter of the French Language* in 1977 to make French “the language of the Government and the law, as well as the normal and every day language of work, instruction, communication, commerce and business”. The key provisions of the *Charter of the French Language* are those that establish French as the exclusive language of work within the civil service, flowing from the province's constitutional authority over provincial public administration. Likewise, the *Charter of the French Language* promotes French as the internal working language of medium- and large-sized business in the province through Quebec's power over property and civil rights, which encompasses the authority to regulate commercial transactions and private sector workplaces. Together, these measures vastly increased range and attractiveness of the economic opportunities for francophones in Quebec.

The responsibility for primary, secondary, and postsecondary education also lies within provincial jurisdiction, and impliedly encompasses power over the language of instruction and curriculum. This authority has been crucial for Quebec, because the Constitution has permitted the province to establish and operate a primary and secondary educational system that operates in French and is a prime instance of linguistic nation-building.

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Additionally, the control over education has enabled Quebec to create French-language colleges and universities, an indispensable support for the use of French in economic and political life. At the same time, this arrangement has denied the federal government the power to set a standard curriculum in a shared national language, a common instrument of nation-building in many countries.

Although the Canadian model of plurinational federalism continues to evolve, many of its key features have been in place since the mid-nineteenth century. However, there was sharp rise in academic and policy interest in Canada's plurinational federalism in the mid-1990s. Why? The answer may be found not in Canada, but in Eastern and Central Europe. The collapse of the communist dictatorships in the latter region were followed by the rise of profound ethnic conflict within these democratizing states. As it turned out, many of these states fulfilled the definition of a plurinational polity, and the political sociology of emergent conflict within plurinational polities—the competing projects of majority and minority nation-building—fit the unfolding pattern of political conflict in those countries. In the search for solutions, plurinational federations such as Canada were an obvious candidate.

But the advocates of plurinational federalism were confronted with the fact that the three former communist dictatorships of Eastern and Central Europe—Czechoslovakia, the Soviet Union, and Yugoslavia—had already been plurinational federations prior to the transition to democracy, and all three began to disintegrate shortly after the transition. By contrast, unitary states with large national minorities in which nationalism served as the axis of internal political conflict—Hungary, Poland, and Romania—did (p. 1088) not fall apart. Indeed, the problem went even deeper. A widely accepted explanation for the disintegration of the communist federations of Eastern and Central Europe is that federalism not only did not prevent their breakup; it may have facilitated it. In these states, federal subunits provided a territorial and institutional power base for national minorities that served as a springboard to statehood. Unitary constitutional structures denied national minorities such a platform.

As plurinational federalism in Eastern and Central Europe may have had the perverse effect of fuelling precisely those political forces it was designed to suppress, the region's experience posed a fundamental challenge to plurinational federalism as a viable constitutional strategy in that part of the world. Indeed, it posed a more general challenge to the very idea of plurinational federalism. The best way to respond to the negative examples of Yugoslavia, Czechoslovakia, and the Soviet Union was to identify models where plurinational federalism had actually worked. Hence the sudden and sharp increase in interest in Canada's plurinational federalism. Will Kymlicka and Charles Taylor were the foremost scholarly proponents of the Canadian federal model.<sup>23</sup> Indeed, Canada became one of the central cases in an ever-broadening comparative debate regarding the very possibility of crafting a constitutional accommodation between majority and minority nationalism within a single state.

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But although it is true that global interest in Canadian federalism manifested itself during the disintegration of the plurinational federations of Eastern and Central Europe, it also coincided with Canada's own constitutional crisis. This arguably began in September 1994, with the resurgence of the Parti Québécois (PQ), which won power on a platform that had as its centrepiece a commitment to hold a referendum on sovereignty within its first mandate, which took place in October 1995. The results were extremely close, with the sovereignty proposal failing by 1 percent. Provincial legislation governing the referendum had set a one-year time limit on those negotiations, after which Quebec would have issued a unilateral declaration of independence. Nor was the near disintegration of the Canadian federation in the mid-1990s completely unexpected. From 1990 onward, the secession of Quebec became a topic of widespread political and academic debate. A sub-literature assumed that Canada was doomed, and that the country should turn to the difficult question of how secession should occur, and examined very specific issues such as the debt, borders, citizenship, the rights of Aboriginal peoples, and the nature of the economic and political partnership between Canada and an independent Quebec, as well as the process for such negotiations.

What was the connection between Canada's constitutional crisis and rise of global interest in the Canadian model of plurinational federalism? The answer is politics. Arguing for the necessary success of the Canadian model was not just a scholarly endeavour. It was a political intervention in two different but interrelated arenas. It was an intervention in international politics—to offer a practical, viable model to deal (p. 1089) with the issue of minority nationalism, which had become a source of political instability in Eastern and Central Europe and beyond. It was also an intervention in domestic constitutional politics—to argue that Canada had hit upon one of the few workable solutions to the accommodation of minority nationalism within a liberal democratic constitutional order. These agendas were integrally linked. Many proponents of the Canadian model not only recognized the crisis gripping the Canadian constitutional order, but also viewed the international promotion of the Canadian model as an important element in resolving domestic problems. The promotion of the Canadian model abroad should be understood, at least in part, as an attempt to reinforce support for the Canadian model in Canada by installing national pride. As the prestige of the Canadian model is enhanced abroad, so too is its prestige at home. Indeed, the violent collapse of the plurinational federations of Eastern and Central Europe appeared to challenge the viability of plurinational federalism not only in that region but in Canada as well. Canadians stared into the constitutional abyss in the 1990s and asked themselves whether the same fate awaited Canada. If the Canadian model could not work in Canada, it could not work in circumstances that are far more difficult. Canada needed to make its constitutional arrangements work not only for the world's sake, but for its own as well.

What was the precise character of the Canadian constitutional crisis? The conventional wisdom is that the Canadian constitutional crisis was *substantive*, and arose from competing constitutional logics which are at war with each other: the accommodation of Quebec, the *Charter*, and the juridical equality of all provinces (including Quebec).<sup>24</sup> These different constitutional logics have come into conflict over two issues:

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asymmetrical powers for Quebec and the constitutional recognition of Quebec as a distinct society. Asymmetry is demanded by Quebec as necessary in order to give it the jurisdictional tools to preserve and promote its distinct identity in economic and social circumstances that have changed dramatically since 1867; it is resisted in English Canada, both by those who want to centralize power in Ottawa as part of a nation-building exercise and by those who believe that special arrangements for any one province are a form of discrimination. Constitutional recognition of Quebec as a distinct society, if designed to augment Quebec's powers alone, raises similar objections. To the extent that such recognition would give greater scope to Quebec to limit *Charter* rights legitimately—in order to preserve and promote its linguistic identity—it would come into conflict with the concept of the *Charter* as the essential foundation of equal citizenship, providing for equal enjoyment of constitutional rights throughout Canada.

But there is also a *procedural* account of the constitutional crisis, in which the near-collapse of the Canadian constitutional system can be traced to a lack of a shared understanding regarding the constitutional procedures within which substantive (p. 1090) constitutional politics could occur.<sup>25</sup> Consider the following argument. In politics, we frequently disagree about the substance of public policies. A basic ambition of constitutionalism is to channel disagreements into institutions that reach decisions that members of the political community will accept as authoritative. But for institutional decisions to yield political settlement, the decision-making procedures of those institutions must be viewed as constituting and regulating political life without forming part of it—as being indifferent among political positions. Were the mechanisms by which political disagreement is managed themselves to be subject to political contestation in the course of their operation, it would be difficult for institutional settlement to translate into political settlement. The rules for constitutional amendment and their relationship to substantive constitutional politics can be conceptualized in like manner. If the rules of constitutional amendment are to operate effectively, they too must be accepted as constituting and regulating constitutional politics, and not forming part of it. They must be seen as operating indifferently among the competing constitutional positions on the table.

The difficulty with this highly simplified picture is that political procedures—both for normal and constitutional politics—are far from substantively neutral themselves. Rather, as Jeremy Waldron has argued, political procedures reflect competing conceptions of the very sorts of values that are the customary fare of both normal and constitutional politics. For example, by determining which individuals and communities can participate in political decision-making, and what role those individuals and communities may play, decision-rules reflect substantive judgments of political sovereignty, and by extension, the very identity of a political community. So the boundary between substantive political disputes and the procedural frameworks within which those disputes are worked out is highly artificial. Liberal democratic constitutionalism depends on the *suspension* of

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political judgment with regard to institutions and institutional decision-making procedures precisely in order to gain the prospect of political settlements.

The suspension of political judgment with respect to political procedures will become exceedingly difficult to sustain when the substantive dispute challenges the very conception of political community that underlies the decision-making framework within which that debate occurs. With respect to the rules of normal politics, the consequence will be to shift the terrain of disagreement from normal politics to constitutional politics, regulated by the procedural rules governing constitutional amendment. But in plurinational polities, the ease with which political judgment with respect to constitutional amending rules can be suspended depends on the nature of the issue at hand. In plurinational polities, constitutional politics takes place on two levels. On the one hand, (p. 1091) there is the sort of constitutional politics that presupposes the existence of a national political community, where the basic question of constitutional design is how this political community should grapple with the task of democratic self-government. This kind of constitutional politics also occurs in political communities that are not plurinational. But in parallel—and simultaneously—plurinational polities also engage in *constitutive constitutional politics*, which concern questions that go to the very identity, even existence, of a political community as a plurinational political entity. In practice, it is hard to disentangle these two sorts of constitutional politics, because they often touch on similar sorts of issues—the structure of national institutions, federalism, and bills of rights—and often occur at the same time. For example, proposals to entrench the Supreme Court of Canada constitutionally, to recognize its unique responsibility as an independent organ of government and final arbiter charged with enforcing the *Charter*—were accompanied by demands by Quebec that, given the Court's role as the final judicial arbiter in federal-provincial disputes, three of its nine seats should be constitutionally guaranteed for justices from that province.

The problem is that it can be very difficult, if not possible, to suspend political judgment regarding the procedures for constitutional amendment at moments of constitutive constitutional politics precisely because these procedures might reflect one of the competing constitutional positions at play. In the absence of agreed-upon procedures for constitutional decision-making, institutional settlement cannot yield political settlement. The result may be that the constitutional system itself comes tumbling down.

This is what happened in Canada in the mid-1990s. For alongside disagreement on the substantive questions of how Quebec's constitutional claims should be accommodated within the Canadian constitutional order and whether Quebec should remain a part of Canada, there was a procedural disagreement over whether the rules governing constitutional amendment should govern the process of secession. As a strictly legal matter, a change in Quebec's status from province to independent country could be achieved through constitutional amendments that would require the consent of the federal government and most, if not all, of the provinces. Unilateral secession would be unconstitutional. But Quebec sovereignists challenged the assumption that Quebec's independence would be governed by the rules governing constitutional amendment, for

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the simple reason that those rules beg the question. Those rules presuppose that Quebec is a constituent component of the Canadian federation, functioning as a subnational community with extensive but limited rights of self-government within Canada. Accordingly, Quebec is a constitutionally recognized actor in the process of constitutional amendment through processes that require a high degree of federal and provincial consensus. Quebec cannot act alone. But it is *precisely* that constitutional vision that the Quebec sovereignty movement challenges, in raising the substantive question of whether Quebec should remain a part of Canada or become an independent state. Not surprisingly, the sovereigntists rejected the amending rules as a neutral framework within which the question of Quebec's independence could be resolved. As sovereigntists wished to make a radical and total break from the Canadian constitutional order, it is hard to imagine that they would have subscribed to a process governed by it.

(p. 1092) The broader point is that the Canadian problem is a common one. The constitutional politics of rules for constitutional amendment are frequently a point of conflict in plurinational polities.<sup>26</sup> The reason is that these rules are where the most fundamental clashes in nation-building occur. By assigning the power of constitutional amendment to certain populations and/or institutions, in various combinations, the rules governing constitutional amendment stipulate the ultimate locus of political sovereignty and are the most basic statement of a community's political identity. The ability to reconfigure the most basic terms of political life must lie with the fundamental agents of political life. By looking at amending rules, we can see who those agents are. In plurinational polities, assigning roles to national minorities as part of the procedure for constitutional change accordingly acknowledges the fundamental plurinational character of the political community. The refusal to acknowledge this fact translates into a preference for constitutional amending rules that do not recognize and empower the constituent nations of a plurinational polity. And in either situation, secession is a limiting case that would challenge the application of the existing constitutional order to part of the state's territory. So it is far from surprising that in a broad variety of recent cases, such as Iraq, Spain, Sri Lanka, and the United Kingdom, as in Canada, a principal arena of constitutional conflict has concerned the design of constitutional amending rules.

The true lesson for multinational polities of the Canadian model of plurinational federalism may be this. Canada is indeed a success story—it is one of the world's oldest countries, has wrestled with and responded imaginatively to forces that have torn other countries apart, and has achieved a remarkable degree of prosperity and freedom. In large part, the Canadian model operates under the law. But as the Canadian constitutional crisis shows us, a legal approach to the accommodation of minority nationalism has both its strengths and weaknesses. The main problem lies in meeting demands for constitutional change from minority nations. Rules for constitutional amendment face genuine difficulty in constituting and regulating moments of constitutive constitutional politics, because at those moments, the very concept of political community those rules reflect is placed in contention by the minority nation. And what Canada may

teach us is that secession may be a limiting case where constitutionalism and the rule of law run out.

### 4. Rights Protection in a Plurinational Federation

Finally, I turn to an issue that has received much less comparative attention, but should: how the different pillars of the Canadian constitutional model interact, in (p. 1093) particular, the complex interplay between a constitutional bill of rights and the constitutional accommodation of minority nationalism. This has occurred both in constitutional politics and adjudication. For the former, perhaps the best example is the debate surrounding the constitutional recognition of Quebec's distinctiveness; for the latter, the role of the Supreme Court of Canada in adjudicating high profile constitutional conflicts over official language policy arising out of Quebec. Although these issues have arisen in different institutional contexts, there is a common problem that unites them—the clash between competing constitutional logics that lie with the same constitutional document, and that give rise to compelling political and legal claims that pull in opposite directions.

Political and judicial institutions sometimes have no choice but to grapple with these tensions. In some cases, they will give priority to one constitutional logic over the other—as occurred, for example, with the rejection of the proposed “distinct society” clause of the Meech Lake Accord, which would have afforded constitutional recognition of Quebec's particularity, on the basis of a fear that it would have eroded the equal enjoyment of *Charter* rights across Canada. In other cases, they may be able to find an accommodation that allows both constitutional logics to operate within the framework of a common constitutional order. The Canadian experience suggests that the ability of particular institutions to achieve this kind of constitutional co-existence might be a product of their institutional design—and that the plurinational character of the Supreme Court might have enabled it to be particularly effective in this respect.

As Peter Russell argued in a classic article, the *Charter* was Prime Minister Pierre Trudeau's central instrument for nation-building, and arose as a direct response to an important shift in the character of Quebec's constitutional demands in the 1960s.<sup>27</sup> Until then, Quebec's constitutional claims had been defensive, aimed at safeguarding its existing areas of jurisdiction. However, in the 1960s, Quebec's goals shifted to engage in a nation-building enterprise and construct a modern Quebec, the major institutions of which operated in French. Why this shift in Quebec took place is a complex story. To a considerable extent, it was a defensive response to the dramatically increased role of Ottawa in economic and social policy after the Second World War. Federal policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebecers were a

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small minority. Another factor was enormous social change within Quebec. After the Second World War, there was massive urbanization and industrialization, in a context where anglophones dominated positions of economic leadership and many of the professions. These demographic and economic shifts underlined and reinforced the role of language as the basis for the unequal distribution of economic power within the province. Quebec's political elites responded by mobilizing francophones around the nationalist project of *maître chez nous*, which encompassed both the expansion of Quebec's jurisdiction and the use of these new tools to shift power away from the anglophone (p. 1094) minority toward the francophone majority through constructing a modern set of economic and political institutions to ensure the survival of a modern, French-speaking society.

The *Charter* was the federal government's defensive response to these centrifugal pressures. At first blush, this is counterintuitive, as nation-building usually involves the assertion of legal and political power to form a common identity in a manner that limits individual freedom of choice, whereas bills of rights set limits on such policies. Yet a bill of rights can nonetheless play this role. Indeed, there are two ways to think about the nation-building role of a bill of rights: the *regulative* conception and the *constitutive* conception.<sup>28</sup> On the regulative conception, the function of a bill of rights is to enable individuals to invoke the machinery of the courts to set binding constraints on political decision-making. Serving this function does not depend on a bill of rights having any effect on citizens' political identities. On the constitutive conception, a bill of rights constitutes the very demos that it also constrains. A bill of rights calls for citizens to abstract away from group markers, such as race, ethnicity, religion, or language. It encodes and projects the idea of a political community built around citizens who are equal bearers of constitutional rights—a constitutional patriotism—whose political membership is unmediated by group identity. To serve as the instrument of nation-building, a bill of rights must alter the very self-understanding of citizens.

The *Charter* relies on both the constitutive and regulative conceptions of a bill of rights to serve as an instrument of nation-building.<sup>29</sup> The *Charter* was intended to function constitutively as the germ of a pan-Canadian constitutional identity. In a federal state such as Canada, where citizens share rights under a bill of rights irrespective of language or province of residence, a bill of rights serves as a transcendent form of political identification—the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity across the country as a whole. The actual effects have been different. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism, likely more quickly than even the most optimistic predictions suggested. However, within Quebec, the *Charter* has decidedly not had this effect. Indeed, the sharply differentiated effect of the *Charter* on Canadian constitutional culture suggests that it may now be harder, precisely because of the *Charter*, to build a unifying account of the Canadian constitutional order that transcends linguistic and regional divides.

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The divergent reactions to the distinct society clause outside and within Quebec powerfully illustrate these points. The clause would have mandated that the Constitution be interpreted to recognize “that Quebec constitutes within Canada a distinct society” and would have affirmed “[t]he role of the legislative and Government of Quebec to (p. 1095) preserve and promote the distinct identity of Quebec”. Outside Quebec, the fear was that the clause would provide for the unequal application of the *Charter*, by authorizing Quebec to limit the *Charter* in a manner not open to other provincial governments. In particular, there was a concern that it would provide additional constitutional support for linguistic nation-building on the part of Quebec. What underpinned this resistance was a shift in political identity outside of Quebec wrought by the *Charter*. The *Charter* was what made Canada a country and was the spine of a Canadian citizenship that was shared by all Canadians, and the potential for its unequal application was an assault on a basic, non-negotiable term of the Canadian social contract. Within Quebec, the view on the distinct society clause was exactly the opposite, rooted in a competing account of Canada. On this account, Canada is unintelligible except against the backdrop of the idea that the institutions of plurinational federalism are designed to protect Quebec’s linguistic distinctiveness. Yet the odd thing about the Canadian Constitution is that it lacks express recognition of this fact and treats Quebec on a basis of juridical equality to the other provinces. The distinct society clause therefore mattered a great deal because it was the first time the Constitution would explicitly acknowledge a view of what Canada was for. The repudiation of the distinct society clause on the basis of a theory of Canadian citizenship that was rooted in the *Charter* set up the *Charter* as an obstacle to, rather than as a central component of, how many Quebeckers understood the nature of their relationship with Canada.

The broader lesson from the Canadian case is that it is very difficult for bills of rights to constitute a new political identity on their own. Contrary to those who argue for the possibility of a pure constitutional patriotism based on the commitment to universalistic principles of political morality, a bill of rights must be nested in a contingent context—a constitutional narrative drawing on a web of political memory forged by shared experiences, challenges, failures, and triumphs. The Canadian experience tells us that in plurinational polities there is an additional hurdle. The task is not simply to situate a bill of rights in a contingent historical and political context. The task is to do so in a context in which the existence of competing nationalisms makes the dominant question of constitutional politics the conflict between contending national narratives. If the ambition of a bill of rights as a constitutive instrument of nation-building is to be a central element of an overarching narrative, by standing apart from, and transcending, those competing narratives, a plurinational context is a particularly difficult environment in which to do so. Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. This is what has happened in Canada. And if this would happen in Canada, where we have managed our nationalist politics peacefully and within the rule of law, the difficulties may be greater still for countries wracked by

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political instability, with weak institutions and a halting commitment to legalism, and often emerging from violent conflict.

What about the regulative nation-building role of the *Charter*? In regulatory terms, the *Charter* imposes legal constraints on minority nation-building by Quebec, through entrenching rights to inter-provincial mobility and minority language education for children. The centrality of the mobility and minority language education rights provisions to the nation-building project of the *Charter* is underlined by their exemption from the override—and hence, from Canada’s system of weak-form judicial review, and the possibilities for dialogue it creates. Both rights can be understood as a response to potential or actual policies of linguistic nation-building by Quebec, and indeed, Quebec has objected to both, precisely because they are not subject to the override. The *Charter* prohibits the use of disincentives to inter-provincial migration by guaranteeing the right to “move and take up residence in any province” and “to pursue the gaining of a livelihood in any province”. Quebec objected, arguing that the province legitimately discriminated to preserve its distinct linguistic identity. (p. 1096)

Far more important as a tool of minority nation-building is the linguistic assimilation of international and inter-provincial migrants. Absent the *Charter*, Quebec could have mandated that the exclusive language of public education be French. Yet the *Charter* granted to certain categories of citizens the right to receive minority language primary and secondary education for their children where numbers warrant it. The flashpoint of controversy within Quebec has been the right of anglophones who received their primary school instruction anywhere in Canada in English to have their children educated in English in Quebec—the so-called “Canada Clause”. This provision was specifically drafted to render unconstitutional a provision in the *Charter of the French Language* that would have limited this right to parents who had been educated in English in Quebec. Another provision of the *Charter*, which grants children who have received their schooling in English anywhere in Canada the right to continue their English-language education in Quebec, also limits Quebec’s ability to linguistically integrate migrants from other provinces.

The clash between the *Charter* and Quebec’s policies of linguistic nation-building occurred in three important cases before the Supreme Court.<sup>30</sup> In all three cases, the Court found these policies to be unconstitutional. In *Ford*, the Court struck down a provision in the *Charter of the French Language* that required outdoor commercial signage to be exclusively in French; in *Quebec Protestant School Board*, it applied the “Canada Clause” to strike down a provision of the *Charter of the French Language* that required citizens educated in the English language elsewhere in Canada to have their children educated in French; in *Solski*, the Court rejected an attempt to construe narrowly the *Charter*’s right of children who have received schooling in English anywhere else in the country the right to continue schooling in English in Quebec.<sup>31</sup>

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There are three noteworthy features of these decisions. First, Quebec lost every case, and the *Charter* did indeed constrain Quebec's ability to establish French as the common language of political, economic, and social life in that province. Second, although the Supreme Court struck down Quebec's nation-building policies, it nonetheless accepted the purpose underlying these laws as legitimate under section 1; the constitutional defect in each case is that the laws, as framed or construed by the Government, (p. 1097) failed at the minimal impairment stage of the proportionality analysis. Third, the judgments were unanimous and handed down by "The Court" as an institution rather than by an individual judge with whom the rest of the Court concurred. Collective authorship by the Court is very rare and indicates the greatest possible degree of consensus among the justices.

These pieces fit together. Their significance becomes clear if one recalls that the Supreme Court is a regionally representative body, with three of nine justices coming from Quebec, three from Ontario, and one from British Columbia, the Prairies, and Atlantic Canada, respectively. However, Quebec's representation is special, as is reflected by the fact that it is the only province whose representation has been legally guaranteed for several decades, whereas the regional distribution of the remaining seats is a matter of constitutional convention at best. An important justification for the special rules governing Quebec's representation is that the Supreme Court takes civil law appeals from Quebec and therefore requires justices with the requisite expertise. But the deeper rationale is that the composition of the Court reflects and institutionalizes the plurinational character of Canada. Quebec's status as a nation within Canada entitles it to a guaranteed minimum level of representation in a federal institution—such as the Supreme Court—that makes important decisions delimiting the scope of Quebec's power to pursue such policies. A Court that ruled on these issues without justices from Quebec would be widely perceived as constitutionally illegitimate within that province.

It is worth reflecting on how the plurinational nature of the Supreme Court's membership might play out in adjudication, especially with respect to cases that arise out of Quebec. As a formal matter, the Quebec justices enjoy no special powers relative to other justices, either individually or collectively. But with regard to cases of special interest to Quebec—for example, those that concern the power of Quebec to engage in linguistic nation-building—as a matter of constitutional practice, the Quebec justices might play a different institutional role in the Court's decision making. Consider the following counter-factual: imagine that in *Ford*, *Quebec Protestant School Board*, and *Solski*, the Court had divided on national lines. The Quebec justices voted to uphold the policies under challenge, perhaps holding that they breached *Charter* rights but were justified under section 1. A majority of the Court, however, struck them down, and went further than holding that the measures were disproportionate. Rather, it held that the very objective of preserving and enhancing the status of French as Quebec's common language was per se illegitimate, because that objective sought to redistribute economic and political power away from anglophones toward francophones, and was therefore inherently discriminatory.

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Moreover, when it rendered judgment in those appeals, the Quebec justices were all francophone and the justices from the rest of Canada all anglophone, so that the division on the Court would have been basic and fundamental, and plurinational in character.

If that had happened, the dissent by the Quebec justices would have been much more than the routine disagreement that occurs on multi-member courts in the common law world. Given the political origins of the *Charter* as a response to Quebec nationalism, and the singular importance of the challenged laws to modern Quebec nationalism, a (p. 1098) Supreme Court divided on national lines would have served to undermine the legitimacy of the *Charter*, and perhaps even the Court itself, within Quebec. This would have been a disaster. The Court's decision to speak unanimously as a single institution indicates its awareness that, with respect to these divisive issues, it was important to present a common front that transcended the national divide built into the Court's design. The Court's choice emphasized that what drove the judgment was not the national origin of any individual justice but the Court's collective understanding of the *Charter* and its relationship to the project of Quebec nationalism. Moreover, in these three cases, the judgments occupied an intermediate position between polar extremes, by striking down the provisions under challenge while still leaving space for Quebec to pursue those policies through accepting Quebec's objectives as constitutionally legitimate.

What role did the Quebec justices play in the Court's internal deliberations on the Quebec language cases? We do not, and may never, really know. But a plausible account is that the Quebec justices brought to these cases alertness to, and understanding of, the roots of modern Quebec nationalism, and the social and economic transformations that gave rise to them. As members of Quebec's elite who had lived through these transformations and were indeed products of them, the Quebec justices brought to the conference table an understanding of the origins and importance of these policies. They were therefore able to persuade their colleagues from outside the province of their constitutional legitimacy, and to highlight for them the risks of interpreting the *Charter* to deny to Quebec the constitutional space to pursue them. Their attempts at persuasion may have been coupled with the threat to collectively dissent, which would have been politically costly for the *Charter* and the Court. Although their leverage was insufficient to save Quebec's legislation, it was enough to shape the manner in which it was struck down, allowing Quebec to enact a more narrowly-tailored policy in the future that would survive constitutional challenge.

Canada holds broader lessons.<sup>32</sup> The Canadian Constitution is not alone in entrenching a bill of rights and accommodating minority nationalism, and in generating cases that require an apex court to work through and craft the relationship between these contending constitutional agendas. Other plurinational polities face a similar set of issues. The judgments of the Supreme Court avoided an all-or-nothing victory for either rights-based constitutionalism or minority nationalism; rather, it created a constitutional middle-ground that protected individual rights while still permitting Quebec to engage in linguistic nation-building. The likelihood of an apex court to chart a path of constitutional compromise under such circumstances probably turns in part on its design. For that

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reason, one should expect there to be a politics of apex court design—as there has been in Canada—where national minorities advance constitutional claims to ensure that an apex court adopts an interpretative agenda that is congenial to the protection of minority interests.

(p. 1099) There are in theory a number of dimensions to the design of apex courts that provide levers for achieving this broader objective. One is the *appointments* process, for example, through granting the authority to federal sub-units controlled by national minorities to appoint a number of judges, through super-majority or concurrent majority requirements that empower minority legislators, or through minority control over nominations (e.g., the exclusive power to generate shortlists). A closely related, but distinct issue would be the *composition* of the Court. Certain seats could be designated for justices from national minorities, or from federal sub-units in which national minorities predominate. Yet another aspect of design would be the justices' *legal expertise*. In bijural jurisdictions, such as Canada and the United Kingdom, a certain number of seats on the apex court could be set aside for judges trained in the component legal traditions where that tradition is tied to questions of a minority nation's identity. Finally, there are the *decision-rules* of the apex court. A court may constitute special panels of subsets of judges to hear cases of special interest to national minorities. These panels would contain a disproportionate number of judges appointed by minority nations, and/or national minority judges. Alternatively, a court may require a super-majority or concurrent majority to reach decisions, either on all issues or those of special concern to national minorities.

Indeed, a largely forgotten part of Canadian constitutional history shows that some of these options were advanced over several decades by Quebec, in the wake of the abolition of Canadian appeals to the Judicial Committee of the Privy Council in 1949.<sup>33</sup> The Privy Council had favoured strong provinces and a weak federal government; with the federally-appointed Supreme Court becoming Canada's final court of appeal, Quebec was concerned that Quebec's autonomy would be eroded by a Court biased in favour of the federal government. An early proposal from Quebec included a nine-member specialist Constitutional Court, consisting of five judges appointed by the federal government and one judge appointed by each of the executives of each region of Canada (Quebec, Ontario, Atlantic Canada, and Western Canada). Another proposal empowered provincial executives to appoint two-thirds of the Constitutional Court, with one-third of the judges appointed by Quebec. Quebec later shifted its focus from the creation of a specialist constitutional court to the reform of the Supreme Court. The 1971 Victoria Charter proposed that appointments require the agreement of the federal and provincial executives, and that every case involving Quebec's civil code be heard by a panel of five justices, including three from Quebec. The Meech Lake Accord would have provided for federal appointment of three justices from Quebec from a list of candidates prepared by the provincial government. A final set of proposals involved expanding the Court and increasing the number of sitting justices from Quebec, as well as ensuring that

constitutional cases be heard by a smaller panel on which all the Quebec justices would sit.

### (p. 1100) 5. Conclusion

Let me conclude by suggesting how to extend the research agenda set out in the last section—how the various components of the Canadian constitutional model interact. Debates about the legislative override have not given much attention to how its application could be conditioned by, or be responsive to, Canada's plurinational character. But the previous section suggests how. The Supreme Court's jurisprudence on the constitutionality of key elements of the *Charter of the French Language* presupposed that it fell to the Court to reconcile the competing logics of rights-protection and minority nationalism. But that assumption in turn rests on the notion of judicial supremacy. To be sure, in the case of the minority language education rights, the Court does enjoy supremacy, because of the inapplicability of the legislative override to the relevant provisions of the *Charter*. But the same does not hold true for other *Charter* rights, such as freedom of religion.

In recent years, the Court has taken a series of appeals from Quebec argued on the basis of freedom of religion that have opened up a new front in the complicated relationship between Quebec nation-building and the *Charter*, around the issue of secularism and reasonable accommodation.<sup>34</sup> The roots of the particular salience of secularism in Quebec lie in the origins of modern Quebec nationalism, which entailed a rejection of the institutionalized role of the Roman Catholic Church in the delivery of health care, education, and social services, and its related role as the arbiter of public morality. The replacement of the Church in these realms by newly created state institutions, coupled with a liberal social morality free from the strictures of the Church, was a central demand of nationalist mobilization in the 1950's. Indeed, it can be said that modern Quebec nationalism was as much about secular nation-building as it was about linguistic nation-building.

However, unlike in its jurisprudence on Quebec's language policy, in its jurisprudence on reasonable accommodation in Quebec, the Court has been divided. Its francophone judges have penned separate concurrences or dissents articulating theories of religion-state relations that echo the discourses of political elites in Quebec. This poses a risk to the legitimacy of both the *Charter* and the Court itself, against the backdrop of ongoing political controversy in Quebec. The absence of the override from these debates is puzzling, because it offers a constitutional mechanism for Quebec to express its disagreement with the Court in a manner that could alleviate the pressure on some members of the Court toward deference, in a manner that could protect the Court from the very public attacks that its jurisprudence has sparked.

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(1) P. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press, 2005).

(2) D. Law & M. Versteeg, "The Declining Influence of the United States Constitution" (2012) 84 *NYU L. Rev.* 762.

(3) See, e.g., P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Carswell, 1987).

(4) S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2 *ICON* 1.

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(6) Choudhry, above (n 4).

(7) S. Choudhry, "The Commonwealth Constitutional Model or Models?" (2013) 11 *ICON* 1094.

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(11) For an overview of this jurisprudence, see S. Choudhry, "So What Is The Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 35 *Sup. Ct. L. Rev.* (2d) 501.

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(14) *Ford v Quebec (AG)*, [1988] 2 S.C.R. 712.

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(31) *Ford*, above (n 14); *Attorney General of Quebec v Quebec Association of Protestant School Boards et al.*, [1984] 2 S.C.R. 66; *Solski (Tutor of) v Quebec (Attorney General)*, [2005] 1 S.C.R. 201.

(32) S. Choudhry & R. Stacey, "Independent or Dependent? Constitutional Courts in Divided Societies" in C. Harvey & A. Schwartz, eds., *Rights in Divided Societies* (Hart Publishing, 2012) 89.

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(34) Choudhry, above (n 30). The cases are *Bruker v Marcovitz*, 2007 SCC 54; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *SL v Commission scolaire des Chenes*, 2012 SCC 7; *Syndicat Northcrest v Amselem*, 2004 SCC 47.

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