Different Ways to Get to “Everything”?: Judicializing Everything? The Clash of Constitutionalisms in Canada, New Zealand, and the United Kingdom by Mark S. Harding

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It is challenging for a book to be both timeless and timely. But Mark S. Harding’s Judicializing Everything? The Clash of Constitutionalisms in Canada, New Zealand, and the United Kingdom manages the feat, giving a comparative analysis of judicial power vis-à-vis bills of rights in three different common law jurisdictions. The book arrived just weeks before two Supreme Court of Canada decisions, R v Brown and R v Bissonnette, placed the role of courts vis-à-vis legislatures in the constitutional order very much in the public light—and controversially at that. Harding’s study, which addresses precisely the issue that Brown discusses, assists our understanding of the political/judicial structure that leads to such decisions and the subsequent reactions. Harding helpfully conceptualizes strong as opposed to weak forms of judicial review (or “legal” instead of “political” constitutionalism) as a continuum rather than as a dichotomy and recognizes that the impacts of this apply not just to constitutional interpretation but to statutory interpretation and the development of the common law. He observes—accurately given recent events—that controversy over the nature of judicial review continued.

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1 (Toronto: University of Toronto Press, 2022).
2 2022 SCC 18 [Brown].
3 2022 SCC 23 [Bissonnette].
4 Harding, supra note 1 at 98–101.
power is unlikely to ever disappear and changes in institutional design may move the site of controversy rather than eliminate it. This book review seeks to summarize and build on Harding’s insights, recognizing their limits while underscoring their timeliness.

One of the book’s most astute insights comes early, as Harding conceptualizes judicial review powers as existing not as a dichotomy but as a continuum. Canada may be considered more “strong-form” in judicial power than the United Kingdom and New Zealand. However, it is less so than the United States, while Australia, alone among these five Anglosphere common law jurisdictions, lacks a judicially enforceable bill of rights. Noting that there is a continuum rather than a dichotomy at play, Harding observes that British and New Zealand courts do not have the power to invalidate legislation, though they are expected to interpret legislation in accordance with bills of rights if possible. Canadian courts, on the other hand, do have an invalidation power. However, Canada has the “legislative safety valve” that is section 33 of the Canadian Charter of Rights and Freedoms (Charter), commonly known as the “notwithstanding clause.” This arguably creates more space for legislative power and makes judicial review in Canada less strong, as Harding notes Kent Roach and Peter Hogg among others have argued. At the same time, the tendency of legislative inertia and a taboo on using section 33 (albeit a decreasing one, as will be discussed later) has resulted in rare instances of “dialogue” where a preferred legislative constitutional interpretation becomes the law. Therefore, the consensus is that Canada has strong-form judicial review. As Harding observes, “courts

5 Ibid at 21–22.
6 Ibid at 22, 155.
7 Ibid at 23.
8 Ibid at 20.
do most of the talking and legislatures do most of the listening.”

While acknowledging that, Harding makes a persuasive argument that “dialogue” between courts and legislatures is actually richer if the courts’ powers are weaker, largely because legislatures are forced to grapple with declarations of inconsistency that, though not binding, can be embarrassing. Though successful litigants do not have the benefit of legislative inertia, a declaration in the absence of invalidation can be better at prompting thoughtful legislative response unconstrained by judicial prescription. In strong-form judicial review, legislators can claim (even if somewhat disingenuously) that courts have tied their hands.

But in one of Harding’s more interesting observations, he notes that the United Kingdom and New Zealand, without the power of invalidation, have relocated rather than eliminated the site of many controversies over judicial power. Rather than controversies arising over the judiciary allegedly exceeding its role through invalidating laws, there has been frequent criticism in the United Kingdom and New Zealand that courts have engaged in strained interpretation of statutes to comply with judicial interpretation of bills of rights. By contrast, in Brown, Justice Kasirer declined to engage in an interpretation of the Criminal Code that “would strain the meaning beyond what the text can plausibly bear.” Of course, while all agree that there is a distinction between strained and legitimate interpretation in theory, the line can be difficult to draw in practice. This issue of legitimate interpretation to avoid constitutional defects occasionally creates controversy in jurisdictions with strong judicial powers such as Canada and


13 See e.g. Harding, ibid at 31.

14 Ibid at 32–33.

15 RSC 1985, c C-46.

16 Brown, supra note 2 at para 88.

17 Harding, supra note 1 at 110.

the United States. Courts in both jurisdictions will otherwise invalidate laws that cannot reasonably be interpreted to comply with the constitution. But “creative” interpretations of legislation appear to be a greater issue in New Zealand and the United Kingdom, where one judge has held that any interpretation short of “judicial vandalism” to statutory language is an appropriate response to find compatibility with a bill of rights.

However, Canada is not immune from creative uses of the Charter that seem to stretch the judicial role. Notably, the use of Charter “values” to interpret legislation in Canada has arguably extended the reach of the document with no small degree of controversy. Nor is this confined, in any of the jurisdictions, to statutory interpretation. Harding provides a thorough description of how common law is not generally considered subject to bills of rights per se, but their values have infused the common law in all three jurisdictions in different ways: as he describes it, having “indirect horizontal effect.”

Harding further explains how courts often have the final say on policy matters, even when they purport not to have this intention. This “final say” extends to interpreting the constitution, ordinary statutes, or the common law. Legislatures often lag in responding to judicial rulings for a whole host of reasons. The lawyerly assumption that this is due to acquiescence is too simple. While acquiescence or even agreement could be a reason that a legislature does not respond to court rulings, that should not be assumed: legislative time is finite, and though legislators may disagree with the Court, they cannot always prioritize a response. In Canada in particular, the Charter can complicate policy responses to private law innovations,

19 Chief Justice Roberts acknowledged that viewing the Affordable Care Act’s individual mandate as a “tax” was not the most natural way to view it but considered it appropriate to uphold the law. National Federation of Independent Business v Sebelius, 567 US 519 at 563 (2012) (“[t]he question is not whether that is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one”).


21 See e.g. Law Society of British Columbia v Trinity Western University, 2018 SCC 32.

22 See e.g. The Honourable Peter D Lauwers, “What Could Go Wrong with Charter Values” (2019) 91 SCLR (2d) 1.


25 See e.g. Harding, supra note 1 at 88–89.
as the precise extent that a judicial ruling has constitutional impact can be unclear. 26 This connects to the work of William Lederman, which Harding repeatedly cites, who had significant concerns about “constitutionalizing everything,” as doing so constrains legislative policy responses. 27 But throughout the book is an acknowledgment and discussion that the real, and often unintended, consequences of “constitutionalizing everything” will sometimes manifest themselves in concerns about “judicializing everything,” with the source of controversy moving to statutory or common law interpretation in the absence of a constitutional invalidation power. This faith in the judiciary can expand even further: in Canada, Mel Cappe and Yan Campagnolo have even recently suggested 28 that a judge should decide whether cabinet confidentiality should be waived to assist the Rouleau Commission that investigated the Trudeau government’s recent invocation of the Emergencies Act. 29 As such, a lesser role for courts in constitutional interpretation may often be better conceived as moving the goal posts of judicial power rather than changing the game.

Lawyers should appreciate that Harding is approaching these topics as a political theorist rather than a lawyer. At times, this creates insights by looking at the legal system from the outside, perhaps without an idealized view of it, and being frank about the trade-offs entailed in conceptualizations of the judicial role. The engagement with many political theorists gives lawyers perspectives with which they may otherwise be unfamiliar. At times, this can feel a tad “book reviewish” as it summarizes others’ theories, even if that is likely necessary given the comprehensiveness of the study. But at other times, a lack of lawyerly precision is apparent. 30 For instance, at one point Harding cites the Judges’ Reference 31 as an example

26 See e.g. ibid at 91–94.
28 See Mel Cappe & Yan Campagnolo, “Cabinet secrecy is essential, but should not be absolute”, Policy Options (24 May 2022), online: <policyoptions.irpp.org/magazines/may-2022/cabinet-secrecy-canada-emergencies-act>.
29 RSC 1985, c 22 (4th Supp).
30 A good and a bad thing, but it likely exists for a reason, as Justice Scalia, dissenting, noted in King v Burwell, 576 US 473 at 502 (2015) (“[l]awmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets”).
of a case where the notwithstanding clause could have applied to correct judicial overreach. However, the Judges’ Reference, not being a Charter case, could not be subject to the notwithstanding clause, at least insofar as it was not entirely based on section 11 of the Charter. This does not detract from Harding’s overall thesis and insights (and was in fact partially based in arguments previously aired by Peter Russell), but is a minor nitpick.

It should also be noted that Judicializing Everything is fundamentally a work of political theory that uses case law to complement its theoretical analysis. It is not, nor does it purport to be, a systematic, empirical analysis of case law. However, while it is accordingly important to qualify the lessons that Harding draws, this is an entirely acceptable methodology that makes for an interesting read.

As the 40th anniversary of the Charter has generally resulted in the document being repeatedly lauded, it is important to recognize that there are unintended consequences of the legal constitutionalism that it entrenched. And that brings us back to Brown and Bissonnette. Brown held that a defence of extreme intoxication akin to automatism must be available for all general intent offences. Though the unanimous Court suggested that a crime of becoming intoxicated and causing violence would be constitutionally compliant, as would a negligence-based offence (which the government ultimately adopted), the decision prompted pre-emptive pleas from academics to use the notwithstanding clause to prohibit extreme intoxication akin to automatism from being a defence to crimes of violence. Bissonnette, within 12 hours of release, had all three frontrunners for the leadership of the Conservative Party of Canada promise to use the notwithstanding clause

32 Harding, supra note 1 at 53.
35 See e.g. Sean Fine, “Canada’s Charter turned 40 on Sunday—and it’s still as radical and enigmatic as it was in 1982”, Globe and Mail (17 April 2022), online: <www.theglobeandmail.com/canada/article-canada-charter-turns-40-supreme-court>.
36 Brown, supra note 2 at para 136.
37 Ibid at para 137.
clause to restore the ability to set parole ineligibility periods of 50 years or more for those who commit mass murder.\(^{40}\) It also prompted a rare public statement from former Prime Minister Stephen Harper, criticizing the decision and calling Parliament to “action.”\(^{41}\) Harding acknowledges\(^ {42}\) that the recent increased use of the notwithstanding clause could be a sign of some pushback to the legal constitutionalism that Canada has adopted.\(^ {43}\)

The book is also timely in Canada given recent jurisprudential developments and controversies. While Brown and Bissonnette were both unanimous decisions, there have been interesting divisions in the Supreme Court of Canada on other aspects of constitutional interpretation,\(^ {44}\) such as the primacy of text and the limited relevance of foreign and international law.\(^ {45}\) And as Harding notes, other battles over conceptualizing the Charter as a liberal or post-liberal document may also result in increased scrutiny of “judicializing everything.”\(^ {46}\)

From a Canadian perspective, learning the British and New Zealand approaches indicates alternative ways forward. Near the end of the book, Harding explains how insights could also be learned from a common law,\(^ {47}\)

\(^{40}\) See Patrick Brown, “I will invoke the notwithstanding clause to keep this terrorist killer behind bars for life” (27 May 2022 at 12:08), online: Twitter <twitter.com/patrickbrownnt/status/1530219280339390464?lang=en>; Pierre Poilievre, “My statement on today’s Supreme Court decision” (27 May 2022 at 14:36), online: Twitter <twitter.com/PierrePoilievre/status/1530256761806627046> (“[a]s Prime Minister, I will use the notwithstanding clause to restore the law so that every life counts again in a killer’s sentence and that the worst murderers stay behind bars for life”); Jean Charest, “Cela dit, dans ce cas de crime odieux avec plusieurs victimes, si les tribunaux n’acceptent pas les peines consécutives, j’utiliserai l’article 33 pour m’assurer que justice soit rendue dans des situations comme celle-ci.” (27 May 2022 at 19:01), online: Twitter <twitter.com/JeanCharest_/status/1530323380569874437>.

\(^{41}\) See Stephen Harper, “Today’s decision by the Supreme Court of Canada in the case of mass murderer Alexandre Bissonnette devalues the lives of his victims. This is a grave injustice that calls for action from Parliament.” (27 May 2022 at 16:27), online: Twitter <twitter.com/stephenharper/status/1530284665940197376>.

\(^{42}\) Harding, supra note 1 at 21–22.

\(^{43}\) Ibid at 58–59, 150.


\(^{45}\) See e.g. the division in Quebec (Attorney General) v 9147-0732 Québec inc., 2020 SCC 32, discussed in Fine, ibid.

\(^{46}\) Harding, supra note 1 at 74–80.
Anglophone jurisdiction without a bill of rights, Australia, as well as a jurisdiction that has a much longer history with judicial review, the United States. Bringing in all five jurisdictions to this study was not realistic, and there was a logic to concentrating on the three with approaches that can most be described as the “middle” of the weak-to-strong judicial power continuum. Though interest in these other jurisdictions remains.

Bissonnette, like Brown to a much lesser extent, prompted outrage in certain circles over judicial overreach. The same happened in the United States when Dobbs v Jackson Women’s Health Organization overturned Roe v Wade. But all have also prompted reflection on the judicial role in our constitutional order. Harding acknowledges that the view of Chief Justice McLachlin in emphasizing legal constitutionalism has, for the most part, become more dominant. It is likely to remain so, something even progressive skeptics of judicial power such as Mark Tushnet have conceded. But Harding also observes that the debate is unlikely to subside, given that political constitutionalism hardly remains a moribund view, and it is not difficult to move along the continuum to greater or lesser judicial power. Harding regularly returns to the holding of Justice McIntyre in Reference Re Public Service Employee Relations Act (Alta):

the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of

47 Ibid at 155.
49 See e.g. “Roe v. Wade: Protests rage on over leaked abortion ruling”, NBC News (6 May 2022), online: www.nbcnews.com/news/us-news/blog/roe-v-wade-live-updates-protests-rage-leaked-abortion-ruling-rcna27427 (the decision was infamously leaked in draft form prior to being released).
50 597 US ___ (2022), 142 S Ct 2228 (WL).
52 Harding, supra note 1 at 58–59, 150.
53 Tushnet, “Judicial Activism”, supra note 11 at 89 (where he acknowledges this explicitly).
54 Harding, supra note 1 at 150.
55 Ibid at 45, 47, 58, 60.
the Charter, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.\footnote{Reference Re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313 at 394, 38 DLR (4th) 161.}

We can debate the contours of the appropriate judicial role, but Judicializing Everything reminds us that it is nihilistic\footnote{For critiques of those seeking to find indeterminacy throughout the law, see e.g. Lawrence B Solum, “On the Indeterminacy Crisis: Critiquing Critical Dogma” (1987) 54:2 U Chicago L Rev 462 at 491; Mark Mancini, “Linguistic Nihilism” (2 November 2020), online (blog): Double Aspect <doubleaspect.blog/2020/11/02/linguistic-nihilism>; Gerard J Kennedy, “The rules-standards debate and Ontario Civil Procedure reform: a case for more rules?” (2022) 47:1 J Leg Philosophy 24.} to pretend that there are no contours, and any pretences in this direction will have unintended, likely negative, consequences. Recent events put this into the limelight. Increased use of, and litigation over,\footnote{See e.g. Hak c Procureur général du Québec, 2021 QCCS 1466; Working Families Coalition (Canada) Inc v Ontario, 2021 ONSC 7697, rev’d on other grounds 2023 ONCA 139 (there was no dispute that section 33 of the Charter imposes merely formal requirements for its invocation).} the notwithstanding clause is likely going to increase this. Harding’s book is thus exceptionally timely. But debates over the contours of the judicial role are also likely to never disappear, especially given a tension between those who seek legal certainty and those who seek moral coherence in the legal system.\footnote{See e.g. Paul Daly, “Legal Certainty, Legal Coherence and Judicial Politics” (15 January 2022), online (blog): Paul Daly: Administrative Law Matters <www.administrativelawmatters.com/blog/2022/01/15/legal-certainty-legal-coherence-and-judicial-politics>.} The book is thus timeless and marks an interesting contribution to legal and political science discourse.