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

Gerard J. Kennedy[*]

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*[1] 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*[2] and *R v Bissonnette*,[3] 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,[4] 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

* Assistant Professor, Faculty of Law, University of Manitoba. The author thanks Matt Rakar for research and editing assistance with this book review, generously supported by the Legal Research Institute of the University of Manitoba. Finally, thanks to Mark Harding himself who, after I sent a draft to him, noted that I had made two mistakes in said draft! All views are the author's, as are any mistakes.

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.[5] 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.[6] 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.[7] Canadian courts, on the other hand, do have an invalidation power.[8] However, Canada has the "legislative safety valve" that is section 33 of the *Canadian Charter of Rights and Freedoms* (*Charter*),[9] 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.[10] 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.[11] As Harding observes, "courts

5 *Ibid* at 21–22.

6 *Ibid* at 22, 155.

7 *Ibid* at 23.

8 *Ibid* at 20.

9 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

10 Harding, *supra* note 1 at 21, citing Kent Roach, "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019); Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1. See also James B Kelly & Matthew Hennigar, "The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights" (2012) 10:1 Intl J Constitutional L 35.

11 Harding, *ibid* at 21, citing Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009); Janet L Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006)

do most of the talking and legislatures do most of the listening."[12] 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.[13] 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.[14]

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*[15] that "would strain the meaning beyond what the text can plausibly bear."[16] 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.[17] This issue of legitimate interpretation to avoid constitutional defects occasionally creates controversy in jurisdictions with strong judicial powers such as Canada[18] and

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69:1 Mod L Rev 7; Andrew Geddis & Bridget Fenton, "'Which Is To Be Master?'—Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25:3 Ariz J Intl & Comp L 733; Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 53 UTLJ 89 [Tushnet, "Judicial Activism"].

12 Harding, *ibid* at 30, citing FL Morton, "Dialogue or Monologue?" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) at 117.

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.

18 See Gerard J Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Toronto: Thomson Reuters Canada, 2022) at § 5:25, contrasting *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 and *R v Guignard*, 2002 SCC 14.

the United States.[19] 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.[20]

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[21] with no small degree of controversy.[22] 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."[23]

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.[24] 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.[25] 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").

20 Harding, *supra* note 1 at 113, citing *Ghaidan v Godin-Mendoza*, [2004] UKHL 30 at para 111, [2004] 2 AC 557.

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.

23 Harding, *supra* note 1 at 72, citing Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008) at 197.

24 See MH Ogilvie, "*Canadian Western Bank v. Alberta*: Cooperative Federalism and the End of 'Banking'" (2008) 47:1 Can Bus LJ 75 at 83.

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.

27 *Ibid* at 40, 61, 80, citing WR Lederman, "Charter Influences on Future Constitutional Reform" in David E Smith, Pater MacKinnon & John C Courtney, eds, *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House, 1991).

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").

31 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 150 DLR (4th) 577.

of a case where the notwithstanding clause could have applied to correct judicial overreach.[32] 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),[33] 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[34] that makes for an interesting read.

As the 40th anniversary of the *Charter* has generally resulted in the document being repeatedly lauded,[35] 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,[36] as would a negligence-based offence[37] (which the government ultimately adopted),[38] 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.[39] *Bissonnette*, within 12 hours of release, had all three frontrunners for the leadership of the Conservative Party of Canada promise to use the notwithstanding

32 Harding, *supra* note 1 at 53.

33 See Peter H Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy", *Policy Options* (1 February 2007), online (pdf): <policyoptions.irpp.org/wp-content/uploads/sites/2/assets/po/the-charter-25/russell.pdf>.

34 See e.g. Raymond E Fancher, Book Review of *More Examples, Less Theory: Historical Studies of Writing Psychology* by Michael Billig, (2021) 57:1 J History of Behavioural Sciences 93 at 94–95.

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.

38 See Peter Zimonjic, "Liberals introduce bill to eliminate self-induced extreme intoxication as a legal defence", *CBC News* (17 June 2022), online: <www.cbc.ca/news/politics/self-induced-extreme-intoxication-defence-legislation-1.6492679>.

39 See Sarah Burningham, "Notwithstanding extreme intoxication", *Policy Options* (22 March 2022), online: <policyoptions.irpp.org/magazines/notwithstanding-extreme-intoxication>.

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,

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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/patrickbrownont/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/1530256761806270465> ("[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 victims, 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.

44 See e.g. Sean Fine, "Canada's Supreme Court is off-balance as 'large and liberal' consensus on the Charter falls apart", *The Globe and Mail* (15 January 2022), online: <www.theglobeandmail.com/canada/article-canadas-supreme-court-is-off-balance-as-large-and-liberal-consensus-on>; Paul-Erik Veel & Katie Glowach, "Early Insights from the Supreme Court of Canada Decisions Project", Lenczner Slaght (25 April 2022), online: <litigate.com/data-driven-decisions/blog#/early-insights-from-the-supreme-court-of-canada-decisions-project>.

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.

Anglosphere jurisdiction without a bill of rights, Australia, as well as a jurisdiction that has a much longer history with judicial review, the United States.[47] 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.[48] The same happened in the United States[49] when *Dobbs v Jackson Women's Health Organization*[50] overturned *Roe v Wade*.[51] 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.[52] It is likely to remain so, something even progressive skeptics of judicial power such as Mark Tushnet have conceded.[53] But Harding also observes that the debate is unlikely to subside, given that political constitutionalism hardly remains a moribund view,[54] and it is not difficult to move along the continuum to greater or lesser judicial power. Harding regularly[55] 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.

48 See e.g. *supra* notes 39–40. See also Elizabeth Sheehy, Isabel Grant & Kerri A Froc, "Supreme Court of Canada ruling a setback for women", *The Toronto Star* (13 May 2022), online: <www.thestar.com/opinion/contributors/2022/05/13/supreme-court-of-canada-ruling-a-setback-for-women.html>. For defences of the decisions, see e.g. Lisa Kerr, "The Supreme Court's ruling to end the death-in-prison penalty isn't about the offender—it's about our own moral code", *The Globe and Mail* (27 May 2022), online: <www.theglobeandmail.com/opinion/article-the-supreme-courts-ruling-to-end-the-death-in-prison-penalty-isnt>; Vanshika Dhawan, "The legal defence of extreme intoxication is not inherently anti-feminist", *The Globe and Mail* (14 February 2022), online: <www.theglobeandmail.com/opinion/article-the-legal-defence-of-automatism-is-not-inherently-anti-feminist>.

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).

51 410 US 113 (1973).

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.[56]

We can debate the contours of the appropriate judicial role, but *Judicializing Everything* reminds us that it is nihilistic[57] 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,[58] 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.[59] The book is thus timeless and marks an interesting contribution to legal and political science discourse.

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56 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 394, 38 DLR (4th) 161.

57 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.

58 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).

59 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>.