RESPONSE

WIND-DOWN AUTHORITY ACROSS THE ST. LAWRENCE: A RESPONSE TO BUCHANAN AND DORF[†]

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CONTENTS

[†] An invited response to Neil H. Buchanan & Michael C. Dorf, *Justice Delayed: Government Officials' Authority To Wind Down Constitutional Violations*, 103 B.U. L. REV. 2065 (2023).

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INTRODUCTION

Neil Buchanan and Michael Dorf make an intriguing and pragmatic argument based on the observation that not all constitutional violations can be remedied right away without significant negative impacts. This reality, they argue, is not a vice but a virtue. Not only should courts be able to grant permission for continued constitutional violations within a specified timeframe, but other branches of government should also identify constitutional violations and make a plan for remedying them. Buchanan and Dorf's point that the alternative is likely to have the other branches defending their or their predecessors' actions as constitutional is well taken.[1] Their proposal has the value of injecting political responsibility into constitutional interpretation in a manner that just might work—at least if highly salient issues are concerned and if it is possible to put the responsibility on specific people. Their example of the executive's response to debt ceiling brinksmanship seems like a situation that would be particularly well suited to their solution. Adopting clear standards for when wind-down authority is appropriate and forcing parties claiming it to define how and in what timeframe it will be used seems a clear improvement over the fuzziness of "all deliberate speed,"[2] or forcing politicians to try to create precedents blessing unconstitutional exercises of power that they themselves would end if given the opportunity.

In making their argument, Buchanan and Dorf point to other common law jurisdictions in which courts have discussed a wind-down authority. As Buchanan and Dorf amply demonstrate, being aware that others do things differently can allow constitutional discussions to become unstuck from the current polarized political imagination. Comparative law is valuable in part because it reminds us that doctrinal limits are constructed and that, if they are not serving their purposes well, they can be dismantled and rebuilt.[3] Comparison also puts paid to the idea that any constitutional order is somehow historically unique or that its problems are unprecedented. Such claims are particularly odd within the common law world—in which our constitutions have roots in a common language, legal history, and the British imperial project. If comparison is done with care, it also allows us to attend to the differences in values in other constitutional orders and to imagine priorities other than our own. Useful comparison requires attention to case selection, with an account of jurisdictions' similarities and differences.[4]

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[1] Neil H. Buchanan & Michael C. Dorf, *Justice Delayed: Government Officials' Authority To Wind Down Constitutional Violations*, 103 B.U. L. REV. 101, 2089 (2023).

[2] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

[3] *See generally* John P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMPAR. L. 683 (1998).

[4] *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMPAR. L. 125, 132-33 (2005).

Other jurisdictions offer several examples of wind-down authority, and scholars often view it quite positively.[5] My contribution addresses Buchanan and Dorf's reference to Canada. As they note, the Supreme Court of Canada ("SCC") granted the equivalent of wind-down authority in the form of a suspended declaration of invalidity in the *Manitoba Language Rights* reference.[6] Since then, the SCC and appellate courts have used suspended declarations of invalidity routinely, albeit sparingly, in relation to unconstitutional laws and regulations.[7] Although Buchanan and Dorf discuss wind-down authority used by all three branches, with a focus on courts and the executive, my contribution will focus on instances in which courts grant wind-down authority.

On paper, significant differences exist between the United States and Canada. Canada is a constitutional monarchy that starts from a history of parliamentary supremacy. Canadian courts use proportionality to balance competing rights claims. With individual rights contained in the Charter of Rights and Freedoms, the Government can also make use of the Notwithstanding Clause.[8] The clause preserves a veneer of parliamentary supremacy by allowing parliaments to override the courts. In reality, many differences are overstated. Present-day Canadian constitutional theory works with a three-branch framework.[9] As Buchanan and Dorf point out—U.S. rights analysis ends up involving a good deal of proportionality.[10] And the Notwithstanding Clause in the Charter is rarely used. The SCC ends up wielding powers nearly as extensive as the U.S. Supreme Court. In terms of broader context—Canada also has a federal system. Canadian history does not include a civil war over race-based slavery, but Canadian identity issues have, at moments, threatened to tear the country apart, to say nothing of preventing its formation.

Buchanan and Dorf acknowledge that wind-down authority would likely work differently in different legal systems, including in the U.S. states.[11] I would like to add a few details about the Canadian system that can help us evaluate whether suspended declarations of invalidity fit within Buchanan and Dorf's paradigm and the U.S. constitutional system more generally. Here, it is worth pausing on the *Manitoba Language Rights* reference itself before examining more modern instantiations. I'll then explain how suspended declarations of

[5] Kent Roach, *Dialogic Remedies*, 17 INT'L J. CONST. L. 860, 861 (2019).

[6] Buchanan & Dorf, *supra* note 1, at 2090.

[7] *See* Hugo Cyr, Catherine Gagnon, Jonathan Hotz-Garber & Valérie Kelly, *Judicially Licensed Unconstitutionality*, 55 U.B.C. L. REV. 323, 375-77 (2022) (offering statistics tracking use of suspended declarations in invalidity by year and by justice).

[8] Canadian Charter of Rights and Freedoms s. 7, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 33 (U.K.).

[9] Beverley McLachlin, then-Chief Just. of Can., Respecting Democratic Roles, Conference on the Law and Parliament, Ottawa (Nov. 2, 2004), https://www.scc-csc.ca/judges-juges/spe-dis/bm-2004-11-22-eng.aspx# [https://perma.cc/5N22-NDFG].

[10] Buchanan & Dorf, *supra* note 1, at 2111.

[11] *Id.* at 2073 n.26.

invalidity, which are creatures of courts, fit with the powers of other branches and why I do not think one can get away from considerations of federalism.

I. SUSPENDED DECLARATIONS OF INVALIDITY IN CANADIAN LAW

Re Manitoba Language Rights may not be as straightforward a case for wind-down authority as it first appears, but it is very instructive for thinking about the differences between U.S. and Canadian constitutionalism. *Re Manitoba Language Rights* is a reference rather than an appeal from a lower court decision. With a reference, the Government brings a constitutional question directly to the Supreme Court. Instead of trying to decide how to address a constitutional violation from within the executive, as Buchanan and Dorf imagine could occur in the United States, the Canadian Government can ask the SCC what to do. Moreover, the reference related to Manitoba law—meaning that federalism considerations come into play.

Re Manitoba Language Rights might seem to be a matter of straight-forward common sense.[12] The Manitoba legislature needed time to translate all the provinces' laws into French, and so the Supreme Court gave the legislature the time it needed. The constitutional rights of French speakers were vindicated, but without creating absurd results. What this story neglects is that the Province of Manitoba had already had time to translate its statutes: approximately ninety-two years.

As the SCC explains it,[13] the requirement that Manitoba statutes be published in French and English in the Constitution Act, 1871, which was the British North America Act, 1871, which incorporated the Manitoba Act of 1870, is a product of the concessions won by Louis Reil and his supporters in the Red River Resistance (or Rebellion, depending on who you ask). The Manitoba legislature violated this requirement when it passed the Official Languages Act, making English the official language and ending publication of the laws in French. A French speaker immediately challenged the Act, resulting in an 1892 judgment that it was *ultra vires* because the colonial legislature had no power to contravene an act of the imperial Parliament.[14] The Manitoba legislature did nothing and continued to publish laws only in English. A 1909 challenge resulted in the same.[15] In 1981, the Manitoba Court of Appeal held in *Bilodeau v. Attorney General of Manitoba* that the Highway Traffic Act was valid despite only being published in English.[16] Still, the legislature finally started publishing in both languages in 1982 (while the traffic case was under appeal to the SCC), but declined to translate its existing statutes.[17] Meanwhile, the SCC ordered

[12] *Id.* at 2072-73.

[13] Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 731-32 (Can.).

[14] *Id.* at 732.

[15] *Id.* at 733.

[16] Bilodeau v. Att'y Gen. of Manitoba, [1981] 5 W.W.R. 393 (Can.).

[17] Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 734 (Can.).

Quebec to keep publishing statutes in English,[18] making Manitoba's continued refusal to use French awkward to say the least. With *Bilodeau* already at the SCC, the federal government stepped in with its reference challenging Manitoba's refusal to translate existing statutes.

With this history in mind, judicial use of delay in *re Manitoba Language Rights* looks more nuanced. It has some elements in common with *Brown II's* "all deliberate speed" in the struggle to end U.S. school segregation, which Buchanan and Dorf take as the main counterexample and "cautionary tale."[19] Language has been a central issue in the struggle over Canadian national identity since before Canada existed. Depending on the time and place, language sweeps into it a mix of race, religion, and colonial legacy. Francophones have often been second-class citizens in English-speaking provinces—subject to discrimination in education and employment. That French in Manitoba was tied to indigeneity—French language having been a demand of Métis rebels—goes some way to explaining why the legislature felt so confident ignoring the needs of French speakers despite losing in court.[20] Meanwhile, the idea of secession was gaining popularity in Quebec. The SCC was faced with these heady centripetal forces, and a constitution that had only been patriated in 1982.

Judges sometimes must balance preserving institutional credibility for their courts and vindicating rights. Courts that are constantly embroiled in political strife might lose effectiveness even in ordinary cases. But a refusal to vindicate rights that the judge believes a party is legally entitled to risks demonstrating that the law is ineffective, and also undermines both the court as an institution and the rule of law as it is often understood. Many judges are already not the type to stick their necks out, creating a risk that they will reach for delay more than is appropriate. Still, Buchanan and Dorf have made a compelling case that delay might be the best of bad options even in cases of chronic delay.[21] If courts follow their framework, they will not be able to hide behind vague pronouncements, but will be actively involved in holding the government to specific timelines.

A court looking to implement the Buchanan-Dorf framework can find inspiration in subsequent cases. For instance, *Ontario v. G* would be useful to Buchanan and Dorf because the Supreme Court sets out a specific balancing test,[22] similar to the exercise they advise US courts to engage in, which would weigh "the interests of constitutional compliance versus other public

[18] Att'y Gen. of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, 1030 (Can.).

[19] Buchanan & Dorf, *supra* note 1, at 2074.

[20] RAYMOND HÉBERT, MANITOBA'S FRENCH LANGUAGE CRISIS: A CAUTIONARY TALE, 5-10 (2004). By the time of the French language crisis of the 1970s and 80s, French was associated with nonwhite ("white" being Anglo-Saxon or German) people in general. *Id.* at 108, 216-27.

[21] Buchanan & Dorf, *supra* note 1, at 2095-96.

[22] Ontario v. G, 2020 SCC 38, para. 139.

interests."[23] In that case, the SCC placed a burden on the government to demonstrate a "compelling public interest" in suspending a remedy.[24] The court should also determine the length of a suspension.[25] This approach lines up with Buchanan and Dorf's argument that the government should have to meet a high threshold in demonstrating why suspension is necessary and that courts should "set a limit on that delay at the outset."[26] Like Buchanan and Dorf, the court located this power in its powers of judicial review.[27]

The Canadian example is a fruitful one for thinking through how wind-down authority would work in the United States. Recent cases offer the kind of balancing test that Buchanan and Dorf might be after. But thinking through these cases also starts to expose the ways in which the Canadian system may not be so similar.

II. PARLIAMENTARY SUPREMACY LITE MEETS PRESIDENTIALISM

As much as suspended declarations of invalidity are about not creating chaos (rule of law values) they are equally about the role of courts in a democracy. The SCC frequently cites the need to respect the role of the legislature as a reason to suspend a declaration of invalidity rather than simply declare legislation or regulation invalid or read it down.[28] Suspended declarations of invalidity work with the overall Canadian constitutional structure to give the government time to figure out how to comply with the constitution and send the legislation through parliament. Ultimately, this process is to give the public a greater say in Canada's constitutional dialogue. Although they note that the legislature should be able to use wind-down authority itself,[29] the main case that Buchanan and Dorf present for wind-down authority is less about allowing the legislature to function than about managing its dysfunction.[30]

Canadian academics have remarked on the similarities between suspended declarations of invalidity and the Notwithstanding Clause in the Charter of Rights and Freedoms.[31] In relation to Charter rights, the clause allows a legislature to engage in planned, renewable, constitutional violations, passing legislation notwithstanding its violation of the Charter.[32] The same spirit of

[23] *Compare* Cyr et al., *supra* note 7, at 385 (emphasis omitted), *with* Buchanan & Dorf, *supra* note 1, at 2086-88.

[24] Ontario v. G, 2020 SCC 38, para. 126.

[25] *Id.* at para. 134.

[26] Buchanan & Dorf, *supra* note 1, at 2093.

[27] Ontario v. G, 2020 SCC 38, para. 121.

[28] *See, e.g.*, *id.* at para. 94; Cyr et al., *supra* note 7, at 368-69.

[29] Buchanan & Dorf, *supra* note 1, at 2088-89.

[30] *See id.* at 2099.

[31] *See, e.g.*, Cyr et al., *supra* note 7, at 345, 380-81; Brian Bird, *The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity*, 42 MAN. L.J. 23 (2019).

[32] Canadian Charter of Rights and Freedoms s. 7, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act of 1982, c 11 § 33 (U.K.). The Canadian constitution is not contained in a single document and the Notwithstanding Clause is for the Charter

deference in allowing Parliament to take responsibility for curing the constitutional violation shows up in decisions that suspend declarations of invalidity.[33] For instance, the *Ontario v. G.* majority stated that the court should suspend declarations of invalidity if failure to do so "would significantly impair the ability to legislate."[34] Deferring to Parliament means that voters can have a greater say in constitutional debates and that responses to constitutional violations will be able to take into account a wider range of factors than courts necessarily can.[35]

Of course, this story is overly idealized. U.S. readers should understand that deferring to Parliament means deferring to the Government-in-Parliament. Although Canadian constitutional law has the same tripartite division of powers, it would not be correct to approach executive and legislative power in the same way because the executive *is* the legislative leadership. That executive often seems perfectly happy to make the courts do most of the work of ensuring that laws and administrative actions are constitutional.[36] Suspended declarations of invalidity could hand some of the responsibility back. However, Robert Leckey cautions that the success of doing so may depend on the timing of the suspension in light of the legislative task.[37] The typical suspension period of one year may simply be insufficient for complex issues it has been used for[38] even if those issues are exactly the ones in which a Canadian judge is likely to want to defer to parliament.

Buchanan and Dorf also want the political branches to take more responsibility for constitutional interpretation. Their proposal is in line with theories of departmentalism, which hold that all branches of government can interpret the Constitution and are responsible for doing so.[39] The value of departmentalism, and of parliamentary supremacy, is that politicians will have to take political responsibility for deciding what the constitution requires. And if voters do not like their interpretation of the constitution, politicians can be

specifically, so it would not apply in cases like *Re Manitoba Language Rights*, which involve other constitutional documents.

[33] *See* Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism,* 8 INT'L J. CONST. L. 167, 170 (2010).

[34] Ontario v. G., 2020 SCC 38, para. 129.

[35] *See* Kent Roach, *The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies*, 5 J. INT'L & COMP. L. 315, 328 (2018).

[36] *See* EMMET MACFARLANE, JANET L. HIEBERT & ANNA DRAE, LEGISLATING UNDER THE CHARTER: PARLIAMENT, EXECUTIVE POWER, AND RIGHTS 2-13 (2023) (arguing Parliament often does not respond to judicial decisions invalidating legislation on Charter grounds and rarely considers constitutionality in legislative process).

[37] *See generally* Robert Leckey, *Assisted Dying, Suspended Declarations, and Dialogue's Time*, 69 U. TORONTO L.J. 64 (2019).

[38] *Id.* at 78.

[39] Robert Post & Reva Seigel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1031 (2004).

removed and replaced with someone whose views on the constitution do reflect the popular will.

Departmentalism runs into two glaring problems with U.S. political reality: gaining a majority of votes nationwide does not translate into political control and functioning government may not be a shared goal of public officials. The U.S. Congress does not necessarily represent a majority of voters and is deeply dysfunctional for reasons too numerous to rehash here.[40] Indeed, a large part of the attraction of Buchanan and Dorf's proposal is that it would help the U.S. President to manage Congressional failure.[41] We can expect this failure to continue to create absurd situations such as the brinksmanship over the debt-ceiling.[42] In years in which the person in the White House is the person who won the popular vote, the President can be said to have a mandate from the American people.[43] The President is politically responsible and as such might be able to make decisions related to constitutional law and be held to account in the next election. However, the presidency has many of the same vulnerabilities as Congress. Thanks to the electoral college, Presidents do not have to gain a majority of votes to win the election and thus do not necessarily have a popular mandate. And, mandate or not, institutional dysfunction can become a political strategy. [44] If constitutional dialogue can be hard to operate in the Canadian context, it may be impossible in the U.S. context, which may be one reason why Buchanan and Dorf do not make it a focus. Thus, wind-down authority may not benefit from tracking a dialogue-based system too closely.

III. OUR FEDERALISMS

In their article, Buchanan and Dorf set aside federal-state relations. One cannot manage everything in one article, but the Canadian example suggests that wind-down authority can play a significant role in managing vertical divisions of power. There are probably as many different versions of federalism as there are federal countries and I was dismayed to learn as a new Canadian law professor that my U.S. federalism instincts did not translate. In Canada, for instance, all criminal law is under the jurisdiction of the federal parliament, but securities law belongs to provincial parliaments. Evaluating the use of suspended declarations of invalidity requires knowing that provincial parliaments use the Notwithstanding Clause much more frequently than the federal parliament, and that the court system is structured differently.

The importance of the first point is obvious. Even if it is hard to get together a political coalition to violate Charter rights at the federal level, it has been easier

[40] *See generally* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015).

[41] Buchanan & Dorf, *supra* note 1, at 2097-2101.

[42] *Id.* 2099-2102.

[43] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105-06 (1991).

[44] *See* Farina, *supra* note 40, at 1691-92.

to do so at the provincial level.[45] Just in the past several years the Quebec Government invoked the Notwithstanding Clause to ban the wearing of religious symbols by government employees (as in France, the ban was aimed at Muslim women)[46] and the Ontario Government invoked it to reduce the size of the Toronto City Council.[47] The Saskatchewan Government now plans to invoke it for legislation that would require schools to out trans and non-binary students to their parents if the students wish to use a different name or pronoun.[48] Once the Notwithstanding Clause is invoked, there's nothing the courts can do about the Charter violation. The suspended declaration of invalidity becomes an alternative to the province rejecting federal rules all together.

Canada has a federal trial court in Ottawa, but it is nothing like the network of federal courts with broad concurrent jurisdiction that grew in the United States. Instead of division and deference, provincial and federal judicial powers are entangled. The judges on lower-level courts are appointed by provincial authorities, even though they frequently apply criminal law, which is federal. The judges of the superior courts and courts of appeal of each province or territory are federally appointed, even though they frequently preside over civil matters, which involve provincial law. The Supreme Court of Canada is also the apex court of each province and territory and is the final authority on provincial or territorial law.

As a result, some lower court judges who appear to U.S. readers to be "Manitoba" or "Ontario" judges will owe their power to federal appointment. Suspended declarations of invalidity offer a way to tread carefully on hot-button issues in the province, setting a timeline for change without provoking use of the Notwithstanding Clause. Judicial use of suspended declarations of invalidity should be understood within this context.

One of the most recent uses of a suspended declaration of invalidity illustrates its relationship to federalism, and also makes clear the different federalism stakes of Canada's court organization system. In *re the Code of Civil Procedure of Quebec*, the SCC invalidated Quebec's expansion of small claims court jurisdiction in response to an application for declaratory judgment by Quebec's Superior Court leadership. The Quebec legislature gave the Court of Quebec exclusive jurisdiction over claims less than CAD 85,000. The effect of the statute was to undercut the jurisdiction of the Superior Court of Quebec. The reason that the legislative majority would want to do so has to do with the struggle over

[45] *See generally* Tsvi Kahana, *The Notwithstanding Clause in Canada: The First Forty Years*, 60 OSGOODE HALL L. J. 1 (2023).

[46] Steve Rukavina, *Muslim Women Most Affected by Quebec's Secularism Law, Court of Appeal Hears*, CBC (Nov. 22, 2022, 2:17 PM), https://www.cbc.ca/news/canada/montreal/muslim-women-most-affected-by-quebec-s-secularism-law-court-of-appeal-hears-1.6644377 [https://perma.cc/64CJ-JJLR].

[47] Toronto (City) v. Ontario (Att'y Gen.), 2021 SCC 34 para. 46 (Can.).

[48] Adam Hunter, *Sask. Parental Bill of Rights Introduced, Notwithstanding Clause To Be Invoked*, CBC (Oct. 12, 2023, 7:00 AM), https://www.cbc.ca/news/canada/s askatchewan/sask-bill-137-notwithstanding-clause-1.6993335 [https://perma.cc/593F-HL7B].

provincial-federal powers. The judges of the Court of Quebec are provincially appointed, in contrast to the federally-appointed judges of the Superior Court. The SCC held that the statute was unconstitutional because it cut into the core of Superior Court jurisdiction guaranteed in the Constitution Act.[49] However, it suspended its declaration of invalidity.[50] Doing so avoided more heavy-handed maneuvers such as reading down the legislation to set a specific limit for the Court of Quebec's exclusive jurisdiction.[51]

Two conclusions follow from these observations. First, U.S. scholars working with Canadian cases need to make sure they are seeing federalism when it is there and that they are comparing apples to apples when considering how the court is treating executive or legislative authorities. Additionally, in cases like the Manitoba and Quebec cases discussed here, the SCC may be mediating between the federal Government and the Governments of the provinces in question. Second, federalism is an important component of how courts would likely wield wind-down authority in practice. Wind-down authority could become a component of how U.S. federal courts address constitutional violations by the state government, as in the Eighth Amendment cases Buchanan and Dorf discuss.[52] One can easily imagine wind-down authority in the U.S. taking on an analogous mediating role to that in Canada in situations in which the Department of Justice has brought a case against a state government for violation of the Constitution or of federal law.

CONCLUSION: COMPARE WITH CAUTION

U.S. legal scholars can benefit from thinking about the Canadian example of entangled powers managing constitutional violations in part because the starting assumptions are so different. Canada provides an example of a system in which the political branches can openly acknowledge that they are violating aspects of the constitution and weigh the public benefit of doing so. Courts that might consider taking Buchanan and Dorf up on providing wind-down authority in their decisions need to use this example with caution. The arguments for wind-down authority are premised on different interbranch relations and capacities than those for suspended declarations of invalidity. On the other hand, Canadian cases may be a useful to federal courts reviewing state government action as they demonstrate the importance of federalism considerations in granting wind-down authority.

[49] Reference re Code of Civil Procedure (Que.) art. 35, 2021 SCC 27, paras. 141, 160.

[50] *Id.* at para. 160.

[51] *Cf.* Cyr et al., *supra* note 7, at 366.

[52] Buchanan & Dorf, *supra* note 1, at 2087.