

The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity

B R I A N B I R D *

ABSTRACT

This article considers suspended declarations of invalidity – court orders in Canada that, like use of the notwithstanding clause by legislatures, temporarily give life to unconstitutional laws. Suspended declarations exceed the judicial review powers of Canadian courts, but the unwritten constitutional principle of the rule of law authorizes them where an immediate declaration of invalidity would create lawlessness. The prospect of this scenario yielded the first suspended declaration in Canada, which I consider a legitimate use of the remedy. Since then, however, the legal basis for this remedy has become obscured and, as a consequence, use of the remedy has at times been unprincipled.

Suspended declarations can threaten the rule of law if they are misunderstood. In 2015, a court in Quebec upheld legislation in that province allowing physician-assisted death during the period in which the federal crime of assisted suicide remained valid due to a suspended declaration. Where a valid federal law and a valid provincial law conflict, the federal law prevails. Allowing the Quebec law to operate alongside the valid federal law during that period violated the rule of law.

Regarding separation of powers, the Canadian Constitution expressly permits legislatures to give life to certain unconstitutional laws via the notwithstanding clause. Courts engage in this kind of activity when they issue suspended declarations. The federal government could have used the notwithstanding clause for physician-assisted death to extend the period of suspended invalidity. There was no need to ask the Supreme Court for the

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extension. In light of the notwithstanding clause, the separation of powers, and the absence of a grave threat to the rule of law, no court should have issued a suspended declaration in that litigation.

Keywords: Canadian Constitution; judicial review; rule of law; separation of powers; notwithstanding clause; suspended declarations of invalidity; *Canadian Charter of Rights and Freedoms*.

I. INTRODUCTION

This article considers court orders in Canada that temporarily prolong the life of laws that courts have found unconstitutional. These orders are known as suspended declarations of invalidity: a court suspends (or delays) the effect of its declaration of constitutional invalidity to a later date rather than give the declaration immediate effect.

Suspended declarations resemble the power of Canadian legislatures to temporarily give life to legislation that limits certain guarantees in the *Canadian Charter of Rights and Freedoms*.¹ This power resides in section 33 of the *Charter* – the so-called “notwithstanding clause.” While scholars such as Sarah Burningham and Emmett Macfarlane have noted the similarities between the notwithstanding clause and suspended declarations,² the notwithstanding clause is far better known and far more controversial both inside and outside of legal academic circles. Yet if the controversy stems at least in part from a discomfort with giving life to unconstitutional laws, the judicial version of the notwithstanding clause – which, despite notable differences, achieves the same result and can be used in all constitutional litigation, not only in relation to certain *Charter* rights – should also attract attention.

As Grant Hoole writes, suspended declarations are now the “remedial instrument of choice [for the Supreme Court of Canada] in most cases

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

² See e.g. Sarah Burningham, “A Comment on the Court’s Decision to Suspend the Declaration of Invalidity in *Carter v. Canada*” (2015) 78 *Sask L Rev* 201-207; Emmett Macfarlane, “Dialogue, Remedies, and Positive Rights: *Carter v. Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*” (2017) 49:1 *Ottawa L Rev* 107 at 116-120.

involving the invalidation of unconstitutional laws.”³ The purpose of these declarations is to allow legislatures to cure the constitutional defects in laws in an environment that is free from abrupt (and at times seismic) legal changes that can follow an immediate declaration of constitutional invalidity. In this article, I investigate the legal basis for suspended declarations through three lenses of Canadian constitutionalism: judicial review, the rule of law, and the separation of powers. I conclude that, as our constitutional law currently stands, suspended declarations are illegitimate apart from the scenario where a judicial declaration that a law is immediately unconstitutional poses a grave threat to the rule of law, in the form of lawlessness. I do not close the door on the possibility of suspended declarations where an immediate declaration of invalidity would imperil other unwritten constitutional principles such as democracy, respect for minorities, and federalism – but that issue is best left for future scholarship. Even if suspended declarations are available in relation to those unwritten constitutional principles, it seems fair to say that the instances in which it is legitimate to issue such a declaration are few and far between.

Suspended declarations of invalidity exceed the judicial review powers of Canadian courts. The Canadian Constitution does not expressly contemplate these declarations. The constitutional provision that is said to govern judicial review for constitutionality today – s. 52(1) of the *Constitution Act, 1982* – only contemplates immediate declarations of invalidity. In fact, there is no reference in that provision to declarations of any sort. Despite this textual state of affairs, I accept, based on its nature and status, that the unwritten constitutional principle of the rule of law authorizes suspended declarations where an immediate declaration would unleash lawlessness. This scenario served as the justification for a suspended declaration when this court order made its debut in Canada in 1985.

While the rule of law permits a suspended declaration when an immediate declaration would create legal chaos, suspended declarations can also threaten the rule of law if they are misunderstood. When assisted death was on the horizon in Canada, a court in Quebec upheld legislation in that province which allowed assisted death during the period in which the federal crime of assisted suicide remained valid due to a suspended declaration issued by the Supreme Court. In Canada, where a valid federal law and a valid provincial law conflict, the federal law prevails. The Quebec

³ Grant R Hoole, “Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity” (2011) 49:1 *Alta L Rev* 107 at 110-111.

court erred by concluding that the federal law was invalid during the period of suspended invalidity. Allowing the Quebec law to operate alongside the valid federal law during that period violated the rule of law.

With respect to separation of powers, the Canadian Constitution expressly permits legislatures – and legislatures alone – to give life to laws that violate certain *Charter* rights and freedoms through invocation of the notwithstanding clause.⁴ Suspended declarations are, in many respects, a judicial form of this power. In the assisted death litigation, the federal government asked the Supreme Court to extend the period of suspended invalidity. The government could have invoked the notwithstanding clause to obtain this extension, as the clause applied to the *Charter* right that was at issue.⁵ There was, in other words, no need to involve the judiciary. In light of the notwithstanding clause, the separation of powers, and the absence of a grave threat to the rule of law, I submit that no court should have issued a suspended declaration in the course of that litigation.

Canada's experience with suspended declarations is worthwhile to consider when fashioning remedies in bills of rights. As the Canadian experience reveals, courts may fashion this remedy if the drafters do not expressly rule it out. Even if a bill of rights expressly allows suspended declarations, there remains the potential for courts to develop an approach to this remedy that lacks coherence with respect to when it should – and should not – be used.

Before turning to the relationship in Canada between suspended declarations and judicial review, the rule of law, and the separation of powers, I will briefly survey the legal history of suspended declarations in Canada.

II. HISTORY OF SUSPENDED DECLARATIONS IN CANADA

For more than 100 years after Confederation in 1867, suspended declarations of invalidity were unknown to the judicial function in Canada. Where a law was found to violate the Constitution, it was immediately invalidated. Before the advent of the *Charter* in 1982, judicial review of laws

⁴ *Charter*, *supra* note 1, s 33.

⁵ *Carter v Canada (AG)*, 2016 SCC 4. During oral argument before the Supreme Court, Justice Russell Brown made this point to the parties.

for constitutionality almost exclusively concerned the division of legislative jurisdiction between the federal and provincial governments.

The suspended declaration first appeared in 1985. In *Re Manitoba Language Rights*, a reference case, the Supreme Court of Canada concluded that the province of Manitoba had, since 1890, failed to satisfy a constitutional requirement to enact all of its laws in both English and French.⁶ Nearly all of Manitoba's laws had been published only in English.

The Court concluded that the invalidity of these laws would not only be prospective. The unconstitutional laws were void *ab initio*: they "are and always have been invalid and of no force or effect."⁷ The Court viewed this scenario as a grave threat to the rule of law, as the "positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 will be destroyed and the rights, obligations, and other effects arising under these laws will be invalid and unenforceable."⁸ To avoid "anarchy"⁹ and a "legal vacuum" with "consequent legal chaos,"¹⁰ the Court suspended the effect of its judgment – and thereby temporarily preserved the validity of the unconstitutional laws – to give Manitoba time to re-enact its unilingual laws in French and English.

The Court justified this remedy on account of the rule of law. The Canadian Constitution "will not suffer a province without laws" the Court said, and so the Constitution "requires that temporary validity and force be given" to the unconstitutional laws of Manitoba.¹¹ The Court went on to note that any "rights, obligations and other effects which have arisen under these laws and the repealed and spent laws" prior to the judgment that would not be saved by common law doctrines such as *de facto* or *res judicata* "are deemed temporarily to have been and continue to be effective and beyond challenge."¹² The Court saw this approach as the only way "that legal

⁶ *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [Manitoba Language Reference].

⁷ *Ibid* at 767. It is for this reason that the re-enacted legislation included provisions deeming it to be retroactive in effect: see *The Re-Enacted Statutes of Manitoba*, 1988, SM 1988-89, c 1, s 8.

⁸ *Manitoba Language Reference*, *supra* note 6 at 749.

⁹ *Ibid* at 758.

¹⁰ *Ibid* at 747.

¹¹ *Ibid* at 767.

¹² *Ibid*.

chaos can be avoided and the rule of law preserved.”¹³ I return to *Manitoba Language Reference* later, when I consider whether the rule of law authorizes suspended declarations in cases that pose a grave threat to this principle.

Since *Manitoba Language Reference*, the Court has expanded the scenarios in which suspended declarations are appropriate. In 1992 the Court stated in *Schachter* (with no preceding analysis) that the supremacy clause in the Canadian Constitution – s. 52(1) of the *Constitution Act, 1982* – grants Canadian courts “flexibility in determining what course of action to take” after discovering unconstitutionality, and that suspended declarations are an option.¹⁴ The Court held that a suspended declaration of invalidity is “clearly appropriate where the striking down of a provision poses a potential danger to the public” or “otherwise threatens the rule of law.”¹⁵ The remedy is also appropriate, the Court held, where the legislation is deemed unconstitutional due to “underinclusiveness” – for example, where a law that provides a benefit to some individuals fails, on equality grounds, to provide it to others.¹⁶ The Court in *Schachter* reasoned that, in such a case, the “logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.”¹⁷

Besides suspended declarations of invalidity, the Court in *Schachter* identified a number of other remedies that courts may employ to temper an immediate declaration of unconstitutionality under s. 52(1). “Severance” involves invalidating only the portion of a law that offends the Constitution, leaving the rest of the law intact. “Reading in” refers to the scenario in which a court inserts words into the law that would render it compliant with the Constitution. “Reading down” is to interpret the law in such a way that its scope of application does not trigger unconstitutionality. The reasoning of the Court in *Schachter* in respect of these remedies is the same as in relation to suspended declarations. Apart from asserting that s. 52(1) empowers Canadian courts to use these remedies, the Court offered no legal basis for their existence. While the issue exceeds the scope of this article, there is no

¹³ *Ibid.*

¹⁴ *Schachter v Canada*, [1992] 2 SCR 679 at 696, 93 DLR (4th) 1 [*Schachter*].

¹⁵ *Ibid* at 715.

¹⁶ *Ibid.*

¹⁷ *Ibid* at 716.

obvious reason why the conclusions here on the legal basis for suspended declarations do not also apply to reading in, reading down, and severance.

In the decades since *Schachter*, suspended declarations of invalidity have become the remedy of choice for the Supreme Court where a law is found to be inconsistent with the Canadian Constitution.¹⁸ Recently, these declarations were used in cases concerning prostitution (*Bedford*)¹⁹ and assisted death (*Carter*).²⁰ In these cases, the Court conducted little analysis before issuing the declarations – a stark contrast to the approach of the Court in *Manitoba Language Reference*.

The repercussions of suspended declarations of invalidity in relation to assisted death will be considered in the sections of this article on the rule of law and the separation of powers. In February 2015, the Supreme Court held in *Carter* that the absolute criminal prohibition against assisted suicide unjustifiably violates the “right to life, liberty and security of the person” in section 7 of the *Canadian Charter of Rights and Freedoms*²¹ with respect to competent adults who meet certain medical criteria and consent to death with the assistance of a physician. The Court suspended the effect of the ruling – and thereby preserved the validity of the absolute criminal prohibition against assisted suicide – for 12 months to afford legislatures in Canada time to respond (should they choose to do so).

In December 2015, assisted death arrived in the province of Quebec through a provincial law²² – but only after a Quebec court ruled that the law could operate during the twelve-month period of suspended invalidity issued in *Carter*.²³ In January 2016, the Canadian government asked the

¹⁸ See e.g. Burningham, *supra* note 2; Hoole, *supra* note 3. See also Bruce Ryder, “Suspending the Charter” (2003) 21:2 SCLR 267-297, Lionel Smith, “Canada: The Rise of Judgments with Suspended Effect” in Eva Steiner, ed, *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Heidelberg: Springer, 2015) 247-259, and Kent Roach, “Charter Remedies” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 673-694.

¹⁹ *Bedford v Canada (AG)*, 2013 SCC 72 [*Bedford*].

²⁰ *Carter v Canada (AG)*, 2015 SCC 5.

²¹ *Charter*, *supra* note 1, s 7.

²² *Act respecting end-of-life care*, CQLR, c. S-32.0001.

²³ *Québec (Procureur general) c D’Amico*, 2015 QCCA 2138 [*D’Amico*].

Supreme Court for a six-month extension of the *Carter* suspension.²⁴ The Court granted an extension of four months. It also allowed Quebec's law to operate during the period of suspended invalidity but declined to rule on the constitutionality of the law during that period. In June 2016, the Parliament of Canada decriminalized assisted death for adults who exhibit certain medical characteristics and consent to the procedure.²⁵

A great distance has been traveled from the first use of a suspended declaration in *Manitoba Language Reference*, where the remedy was viewed as a measure of last resort to avoid a "state of emergency" in Manitoba.²⁶ In Canada, suspended declarations are no longer viewed as reflecting the notion that desperate times call for desperate measures. Today, these declarations are more a matter of course than a measure of last resort. With this background knowledge in hand, I turn to the relationship of suspended declarations to judicial review, the rule of law, and the separation of powers.

III. JUDICIAL REVIEW

In Canada, courts routinely perform "strong-form" review of laws for constitutionality.²⁷ In other words, Canadian courts do more than determine whether laws are inconsistent with the Constitution. Once that determination is made, the law is invalid to the extent of the inconsistency. The law is, as it is often said, struck down. This approach differs from that of the United Kingdom, for example, where strong-form judicial review does not exist. One of the closest practices is a declaration that a law is incompatible with the *Human Rights Act 1998*, but such a declaration does not invalidate the law.²⁸ The practice of "weak-form" judicial review in the UK flows from the fundamental and enduring position of parliamentary

²⁴ *Carter v Canada (AG)*, 2016 SCC 4.

²⁵ *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3.

²⁶ *Manitoba Language Reference*, *supra* note 6 at 766.

²⁷ See e.g. Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009).

²⁸ *Human Rights Act 1998 (UK)*, 1998, c 42.

sovereignty in the British constitutional order: the idea that Parliament can enact or repeal any law as it sees fit.²⁹

The present-day legal basis for the Canadian brand of constitutional judicial review is the supremacy clause in the Canadian Constitution, s. 52(1) of the *Constitution Act, 1982*: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”³⁰

Section 52(1) is, in other words, the legal basis on which Canadian courts rely to strike down laws that are inconsistent with the Constitution. Section 52(1) is relevant to the topic of suspended declarations of invalidity. If s. 52(1) excludes such declarations, the legal basis for them will have to be found elsewhere. Nothing in the text of the Constitution expressly empowers Canadian courts to issue suspended declarations. The Constitution of South Africa, as a point of comparison, expressly empowers courts in that country to issue suspended declarations of invalidity.³¹

While suspended declarations of invalidity in Canada are “accepted” today as a way of “temporarily limiting the retroactive effect of constitutional remedies in order to prevent legal vacuums,” Canadian courts have failed to precisely identify the legal basis for this remedy and

²⁹ See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund Inc, 1982) at xlii. The difference in approach to judicial review between Canada and the UK raises intriguing questions. While Canada inherited a Constitution that is “similar in Principle” to that of the UK, strong-form judicial review has been practised in Canada since at least Confederation in 1867: see *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

³⁰ *Constitution Act, 1982*, s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

³¹ *Constitution of the Republic of South Africa* No 108 of 1996, s 172(1)(b). For a comparison of the Canadian and South African approaches, see Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015) at 102-106. Suspended declarations - or remedies that resemble them - have been used in Germany and Ireland: see Eva Steiner, “Judicial Rulings with Prospective Effect: From Comparison to Systematisation” in Steiner, *supra* note 18 at 11. The same is true in Israel: see Ittai Bar-Siman-Tov, “Time and Judicial Review in Israel: Tempering the Temporal Effects of Judicial Review” in P Popelier et al, eds, *The Effects of Judicial Decisions in Time* (Cambridge: Intersentia Publishing, 2014) 207 at 213-15.

scholars have largely given the courts a pass on that issue.³² Suspended declarations are a form of dialogue between courts and legislatures that can avoid dramatic consequences that might attend the immediate invalidity of a law, but what is the legal basis for these declarations? Dialogue between courts and legislatures, to be legitimate, must first have a legal basis.³³

As a matter of statutory interpretation, I submit that s. 52(1) excludes suspended declarations of invalidity. Grant Hoole notes that on “a plain reading of this provision, the invalidation of any law found to be ultra vires the Constitution should be immediate.”³⁴ He observes, as I noted earlier, that issuing immediate declarations of invalidity in the context of constitutional judicial review was “the exclusive approach of the courts in Canada prior to the *Manitoba Language Reference* in 1985.”³⁵ There is no evidence that s. 52(1), when it arrived in 1982, sought to change the nature of judicial review in Canada. On the contrary, the testimony of Barry Strayer, a principal drafter of s. 52(1), suggests that the provision was included to preserve the *status quo* with respect to constitutional judicial review.³⁶ The jurisprudence of the Supreme Court of Canada during the 1980s suggests the same.³⁷

The Supreme Court has noted the tension between the text of s. 52(1) and use of suspended declarations. The Court has described suspended declarations as a “remedial innovation” that emerged “notwithstanding the express terms of s. 52(1),” which suggests “that declarations of invalidity can

³² *Canada (AG) v Hislop*, 2007 SCC 10 at para 159 Bastarache J [*Hislop*].

³³ See Robert Leckey, “Assisted Dying, Suspended Declarations, and Dialogue’s Time” UTLJ (forthcoming).

³⁴ Hoole, *supra* note 3 at 110.

³⁵ *Ibid.*

³⁶ See Barry L Strayer, *Canada’s Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 163-164. Now a retired judge, Strayer served as Assistant Deputy Minister of Justice for the federal government from 1974-1983. He is credited, in this capacity, as having played a key role in the patriation of the Canadian Constitution. He is also considered a principal writer of the *Charter*.

³⁷ See e.g. *Manitoba Language Reference*, *supra* note 6 at 746; *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at 482, 18 DLR (4th) 481; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 313, 18 DLR (4th) 321.

only be given immediate effect.”³⁸ The Court has also noted that s. 52(1) “confers no discretion on judges” – in fact it does not refer to judges or courts – but “simply provides that laws that are inconsistent” with the Constitution “are of no force and effect to the extent of the inconsistency.”³⁹ This statement conflicts with the use of suspended declarations, which presumes that s. 52(1) permits judicial discretion regarding the moment at which a declaration of constitutional invalidity will take effect.

The use of the word “declaration” in association with s. 52(1) – whether the declaration is immediate or suspended – is itself misleading. It is inaccurate to say that a court issues a declaration of invalidity when it invokes s. 52(1). The provision does not mention that word or refer to any declaratory-like action that a court (or other branch of government) must take in order to give effect to the provision.⁴⁰ The question in a case concerning the constitutionality of a law is whether s. 52(1) *has operated by virtue of the inconsistency of the law with the Constitution*. While judicial engagement with s. 52(1) is often called “striking down” a law, in reality the law “has failed by operation of” s. 52(1) and the law is therefore “null and void.”⁴¹ The invalidity of an unconstitutional law, in other words, “does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1).”⁴² Peter Hogg, the leading scholar of Canadian constitutional law, agrees.⁴³ Although a court determines whether s. 52(1) is operative in a given case, the declaration by the court upon making that determination is not the pivotal moment for the efficacy of the provision. A law that is inconsistent with the Canadian Constitution is of no force or effect due to the operation of s. 52(1), not due to a judicial declaration that renders the provision operational.

³⁸ *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at para 99, 150 DLR (4th) 577 [Provincial Judges Reference].

³⁹ *R v Ferguson*, 2008 SCC 6 at para 35 [Ferguson].

⁴⁰ The declaratory theory of Blackstone – the idea judges in the common law tradition merely discover the law (as it always was) rather than make new law – has limited application to judicial review in respect of the Canadian Constitution: see *Hislop*, *supra* note 32 at paras 138, 141-146, Bastarache J.

⁴¹ *Ferguson*, *supra* note 39 at para 35.

⁴² *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 28.

⁴³ Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed supp looseleaf (Toronto: Carswell, 2007) at 58-62.

Arguably, the absence of an express reference to suspended declarations in the Canadian Constitution does not preclude their use. Canadian courts routinely invoke and apply unwritten constitutional principles or doctrines. Federal paramountcy is an example of such a doctrine. It instructs that, where a valid federal law and a valid provincial law conflict, the federal law prevails. That this principle does not appear in the text of the Canadian Constitution is not a cause of controversy.

Applying this reasoning to suspended declarations of invalidity is flawed. The distinction between federal paramountcy and suspended declarations is that there is a constitutional provision – s. 52(1) of the *Constitution Act, 1982* – that excludes the latter. There is no constitutional provision that bars federal paramountcy, such as a provision that permits the coexistence of conflicting federal and provincial laws. The Supreme Court has described suspended declarations and federal paramountcy as examples of how Canadian courts may fill gaps “in the express terms of the constitutional text.”⁴⁴ The authority for this gap-filling role is the preamble to the *Constitution Act, 1867*, which declares that Canada enjoys a Constitution “similar in Principle to that of the United Kingdom.”⁴⁵ I do not question here the legitimacy of the gap-filling role. I simply submit that there is no textual gap to be filled in respect of constitutional invalidity. The constitutional text – s. 52(1) – dictates that the invalidity is immediate. Notably, in *Manitoba Language Reference*, the Supreme Court suggested as much by noting that s. 52(1), on its own, only permits immediate declarations of invalidity.⁴⁶ It was a distinct and unwritten constitutional principle – the rule of law – that enabled a suspended declaration of invalidity in that case (a topic to which I turn in the next section). In other words: the approach of the Supreme Court in *Manitoba Language Reference*, the first Canadian case to feature a suspended declaration, endorses the

⁴⁴ *Provincial Judges Reference*, *supra* note 38 at para 104. Some might argue that the principle of federal paramountcy actually violates the text of the *Constitution Act, 1867*. This argument rests on the view that the provisions of this statute which delineate the legislative jurisdiction of the provincial and federal governments do not contemplate conflicts between provincial and federal legislation. I disagree. In my view (and in the view of the Supreme Court of Canada in *Provincial Judges Reference*), the *Constitution Act, 1867* is silent on what must transpire where provincial and federal legislation conflict. The *Constitution Act, 1867* does not mandate that these conflicts are allowed to occur.

⁴⁵ *Constitution Act, 1867*, *supra* note 30 at preamble.

⁴⁶ *Manitoba Language Reference*, *supra* note 6 at 746-749.

view that s. 52(1) operates immediately. This understanding means that the legal basis for a suspended declaration must be found elsewhere. Seven years later, in *Schachter*, the Court departed from this view – errantly, I submit – when it asserted that suspended declarations (as well as other constitutional remedies) flow directly from s. 52(1).

Setting aside s. 52(1) for a moment, some might argue that a separate provision in the Canadian Constitution empowers Canadian courts to issue suspended declarations of invalidity – at least in relation to infringements of the *Charter*. Section 24(1) of the *Charter* provides that anyone “whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”⁴⁷ Does this grant of judicial authority permit suspended declarations of invalidity in cases where the *Charter* has been infringed?

In my view, s. 24(1) does not empower Canadian courts to issue suspended declarations of invalidity where a law has been found to limit a *Charter* right or freedom. Section 24(1) has been consistently interpreted as granting courts the power to fashion remedies for government *action* that violates the *Charter*, but not for *laws* that violate the *Charter*. Put differently, s. 52(1) stipulates the legal ramification where legislation is found to be inconsistent with the Canadian Constitution (which encompasses the *Charter*): the legislation is of no force or effect to the extent of the inconsistency. Section 24(1), meanwhile, is “generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional.”⁴⁸ Most often, s. 24(1) is raised by an individual litigant to obtain some sort of recompense for her personal suffering on account of government action that violated her rights or freedoms under the *Charter*. While the broad wording of s. 24(1) could conceivably support the interpretation that it authorizes courts to issue suspended declarations of invalidity in respect of legislation that violates the *Charter*, such an interpretation would betray the well-established understanding of s. 24(1).

Ultimately, then, I conclude that there is no *textual* basis that empowers Canadian courts to issue suspended declarations of invalidity. Section 52(1),

⁴⁷ *Charter*, *supra* note 1, s 24(1).

⁴⁸ *Ferguson*, *supra* note 39 at para 60. On the relationship between s 52(1) and s 24(1), see *Ferguson* at paras 58-66.

the strongest candidate for serving as that basis, contemplates only immediate operation – there is no temporal element to s. 52(1) or discretion afforded to courts as to when it should operate on a law that is inconsistent with the Canadian Constitution. Section 52(1) is straightforward in its operation. If a law is inconsistent with the Constitution, the law is of no force or effect to the extent of the inconsistency. There is some debate over whether the nullity is only forward-looking (prospective) or if it is also backward-looking (retroactive), but the question of when the nullity occurs is, in my view, indisputable: it is immediate.⁴⁹

Is there a *non-textual* legal basis for concluding that suspended declarations of invalidity form part of the remedial toolbox for Canadian courts in constitutional cases? Recourse to a legal basis such as inherent jurisdiction of superior courts seems unhelpful. The Supreme Court of Canada, which is not a court of plenary jurisdiction, does not possess inherent jurisdiction. Even for courts that do possess it, inherent jurisdiction cannot be exercised in a way that contravenes a statute.⁵⁰ If s. 52(1) only allows immediate declarations of invalidity, inherent jurisdiction will be of no assistance with respect to providing a legal basis for the use of suspended declarations.

It might also be proposed that suspended declarations form part of the “internal architecture” of the Canadian Constitution, but I consider this idea to be dubious.⁵¹ That suspended declarations made their debut more than a century after Confederation, during which time Canadian courts regularly engaged in constitutional judicial review, casts major doubt on the suggestion that this remedy forms part of Canada’s “basic constitutional structure.”⁵² While I agree that the Canadian Constitution amounts to more than a “mere collection of discrete textual provisions,”⁵³ it seems an

⁴⁹ The more accepted view is that declarations of invalidity are both backward and forward looking (ie, the law is void *ab initio*): see e.g. Sujit Choudry & Kent Roach, “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003) 21:2 SCLR 205-266.

⁵⁰ IH Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 Current Leg Probs 23 at 24.

⁵¹ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 50, 161 DLR (4th) 385 [Secession Reference].

⁵² *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 57, 41 DLR (4th) 1.

⁵³ *Reference re Senate Reform*, 2014 SCC 32 at para 27.

uphill challenge to demonstrate that suspended declarations enjoy the status of being an architectural feature of Canadian constitutionalism.

What about the rule of law? Is this constitutional principle, as the Supreme Court of Canada concluded in *Manitoba Language Reference*, a non-textual legal basis for the use of suspended declarations in constitutional cases? I turn to this question – and to how suspended declarations can endanger the rule of law if they are misunderstood – in the next section.⁵⁴

IV. RULE OF LAW

The Supreme Court of Canada, in *Manitoba Language Reference*, concluded that the rule of law required a suspended declaration of invalidity in a case where the (immediate) operation of s. 52(1) would create “anarchy,” “legal chaos,” or a “legal vacuum” – in short, lawlessness. In that case, the immediate operation of s. 52(1) meant that nearly all of Manitoba’s laws would be void *ab initio*. The Court concluded that the rule of law – a fundamental, unwritten constitutional principle – dictated that this scenario was itself unconstitutional. The solution, the Court determined, is a suspended declaration of invalidity.

Manitoba Language Reference focused on one of the three dimensions of the rule of law as it is understood in Canada. Thirteen years later, in 1998, the Court discussed these three dimensions in *Reference re Secession of Quebec*. The first dimension is “that the law is supreme over the acts of both governments and private persons” – there is “one law for all.”⁵⁵ The second, and here the Court quotes *Manitoba Language Reference*, is that “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.”⁵⁶ In *Secession Reference*, the Court noted that “it was this second aspect of the rule of law that was primarily at issue” in *Manitoba Language*

⁵⁴ Like most jurists in Canada, I refer to the rule of law here as an unwritten constitutional principle. That being said, it is worth noting that the principle appears in the preamble to the *Constitution Act, 1982*, *supra* note 30: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

⁵⁵ *Secession Reference*, *supra* note 51 at para 71, quoting *Manitoba Language Reference*, *supra* note 6.

⁵⁶ *Ibid.*

Reference.⁵⁷ The third dimension of the rule of law is that “the exercise of all public power must find its ultimate source in a legal rule” – that is, the “relationship between the state and the individual must be regulated by law.”⁵⁸ *Secession Reference* describes the rule of law as a “principle of profound constitutional and political significance.”⁵⁹ It also noted that the principle of constitutionalism, embodied by the supremacy clause in s. 52(1), bears “considerable similarity to the rule of law.”⁶⁰ If the rule of law requires that all state action must comply with the law, constitutionalism lies at the heart of that obligation as the Constitution is the supreme law of Canada.

Zooming out from the three dimensions of the rule of law, it is important to situate the rule of law within the Canadian constitutional order. In *Secession Reference*, the Court described this principle (and the related principle of constitutionalism) as one of the four “fundamental and organizing principles” of the Canadian Constitution – the other three being federalism, democracy, and respect for minorities.⁶¹ These principles “inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”⁶² Stated differently, these principles “infuse” the Constitution and “breathe life into it.”⁶³ They also “assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”⁶⁴ The “observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution” of the Canadian Constitution as a “living tree.”⁶⁵ Despite the “primacy” of the written components of the Constitution, these underlying (unwritten) principles may “in certain circumstances give rise to substantive legal obligations” which “constitute substantive limitations upon

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at para 72.

⁶¹ *Ibid* at para 32.

⁶² *Ibid* at para 49.

⁶³ *Ibid* at para 50.

⁶⁴ *Ibid* at para 52.

⁶⁵ *Ibid.*

government action.”⁶⁶ These principles can “give rise to very abstract and general obligations, or they may be more specific and precise in nature.”⁶⁷ These principles, in other words, are “not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”⁶⁸

The substantive deployment of the rule of law in *Manitoba Language Reference* is, in my view, an example of when these unwritten constitutional principles can operate prescriptively. I accept, for the reasons given by the Court, that the rule of law justifies the use of a suspended declaration to prevent a scenario that would amount to a “transgression of the rule of law.”⁶⁹ The rule of law demands a stable body of laws so that a society can be ruled by law. This is the legal basis that authorizes a suspended declaration of invalidity in a case such as *Manitoba Language Reference*. The threshold for this remedy is a high one: there must be a “state of emergency” for the rule of law.⁷⁰ Needless to say, most of the subsequent uses of suspended declarations by the Supreme Court have not reached that threshold. While decriminalizing assisted death (for example) is a transformational moment for a society, it is hard to grasp how an immediate declaration of invalidity on that issue in *Carter* would have led to a state of emergency for the rule of law in Canada.

That the rule of law can, in extreme cases, justify suspended declarations of invalidity does not illuminate why the judiciary rather than the legislature is entitled to issue them. Imagine if the Court in *Manitoba Language Reference* had issued an immediate declaration of invalidity. On what basis would the Manitoba legislature be prevented from enacting legislation entitled the *Response to the Manitoba Language Reference Act* deeming Manitoba’s laws temporarily valid on the same grounds that the Court cited to justify a suspended declaration? If a dimension of the rule of law justifies the use of suspended declarations, there is no apparent reason why these declarations should be in the judicial but not the legislative toolbox. Whether it is more

⁶⁶ *Ibid* at paras 53-54.

⁶⁷ *Ibid* at para 54.

⁶⁸ *Ibid*.

⁶⁹ *Manitoba Language Reference*, *supra* note 6 at 753.

⁷⁰ *Ibid* at 766.

appropriate, as a general principle, for legislatures rather than courts to issue these declarations (or vice versa) merits deeper consideration.⁷¹

While the rule of law authorizes the use of suspended declarations in extraordinary cases, attention must be paid so that these declarations themselves do not lead to violations of the rule of law. When the Supreme Court concluded in *Carter* that the absolute criminal prohibition against assisted suicide was unconstitutional, it issued a suspended declaration of invalidity that ultimately (as a result of an extension) lasted 16 months. When a law in Quebec permitting assisted death in that province was about to enter into force during the period of suspended invalidity, a question arose: could the law operate during that period?⁷² The answer, in my view, is obvious: by virtue of federal paramountcy, the provincial law could not operate while the federal law remained valid. Federal paramountcy means that, where a federal law and a provincial law are both valid (as the laws in this case were) and the two laws conflict (as the laws in this case did), the federal law prevails.

In the litigation over the relationship between Quebec's assisted-dying law and the federal crime of assisted suicide, the court of first instance held that federal paramountcy applied: Quebec's law could not operate until the validity of the federal law expired.⁷³ On appeal, the Quebec Court of Appeal disagreed on the basis that, for the lower court's conclusion to hold water, there must be a valid federal law and a valid provincial law.⁷⁴ The Court of Appeal held that, by virtue of *Carter*, the federal law – the crime of assisted suicide – was not valid. As there was no valid federal law in the mix, federal paramountcy did not apply and therefore Quebec's law could operate.

In my view, the Court of Appeal erred. While the Supreme Court concluded in *Carter* that the crime of assisted suicide was unconstitutional, the Court postponed the effect of that conclusion for a period of time – and

⁷¹ The next section of this article suggests that, in Canada, it may be more appropriate – on the basis of the separation of powers – for the legislature (and the legislature alone) to enact what amounts to a suspended declaration in cases that implicate the notwithstanding clause in the *Charter* and where immediate invalidity does not risk legal chaos.

⁷² For clarity, the province of Quebec could enact such a law because health is an area of concurrent jurisdiction between the federal and provincial governments: see *Carter*, *supra* note 20 at para 53.

⁷³ *D'Amico c Québec (Procureur Générale)*, 2015 QCCS 5556.

⁷⁴ *D'Amico*, *supra* note 23.

thereby prolonged the validity of the crime of assisted suicide for that period. The Court of Appeal did not grapple with this reality prior to concluding that the federal law was invalid. It is more accurate to say that the federal law is invalid, but its invalidity would not take effect until a later date. The Court of Appeal seems to suggest that the federal law hangs in a sort of legal limbo that allows incompatible provincial laws to operate alongside it.

The Court of Appeal found support for its conclusion on the invalidity of the federal law in the decision of the Supreme Court which, just over 20 years before *Carter*, upheld the crime of assisted suicide.⁷⁵ In *Rodriguez*, one of the dissenting judges – Chief Justice Antonio Lamer – would have declared the crime unconstitutional, suspended the declaration of invalidity for a period of time and, during that period, given the plaintiff – Sue Rodriguez – a constitutional exemption to end her life with the assistance of a doctor. The Quebec Court of Appeal seized upon the statement by Lamer C.J. that, where a suspended declaration is issued, the law in question is “both struck down and temporarily upheld.”⁷⁶ The Court of Appeal also referred to his statement that “the legislation subjected to a suspended declaration of invalidity will not necessarily be left operative in all of its violative aspects...during the period of the suspension.”⁷⁷

The Court of Appeal, in my view, misconstrued these statements of Lamer C.J. in *Rodriguez*. His statement that a suspended declaration means that the law under scrutiny has been both “struck down” and “temporarily upheld” does not mean that the law is, at the same time, both of these things. If that were so, the law would be simultaneously valid and invalid – an impossibility. Lamer C.J. was simply describing the sequence of events where a suspended declaration is issued: the law is found unconstitutional but is allowed to live on for a prescribed period of time. The Court of Appeal noted that Lamer C.J. would have granted a constitutional exemption to Sue Rodriguez during the period in which the law’s validity was preserved, but the Court does not concede the obvious implication. The fact that Rodriguez would need a constitutional exemption during the suspended period of invalidity means that the law remains valid during that period. In short, the conclusion of the Court of Appeal is premised on the erroneous notion that the federal law was invalid

⁷⁵ *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez* cited to SCR] [emphasis in original].

⁷⁶ *Ibid* at 577.

⁷⁷ *Ibid* at 571-572.

during the lifetime of the suspended declaration of invalidity – a declaration that temporarily preserved the validity of the federal law.

As for the statement that a law which is subject to a suspended declaration of invalidity will “not necessarily be left operative in all of its violative aspects,” the Court of Appeal neglected to mention that Lamer C.J. was referring to a case in which the suspended declaration had been tailored so that certain aspects of the unconstitutional law were struck down immediately as of the date of the judgment.⁷⁸ This sort of suspended declaration is not the norm in Canada, and it was not the sort of declaration that the Supreme Court issued in *Carter*. In that case, the Court suspended the declaration of invalidity vis-à-vis the crime of assisted suicide without qualification. This meant that the crime of assisted suicide remained valid during the period of suspended invalidity, such that the Quebec law that purported to enter into force during that period was inoperative on account of federal paramountcy.

Earlier, I accepted that the rule of law permits suspended declarations of invalidity in cases where an immediate declaration threatens the aspect of this unwritten constitutional principle that demands a stable body of laws to govern a society. *Manitoba Language Reference* is a case in point. I do not exclude the possibility, based on the reasoning in this article, that immediate declarations of invalidity which would imperil federalism, democracy, or respect for minorities may also authorize a court to issue a suspended declaration (just as an immediate declaration which would imperil the rule of law may authorize it to issue a suspended declaration). If the “fundamental and organizing principles” of the Canadian Constitution are equally potent in terms of constraining state action, there is no obvious basis upon which to foreclose this scenario. That being said, for the sake of brevity and focus, this issue is best left for future scholarship.

There remains the question of whether it is more appropriate for courts rather than legislatures to issue suspended declarations. In the next section, I argue that the separation of powers in Canada suggests that, at least in respect of certain *Charter* rights and freedoms, it is certainly more (and perhaps only) appropriate for the legislature to issue these declarations unless an immediate declaration of invalidity would lead to lawlessness.

⁷⁸ *R v Swain*, [1991] 1 SCR 933, 63 CCC (3d) 481.

V. SEPARATION OF POWERS

The separation of powers between the three branches of government – legislative, executive, and judicial – is one “of the defining features of the Canadian Constitution.”⁷⁹ Broadly put, “the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; [and] the role of the executive is to administer and implement that policy.”⁸⁰ In the Westminster system, the separation of powers is not strict: it “is not a rigid and absolute structure.”⁸¹ For example, “except in certain rare cases, the executive frequently and *de facto* controls the legislature.”⁸² The separation of powers in Canada also means that “judicial functions, including the interpretation of law, may be vested in non-judicial bodies such as tribunals” and that “conversely the judiciary may be vested with non-judicial functions.”⁸³ That being said, the Supreme Court has held that the separation of powers “requires, at the very least, that some functions must be exclusively reserved to particular bodies.”⁸⁴

I submit that where the Constitution assigns a specific power to a branch of government, this principle of exclusivity applies. It is intuitive to say that a function expressly assigned to one branch of government by the Constitution must not be performed by another branch. There would be an uproar if the Supreme Court of Canada altered the eligibility criteria for persons who may be judges of the Court. The *Constitution Act, 1867* empowers Parliament – not the judiciary – to “provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for

⁷⁹ *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at 871, 140 DLR (4th) 193 [Cooper].

⁸⁰ *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 469-470, 23 DLR (4th) 122.

⁸¹ *Wells v Newfoundland*, [1999] 3 SCR 199 at 221, 177 DLR (4th) 73.

⁸² *Ibid.*

⁸³ *Cooper*, *supra* note 79 at 871.

⁸⁴ *Provincial Judges Reference*, *supra* note 38 at para 139.

Canada.”⁸⁵ There should also be an uproar if, in certain cases, suspended declarations of invalidity usurp a power belonging to legislatures in Canada.

This, I submit, is the case with suspended declarations of invalidity – at least in relation to certain rights and freedoms guaranteed by the *Charter*. In the Canadian Constitution, the only branch of government that is expressly permitted to give life to an unconstitutional law is the legislature by way of the “notwithstanding clause.” Section 33 of the *Charter* provides that Canadian legislatures may declare that legislation “shall operate notwithstanding a provision included in section 2 or sections 7 to 15” of the *Charter*.⁸⁶ The notwithstanding clause allows Canadian legislatures to exempt legislation from the scrutiny of these *Charter* rights and freedoms. Exemptions can last for up to five years at a time. If an exemption is not renewed, it expires, and the legislation is consequently invalid if it in fact violates the *Charter*.

Suspended declarations are, in many respects, a judicial version of the notwithstanding clause. The reasons given by courts for using suspended declarations of invalidity have at times even resembled reasons that might inspire a legislature to use the notwithstanding clause. In the decision of the Supreme Court that invalidated criminal offences related to prostitution for violating section 7 of the *Charter*, the Court suspended the declaration of invalidity for one year. In its brief reasons for issuing the suspended declaration, the Court noted that “[h]ow prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated.”⁸⁷ The Court considered it “clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would

⁸⁵ *Constitution Act, 1867*, *supra* note 29, s 101. However, Parliament cannot exercise this power in a way that alters the “constitutionally protected features of the Court”: *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 101. Changes of that sort can only be made through constitutional amendment.

⁸⁶ *Charter*, *supra* note 1, s 33. Section 2 of the *Charter* guarantees “fundamental freedoms” (such as freedom of religion, association, and expression), section 7 guarantees the right to life, liberty, and security of the person, and section 15 guarantees equality before and under the law. The other *Charter* rights to which the notwithstanding clause applies mainly implicate criminal proceedings, such as the right to be secure against unreasonable search and seizure (section 8) and the right not to be arbitrarily detained or imprisoned (section 9).

⁸⁷ *Bedford*, *supra* note 19 at para 167.

be a matter of great concern to many Canadians.”⁸⁸ These are statements that one could well expect to be made by a Member of Parliament in a debate on regulating prostitution. The Court did not make statements of this sort – and did not issue a suspended declaration – when it invalidated the crime of abortion in 1988.⁸⁹ In that case, the Court gave its ruling immediate effect, leaving abortion entirely unregulated in Canada from the perspective of the criminal law.

There are, of course, important differences between suspended declarations of invalidity and the notwithstanding clause. First and foremost: while the notwithstanding clause can be invoked for purely political reasons, suspended declarations are issued according to a legal framework – though, as I argue in this article, that legal framework has over time become rather ill-defined.

Suspended declarations are only issued after a law has been found to violate the Constitution, whereas the notwithstanding clause can be invoked either after a court has found a law to be unconstitutional or preemptively (that is, before a court has opined on whether the law in question violates the Constitution). The notwithstanding clause must be renewed by the legislature every five years, whereas suspended declarations usually last for a shorter period of time and are usually issued on one occasion in respect of a law. That said, there have been instances in which a suspended declaration has been extended. In *Carter*, regarding assisted death, the federal government obtained a four-month extension of the initial one-year suspended declaration. In *Manitoba Language Rights*, the suspended declaration ultimately lasted at least seven years.⁹⁰ Suspended declarations exceed the scope of the notwithstanding clause, as they can be applied to aspects of the Constitution that do not fall within the ambit of the notwithstanding clause.

Suspended declarations, in my view, violate the separation of powers – at least when they are issued in respect of a *Charter* right or freedom to which the notwithstanding clause applies and there is no existential threat to the rule of law. In those circumstances, whether an unconstitutional law should be allowed to live on for a period of time is a decision for the legislature.

⁸⁸ *Ibid.*

⁸⁹ *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

⁹⁰ *Reference re Manitoba Language Rights*, [1992] 1 SCR 212, 88 DLR (4th) 385.

Just as the separation of powers “cannot be invoked to undermine the operation of a specific written provision of the Constitution,”⁹¹ the separation of powers cannot be ignored so as to undermine the operation of such a provision. As I noted earlier, whether the legislature should take the lead on suspended declarations in all cases – even where there is a grave threat to the rule of law – merits further study. One might argue that, even in these cases, it is up to the legislature to issue a suspended declaration (in the form of legislation) unless it has asked the judiciary to do so. If the legislature fails to protect the rule of law in the wake of an immediate declaration, the option of seeking its protection in the courts through a suspended declaration would seem to be available.

To be clear, I am of the view that the prospect of legal chaos authorizes a court to issue a suspended declaration in all constitutional litigation – even where the litigation pertains to a *Charter* right or freedom to which the notwithstanding clause applies. I am concerned in this section with cases in which that sort of threat to the rule of law is not present. The point I wish to make here is that the separation of powers is, in certain cases, an additional barrier to the use of this judicial remedy. More specifically, it is a barrier where (i) the constitutional litigation implicates a *Charter* right or freedom to which the notwithstanding clause applies and (ii) legal chaos flowing from an immediate declaration is not a concern.⁹²

Ironically, the Supreme Court has suggested that suspended declarations may safeguard the separation of powers. The Court stated that it may “be appropriate to temporarily suspend a declaration of invalidity where it would be less intrusive on the separation of powers to allow the legislature a stated period of time to reconsider its policy and budgetary choices in light of constitutional parameters.”⁹³ This idea, though well-intentioned, is rendered illegitimate by my conclusion that s. 52(1) only permits immediate declarations of invalidity and that a threat to the rule of

⁹¹ *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 104.

⁹² See Macfarlane, *supra* note 2 at 120: “As a general rule, when the notwithstanding clause is available, it is questionable whether courts should provide suspensions in contexts that fall outside of the *Schachter* guidelines.” I take a stricter position. In my view, when the notwithstanding clause is available, it is illegitimate (owing to the separation of powers) for courts to issue suspended declarations unless an immediate declaration will lead to lawlessness (or, perhaps, if an immediate declaration will imperil another unwritten constitutional principle).

⁹³ *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 at para 244.

law in the form of lawlessness is the only justification for suspended declarations (subject to further study on whether this remedy is available in relation to other unwritten constitutional principles). Where this idea relates to a *Charter* right or freedom to which the notwithstanding clause applies, the separation of powers dictates that courts ought to leave the decision of whether to prolong the life of the unconstitutional law up to the legislature unless lawlessness would follow an immediate declaration.

Disregard for the separation of powers through the use of suspended declarations of invalidity was on full display when the federal government sought to extend the period of suspended invalidity in *Carter*. The federal government had no need to ask the Court for such an extension – it could have, by way of the notwithstanding clause, obtained this extension on its own because the clause applied to the *Charter* right at issue (section 7). That the notwithstanding clause has become a political third rail in Canada is no excuse for disregarding the separation of powers, a basic principle of Canadian constitutionalism. While the notwithstanding clause was likely not envisioned as a means to prolong unconstitutional laws so as to buy additional time for legislatures to cure them, nothing in principle or in the text precludes such a use of the notwithstanding clause.

Despite the foregoing discussion on how suspended declarations implicate the separation of powers, upholding the Constitution is equally the responsibility of all the branches. Returning to s. 52(1), its wording suggests that all branches of government must protect the Constitution. Yet, since the arrival of the *Charter* and the repatriation of the Canadian Constitution from the United Kingdom in 1982, the Canadian judiciary has often, citing s. 52(1), declared itself to be the “guardian of the Constitution.”⁹⁴ The Supreme Court has even stated that s. 52(1) gives courts an “express mandate” to invalidate laws that are inconsistent with the Constitution.⁹⁵ This statement is peculiar, as s. 52(1) makes no reference to courts. In fact, it makes no reference to any branch of government.

While the judiciary has emerged as the primary – or at least the final – arbiter of constitutionality in Canada since Confederation, the other branches of government are equally charged with guarding the Constitution. Legislatures must strive to enact only constitutional laws. Legislatures must also repeal unconstitutional laws, and the executive must

⁹⁴ *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155, 11 DLR (4th) 641.

⁹⁵ *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 104, 82 DLR (4th) 321.

cease to enforce them. Government lawyers routinely opine on the constitutionality of legislation and state action. That said, there is a strong sentiment in Canada that the judiciary is the primary guardian of the Constitution. This sentiment should be transformed so that all branches of government are equally considered to bear that title and responsibility.⁹⁶ Constitutionalism in Canada only stands to benefit from such a transformation.

VI. CONCLUSION

This article explored the legal basis for suspended declarations in Canada. This exploration included a consideration of the relationship of suspended declarations to judicial review, the rule of law, and the separation of powers. Insufficient attention has been paid to the legal basis for suspended declarations, their potential to enable violations of the rule of law (a principle that they are often said to protect), and the reality that the only branch of government that is expressly authorized by the Constitution to be in the business of giving life to unconstitutional laws is the legislature by way of the notwithstanding clause.

I argued that suspended declarations are authorized where the rule of law faces a grave threat, as it did in *Manitoba Language Reference*. It is difficult in the abstract to articulate precisely when that threshold is reached, but it seems safe to say that most (if not all) of the cases in which suspended declarations have been issued after *Manitoba Language Reference* have not reached this threshold. Even where that threshold has been reached, however, it is questionable whether these declarations should be the exclusive domain of the judiciary. If the rule of law is the legal basis for suspended declarations, what prevents a legislature from enacting a statute after an immediate declaration of invalidity in a case such as *Manitoba Language Reference* that temporarily suspends the effect of that ruling? An answer to this question is beyond the scope of this article, but I do not perceive an obvious bar to such legislation.

⁹⁶ See e.g. Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010). I do not advocate here for displacing courts as final arbiters of constitutionality in Canada. I am advocating for a deeper sense of guardianship for the Constitution within the legislature and the executive.

Where a case does not pose a grave threat to the rule of law, a judicial determination that a law is unconstitutional should be given immediate effect in keeping with s. 52(1), the provision that authorizes and governs judicial review in Canada. In the case of laws that violate *Charter* rights and freedoms to which the notwithstanding clause applies, I submit – in light of the separation of powers – that suspended declarations of invalidity are illegitimate (unless there is a grave threat to the rule of law, in which case this unwritten constitutional principle will intervene). It is for the legislature, in those cases, to determine whether or not to prolong the life of an unconstitutional law. On this ground alone, I submit that the issuance of a suspended declaration by the Supreme Court in the litigation concerning assisted death – which was decided on the basis of a *Charter* right to which the notwithstanding clause applies – was illegitimate.

Recently the Court may have hinted that, in its view, the use of suspended declarations has become unprincipled. In *Boudreault* (2018), after concluding that the mandatory victim surcharge which must be paid by offenders under the *Criminal Code* violates their *Charter* right not to be subjected to cruel and unusual punishment, the Court refused to issue a suspended declaration. The majority – using language that is absent from cases such as *Bedford and Carter*, in which suspended declarations were issued – rejected the federal government’s request for the declaration, as the government had “not met the high standard of showing that a declaration with immediate effect would pose a danger to the public or imperil the rule of law.”⁹⁷

Looking forward, the Supreme Court will surely have further opportunities to clarify the legal principles governing suspended declarations of invalidity. The Court should take those opportunities. For scholars, an important avenue of inquiry will be whether suspended declarations are available where unwritten constitutional principles other than the rule of law are at stake. This article sought to illuminate, at least to some extent, the legal basis for suspended declarations. Without a firm grasp of that legal basis, suspended declarations run the risk of undermining rather than supporting the rule of law: the unwritten constitutional principle which first ushered this remedy into Canadian constitutionalism.

⁹⁷ *R v Boudreault*, 2018 SCC 58 at para 98. Unless a “danger to the public” is shown to be an instance in which the rule of law (or another unwritten constitutional principle) is imperilled, it is not obvious that this criterion authorizes a suspended declaration.