Notwithstanding the Charter:

Does Section 33 Accommodate Federalism?[1]

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Scholarly discussions of the Canadian Charter of Rights and Freedoms have addressed a wide range of subjects relating to how the Charter has affected Canadian political governance including the Charter's implications for principles of representative government,[1] litigation as a strategy for legislative reforms,[2] institutional changes affecting how legislative bills are evaluated before and after their introduction to parliament,[3] government litigation strategies,[4] specific judicial rulings (too numerous to list), and metaphors for evaluating the judicial/parliamentary relationship.[5]

Yet Charter scholarship has exhibited significantly less interest in the Charter's influence on federalism. A fundamental characteristic of a federal society is the ability of its constituent parts to promote local or regional preferences according to the constitution's division of powers. For issues that are fully within Canadian provincial constitutional competence, no provincial legislature is required to satisfy the preferences of voters in another province or the national government.[6]

Yet the Charter can undermine the provinces' abilities to diverge from national norms about how rights are defined and can result in judicial rulings that constrain legislative objectives that federalism might otherwise allow. The legal context for

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interpreting the Charter lacks an obligation or directive for courts to consider or accommodate key historic rationales for the federal principle in Canada: the insulation of Quebec from pressures of assimilation, the protection of local interests, and the acceptance of diverse policy outcomes amongst provinces. Judicial review of the Charter is oriented towards a pan-Canadian or uniform interpretation of whether rights are infringed and, if so, if legislation restricts them in a reasonable manner under s. 1. The context for these s.1 assessments is whether legislative restrictions are justified in a democratic society; not a democratic society that is federally constituted.

Thus, judicial assessments of whether legislation comprises justifiable limits on rights are not directed to also consider explicitly whether federalism is a valid consideration when assessing the justification of limits on rights. Perhaps not surprisingly, the Supreme Court has not developed a theoretical or methodological approach for considering whether and how federalism is relevant when interpreting the Charter. A lack of diversity in provincial outcomes can also arise from the fact that Supreme Court judges are appointed by the federal government without any formal provincial input and its rulings are binding on all other courts.

Early Charter scholarship acknowledged possible tensions for federalism, such as the promotion of identities based on Canadianness at the expense of regional loyalties;[7] changing perceptions of constitutional values arising from citizens' interventions that helped shape many of the Charter's key provisions[8] and the effect this citizen engagement has had on transforming citizens' conception of their relationship to the constitution;[9] the declining emphasis on federalism when understanding Canadian political culture;[10] and the impact of potential Charter litigation on undermining diversity when developing and

promoting the government's legislative agenda.[11] In a particularly stark warning, Pierre Fournier characterized the Charter as a "time bomb" for Quebec.[12]

However, this interest in the Charter's impact on federalism has declined, particularly outside Quebec. One sign of this is that recent academic commentary is virtually non-existent on whether and how use of the notwithstanding clause is an appropriate way of reconciling the federal principle with the Charter and, if so, whether particular normative considerations should guide such uses. Yet the notwithstanding clause is the only explicit federalist element of the Charter and can serve federalist purposes by allowing provincial dissent where judicial rulings represent norms or constrain legislative goals in ways that are inconsistent with provincial priorities and provincial autonomy.

The lack of discussion or interest in the federalist potential of the notwithstanding clause reinforces the continued significance of Samuel LaSelva's observation of more than 20 years ago: that just as Canada's theory of federalism lacks a theory of justice, the Charter gives too little attention to the particularities of federalism.[13]

This paper addresses uses of the notwithstanding clause for federalism purposes. It is organized in the following manner. Part one discusses the possibility of distinguishing between federalist and democratic uses of the notwithstanding clause. Part two identifies uses of the notwithstanding clause and evaluates whether these are best illustrative of a federalist or democratic response to Charter rulings. Finally, in part three, the paper discusses whether inferences for federalism can be drawn from political reticence to invoke the notwithstanding clause.

The paper argues that more than half of the 18 uses of the notwithstanding clause to date have been for federalism purposes. Quebec has used this power more often than other provinces. However, the frequency of these formal uses likely understates provincial willingness in all provinces to deviate from Charter norms because of the ability and incentive to pursue less controversial ways of pursuing inconsistent legislation. Thus it is problematic to equate the relative spartan use of the notwithstanding clause to date with compliance with Charter norms or with provincial acquiescence to pan-Canadian Charter norms at the expense of federalist objectives.

Part One:

Distinguishing where the emphasis should be placed between Democratic and Federalist uses of the Notwithstanding Clause

Although the notwithstanding clause has been subject to considerable political and academic commentary, much of which is critical, it is not the federalist dimension that is usually discussed. Instead, attention focuses on whether the notwithstanding clause is consistent with the logic of a constitutional framework that otherwise emphasizes judicial resolutions for disagreements about rights.[14]

As is well known, the notwithstanding clause was a key factor for securing constitutional agreement in the late stages of prolonged negotiations to amend and repatriate the Canadian constitution, which began in the 1960s and were rekindled in 1980-81. Although these negotiations involved a potpourri of provincial and federal demands, a key to securing agreement was a compromise on two critical stumbling

blocks. One was agreement for an amending formula, which would be critical not only for future constitutional changes but was also essential to the task at hand, which was to 'Canadianize' a constitution that previously had been an Act of the British Parliament. A second key unresolved issue was agreement for the Canadian Charter of Rights, which would fundamentally alter constitutional principles by codifying rights and authorizing strong judicial remedial powers of the kind previously unthinkable in a system that until that point had emphasized the principle of parliamentary supremacy (as modified initially by Canada's colonial status and also by federalism's division of powers).

After years of failing to convince provincial premiers to accept the federal government's constitutional proposals, which included the Charter of Rights and Freedoms, new pressure to reach a compromise arose in late 1981 after the Supreme Court's ruling on the constitutional validity of proposed federal unilateral action to amend the constitution. The Supreme Court's politically clever ruling in the Patriation Reference case[15] conveyed both victory and loss for provincial and federal governments,[16] thus creating new pressure to seek compromise.

The November 1981 First Ministers conference that was convened in the wake of this ruling has been characterized as constituting a "mixed mood of grudging necessity, persistent mistrust, and modest hope."[17] A late-stage resolution was reached between the federal government and seven of the eight premiers (all but Quebec's Premier René Lévesque). Under this political agreement, Ottawa would accept the provinces' preferred amending formula, but without fiscal compensation for opting out, and the provinces would accept the Charter, but with a notwithstanding clause that would apply to fundamental freedoms, legal and equality rights.

The Charter presents serious tensions for two key constitutional principles upon which Canada was founded: the principle of majority-based democratic governance as reflected in the principle of parliamentary or legislative supremacy and ii) federalism, which assigns provinces jurisdiction over a range of matters conceived initially to protect more local (and for Quebec in particular, linguistic and cultural) objectives.

The Charter can undermine the democratic principle of representative self-government underlying the principle of parliamentary supremacy by authorizing courts to declare inconsistent legislation to be unconstitutional and therefore unlawful. The Charter can also undermine federalism because this same judicial authority clashes with a principal intent of federalism, which is to allow provinces to exercise legislative autonomy over their areas of responsibility and, as discussed above, offers no directive to consider federalism when evaluating Charter consistency. Moreover, the Charter's emphasis on individual rights and a judicial orientation towards pan-Canadian interpretations can present particular challenges for a government wishing to protect cultural and linguistic policies that are conceptualized in community rather than individual terms (for example, see below for Robert Bourassa's explanation for using the notwithstanding clause in Quebec to insulate new sign law legislation from judicial review).

Although the notwithstanding clause can be used to mitigate both democratic and federalist tensions associated with new judicial interpretive and remedial powers, most of the discussion about this power, particularly in English-speaking Canada, focusses on the democratic rather than federalist dimension.

Many critics of the notwithstanding clause argue the power is inconsistent with the Charter's project of giving priority to juridical over political judgments involving rights, and worry that use of the notwithstanding clause is an unwelcome retention of majoritarian politics they believe the Charter has replaced, as its use to set aside the effects of a judicial ruling or to prevent Charter litigation requires only a majority support in parliament. In contrast, many supporters of the notwithstanding clause place more emphasis on principles of representative democratic government and view the notwithstanding clause as a valid accommodation of the democratic principle.[18]

In one sense, this democratic rather than federalist emphasis when evaluating the notwithstanding clause is not particularly surprising, particularly outside Quebec. Few English-speaking Canadians equate federalism with the protection of culture and language or perceive a conflict between provincial or English-Canadian identities and the values represented in the Charter. For many English-speaking Canadians, the idea that the notwithstanding clause is a valid federalist instrument that allows provinces to deviate from a national rights standard is antithetical to the kind of rights project they associate with the Charter. As Peter Russell argues, for a majority of English-speaking Canadians, Charter rights have displaced the interest in provincial autonomy where Charter issues arise.[19] Thus, to the extent there is political reluctance to invoke the notwithstanding clause, this might be viewed not only as the triumph of juridical over political judgment about how rights should guide or constrain state actions, but also as the triumph of Pierre Trudeau's 'anti-federalist' view of the Charter; the promotion of pan-Canadian or uniform judgments about rights and the subordination of local or cultural values where these conflict with judicial Charter norms.

In Quebec, Charter concerns take on a much more explicit federalism perspective as many perceive the Charter as potentially undermining a basic prerequisite for meaningful federal governance: the "autonomy" of Canada's constituent parts and, in particular, Quebec. Judicial review of the Charter creates a serious tension with Canada's historic compromise intended to protect provincial control over local matters and, more the point, to protect Quebec's autonomy over language and culture as enabled in the powers granted in 1867 under the division of powers.[20] Thus, the Charter not only compromises the federal principle, some construe it as undermining a key historic compromise that led Quebec's political leaders to agree to Confederation in 1867.[21]

Although the cultural connection with federalism may not be pervasive in English speaking Canada, and little attention has been paid to whether there should be a greater federal emphasis on Charter interpretations, to rule out a federalist interest in the notwithstanding clause is to overlook historical grievances directed at interferences with the federal principle. What should not be forgotten is that early post-Confederation politics were characterized by intense battles to protect the federal principle and provincial autonomy (often viewed as one and the same) from perceived encroachments by the federal government. A key factor in this battle was the federal government's use of the disallowance power that interfered with provincial jurisdiction.[22] Another indication of provincial concern for provincial autonomy is use of constitutional litigation to challenge perceived federal government infringements. Given the continued significance of federalist impulses as indicated by robust provincial resistance to federal policies that are perceived to interfere with provincial powers, it is possible to imagine provincial interest in the notwithstanding clause as an exercise of federalism to protect

provincial autonomy; not in the earlier political sense of fighting Ottawa but instead to resist judicial imposition of a pan-Canadian interpretation of rights that conflict with provincial or community preferences.

Although I have suggested it is possible to interpret uses of the notwithstanding clause as emphasizing both democratic and federalist principles, this begs the following questions. How should democratic and federalist emphases be distinguished when assessing uses of the notwithstanding clause? Are both levels of government capable of using the notwithstanding clause in both ways? In other words, could the federal government's use of the notwithstanding clause (if indeed this were ever to occur) be characterized as a federalist use? Should all provincial uses of this power be considered federalist uses?

Admittedly, it can be difficult to distinguish whether a provincial use of the notwithstanding clause is best characterized as constituting democratic or federalist dissent from judicial review of the Charter. Particular uses might satisfy both categories of dissent. Moreover, some might contest the need to make this distinction at all, particularly as federalism can be viewed in a diverse society as a more desirable way to organize democratic government than a unitary system that may not provide political accommodation or recognition for community or cultural distinctions.

When assessing whether provincial uses of s. 33 are best construed as democratic or federalist dissent from judicial review, what is most relevant for purposes here is where the emphasis should be placed between these two categories of dissent, rather than to construe these categories as if they were mutually exclusive.

Federalist Use of S. 33

Not all provincial uses of the notwithstanding clause necessarily constitute federalist uses. To construe all provincial uses of the notwithstanding clause as federalist responses to the Charter, simply by virtue of protecting provincial legislative competence from a negative judicial Charter ruling, constitutes a fairly thin understanding of what constitutes federalist dissent from judicial review. It fails to consider the reasons for using section 33 and whether and how these relate to provincial autonomy or cultural objectives associated with Canadian federalism.

This paper adopts the notion of a 'thick' federalist response to distinguish between democratic and federalist forms of dissent, and to avoid characterizing all provincial uses of s. 33 as constituting federalist responses. The criteria considered here for characterizing use of s. 33 as a thick federalist response is *whether a provincial use of s. 33 implicitly or explicitly reflects a political intent to protect provincial autonomy from judicially defined Charter constraints, and or rejects the necessity of having to conform with national norms about the justification for restrictions on Charter rights for those areas of responsibility assigned to the provinces*.

Just as it is not appropriate to characterize all provincial uses of the notwithstanding clause as constituting federalist responses to judicial review of the Charter, it is also problematic to interpret the federal government's use of this power as ever constituting a federalist response (assuming a federal government was ever prepared to invoke this power, which to date has not occurred). As Canadian federalism is grounded in the idea of allowing the provinces to protect differences it makes little sense to equate the federal government's use of this power as a federalist interpretation of the

Charter. Arguably, only provincial use of the notwithstanding clause can be interpreted as federalist a use. Federal government uses of the notwithstanding clause should be interpreted as democratic responses to judicial review.

Democratic Use of S. 33

A democratic use of the notwithstanding clause would include federal or provincial legislative acts invoking this power (pre-emptively or reactively) to protect the stability of legislation from relevant Charter jurisprudence in light of uncertainty about whether legislation is vulnerable to judicial censure; to give effect to a philosophical or political disagreement with the Court about whether legislative objectives are too important to be set aside because of judicially-imposed Charter constraints; to express disagreement about the priority or interpretation given to the rights issue in question; or as an expression of political refusal to abide by judicially-defined Charter constraints for partisan or other political reasons (for example, to protect a legislative outcome that is a priority for the government's legislative agenda, or interpreted as responding to majority public opinion).

The understanding used here to characterize democratic use of the notwithstanding clause refers to how political power is exercised in a representative democracy, where legislative decisions are approved in parliament according to the majority principle. Although interpretations of democracy are extremely contested, and many infuse democracy with other normative considerations such as those impacting on the capacity to contribute to democratic decision-making in a meaningful way, for purposes here my reference to a democratic use of the notwithstanding clause aligns with

Jeremy Waldron's understanding of democracy. Waldron argues that persistent disagreement should be regarded 'as one of the elementary conditions of modern politics'.[23] In these circumstances, the majority principle is relied upon to resolve contentious debates; a reflection of what Waldron characterizes as a respectful way for governing given the reality of differences of opinion about justice or the common good.[24]

Some uses of the notwithstanding clause might satisfy both democratic and federalist criteria. In cases of provincial use, before labelling any disagreement as a democratic response it is also necessary to determine if use of the notwithstanding clause also satisfies federalist grounds. For example, provincial use of the notwithstanding clause might seek to protect cultural goals that reflect ideological differences from Supreme Court rulings about the primacy given to individual rights, as was the case in Quebec's use of this power to exempt its sign law from judicial review (as discussed below). In cases of overlap between federalist and democratic considerations, the presence of federalist factors justifies characterizing it as a federalist use.

When distinguishing between federalist and democratic reasons for using the notwithstanding clause it is also helpful to reflect on subsequent constitutional developments elsewhere, where ideas associated with the notwithstanding clause were adopted by unitary systems, and therefore clearly envisage democratic (rather than federal) dissent from judicial review. New Zealand and the UK have been influenced by Canada's invention of the notwithstanding clause. Reformers in New Zealand and the UK who were interested in adopting a bill of rights faced a serious obstacle: they lacked sufficient political support to give courts the kind of strong remedial powers the Charter authorizes, which includes the power to declare legislation invalid where inconsistent

with protected rights. However, Canada's adoption of the notwithstanding clause introduced the idea that a bill of rights can function in a manner that separates judicial review from binding judicial remedies (at least on a temporary basis in Canada). Thus, reformers in New Zealand and the UK who were keen to retain the principle of parliamentary supremacy interpreted the notwithstanding clause as signaling the possibility of both adopting a bill of rights and also preserving parliament's ability to have the final say on the legality of legislation.[25]

Political reluctance to authorize courts to invalidate inconsistent legislation meant it was unnecessary in the bills of rights for New Zealand or the UK to actually incorporate a mechanism emulating s. 33. Hence, the triggering mechanism for political dissent from judicial rulings in New Zealand and the UK differs from what occurs in Canada. Whereas in Canada the federal parliament or a provincial legislature must enact legislation that invokes the notwithstanding clause either as a pre-emptive way to deny potential litigants the opportunity for judicial review or in a reactive manner to dissent from a judicial ruling, New Zealand and UK parliaments can disagree with judicial rulings by simply ignoring them, unless courts have used their interpretive powers to alter the intent or scope of legislation to arrive at rights-compliant interpretation, after which the legislatures can simply pass ordinary legislation to reinstate their preferred intentions.[26] Yet, as neither New Zealand nor the UK is a federation, the intent of allowing for legislative dissent is to reconcile judicial review with democratic principles of representative government, whereas in Canada the notwithstanding clause can be inspired by both democratic and federalist impulses.

When distinguishing where the emphasis should be placed between federalist and democratic uses of the notwithstanding clause, it is helpful to reflect on the following questions:

i) Does use of the notwithstanding clause represent an attempt to protect legislation from judicial censor given uncertainty about consistency with relevant Charter jurisprudence or to maintain legislation that has already been declared invalid?
ii) Does the use of the notwithstanding clause reflect ideological or other political disagreements with how the Court has interpreted the Charter?
iii) Is provincial use of the notwithstanding clause defended or best understood as an explicit or implicit attempt to protect provincial autonomy or provincial cultural objectives from Charter constraints?
iv) Is there an explicit or implicit defense of a provincial legislature's competence and legitimacy to reject national judicial Charter norms?

If the answer best satisfies questions i and/or ii, and there is no indication of the relevance of questions iii and/or iv, the use of the notwithstanding clause is best categorized as a democratic response. If the answer best satisfies questions iii and/or iv, it is better characterized as a federalist response, even if it also satisfies questions i and/or ii

Part Two

Differentiating between democratic and federalist emphases when using s. 33 to date

Although the notwithstanding clause has not been used extensively, it has been invoked more often than many realize. The notwithstanding clause has been used 18 times: once in an omnibus and retroactive fashion and in 17 specific instances.

The federal parliament has never used the notwithstanding clause and only three provinces and one territory have invoked it (Quebec, Alberta, Saskatchewan and Yukon). With the exception of Saskatchewan's use of the notwithstanding clause in 2018 (discussed below), all uses to date have been pre-emptive: to insulate legislation from judicial review, as contrasted with a re-active response to set aside the effects of a ruling that has declared legislation invalid (despite a popular tendency to treat Quebec's use of s. 33 to protect sign law legislation as a reactive overturning of the Supreme Court's *Ford* ruling).

The majority of uses of s. 33 occurred in the early years of the Charter. Most of these pre-emptive enactments did not precipitate strong opposition, likely because potential critics were either unaware this power was being used or because strong opposition to s. 33 had not yet become a potent force in Canadian politics.

Quebec has invoked the notwithstanding clause more often than any other province. Quebec has invoked this power on 14 occasions, Saskatchewan has used it twice and Alberta and Yukon have each used it once.

Ten of the 18 uses of the notwithstanding clause (Table One) can be characterized as federalist responses to the Charter (eight times by Quebec, once by Alberta and once by Saskatchewan), while eight of the 18 uses are characterized as inspired by democratic impulses.

Table One

Democratic vs. Federalist Uses of the Notwithstanding Clause

	Quebec	Yukon	Alberta	Saskatchewan
Federalist	8		1	1
Democratic	6	1		1

As illustrated below in Table Two, uses of the notwithstanding clause fall within four categories.[27] These categories are: 1) risk aversion to protect the stability of legislation in the face of constitutional uncertainty about how freedom of association or equality rights would be interpreted (8 uses); 2) risk aversion to protect the stability of legislation as a result of uncertainty about whether legislation would be upheld under s. 1 (6 uses); 3) political protest about the constitutional process that led to the Charter and the substantive effects this would have on provincial autonomy (1 use); and 4) disagreement with the Supreme Court's interpretation of the Charter and its implications for legislative priorities (3 uses).

All uses of s. 33 other than the eight in the first category can be construed as federalist responses to the Charter. The most obvious (or thick) federalist uses of s. 33 have occurred in categories three and four. Quebec has used the notwithstanding clause at least once in each category.

Table Two

Uses of the Notwithstanding Clause by Category

	Quebec	Yukon	Saskatchewan	Alberta
1. Uncertainty about scope of rights	6	1	1	
2. Uncertainty about s. 1	6			
3. Political Protest	1			
4. Political Disagreement	1		1	1

1) Risk Aversion because of Uncertainty about how rights would be interpreted

The notwithstanding clause was invoked eight times within this first category. Quebec used it six times to protect legislation in the face of uncertainty about how equality rights would be interpreted. Five of the six Quebec uses of the notwithstanding clause in this manner were to protect legislation that had gender-based differences for pension eligibility while one use involved different eligibility criteria for government grants for purchasing or leasing new farms.[28] This category also includes Yukon's use of this power to exempt possible conflicts with equality rights with respect to nominations for the Land Planning Board or Land Planning Committees[29] and Saskatchewan's use of this power with respect to whether back to work legislation for the public sector offends freedom of association.[30] These uses occurred in the early days of the Charter before the Supreme Court had interpreted how it would define equality and make clear what kinds of policy distinctions constitute discrimination, or whether or not freedom of expression would be construed as including the right to strike.

The motivation for invoking the notwithstanding clause appears to be its strategic use to protect the government's legislative agenda from possible judicial invalidation in light of the unknown factor of how certain Charter rights will be interpreted, rather than as an explicit attempt to protect provincial autonomy.

These uses occurred at a time when the notwithstanding clause evoked little attention. Thus, these uses were not particularly controversial and were likely seen by political advisers and government decision-makers as an effective and practical way to protect the stability of legislation in light of uncertainty about how the Supreme Court would interpret equality rights or freedom of association. In this sense, they can be

interpreted as democratic uses of the notwithstanding clause, to safeguard legislation from judicial invalidation, as they did not reflect an implicit or explicit defense of federalist values, such as protecting culture or provincial autonomy.

2) Risk Aversion because of Uncertainty about the success of s. 1 arguments

The six pre-emptive uses of the notwithstanding clause in category two, to protect legislation in light of uncertainty about how it would fare under interpretations of s. 1, can be construed as federalist responses to the Charter because of the nature of the legislation at issue. These six uses by Quebec were with respect to moral and religious instruction in public schools.[31] Provincial jurisdiction over education policy was a critical demand for a federal rather than unitary system of government. In using the notwithstanding clause in this context, Quebec insulated its legislation from the kinds of challenges that occurred in other provinces, as to whether the denominational character of Canadian public education violates Charter guarantees of religious freedom or equality in a manner not justified under s. 1.[32]

These uses raise the question of why Quebec would have engaged in pre-emptive use of s. 33 rather than wait for the Court to rule and invoke s. 33 if necessary, to set aside a judicial decision and restore the impugned legislation. Any response can only be speculative, but it is reasonable to assume that this pre-emptive use was seen as an effective and practical policy response to Quebec's concerns about protecting its education policy from potential challenges, particularly absent strong controversy surrounding earlier uses of this power. A pre-emptive use was likely viewed as a much more efficient away of avoiding policy uncertainty than to have to wait for multiple court

challenges to work their ways through the system, followed by the need to then introduce legislative responses to negative rulings. Moreover, although protecting the denominational character of Quebec's public education system was deemed an important objective in a federalist sense, there was no perceived need to stage a 'public war' on the Charter by waiting for litigation and then overriding a Supreme Court ruling. As discussed below, it is important to remember that to date, only one government (Saskatchewan) has yet invoked s. 33 in reactive manner.

The thickest examples of a federalist use of the notwithstanding clause occur in categories three and four. These uses justify more detailed discussion because they represent the most significant examples of how the notwithstanding clause has been used explicitly to mitigate tensions with federalism.

3) Federalist use of section 33, as a Protest of the 1982 Constitutional Changes

The sole use of the notwithstanding clause in this category was Quebec's use of this power as a political protest of the decision to adopt the Charter and other constitutional reforms without Quebec's consent. Shortly after the Charter came into effect, the Quebec National Assembly invoked the notwithstanding clause in a retroactive and omnibus fashion to repeal and reenact all legislation passed before the Charter was enacted. This action represented a political statement of opposition to the Charter and to the willingness of Canada to reform the constitution in a manner that affected Quebec, despite its failure to consent to the changes. As the Bélanger-Campeau Commission reported, the 1982 constitutional reforms contain "a new definition of Canada which has altered the spirit of the 1867 Act and the compromise established at the time."[33] Christopher Manfredi

characterizes Quebec's invocation of the notwithstanding clause in this manner as forcefully confirming Quebec's opposition to how the Charter was adopted as well as its substance.[34]

4) Federalist uses of s. 33, to Disagree with a Supreme Court ruling

Three uses of s. 33 constitute thick federalist responses in category four and have involved explicit contestation about the validity or merits of conforming to Charter norms that constrain provincial priorities on areas of particular significance from a federalist perspective. Quebec, Alberta and Saskatchewan have each used the notwithstanding clause in this manner.

Quebec's Use of S. 33 to Protect New Sign Law

The most controversial use of the notwithstanding clause to date was Quebec's response to a Supreme Court decision that ruled unconstitutional sign law legislation intended to promote the "visage linguistique" of the province. The impugned legislation was enacted by the Parti Québécois and prohibited the use of any language but French on public signs. On December 15 1988, the Supreme Court ruled this restriction was invalid for violating freedom of expression in a manner not justified under s. 1 of the Charter (in *Ford v. Quebec*).[35]

In the provincial election campaign that preceded this ruling, provincial Liberal leader Robert Bourassa had promised English voters that if elected, his government would allow bilingual signs. He also promised to end the previous PQ government's practice of systematically invoking the notwithstanding clause to protest the 1982 constitutional changes.[36]

However, the ruling occurred in a political moment that would influence how Bourassa interpreted his election commitment: just beyond the half-way stage of the three-year ratification process for the controversial Meech Lake Accord, which was initiated to address Quebec's minimum demands to agree to the 1982 substantial reforms adopted without Quebec's consent. Three days after the Court's ruling, the largest nationalist rallies occurred since the 1980 referendum, urging the Bourassa government to use the notwithstanding clause to overturn the Court's ruling. After the rallies and facing a divided cabinet and caucus, Bourassa decided to enact new legislation – Bill 178 – that would maintain a French-only requirements for commercial signs outdoors, while also allowing multilingual signs indoors as long as they were out of sight from the street.[37] Bourassa indicated he would invoke s. 33 pre-emptively, which would insulate his government's new sign law legislation from a new constitutional challenge.

Some question whether use of the notwithstanding clause was actually required[38] as the Supreme Court had indicated it was constitutionally valid for Quebec to give priority to French on public signs, as long as it did not ban the use of other languages. This use of the notwithstanding clause is being interpreted here as a pre-emptive rather than reactive use because s. 33 was enacted for significantly different legislation than that struck down by the court.

The use of s. 33 provoked substantial controversy. Public and political actors did not debate whether the legislation would have satisfied the Court as a reasonable limitation under s. 1 in the event of an almost certain constitutional challenge. Instead, debated focused on what Quebec's use of the notwithstanding clause signaled for the already controversial political issue of how the proposed distinct society clause in the

Meech Lake Accord would affect interpretations of the Charter. Peter Russell characterizes the reaction to use of the notwithstanding clause outside Quebec as severe and tribal,[39] while Patrick Monahan characterizes this decision as weakening political support for the Meech Lake Accord to the point of there being "virtually no chance that the Meech Lake Accord would be ratified."[40]

Contributing to this controversy was Bourassa's explicit federalist explanation for invoking this power. In defending his decision, he justified it both in terms of protecting Quebec's culture and also his responsibility as premier to initiate a federalist response to the Charter. As he argued:

> When two fundamental values clash, someone has to make a choice, and find a balance between both. An unavoidable arbitration has to take place. Anywhere else in North America, the arbitration would have been made in favour of individual rights . . .
>
> At the end, when a choice had to be made between individual rights and collective rights, I arbitrated in favour of collective rights, by agreeing to invoke the notwithstanding clause.
>
> . . . I am the only head of government in North America who had the moral right to follow this course, because I am, in North America, the only political leader of a community which is a small minority.
>
> Who can better, and who has more of a duty to protect and promote the French culture if not the Premier of Quebec? . . . I chose to do what seemed to me to be vital for the survival of our community.[41]

Enhancing the controversy associated with Bourassa's federalist explanation for using s. 33 was his suggestion that had the Meech Lake Accord and its distinct society clause been ratified before the Court ruled in *Ford*, it would not have been necessary to use the notwithstanding clause. This statement implied the following assumption: that the distinct society clause would have changed how the Supreme Court interpreted the issue and would have resulted in a different ruling. Bourassa's explanation was extremely controversial, particularly for those whose concerns had been dismissed as unfounded, particularly outside Quebec where defenders of the Accord suggested this clause would not have any substantive impact on interpretations of the Charter because it was little more than constitutional poetry: a symbolic statement of the fundamental characteristics of Canada. By linking the distinct society clause and the notwithstanding clause, Bourassa's explanation also fueled controversy amongst those who had argued that both provisions were inconsistent with how many interpreted the significance of the Charter project: to ensure the primacy of judicial interpretations of individual rights over political decisions that would infringe them.[42]

Also adding fuel to the controversy about Quebec's use of the notwithstanding clause was the intervention of former prime minister Pierre Trudeau and the response of then current prime minister Brian Mulroney. In a highly polemical editorial in the *Toronto Star* and Montreal's *La Presse*, Trudeau characterized Quebec nationalists as "perpetual losers" and criticized Mulroney and the 10 provincial premiers for authoring a constitutional reform that would "render the Canadian state totally impotent" and would destine the country's governance to "eunuchs".[43] In retaliation, Mulroney blamed Trudeau for agreeing to include the notwithstanding clause in the Charter, and

characterized the potential impact of this power as rendering the Charter "not worth the paper it is written on."[44]

In short, Quebec's use of s. 33 to pre-empt new sign legislation from the Charter appears to have crystallized opposition to the notwithstanding clause. As discussed earlier, apart from the omnibus use of s. 33 as a form of political protest, previous uses of s. 33 had sparked little discussion and debate. Although the earlier omnibus use of s. 33 did not go unnoticed, its motivation was generally seen for what it was – a political (and federalist) protest rather than an explicit attempt to give primacy to legislative objectives that infringe upon protected rights.

Alberta's Use of s. 33 to Protest Supreme Court Jurisprudence affecting marriage

In 2000, Alberta employed s. 33 as a political protest of the policy implications provinces would endure from judicial interpretations of equality rights with respect to the treatment of sexual orientation and those in same-sex relationships. Alberta passed the *Marriage Amendment Act* (Bill 202) in a free vote within the government caucus. The government supported this private member legislation, which invoked the notwithstanding clause to disagree with the Supreme Court's interpretation that equality rights in s. 15 protect against discrimination on the basis of sexual orientation. [45] At one level, this protest was a symbolic gesture as Alberta (like other provinces) lacks jurisdiction over marriage. However, seen from a federalist perspective, Alberta's dissent is consistent with earlier criticism by the provincial government for having to change critical assumptions for a wide range of social policies to conform with national judicial norms about the scope of equality rights.[46] This issue has significant implications for provincial autonomy, and

hence federalism, because the provinces have the bulk of responsibility for social policies that make distinction about benefits and responsibilities where norms about how to define family or spouse are critical in these distinctions.

Saskatchewan's Use of s.33 to protest lower court ruling on non-minority faith students attending separate schools

In 2018, Brad Wall's government in Saskatchewan invoked the notwithstanding clause in a reactive manner to set aside the effects of a judicial decision after the Court of Queen's Bench ruled that the province had violated the principle of religious neutrality and equality rights by providing funding for non-minority faith students to attend separate schools.[47] The case arose after non-Catholic parents decided to send their children to a local Catholic school, rather than bus their children to a more distant public school following a decision to close their previous public school for declining enrollments. Rather than appeal the ruling, Wall's government invoked s. 33 in Bill 89[48] and he defended this use of the notwithstanding clause to allow parental choice (Global News 2017).

The Saskatchewan government's use of s. 33 can be appropriately characterized as a federalism-inspired disagreement with the judiciary. As discussed above, education policy is not only a significant area of provincial responsibility, but provincial autonomy on this issue was considered an important and contested issue at the time of Confederation. Moreover, questions related to funding religious schooling have remained sources of contestation within provinces.

Part Three:

Political Reluctance to Invoke S. 33 - Inferences for Federalism?

The notwithstanding clause has only been used twice since the Bourassa government invoked it in 1988 in a pre-emptive manner to insulate new sign legislation from judicial review following the *Ford* ruling. This infrequent use and the controversy generated by Quebec's pre-emptive use during the Meech Lake Accord are often interpreted as related; provinces are presumed to be reluctance to invoke this power because of the anticipated controversy that such use would generate. Adding to this perception is Alberta's quick reversal of its stated intent to use the notwithstanding clause in 1998 following swift and robust controversy after the proposed use was announced.[49]

However, recent developments suggest that the controversy associated with invoking this power might no longer be as serious an impediment for using it as was previously assumed. Ontario Premier Doug Ford proposed to invoke the notwithstanding clause in 2018 after an Ontario Superior Court ruling declared that legislation to change Toronto municipal boundaries was unconstitutional. At issue was the Better Government Act which reduced the number of wards for Toronto municipal elections from 47 to 25 and did so during an ongoing campaign after more than 500 candidates had already been certified and had decided to contest the election under the assumption the earlier ward boundaries were in effect. Ford criticized the court ruling as 'unacceptable' for its interference with the democratic will of the legislature, indicating he was not only prepared to invoke the notwithstanding clause to set aside the effects of the ruling, rather than wait until the decision is appealed, but was not be afraid to invoke the clause again if courts rule against his government. The legislature met in a rare weekend and overnight

session to pass revised legislation that maintained the new 25-ward system and included the notwithstanding clause. However, before the legislation was passed, the government sought an urgent hearing before the Ontario Court of Appeal to request an immediate stay of the lower court ruling. A senior government lawyer indicated that if this request was successful, the government would not proceed with its revised bill (that included the notwithstanding clause).[50] The stay was granted, which meant that it was not necessary to proceed with the revised legislation that included the notwithstanding clause.

Had the notwithstanding clause been invoked, this would best be characterized as a democratic response to the Charter, which was clearly indicated in Ford's explanation for why this power should be invoked. His argument was constructed in explicit democratic terms without obvious reference to federalist reasons.

What proved interesting about this event was that extreme controversy about using the notwithstanding clause appears to have had little effect on discouraging the Ford government from pursuing the notwithstanding clause and promising to use it in the future. Loud protests occurred both inside and outside the Ontario Legislative Assembly. Moreover, several key participants in the 1981 constitutional negotiations that led to the adoption of the notwithstanding clause stated publicly that they did not believe Ford's use was appropriate or consistent with the intent of the clause. These included Roy McMurtry, Roy Romanow, and Jean Chrétien who criticized Ford's intent to use the clause, which they characterized as having been "designed to be invoked by legislatures in exceptional situations, and only as a last result after careful consideration" and not "to be used by governments as a convenience or as a means to circumvent proper process".[51] Former Ontario Conservative premier Bill Davis (who was in power during the 1981

constitutional negotiations) also stated that he did not believe Ford should use the notwithstanding clause in this manner. He added a federalist explanation that had not before been made with respect to the clause: that the "sole purpose" of this clause was to provide some relief in "exceptionally rare circumstances" when a province wished to introduce a "specific benefit or program provision" affecting some segments of the population but not all, and therefore might be viewed as discriminatory.[52] In addition to these statements by former prominent politicians, more than 400 legal academics signed a letter to Ontario Attorney General Caroline Mulroney asking her not to support use of the notwithstanding clause.[53]

In 2019, the Coalition Avenir Québec (CAQ) introduced legislation that also included a pre-emptive use of the notwithstanding clause. At the time of writing, the proposed law has not been enacted. If enacted Bill 21 would impose a ban on what is characterized as religious symbols for a broad range of public servants, including judges, court officials, police officers, prosecutors, elementary and high school teachers, and members of government commissions. The stated intent of the bill, "An Act respecting the laicity of the State", is to promote secularity to ensure a "balance between the collective rights of the Quebec nation and human rights and freedoms". Premier François Legault acknowledged that use of the notwithstanding clause is "a big decision" but one he says is justified to protect collective rights and to maintain a distinction between government and religion.[54]

Both the bill and the intended use of the notwithstanding clause have been controversial. The claimed neutrality of the bill is contested as it treats religious symbols as if these are simply choices or options that are neutral in their effects, regardless of their

significance to one's religious values or heritage. However, the impact of the legislation will be anything but neutral and will effectively require individuals who wish to pursue public sector careers to make a choice between employment and abiding by religious practices and beliefs, despite the absence of any harm that would otherwise be inflicted on others in society. Not surprisingly, the bill has been subject to extensive public protests.[55]

Critics argue the legislation is discriminatory and will inspire intolerance. Gérard Bouchard and Charles Taylor, who co-chaired the 2008 Bouchard-Taylor report on reasonable accommodations, both denounced the bill. Moreover, Bouchard accused the government of contradicting earlier uses of the notwithstanding clause by the province, which he interpreted as having been invoked as a way of protecting the rights of citizens, but in Bill 21 this power is being used to infringe citizens' rights.[56]

Montreal city councillors unanimously adopted a declaration opposing the bill, and Montreal mayor Valérie Plante denounced the proposed law, stating on behalf of the city's government that "[I]t is our duty to speak up" and to affirm that those individuals affected by Bill 21 have the "right to have the same opportunities whoever you are, whatever you wear." The City's declaration states that Quebec is already a secular society, and there is no need to legislate what employees wear".[57]

If this legislation passes, use of the notwithstanding clause would be categorized as a federalist use, to protect legislation the Premier has (controversially) defended as way to protect 'our identity'.[58] Its passage would also reinforce the point that substantial controversy about using the notwithstanding clause is not necessarily a strong enough deterrent to prevent a legislature from invoking this power.

Whether or not recent trends suggest a greater provincial willingness to invoke this power, it is problematic to assume that the relatively spartan use to date of the notwithstanding clause signals that provinces have accepted the primacy of judicial interpretations of the Charter over federalist goals. The problem is that this assumption overlooks the distinct possibility that governments knowingly pass legislation that stands a high probability of being declared unconstitutional, whether or not they are prepared to invoke s. 33.

James Kelly and Matthew Hennigar warn against assuming that a provincial legislative response to a prior negative judicial ruling necessarily complies with the court's interpretation of the Charter, just because it does not invoke the notwithstanding clause. They argue that the Quebec National Assembly has demonstrated willingness to legislate in a manner that appears to ignore the very judicial reservations that were responsible for the prior invalidation of legislation, without invoking the notwithstanding clause. Kelly and Hennigar have characterized this practice as 'notwithstanding-by-stealth'.[59] This suggests that although the Quebec government is not prepared to be constrained by judicial norms, it is also not willing to acknowledge this by invoking s. 33 in a re-active manner. There is little reason to assume that Quebec is the only province to behave in this manner (for reasons discussed below).

What is relevant is not simply legislative responses to prior judicial rulings that contradict judicial norms without use of the notwithstanding clause. This behaviour can also influence legislative decisions at the outset, before judicial review. Although provincial and federal governments have policy processes in place to advise them on likely Charter problems and provide assessments of the level of risk of a successful

Charter challenge, apprehension of using the notwithstanding clause does not necessarily discourage the introduction and passage of high-risk and potentially inconsistent legislation. Instead, it almost certainly encourages strategic behaviour to choose less controversial ways to promote provincial agendas that are vulnerable to judicial invalidation, which involve reliance on arguments under s. 1 in the event of a Charter challenge. Even if legislation is ultimately challenged and declared unconstitutional for failing to satisfy judicial s. 1 criteria, by the time the relevant government exhausts its appeal options and the Supreme Court has ruled on the issue, another election will likely have occurred before political leaders have to address fully the consequences of losing. Thus, even if the same government responsible for the legislation has been re-elected, its political leaders will have had several years to exploit their party's record and appeal to their political base, while avoiding the potentially damaging label of being the political party that is willing to 'override' rights. In other words, this time frame for the potentially non-compliant legislation to function is close to, and may even be longer, than the five-year exemption from judicial review associated with using the notwithstanding clause, but with significantly reduced political backlash than use of s. 33 could generate.[60]

Thus, a problem with equating reluctance to use s. 33 with compliance with judicial norms, and the potential constraint Charter rulings impose for provincial-based differences that federalism would otherwise allow, is that this suggests a legislative motive of compliance with judicial Charter norms that is not necessarily evident.

The assumption that a government will invoke s. 33 if it intends to knowingly passing legislation that is inconsistent with judicial interpretations of the Charter also does not confront the continued relevance of Westminster factors when influencing how

political power is exercised, despite the adoption of the Charter. These factors ensure governments usually have the power to get their preferred legislative agendas through parliament and may include political objectives that do not necessarily prioritize Charter compliance. [61]

Westminster factors include executive dominance of the legislative process, the introduction of legislation at an advance stage of development, a strict interpretation of the convention of responsible government (where the government must maintain support of the House of Commons to continue functioning in power) and the centrality of strong, cohesive parties that organize how parliament functions. The convention that government will resign if it loses a confidence vote has encouraged in Canada amongst the strongest party discipline evident in Westminster systems, and ensures defections from the preferences of party leaders are remarkably low.[62] Discipline is maintained not only by the culture of shared political commitments but also by privileges leaders dispense, such as elevation beyond the backbench (or, if in opposition, appointment to or demotion from a shadow minister position) but also by the power leaders exert to demote ministers or expel members from caucus and deny them the opportunity to run as a party member in future elections.

Rather than equate non-use of the notwithstanding clause with acceptance of judicial interpretations of the Charter (and the possible diminishing of federalist responses) what is required instead is careful analysis of whether governments are knowingly promoting legislative agendas (with legislative approval) that are inconsistent with judicial norms, followed by an assessment of whether and how these are understood as democratic or federalist responses to the Charter. As discussed earlier, while

democratic and federalist dissent from the Charter might not be mutually exclusive, it is helpful to assess where the emphasis is best placed if for no other reason than to have a better understanding of the extent to which the Charter constrains the diversity the Canadian federalist principle is intended to protect.

CONCLUSIONS

Use of the notwithstanding clause as an instrument of federalism has been far more prevalent in Quebec than in other provinces where Charter supporters appear to have accepted the value and narrative of a pan-Canadian conception of rights that the Charter has encouraged, and which judicial interpretations generally reinforce.

Although the notwithstanding clause has potential to offer a stage on which provincial governments can defend their disagreements with pan-Canadian or uniform interpretations of the Charter, and argue against the primacy of Charter over federalism concerns, deep skepticism about the legitimacy of the notwithstanding clause has undermined not only the willingness to address whether or how federalism and the Charter can be reconciled, but has also undermined constitutional transparency when governments seek to constrain the Charter's influence on legislation, whether motivated by federalist or democratic concerns.

Whether or not anticipated controversy continues to discourage frequent use of the notwithstanding clause for democratic or federalist reasons remains to be seen. However, this controversy does not necessarily discourage governments from promoting legislation that is inconsistent with judicial norms. Instead, it almost certainly encourages strategic behaviour to choose less controversial ways to promote provincial agendas, which involve

reliance on arguments under s. 1 even if aware these arguments stand a high chance of being defeated. However, this form of strategic political behaviour diminishes what some might argue is the virtue of the notwithstanding clause: imposing an expectation that government justifies and explains its reasons for disagreeing with judicial norms about the Charter, and the constraints this jurisprudence suggests for legislative decisions. By avoiding debates about uses of the notwithstanding clause, this form of strategic behaviour also helps explain why politicians, academics and courts have not confronted in any serious manner the following important questions: are differentiated interpretations of Charter rights for federalist or democratic reasons justified and, if so, what principles should guide political or judicial judgments that diverge from judicial norms about the scope or meaning of protected rights?

ENDNOTES

[1] Lorraine Eisenstat Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State," 33 Israel Law Review 199, pp. 13-50; and F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party,* (Toronto: Broadview Press 2000).

[2] Charles R. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms," American Political Science Review, 90:4 (1996), 765-779; Miriam Smith, *Lesbian and Gay Rights in Canada. Social Movements and Equality-Seeking, 1971-1995*, (Toronto: University of Toronto Press 1999), 73-110.

[3] Janet L. Hiebert, *Charter Conflicts. What is Parliament's Role*, McGill-Queen's University Press; James B. Kelly, *Governing with the Charter. Legislative and Judicial Activism and Framers' Intent*, (Vancouver: UBC Press 2005).

[4] Matthew Hennigar, "Reference re Same-Sex Marriage: Making Sense of the Government's Litigation Strategy," in James B. Kelly and Christopher P. Manfredi, eds., *Contested Constitutionalism* (Vancouver: UBC Press 2009), 209-230.

[5]Peter W. Hogg, Allison A. Bushell Thornton, and Wade K. Wright, "Charter Dialogue Revisited – or "Much Ado About Metaphors", *Osgoode Hall Law Journal*, 45:1 (2007), 1-65; Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)," *Osgoode Hall Law Journal*, v. 45:1 (2007), 147-167; Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory," in *Contested Constitutionalism*, 50-85.

[6] Admittedly, the autonomy of Canadian provinces is compromised by concurrent powers in which Ottawa prevails in situations of conflict, as well as by Ottawa's ability to use its fiscal Ottawa's ability to use its fiscal powers to influence decisions or priorities for social policies in areas of provincial responsibility (for example, health care). Nevertheless, the federal principle is strong and robust, as Canada is a particularly strong decentralized federation.

[7] Heather MacIvor, *Canadian Politics and Government in the Charter Era* (Toronto: Thomson-Nelson 2006), 221-22.

[8] Kelly, *Governing with the Charter*, 63-64.

[9]A.C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, in D.E. Williams (ed), (Toronto: McClelland and Stewart 1995).

[10] Guy Laforest, "One Never Knows…Sait-on jamais? in Michael Murphy, ed., Canada*: The State of the Federation 2005, Quebec and Canada in the New Century. New Dynamics, New Opportunities*, (Montreal: McGill-Queen's University Press), 70.

[11] Alain Gagnon and Raffaele Iacovino, *Federalism, Citizenship and Quebec. Debating* Multinationalism, (Toronto: University of Toronto Press 2007), 41.

[12] Pierre Fournier, "The Future of Quebec Nationalism," in Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen 1983), 159.

[13] Samuel V. LaSelva, The Moral Foundations of Canadian Federalism. Paradoxes, Achievements, and Tragedies of Nationhood, (Montreal: McGill-Queens University Press 1996), 68, 96.

[14] John D. Whyte, "On Not Standing for notwithstanding," *Alberta Law Review* 28 (1990), 347; Peter H. Russell, "Standing up for notwithstanding," *Alta. L Review*, 29 (1991) 293; Janet L. Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding," in *Contested Constitutionalism,* 107-125.

[15]*Reference Re Amendment of the Constitution of Canada, (Nos. 1, 23 and 3)* [1981] 1 S.C.R. 753.

[16] Peter H. Russell, "Bold Statecraft, Questionable Jurisprudence," in Keith Banting and Richard Simeon, eds., *And No One Cheered. Federalism, Democracy and The Constitution Act*, (Toronto: Methuen Publication 1983), 210-238.

[17] Roy Romanow, John Whyte and Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984), 193.

[18] Jeremy Clarke and Janet Hiebert, "Scholarly Debates about the Charter/Federalism Relationship: A Case of Two Solitudes" in *The Federal Idea. Essays in Honour of Ronald L. Watts,* in Thomas J. Courchene et al (eds.), (Montreal: McGill-Queen's University Press, 2011), pp. 77-98.

[19] Peter H. Russell, *Constitutional Odyssey. Can Canadians Become a Sovereign People?* 3rd edition, (Toronto: University of Toronto Press 2004), 146-147.

[20] Ibid, pp. 84-85.

[21] Guy Laforest, *Trudeau and the End of a Canadian Dream*, (Montreal: Queen's University Press, 1991).

[22] See for example, Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press 1991).

[23] J. Waldron, *The Dignity of Legislation*, (Cambridge: Cambridge University Press 1999), 153.

[24] Ibid., 159-160.

[25] Janet L. Hiebert and James B. Kelly, *Parliamentary Bills of Rights. The Experiences of New Zealand and the United Kingdom*, (Cambridge: Cambridge University Press 2015).

[26]Janet L. Hiebert, "Constitutional experimentation: Rethinking how a Bill of Rights Functions" in Rosalind Dixon and Tom Ginsberg (eds.) *Handbook of Comparative Constitutional Law,* (Cheltenham UK: Edward Elgar Publishing Ltd, 2011), 300-303.

[27] This analysis borrows from earlier work by the author. See Janet L. Hiebert, "The Notwithstanding Clause: Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms," in Nathalie Des

Rosiers, Patrick Macklem and Peter Oliver (eds), (Oxford: *Oxford Handbook of the Canadian Constitution*, 2017).

[28] In the early days of the Charter, a serious challenge for legislative decision-making was to anticipate how the Supreme Court would interpret equality and, in particular, to predict when a distinction with respect to social policy benefits constitutes constitutionally invalid discrimination under section 15. The equality rights did not come into force for three years after the Charter was adopted, and it would not be until 1989 that the Supreme Court would first outline its method for interpreting equality; a method that continues to be revised. For a description of the specific legislative acts in question see Tsvi Kahana, "The notwithstanding mechanism," *Canadian Public Administration*, 44:3 (2001) 258, 282 n 5.

[29]Ibid., 258.

[30] Saskatchewan invoked the notwithstanding clause in 1986 with respect to back-to-work legislation for the public sector after a series of rotating strikes. At the time the Supreme Court had not dealt with whether the Charter protects the right to strike. The Court's rulings two years later confirmed that the use of this power would not have been required at the time, as the Court then rejected the right to strike is constitutionally protected. Reference re Public Service Employee Relations Act (Alta), (1981) 1 SCR 313. More than three decades later, the Supreme Court reversed this position in Saskatchewan Federation of Labour v. Saskatchewan (2015) SCC 4. Kahana; Hiebert, "The Notwithstanding Clause: Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms."

[31]Kahana, 255, 262-263.

[32] William F. Foster, "Moral and Religious Instruction in Quebec: Some legal issues," *McGill Journal Of Education*, v. 28:1 (1993), 33.

[33] Report of the Commission on the Political and Constitutional Future of Quebec (Quebec: Editeur Officiel du Québec, 1991), 30.

[34] Christopher P. Manfredi, *Judicial Power and the Charter; Canada and the Paradox of Liberal Constitutionalism* (Oxford: Oxford University Press 2001), 176.

[35] *Ford v. Quebec (Attorney General)* [1988] 2 SCR 712.

[36] Russell, Constitutional Odyssey, 145.

[37] Ibid., 145-146.

[38] Ibid; Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queen's University Press, 1996), 144.

[39] Russell, Constitutional Odyssey, 146.

[40] Patrick Monahan, *Meech Lake. The Inside Story*, (Toronto: University of Toronto Press 1991), 164.

[41] "Bourassa's use of Charter clause shows his vision of distinct Quebec,' *Globe and Mail* , 22 December 1988, A1, A5.

[42] Hiebert, Limiting Rights, 138-142.

[43]Pierre Trudeau, "P.E. Trudeau: 'Say good-bye to the dream' of one Canada," Toronto Star, May 27 1987.

[44] House of Commons Debates, Brian Mulroney, April 6 1989, p. 153.

[45] Hiebert, *Charter Conflicts*, 197-198.

[46]Hiebert, *Charter Conflicts*, 190-191.

[47] Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan, Queen's Bench For Saskatchewan, 2017 SKQB 109, April 20 2017.

[48] Saskatchewan, An Act to amend *The Education Act, 1995* (Bill 89). The legislation received Royal Assent May 30 2018.

[49]A controversial proposed use of the notwithstanding clause was Alberta's decision to invoke the notwithstanding clause in Bill 26, The Institutional Confinement and Sexual Sterilization Compensation Act. Then Premier Ralph Klein admitted that the government's consideration of the notwithstanding clause was a mistake, and implied that his government had been badly advised by its own legal advisers. Alberta Government Press Release, March 10 1998; "Alberta, the Notwithstanding Clause and the Weak," *Vancouver Sun,* March 12 1998, A10; "Klein backs off on sterilization deal," *Calgary Herald*, March 12 1998, A1, 3.

[50] "Ontario's highest court paves way to reduce size of Toronto city council," CBC, September 19 2018, https://www.cbc.ca/news/canada/toronto/ford-court-toronto-council-1.4829250

[51] "Jean Chretien, Roy Romanow and Roy McMurtry Condemn Doug Ford's Use of Notwithstanding Clause," Canadian Press, September 14 2018, https://www.huffingtonpost.ca/2018/09/14/jean-chretien-roy-romanow-roy-mcmurtry-condemn-doug-ford-use-of-notwithstanding-clause_a_23527716/

[52] Steve Paikin, "Former Ontario premier Bill Davis: Ford wrong to use the notwithstanding clause", Sept. 12 2018. https://tvo.org/blog/current-affairs/former-ontario-premier-bill-davis-ford-wrong-to-use-notwithstanding-clause https://tvo.org/blog/current-affairs/former-ontario-premier-bill-davis-ford-wrong-to-use-notwithstanding-clause

[53] Alanna, Rizza. September 16 2018. "Some members of legal community oppose Ontario's use of notwithstanding clause". The Canadian Press (as reported by CTV News) https://www.ctvnews.ca/canada/some-members-of-legal-community-oppose-ontario-s-use-of-notwithstanding-clause-1.4096320

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[57] Verity Stevenson, "It is our duty to speak up': Montreal city council passes unanimous declaration against Bill 21." CBC News. April 15 2019. https://www.cbc.ca/news/canada/montreal/city-council-vote-bipartisan-resolution-bill-21-1.5098239

[58] "Opinion: Rather than Bill 21, let's have pluralistic secularism," Montreal Gazette, April 9 2019, https://www.mcgill.ca/newsroom/channels/news/montreal-gazette-opinion-rather-bill-21-lets-have-pluralistic-secularism-296084

[59] James B. Kelly and Matthew A. Hennigar, "The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights" I-CON, v. 10:1 (2012), 35.

[60] Janet L. Hiebert, "The Charter's Influence on Legislation. Political Strategizing about Risk." Presidential Address to the Canadian Political Science Association, Regina. *Canadian Journal of Political Science* 51:4 (2018), 727-747.

[61] Ibid.

[62] For more analysis of the causes and effects of party discipline and a comparative analysis of Westminster-based jurisdictions, see C.J. Kam, *Party Discipline and Parliamentary Politics* (Cambridge: Cambridge University Press, 2009); R.A. Rhodes, J. Wanna and P. Weller, *Comparing Westminster* (Oxford: Oxford University Press, 2009.