(Not)withstanding Minority Rights: Re-Thinking Canada's Notwithstanding Clause



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Abstract

On October 22, 2018, Ontario Premier Doug Ford announced that he would be using the *Canadian Charter of Rights and Freedoms* notwithstanding clause to override an Ontario Superior Court decision which held that his government's municipal election legislation was unconstitutional. Ford went so far as to say that he 'won't be shy' about using the clause in the future. Several months later, Quebec Premier Francois Legault used the notwithstanding clause in legislation to ban the wearing of religious symbols in public service roles. The recent actions of both Ford and Legault reignited the debate over the notwithstanding clause, upon which current scholarship is dominated by discussions of balance of power between the legislative and judicial branches. In this paper, I argue that the current scholarship that focuses primarily on the relationship between the courts and legislatures, overlooks the threat the notwithstanding clause poses to constitutional minority rights protections. Ford's threat and Legault's use of the notwithstanding clause reveal the ways in which minority rights are uniquely vulnerable to the current Canadian constitutional structure and must be further examined.

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I. Table of Contents

I. Introduction 11

II. The Development of and Responses to the *Charter* and Notwithstanding Clause 19

i. A Historical Account of the Charter and the Inclusion of the Notwithstanding Clause 19

ii. Defining the Notwithstanding Clause and Subsequent Use 25

iii. A Theoretical and Critical Account of Judicial Review post-Charter 31

iv. Theorising Notwithstanding Clause 47

III. Thesis and Arguments 58

i. Minority Rights Protections as a Foundational Element of the Charter 58

ii. The Unique Vulnerability of Minority Groups to the Notwithstanding Clause 73

iii. Conclusion 94

iv. Appendix A: Uses and Attempted Uses of the Notwithstanding Clause 97

v. Bibliography 104

Table of Abbreviations:

SCC	Supreme Court of Canada
UK	United Kingdom
LGTBQ2S+	Lesbian, Gay, Transgender, Bisexual, Queer and Two-Spirited

Table of Cases

American Cases

United States v Carolene Products Co., 304 U.S. 144 (1938)

Canadian Cases

Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, 2002 SCC 86

City of Toronto et al v Ontario (Attorney General), 2018 ONSC 5151 4

Doucet-Boudreau v Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62

Egan v Canada, [1995] 2 S.C.R. 513.

Ford v Quebec (A.G.), [1988] 2 S.C.R. 71

Good Spirit School Division v Christ the Teacher Roman Catholic Separate School Division No.212 and The Government of Saskatchewan, 2017 SKQB 109

Halpern v Canada, [2003] 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 (CA)

M. v H., [1999] 2 S.C.R. 3.

Multani v Commission Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256

R v. Big M Drug Mart, [1985] 1 S.C.R. 295.

R. v. Edwards Books and Art Ltd, [1986] 2 SCR 713.

R. v Ferguson, [2008] 1 S.C.R. 96, 2008 SCC 6

R. v. Hess; R. v. Nguyen, [1990] 2 S.C.R. 906

R. v Morgentaler, [1993] 3 S.C.R. 463

R. v Oakes, [1986] 1 S.C.R. 103

R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2

Re: Resolution to amend the Constitution, [1981] 1 S.C.R. 753

Reference Re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

Reference re Senate Reform, [2014] SCC 32

Sauvé v. Canada (Attorney General), [1993] 2 S.C.R. 438

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68

Schachter v. Canada, [1992] 2 S.C.R. 679

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1.

Syndicat Northcrest v. Amselem, [2004] 2 SCR 551

The Queen v Drybones, [1970] SCR 282

Toronto (City) v Ontario (Attorney General), 2018 ONCA 761

Vriend v Alberta, [1998] 1 S.C.R. 493

Zylberberg v. Sudbury Board of Education [1988] 65 O.R. (2d) 641.

Table of Legislation

Canadian Legislation

Alberta Bill of Rights, RSA 2000

An Act Respecting the Civil Service Superannuation Plan, RSQ 1986

An Act Respecting the Conseil supérieur de l'Éducation, RSQ 1986

An Act Respecting the Constitution Act, 1982 (Quebec)

An Act Respecting the Government and Public Employees Retirement Plan, RSQ 1986

An Act Respecting the Ministère de l'Éducation, RSQ 1986

An Act Respecting the Pension Plan of Teachers, RSQ 1986

An Act Respecting the Laicity of the State, RSQ 2019, c 30

A Better Local Government Act, SO 2018

Canada Act 1982 (UK), c 11

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

Civil Marriage Act, S.C. 2005 (Canada)

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

Defence of Canada Regulations of the War Measures Act, SC 1941

The Education Act for Cree, Inuit and Naskapi Native Persons, RSQ 1986

United Kingdom Legislation

Statute of Westminster 1931

Balfour Declaration 1916

I. Introduction

On July 27, 2018, the newly elected Premier of Ontario, Doug Ford, announced that he would be intervening in the already commenced Toronto City Council election by changing the city ward structure. At a Queen's Park Legislature press conference, Ford labelled the Toronto City Council 'the most dysfunctional political arena' in Canada while outlining his government's decision to introduce legislation that would cut the size of the Council by almost half.[1] He indicated that he would be enacting legislation to reduce the size of the Toronto City Council from forty-seven-wards to twenty-five.[2] To justify his decision, Ford adopted an efficiency approach by claiming that a smaller city council would lead to quicker decision-making and cost-saving. This policy decision was not a part of the Ford government's Progressive Conservative Party of Ontario election manifesto as they sought election on June 7, 2018.[3] Thus, the announcement was a shock to Toronto residents, their city councillors, and John Tory, the mayor of Toronto seeking re-election.

On August 14, 2018, the Progressive Conservative majority government passed the legislation *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001 and the Municipal Elections Act, 1996* (herein referred to as the *Better Local Government Act*).[4] Six days later on August 20, 2018, the then Toronto City Council, led by mayor John Tory, challenged the constitutionality of the *Better Local Government Act.*[5] On September 10, 2018, Justice Belobaba released his decision in the *City of Toronto v Ontario (Attorney General)*

1 'Ford Government Reducing Toronto City Council to 25 Members' *iheart radio NewsTalk 1010* (Toronto, 27 July 2018) < http://www.iheartradio.ca/newstalk-1010/news/watch-listen-ford-government-reducing-toronto-city-council-to-25-members-1.4270300> accessed 21 December 2018.

2 *City of Toronto et al v. Ontario (Attorney General*), 2018 ONSC 5151 4 [60].

3 'Important Dates for the 2018 General Election' (*Elections Ontario*, 2018) <https://www.elections.on.ca/en/political-entities-in-ontario/by-election-important-dates1.html> accessed 21 December 2018.

4 *A Better Local Government Act*, SO 2018, c 11.

5 'Toronto Council Votes to Challenge Doug Ford's Council-Slashing Bill in Court' *CBC News Toronto* (Toronto, 20 August 2018) <https://www.cbc.ca/news/canada/toronto/toronto-city-hall-debates-launching-legal-challenge-of-ford-s-council-cuts-1.4791033> accessed 21 December 2018.

ruling in favour of the plaintiffs (the City of Toronto). It was held that the *Better Local Government Act*, 'substantially interfered with both the candidate's and the voter's right to freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*'. Justice Belobaba maintained that the altering of the size of Toronto City Council was not in itself undemocratic or *ultra vires* the provinces constitutional jurisdiction.[6] Rather, it was the timing of the legislation that made it unconstitutional, whereby the province 'clearly crossed the line' by intervening in an election that was already underway.[7] As a result of the significant section 2 rights violation, Justice Belobaba ruled that the municipal election should continue as scheduled on October 22, 2018; however, the ward structure should be reverted to its original size of forty-seven wards.[8] He left open the option for the Ford government to re-introduce the legislation at a later date, as it was likely to be constitutionally valid when not interfering with an election that was already in progress.[9]

The response from the Ford government was swift and severe. Within hours of Justice Belobaba's decision, Ford announced he would be using the Canadian Charter of Rights and Freedoms' (*Charter*) notwithstanding clause to override the ruling.[10] Briefly, the notwithstanding clause refers to section 33 of the *Charter*.[11] It provides federal and provincial legislatures with the ability to pass legislation that either pre-empts judicial review or overrides judicial decisions that concern certain *Charter* rights. Any legislation that includes a notwithstanding clause must also contain a five-year sunset clause.[12]

6 *City of Toronto* (n 3) [15]-[16].

7 ibid [9].

8 ibid [85]-[86].

9 ibid.

10 John Rieti ,'Premier Doug Ford to use Notwithstanding Clause to Cut Size of Toronto City Council' *CBC News Toronto* (Toronto, 9 September 2018) < https://www.cbc.ca/news/canada/toronto/judge-ruling-city-council-bill-election-1.4816664> accessed 21 December 2018.

11 The text of section 33 of the *Charter* and an analysis of its components begins on page 19.

12 Peter W. Hogg, *Constitutional Law of Canada* (5th ed. supplemented edn, Carswell 2007) 881.

Ford's threat to use the notwithstanding clause was unprecedented – it would be the first time the clause was used in Ontario.[13] He announced his decision to invoke the notwithstanding clause by stating that 'we're taking a stand, if you want to make new laws in Ontario or Canada, you first must seek a mandate from the people and you have to be elected […] I was elected by 2.3 million people, [Justice Belobaba] was appointed by one man'.[14] Ford went so far as to say that he 'won't be shy' about using the clause in the future.[15]

Ultimately, Ford was not required to use the notwithstanding clause because of a ruling by the Ontario Court of Appeal on the matter. On September 19, 2018, the Court of Appeal of Ontario stayed Justice Belobaba's decision. The Court of Appeal was critical of Justice Belobaba's decision, stating that although they understood that the legislation could have been perceived to have been frustrating and unfair, 'unfairness alone does not establish a *Charter* breach'.[16] Therefore, the Court of Appeal stayed the lower court's decision on the *Better Local Government Act* – pending a completed appeal process. This resulted in a reinstating of the legislation and a return to the legally mandated twenty-five ward structure.

Ford's actions and threat to use the notwithstanding clause effectively opened Pandora's box. Shortly thereafter, in October 2018, another newly elected Premier – François Legault of Quebec – also declared during a press conference that he would be using the notwithstanding clause to prevent public servants, such as teachers, police officers, and judges, from wearing religious garments. On June 16, 2019, this announcement became a reality when

13 John Rieti ,'Premier Doug Ford to use Notwithstanding Clause to Cut Size of Toronto City Council' *CBC News Toronto* (Toronto, 9 September 2018) < https://www.cbc.ca/news/canada/toronto/judge-ruling-city-council-bill-election-1.4816664> accessed 21 December 2018.

14 Brian Lilley, 'Ford Makes Right Call to Trigger the Notwithstanding Clause' *Toronto Sun* (11 September 2018) <https://torontosun.com/opinion/columnists/lilley-ford-makes-right-call-to-trigger-notwithstanding-clause > accessed 21 December 2018.

15 Mike Crawley, 'Doug Ford 'won't be shy' to Use the Notwithstanding Clause Again, and He's Getting Support For That' *CBC News Toronto* (12 September 2018) <https://www.cbc.ca/news/canada/toronto/doug-ford-notwithstanding-charter-1.4818730 > accessed 21 December 2018.

16 *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761.

the Quebec government passed *An Act Respecting the Laicity of the State*.[17] The legislation's stated purpose is to assert religious neutrality to ensure a balance between 'the collective rights of the Quebec Nation and human rights'.[18] It adopts an extensive approach to religious neutrality by prohibiting those working in public service positions of authority from wearing religious symbols such as a hijab, kippa or turban. It applies to Quebec Crown prosecutors, judges, public service employees who carry a firearm, teachers, and principals. It includes a grandfather clause that exempts teachers who are already employed from the restriction; however, those who wear religious symbols are unable to apply for a promotion or change school boards.[19] In addition to the regulations concerning public service employees, the legislation also requires all individuals to uncover their face to receive a public service for identification or security purposes. This includes requiring individuals to uncover their face to ride public transportation.[20]

To pre-empt what they perceive to be inevitable *Charter* challenges, the Quebec government invoked the notwithstanding clause, immunizing the legislation from constitutional challenges under sections 2 and 7 to 15 of the *Charter*.[21] Premier Legault justified the use of the notwithstanding clause on the basis of protecting Quebec collective rights and national identity. Legault acknowledged the significance of the pre-emptive use of the notwithstanding clause but viewed it as a necessary step, stating: 'It's not a small thing. It's a big decision. But sometimes, in order to protect collective rights, we have to use it. I think

17 *An Act Respecting the Laicity of the State*, RSQ 2019, c 30 (Quebec).

18 Daniel Leblanc 'Quebec to Invoke Notwithstanding Clause to Prevent Charter Challenges of Religious-symbols Ban' *The Globe and Mail* (Toronto, 27 March 2019) <https://www.theglobeandmail.com/canada/article-quebec-to-invoke-notwithstanding-clause-to-prevent-charter-challenges/> accessed 28 March 2019.

19 ibid.

20 Benjamin Shingler 'Quebec Government's Proposed Secularism Law Would Ban Public Workers from Wearing Religious Symbols' *CBC Montreal* (Montreal, March 28, 2019) <https://www.cbc.ca/news/canada/montreal/quebec-notwithstanding-religious-symbols-1.5073945> accessed on March 29, 2019.

21 *An Act Respecting the Laicity of the State* (n 17) c 30.

we have to protect our collective identity […] To separate religion and politics is important in Quebec'.[22]

In light of the actions of Ford and Legault, Canadians are being confronted with a new reality, one whereby publicly elected officials have begun to openly defy the longstanding norm of restricted use of Canada's notwithstanding clause. No longer can the notwithstanding clause be defended as a constitutional tool of last resort. This shift towards threatened frequent use of the notwithstanding clause has resulted in significant protest in both Ontario and Quebec.[23] Beyond the Canadian public, there was a re-emergence of debates surrounding the use of the notwithstanding clause. On the one hand, the proponents of the notwithstanding clause argued that in liberal democracies, legislatures should have the final say as they are elected to represent their constituents. This is best evidenced by language used by the former federal Conservative staffer, Rachel Curran, who stated: 'Who are we actually governed by? Are we governed by our elected representatives or a small cabal of largely left-leaning judges?'.[24]

On the other hand, those who oppose the use of the notwithstanding clause argue that its unrestricted use threatens the foundations of our constitutional democracy, which provides effective independent and non-arbitrary judicial relief for rights violations by government. An example of this was the publishing of an open letter titled The Notwithstanding Clause – Only in the Last Resort, written by the University of Toronto Law Professor Brenda Cossman in response to Ford's announcement.[25] This letter, which was ultimately signed by eighty law professors across the country, criticized Ford's apparent unrestricted use of the notwithstanding clause by focusing primarily on the delicate balance of constitutional democracy. It stated:

22 Shingler (n 20).

23 Muriel Draaisma, 'Activists collect signatures on large copy of Charter at Queen's Park protest picnic' *CBC News* (15 September 2018) <https://www.cbc.ca/news/canada/toronto/council-of-canadians-charter-ontario-government-1.4825407> accessed 21 December 2018.

24 ibid.

25 Silas Le Blanc, 'U of T law professor pens open letter against Ford's threat to use the notwithstanding clause' *The Varsity* (24 September 2018) <https://thevarsity.ca/2018/09/24/u-of-t-law-professor-pens-open-letter-against-fords-threat-to-use-notwithstanding-clause/> accessed 21 December 2018.

> Canada's constitutional democracy is premised on a balancing of majority rule and constitutional rights. Both legislatures and courts have a fundamental role to play in maintaining this crucial balance. You are not simply invoking the notwithstanding clause to pass a law – you are challenging the core principles underlying our constitutional democracy. You are questioning – and rejecting – the role of an independent judiciary in upholding the fundamental rights and freedoms of every person in Ontario.[26]

These debates in the aftermath of Ford's declaration, similar to when the notwithstanding clause was first introduced, centred the balance between entrenched *Charter* rights and transient popular will.

In light of the actions of Ford and Legault, I will seek to provide a fresh perspective by focusing on those likely to be most impacted by the existence and use of the notwithstanding clause – individuals and communities from minority groups. Within the current scholarship on the notwithstanding clause there has been a focus on either celebrating or criticizing its impact on the relationship between the courts and legislatures in a constitutional democracy. To provide a fresh perspective, I argue that at its core, the current literature on the notwithstanding clause has mis-appreciated the threat that the notwithstanding clause poses to one of the normative purposes of the *Charter* – to protect the rights of minorities. Thus, either as a result of over-playing the role of the notwithstanding clause to resolve the tension between judicial and parliamentary supremacy or of underestimating the peculiar vulnerability of minorities to the notwithstanding clause, I will argue that the current literature on the notwithstanding clause has failed to fully appreciate the potentially disastrous impacts of the notwithstanding clause on minority groups.

To fill this gap in scholarship, I critically examine ways in which minority populations and their rights are uniquely vulnerable to the notwithstanding clause. The actions of Ford and Legault demonstrate the fragility of constitutional rights protections whereby the frequent use or threatened frequent use of the notwithstanding clause leaves minority rights protections

26 ibid.

particularly vulnerable to arbitrary State power. My analysis consists of an examination of the structural protections embedded within the text of the notwithstanding clause which, it could be argued, act as safeguards for minority groups from targeted application. Through this analysis I seek to demonstrate that these embedded structural protections within the notwithstanding clause are inadequate and ill-suited for the particular vulnerability of minority groups. I argue that this is an element of the notwithstanding clause that has been underestimated within the current scholarship and warrants further discussion.

This dissertation is divided into three main sections based on this argument. The first section consists of a historical account of the adoption of the *Charter* and an exploration of the normative scholarship responses to judicial review post-*Charter* and the notwithstanding clause. Within this first section are three sub-parts. The first sub-part is a historical account of the *Charter* and the various factors that contributed to the inclusion of the notwithstanding clause in the final draft. The second sub-part is an exploration and review of the normative scholarship responses to the transformation of judicial review post-*Charter*. At the end of this section, I situate my own argument regarding the notwithstanding clause within the normative responses to judicial review. The third and final sub-part explores the scholarship responses specific to the notwithstanding clause. Therein, I argue that the current scholarship responses to the notwithstanding clause focus primarily on the relationship between the courts and legislatures, rather than the impacts of the clause on minority rights. This sets the stage for my primary argument, which seeks to provide a different analysis of the scholarship gap by focusing on the specific vulnerability of minority rights under the notwithstanding clause.

The second section, providing the main argument, seeks to provide a fresh perspective to the notwithstanding clause by arguing that at a more fundamental level minority populations and their rights are uniquely vulnerable to the notwithstanding clause. My argument is presented in two parts – combining both a doctrinal and normative approach. First, I argue that

the protection of minority rights is a central and foundational purpose of the *Charte*r. To make this argument I adopt a doctrinal approach by using case law and historical records to demonstrate that it has become a key tool for minority groups to pursue effective judicial relief from an independent body for rights violations of their provincial or federal government(s). This sets the foundation for my second more normative argument – that minority populations and their rights are uniquely vulnerable to the notwithstanding clause. In this section I examine and deconstruct the possible safeguards for the rights of minorities structured within the text of the notwithstanding clause, supplemented by an analysis of whether each of these possible safeguards provides sufficient protections for the rights of minority groups. This supports my broader argument that the actions of Ford and Legault precipitate the need for further reflection on the role of the notwithstanding clause and the ways it undermines minority rights – making these groups particularly vulnerable.

The third and final section presents the argument that we must reflect on the risks of the notwithstanding clause on minority groups. In absence of extensive use of the notwithstanding clause, scholarship has focused primarily on the relationship between the courts and legislatures. However, as argued in this dissertation, this focus has resulted in a lack of scholars fully appreciating the risks or costs of its existence in the *Charter*.

II. The Development of and Responses to the *Charter* and Notwithstanding Clause

i. A Historical Account of the Charter and the Inclusion of the Notwithstanding Clause

The notwithstanding clause has often been described as a uniquely Canadian invention.[27] At the time of the patriation of the Canadian Constitution in 1982, it was the first legislative override clause included in an entrenched constitution among developed States. Furthermore, there was no equivalent in international human rights documents.[28] To understand the development of this unique legal invention and the factors that contributed to its inclusion in the 1982 Constitution it is important to understand the political context at the time of its drafting. Briefly, the notwithstanding clause is best understood as a political compromise that was essential to ensuring agreement between the federal and provincial governments on the final draft of the *Constitution Act, 1982*. The clause was the culmination of numerous attempts over the better part of the twentieth century to achieve full legislative sovereignty for Canada.[29]

Prior to the repatriation of Canada's Constitution in 1982, the country was under the legislative control of the British Parliament. The foundational *Constitution Act, 1867* (also referred to as the *British North America Act, 1867*) included no amendment formula, and thus, all legislation (constitutional or statutory) required the approval of Westminster Parliament, in addition to royal assent from the Queen or her Governor General representative.[30] This legislative arrangement changed in 1931 with the passing of the *Statute of Westminster*.[31] The *Statute of Westminster*, passed by the Westminster Parliament, delegated statutory authority to

27 Library of Parliament, *The Notwithstanding Clause of the Charter Background Paper* by Marc-André Roy and Laurence Brosseau, Publication No. 2018-17-E (Ottawa: Library of Parliament, May 7, 2018) 2.

28 ibid.

29 Patrick Monahan, *Constitutional Law* (Irwin Law 1997) 19.

30 Hogg (n 12) 64.

31 Statute of Westminster 1931.

the Canadian Parliament and provincial legislatures.[32] Canada, however, did not gain the ability to amend its own Constitution. As a result, a constitutional convention was developed whereby Westminster Parliament would only amend the Canadian Constitution with the consent of Canadian Parliament through a joint address from both the Canadian House of Commons and the Senate of Canada.[33]

Thus, in 1931, Canada gained complete autonomy over all its legislative affairs, save for constitutional amendments. Throughout the next several decades, the Canadian Parliament, in partnership with the provinces, sought on several occasions to patriate Canada's Constitution. The most significant barrier that remained was the inability to agree on a constitutional amendment procedure between the federal and provincial governments. On two occasions (the 1964 Fulton-Favreau formula[34] and the 1970 Victoria Charter[35]), the federal and provincial governments came close to agreeing on an amending formula for the Constitution. However, these attempts ultimately failed because of Quebec exercising its provincial vetoing power.[36]

In 1980, the then re-elected Prime Minister Pierre Elliot Trudeau (father of current 2019 Prime Minister Justin Trudeau and herein referred to as Trudeau Senior) announced that he would be patriating Canada's Constitution once and for all.[37] He announced that the patriation of the Constitution would include both an amending formula and an entrenched charter of

32 Hogg (n 12) 64.

33 ibid.

34 The Fulton-Favreau constitutional formula was structured to require all provinces to approve constitutional amendments that impact provincial constitutional jurisdiction and only certain provincial approval would be required for connotational amendments affecting certain regions. As it concerns constitutional amendments regarding education, two-thirds of the provinces representing fifty-percent of the population would be required.

35 The Victoria Charter created a constitutional amending formula that gave veto power to Ontario and Quebec. Additionally, the Victoria Charter required that at least two provinces in Western Canada approve constitutional amendments amendment, and that these provinces consist of at least fifty percent of the total Western population. For the amendment to pass the majority of provinces must approve it, including at least two provinces in Atlantic Canada.

36 Hogg (n 12) 67.

37 Monahan (n 29) 153.

rights.[38] Trudeau Senior's goal of creating a charter of rights was in part due to the lack of rights protections that existed in Canada at that time. In 1867, when Canada adopted the *Constitution Act, 1867*, the legislature modelled itself on the mostly unwritten British constitution – which lacked a codified bill of rights.[39] It was not until the 1960 *Canadian Bill of Rights* that Canada codified the fundamental rights and freedoms of Canadians. It is important to note that the *Canadian Bill of Rights* was not constitutionally entrenched, and thus, courts lacked the constitutional authority to remedy rights violations perpetrated by the federal and provincial governments.[40] This resulted in weak enforcement of the *Bill of Rights* whereby of the thirty-five cases between the years of 1960 and 1982, only one resulted in a piece of legislation being declared as having no force or effect.[41] It was from this perceived and actual failure to enforce the *Bill of Rights* that Trudeau Senior sought to create protections for Canadians that were beyond the reach of statutory legislation.

To achieve this goal of a patriated constitution, the first of the Ministers' Meetings occurred in November 1980 and was attended by all provincial Premiers, the Prime Minister, the Minister of Justice, and several advisors from the public service.[42] As with earlier attempts, the federal and provincial governments were unable to reach an agreement. However, unlike the previous failed attempts, Trudeau Senior refused to accede to the unwillingness of the provinces. In doing so, Trudeau Senior proceeded to seek patriation unilaterally by tabling constitutional amendments in the House of Commons on October 2, 1980.[43]

Trudeau Senior's declaration of unilateral constitutional amendments was quickly blocked by the provinces. The provinces of Manitoba, Newfoundland and Labrador, and

38 John English, *Just Watch Me: The Life of Pierre Elliot Trudeau:1968-2000* (Alfred A. Knopf 2009) 462.

39 ibid.

40 Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada* (Rev. edn, Thompson Educational Pub 1994) 14-15.

41 *The Queen v Drybones* [1970] SCR 282.

42 ibid 471.

43 ibid 479-480.

Quebec launched constitutional court challenges seeking judicial review on whether the federal government had the legislative legitimacy to unilaterally seek constitutional amendments without the consent of the provinces.[44] The case was heard by the Supreme Court of Canada (SCC) in May 1981. The SCC's decision in *Re: Resolution to amend the Constitution* was released September 28, 1981, with no clear victor.[45] The SCC delivered a split ruling whereby although the federal government had the legal authority to submit constitutional amendments to the Westminster Parliament without the consent of the provinces, the federal government was bound by a constitutional convention that required 'substantial provincial consent' for any amendments that directly altered the federal-provincial constitutional relationship.[46] As a result, the federal government was required to return to negotiations with the provinces.

On November 2, 1981, a final Ministers Meeting was held in Ottawa, bringing together all previous provincial stakeholders from the first Ministers Meeting in 1980. It has been reported that the first several days of negotiations went poorly, with few concessions being made on either side. It was not until the proposal of a notwithstanding clause from the Alberta Premier Peter Lougheed that there was a breakthrough. Lougheed had first heard of this notwithstanding clause from his provincial Attorney General Merv Leitch ten years prior to the drafting of the Constitution.[47] In 1971, while drafting the *Alberta Bill of Rights*, Leitch suggested the idea of creating a clause that would allow the provincial government to propose legislation that was in contradiction with the *Alberta Bill of Rights*, or to override court decisions that invalidated government legislation with the bill. Viewing the notwithstanding

44 English (n 38) 471.

45 [1981] 1 S.C.R. 753.

46 ibid [759], [886].

47 Peter Lougheed 'Charting the Future: Canada's New Constitution.' *CBC Archives* <https://www.cbc.ca/archives> accessed 2 January, 2018.

clause as a key tool to maintain provincial sovereignty and supreme legislative authority, Lougheed included it in section 2 of the final draft of the *Alberta Bill of Rights* in 1972.[48]

Several years later during the 1980 constitutional amendments debate, it was Merv Leitch who once again reached out to Lougheed to suggest that a notwithstanding clause be included within the proposed constitutional charter of rights.[49] Lougheed then presented the concept to the other Premiers and government stakeholders in October 1980. The idea of a notwithstanding clause was immediately viewed favourably by the provinces, many of whom were primarily seeking to maintain their supreme legislative authority in the negotiations. The notwithstanding clause remained a key point of discussion and negotiation when the premiers returned to the final Ministers Meeting in 1981.[50]

It was during the afternoon of November 4, 1981, that there was a significant breakthrough in negotiations – what is now known as the kitchen accord. The kitchen accord was an agreement reached over breakfast and then in the kitchen of a convention centre between then federal Minister of Justice Jean Chrétien, Premier of Saskatchewan Roy Romanow, and attorney general of Ontario Roy McMurtry.[51] It was a compromised agreement sketched out by the three leaders that had concessions on both sides. Per the agreement, the provinces would agree to the inclusion of a charter of rights in exchange for the Vancouver amendment formula.[52] Furthermore, the provinces would agree to the removal of the opt out with compensation clause whereby individual provinces could choose to reject the constitutional amendments, in exchange for the federal government including a

48 *Alberta Bill of Rights*, RSA 2000.

49 Lougheed (n 47).

50 English (n 38) 494.

51 ibid 506.

52 The Vancouver formula is the final constitutional amendment formula included in the Constitution Act, 1982. Under this formula a constitutional amendment requires the approval of the Senate, House of Commons and the legislative assemblies of at least two-thirds of the provinces representing at least fifty-percent of the population.

notwithstanding clause in the charter of rights.[53] At the time of negotiations both Chrétien and Trudeau Senior were opposed to the inclusion of the notwithstanding clause in the charter of rights; however, they acquiesced to the provinces proposal – viewing it as a necessary concession to secure 'substantial provincial support'.[54]

With the tentative support from Trudeau Senior, achieved through the persuasion by Chrétien, the Newfoundland and Labrador delegation began drafting a constitutional amendment proposal. The nine-other provincial and federal stakeholders, to the exclusion of Quebec, spent the rest of the evening preparing the compromised proposal.[55] The Premier of Quebec, René Lévesque, was not present, as he had already returned to his hotel located in Quebec, across the river from the Château Laurier hotel in Ottawa where all of the remaining Premiers and federal officials were staying. Upon his return to the Château Laurier for breakfast with the other officials, Lévesque was informed of an agreement reached the night before.[56] Shortly after this breakfast, on November 5, 1981, the Newfoundland and Labrador Premier Brian Peckford read out the compromised proposal and it was signed by Trudeau Senior and the nine provincial Premiers.[57] Quebec was the sole province that did not sign the agreement. It was reported that Lévesque walked out of the room viewing the agreement reached without Quebec as a betrayal by English Canada in what he labelled as 'the night of the long knives'.[58]

Despite the lack of support from Quebec, Trudeau Senior had gained the 'substantial provincial consent' required to request that Westminster pass the constitutional amendments and finally patriate Canada's Constitution. In early December 1981, the House of Commons and the Senate of Canada sent a joint address regarding the constitutional amendments to the

53 English (n 38) 506.

54 ibid.

55 ibid 507.

56 'The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home its Constitution' *CBC* <https://www.cbc.ca/history/EPISCONTENTSE1EP17CH1PA3LE.html> accessed 2 January 2018.

57 English (n 38) 507.

58 'The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home its Constitution' (n 56).

lawmakers in England, and on March 29, 1982, the British Parliament passed the *Canada Act, 1982*.[59] The *Canada Act, 1982* expressly patriated the Canadian constitution by stating in section 2 that no subsequent United Kingdom law 'shall extend to Canada as part of its law'.[60] The *Canada Act, 1982* also contained the *Constitution Act, 1982* which included the constitutional amendment procedure and the *Canadian Charter of Rights and Freedoms*. The *Charter* constitutionally entrenched for the first time in Canada a set of rights and freedoms, as well as protective measures to guarantee their enforcement – completely altering the law-making power of Canadian courts.[61] The notwithstanding clause was included in the *Charter*, where it applied to various rights and freedoms. On April 17, 1982, Queen Elizabeth II came to Canada to affirm the coming into force of the *Constitution Act, 1982* on Parliament Hill. In protest of this ceremony, René Lévesque ordered the Quebec flag to be flown at half-mast.[62]

ii. Defining the Notwithstanding Clause and Subsequent Use

Undoubtedly, the process of gaining the necessary federal and provincial government consensus would not have been possible without the compromise on the inclusion of the notwithstanding clause.[63] As a result of this compromise the notwithstanding clause is included in section 33 of the *Charter*, which reads as follows:

> *33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.*
>
> *(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.*
>
> *(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.*

59 ibid 157.

60 *Canada Act*, 1982 (UK), c 11.

61 R.J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (Irwin Law 2013) 1.

62 'The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home its Constitution' (n 56).

63 Hogg (n 12) 878.

> *(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).*
>
> *(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).*[64]

The notwithstanding clause is best understood as a legislative tool to pre-empt judicial review of legislation or reactively suspend the effects of judicial review of certain *Charter* rights for a period of up to five years.[65]

There are four main elements to the notwithstanding clause included in section 33. First, it must be an express declaration. For use of the clause to be considered valid, the legislation in question must expressly state that it is operating 'notwithstanding' a *Charter* right. Furthermore, it must explicitly identify the statute and *Charter* right to which it will apply.[66] In *Ford v. Quebec (1988),* the SCC affirmed that the notwithstanding clause could be applied in an omnibus use – that is, applied to numerous statutes through one act.[67]

Second, the notwithstanding clause can only be invoked via legislation that is introduced and passed in a federal or provincial legislature. This is an important aspect of the notwithstanding clause that expressly places its invocation under the power of the legislature within Canada's separation of powers. This ensures that the clause is not invokable by the executive without a full consideration and vote in the legislature.

Third, the notwithstanding clause only applies to certain rights in the *Charter*. Per section 33(1) of the *Charter,* the notwithstanding clause has the ability to operate notwithstanding provisions included in section 2 and section 7 to 15 of the *Charter*.[68] Section 2 encapsulates the fundamental freedoms including freedom of conscience and religion,

64 *Canadian Charter of Rights and Freedoms*, s 1, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s.33 (*Charter*).

65 Christopher P. Manfredi and James B. Kelly, *Contested Constitutionalism : Reflections on the Canadian Charter of Rights and Freedoms* (University of British Colombia Press 2009) 107.

66 Hogg (n 12) 881.

67 *Ford v. Quebec (A.G.),* [1988] 2 S.C.R. 71 [35].

68 *Charter of Rights and Freedoms* (n 64) s.33 (1).

freedom of expression, freedom of peaceful assembly, and freedom of association.[69] Sections 7 to 14 include the legal rights of Canadian citizens and residents. The final section of the *Charter* that the notwithstanding clause may apply to is section 15, relating to equality rights.[70] For the invocation of the notwithstanding clause to be considered valid, the federal or provincial legislature must directly refer to the *Charter* right(s) it seeks to override. In *Ford v. Quebec (1988)*, the SCC affirmed that the notwithstanding clause could be used to invalidate numerous *Charter* rights concurrently.[71]

The fourth and final element of the notwithstanding clause is the provision of a five-year limitation in section 33 (3). In 1982, acknowledging the vast override powers of section 33, the drafters of the constitutional amendments all agreed to place a temporal restriction on the notwithstanding clause. As a result, it was determined that the notwithstanding clause would automatically expire within five years of it coming into force.[72] However, it should be noted that declarations are perpetually renewable.[73] The intended purpose of the five-year sunset clause was to limit the unchecked powers of the legislature to override constitutionally entrenched rights. By requiring review and renewal at five-year intervals, section 33 ensures that the notwithstanding clause is reviewed every election cycle, thus making it subject to removal or expiration through the election of different political leaders.[74]

In 1982, when the provincial Premiers and federal ministers decided to include the notwithstanding clause within the final draft of the *Charter*, it was described as a safety valve for legislatures from judicial supremacy. Proponents of the notwithstanding clause argued that it would be a measure of last resort that would be rarely used by the legislatures except to

69 ibid s.2.

70 ibid s.15.

71 *Ford v. Quebec* (n 67) [231].

72 *Charter of Rights and Freedoms* (n 64) s.33(3).

73 Hogg (n 12) 881.

74 ibid.

'correct absurd situations'.[75] This line of argument was promoted by officials such as then Justice Minister Jean Chrétien, who stated:

> What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy […] It is important to remember that the concept of an override clause is not new in Canada. Experience has demonstrated that such a clause is rarely used and when used it is usually not controversial.[76]

Despite these reassurances by government officials, even at the time of its adoption, the inclusion of the notwithstanding clause was controversial. Critics responded to the arguments for the notwithstanding clause by expressing concerns over the creation of a tool that allows governments to arbitrarily override constitutionally entrenched rights protections. They stipulated that the purpose of entrenching *Charter* rights was to ensure that minorities were protected from the wills of a majority government. This stance was exemplified by Senator Eugene Forsey, who argued that the notwithstanding clause should be abolished because it fundamentally undermines the purpose of the *Charter*. He stated:

> The notwithstanding clause is a dagger pointed at the heart of our fundamental freedoms, and it should be abolished. Although it does not apply to the whole Charter of Rights, it does apply to a very large number of the rights and freedoms otherwise guaranteed […] Clearly, then, it gives federal and provincial legislators very wide powers to do as they see fit in limiting or denying those rights and freedoms. The Charter would not have protected the Japanese-Canadians who were forcibly interned during World War. Nor will it protect anyone advocating an unpopular cause today. Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a Charter of Rights.[77]

75 Library of Parliament (n 27) 5.

76 ibid.

77 ibid.

In the years since its inclusion in 1982, the desire to abolish the notwithstanding clause has been expressed by other Parliamentarians – most notably Prime Ministers Brian Mulroney and Paul Martin.[78]

In spite of these initial concerns, in the thirty-seven years since the adoption of the *Charter*, the notwithstanding clause has rarely been used – effectively having gone into constitutional hibernation. Section 33 has only been fully invoked fifteen times since 1982 – mostly by the government of Quebec.[79] In the aftermath of the passing of the *Canada Act, 1982* Quebec sought to protest the forced imposition of the *Charter* on their province through passing *An Act Respecting the Constitution Act, 1982*.[80] This act retroactively applied the notwithstanding clause to each of the statutes in force in Quebec as of April 16, 1982. In addition to this legislation, the National Assembly of Quebec routinely included the notwithstanding clause in all new pieces of legislation after April 1982.[81]

This practice ended after December 2, 1985, with the election of a new Liberal government that allowed the use of the notwithstanding clause imposed by *An Act Respecting the Constitution Act, 1982* to expire in 1987.[82] Despite ending the blanket application of the notwithstanding clause, the new Liberal government led by Premier Robert Bourassa included the notwithstanding clause in twelve subsequent pieces of legislation. The most controversial of its applications in Quebec was its inclusion in *An Act to Amend the Charter of the French Language, 1988* – an act prohibiting the use of English in exterior commercial signs.[83] In 1993, the government let the notwithstanding clause on the legislation expire, deciding to pass new

78 After the failed constitutional amendment process with the Meech Lake Accord the Prime Minister Brian Mulroney stated the notwithstanding clause was the 'fatal flaw' of the Constitution and 'not worth the paper it's written on'. This was followed by Prime Minister Paul Martin who in his 2006 campaign vowed to ban the federal government's use of the notwithstanding clause.

79 Refer to Appendix A for a breakdown of all of the invocations of the notwithstanding clause.

80 *An Act Respecting the Constitution Act*, 1982 (Quebec).

81 Hogg (n 12) 879.

82 ibid.

83 ibid 880.

legislation solely requiring that the French language on commercial signs be predominant. This was the last time Quebec invoked the notwithstanding clause, prior to Premier Legaults' use of the clause in 2019.

Outside of Quebec, the clause has been used by Yukon, Alberta, and Saskatchewan, with the uses of the clause by the Yukon and Alberta later being deemed moot or *ultra vires* their jurisdiction.[84] It should also be noted that in 1998 Alberta again sought to apply the notwithstanding clause to deny compensation to victims of forced sterilization. Ultimately the legislation was not passed due to broad public condemnation.[85] In Saskatchewan the clause has been invoked twice. First, it was used to supersede a Saskatchewan Court of Appeal decision invalidating their government's back to work legislation. Subsequently, the SCC in *RWDSU v. Saskatchewan (1987)* ruled that the back to work legislation did not in fact violate the *Charter* and thus the application of the notwithstanding clause was moot.[86] Second, the notwithstanding clause was introduced in 2017 in Saskatchewan to temporarily set aside the Saskatchewan Court of Appeal decision in *Good Spirit School Division v Christ the Teacher Roman Catholic Separate School Division No.212 and The Government of Saskatchewan,* which found that provincial funding for catholic schools violates the *Charter* and the 'states duty of religious neutrality'.[87]

During this same period of infrequent use of the notwithstanding clause, minority groups and individuals from marginalized communities were able to gain significant rights protections through the *Charter* and judicial review by the Supreme Court of Canada (SCC). The rights gains included the decriminalization of sex work and abortion, as well as the

84 ibid.

85 CBC News, 'Alberta Backs Down on Sterilization Compensation' *CBC News* (3 November 1998) <https://www.cbc.ca/news/canada/alberta-backs-down-on-sterilization-compensation-1.158995> accessed 2 January 2019.

86 Library of Parliament (n 27) 7.

87 *Good Spirit School Division v Christ the Teacher Roman Catholic Separate School Division No.212 and The Government of Saskatchewan,* 2017 SKQB 109.

introduction of same-sex marriage legislation and the legalisation of medical assistance in dying. The following section will provide an exploration and review of the scholarship responses to the transformation of judicial review post-*Charter*. At the end of this section, I will situate my own argument regarding the notwithstanding clause within the normative responses to judicial review. Specifically, my argument aligns within the scholarship that views the transformation of judicial review post-*Charter* as a positive shift that strengthens Canadian democracy and provides a check on arbitrary government power.

iii. A Theoretical and Critical Account of Judicial Review post-Charter

On April 17, 1982, with the adoption of the *Charter*, Canadians became protected under an entrenched set of rights – transforming the enforcement role of the courts. This transformation of the role of the courts and their approach to judicial review was accomplished primarily through two sections in the 1982 Constitution: section 24(1) of the *Charter* and section 52(1) of the *Constitution Act, 1982*. Section 52(1) of the *Constitution Act, 1982* and section 24(1) of the *Charter* operate independently and play different roles in the process of the court remedying a rights violation. The distinct roles of section 52(1) and section 24(1) was formulated in *R v Ferguson*[88] (*Ferguson*) whereby the SCC outlined the different remedial purposes of the two sections. The court in *Ferguson* held that section 52(1) applies to laws that are inconsistent with the *Charter* because of the legislation's purpose or effect. This remedy (also referred to as striking down the law) enables the courts to render a law they deem to be in violation of the *Charter* null and void.[89] Section 52(1) does not provide a personal remedy for the rights violation(s).[90]

88 [2008] 1 S.C.R. 96, 2008 SCC 6 [59].

89 ibid [35].

90 ibid [59].

Under section 52(1) the courts have six remedies available, that range in severity, to respond to unconstitutional legislation: (1) striking down a law in its entirety,[91] (2) declaring partial invalidity of a law,[92] (3) reading down legislation to give laws a narrower constitutional interpretation,[93] (4) reading in and extending benefits of legislation to groups that are excluded from legislation,[94] (5) providing in rare circumstances constitutional exemptions,[95] and (6) imposing a temporary suspension of invalidity[96] to permit legislatures time to craft a legislative response.

As it relates to section 24(1), the SCC in *Ferguson* maintained that section 24(1) has a very different remedial purpose than section 52(1) – specifically, its purpose is to provide a case-by-case remedy for unconstitutional acts by government officials. Under section 24(1), the constitutionality of the law or legislative regime would not be challenged, but the specific acts of government officials would be.[97] To maintain the flexibility of section 24(1), the courts developed three principle remedies: (1) declaratory relief[98] from the court acknowledging a rights violation, (2) an injunction[99] to stop or require certain actions by the defendant, and (3) damages[100] to compensate an individual monetarily.

Before determining what remedy under section 24(1) or section 52(1) is appropriate the courts must first determine whether a rights violation, that cannot be justified under the section 1 of the *Charter*, occurred. This is determined through a two-step process. First, the courts must determine whether a *Charter* right(s) violation occurred. The burden of proof rests with the

91 *R. v. Hess ; R. v. Nguyen*, [1990] 2 S.C.R. 906.
92 Sharpe and Roach (n 61) 420.
93 *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2.
94 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
95 Sharpe and Roach (n 61) 425.
96 *Schachter v. Canada*, [1992] 2 S.C.R. 679.
97 *R. v. Ferguson* (n 88) [35].
98 ibid [409].
99 ibid [410] – [411].
100 Sharpe and Roach (n 61) [415] – [416].

claimant to prove that one (or several) of the rights guaranteed by the *Charter* was violated due to the actions or omissions of the government.[101] Once a rights violation has been proven, the burden of proof shifts to the government for the second step. The second step of the constitutional analysis is for the courts to determine whether the violation of right(s) that were proven by the claimant can be justified under section 1 of the *Charter*, which states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[102]

To evaluate the applicability of section 1, the courts developed a legal framework in *R v Oakes* (also referred to as the *Oakes* test) that must be used by the courts in section 1 analyses.[103] It is upon determining that the government has violated a *Charter* right and that the rights violation cannot be justified under section 1 that the courts will consider remedies. The courts will employ the numerous flexible and creative remedies available under either section 24(1) or section 52(1) to redress the rights violation.

The inclusion of section 24(1) and section 52(1) completely transformed the role of the courts and judicial review in Canada. This transformation of judicial review led to significant responses from the academic legal community – both positive and negative. The remainder of this section focuses on the scholarship responses to the new role of the courts in judicial review post-Charter. This section concludes by situating my own normative argument on the notwithstanding clause and minority rights within this scholarship.

When the *Charter* was adopted and the role of the courts in judicial review was transformed there was a significant response from Canadian scholars. Although there are a range of positions, these normative responses can be generally categorized into two main

101 Patrick Monahan, *Constitutional law* (3rd edn, Irwin Law 2006) 411.

102 *Charter of Rights and Freedoms* (n 64) s.1.

103 *R. v Oakes*, [1986] 1 S.C.R. 103, [69].

groups: (1) that the *Charter* undermines Canadian democracy, and (2) that the *Charter* strengthens Canadian democracy by providing a check on arbitrary government power.

The first classification of scholars were critical of the adoption of the *Charter* because they questioned the legitimacy of unelected judges to decide what they perceived to be political disagreements better dealt with by the legislatures. The most prominent critic from this group is Patrick Monahan, a former Dean of Osgoode Hall Law School at York University (2003-2009) and a current Judge of the Ontario Superior Court in Toronto.[104] In his 1987 text *Judicial Review and Democracy*, Monahan raises concerns regarding the ways in which the courts under the *Charter* will now have the authority to make political decisions on matters of public policy that will be masked as objective legal decisions.[105] To him, it would be a false assumption to believe that the rights guaranteed in the *Charter* are based on objective standards that will be dealt with by the courts on solely legal grounds.[106] Rather, Monahan asserts that many parts of the *Charter* are vague and open-ended and therefore require judges to examine the wisdom of the *Charter* – inviting the courts to make political decisions balancing the interests of society against individual rights.[107] He regards the *Oakes* test as proof of the political character of judicial review as it requires an inherently normative assessment, which amounts to the courts asking, 'is this worth what it costs?'[108] He argues that it is not the role of the judiciary to make such normative assessments on the substantive outcomes of public policy based on their own assessment about what is right or good.[109] To him, such an approach would result in the

104 Department of Justice Canada, 'Government of Canada Announces Judicial Appointments in the Province of Ontario' (19 May 2017) <https://www.canada.ca/en/department-justice/news/2017/05/government_of_canadaannouncesjudicialappointmentsintheprovinceof2.html> accessed on 13 February 2019.

105 Patrick J. Monahan, 'Judicial Review and Democracy: a Theory of Judicial Review' [1987] 21 UBCLR 87, 88.

106 Sharpe and Roach (n 61) 28.

107 Patrick Monahan, 'A Critics Guide to the Charter*'* in Christopher P. Manfredi and James B. Kelly (eds), *Contested Constitutionalism Reflections on the Canadian Charter of Rights and Freedoms* (University of British Colombia Press 2009) 387.

108 ibid.

109 ibid.

judiciary overstepping its role and having to make substantive choice values on public policy.[110]

As a response to the perceived politicisation of the judiciary, Monahan proposes that the courts take on a much more limited and circumscribed form of judicial review that focuses primarily on upholding the integrity of the political process, rather than evaluating the outcomes of these political processes. His process-oriented approach is based on the principle of equal access to and participation in a political system. As a result, the courts role should be to advance democracy by removing barriers limiting public debate and accessing political processes.[111] He views this limited approach to judicial review as a way in which constitutional adjudication can act in aid of democracy, rather than its current form as a derogation from it.[112]

Monahan's argument against judicial review mirrors many of the arguments put forth by American legal scholar Jeremy Waldron in his 2006 article the Core Case Against Judicial Review.[113] In this article, Waldron criticizes judicial review on two fronts. First, he argues that it is a false assumption to believe that rights are better protected by the courts, as opposed to democratically elected legislatures. Second, he argues that judicial review is democratically illegitimate.[114] In regards to the second point, he puts forward a normative critique of judicial review whereby he argues that in a free and democratic society, judicial review is an inappropriate method of final decision-making.[115] To Waldron, modern liberal society is characterized by what he deems as 'rights disagreements'.[116] He asserts that these rights disagreements are best dealt with by the legislatures as they are democratically elected with the freedom to fully debate the moral and other implications of the final decision over the definition

110 D. C. McDonald, *Legal rights in the Canadian Charter of Rights and Freedoms* (2nd edn, Carswell 1989) 10.

111 ibid 12.

112 ibid 11.

113 Jeremy Waldron, 'The Core of the Case Against Judicial Review' [2006] 115 The Yale Law Journal 1346.

114 ibid 1346.

115 ibid 1348.

116 ibid 1353.

and scope of certain rights.[117] Similar to Monahan, Waldron proposes that judicial review be limited to ensuring democratic processes to guarantee access to the political systems.[118] This process oriented approach is juxtaposed against the outcome oriented approach which he states represents decisions that seek to ensure a 'good, just, or right' outcome.[119] He argues that it is politically and democratically illegitimate to privilege the decision-making role of a small group of unelected and unaccountable judges over the wills of a democratic legislature representative of the people.[120] Thus, he is fundamentally opposed to courts determining moral issues on what he deems 'rights disagreements', and instead views their role as guaranteeing the democratic process to facilitate free and open debate on these issues.[121]

Beyond the concerns over the substance of claims the courts should be reviewing, other scholars have raised critiques over judicial review post-*Charter* and its role in undermining democratic processes. In their 2000 book The Charter Revolution and the Court Party, former Alberta Cabinet Minister Ted Morton and University of Calgary Professor of Political Science Rainer Knopff argue that the courts have adopted what they deem to be an 'unacceptable' law-making role through the *Charter*. They build upon this argument by stating that the *Charter* has led to the development of a 'Court Party' – a coalition of interest groups such as women's rights and civil liberties organizations – that is able to 'exploit this new-found judicial power to achieve policies that would not otherwise attract majority support'.[122] Specific special interest policies that they argue have been exploited by the 'Court Party' include equality rights for minorities, such as those for same-sex couples, and abortion rights.[123] Consequently, they

117 ibid 1381.

118 ibid 1372.

119 ibid 1373.

120 ibid 1353.

121 ibid 1348.

122 F. L. Morton and Rainer Knopff, *The Charter revolution and the Court Party* (Broadview Press 2000) 78-79.

123 ibid.

conclude that the transformation to the courts that is being pursued by the 'Court Party' is nothing short of 'authoritarian, not just in process, but more dangerously in spirit'.[124]

The final key critique of judicial review post-*Charter* comes from the political scientist Peter H. Russell. In his 1983 article The Political Purposes of the Canadian Charter of Rights and Freedoms, Russell puts forward the claim that the 'principal impact of the *Charter* is that it judicialized politics and politicized the judiciary'.[125] Through this argument, Russell warns that the overreliance on judicial review may result in the weakening of the 'sinews of Canadian democracy' – what he understands as the ability of the Canadian political processes to engage with divisive normative issues through public debate to arrive at political compromises.[126] He cautions against the overreliance of litigation to respond to moral issues, as it may result in issues of social and political justice being transformed into legal questions.[127] He foresaw that this transformation of public policy issues into technical legal issues could result in litigation replacing public debate as Canadians leave the responsibility of resolving moral issues to lawyers and the courts. He regards this post-*Charter* shift in the role of the courts as a concerning reduction of Canada's ability to act as a deliberative democracy.[128]

Before turning to the other category of scholars who normatively assert that the adoption of the *Charter* strengthened Canadian democracy, it is important to note that some scholars who expressed initial opposition to the *Charter* in the early days have since shifted their stance – primarily in light of SCC practice. According to the scholars themselves, many of their initial concerns have not appeared. Furthermore, their own empirical research has led them to become cautiously optimistic regarding the practice of judicial review post-*Charter*.

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124 ibid.

125 Peter Russell, 'Political Purposes of the Canadian Charter of Rights and Freedoms', (Toronto) 61 Canadian Bar Review 30, 51-52.

126 ibid 52.

127 ibid.

128 Peter Russell 'The Charter and Canadian Democracy' in Christopher P. Manfredi and James B. Kelly (eds), *Contested constitutionalism: reflections on the Canadian Charter of Rights and Freedoms* (University of British Colombia Press 2009) 288.

Two early *Charter* critics mentioned in the first category who shifted their stance are Patrick Monahan and Peter Russell. Both authors have acknowledged that many of their initial critiques of the *Charter* have not materialized in the actual practice of courts since the adoption of the Constitution in 1982. Monahan, contrary to his earlier 1987 theory of process-oriented judicial review, conceded in a 2006 publication that in the past twenty-five years, the *Charter* had made a significant contribution to Canadian democracy.[129] He comes to this conclusion through an empirical study and analysis of the constitutional cases that were heard by the courts. Through his study, he determined that constitutional challenges have a success rate of thirty-three percent and that the courts have been more receptive to constitutional challenges around legal rights (section 8-14) and less receptive to claims pertaining to the fundamental freedoms (section 2) and the right to life (section 7).[130] This study led him to conclude that the courts through judicial review under the *Charter* have taken on an appropriate approach to judicial review of the *Charter* by operating as a 'meaningful and substantive limit on the authority of government while avoiding many of the pitfalls made by critics'. [131]

Peter Russell has also adopted a new approach to judicial review in light of the *Charter's* practical application since 1982. He became a supporter of the *Charter* due to its role in limiting arbitrary executive power – primarily rights violations by the police. Through analysis of constitutional court cases, Russell notes that a large portion of the *Charter* cases did not pertain to the substance of the legislation, but rather unconstitutional acts by government officials.[132] This has resulted in the courts taking on an important role of limiting arbitrary executive power. By extension, he argues that the limiting of unlawful arbitrary power by state actors strengthens Canadian democracy, because to him, 'judicial review of the police

129 Monahan (n 107) 390.

130 ibid.

131 ibid.

132 Russell (n 128) 294.

is an essential practice of Canadian democracy'.[133] As a result, Russell concludes that the judicial review by the courts has not resulted in a stifling of public debate on controversial issues and that 'despite his fears, the sinews of democracy have not been significantly weakened by the *Charter*'.[134]

Another theory regarding the judicial review post-*Charter* that developed as a result of an empirical study of the *Charter* case law is dialogue theory. Dialogue theory, developed by Osgoode Hall of Law Professor Peter Hogg and lawyer Allison Bushell, analysed the outcomes of constitutional challenges to argue that dialogue occurs between the courts and legislatures when a judicial decision leaves open the possibility for legislatures to respond to the decision with reversal, modification, or avoidance.[135] Through their study of sixty-five (primarily SCC) cases where legislation was struck down due to breaches of *Charter* rights, Hogg and Bushell found that in forty-four (two-thirds) of the cases, the legislative body responded by amending the law and re-passing it as a legislative sequel. In most cases, the legislature was only required to make minor amendments to ensure that the legislative response respected the *Charter*, while maintaining the objective of the original legislation.[136] Thus, they coined the term 'dialogue theory' to describe the forms of ongoing dialogue or '*Charter* speak' occurring between the courts and legislatures which ensured that legislation passed by government respects the rights guaranteed by the *Charter*. They present four features that facilitate dialogue between these two branches: (1) the notwithstanding clause (section 33), (2) the reasonable limits clause (section 1), (3) the qualified rights under section 7, 8 and 9 and (4) the various remedies available to respond to equality clause (section 15) violations.[137] Dialogue theory proposes a

133 ibid 295.

134 ibid 290.

135 Peter W Hogg and Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures:(Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)' in *Bills of Rights* (Routledge 2017) 79.

136 ibid 81.

137 ibid 82.

dynamic and collaborative relationship between the courts and legislatures that results in a positive impact on the facilitation of democracy.

The shifted stance in light of empirical evidence of these formers *Charter* critics is distinct from those who celebrate the transformation of judicial review post-*Charter* for its role in strengthening Canadian democracy. The scholars in this second category are distinct because they normatively support the practice of judicial review under the *Charter* for its limitations on the arbitrary power of the legislature and its ability to violate the rights of minority groups. This second category of scholars is well characterized by political scientist Scott Reid in his review of the schools of thought that emerged in response to the *Charter*.[138] He characterizes this group of *Charter* supporters as those who regard the power of review as an important check on government authority. Specifically, these scholars believe that the courts, with their ability to review government legislation and actions, limit the power of the legislature to oppress its constituents – especially vulnerable minority groups.[139]

Reid notes that the concerns of legislative oppression are well-founded if one is to review Canada's historical human rights record. This includes human rights violations such as the Japanese internment camps that were created through Parliaments' use of the *War Measures Act* in 1941.[140] Following the Japanese army's attack on Pearl Harbour, the Canadian government decided to use emergency legislation to legislate discrimination against 'all persons of Japanese racial origin'.[141] It began with the confiscation of Japanese-Canadians' property and fishing licenses, and escalated into the relocation and internment of 22,000 Japanese-Canadians to camps in the interior of British Columbia.[142] This was a popular policy

138 Reid, S, 'Penumbras for the People: Placing Judicial Supremacy under Popular Control' in A Peacock, ed, *Rethinking the Constitution: Perspectives in Canadian Constitutional Reform* (Toronto: Oxford University Press, 1996).

139 ibid 188.

140 Tom Sando, *Wild Daisies in the Sand*, (Anonymous Translator, Edmonton, NeWest Press, 2002).

141 Defence of Canada Regulations of the War Measures Act, SC 1941 (Canada).

142 Sando (n 140).

that was supported by many Canadians through their municipal, provincial, and federal representatives. The treatment of Japanese-Canadians in the Second World War remains a prominent example for those who support the important role of judicial review post-*Charter* to limit the targeting of minority groups – that could be enacted by the legislative and executive branches.[143] To these scholars who celebrate the *Charter*, Reid points out that the judiciary is considered as a 'salutary break against the momentary passions of the majority and mob rule'.[144]

Canadian pro-judicial review scholar J. G. Castel is the former editor of the Canadian Bar Review. Castel was a strong supporter of the entrenched *Charter* and the new judicial review powers it provided to judges. Following the creation of the *Charter,* Castel wrote about the limitations of previous Canadian rights protections such as the *Canadian Bill of Human Rights, 1960* and the *British North America Act, 1867*. In this article, he argues that in light of their inability to provide meaningful protections for basic rights and freedoms with the inclusion of minority rights, constitutional entrenchment was necessary. Similar to the description of this group of scholars provided by Reid, Castel supports his argument by underscoring the need to meaningfully protect minority rights. Specifically, he states that 'an entrenched *Charter of Rights and Freedoms* should ensure that fundamental rights and freedoms will not be set aside by a transient majority'.[145] He describes the *Charter* as a 'legislative measure and standard of protection of civil liberties in Canada'.[146]

As an extension of his belief in the purpose of the *Charter* to protect minority rights, Castel makes a case for the judiciary to play a larger role in upholding it. He asserts that the *Charter* must overcome the previous failings of the courts under the *Canadian Bill of Rights*

143 Reid (n 138) 188-189.

144 ibid 189.

145 J.G. Castel, 'The Canadian Charter of Rights and Freedoms' [1983] 61 Canadian Bar Review 1, 1.

146 ibid 2.

and adopt a more impactful approach.[147] Specifically, he argues that the constitutional entrenchment of rights would have the effect of empowering the judiciary to take on a stronger role in upholding and protecting minority rights. Although the responsibility for upholding the *Charter* falls on all Canadians, he argued that the following decades would provide a test for the courts, to evaluate whether they would embrace their new role as the 'wielders of protective authority against an invasion of the liberty by the governments or their agencies'.[148]

Castel's argument, in many ways, is an extension of that of American legal scholar John Hart Ely. In his 1980 book *Democracy and Distrust*, the influential legal scholar Ely put forward a strong defence of judicial review in constitutional democracies. In his book, Ely criticizes the process-oriented approach, similar to that proposed by Monahan and Waldron, whereby he argues that democracy within a constitutional system requires more than 'a voice and a vote' for minority groups.[149] Ely was influenced by the 1938 decision of Justice Harlan F. Stone in *United States v. Carolene Products Co.* and its well-known footnote number four. In this decision, which dealt with commercial shipping of milk, the U.S. Supreme Court held that although the courts must maintain a presumption of constitutionality and deference to government legislation, in certain circumstances they may need to intervene through judicial review regarding cases that curtail individual rights.[150] In footnote number four, Justice Stone acknowledged that legislation that creates barriers to accessing political processes or discriminates against already vulnerable minority groups should be subjected to more judicial scrutiny under the Fourteenth Amendment.[151]

Ely built upon the precedent set by footnote number four by arguing that it would be false to believe that the sole role of the courts should be to guarantee access to political

147 ibid.

148 ibid.

149 John Hart Ely, *Democracy and Distrus : a Theory of Judicial Review* (Harvard University Press 1980) 135.

150 *United States v Carolene Products Co.*, 304 U.S. 144 (1938) footnote 4.

151 ibid.

processes, as such a belief fails to account for the ways in which the majority continuously ignores the needs and rights of minorities who lack political representation. He wrote that 'no matter how open the process, those with the most of the votes are in a position to vote themselves advantages at the expense of others, or otherwise refuse to take their interests into account'.[152] He uses the examples of discrimination enacted by the majority against 'aliens', the 'poor' and 'homosexuals' as demonstrative of the vulnerability of minority groups to the majority who continuously outvote these groups to maintain legislative control and enact policies that either ignore their interests or are directly harmful to them.[153]

A further, Canadian application of Ely's theory regarding judicial review and minority rights was put forward by Bernard H. Siegan, who responded to Monahan's process-oriented theory of judicial review in 1987.[154] As mentioned earlier, Monahan, an early critic of the *Charter*, proposed that judges be restricted to solely engaging in judicial review for cases that concern protecting democratic processes.[155] Siegan strongly rejected Monahan's theory of process-oriented judicial review and put forward his own normative case for judicial review. In criticizing Monahan's theory, Siegan asserts that the *Charter* has two primary purposes: (1) to create and maintain the structure of government, and (2) provide protections for individual liberties.[156] He compares the Canadian *Charter* with the American Constitution judicial review model to argue that Monahan's process-oriented review is incompatible with conventional understandings of the purpose of judicial review, which supports the constitutional structure designed to separate and limit government control.[157] Siegan states that 'substantive judicial review is consistent with democratic government, under the assumption that no matter how

152 Ely (n 149) 135.

153 ibid 161-162.

154 Bernard H Siegan. 'Commentary on Monahan Paper' [1987] 21 UBCLR 1, 165.

155 Monahan (n 29) 390.

156 Siegan (n 154) 165.

157 ibid.

popular the state is, it does not possess the authority to deny or to diminish the fundamental liberties of its constituents'.[158] Thus, to ensure the constitutional design of separation of powers is maintained within a constitutional democracy, Siegan asserts that the courts should be given a major substantive role in providing protections for individual rights and liberties.[159]

In many ways, Siegan expresses similar scepticism of legislative bodies being the primary defender of individual rights as the legal philosopher Ronald Dworkin. In his 1997 book *Taking Rights Seriously*, Dworkin presents his theory of judicial review of rights as trumps. Dworkin theory is based on an understanding of constitutionalism whereby the constitutional system creates a set of individual rights against the government that must be protected through the restraint of majoritarian governments.[160] He proposes that in constitutional democratic systems, 'individual rights are political trumps held by individuals'.[161] He first seeks to contextualize the understanding of rights in 'the strong sense', meaning that individuals have rights against the government that should not be violated by the government regardless of whether the government believes it is enacting a good policy for the majority of the population.[162] Dworkin's theory of 'rights as trumps' asserts that for fundamental rights against the government, utilitarian justifications are not enough to justify their infringement.[163] If the government has the ability to override the fundamental rights against government using claims of utilitarian community benefits then it reduces the rights claims to empty words. Thus, Dworkin argues that if governments are to take rights seriously then they must respect the institution of rights as he argues that it is 'crucial because it represents the majority's promise to the minorities that their dignity and equality will be

158 ibid 168.

159 ibid.

160 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Academics 2013) 181.

161 ibid 6.

162 ibid 230.

163 ibid 231.

respected'.[164] It is important to note that Dworkin does acknowledge that in some very limited circumstances such as competing individual rights claims, the government may retain the ability to override the individual's rights against government, however he maintains that merely utilitarian gains of the majority do not meet that standard.[165]

Siegan expresses similar concerns with the ability of the democratic legislature without judicial oversight to meaningfully consider and protect the rights of minorities in light of utilitarian interests. He notes that there are numerous flaws in the law-making process that inhibit its ability to meaningfully hear, consider, and legislate the rights of minority groups.[166] These flaws include what Siegan describes as a tenuous relationship between the will of the majority and legislation passed – the passage of laws that are overbroad and that unnecessarily deprive minority rights and the ability of powerful special interest groups to influence the passing of laws that are oppressive to others.[167] Although he acknowledges that the judiciary is not without its own flaws, he asserts that it is a risk that must exist in a constitutional system that separates and limits government power.[168] To him, the necessary response to the risks posed by the courts as a final decision-maker of rights is to create a more responsible judiciary – particularly through the creation of strong constraints on the courts through the separation of powers and restrictions on their interpretive power of the Constitution.[169]

In sum, there are numerous Canadian and American scholars who regard judicial review as a necessary protection in a democratic constitutional system for the rights of minorities. They regard the legislative body as an inadequate sole protector of individual rights – particularly when it comes to the rights of minorities. In a democratic constitutional system

164 ibid 247.
165 ibid 241.
166 Siegan (n 154) 169.
167 ibid.
168 ibid 175.
169 ibid.

that is designed to separate and limit the powers of the executive, legislatures, and the courts, it is imperative that independent courts are able to safeguard the rights of minorities. Although many of these scholars acknowledge the flaws inherent within the judiciary, advocates for the *Charter* such as Castel maintain that strong judicial review is necessary to overcome the previous shortcomings of the *Canadian Bill of Rights* whereby the courts failed to uphold the rights of minorities from oppressive government policies.

To situate my own argument in relation to these opposing camps of scholars – concerns over the impact of the notwithstanding clause on the rights of minorities aligns with the view that the transformation of judicial review post-*Charter* is a positive step towards strengthening Canadian democracy and creating a more just society. My argument is that the notwithstanding clause risks undermining the fundamental and necessary role of the courts in protecting minority rights through judicial review. The notwithstanding clause threatens the primary role of the courts as a safeguard for the rights of minority groups from oppressive government policies that either fail to account for their individual rights or directly target them. Thus, as argued by Castel, Ely, and Siegan, the scholars that oppose judicial review under the *Charter* fail to adequately consider the shortcomings inherent within democratic legislatures that inhibit its ability to meaningfully protect the rights of minorities. Furthermore, these critics of judicial review fail to acknowledge the important role that judicial review has played in providing forums for strategic litigation by minority groups to defend their individual and collective rights from oppressive majoritarian policies.

Here, I present my argument, which is founded upon the normative theories of pro-*Charter* scholars, in two parts. First, I use doctrinal evidence to argue that the *Charter* has developed into and has been utilized as an important tool for minority groups to insulate their rights from the majoritarian wills expressed through the legislature. Second, I examine the structural protections embedded within the text of the notwithstanding clause which, it could

be argued, act as safeguards from invocation of the notwithstanding clause that threatens minority rights. Through this analysis I will seek to demonstrate that these embedded structural protections are inadequate and ill-suited for the particular vulnerability of minority groups to the notwithstanding clause.

However, prior to presenting my main argument regarding this scholarship gap in the literature on the notwithstanding clause, I must first provide an overview of the existing literature. The following section will explore the scholarship responses specific to the notwithstanding clause. At the end of this section, I argue that the current scholarship on the notwithstanding clause focuses primarily on the equilibrium of power, rather than the impacts of the clause on minority rights. This sets the stage for my primary argument, which focuses on the specific vulnerability of minority rights under the notwithstanding clause.

iv. Theorising Notwithstanding Clause

Since the adoption of the *Constitution Act, 1982*, the notwithstanding clause has remained one of the most controversial and debated aspects of the *Charter*. Described as a uniquely Canadian invention, the notwithstanding clause has become a central focus for Canadian and non-Canadian scholars around the world who have sought to discuss its role as a possible solution to the counter-majoritarian dilemma. As an extension of the scholarship debates, academics have sought to theorise the causes for the development of the almost dormant state of the notwithstanding clause and suggest modifications that will encourage more mainstream use.

Numerous Canadian legal scholars have promoted a narrative of the notwithstanding clause as an ingenious legislative invention. Lorraine Weinreb, a Professor of the University of Toronto, describes the constitution as a 'seamless web' within which the override is a constitutive part that strengthens the web's 'patterns of respect for democracy, different and individual dignity'.[170] She puts forward the argument that the notwithstanding clause in fact

170 Lorraine Weinrib, 'Learning to Live With The Override' [1990] 35 Mcgill Law Journal 541, 571.

'frees Canada from the crisis of judicial legitimacy that mars other rights protecting systems'.[171] The previously mentioned legal scholar Kent Roach of the University of Toronto argued that the notwithstanding clause is 'far from a dead letter' as it plays an influential role in keeping both the judiciary and legislature accountable.[172] Legal scholar Paul Weiler, a former Professor at Osgoode Hall of Law, characterised the notwithstanding clause as an intrinsically sound solution to the dilemma of legislatures and courts by masterfully combining the systems of British parliamentary supremacy and American judicial supremacy.[173] Finally, Peter Russell of the University of Toronto was a strong supporter of the override clause, describing it as a 'prudent system of checks and balances that recognizes the fallibility of both the courts and the legislatures and gives closure to the decision of neither'.[174]

Beyond these Canadian scholars, the notwithstanding clause has also been of interest to non-Canadian scholars, who have sought to critically analyse its function as a best practice for other jurisdictions. One of the most prominent international scholars who has written on the notwithstanding clause is UCLA constitutional legal scholar Stephen Gardbaum. In his 2001 article The New Commonwealth Model of Constitutionalism, Gardbaum theorizes a third constitutional model in addition to the already established models of judicial supremacy (strong-form constitutionalism) and parliamentary supremacy (weak-form constitutionalism).[175] This new third model, which he labels as the new commonwealth model of constitutionalism, seeks to provide a balance between the traditional dichotomy between

171 ibid.

172 Jamie Cameron, 'The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?' [2004] 23 SCLR, 148.

173 Paul Weiler, 'Rights and judges in a democracy : a new Canadian version' [1983] 18 Journal of Law Reform 51, 54.

174 Cameron (n 172) at 144.

175 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 The American Journal of Comparative Law 707, 708 - 709.

parliamentary and judicial supremacy by re-allocating the relationship while maintaining adequate protections for constitutional rights.[176]

Gardbaum uses the constitutional models of Canada, New Zealand, and the United Kingdom to form a completely normative argument surrounding this new model – a distinctive model in itself, and a best practice in constitutional engineering.[177] He characterizes constitutional structures that fit within the models of the new commonwealth constitutionalism as having three main criteria: (1) a legalised bill of rights, (2) enhanced judicial power to enforce rights, and (3) a structure that gives the final say to the legislature.[178] To him, the Canadian Constitution (in theory) is an optimal example of the new commonwealth constitutionalism model. It has the legalised bill of rights in the *Charter*, which also gave broader enforcement powers to the judiciary. Furthermore, he regards the notwithstanding clause as the critical and distinctive structural feature of the *Charter* that gives the final say to the government, enabling it to be classified within the new commonwealth constitutionalism model.[179]

Despite his initial celebration of the Canadian Constitution in his 2001 theory, Gardbaum later expressed concerns over the lack of use of the notwithstanding clause. In a 2010 re-assessment of the new commonwealth constitutionalism model, he noted that the low uptake of the notwithstanding clause by legislatures has undermined the Canadian Constitution's ability to be characterized as a new commonwealth constitutionalism model. Regardless, he argued that despite these concerns over low uptake, the Canadian Constitution remains an example of the new commonwealth constitutionalism model and can be improved with various reforms to the notwithstanding clause to encourage more frequent use.

176 Stephen Gardbaum, 'Reassessing the new Commonwealth model of constitutionalism' [2001] 8 International Journal of Constitutional Law 167, 168.

177 ibid 170.

178 ibid 169.

179 ibid 170.

Rosalind Dixon, an Australian legal scholar, examines the notwithstanding clause as it relates to the strength of judicial review.[180] In her paper, she challenges the claim by other scholars that the notwithstanding clause makes the Canadian constitution a weaker form of judicial review than the American strong-form constitutionalism. She supports this argument by claiming that due to the low use of the notwithstanding clause it has had little direct effect on the strength of judicial review in Canada.[181] Despite this argument, Dixon concedes that due to the dialogic aspects of the notwithstanding clause that encourage a dynamic relationship between the legislatures and the courts, it may have some indirect effects on the strength of Canada's judicial review.[182] She concludes by encouraging other scholars who are analysing the notwithstanding clause to consider its indirect impacts in addition to the direct ones.[183]

Meghan Campbell, a Canadian scholar and lecturer at the University of Birmingham, has suggested that the notwithstanding clause may serve as a best practice that could resolve shortcomings of the judicial review process in the United Kingdom (UK).[184] She examines the recent attempted use of the notwithstanding clause by the government in response to the *Good Spirit School Division v Christ the Teacher Roman Catholic Separate School Division No.212* (*Good Spirit*) decision by the Saskatchewan Court of Appeal and the implications of Hogg's dialogue theory for the *UK Human Rights Act*. Campbell presents that the UK constitutional structure is one of weak-form constitutionalism whereby the courts have the ability to make declarations of invalidity when a piece of legislation is determined to be incompatible with the *UK Human Rights Act*.[185] Despite the declaration of invalidity, the decision to implement the decision and amend or repeal legislation remains completely with the executive. This structure

180 Rosalind Dixon, 'Weak-Form Judicial Review and American Exceptionalism' [2012] 32 Oxford Journal of Legal Studies 487, 490.

181 ibid 493.

182 ibid 495.

183 ibid 506.

184 Meghan Campbell 'Reigniting the Dialogue: The Latest Use of the Notwithstanding Clause in Canada' [2018] Public Law.

185 ibid 3.

results in a situation whereby the executive can ignore the declaration of incompatibility without providing substantive justifications.[186]

Campbell argues that the use of the notwithstanding clause by the Saskatchewan government in response to the *Good Spirit* decision has important lessons that can be applied to the perceived shortcomings of the UK declarations of invalidity. She argues that the example of Saskatchewan demonstrates that the notwithstanding clause mandates the government to act transparently because it requires them to overtly state the right that they will be overriding and provide substantive reasons to justify their decision to the public. She engages Hogg's dialogue theory to argue that the notwithstanding clause is a 'powerful tool to foster dialogue' and 'fosters a culture of transparency, accountability and good administration'.[187] As such, she suggests the notwithstanding clause as a best practice that could enhance transparency and good administration in the UK by requiring the executive to provide justifications for not implementing the declarations of invalidation by the courts.[188]

In addition to these international scholars who look to the notwithstanding clause as a best practice, there are others who are more critical of its existence and practice. Take for example Osgoode Hall of Law Professor Jamie Cameron, who is highly critical of the celebration of the notwithstanding clause. She believes that the clause has been 'scripted as playing a central role in *Charter* mythology'.[189] She seeks to challenge the perceived myth that is promoted by many Canadian and international scholars that the notwithstanding clause offers a solution to the 'consequences of substituting judicial supremacy with parliamentary supremacy' as was done with the adoption of the *Charter*.[190] Cameron asserts that because legislators have not used the notwithstanding clause to a large extent, it has failed to meet its

186 ibid 8.

187 ibid 2.

188 ibid 8.

189 Cameron, (n 172) 137.

190 ibid 138.

designation as a middle ground between competing poles of supremacy.[191] She offers a pessimistic view of the notwithstanding clause and its celebrated place in Canada's constitutional framework by arguing that its rare use along with other factors has made it essentially politically unavailable.[192] Thus, she contends that the notwithstanding clause cannot be characterized – as it has been by other scholars – 'an unqualified success' but rather should be characterized as a concept of 'self-delusion'.[193]

Despite Cameron's pessimism, numerous other scholars, after acknowledging the shortcomings of the notwithstanding clause, have suggested reforms to encourage its use and increase its ability to resolve what they perceive to be a dilemma of judicial supremacy. The first scholar within this group is the Queen's University Professor Tvsi Kahana.[194] Through his overview of the thirteen uses of the override clause – a number that has gone up since the article's publication in 2001 – he examines why certain uses of the clause garnered more public response, while others were invoked with little notice. Kahana theorises that there are two factors that impact the extent of the public response surrounding the notwithstanding clause: (1) visibility and (2) accessibility.[195] He asserts that when the legislature applies the notwithstanding clause to an issue that is not on the public agenda, it results in the invocation becoming invisible. Further, when the notwithstanding clause is invoked to respond to complex policy questions that is not easily understood by the general public, it renders its use inaccessible.[196] To him, the invisibility and inaccessibility of the use of the notwithstanding clause hinders its ability to be a tool that promotes democratic processes through extensive public discussions over its invocation. Therefore, Kahana argues that the best way to address

191 ibid 148.

192 ibid 139.

193 ibid 166.

194 Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practices of Section 33 of the Charter' [2001] 44 Canadian Public Administration 255.

195 ibid 255-256.

196 ibid 257.

the shortcomings of the clause is to take steps to increase its visibility and accessibility. His recommendation is that the notwithstanding clause is revised to require that it can only be invoked in response to a decision by the Supreme Court.[197] His theory is that by doing away with the pre-emptive use of the notwithstanding clause, it will make the override uses more visible and accessible, and by extension ensure that the legislatures are more accountable to the public. He argues that a Supreme Court decision elevates the issue to one that is on the national agenda – for both federal and provincial issues that are being considered for the notwithstanding clause.[198] He makes the further point that the waiting period caused by rendering a Supreme Court decision will reduce the use of the notwithstanding clause and by extension make it seem more exceptional to the public – prompting a greater response.[199]

Peter Russell of the University of Toronto expressed similar concerns over the notwithstanding clause and its current shortcomings regarding low public involvement. First, Russell is a strong supporter of the continued existence of the notwithstanding clause on both substantive and procedural grounds. On substantive grounds, he argues that no judge is infallible, nor is there any right that is absolute and thus, there needs to be a process that facilitates discussing (with the possibility of rejecting) judgements by the courts.[200] He believes that the notwithstanding clause creates such a process. Further, he argues that on a procedural level, the notwithstanding clause facilitates good governance and democracy by encouraging transparency on the part of the government.[201] To ensure that the notwithstanding clause is better able to fulfil its substantive and procedural role in Canadian democracy he argues that it must be reformed, rather than abolished, and suggests two possibilities.[202] First, he puts forward

197 ibid 276.

198 ibid 278.

199 ibid-279.

200 Peter H. Russell, 'Standing Up for Notwithstanding' [1991] 29 Alberta Law Review 293 at 295.

201 ibid 299.

202 ibid 301.

that the precedent set by *Ford v Quebec* (1988), whereby legislatures can invoke blanket applications of the notwithstanding clause on numerous pieces of legislation with one bill, should be prohibited. He argues that the development of such a practice seriously undermines the ability of the notwithstanding clause to create opportunities for responsible and accountable discussions of rights issues if it can be used in such a blanket fashion. Second, he suggests that there should be a requirement that the notwithstanding clause must be invoked twice– once prior to an election and one after an election has occurred. Russel theorises that requiring a second renewal of the notwithstanding clause after an election will ensure broad citizen involvement and meaningful reflection on the use of the notwithstanding period after an 'election cooling off period'.[203]

Former academic and current Canadian member of federal Parliament Scott Reid suggested similar reforms to the notwithstanding clause to infuse further democratic processes within its invocation. In his 1996 essay *Penumbras for the People: Placing Judicial Supremacy Under Popular Control*, Reid theorised requiring referendums for the invocation of the notwithstanding clause to 'democratise' its use – he calls this the 'democratic override'. He acknowledges that currently the notwithstanding clause is facing a crisis of legitimacy whereby the public does not trust the legislature more than the judiciary to be the final decision-maker on rights. Thus, he asserts that to increase the legitimacy of the notwithstanding clause and its use it must be 'invested in an institution other than the legislative arm of the government'. He suggests the legitimacy of the notwithstanding clause be invested in the people through a democratic referendum. He uses the example of the Charlottetown Accord, whereby there was a public referendum on a package of amendments to the Canadian Constitution that was rejected by the Canadian population, thus demonstrating the Canadian public's support for referendums as a legitimate process. He states:

203 ibid 302.

> If Canadians were willing to accept the legitimacy of a popular override on this vast package of constitutional amendments, it is entirely possible that they will feel comfortable using referendum to ratify or veto the *Charter* interpretation by the Supreme Court, which can carry the weight of de facto amendments to the Constitution.[204]

He uses the further example of the Switzerland referendum model, whereby citizens vote on an average of six referendum questions annually, as an example of a well-managed system of direct democracy.[205] He counters the foreseen criticisms that the democratic override would result in tyranny by the majority by arguing that voters tend to take the time to educate themselves when they are in situations voting directly on complex issues.[206] This all leads him to conclude that the shift towards a democratic override could result in a return of legitimacy to the notwithstanding clause that facilitates its further use and better engagement of the public in rights decisions.[207]

The final key scholar I will present who has suggested reforms to the notwithstanding clause is Christopher Manfredi, a professor of political science at McGill University. Manfredi is a long-time critic of judicial review and regards the notwithstanding clause as an important tool to mitigate the power of the judiciary. Manfredi, however, is critical of the clause's current state. In writing about the notwithstanding clause he states that it has 'atrophied through lack of use' and has become 'largely ineffective'.[208] He attributes this atrophy to actions that have occurred largely outside of the realm of the judiciary in the political sphere – particularly with the significant use of the notwithstanding clause by Quebec shortly after the adoption of the *Charter*. He argues that this development of the norm of limited use of the notwithstanding has resulted in the judiciary taking on a broader role in asserting rights through constitutional

204 ibid 204.

205 ibid 205.

206 ibid.

207 ibid 209.

208 Christopher P. Manfredi, *Judicial power and the Charter: Canada and the paradox of liberal constitutionalism* (2nd ed. edn, Oxford University Press 2001) 4.

interpretation.[209] To Manfredi, it is only if the notwithstanding clause is taken seriously and regarded as a legitimate application of legislative power that the structure of liberal democracy will not be undermined in Canada. This is primarily because he characterises the notwithstanding clause as a combination of 'democratic control of judicial review with the enrichment of deliberative democracy'.[210]

Despite this celebration of the notwithstanding clause as a legislative tool, he recognizes that the notwithstanding clause is not without flaws. As a result, he presents a rewriting of section 33 of the *Charter* to enhance its legitimacy and effectiveness within the constitutional order:

> 33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding *a final decision that the legislature or a provision thereof abrogates or unreasonably limits* a provisions included in section 2 or section 7 to 15 of this *Charte*r. *A declaration under this subsection becomes effective upon the agreement of three-fifths of the House of Commons and the Senate or three-fifths if the provincial legislature, as the case may be*.
>
> […]
>
> (3) A declaration made under subsection (1) shall cease to have effect upon *the dissolution of the Parliament or legislature making the declaration* or five years after it comes into force or on such earlier date as may be specified in the declaration.[211]

There are three main characteristics to Manfredi's suggested reforms. First, he proposes a prohibition on the use of the notwithstanding clause pre-emptively. He contends that requiring legislatures to respond to SCC decisions will illustrate that the legislature is overriding the judicial decision rather than substantive rights. Second, he proposes that the notwithstanding clause require more than a simple majority for invocation. It is suggested that the legislature be required to pass the notwithstanding clause with a three-fifths majority – a higher standard than usual for legislatures. Finally, he suggests, similar to what was proposed by Peter Russell,

209 ibid 5.

210 ibid 170.

211 ibid 193.

that the notwithstanding clause require automatic reconsideration after an election. Manfredi concludes that these three reforms could shift the substantive and procedural role of the notwithstanding clause to make it more compatible with Canadian liberal democracy.[212]

Through a review of the literature, it is apparent that there is currently a gap in consideration and discussions of minority rights within the context of the notwithstanding clause. The vast majority of scholars who write on the notwithstanding clause are focused primarily on its role as a solution to the perceived dilemma of judicial supremacy in Canada's constitutional structure. On the one hand, there are international scholars – such as Gardbaum, Dixon and Campbell – who celebrate it as a best practice for other jurisdictions. On the other, there are the primarily Canadian scholars who are more critical of the current structure and practice of the notwithstanding clause. As was summarised earlier, they propose numerous possible reforms that they believe will correct its perceived shortcomings. Their suggested reforms seek to address the crisis of legitimacy by shifting the invoking institution or requiring higher standards for ratification. They argue that these shifts will result in the notwithstanding clause no longer being perceived as the legislature overriding the rights guaranteed within the *Charter*, but rather as the legislature disagreeing with court interpretations of rights issues. As such, they conclude that the adverse effect of increasing the legitimacy of the notwithstanding clause will be its increased invocation.

The argument of this paper is that the scholars who have written about the notwithstanding clause have underestimated the possible impacts of the notwithstanding on the rights of minorities. As a result of the focus on the relationship between the legislature and the judiciary, the notwithstanding clause literature undervalued the unique vulnerability of minorities to the clause, and therefore failed to appreciate the possible harmful impacts on the group. My argument is that the early literature on the notwithstanding clause that advocates for

212 ibid.

further adoption or reforms to the notwithstanding clause undervalues the ways in which the notwithstanding clause has an impact on one of the key normative purposes of the *Charter* – the protection of minority rights. I am arguing that the recent events of 2018, with the actions of both Ford and Legault, reveal this gap in the literature and thus require a deeper investigation. The following section contains my argument which examines the intersection between minority rights and the notwithstanding clause. First, I use doctrinal evidence to demonstrate that the protection of minority rights is a key normative purpose of the *Charter*. Then, I examine the structural protections embedded within the text of the notwithstanding clause that could be argued act as safeguards from invocation of the notwithstanding clause that targets minority groups. Through this analysis, I seek to demonstrate that these embedded structural protections are inadequate and ill-suited for the particular vulnerability of minority groups to the notwithstanding clause.

III. The Unique Vulnerability of Minority Rights to the Notwithstanding Clause

i. Minority Rights Protections as a Foundational Element of the Charter

The creation of protections for minority rights was a central purpose of the drafting of the *Charter* and remains a vital constitutional principle. In drafting the *Charter*, Trudeau Senior sought to create a 'more just society' by developing meaningful mechanisms to protect fundamental rights and freedoms from arbitrary government authority.[213] The centrality of minority rights protections within Canada's new constitution has since been solidified in subsequent *Charter* case law. A key case that crystallized the foundational role of minority rights protections within the *Charter* was *Reference re Secession of Quebec (1998)*.[214] In this case, regarding the legality of a unilateral secession of Quebec from Canada, the SCC outlined four vital unstated principles upon which Canada's constitution is based: (1) federalism, (2)

213 Department of Justice, 'A Canadian Charter of Human Rights' (Ottawa, Roger Duhamel, Queen's Printer, 1968), 9.
214 [1998] 2 S.C.R. 217.

democracy, (3) constitutionalism and the rule of law, and (4) respect for minority rights. These underlying principles were said by the SCC to 'infuse our constitution and breathe life into it'.[215] It was established that these four principles are all equal in value and that no principle can act in isolation from the others.[216]

The *Reference re Secession of Quebec* decision established that Canadian democracy extends beyond majoritarian rule to encapsulate the principles of constitutionalism and the rule of law, as well as respect for minority rights. In this decision, the SCC made this clear by stating: 'it would be a grave mistake to equate legitimacy with the sovereign will or majority rule alone, to the exclusion of other constitutional values'.[217] The court goes on to highlight the fact that respect for and protection of minority rights is in itself a constitutional principle as it seeks to 'maintain and promote [minority group] identities against the assimilative pressures of the majority'.[218] Specifically, the SCC asserted that respect for minority rights is inherently tied to the principles of democracy and constitutionalism because of the vulnerability of the minority to the will of the majority, which may mean that the majority will be 'tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively'.[219] Thus, the principles of constitutionalism, the rule of law, and respect for minority rights were said to be integral to Canadian democratic processes.

Despite this declaration, it should be noted that since the SCC decision in *Reference re Secession of Quebec*, the SCC has been cautious to apply the underlying principles of the Constitution to specific case decisions as sources of primary authority.[220] Rather, they have maintained that these are principles that should inform the court decisions to aid with

215 ibid [50].

216 ibid [49].

217 ibid [67].

218 ibid [74].

219 ibid.

220 Sharpe and Roach (n 61) 25.

constitutional interpretation.[221] Therefore, although the *Reference re Secession of Quebec* provides strong evidence of the centrality of minority rights protections within the *Charter,* my argument will also be supplemented by case law that has emerged in the past thirty-seven years of *Charter* practice.

This protective role of the courts and the *Charter* has been utilized continuously by minority groups who have sought to crystallize their constitutional minority rights from government overreach through the judicial system. The rights guaranteed in the *Charter* have acted as an empowerment tool for minority groups who are demographically disadvantaged at the ballot box and whose rights as a result (among other factors) are often not a priority of those elected. The role of the *Charter* as a safeguard for minority rights has become evident in a series of cases that have emerged since the *Charter's* enactment in 1982. These cases include the establishment of constitutional protections for numerous minority groups who are marginalized based on various identity factors such as religion, language, sexual orientation, and social status.

First, the *Charter* has enabled those who are members of religious and language minority groups to seek constitutional protections from assimilative policies by majoritarian governments. Under the *Charter,* freedom of religion and minority language rights are protected respectively in sections 2(a) and 23 with numerous cases having solidified and expanded these protections. As it relates to religious minorities, in *Syndicat Northcrest v. Amselem (2004),* the SCC asserted that 'respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy'.[222] This built upon the precedent set by hallmark *R v. Big M Drug Mart* case, which specifically protected religious minorities from required universal observance of Christian religious

221 ibid.

222 [2004] 2 SCR 551.

values.[223] In this case, the court held that the *Lord's Day Act* (mandatory Sunday closing law) had an expressly religious purpose – rejecting the government claim that it had a secular purpose.[224] As a result, the court deemed the legislation unconstitutional. Specifically, the SCC maintained that the legislation had a coercive element that enforced universal adherence to Christian beliefs.[225] In striking down the *Lord's Day Act,* the Court entrenched within case law protections for religious minority groups from legislative incursion.[226]

Relevant to the current steps taken by the government of Quebec to curb the wearing of religious symbols in the public service is the 2015 case of *Ishaq v. Canada (Citizenship and Immigration)*.[227] In this case, the applicant Ms. Zunera Ishaq challenged a section of the *Citizenship Act, 1985* that had been recently amended to include the prohibition of the wearing of a veil covering the face during citizenship ceremonies. She argued that the policy infringed on section 2(a) (freedom of religion) of the *Charter* because wearing the niqab is a religious practice in which she sincerely believes, and the anti-niqab policy interferes with that practice in a manner that is more than trivial.[228] She stated that she was willing to unveil herself to a female citizenship officer privately to prove her identity before the ceremony and sign the declaration which acts as proof that they did recite the citizenship oath (required under section 21 of the *Citizenship Regulations*).[229] However, without such accommodations, she stated that the policy 'is a personal attack on me, my identity as a Muslim woman and my religious beliefs'.[230] The government responded to the court challenge by arguing that section 2 (a) of the *Charter* is not violated because the applicant's choice to wear a niqab is 'nothing more than

223 [1985] 1 S.C.R. 295 (*Big M Drug Mart Ltd).*

224 ibid 331.

225 ibid 336-337.

226 ibid 349.

227 *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, 249 A.C.W.S. (3d) 516.

228 ibid [21].

229 ibid [26].

230 ibid [1].

a subjective belief' and this policy is nothing more than a trivial violation (because the oath takes less than a minute to write).[231]

Upon hearing the case, the Federal Court of Canada ruled in favour of Ms. Ishaq and declared the portions of the *Citizenship Act, 1985* that pertained to the wearing of a niqab to have no force or effect. In this case, Justice Boswell came to this determination not by looking at the religious freedom *Charter* right of the application, but rather by examining whether the anti-niqab policy fettered the discretion that citizenship judges have. Ultimately, the Federal Court decided that it was not necessary to weigh in on the possible *Charter* rights violation because the policy was already determined to be having no force or effect. Regardless, this case represents one of the first Canadian instances of Muslim women seeking judicial review from the courts to protect their religious rights. It set a precedent that has since been followed in the case of Quebec's use of the notwithstanding clause in the *Act Respecting the Laicity of the State.* This legislation, which has the seemingly direct intent to target religious minority groups (including Muslim women), has similarly been challenged in the courts by Muslim women. This occurred less than twenty-four hours after the passing of the legislation with three parties – the National Council of Canadian Muslims, the Canadian Civil Liberties Association, and Amrit Kaur, a recent teaching graduate who wears a hijab – filing a joint suit challenging the constitutionality of the notwithstanding clause on numerous constitutional grounds.[232] These two cases represent a growing trend of Muslim women seeking judicial review from the courts to protects their religious minority rights from majoritarian encroachment.

The courts have also played an important role in safeguarding religious minority rights within educational institutions. A key example is the case of *Multani v Commission Scolaire*

231 ibid [34].

232 Giuseppe Valiante, 'Groups launch challenge of Quebec's secularism bill one day after it becomes law' *CTV News* (17 June 2019) <https://www.ctvnews.ca/canada/groups-launch-challenge-of-quebec-s-secularism-bill-one-day-after-it-becomes-law-1.4470058> accessed 20 June 2019.

Marguerite-Bourgeoys (2006) (Multani).[233] In this case, the SCC cemented protections for religious minorities in schools by establishing that the prohibition of a young Sikh boy from bringing in his kirpan (small religious dagger) was unconstitutional per section 2(a) of the *Charter*. The court maintained that compromises could be made to accommodate the young boy and his religious rights – such as the kirpan being carried in a sheath of wood that is wrapped and sewn securely in an envelope held under his clothes.[234] Furthermore, the court also considered the low likelihood of resulting harms by noting that the student in question has never exhibited any violent behaviour and the reality that throughout Canada there has never been a single case of a violent incident relating to the presence of a kirpan.[235] It was thus determined that the plaintiff could wear the kirpan in school if they followed the accommodations parameters set out by the court.[236]

In addition to providing protections for religious minority rights, groups have sought relief from the courts to ensure their minority language rights (section 23 of the *Charter*).[237] One of the landmark cases in this regard is *Arsenault-Cameron v Prince Edward Island* (2000) (*Arsenault-Cameron*).[238] This case was initiated by the parents of francophone children in Summerside, Prince Edward Island after their request to build a French language school was rejected by the provincial Minister of Education.[239] In *Arsenault-Cameron*, the SCC overturned the decision of the Minister of Education after applying a purposive approach to section 23 of the *Charter*. They held that the *Charter* 'mandates that the provincial governments do whatever is practically possible to preserve and promote minority language education'.[240] Per the

233 [2006] 1 S.C.R. 256.

234 ibid [8].

235 ibid [57]-[59]

236 ibid [55].

237 Rand Dyck, *Canadian Politics; Critical Approaches* (3rd edn, Scarborough, Ont, Nelson Thomson Learning, 2000) 442.

238 [2000] 1 S.C.R. 3.

239 ibid [3].

240 ibid [26].

unanimous decision of the SCC, the remedies applied sought to redress historical injustices experienced by the minority language group through acknowledging that a formal equality approach to issues of minority language rights was not appropriate. The court thus applied a substantive equality approach that sought to provide minority language groups with 'equal access to high quality education in [their] own language' in situations 'where numbers warrant'.[241] The court acknowledged that although this must be evaluated on a case by case basis, it must also be evaluated based on the known demand of services, in addition to the number of students who could potentially benefit from the service.[242]

A key precedent set in this case of minority rights in Canada was the acknowledgement by the SCC that section 23 of the *Charter* did not have the purpose of maintaining the status quo as it relates to language rights. Rather, the court was clear in determining that to ensure substantive equality for minority groups, it requires them to be 'treated differently' in some circumstances.[243] The government must take into account their 'particular circumstances and needs in order to provide them with a standard of education equivalent to that of the official language majority'.[244] It was a landmark decision for minority rights as it relates to language, and more broadly in acknowledging the ways in which substantive equality can be manifested to uphold minority rights.

In terms of religious and language minority groups, it is evident that the courts have played an important role in safeguarding their rights. Whether it be an infringement by the government (or state actors) or other educational institutions, the court has maintained that language rights and freedom of religion are constitutive parts of minority rights and tolerance in Canadian society. They have emphasized that to ensure these constitutive pieces are

241 ibid [27].

242 ibid [32].

243 ibid.

244 ibid [31].

respected, both protections from coercive universal policies and differential accommodations to meet the needs of specific groups are required. This premise is illustrated in *Big Drug Mart Ltd* whereby the SCC stated:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct […] The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[245]

Thus, the courts, by way of the *Charter*, have played and will continue to play an important role in protecting minority and religious minority rights from majoritarian overreach. The SCC in *Big Drug Mart Ltd* encapsulated this principle, whereby it stated:

> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority.[246]

Evidently, the *Charter* case law as it relates to minority language and religious rights has developed into a strong avenue for minority groups to seek protections for their rights through section 2 and 23 of the *Charter*.

Claims under section 15 of the *Charter* (the equality clause) have also been an important avenue for the advancement of minority rights protections in Canada. These minority rights advancements through section 15 challenges include those from the lesbian, gay, trans, bisexual, queer, and two-spirit community (LGTBQ2S+). One of the greatest successes that has been achieved in relation to discrimination based on sexual orientation is in the areas of government benefit programs and marriage. The expansion of LGTBQ2S+ rights in Canada is best understood as a piece-meal process that has been achieved through successive litigation brought forward by primarily same-sex couples.

245 *Big M Drug Mart Ltd* (n 223) 336.

246 ibid 337.

One of the first cases brought forward by individuals from the LGTBQ2S+ minority group was *Egan v Canada 1995* (*Egan*).[247] In *Egan*, a same-sex couple who had lived in a committed relationship for over forty-five years were denied the ability to seek spousal allowance under the *Old Age Security Act*. Ultimately, in a split decision, the SCC dismissed the appeal by the plaintiff by ruling that the legislation in question was not discriminatory in nature.[248] However, the majority of the court did recognize that sexual orientation was an analogous ground for discrimination under section 15 of the *Charter*.[249] Thus, the *Egan* case, although it was a loss for the plaintiffs, was a significant gain for LGTBQ2S+ rights that set the stage for future litigation.

Following *Egan*, numerous cases built upon the decision to expand protections for the rights of the LGBTQ2S+ community in Canada. In *Vriend v Alberta 1998 (Vriend)*,[250] the SCC read in sexual orientation as a protected ground from discrimination in the *Alberta Individual Rights Protection Act* (now referred to as the *Alberta Human Rights Act*). The complaint at hand in *Vriend* was an individual who was fired from his full-time permanent position at a college in Alberta solely on the basis of his sexual orientation.[251] In this case, the SCC build upon the decision in *Egan* to determine that the omission of sexual orientation from being a protected ground under the Alberta *Individual Rights Protection Act* was discriminatory under section 15 of the *Charter* and could not be justified under section 1.[252] They came to this decision by determining that, through an under-inclusive scope, the *Individual Rights Protection Act* created a distinction that denies the plaintiff from the 'equal benefit and protection of the law'.[253] The court determined that this was contrary to the values of equality

247 [1995] 2 S.C.R. 513.

248 ibid [27].

249 ibid [13].

250 *Vriend* (n 94).

251 ibid [7].

252 ibid [180].

253 ibid [88].

and minority rights entrenched in the Constitution and thus corrected it through their decision to read in sexual orientation to the *Individual Rights Protection Act.*[254]

In the 1999 case *M v H*, the court effectively reversed the decision from *Egan* by striking down parts of the *Family Law Act.* This was in response to a successful *Charter* claim by a lesbian couple who were initially denied spousal benefits after they separated.[255] In this decision, the court held that the denial of spousal benefits was unconstitutional because it was discriminatory under section 15. The SCC equated this discriminatory legislation to having negative impacts on the claimant's dignity by exacerbating pre-existing disadvantages and vulnerabilities experienced by the minority group of those in same-sex relationships.[256] This decision, by way of acknowledging and validating the legitimacy of same-sex relationships, paved the way for subsequent cases that successfully gained the legalisation of same-sex marriage in Canada.

The decision in *Chamberlain v. Surrey School District No. 36*, 2002, saw sexual orientation rights pitted against religious rights in the context of education materials.[257] In this case, a British Columbia school board rejected a Kindergarten-Grade-One teacher's request to include educational resource materials that included same-sex parented couples in the classroom. This decision resulted in the SCC balancing the religious rights in section 2 and equality rights under section 15 while considering the requirement that the school board 'must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves'.[258] Ultimately, the SCC ruled against the defendants and required the school board to reconsider their decision, while following their requirement to embody the principles of

254 ibid [153].

255 *M. v H.*, [1999] 2 S.C.R. 3 [14].

256 ibid [3].

257 *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86.

258 ibid [25].

tolerance, non-discrimination, and non-sectarianism within the *School Act*.[259] This decision engrained within the Canadian education system the need for respect of those with differing identities – reflecting a further shift in tolerance for minority groups with differing sexual orientations.

The legalisation of same-sex marriage in Canada was achieved through successive and cross-jurisdictional litigation in provinces across the country. By the time the Canadian federal government passed the *Civil Marriage Act* in 2005, courts in seven of Canada's ten provinces and one of Canada's three territories had already legalised same-sex marriage.[260] The case that initiated this cascade of case law for the legalisation of same-sex marriage was *Halpern v Canada* (2003).[261]

In 2003, after being denied the ability to file for civil marriage licenses with the Clerk of the City of Toronto, seven gay and lesbian couples sought legal remedies under section 15 of the *Charter,* challenging the heterosexual definition of marriage.[262] The Ontario Court of Appeal ruled in favour of the applicants and found that the former definition of marriage was discriminatory per section 15 of the *Charter* and could not be justified under section 1.[263] The Court of Appeal in *Halpern* determined that the exclusion of same sex couples from marriage was discriminatory because it denied them the freedom of choosing to marry their partner.[264] A key point acknowledged by the court was that in refusing to institutionalize same-sex marriage, the State was causing social harm – as evidenced by EGALE Canada, who linked the lack of recognition of same-sex couples to youth suicides.[265]

259 ibid [73].

260 'Timeline: Same-sex marriage in Canada' *CBC News* (12 January 2019) < https://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516> accessed 1 June 2019.

261 [2003] 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 (CA).

262 ibid [9].

263 ibid [2].

264 ibid [87].

265 ibid [15].

Although *Halpern* was a provincial case, it pressured the federal government to seriously reconsider the definition of marriage and ask the SCC to rule on the constitutionality of same-sex marriage in Canada. Less than a year later, the federal government submitted a reference question to the SCC asking if a change to the definition of marriage is constitutional. In *Reference Re Same-Sex Marriage*, 2004, the SCC ruled that any change to the definition of marriage was constitutional and could be done while respecting the *Charter*'s section 2 right to freedom of religion.[266]

Less than a year after this decision, the federal government passed the *Civil Marriage Act* – legalizing same sex marriage across Canada. The legalization has since become a marker of Canadian tolerance and respect for minority rights. The LGTBQ2S+ community which has and continues to experience vulnerability and social disadvantage was able to employ the *Charter* to exercise their rights to equality and freedom from discrimination through judicial review. It was through large-scale and cross-jurisdictional strategic litigation that this minority group was able to achieve significant gains for minority rights – ultimately triggering a response from Parliament.

In addition to claims for minority rights under section 2, 23, and 15 of the *Charter*, minority groups have been able to make significant rights gains through section 7 litigation. Section 7 of the *Charter* states: 'everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.[267] Section 7 has been used as an important tool for minority groups to seek rights protection through the *Charter*. By way of section 7, these groups are able to seek protections from majoritarian policies that are actively harmful to them and threaten their right to 'life, liberty and security of the person'.[268]

266 *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 [11].

267 *Charter of Rights and Freedoms* (n 64) s.7.

268 ibid

The SCC and the *Charter* have also played an important role for other minority populations who lack (or lacked) the ability to have their voices heard in federal elections – specifically refugee claimants and those convicted of criminal offences who are incarcerated (herein referred to as prisoners). In *Suresh v Canada* (2002) (*Suresh*), the SCC heard a *Charter* challenge brought forward by a refugee claimant who was in the process of being deported back to Sri Lanka where he faced a significant risk of being tortured upon his return.[269] The Minister of Immigration justified the discretionary executive decision to deport him by citing a confidential memorandum alleging that he was a member of the terrorist organisation the Liberation Tigers of Tamil Eelam.[270] Upon hearing the case, SCC ruled that the government cannot deport refugee claimants to a country where they are at risk of being tortured. The sole exception to this ruling is if the refugee claimants are a serious security risk to Canadians.[271] The SCC ruled that the Minister's discretionary power was subject to the *Charter,* and in this case violated the claimant's section 7 right to life – a violation that could not be justified under section 1.

In this case, the court provided an important shield for refugee claimants from torture by requiring procedural protections for refugees who can establish a *prima facie* case that there may be risk of torture if they are deported. The court held that the claimant in this case had met this burden of proof and thus required the Minister to reconsider the deportation order while respecting procedural fairness procedures. The litigation pursued by the claimant was lifesaving, as he lacked other avenues to encourage the Minister to reconsider their decision to deport him to a country where he faced significant risk of torture. First, as a refugee he was part of a vulnerable minority group that lacked the ability to vote – and thus was not considered an important voting demographic for elected officials. Second, as an individual accused of

269 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 [78].

270 ibid [16].

271 ibid [5].

terrorism by the government less than a year following the terrorist attacks of September 11, 2001, the claimant was at risk of considerable stigma by the Canadian public – making a public plea for support less likely to succeed. It was through the courts, which have the constitutional mandate to provide an impartial interpretation of the *Charter*, that he was able to gain a legal shield that protected him from the arbitrary decisions that placed him at serious risk of torture.

Another minority group that lacked the ability to vote and also faced (and continues to face) considerable stigma is prisoners. The discriminatory voting policy was successfully challenged through two court cases, in 1993 and 2002 respectively, by Richard Sauvé – a former member of the Satan's Choice biker gang who was serving a life sentence for first-degree murder.[272] First, in *Sauvé v Canada, 1993* (referred to as *Sauvé I*), the SCC determined that the denial of the right to vote to those incarcerated in federal and provincial prisons was unconstitutional as it violated section 3 of the *Charter* on democratic rights.[273] In what some scholars would characterize as democratic dialogue, Parliament responded by amending section 51(e) of the *Canada Elections Act* to limit the denial of the right to vote to prisoners who were serving a sentence of two years or more and were incarcerated in federal prisons.[274] This Parliamentary legislative response was successfully challenged once again by Richard Sauvé in *Sauvé v Canada, 2002* (referred to as *Sauvé II*) whereby the SCC determined in a split 5-4 decision that any denial of the right to a certain class of citizens because of their criminal status was a violation of *Charter* rights that could not be justified under section 1. [275]

In this decision, the court recognized that although they should exercise deference as it relates to government social and political policy, when it comes to the limitation of fundamental

272 Kathleen Harris, 'More than 22,000 federal inmates eligible to vote' CBC News (25 August 2015) <https://www.cbc.ca/news/politics/canada-election-2015-prisoners-voting-1.3202010> accessed on June 16 2019.

273 *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 (*Sauvé I*).

274 *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68 [2] (*Sauvé II*).

275 ibid [1].

rights they are obliged to intervene.[276] The majority in *Sauvé II* stated: 'denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*'.[277] In addition to the concerns over the violation of the rights of the minority group of prisoners, the SCC also expressed a need to protect the right to vote of an additional minority group – Indigenous Peoples. In the *Sauvé II* decision, the SCC highlighted the disproportionate representation of Indigenous Peoples in Canadian prisons and the ways in which the denial of the right to vote would further marginalize this vulnerable minority group in Canada.[278] Similar to the claimants in *Suresh,* prisoners were disadvantaged politically and socially from having their interests considered by politicians. Thus, judicial review by way of the *Charter* was a vehicle for them to have their humanity and fundamental democratic rights protected.

In considering the vast array of case law that has crystallized meaningful protections for minority rights, it becomes evident that the *Charter* is an important safeguard for minority groups. Both in the drafting and subsequent interpretation, the *Charter* has acted as an important tool for minority groups to assert their rights and reject discriminatory or harmful policies by majoritarian governments. This has been confirmed consistently by SCC decisions – ruling that federal and provincial governments are required to adhere to minority rights under the *Charter* – barring exceptional circumstances justified under section 1. Thus, minority rights protections are a central and foundational aspect of the *Charter*, which provides rights protections and recourse mechanisms to vulnerable minority groups who are disadvantaged through various factors such as political demographic representation, inability to vote, and social stigma. This has resulted in the overturning of government policies that were not only discriminatory, but that placed the lives of vulnerable minority groups at risk of harm or death.

276 ibid [13].

277 ibid [44].

278 ibid [60].

In essence, rights protections have not only preserved the dignity of minority groups but have also saved lives.

ii. The Unique Vulnerability of Minority Groups to the Notwithstanding Clause

As demonstrated through significant *Charter* case law in the previous section, judicial review has been and continues to be an important site for minority groups to seek protections for their fundamental rights. My argument, influenced by the actions of Ford and Legault, centres around the assertion that minority groups, and by extension their rights, are uniquely vulnerable to the notwithstanding clause. I am seeking to add a unique perspective to the literature on the notwithstanding clause by focusing primarily on the ways it impacts minority rights.

My argument seeks to fill a scholarship gap in the literature on the notwithstanding clause. In an earlier section I sought to demonstrate that the current literature on the notwithstanding clause omits almost any discussion of the ways in which the invocation of the clause could have an impact on the rights of minorities. Instead, I argued that this literature provides a primarily positive outlook on the notwithstanding clause. Those who were more critical of the clause focused largely on ways to reform the clause to increase its invocation, rather than the potential impacts of such an outcome. It seems apparent that, among these scholars, there has been little serious consideration of the ways in which minorities are vulnerable under the notwithstanding clause.

This gap in the literature exists despite the well-established acknowledgment by legal scholars that minority groups face more vulnerability to majority rule in liberal democracies. This acknowledgment includes some of the most prominent critics of judicial review such as Jeremy Waldron, who included a commitment to minority rights as a necessary assumption for his argument against judicial review. In establishing this assumption in his article, The Core of the Case Against Judicial Review, he states:

> Although they believe in majority rule as a rough general principle for politics, they accept that individuals have certain interests and are entitled to certain liberties that

> should not be denied simply because it would be more convenient for most people to deny them. They believe that minorities are entitled to a degree of support, recognition, and insulation that is not necessarily guaranteed by their numbers or by their political weight.[279]

The concerns over the vulnerability of minority rights to majority rule has also been of central importance to the scholars John Hart Ely, Ronald Dworkin, and Bernard H Siegan, whose stances were highlighted in the earlier section on judicial review. It has also been a concern of political leaders. For example, Herbert Marx, the former Liberal Opposition Justice Critic in Quebec, stated that 'the danger of having a "notwithstanding clause" will become evident when we need protection most – we will not have it'.[280] Considering the concerns raised by both judicial review scholars and politicians, it is surprising that there appears to be little discussion of similar concerns by scholars who have written about the notwithstanding clause. This is despite their arguments in favour of the notwithstanding clause seeming most tenuous when it comes to minority rights.

This apparent void in the scholarship is at the core of my argument – that in light of the recent actions by Ford and Legault, scholars must reflect further on the ways in which minority groups are uniquely vulnerable to the notwithstanding clause. To support this argument, I examine and deconstruct the possible safeguards for the rights of minorities structured within the text of the notwithstanding clause. I supplement this breakdown with an analysis as to whether each of these possible safeguards provides sufficient protections for the rights of minority groups. This supports my broader argument that the actions of Ford and Legault precipitate the need for further reflection on the role of the notwithstanding clause and the ways it can undermine minority rights – making these groups particularly vulnerable.

There are five structural elements of the notwithstanding clause that could be argued to act as (mostly indirect) safeguards for minority rights. The five structural safeguards that I will

279 Waldron (n 113) 1403-1404.

280 Library of Parliament (n 27) 11.

examine are: (1) the constitutional division of powers between federal and provincial jurisdictions; (2) the separation of powers and the invocation power being vested in the legislature; (3) the requirement of an explicit invocation of the clause; (4) the limitations on rights that can be subject to the clause, and (5) the five-year sunset clause. In the following section I provide a breakdown of each of the safeguards and why it could be argued that each of them provide structural protections for minority rights. I then critically analyse each claim and make my argument that these perceived safeguards are inadequate as they do not provide meaningful rights protections for minority groups.

The first perceived safeguard within the structure of the notwithstanding clause is the constitutional division of powers. Within the Canadian constitutional system, under the *Constitution Act, 1867,* Canada divided legislative power between the federal and provincial governments. Section 91 of the *Constitution Act, 1867* grants the federal government with the exclusive power to legislate issues within the jurisdictions of national defence, foreign affairs, fisheries, Indigenous issues, and criminal law. Section 92 of the *Constitution Act, 1867* grants the provincial governments with similar exclusive legislative power over the jurisdictions of hospitals, prisons, education, marriage, property and civil rights, and municipal matters.[281] The division of powers is a central aspect of Canada's federalist structure intended to limit the unfettered power of the federal or provincial governments.

As it relates to the notwithstanding clause, it could be argued that the constitutional division of powers acts as a safeguard for minority rights through its limiting of both federal and provincial power. This is because neither the federal nor provincial legislatures can fully remove the rights of their constituents. Rather, the rights that can be limited are divided within different constitutional jurisdictions. For example, despite calls by anti-abortion activists for Ford to use the notwithstanding clause to criminalise abortion by setting aside the SCC decision

281 For an exhaustive list of federal and provincial division of powers please refer to section 91 and 92 of the *Constitution Act 1867*.

in *R v Morgentaler*,[282] he would be unable to do so as it is *ultra vires* the jurisdiction of provincial governments. The criminal law is under the sole jurisdiction of the federal government and thus any attempt to criminalise access to abortion services is only possible through the invocation of the notwithstanding clause in legislation passed by a simple majority in both the House of Commons and the Senate.

Proponents of this argument, that the constitutional division of powers acts as a structural protection within the text of the notwithstanding clause, would point to the example of Alberta's attempted use of the notwithstanding clause in 2000. In this instance, Alberta passed Bill 202 titled *The Marriage Amendment Act* in response to the growing movement towards the legalisation of same-sex marriage. This legislation, introduced via a private members bill, re-asserted the definition of marriage as an exclusively opposite-sex union and invoked the notwithstanding clause to immunize the law from constitutional challenges under section 2 and 7 to 15 of the *Charter*.[283] Despite the concerns raised by the opposition members, *The Marriage Amendment Act, 2000* was ultimately passed through a majority vote of 32-15.

In this instance, the division of powers acted as a protection for minority rights because section 91 of the *Constitution Act, 1867* rendered the Alberta legislation as having no force or effect. This was confirmed in the subsequent 2004 decision *Reference re Same-Sex Marriage.*[284] In this decision, the SCC unanimously held that any legislation that 'pertains to the legal capacity for civil marriage' is exclusively *intra vires* the jurisdiction of the federal Parliament under section 91(26) of the *Constitution Act, 1867*.[285] The SCC held that it is within the power of the federal Parliament to redefine the legal definition of marriage and that any impact on the provincial constitutional power over the 'solemnization of marriage' [section

282 *R. v Morgentaler*, [1993] 3 S.C.R. 463.

283 *An Act Respecting the Laicity of the State* (n 17).

284 *Reference Re Same-Sex Marriage* (n. 266).

285 ibid [19].

92(12)] and 'property and civil rights' were solely incidental and could be justified.[286] Thus, as a result of this decision, when Parliament legalised same-sex marriage through the passing of the *Civil Marriage Act, 2005,*[287] the Albertan *Marriage Amendment Act, 2000* was overridden and same-sex couples could get married in all provinces and territories.

On its face, it may seem that this example represents the ways in which the division of powers can provide protections for minority rights. As a result of section 91 of the *Constitution Act, 1867,* the Alberta government was unable to lawfully invoke the notwithstanding clause to limit the rights of the LGTBQ2S+ community in the realm of marriage. In the alternative, if the federal Parliament were ever to use the notwithstanding clause on an issue that fell within the exclusive constitutional control of the provinces, they would be similarly limited. Thus, the division of powers limits the ability of both federal and provincial legislatures to impose rights limitations on minority groups.

However, through further analysis, it is apparent that the division of powers is a weak protection for minority rights at best. It acts as an inadequate protection for the rights of minorities that requires them to rely on technical jurisdictional concerns rather than encouraging respect and consideration of their fundamental rights. Although through the constitutional division of powers the federal and provincial governments are limited in their ability to fully restrict the rights of minorities in all jurisdictions, it does not have any impact on rights limitations of minority groups within the respective federal and provincial jurisdictions. If, for example, the federal government decides to invoke the notwithstanding clause to once again to end the legal recognition of same-sex marriage, the division of powers provides no protections to the LGBTQ2S+ community from this constitutionally permitted discrimination. Further, despite the limited jurisdiction that results from the division of powers,

286 ibid [31].

287 *Civil Marriage Act*, S.C. 2005 (Canada).

the provinces continue to have broad jurisdiction over numerous portfolios that greatly impact the lives of minority groups. This includes the exclusive jurisdictional control over education, healthcare, municipalities, and property and civil rights. Thus, although they lack the constitutional authority to invoke the notwithstanding clause to discriminate against members of the LGTBQ2S+ community in the realm of marriage, they are not limited in the previously mentioned fields, such as property and civil rights. If they were to use the notwithstanding clause to justify the exclusion of sexual orientation of the *Alberta Human Rights Act*, they could temporarily set aside the decision in *Vriend*. This would enable Albertans to discriminate against the LGTBQ2S+ community in the areas of housing and education free of complaints under the *Alberta Human Rights Act* and the *Charter*.

This point is further evidenced by the recent attempted invocation of the notwithstanding clause by the Ford government in the fall of 2018. In an effort to block Ford's threatened use of the notwithstanding clause, local constituents and Toronto city councillors reached out to Prime Minister Justin Trudeau to request intervention by the federal government into the dispute and proposed use of this constitutional tool. These pleas for intervention were quickly rejected by the Prime Minister, who, although he expressed disappointment in the decision to invoke the notwithstanding clause, clearly stated that his government would not be 'weighing in' on the dispute.[288] The federal government's refusal to intervene in the case of Ontario and the ways in which Alberta could subvert LGTBQ2S+ rights through their human rights code are demonstrative of the minimal applicability of this structural protection for minority rights. The division of powers leaves minority groups vulnerable to the extensive rights limitations by federal and provincial governments – so long as they are within the proper jurisdiction.

288 Amanda Connolly, 'Trudeau "won't be weighing in" on Doug Ford's vow to slash Toronto city council by overriding Charter' Global News (11 September 2018) <https://globalnews.ca/news/4441133/justin-trudeau-doug-ford-notwithstanding-clause/> accessed on June 18 2019.

A second structural component of the notwithstanding clause that could be seen as providing minority rights protections is the separation of powers and the invocation power being vested in the legislature. As stated earlier, to be invoked, the notwithstanding clause requires legislation to be passed in the appropriate legislature. When it comes to the notwithstanding clause, the *Charter* explicitly prohibits the executive from invoking the notwithstanding clause without its inclusion in a bill that is passed through the legislative process. These processes would include extensive consideration and debate throughout the legislative process of three reading stages and a committee stage study of the legislation. In the case of legislation that includes the notwithstanding clause at the federal level, the bill would have to be passed by a simple majority in both the House of Commons and the Senate.

It could be argued that the notwithstanding clause's requirement of legislative invocation creates a meaningful structure of transparency that results in democratic debate on the possible invocation of the notwithstanding clause. In the event of a decision by the government or a private member of the legislature to propose the invocation of the notwithstanding clause, they would be required to justify and debate its inclusion throughout the lengthy legislative process. This constitutionally structured requirement ensures that the other elected representatives are notified of the proposed use of the notwithstanding clause and are able to participate in the decision-making process of whether to implement it. As an extension, the requirement of the legislative process can also result in a heightened awareness of the proposed use of the notwithstanding clause among the public – who can engage with the proposed legislation in various forms such as contacting their local representative or participating in political demonstrations. This effect was demonstrated in both Ontario and Quebec following the respective 2018 attempted and successful uses of the notwithstanding clause whereby members of the public participated in massive demonstrations against its invocation.

This democratic requirement is a key focus of many of the scholars who write about the notwithstanding clause. This is primarily because they regard the notwithstanding clause as a democratic tool providing the people, via the legislature, with the final say over *Charter* rights. In many instances, scholars who were supportive of the notwithstanding clause sought to increase its democratic component. For example, both Peter Russell[289] and Christopher Manfredi[290] proposed that the notwithstanding clause be reformed to require renewal of the clause after every election regardless of the five-year sunset clause. To them, the legislative requirement of the notwithstanding clause is crucial to ensuring proper consideration of the impacts (including those on minority rights) of the notwithstanding clause and should be required beyond the five-year sunset clause.

By extension, it could be argued that this legislative democratic requirement provides protections for minority rights. Specifically, by requiring the notwithstanding clause to be passed via legislation, it encourages what legal scholar Tsvi Kahana refers to as visibility and transparency.[291] Prior to its invocation, the legislative requirement notifies the other legislators and the public of the intended invocation of the notwithstanding clause and enables them to respond in various ways – both within and outside of the legislative process. As it relates to legislators, they have numerous democratic mechanisms to oppose the use of the notwithstanding clause, such as expressing their opposition through speeches and votes. The protection of minority rights in Canadian democratic institutions is particularly relevant when it comes to the role of the Canadian Senate at the federal level – an institution that was created initially to ensure that regional minorities were represented. The SCC has noted that the Senate of Canada, also known as the chamber of 'sober second thought',[292] has since evolved to

289 Russell (n 200).

290 Manfredi (n 208).

291 Kahana (n 194).

292 *Reference re Senate Reform*, [2014] SCC 32 [15].

represent 'groups that were under-represented in the House of Commons'.[293] The SCC even went so far to say that the Senate has 'served as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process'.[294]

Thus, to many, the extensive legislative process at both the provincial and federal levels, with the added protections of the Canadian Senate's role, points to the democratic invocation process providing substantial protections for minorities. It could be argued that the democratic requirement would enhance the visibility and transparency of the invocation of the notwithstanding clause. As a result, members of these democratic institutions, working independently or in conjunction with the public, are able to bring attention to and either support or oppose its invocation.

However, the assumption that the legislative invocation requirement will result in members of democratic institutions playing a protective role for the rights of minority groups has already been previously discussed by scholars – such as John Hart Ely. In his scholarship, Ely has sought to demonstrate the flaws that exist in the assumption that democratic processes can adequately protect the rights of minorities. Often, this is due to the unpopularity of the issues relevant to minority rights and the utilitarian interests of democratic representatives. For example, Ely is highly critical of those who view democratic institutions as providing sufficient protections for minority groups because he argues that the view fails to account for the ways in which the majority will continuously ignore the needs and rights of minorities who lack political representation.[295] He supplemented this argument by citing examples of discrimination against vulnerable minority groups to argue that 'no matter how open the

293 ibid [16].

294 ibid.

295 Ely (n 149) 135.

process, those with the most votes are in a position to vote themselves advantages at the expense of others, or otherwise refuse to take their interests into account'.[296]

Ely's argument can also be applied to the notwithstanding clause. The Canadian democratic systems are not a sufficient protection for the rights of minorities as they are influenced by similar structural flaws highlighted by these judicial review scholars. As highlighted by Ely, many issues for minority groups are not those that are the concern of the majority and in many cases are in fact unpopular among the majority of voters. The previously highlighted Canadian case law brought forward by refugees accused of being part of terrorist organisations and religious minorities are perfect examples of minority rights issues that come into conflict with the interests of the majority. To elected representatives, who are statistically not from specific minority groups, it is understandable that there could be little concern for the needs or rights of people that fall into such minority groups. In other situations, it could be that the elected representatives who either represent a minority group or are interested in the issues relevant to a minority group are often not in the majority or a member of the executive and thus have little influence over the decision of the government.

This is particularly relevant in the case of the notwithstanding clause, as it is primarily a tool used by the majority government to subvert rights under the *Charter*. The protections offered by the invocation requirement are weak when one considers that the notwithstanding clause is primarily invoked by governments who hold a majority in the legislature. Thus, whether or not the notwithstanding clause goes through the legislature or the executive there are few structural protections available to minorities. Out of the twenty past actual and attempted invocations of the notwithstanding clause, all but one was proposed by government legislation.[297] In this sole instance, the use of the notwithstanding clause to prohibit same-sex

296 ibid.

297 Refer to Appendix A for a breakdown of the past and current invocations of the notwithstanding clause.

marriage in Alberta was proposed via a private member's bill, but had the support of the majority government and was ultimately passed.[298] In the case of Ontario and Quebec in 2018, both governments held strong majorities and thus were mostly unaffected by this legislative requirement beyond having to formally go through the legislative process. For example, in Quebec, despite substantial opposition by both members of the opposition and the public through demonstrations, the *Act Respecting the Laicity of the State* was passed 73-35.[299] This example supports the argument that although the legislative invocation requirement is important for democratic ideals – it ultimately provides little protection for minorities who are already experiencing discrimination or harm by the majority government that is evidenced by its very proposed invocation of the clause in the first place. As seen by the example of Quebec's most recent invocation, the legislative invocation requirement may promote more visibility and transparency, but when the government proposing the use of the notwithstanding clause has a majority, this safeguard is seemingly reduced to an empty symbol of structural protection for minority groups.

This argument similarly applies to the third structural protection of the notwithstanding clause, the requirement of a clear articulation of its application. This requires that for the invocation of the notwithstanding clause to be considered valid, the proposed legislation must clearly state in which context and to what rights within the *Charter* it applies to. For example, when Premier Legault of Quebec invoked the notwithstanding clause through *An Act Respecting the Laicity of the State,* they ensured that the legislation clearly stated that it applied to section 2 and 7 to 15 of the Charter.[300] They also included clear definitions of what a religious symbol is and to what sectors of the public service the prohibition would apply to.[301] Similar

298 Refer to Appendix A for a breakdown of the past and current invocations of the notwithstanding clause.

299 National Assembly of Quebec, 'Project de loi n 21' (16 June 2019) <http://m.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-21-42-1.html> accessed on 18 June 2019.

300 *An Act Respecting the Laicity of the State* (n 17).

301 ibid.

to the legislative requirement, by requiring a clear articulation of the rights that will be overridden through the notwithstanding clause, it also ensures visibility and transparency. As argued by Campbell, this requirement fosters dialogue by not only requiring the government to publicly state its intent to override the rights of its constituents, but indirectly requires them to provide justification for their decision.[302] Campbell argues that this requirement fosters a culture of transparency, accountability, and good administration.[303]

The clear articulation requirement is viewed as a structural protection because it adds an element of political cost to the use of the notwithstanding clause. By requiring primarily majoritarian governments to announce their decision to breach a section (or several sections) of the *Charter,* they are then placed in a potentially vulnerable position due to the popularity of the *Charter* and the widespread support for rights protections in Canada. To mitigate the possible political costs of unpopularity and risks to their re-election, governments will seek to justify the use of the clause to the public. Campbell presents the example of the 2015 Saskatchewan invocation of the clause in response to the *Good Spirit* case as an example of this. In this instance, the Saskatchewan government actively sought to justify its decision to invoke the notwithstanding by engaging in rights interpretation and presenting a competing understanding of *Charter* rights.[304] Rather than having the invocation of the notwithstanding clause framed as the Saskatchewan government overriding specific *Charter* rights, they sought to characterise its use as a difference in interpretation of the rights that were considered in the court decision. In doing so, they aspired to mitigate the political costs of the notwithstanding clause.[305]

302 Campbell (n 184) 2.

303 ibid.

304 ibid 8.

305 ibid.

The analysis as it relates to this safeguard is whether the political costs of a clear articulation of rights provides an adequate safeguard for minority groups. Initially, through the examination of past attempted invocations of the clause, it may appear to be an effective protection for minority groups—the best example being the attempted use of the clause by the Alberta government with *Bill 26: Institutional Confinement and Sexual Sterilization Act.* In 1996, Leilani Muir successfully sued the Albertan government for almost one million dollars to compensate for her forced sterilization while institutionalized as a child. Predicting class-action lawsuits that would cost the province upwards of $760 million dollars, Alberta Premier Ralph Klein sought to mitigate the financial loss to the province through legislation.[306] In 1988, his government introduced *Bill 26: Institutional Confinement and Sexual Sterilization Act*, which included the notwithstanding clause to limit compensation to sterilisation victims to $150,000.[307] It was only as a result of extensive public criticism, including the mobilisation of individual pressure on elected representatives, that the government decided to not pass the legislation, and subsequently enter negotiations with the 700 other victims.[308] In this example, the political costs of the invocation of the notwithstanding clause to limit the amount of compensation provided to victims of sterilisation was determined to be too high for the provincial government. Thus, these political costs, brought on by the requirement of a clear articulation of the rights limitations, resulted in the successful protection of the rights of those who experienced sterilisation by the government, primarily Albertans living with disabilities.

However, it is important to recognize that this safeguard is not absolute, and in many instances fails minority groups. Where the structural protection of political costs fails is when the rights protections of minorities are being subverted and the general public is either apathetic

306 'Alberta backs down on sterilization compensation' CBC News (14 November 1998) <https://www.cbc.ca/news/canada/alberta-backs-down-on-sterilization-compensation-1.158995> accessed on 18 June 2019.

307 ibid.

308 ibid.

or actively supportive of the rights limitation. These instances create situations whereby governments are able to invoke the notwithstanding clause to subvert minority rights with little fear of political consequences or electoral repercussions. Unfortunately, as highlighted in judicial review scholarship and *Charter* case law, minority groups are particularly vulnerable – making this structural protection of political costs significantly weaker.

Canadian *Charter* case law demonstrates that the rights of minorities are often related to issues that can be controversial and steeped in stigma. This can result in the general public being outwardly supportive of the limitation of minority rights through government policies or the invocation of the notwithstanding clause. An example of this can be seen the *Suresh* case, that considered the rights of a suspected terrorist a year following the September 11, 2001 terrorist attacks.[309] In this instance, the plaintiff faced considerable stigma by both the government and Canadian public due to his perceived identity as a terrorist in the wake of the terrorist attacks. It was only through extensive litigation, rather than political or public support, that he was able to secure rights protections and protections from deportation to torture.

In terms of other examples of popular support for discriminatory policies, one does not have to look too far back into Canadian history to find examples of public support for minority rights limitations, such as the previously mentioned Japanese internment camps and the creation of residential schools for Indigenous children. In the latter example, through what has now been labelled a 'cultural genocide',[310] the Canadian government systematically removed Indigenous children from their families and forcibly placed them in Christian residential schools.[311] For almost one hundred years, thousands of Indigenous children experienced physical, sexual, and psychological abuse at the hands of church officials within these

309 *Suresh* (n 269).

310 Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015)
<http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> accessed 18 June 2019.

311 ibid.

institutions that were sanctioned and coordinated by the government, causing intergenerational trauma that continues to this day. Similar to the example of Japanese internment camps, residential schools were a popular government policy that targeted minorities and was supported across party lines and by the Canadian public. It would be flawed to assume that the courts would have served as a bulwark against this discriminatory policy, but they could have at least provided alternative avenues of recourse for these minority groups. Further, in the case of recourse for the harms of residential schools experienced by Indigenous children, the courts eventually served as an important site for justice. In this instance, it was ultimately through class action lawsuits and the subsequent Indian Residential School Settlement Agreement that survivors of residential schools were able to receive an apology, compensation, and the development of a truth and reconciliation commission. Thus, in the case of residential schools, the courts provided an avenue of recourse that enabled survivors to pursue a remedy for the harms they experienced.

Through further examination of the most recent invocation of the notwithstanding clause by Quebec, it is apparent that this is a policy that is actively supported by the constituency. Unlike the situation in Ontario where the Ford government did not inform the public during the provincial election campaign that they were planning to interfere in the Toronto city election, the Quebec government made the limitation of minority religious rights a central part of their election campaign. It became a key election issue, with all parties running in the election presenting stances on the issue of whether religious symbols should be banned in public service. In spite of, or perhaps as a result of Legault's party stance committing to the religious symbols policy, they won the election in a landslide.[312] Further polling conducted in March 2019 confirmed the popularity of the policy in Quebec with seventy-four percent of

312 élections Québec, 'October 1, 2018, Provincial General Election Official Results' <https://www.electionsquebec.qc.ca/provinciales/en/results_2018.php> accessed on 18 June 2019.

those polled saying that they supported the ban being applied to judges, prosecutors, police, and prison guards, and sixty-nine percent saying they supported the ban being applied to teachers.[313] This demonstrates the shortcomings of the safeguard of the legislative invocation requirement and political consequences when it comes to minority rights, because there are not often any consequences for the limitation of their rights. Thus, these minority groups remain significantly vulnerable to the notwithstanding clause, in spite of this perceived safeguard.

The fourth and fifth structural protections are interrelated – they both rely on democratic elections to act as a protective shield for minority rights. The fourth structural protection is the limitation on the rights to which the notwithstanding clause can be applied. As previously mentioned, the notwithstanding clause solely applies to section 2 and 7 to 15 of the *Charter*. These rights include the freedom of expression, peaceful assembly, and association (section 2); the right to life, liberty and security of a person (section 7); protections from unreasonable search and seizure (section 8); protections from arbitrary detention or imprisonment (section 9); the right to information, to counsel, and to *habeas corpus* upon detention (section 10); criminal proceeding rights such a trial within a reasonable period of time and the presumption of innocence (section 11); protections from cruel and unusual punishment (section 12); right to not self-incriminate (section 13), and the right to an interpreter for language or disability accommodations (section 14).[314] Section 15 is the equality clause and encapsulates the right to freedom from discrimination based on enumerated and analogous grounds.[315]

An important aspect of this limitation within the text of the notwithstanding clause is that it cannot be applied to the democratic rights enumerated in section 3, 4, and 5 of the *Charter*. These sections guarantee the right of every Canadian citizen to vote in elections they

313 'Religious symbols: Quebecers back ban and notwithstanding clause, poll says' *Montreal Gazette* (29 March 2019) <https://montrealgazette.com/news/local-news/religious-symbols-quebecers-back-ban-and-notwithstanding-clause-poll-says> accessed 18 June 2019.

314 *Charter of Rights and Freedoms* (n 64) s. 7-14.

315 ibid s. 15.

are eligible for, and require that both federal and provincial legislative bodies must hold elections every five years. As a result, legislatures are not permitted to employ the notwithstanding clause to limit constituents' access to elections or to delay the elections beyond their five-year terms. This exclusion of democratic rights from falling under the applicability of the notwithstanding clause by the framers of the Constitution was purposeful. In doing so, they sought to make free and fair elections a key protection for constituents from the notwithstanding clause. Through elections, citizens have the ability to hold their governments accountable for their use of the notwithstanding clause and either affirm or reject its use through the ballot box. Ultimately, it seeks to give the final say on the notwithstanding clause to the people, in a more direct manner than through elected representatives.

The fifth interrelated structural protection included within the text of the notwithstanding clause is that of the five-year sunset clause. In section 33(3), the notwithstanding clause includes a temporal restriction whereby the notwithstanding clause will automatically expire within five years of coming into force.[316] The intended purpose of this five-year expiry was to limit the unchecked powers of the legislature to override constitutionally entrenched rights. By requiring review and renewal on five-year intervals, section 33 ensures that the notwithstanding clause is reviewed every election cycle, thus making it subject to removal or expiration through the election of different political leaders. However, it should be noted that declarations are perpetually renewable,[317] with many invocations of the notwithstanding clause by Quebec in the 1980's continuing to be renewed by successive governments to this day.[318]

The five-year sunset clause could be considered a structural protection for minority rights because it cyclically increases the visibility of the invocation of the notwithstanding

316 ibid s.33 (3).

317 Hogg (n 12) 881.

318 Refer to Appendix A for a breakdown of the past and current invocations of the notwithstanding clause.

clause. In theory, although not always in practice, the constitutionally required renewal of the notwithstanding clause would result in a resurrection and reconsideration of its necessity. In many instances, governments have decided to allow the notwithstanding clause to expire – ultimately avoiding the renewal of the debate over the merits of its invocation.[319] The inclusion of a five-year expiration period intrinsically ties the use of the notwithstanding clause to elections – whereby it must be considered by each successive government during their mandate. This can have the indirect result of increasing the visibility of the notwithstanding clause during elections – making it a key issue to be considered by voters.

Although these two elements of the notwithstanding clause could be considered a structural protection for the public to hold governments accountable for their invocation of the notwithstanding clause, these democratic protections provide few protections for minority groups. Due to numerous factors that contribute to the vulnerability of minority groups, these two democratic elements of the notwithstanding clause are particularly ineffective. First, it is of no surprise that minority groups, by definition, lack meaningful representation in the legislature and have minimal impact through the ballot box. In some instances, this could be attributed to lower numbers of members of the particular minority groups. In addition to the lack of demographic representation, many minority groups face numerous barriers in accessing the ability to vote – particularly those who experience higher rates of trauma, poverty, and homelessness. This could be due to numerous factors such as lack of identification (often due to inability to pay fees or due to a lack of stable housing for a permanent address), election dates on religious holidays, or inability to physically access voting stations. Therefore, these minority groups who face significant barriers and stigma have little ability to impact the elections, understandably making their needs of little interest to elected representatives campaigning for votes. It has indeed been as a result of lack of representation by and interest

319 Refer to Appendix A for a breakdown of the past and current invocations of the notwithstanding clause.

from policy makers that has resulted in many of these groups engaging in strategic litigation to have their rights recognised through judicial review.

Finally, there are minority groups that have no ability to access the ballot box due to their status as non-citizens. These are primarily refugees, permanent residents, and other non-citizens (such as international citizens who have been detained). It would have also formerly included prisoners incarcerated in federal prisons prior to 2002. These minority groups have no ability to directly influence the election, and due to their often precarious status could be unable to indirectly influence the election through other means, such as demonstrations or campaigns. Thus, due to issues of demographics or access, minorities are often unable to meaningfully influence elections.

Recognizing the demographic and systemic barriers faced by minority groups, they are thus forced to rely on the general public to take an interest in their rights and vote based on the actual or threatened use of the notwithstanding clause against one (or several) minority group(s). This would then place the minority groups in the same dilemma that was discussed in regard to the third structural protection – that the political costs of the notwithstanding clause fail when the general public is either apathetic or actively supportive of the curtailment of their rights. The example of Quebec's most recent invocation of the clause targeting religious minority groups with broad support across the province demonstrates the vulnerability of minority groups to rely on the majority to protect their interests.

On a more fundamental level, the creation of a mechanism whereby elected legislators and then the general public are able to vote on the limitation on the rights of minorities seems antithetical to the purpose of constitutional rights entrenchment. This is a key point made by JH Ely, who has argued that minority groups require more than access to political processes to have their rights respected. He uses the examples of discrimination enacted by the majority against 'aliens', the 'poor', and 'homosexuals' as demonstrative of the vulnerability of minority

groups to the majority who continuously out vote these groups to maintain legislative control and enact policies that either ignore their interests or are directly harmful to them.[320] In the Canadian context, through the creation of the *Charter*, the political leaders at the time were acknowledging that there are fundamental rights that require protections from federal and provincial legislatures. There was a conscious decision to place these rights within an entrenched Constitution and provide courts with the mechanism of judicial review to ensure that they were respected by the government and their representatives. In the years since the entrenchment of minority rights, minority groups have time and time again had to turn to the courts seeking protections for their fundamental *Charter* rights that have been infringed upon by the government. The process of judicial review has been central to the maintenance of continued respect for the rights of minorities.

The paradox of the notwithstanding clause is that when minority groups are most in need of the protections of judicial review from government rights infringements, it can be invoked to completely circumvent this process. The government's ability to immunize themselves from the *Charter* or subsequent *Charter* judicial review through the notwithstanding clause reduces the constitutionally entrenched rights protections to those of a symbolic nature that, similar to the previous issues under the *Canadian Bill of Rights*, are ultimately unenforceable. The creation of structural protections, particularly those of democratic elections as accountability mechanisms, although well-intentioned, seem ill-suited for minority groups who face numerous demographic and access issues in elections. This, in turn, results in a situation whereby minority groups are vulnerable to the wills and interests of the majority, who may be apathetic to their situation or actively supportive of the limitation of their rights. Thus, it seems that although the creators of the *Charter* did seek to create protection mechanisms to add a level of accountability to the invocation of the notwithstanding clause,

320 Ely (n 149) 161-162.

these protections, particularly those relying on democratic elections, were not written with consideration of the specific vulnerability of minority groups.

In sum, initially it may seem as though the drafters of the *Charter* included numerous structural protections as safeguards within the notwithstanding clause. These structural protections are: (1) the constitutional division of powers, (2) the invocation power being vested in the legislature, (3) the requirement of an explicit invocation of the clause, (4) the limitations on rights that can be subject to the clause, and (5) the five-year sunset clause. However, through a careful analysis of these structural protections I have sought to demonstrate their shortcomings in relation to the protection of minority rights. Due to various demographic and social factors, minority groups are particularly vulnerable in situations where the notwithstanding clause could be or has been invoked. Specifically, the notwithstanding clause structural protections of democratic elections are often inadequate and inaccessible for minority groups who are then vulnerable to the wills of the general public. These shortcomings were best demonstrated with the most recent invocation of the notwithstanding clause in Quebec targeting religious minorities – a policy that was and continues to be supported by the majority of Quebec constituents. Through this analysis, I sought to demonstrate that there needs to be further consideration and reflection on the ways in which minority groups are vulnerable to the attempted or actual invocation of the notwithstanding clause. The structural protections included within the clause to add accountability processes surrounding its use seem to be ill-suited for the particular vulnerability of minority groups and should be explored further. This is a current gap in the literature on the notwithstanding clause, which primarily focuses on ways to reform the clause to encourage further use among Canadian governments – omitting the possible impacts increased use may have on minority groups.

iii. Conclusion

In 2018, the almost dormant notwithstanding clause became a significant topic of discussion among Canadians. This was a result of the decision by Ford in Ontario and Legault in Quebec to announce their decision to invoke the clause to supersede *Charter* rights. Although the clause was ultimately not used in Ontario, these two announcements effectively opened Pandora's box – reigniting the debate on the notwithstanding clause. In light of the actions taken by Ford and Legault, I have sought to provide a fresh perspective by focusing on those likely to be most impacted by the existence and use of the notwithstanding clause – individuals and communities from minority groups. Within the current scholarship on the notwithstanding clause, there has been a focus on either celebrating or criticizing the clause and its impact on the relationship between the courts and legislatures in a constitutional democracy. However, I argued that the current literature on the notwithstanding clause has failed to fully appreciate the possible disastrous impacts of the notwithstanding clause on minority groups.

Through a combination of a doctrinal and normative analysis of minority rights and the notwithstanding clause I have sought to demonstrate the ways in which minority groups are particularly vulnerable to the notwithstanding clause. First, I utilized the *Charter* case law to illustrate the centrality of litigation to the development and protection of minority rights in Canada. This set the foundation for my following argument to critically examine ways in which minority populations and their rights are uniquely vulnerable to the notwithstanding clause. To make this point, I examined the structural protections embedded within the text of the notwithstanding clause that could be argued to act as safeguards from inappropriate invocation of section 33. Through this analysis I sought to demonstrate that these embedded structural protections are inadequate and ill-suited for the particular vulnerability of minority groups to the notwithstanding clause.

Through this dissertation I have sought to provide a different analysis on the notwithstanding clause that has not previously been extensively investigated by legal scholars. My primary goal has been to demonstrate the shortcomings of the notwithstanding clause as it relates to minority rights to encourage further reflection within the legal community. The 2018 actions of Ford and Legault represent a possible shift towards more frequent use of the notwithstanding clause. I argued that this shift towards increased use of the notwithstanding clause poses the risk of increased harmful impacts on minority groups. This argument should be explored further, as the current literature on the notwithstanding clause is lacking an examination of the notwithstanding clause from this perspective. This could include a further exploration as to whether there are other tools for counter-majoritarianism that do not put the fundamental rights of minority groups at risk. Another area of research that could be explored is the relationship between section 1 of the *Charter* and the notwithstanding clause. Specifically, there could be an examination of whether the use of the notwithstanding clause must comply with section 1 of the *Charter* by being a reasonable limit that is 'demonstrably justified in a free and democratic society'.[321]

In essence, my argument seeks to encourage the beginning of further discussion and analysis of the notwithstanding clause as it relates to the rights of minorities. Specifically, I sought to demonstrate that the current structural protections within the notwithstanding clause are inadequate and ill-suited for the rights of minorities. This is an analysis that seems to be lacking among the current notwithstanding clause literature – despite it seeming as though the arguments in support of the notwithstanding clause are most tenuous when one examines its impacts on minority rights. In light of the actions of Ford and Legault, this analysis is timely and may be necessary. If these actions represent a shift towards more frequent use of the notwithstanding clause, I have sought to demonstrate that minority groups are at particular risk.

321 *Charter of Rights and Freedoms* (n 64) s. 1.

They are thus in a position whereby when they are most in need of rights protections through the *Charter* and subsequently judicial review, they could be rendered powerless by the notwithstanding clause and unable to utilize the structural protections embedded within it. As Premiers such as Ford are stating that they 'won't be shy' to use the notwithstanding clause in the future, this analysis on the ways such actions would impact minority groups should be further explored within the legal community.

iv. Appendix A: Uses and Attempted Uses of the Notwithstanding Clause

	Year	Legislature	Act Title	Enacted?	Details
1.	Enacted: 1982 Expired: 1987	Quebec	*An Act Respecting the Constitution Act, 1982*[322]	Yes	This was a pre-emptive and blanket use of the notwithstanding clause on s.2 and s.7-15 of the *Charter* by Quebec. It applied to all statutes that we passed from 1982-1987 to include the notwithstanding clause pre-emptively. It also amended all past Quebec statutes to include the notwithstanding clause. The blanket application was largely symbolic and was largely unnecessary. In *Ford v Quebec, 1988* the SCC held that this blanket application of the notwithstanding clause was constitutional as of May 1, 2019.[323]
2.	Enacted: 1986 Renewed: 1991, 1996, 2001, 2004, 2009, 2014 (Still in force)	Quebec	*An Act Respecting the Pension Plan of Teachers (s.62)*[324]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims under s. 15 equality rights. The purpose of the use of the notwithstanding clause is to ensure the rights of teachers who were part of religious schools and did not have access to pensions during their career. Furthermore, it included discriminatory clauses to favour women and allow them faster access to their pension benefits. This legislation has been continuously enacted and is still in force.
3.	Enacted: 1986 Renewed: 1991, 1996, 2001, 2004, 2009, 2014 (Still in force)	Quebec	*An Act Respecting the Government and Public Employees Retirement Plan (s.223.1)*[325]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims under s. 15 equality rights as of May 1, 2019. This legislation has been continuously enacted and is still in force.

4.	Enacted: 1986 Renewed: 1991, 1996, 2001, 2004, 2009, 2014 (Still in force)	Quebec	*An Act Respecting the Civil Service Superannuation Plan (s.114.1)*[326]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims under s. 15 equality rights. This legislation has been continuously enacted and is still in force as of May 1, 2019.
5.	Enacted: 1986 Renewed: 1991, 1996, 1999 Repealed: 2001	Quebec	*An Act Respecting the Conseil supérieur de l'Éducation (s.31-32)*[327]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights. This legislation was repealed in 2001.
6.	Enacted: 1986	Quebec	*An Act Respecting the Ministère de l'Éducation (s.17-18)*[328]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights.

322 *An Act Respecting the Constitution Act*, RSQ 1982 (Quebec).

323 *Ford v Quebec (A.G.)*, [1988] 2 S.C.R. 71.

324 *An Act Respecting the Pension Plan of Teachers*, RSQ 1986 (Quebec).

325 *An Act Respecting the Government and Public Employees Retirement Plan*, RSQ 1986 (Quebec).

326 *An Act Respecting the Civil Service Superannuation Plan*, RSQ 1986 (Quebec).

327 *An Act Respecting the Conseil supérieur de l'Éducation*, RSQ 1986 (Quebec).

328 *An Act Respecting the Ministère de l'Éducation*, RSQ 1986 (Quebec).

	Renewed: 1991, 1996, 1999 Repealed: 2001				This legislation was repealed in 2001.
7.	Enacted: 1986 Renewed: 1991, 1996, 1999 Repealed: 2001	Quebec	*The Education Act for Cree, Inuit and Naskapi Native Persons (s.720-721)*[329]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights. This legislation was repealed in 2001.
8.	Enacted: 1986 Repealed: 1987	Quebec	*An Act to Amend the Act to Promote the Development of Agriculture Operations (s.16)*[330]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights. This legislation was repealed in 1987.
9.	Enacted: 1988 Repealed: 1993	Quebec	*An Act Amend the Charter of the French Language (s. 10)*[331]	Yes	This act was passed in response to the *Ford v Quebec* SCC decision regarding languages on commercial signs. The Quebec government passed this act with the notwithstanding clause to override to override the SCC decision and uphold French as the only language on outdoor commercial signs in shopping centres and the public transit system. It applied to s. 2(b) of the *Charter*.

329 *The Education Act for Cree, Inuit and Naskapi Native Persons*, RSQ 1986 (Quebec).

330 *An Act to Amend the Act to Promote the Development of Agriculture Operations*, RSQ 1986 (Quebec).

331 *An Act Amend the Charter of the French Language*, RSQ 1988 (Quebec).

10.	Enacted: 1988 Renewed: 1994, 1999 Expired: 2004	Quebec	*Education Act (s.726-727)*[332]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights. This legislation expired in 2004.
11.	Enacted: 1989 Renewed: 1994 Expired: 1999	Quebec	*An Act Respecting School Elections (s.283-284)*[333]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights. This legislation expired in 1999.
12.	Enacted: 1992 Expired: 1997	Quebec	*An Act Respecting Private Education (175-176)*[334]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims s.2(a) under s. 15 equality rights. This legislation expired in 1997.
13.	2001, 2004, 2009, 2014	Quebec	*An Act Respecting the Pension Plan of Management Personnel (s.240)*[335]	Yes	The government of Quebec invoked the notwithstanding clause to immunize the legislation from *Charter* claims under s. 15 equality rights.

332 *Education Act*, RSQ 1988 (Quebec).

333 *An Act Respecting School Elections*, RSQ 1989 (Quebec).

334 *An Act Respecting Private Education*, RSQ 1992 (Quebec).

335 *An Act Respecting the Pension Plan of Management Personnel*, RSQ 2001 (Quebec).

	(Still in force)				This legislation has been continuously enacted and is still in force as of May 1, 2019.
14.	Passed: 2019	Quebec	*An Act respecting the laicity of the State (s.30)*[336]	Yes	This legislation was passed by the Quebec government and pre-emptively applies to s.2 and 7-15 of the *Charter*. It prohibits the wearing of visible religious symbols for those working in public service.
15.	Enacted: 1986 Expired: 1991	Saskatchewan	*SGEU Dispute Settlement Act*[337]	Yes	This act was passed with the notwithstanding clause to protect back to work legislation. This legislation was brought into force in response to a declaration of unconstitutionality by the Saskatchewan Court of Appeal and applied to s. 2(d) of the *Charter*. It was ultimately deemed unnecessary by the SCC which held that the original legislation was constitutional.
16.	Tabled: 2018	Saskatchewan	*School Choice Protection Act*[338]	No	This legislation was passed in response to the Saskatchewan Queen's Bench Court *Good Spirit School Division No. 204 v Christ The Teacher Roman Catholic Separate School Division No. 212* case. They invoked the notwithstanding clause to apply to s. 2 and 15 of the *Charter*. The legislation seeks to override *Charter* rights to continue funding Catholic schools in province (an act deemed unconstitutional by the Saskatchewan courts). As of 1 May 2019 the legislation has not yet been proclaimed into force.
17.	Tabled: 1988	Alberta	*Institutional Confinement and Sexual Sterilization Act*[339]	No	This legislation was tabled to limit the compensation available to those in Alberta who experienced forced sterilization. It was intended to apply to s.15 of the *Charter*. It was ultimately never passed due to the extensive public outcry.

336 *An Act Respecting the Laicity of the State* (n 17).

337 *SGEU Dispute Settlement Act*, SS 1986 (Saskatchewan).

338 Bill 89, *School Choice Protection Act*, 2nd Sess, 28th Leg, Saskatchewan, 2015.

339 Bill 26, *Institutional Confinement and Sexual Sterilization Act, 2nd Sess, 24th Leg, Alberta, 1998.*

18.	Declared: 2000	Alberta	*Marriage Amendment Act*[340]	Yes	This legislation was passed in an attempt to amend the provincial Marriage Act to include a definition of marriage that is opposite-sex only. It was done to pre-empt any federal legislation that would legalise same-sex marriage nation-wide. They invoked the notwithstanding clause to apply to s.15 of the *Charter*. Despite the use of the notwithstanding clause, the legislation was deemed ultra vires the jurisdiction of the province and was thus moot.
19.	Declared: 2018	Ontario	*Efficient Local Government Act*[341]	No	This legislation was tabled to alter the number of wards in the Toronto city election in 2018. It was intended apply to s.2 of the *Charter*. Although the legislation was passed it did not include the notwithstanding clause because it was deemed unnecessary by the Ontario Court of Appeal.
20.	Tabled: 1982	Yukon	*Land Planning Act*[342]	No	This was legislation passed the government of Yukon to apply to the selection of members for the Land Planning Board. It received royal assent but was ultimately not brought into force.

340 *Marriage Amendment Act*, RSA 2000 (Alberta).

341 *A Better Local Government Act (n 4)*.

342 Bill 16, *The Land Planning Act*, 2nd Sess, 42nd Leg, Yukon, 1982.

v. Bibliography

—— ‘Alberta Backs Down on Sterilization Compensation’ *CBC News* (3 November 1998) <https://www.cbc.ca/news/canada/alberta-backs-down-on-sterilization-compensation-1.158995> accessed 2 January 2019

—— ‘Canada's notwithstanding clause — what's that again?’ *CBC News*, (10 September 2018) <https://www.cbc.ca/news/canada/canada-constitution-notwithstanding-factsheet-ford-1.4817751> accessed 21 December 2018

—— Ford Government Reducing Toronto City Council to 25 Members’ *iheart radio NewsTalk 1010* (Toronto, 27 July 2018) < http://www.iheartradio.ca/newstalk-1010/news/watch-listen-ford-government-reducing-toronto-city-council-to-25-members-1.4270300> accessed 21 December 2018

—— ‘Important Dates for the 2018 General Election’ (*Elections Ontario*, 2018) <https://www.elections.on.ca/en/political-entities-in-ontario/by-election-important-dates1.html> accessed 21 December 2018

—— ‘Religious symbols: Quebecers back ban and notwithstanding clause, poll says’ *Montreal Gazette* (29 March 2019) <https://montrealgazette.com/news/local-news/religious-symbols-quebecers-back-ban-and-notwithstanding-clause-poll-says> accessed 18 June 2019

—— ‘The Night of Long Knives: Political Intrigue Highlights Canada’s Struggle to Bring Home its Constitution’ *CBC* <https://www.cbc.ca/history/EPISCONTENTSE1EP17CH1PA3LE.html> accessed 2 January 2018.

—— ‘Timeline: Same-sex marriage in Canada’ *CBC News* (12 January 2019) < https://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516> accessed 1 June 2019.

—— ‘Toronto Council Votes to Challenge Doug Ford’s Council-Slashing Bill in Court’ *CBC News Toronto* (Toronto, August 20, 2018) <https://www.cbc.ca/news/canada/toronto/toronto-city-hall-debates-launching-legal-challenge-of-ford-s-council-cuts-1.4791033> accessed on December 21, 2018

Alberta, Legislative Assembly, *Hansard*, 24th Leg, 4th Sess, 8 March 2000, 3:30.

Cameron J, ‘The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?’ Supreme Court Law Review 23 (2004)

Castel JG, ‘The Canadian Charter of Rights and Freedoms’ [1983] 61 Canadian Bar Review 1

Crawley M, ‘Doug Ford ‘won’t be shy’ to use the notwithstanding clause again, and he’s getting support for that’ *CBC News Toronto* (September 12, 2018)

<https://www.cbc.ca/news/canada/toronto/doug-ford-notwithstanding-charter-1.4818730 > accessed on December 21, 2018

Connolly A, 'Trudeau "won't be weighing in" on Doug Ford's vow to slash Toronto city council by overriding Charter' Global News (11 September 2018) <https://globalnews.ca/news/4441133/justin-trudeau-doug-ford-notwithstanding-clause/> accessed on June 18 2019

Department of Justice, 'A Canadian Charter of Human Rights′ (Ottawa, Roger Duhamel, Queen's Printer, 1968)

Department of Justice, 'Technical Paper: Bill C-36 Protection of Communities and Exploited Persons Act', (Ottawa, 1 December 2014)

Department of Justice Canada, 'Government of Canada announces judicial appointments in the province of Ontario' (May 19, 2017) < https://www.canada.ca/en/department-justice/news/2017/05/government_of_canadaannouncesjudicialappointmentsintheprovinceof2.html> accessed on February 13, 2019

Dixon R, 'Weak-Form Judicial Review and American Exceptionalism' 32 Oxford Journal of Legal Studies 487

Draaisma M, 'Activists collect signatures on large copy of Charter at Queen's Park protest picnic' *CBC News* (2018-09-15) <https://www.cbc.ca/news/canada/toronto/council-of-canadians-charter-ontario-government-1.4825407> accessed on December 21, 2018

Dubinski K, 'Lawyers argue Canada's prostitution laws violate sex workers' charter rights' *CBC News* (23 April 2019) <https://www.cbc.ca/news/canada/london/london-ontario-charter-challenge-prostitution-laws-c-36-1.5103551> accessed 10 June 2019.

Dworkin R, *Taking Rights Seriously* (Bloomsbury Academics 2013)

Elections Canada, 'The Voter Information Campaign' (Elections Canada, 28 June 2019) <https://www.elections.ca/content.aspx?section=ele&dir=erp&document=index&lang=e> accessed on 30 June 2019.

élections Québec, 'October 1, 2018, Provincial General Election Official Results' <https://www.electionsquebec.qc.ca/provinciales/en/results_2018.php> accessed on 18 June 2019.

Ely JH, *Democracy and Distrust : A Theory of Judicial Review* (Harvard University Press 1980) 135

English J, *Just Watch Me: The Life of Pierre Elliot Trudeau:1968-2000* (Alfred A. Knopf 2009)

Gardbaum S, 'The New Commonwealth Model of Constitutionalism' 49 The American Journal of Comparative Law 707

— — ‘Reassessing the new Commonwealth model of constitutionalism’ 8 International Journal of Constitutional Law 167

Kathleen Harris, ‘More than 22,000 federal inmates eligible to vote’ CBC News (25 August 2015) <https://www.cbc.ca/news/politics/canada-election-2015-prisoners-voting-1.3202010> accessed on June 16 2019.

Hogg P, *Constitutional Law of Canada* (5th ed. supplemented edn, Carswell 2007) 881

Hogg P and Bushell A, ‘The Charter Dialogue Between Courts and Legislatures:(Or Perhaps The Charter Of Rights Isn’t Such A Bad Thing After All)’ in *Bills of Rights* (Routledge 2017)

Kahana T, ‘The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practices of Section 33 of the Charter’ [2001] 44 Canadian Public Administration 255.

Leblanc D, ‘Quebec to Invoke Notwithstanding Clause to Prevent Charter Challenges of Religious-symbols Ban’ *The Globe and Mail* (Toronto, 27 March 2019) <https://www.theglobeandmail.com/canada/article-quebec-to-invoke-notwithstanding-clause-to-prevent-charter-challenges/> accessed 28 March 2019.

Le Blanc S, ‘U of T law professor pens open letter against Ford’s threat to use the notwithstanding clause’ *The Varsity* (September 24, 2018) <https://thevarsity.ca/2018/09/24/u-of-t-law-professor-pens-open-letter-against-fords-threat-to-use-notwithstanding-clause/> accessed on December 21, 2018

Library of Parliament, *The Notwithstanding Clause of the Charter Background Paper* by Marc-André Roy and Laurence Brosseau, Publication No. 2018-17-E (Ottawa: Library of Parliament, May 7, 2018)

Lilley B, ‘Ford Makes Right Call to Trigger the Notwithstanding Clause’ *Toronto Sun* (September 11,2018) <https://torontosun.com/opinion/columnists/lilley-ford-makes-right-call-to-trigger-notwithstanding-clause > accessed on December 21, 2018

Lougheed P, ‘Charting the Future: Canada's New Constitution.’ *CBC Archives*, <http://archives.cbc.ca/politics/constitution/topics/1092/> accessed on January 2, 2018

McDonald D, *Legal Rights in the Canadian Charter of Rights and Freedoms* (2nd edn, Carswell 1989)

Mandel M, *The Charter of Rights & the Legalization of Politics in Canada* (Rev. edn, Thompson Educational Pub 1994)

Manfredi C and Kelly J, *Contested Constitutionalism : Reflections on the Canadian Charter of Rights and Freedoms* (University of British Colombia Press 2009)

Manfredi C, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed. edn, Oxford University Press 2001)

Monahan P, *Constitutional Law* (Irwin Law 1997)

— — *Constitutional Law* (3rd edn, Irwin Law 2006)

— — 'Judicial review and democracy: a theory of judicial review' [University of British Columbia Law Review Society (Canada)] 21 University of British Columbia Law Review 87

— — A Critics Guide to the Charte*r'* in Christopher P. Manfredi and James B. Kelly (eds), *Contested constitutionalism : reflections on the Canadian Charter of Rights and Freedoms* (University of British Colombia Press 2009)

Morton F and Knopff R, The Charter revolution and the Court Party (Broadview Press 2000)

National Assembly of Quebec, 'Project de loi n 21' (16 June 2019) <http://m.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-21-42-1.html> accessed on 18 June 2019

Patriquin M, 'Quebec's religious symbol ban targets minorities in the name of secularism' *The Guardian* (31 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/31/quebec-religious-symbol-ban-caq> accessed on 18 June 2019

Dyck R, *Canadian Politics; Critical Approaches* (3rd edn, Scarborough, Ont, Nelson Thomson Learning, 2000).

Reid S, 'Penumbras for the People: Placing Judicial Supremacy under Popular Control' in A Peacock, ed, *Rethinking the Constitution: Perspectives in Canadian Constitutional Reform* (Toronto: Oxford University Press, 1996)

Rieti J, 'Premier Doug Ford to use Notwithstanding Clause to Cut Size of Toronto City Council' *CBC News Toronto* (Toronto, September 9, 2018) < https://www.cbc.ca/news/canada/toronto/judge-ruling-city-council-bill-election-1.4816664> accessed on December 21, 2018

Russell P, 'Political Purposes of the Canadian Charter of Rights and Freedoms', (Toronto) 61 Canadian Bar Review 30

— — The Charter and Canadian Democracy' in Christopher P. Manfredi and James B. Kelly (eds), *Contested constitutionalism : reflections on the Canadian Charter of Rights and Freedoms* (University of British Colombia Press 2009)

— — 'Standing Up for Notwithstanding' 29 Alberta Law Review 293

Sando T, *Wild Daisies in the Sand*, (Anonymous Translator, Edmonton, NeWest Press, 2002)

Standing Senate Committee on Legal and Constitutional Affairs, *Transcript (Evidence) of Proceedings*, Issue 15 (September 9 2014)

Shingler B, 'Quebec Government's Proposed Secularism Law Would Ban Public Workers from Wearing Religious Symbols' *CBC Montreal* (Montreal, March 28, 2019)

<https://www.cbc.ca/news/canada/montreal/quebec-notwithstanding-religious-symbols-1.5073945> accessed on March 29, 2019.

Siegan BH, 'Commentary on Monahan Paper', *University of British Columbia Law Review*, vol. 21/no. 1, (1987)

Sharpe RJ and Roach K, *The Charter of Rights and Freedoms* (Irwin Law 2013)

Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015) <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> accessed 18 June 2019

Valiante G, 'Groups launch challenge of Quebec's secularism bill one day after it becomes law' *CTV News* (17 June 2019) <https://www.ctvnews.ca/canada/groups-launch-challenge-of-quebec-s-secularism-bill-one-day-after-it-becomes-law-1.4470058> accessed 20 June 2019

Waldron J, 'The Core of the Case against Judicial Review' 115 The Yale Law Journal 1346

Weiler P, 'Rights and judges in a democracy : a new Canadian version' [1983] 18 Journal of Law Reform 51

Weinrib L, 'Learning to Live With The Override' (Montreal) 35 Mcgill Law Journal 541