THE NOTWITHSTANDING CLAUSE IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A NEW INTERPRETIVE APPROACH



Caitlin Salvino
Student Number: 1220950
University College

Supervised by
Professor Kate O'Regan
July 2, 2022

Word Count: 98073

Submitted to the Examination Schools, University of Oxford in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Law

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Caitlin Salvino
1220950

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Abstract

The notwithstanding clause is a constitutional tool that can be invoked by federal, provincial, and territorial legislatures. It provides these legislatures with the ability to pass legislation that either pre-empts or overrides judicial review that concern certain *Charter* rights. Any notwithstanding clause legislation must contain a renewable five-year sunset clause. The notwithstanding clause has been tabled in legislation twenty-five times. Between 2018 and 2022, there were seven notwithstanding clause bills tabled in four provincial legislatures. These post-2018 notwithstanding clause invocations raise important questions about the role of the judiciary in substantively evaluating section 33.

Currently, the only authoritative case law on the notwithstanding clause is *Ford v Quebec*. In *Ford*, the Supreme Court of Canada determined that the notwithstanding clause should be evaluated in 'form-only', without substantive review of its use. Through my thesis, I seek to critically engage with *Ford* and ask, 'can substantive limits be placed on the notwithstanding clause through judicial review?'. After identifying shortcomings within theoretical approaches to the notwithstanding clause and critiquing *Ford*, I will present my own theory on the need to revisit the judiciary's approach to interpreting the notwithstanding clause. Through the application of ordinary approaches to Canadian constitutional interpretation, I argue there are at least four limits on notwithstanding clause application: (1) section 33 cannot be invoked in an omnibus manner; (2) the the unwritten constitutional principle of democracy limits its application to political expression; (3) customary international law *jus cogens* norms limits its application to torture; and (4) section 28 of the *Charter* safeguards gender equality from its scope. My four proposed limits on the notwithstanding clause do not represent an exhaustive approach on limits to section 33. Instead, I argue that there are judicial review limits on section 33 that can be derived through constitutional interpretation and non-exhaustively explore four.

300/300 words

Candidate Name: Caitlin Salvino
Candidate Student Number: 1220950
College: University College
Academic Supervisor: Professor Kate O'Regan
Degree for which the thesis is submitted: DPhil in Law
Word Count: 93661
Date of Submission: July 2, 2022

Acknowledgements

I would like to thank my supervisor Professor Kate O'Regan for her guidance and support throughout this process. Professor O'Regan has greatly enriched my academic and professional experiences during my time at Oxford. I have felt both challenged and supported academically in writing this thesis, which has enabled me to produce a contribution to the literature that I am proud of. I am grateful to Professor O'Regan for the central role she has played in this achievement.

I am also incredibly grateful to my parents Connie and Ralph and my brother Ryan, as well as my partner Matthew, and my dear friends who provided me with continuing support as I wrote this thesis. Undoubtedly, they all now know more about the notwithstanding clause and Canada's Constitution than they had ever envisioned. I appreciate nonetheless them allowing me to share this part of my life with them and being supported throughout my time in Oxford.

Finally, I am continuously grateful to those on the Ontario Rhodes Scholarship Committee, the Canadian Rhodes Scholarship Foundation, and the Rhodes Trust for providing me with this incredible opportunity to study and live in Oxford. Without the Rhodes Scholarship this experience would not have been possible.

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Table of Abbreviations:

AB	Alberta
BC	British Columbia
CAQ	Coalition Avenir Québec
CBC	Canadian Broadcasting Corporation
CCF	Co-operative Commonwealth Federation
CCLA	Canadian Civil Liberties Association
CEGEP	Collège d'enseignement général et professionnel
CND	Canadian Currency
CUPE	Canadian Union of Public Employees
EMSB	English Montreal School Board
FAE	Fédération Autonome de l'Enseignement
ICCPR	*International Covenant on Civil and Political Rights*
LGTBQ2S	Lesbian, Gay, Transgender, Bisexual, Queer and Two-Spirited
MLA	Member of Legislative Assembly
MP	Member of Parliament
NAC	National Action Committee on the Status of Women
NB	New Brunswick
NCCM	National Council for Canadian Muslims
NDP	New Democratic Party
ONSC	Ontario Superior Court
ONCA	Ontario Court of Appeal
OQLF	Office québécoise de la langue française
Trudeau Senior	Prime Minister Pierre Elliott Trudeau
QC	Quebec

QCCA	Quebec Court of Appeal
QCSC	Quebec Superior Court
RCMP	Royal Canadian Mounted Police
SCC	Supreme Court of Canada
SK	Saskatchewan
SKCA	Saskatchewan Court of Appeal
SKQB	Saskatchewan Queen's Court Bench
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States
WHO	World Health Organisation

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THE NOTWITHSTANDING CLAUSE IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A NEW INTERPRETIVE APPROACH

SECTION ONE: 'A 'UNIQUELY CANADIAN INVENTION': INTRODUCING AND CONTEXTUALIZING THE NOTWITHSTANDING CLAUSE

CHAPTER ONE

1. A 'Uniquely Canadian Invention'[1] Introducing and Contextualizing the Notwithstanding Clause

The notwithstanding clause[2] is often described as a uniquely Canadian invention.[3] Entrenched under section 33 of the *Canadian Charter of Rights and Freedoms* (*Charter*)[4], the notwithstanding clause is a constitutional tool that can be invoked by federal, provincial, and territorial legislatures.[5] The text of section 33 states:

> 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.
>
> (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).

1 Marc-André Roy and Laurence Brosseau, 'The Notwithstanding Clause of the Charter Background Paper' (Library of Parliament 2018) 2018-17-E https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf.

2 There are many terms that have been used to refer to section 33 of the *Charter*. These include the notwithstanding declaration, the notwithstanding act (to refer to legislation that invokes section 33 of the *Charter*), the notwithstanding mechanism, the override clause and the legislative override. For the purposes of this piece I will be using the term "the notwithstanding clause" to refer to section 33 of the *Charter*. In this respect, it is important to distinguish the notwithstanding clause from the reasonable limitations' clause, which refers to section 1 of the *Charter*.

3 Roy and Brosseau (n 1).

4 *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11 (*Canadian Charter of Rights and Freedoms*).

5 There is general consensus that the territories have the authority to invoke the notwithstanding clause. Although, section 33 only explicitly refers to 'Parliament or the legislature of a province', section 30 of the *Charter* extends the constitutional document to the territories. The text of section 30 states 'A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be'. In 1982 the Yukon passed legislation that invoked the notwithstanding clause. Although this legislation never came into force, this was not due to a perception that Yukon did not have the authority to invoke the notwithstanding clause. For further information on the attempted invocation of the notwithstanding clause by the Yukon, refer to chapter 3.

Section 33 provides federal, provincial, and territorial legislatures with the ability to pass legislation that either pre-empts judicial review or overrides judicial decisions that concern certain[6] *Charter* rights. Any legislation that invokes the notwithstanding clause must contain a five-year sunset clause. At the end of the five-year period, the legislation expires, and the government of the day must re-invoke the notwithstanding clause if it seeks to extend the life of the legislative provisions inconsistent with the *Charter*.[7]

The inclusion of the notwithstanding clause in the *Charter* resulted from political compromise between the federal and provincial governments to ensure the requisite broad consensus to patriate the *Constitution Act, 1982*. At the time of its passing, it was the first legislative override clause in an entrenched constitution among common-law States.[8] There was no equivalent in international human right documents.[9]

In 1981, when the notwithstanding clause was introduced in the House of Commons, Minister of Justice Jean Chrétien, alongside other *Charter* drafters, sought to establish a practice of notwithstanding clause rare use. In describing the notwithstanding clause, Chrétien argued that it would be a measure of last resort, rarely used by the legislatures except to correct absurd situations.[10] This political practice of rare use, combined with the textual components of section 33, has been largely effective, with sixteen promulgated and effective invocations[11] of the notwithstanding clause since 1982.[12] Beginning in 2018, after an eighteen-year

6 The notwithstanding clause can only be applied to section 2 and 7 to 15 of the *Charter*.

7 Peter Hogg, *Constitutional Law of Canada* (Student ed, Carswell 2006) 881.

8 Roy and Brosseau (n 1) 1–2.

9 ibid 2.

10 House of Commons, *Debates*, 20 November 1981, 13042–13043.

11 In total there are 24 bills tabled in the legislature that included the notwithstanding clause. Of this total, 16 were successfully passed and implemented. See chapter 3 for further analysis on the political uses of the notwithstanding clause. Also see Caitlin Salvino, 'A Tool of Last Resort: A Comprehensive Account of the Notwithstanding Clause Political Uses 1982-2021' (2022) 16 JPPL.

12 This total is developed from the catalogue of notwithstanding clause uses I have developed. For other sources on notwithstanding clause uses, see Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter' (2001) 44 Can Pub Admin 255; Guillaume Rousseau and François Côté, 'A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights' (2017) 47 RGD 343. Also see chapter 3 for further analysis on the political uses of the notwithstanding clause.

hibernation period, Saskatchewan[13], Ontario[14], Quebec[15], and New Brunswick[16] tabled legislation invoking the notwithstanding clause in novel ways. These invocations included using the notwithstanding clause to target religious minorities and democratic institutions. These four post-2018 notwithstanding clause invocations have raised questions about the role of the judiciary in substantively evaluating the use of section 33.

Through my thesis, I critically analyse if substantive limits can be placed on the notwithstanding clause through judicial review. After identifying shortcomings within the current theoretical approaches[17] to the notwithstanding clause and critically analysing the existing Supreme Court of Canada (SCC) case law, I present my own theory on the need to revisit the judiciary's approach to interpreting the notwithstanding clause. I argue that four limits can be placed on the application of the notwithstanding clause through judicial review. First, the notwithstanding clause cannot be applied in an omnibus fashion. Second, the unwritten constitutional principle of democracy limits the notwithstanding clause's application to political expression. Third, the customary international law jus cogens norm against torture bars the application of the notwithstanding clause to permit cruel and unusual punishment. Fourth, section 28 of the *Charter* encapsulates protections for gender equality that cannot be undermined by notwithstanding clause use.

I develop these four proposed limitations on the notwithstanding clause through the application of ordinary principles of Canadian constitutional interpretation. I engage with a textual, purposive, progressive, and generous and liberal interpretation of the notwithstanding

13 *The School Choice Protection Act*, RSS 2018, c 39 (Saskachewan).

14 Bill 31, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001, the Municipal Elections Act, 1996 and the Education Act and to revoke two regulations*, 1st sess, 42nd, Ontario, 2018 (referred to as the *Efficient Local Government Act*, 2018); *An Act to Amend the Election Finances Act*, RSO 2021, c 31 (Ontario).

15 *An Act Respecting the Laicity of the State*, CLQR 2019, c 12 (Quebec).; Bill 96, *An Act Respecting French, the Official and Common Language of Québec*, 1st Sess, 42nd Leg, Quebec, 2021.

16 Bill 11, *An Act Respecting Proof of Immunisation*, 3rd Sess, 59th Leg, New Brunswick, 2019.

17 The two theoretical approaches to the notwithstanding clause I will analyse are the dialogue theory and weak-form judicial review.

clause and other provisions of the *Charter*. Through this analysis, I am not proposing a general or exhaustive approach on limits to section 33. There is no overarching principle that underlies each of my four proposed limits on omnibus use, political expression, torture, and gender equality.

Instead, my argument is that there are judicial review limits on section 33 that can be identified through ordinary approaches to Canadian constitutional interpretation. I identify and explore four. The four proposed limits all relate to each other by being drawn from ordinary interpretative approach, but their source varies and they are not united substantively. My exploration of judicial review limits on section 33 is non-exhaustive and seeks to prompt, rather than end, further discussion on the notwithstanding clause's scope.

1.1 A New Approach: Substantive Limits on the Notwithstanding Clause

Since its entrenchment in the *Charter*, the courts have been largely silent on the notwithstanding clause. The only authoritative case law on section 33 is *Ford v Quebec, 1988* (*Ford*).[18] In *Ford*, the SCC held that the courts should adopt a 'form-only' textual interpretive approach to the notwithstanding clause.[19] Through this, the SCC held that the omnibus application of the notwithstanding clause to every past Quebec statute through *An Act Respecting the Constitution Act, 1982* was constitutional.[20] The only intervention the SCC made regarding section 33 was to draw on common law principles to prohibit the retroactive application of the notwithstanding clause.[21] This precedent set by the SCC in *Ford* remains the defining precedent on judicial interpretation of the notwithstanding clause.

I argue that the SCC's 'form-only' approach set by *Ford* is a precedent that should be revisited. My critique of *Ford* is three-fold. First, the reasoning that justified the adoption of

18 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*].

19 ibid [33].

20 See *An Act Respecting the Constitution Act, 1982*, CQLR, c-L-4.2 (Quebec); *Ford* (n 18).

21 *Ford* (n 18) [35]-[36].

the 'form-only' approach to the notwithstanding clause was based on an erroneous textual interpretation of section 33. Second, the SCC failed to apply the established methods of *Charter* interpretation. Third, the outcome of *Ford* may have been influenced by the existing political climate and the decision could have been shaped in response to the threat of Quebec secession.

Following a critique of *Ford*, I propose my own theory of a new interpretative approach to the notwithstanding clause that expands the role of the court beyond the established 'form-only' approach. My theory recognises that the notwithstanding clause plays an important role as a safety valve for the Canadian Constitution that is very difficult to amend.[22] The section 33 safety valve provides a constitutional tool for Canadian institutions to avoid the pressure-cooker-like environments seen in some strong-form judicial review jurisdictions. I argue, however, that particularly in light of the post-2018 invocations of the notwithstanding clause, the 'form-only' approach should be revisited and new interpretative approaches to the notwithstanding clause should be developed.

My interpretive approach to the notwithstanding clause seeks to restrict its use, while still allowing it to be invoked as a safety valve by legislatures. I argue that the notwithstanding clause should be interpreted in a manner that prevents it from being invoked to distort or undermine other provisions of the Constitution that fall outside of sections 2 and 7 to 15 of the *Charter*, as well as the underlying constitutional framework. My proposed non-exhaustive interpretive approach would ensure that the notwithstanding clause could not be employed as

22 Canada's constitutional amendment formula and requirements are in sections 38 to 42 of the *Constitution Act, 1982*. Generally, for any major amendments to the Constitution requires the consent of seven of ten provinces representing over fifty percent of the Canadian Constitution and resolutions from the House of Commons and Senate. The consent of the provinces must be obtained by a resolution supported by the majority of the legislature. Due to these requirements, among others, the Constitution of Canada is considered difficult to amend by constitutional scholars. For further analysis, see Peter H Russell, 'The End of Mega Constitutional Politics in Canada' in Kenneth McRoberts and Patrick J Monahan (eds), *The Charlottetown Accord, the referendum, and the future of Canada* (University of Toronto Press 1993); Patrick J Monahan, 'The Sounds of Silence' in Kenneth McRoberts and Patrick J Monahan (eds), *The Charlottetown Accord, the referendum, and the future of Canada* (University of Toronto Press 1993); Andrew Heard and Tim Swartz, 'The Regional Veto Formula and Its Effects on Canada's Constitutional Amendment Process' (1997) 30 Can J Poli Sci 339; Mary Dawson, 'From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown' (2012) 57 McGill LJ 955.

a trojan horse to threaten the entire constitutional structure and fundamental tenets of democracy.

My proposed interpretive approach presents four additional limitations that narrow the scope of the notwithstanding clause's application. These four proposed limitations are derived through ordinary approaches to constitutional interpretation and are non-exhaustive. The four proposed limits all relate to each other by being drawn from ordinary interpretative approach, but their source varies and they are not united under a substantive principle.

First, I argue that the SCC erred in their interpretation on the omnibus application of the notwithstanding clause. Through a textual and purposive analysis, I propose that the omnibus application of the notwithstanding clause through a single statute be prohibited. If a legislature seeks to apply the notwithstanding clause to multiple statutes — or in the case of Quebec in 1982 to apply it to every provincial statute ever — each application must undergo the democratic legislative processes required by section 33(1).

Second, the application of the notwithstanding clause to freedom of expression should be limited by the unwritten principle of democracy. The Canadian Constitution is a combination of written text and unwritten principles, both of which are enforceable. In 1995, in the reference *Re Secession of Quebec,* the SCC recognised four vital unwritten principles upon which Canada's constitution was founded, one of them being the unwritten principle of democracy.[23] These unwritten principles were said by the SCC to 'infuse our constitution and breathe life into it'.[24] Despite the recognition of unwritten constitutional principles, the SCC has been cautious to apply the unwritten principles as sources of primary authority to overturn legislation.[25] It must be noted, however, that in *Re Secession of Quebec* and subsequent decisions, the SCC has affirmed that in rare circumstances, unwritten principles can not only

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

24 ibid [50].

25 Robert J Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (5th edn, Irwin Law 2013) 25.

be used to fill gaps in the written text of the Constitution, but also overturn statutes contrary with these principles.[26]

I argue that applying the unwritten constitutional principle of democracy to the notwithstanding clause constitutes one of those rare instances. Although per section 33, the notwithstanding clause can temporarily set aside the effects of section 2 of the *Charter*, I argue that this authority should be limited as it relates to freedom of expression and political processes. My argument is presented in three parts. First, the SCC in *Ford* already applied unwritten principles to limit the application of the notwithstanding clause. In this case, the SCC prohibited the retroactive application of the notwithstanding clause.[27] Second, I draw on the Duff Doctrine implied Bill of Rights and more recently affirmed SCC case law, which has recognised an unwritten principle of democracy and freedom of expression that flows from the *Constitution Act 1867*. Finally, I engage with a textual and purposive interpretation of section 33 to demonstrate that the notwithstanding clause was designed to be accountable to democratic elections. This analysis will provide added democratic and interpretive legitimacy to an application of unwritten principles that may be challenged as an overreach of judicial branch.

I argue that section 33 should not be permitted to subvert customary international law *jus cogens* norms, such as torture. Although the text of section 33 is unambiguous as to its application to sections 2 and 7 to 15 of the *Charter*, the text is silent on its relationship with international law. At the international level, Canada has a multitude of human rights obligations that governments have ratified and implemented at the national level.[28] Among these international rights obligations, customary international law refers to norms expected of States

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

27 *Ford* (n 18) [35]–[36].

28 John H Currie, *Public International Law* (Irwin Law 2001) 193–228.

regardless of whether they committed to these human rights obligations through treaties.[29] *Jus cogens* norms are a subset of customary international law.[30] A norm becomes *jus cogens* when there is a development of international practice that reflects a widely accepted status. *Jus cogens* norms apply to all States, regardless of meeting general practice or *opinio juris* requirements. Within the limited category of *jus cogens*, norms are prohibitions against genocide, crimes against humanity, slavery, and cruel, inhumane, and degrading treatment (also referred to as torture).[31]

As a subset of customary international law, *jus cogens* norms are automatically incorporated into Canada's common law through the doctrine of adoption.[32] What distinguishes *jus cogens* from customary international law as it relates to the doctrine of adoption is that it is a 'peremptory norm […] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[33] The SCC reaffirmed that *jus cogens* norms cannot be 'derogated from by any State'.[34] As a result, unlike customary international law, *jus cogens* norms cannot be overridden by conflicting legislation or express overriding legislation.

In my analysis, I critically analyse the intersection of the notwithstanding clause and international *jus cogens* norms, to argue that the notwithstanding clause should be unable to suspend rights that are also *jus cogens* norms. I will make this point by critically examining the peremptory norm of torture.

Section 12 of the *Charter* encapsulates the protections from torture and applies to everyone regardless of citizenship status.[35] Per section 33(1) of the *Charter*, section 12 is also

29 ibid 160–193.

30 ibid.

31 *Nevsun Resources Ltd v Araya,* 2020 SCC 5 [103].

32 ibid [90].

33 *Vienna Convention on the Law of Treaties* (entered into force 27 January 1980) Can TS 1980 No 37, art 53.

34 *Kazemi Estate v Islamic Republic of Iran,* 2014 SCC 62 [183].

35 *Canadian Charter of Rights and Freedoms* s 12.

a right that can be suspended for a renewable period of five years. I argue that although the notwithstanding clause allows legislation to temporarily operate notwithstanding section 12 of the *Charter*, it does not allow legislatures to suspend their non-derogatory international legal obligations. Thus, the parameters of the notwithstanding clause should ensure that Canada respects the peremptory *jus cogens* norms that form a part of Canadian common law.

Finally, I argue that section 28 of the *Charter* immunizes gender equality protections from the notwithstanding clause.[36] Section 28 was only included in the *Charter* after significant activism by women's rights groups.[37] During the closed-door November Accord discussions, the drafters of the final draft of the *Charter* chose to apply the notwithstanding clause to sections 2, 7 to 15, and 28 of the *Charter*.[38] Following outcry by women's rights leaders, the House of Commons voted unanimously to amend the draft to remove the applicability of the notwithstanding clause to section 28 of the *Charter*.[39] The exclusion of gender equality provisions from the applicability of the notwithstanding clause was an intentional and deliberate act of the legislature that should be respected and upheld by the judiciary. I will argue that the history of sections 33 and 28 of the *Charter* are relevant to any constitutional interpretation of the notwithstanding clause. Thus, my proposed interpretative approach bars the notwithstanding clause from being applied to shield gender discrimination from *Charter* scrutiny.

In sum, my proposed interpretive approach seeks to balance the Canadian constitutional structure and provide the federal, provincial, and territorial governments with a *Charter* safety valve. The four proposed limitations on the notwithstanding clause do not encompass an

36 ibid 28.

37 Marilou Mcphedran, 'Creating Trialogue: Women's Constitutional Activism in Canada' (2006) 25 Can Woman Stud 5.

38 Adam M Dodek, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (University of Toronto Press 2018) 77–78.

39 House of Commons, *Debates*, 32nd Parl, 1st Sess, 24 November 1981, 13345.

exhaustive list and do not emanate from an overarching principle. Rather, I seek to prompt further analysis on the role of constitutional interpretation of the notwithstanding clause.

1.2 The Thesis Framework and Chapter Structure

This thesis is divided into four sections and twelve chapters. Section 1, titled 'A "Uniquely Canadian Invention": Introducing and Contextualizing the Notwithstanding Clause', consists of two chapters. In addition to this introductory chapter, chapter 2 summarizes the historical development of the notwithstanding clause. This chapter also includes a breakdown of the components of section 33 and a comparative analysis of other jurisdictions with notwithstanding clause-like provisions.

Section 2, titled 'Political Uses and Judicial Responses to the Notwithstanding Clause' consists of three chapters. These chapters summarize the past invocations of the notwithstanding clause, as well as the legislative and judicial responses. Chapter 3 consolidates and outlines the political uses of the notwithstanding clause from 1982 to 2017. Chapter 4 outlines the political uses of the notwithstanding clause between 2018-2022. In this chapter, I contrast the political uses of the notwithstanding clause in its first thirty-five years of existence against the post-2018 invocations. I argue that although the post-2018 uses do not yet mark a shift away from the rare use political practice for section 33, they do raise important questions about the role of the court in substantively reviewing the use of the notwithstanding clause. Chapter 5 presents and critically analyse the judicial responses to the notwithstanding clause. This chapter begins by summarizing the Canadian approach to judicial interpretation of the Constitution. Following a review of the Canadian approach to constitutional interpretation, I critically analyse the existing jurisprudence on the notwithstanding clause and argue that the notwithstanding clause interpretive precedent should be revisited.

Section 3, titled 'Shortcomings in Current Theoretical Approaches to the Notwithstanding Clause', consists of a single chapter. Chapter 6 focuses on theoretical

approaches to the role of section 33 in the Canadian constitutional framework. I present the approaches of the dialogue theory and weak-form judicial review to section 33. My critique focuses on how these theories are limited tools to redress section 33 uses related to minority rights and democracy.

The fourth section consists of five chapters and is titled 'The Future of the Notwithstanding Clause: Proposing a New Interpretive Approach'. In these chapters I present my proposed interpretive approach to the notwithstanding clause. Through this analysis, I argue that the judiciary should interpret the Constitution to apply additional limitations to the notwithstanding clause. In chapter 7, I apply a textual and purposive analysis, to argue that the omnibus application of the notwithstanding clause to multiple statutes through a single act should be barred. If a legislature seeks to apply the notwithstanding clause to multiple statutes, or in the case of Quebec in 1982, to apply it to every provincial statute ever, each application must undergo the democratic legislative processes required by section 33(1). In chapter 8, I argue that unwritten constitutional principle of democracy limits the application of the notwithstanding clause to freedom of expression within political processes. In chapter 9, I examine the relationship between the notwithstanding clause and international law. Through an examination of the potential application of the notwithstanding clause to section 12 of the *Charter*, I argue that the notwithstanding clause should be unable to suspend rights that are also customary international law *jus cogens* norms. In chapter 10, I argue that section 28 of the *Charter* immunizes gender equality protections from the notwithstanding clause.[40] The exclusion of gender equality provisions from the applicability of the notwithstanding clause was an intentional and deliberate act of the legislature that should be respected and upheld by the judiciary. In chapter 11, I examine the relationship between sections 1 and 33 of the *Charter* to argue that section 1 cannot be applied to limit the scope of section 33. At the same time, I

40 *Canadian Charter of Rights and Freedoms*, s 28.

present that section 1 plays an important role within my analysis on limiting the scope of the notwithstanding clause through judicial interpretation. Even though my proposed interpretive approach seeks to narrow the applicability of the notwithstanding clause, this does not mean that a legislature is barred from passing legislation that infringes on *Charter* rights. Instead, through section 1, the legislature can pass legislation that infringes on freedom of expression in political processes, the prohibition against torture and gender equality rights under section 28, so long as it can be justified in a free and democratic society. Therefore, my proposed interpretive approach to the notwithstanding clause does not argue that some Charter rights cannot be overridden but argues that carte blanche limitations in some areas of rights is not permissible.

In chapter 12, I conclude by summarising the arguments presented in my thesis and my proposed interpretive approach. My non-exhaustive proposed interpretive approach to the notwithstanding clause seeks to encourage the beginning of further discussion and analysis of constitutional interpretation of the notwithstanding clause.

CHAPTER TWO

2. Historical Background and Contextualizing the Notwithstanding Clause

The inclusion of the notwithstanding clause in the *Charter* was the result of political compromise between the federal and provincial governments to ensure the requisite broad consensus to patriate the *Constitution Act, 1982*. To understand the development of this 'uniquely Canadian'[41] legal invention, I will examine the factors that contributed to its inclusion in the 1982 Constitution.

2.1 Pre-*Charter* Developments: Moving Towards a Constitutional Charter of Rights

The passing of the *Charter* was the culmination of several attempts over much of the twentieth century to achieve full legislative sovereignty for Canada.[42] Before the patriation of Canada's Constitution in 1982, the country was under the legislative control of the British Parliament. The foundational *Constitution Act, 1867*[43] did not include an amendment formula and thus, all legislation (constitutional and statutory) required the approval of the United Kingdom (UK) Parliament.[44] This legislative arrangement changed in 1926 with the *Balfour Declaration*,[45] which recognised the independent status of six dominions within the British Empire, including Canada and Newfoundland.[46] The Balfour Declaration was codified in legislation in 1931 with the passing of the *Statute of Westminster* by the UK Parliament.[47] The *Statute of Westminster* delegated statutory authority to the Canadian Parliament and provincial legislatures.[48] Canada, however, did not gain the ability to amend its own Constitution. As a result, a constitutional convention was developed under which the UK Parliament would amend the Canadian

41 Roy and Brosseau (n 1) 2.

42 Patrick Monahan, *Constitutional Law* (Irwin Law 1997) 9.

43 This constitutional document is also referred to as the *British North America Act, 1867*. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 (Canada).

44 Hogg, *Constitutional Law of Canada* (n 7) 64.

45 *Balfour Declaration*, 1916.

46 Newfoundland was an independent British dominion until 1949. In 1949, following a public referendum, they joined Canada as the province of Newfoundland and Labrador. See Dodek (n 38) 17.

47 *Statute of Westminster*, 1931, 22 Geo V, c 4 (UK).

48 Hogg, *Constitutional Law of Canada* (n 7) 64.

Constitution only with the consent of Canadian Parliament through a joint address from the House of Commons and the Senate of Canada.[49]

Thus, by 1931, Canada had gained complete autonomy over all its legislative affairs, save for constitutional amendments. Over the course of the next several decades, the Canadian federal government, in partnership with the provinces, sought on several occasions to patriate[50] 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[51] and the 1970 Victoria Charter[52]), the federal and provincial governments came close to agreeing on an amending formula for the Constitution. However, these attempts ultimately failed when Quebec exercised its provincial veto power.[53]

The lack of a constitutional amendment procedure was not the only identified gap in Canada's 1867 Constitution. In the century that preceded Canada's 1982 Constitution, there were growing concerns over the lack of individual rights protections in existing constitutional documents. The lack of individual constitutional rights protections was in part influenced by the UK judicial tradition. The *Constitution Act, 1867* established in its preamble that Canada would have a constitution 'similar in principle to that of the United Kingdom,' and this was reflected in the design of the document.[54] The UK constitutional structure mirrored in Canada

49 ibid.

50 Patriation refers to the process of achieving full sovereignty over the legislative affairs of the country, including constitutional amendments. See Patrick Monahan and Byron Shaw, *Constitutional Law* (4th edn, Irwin Law 2013) 536.

51 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.

52 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.

53 Hogg, *Constitutional Law of Canada* (n 7) 67.

54 *Constitution Act, 1867,* preamble.

did not include a charter of rights or enforcement mechanisms for the courts to overturn legislation based on individual rights.

Because of this constitutional design, the courts were limited when faced with overtly discriminatory government legislation. In such situations, the courts had no written constitutional authority to invalidate legislation based on individual rights. In response to their limited authority, the SCC sometimes drew on the federal division of powers to invalidate discriminatory legislation.[55] This is best exemplified in *Union Colliery Co of BC Ltd v Bryden* (1899) when the UK Privy Council[56] struck down a British Columbia (BC) law denying the right to vote to Canadians of Asian origin.[57] Rather than applying principles of equality, the court relied on federalism and deemed the legislation *ultra vires* because authority over 'naturalization and aliens' fell under federal jurisdiction.[58]

Although some judges, such as Chief Justice Lyman Duff, recognised an implied bill of rights within the unwritten principles of the *Constitution Act, 1867*, this interpretation was never recognised by the majority of the SCC before the *Charter* was entrenched.[59] Except for rare instances, the Canadian judiciary did not intervene in cases of overtly discriminatory government policy. This approach to constitutional interpretation resulted in minority groups in Canada being vulnerable to discriminatory government policies. For example, during this period the majority of visible racial minorities, including Indigenous Peoples, were denied the right to vote.[60] Segregated schools for Black children existed in Nova Scotia and Ontario until

55 Ian Greene, *The Charter of Rights and Freedoms: 30+ Years of Decisions That Shape Canadian Life* (James Lorimer & Company 2014) 31–32.

56 The Judicial Committee of the Privy Council in London served as Canada's highest appeal court until 1949. Following 1949 the Supreme Court of Canada became Canada's final court of appeal through the passing of the *Supreme Court Act.* See *Supreme Court Act*, RSC 1985, c S-26.

57 *Union Colliery Co of BC Ltd v Bryden*, [1899] AC 580 (JCPC) [*Union Colliery*].

58 ibid.

59 *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100, 2 DLR 81 [*Reference Re Alberta Statutes*].

60 Dominique Clément, *Human Rights in Canada: A History* (Wilfrid Laurier Univ Press 2016) 35.

the 1960's.[61] Indigenous children were separated from their families and communities by the Royal Canadian Mounted Police (RMCP) and forced to attend residential schools.[62] The federal government imposed a 'head tax' of fifty dollars[63] on individuals immigrating from China. This policy was followed by the almost complete ban of immigration from China in 1923 through the *Chinese Immigration Act*.[64] Finally, during the Second World War, the federal government used their emergencies powers under the *War Measures Act*[65] to intern Canadians of Japanese descent.[66]

It was in part due to the lack of individual rights protections in the Canadian written Constitution that the *Canadian Bill of Rights, 1960* was passed.[67] The drafting and passing of the *Canadian Bill of Rights, 1960* was led by Prime Minister John Diefenbaker (1957-1963).[68] Initially, Diefenbaker wanted the bill of rights to be entrenched constitutionally, but after recognising the challenges associated with gaining broad provincial consent to amend the

61 ibid.

62 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) 1 http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf accessed 18 June 2019.

63 The value of the fifty-dollar head tax in 1923, would amount to approximately 747 dollars in 2021 (Canadian currency).

64 Clément (n 60) 36.

65 *The War Measures Act*, RSC 1970, c W-2.

66 During the Second World War Canada invoked the *War Measures Act* to disenfranchise, deport and detain thousands of Canadians of Japanese descent in internment camps. This was fueled by the majority of Canadians who were suspicious and supported a strong government response. On February 24, 1942 the federal Cabinet issued an order-in-council that required the removal and detainment from Japanese Canadians 'from any protective areas', which they later deemed to be the Pacific Coast. Following this order-in-council. Following this order-in council, ninety percent of Japanese Canadians in Canada, 21,000 people at the time, were sent to the internment camps. The Canadian federal government further targeted Japanese Canadians with a second order-in-council on January 19, 1943. This second order-in-council focused on the material and financial assets held by Japanese Canadians. It permitted the government to seize and sell of the of the property and material possessions of Japanese Canadians who were detained by the government in the internment's camps. These possessions were sold by the government and the funds were used to offset the costs of the detainment camps. The camps were ultimately closed in 1946. While closing the camps, the detained Japanese Canadians were given two choices: move back to Japan or move to Eastern provinces across Canada. It was not until 1988 that the Canadian federal government provided a formal apology for the harm caused by the Japanese Canadian internment camps. See Pamela Hickman and Masako Fukawa, *Righting Canada's Wrongs: Japanese Canadian Internment in the Second World War* (James Lorimer & Company 2012).

67 Clément (n 60) 87.

68 Greene (n 55) 40.

Canadian Constitution,[69] he settled on passing the bill of rights as a federal statute through Parliament.[70]

Diefenbaker, a prairie politician himself, was in part inspired by the passing of the *Saskatchewan Bill of Rights.*[71] The *Saskatchewan Bill of Rights*, passed in 1947, was the 'first legislation of its kind in North America'.[72] It was passed eighteen months before the adoption of the *Universal Declaration of Human Rights* (*UDHR*)[73] in 1948.[74] The *Saskatchewan Bill of Rights* was modelled based on the Ontario *Racial Discrimination Act, 1944*.[75] As Canada's first anti-discrimination law, the *Racial Discrimination Act* prohibited discrimination in commercial displays.[76] The *Saskatchewan Bill of Rights*, passed three years later, recognised the inalienable rights and freedoms of its residents, including democratic freedoms of the right to vote and freedom of expression.[77] Despite adopting an expansive approach to individual rights, the *Saskatchewan Bill of Rights* was predominantly a symbolic document. It included no enforcement mechanisms and was rarely applied because of concerns over its legitimacy.[78]

Despite this mostly symbolic role, Diefenbaker sought to recreate a form of the *Saskatchewan Bill of Rights* nationally through the passing of the *Canadian Bill of Rights* in 1960.[79] This legislation was a federal statute that Diefenbaker believed could invalidate other

69 At this point in the late 1950's, Canada did not have a constitutional amendment formula and would require any amendments to be done by the Westminster Parliament in the UK.

70 *Canadian Bill of Rights*, RSC 1960, c 44.

71 *The Saskachewan Bill of Rights Act*, RSS 1978, c S-9 (*Saskatchewan Bill of Rights*). The *Saskatchewan Bill of Rights* was replaced in 1978 by the *Saskatchewan Human Rights Code*, RSS 1979, c S-24.1.

72 Saskatchewan Human Rights Commission, '70th Anniversary of the Saskatchewan Bill of Rights Act' (*Saskatchewan Human Rights Commission*, 8 December 2017) <https://saskatchewanhumanrights.ca/70th-anniversary-of-the-saskatchewan-bill-of-rights-act/> accessed 12 May 2020.

73 *Universal Declaration of Human Rights* [adopted 10 December 1948 UNGA Res 217 A(III)].

74 Greene (n 55) 40.

75 *The Racial Discrimination Act*, RSO 1944, c 51 (Ontario).

76 Clément (n 60) 57.

77 Saskatchewan Human Rights Commission (n 72).

78 Greene (n 55) 40.

79 *Canadian Bill of Rights*.

discriminatory legislation and activities that conflicted with it.[80] The *Canadian Bill of Rights* is a short two-page document that remains in operation to this day. The legislation includes guaranteed rights to Canadians in a manner that is free from discrimination by 'reason of race, national origin, colour, religion or sex'.[81] The *Canadian Bill of Rights* guarantees the right to life, liberty, security of the person and property; the right to equality before the law; freedom of religion; freedom of speech; freedom of assembly and association; and freedom of the press. Additionally, the *Canadian Bill of Rights* includes a separate section on the legal rights of Canadians in the judicial system.[82]

The *Canadian Bill of Rights* also contained an early version of a notwithstanding clause. In section 2, the legislation states:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.[83]

The inclusion of this early notwithstanding declaration served two purposes. First, it provided a safety valve to the legislature to explicitly override the statute's provisions as needed. Second, it represented the federal government's intent to designate the *Canadian Bill of Rights* as a superior statute over other federal legislation, without giving it constitutional status.[84]

Unfortunately, the attempt to give the *Canadian Bill of Rights* superior legislative status was not regarded as having much legitimacy by the courts.[85] In the years following the bill's passing, the courts interpreted that due to its non-constitutional status, they lacked the authority to apply the *Canadian Bill of Rights* to remedy rights violations perpetrated by the federal and

80 Greene (n 55) 41.

81 *Canadian Bill of Rights*, part 1, s 1.

82 ibid, part 1, s 2.

83 ibid, part 1, s 2 [emphasis added].

84 Greene (n 55) 42.

85 ibid.

provincial governments.[86] Of the thirty-five cases that occurred between the years of 1960 and 1982 that relied on a *Canadian Bill of Rights* claim, only one resulted in a law being declared as having no force or effect.[87]

In *Queen v Drybones*, the court considered whether section 94 of the *Indian Act, 1876* violated the equality under the law guarantee of the *Canadian Bill of Rights*. The *Indian Act, 1876* made it a criminal offence for 'Indians' to be intoxicated or in possession of 'intoxicants' off a reserve. The issue in *Drybones* was the unequal application of the law: it only applied to 'Indians' and created harsher sanctions for this group than for non-Indigenous individuals. In a 6-3 decision, the SCC applied the *Canadian Bill of Rights* for the first and only in its history to strike down a part of legislation. The court struck down section 94 of the *Indian Act, 1876* because it violated section 1(b) of the *Canadian Bill of Rights*, which guaranteed 'equality before the law'.[88] The SCC relied on the wording of section 2 of the *Canadian Bill of Rights* and its inclusion of a non-obstante clause[89] to justify its ruling. The court found that it was 'a more realistic meaning' to construe the non-obstante clause as representing an intent by the drafters to allow the *Canadian Bill of Rights* to invalidate conflicting legislation, unless Parliament expressly invokes the non-obstante clause to immunise the legislation from the *Canadian Bill of Rights'*.[90]

The precedent established in *Drybones* was not interpreted to apply to subsequent *Canadian Bill of Rights* cases. Of the fifteen *Canadian Bill of Rights* cases that followed the *Drybones* decision, none were interpreted to permit the *Canadian Bill of Rights* to invalidate legislation. The *Drybones* precedent was narrowed through the strict interpretation of the

86 Michael Mandel and Stephane Kirkland, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publisher Toronto 1994) 14–15.

87 *The Queen v Drybones*, [1970] SCR 282, 9 DLR (3d) 473.

88 ibid 298.

89 The non-obstante clause in the *Canadian Bill of Rights* is recognised as an early version of the *Charter's* notwithstanding clause under section 33.

90 *Drybones* (n 87) 294.

Canadian Bill of Rights equality before the law guarantee.[91] As noted by Tarnopolsky, the SCC distinguished subsequent cases, such as *Attorney General of Canada v. Lavell* (1974)[92], *Smythe v The Queen* (1971),[93] and *Bliss v. Attorney General for Canada* (1978),[94] by interpreting a requirement of overt discrimination under the section 2 guarantee of 'equality before the law'.[95] This interpretive approach is best evidenced in *Bliss*, a case in which claimants sought to challenge differences in benefits for pregnant women under the *Canadian Bill of Rights*. In this decision, the SCC directly addressed the need to distinguish the case at hand from *Drybones*:

> There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *R. v. Drybones* [..] and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected. the other involves a definition of the qualifications required for entitlement to benefits.[96]

Based on this narrow interpretive approach, the *Canadian Bill of Rights* was regarded as a limited tool to redress discrimination by the government. The perceived failure of the *Canadian Bill of Rights* was a central motivating factor for Pierre Elliot Trudeau in his pursuit of an entrenched charter of rights.[97] For example, section 15 of the *Charter* was designed to address the perceived shortcomings of the SCC's narrow interpretation of 'equality before the law' in the *Canadian Bill of Rights*.[98]

Despite the enforcement shortcomings of the *Canadian Bill of Rights*, the concept of a bill of rights was popular among voters and other provinces quickly followed by passing their

91 *Canadian Bill of Rights* s 2.

92 *Attorney General of Canada v Lavell,* [1974] SCR 1349, 38 DLR (3d) 481.

93 *Smythe v The Queen*, [1971] SCR 680, 19 DLR (3d) 480.

94 *Bliss v Attorney General for Canada*, [1979] 1 SCR 183, 92 DLR (3d) 417

95 Walter S Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms. (North America: Law, Politics and Economics; Canadian Federalism)' (1981) 44 L & Contemp Probs 169, 175–176.

96 *Bliss* (n 94) 423.

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

98 Walter S Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms' (1983) 16 Can Bar Rev 242, 248–251.

own bills of rights.[99] In 1962, Ontario passed Canada's first enforceable *Human Rights Code*[100] (herein called the *Ontario Human Rights Code*).[101] The code combined previous Ontario anti-discrimination laws[102] into one statute and added new protections. The most innovative new protection was the creation of the enforcement bodies of the Ontario Human Rights Commission and Tribunal to implement the newly passed *Ontario Human Rights Code*.[103] The *Ontario Human Rights Code* included a closed list of protected grounds[104] that were guaranteed in the areas of accommodation (housing), contracts, employment, goods, services, and facilities and membership in unions, trade or professional associations. If an individual experienced discrimination in the private sector based on one of the listed grounds, they could file a complaint with the Ontario Human Rights Commission.[105] The commission could investigate the discrimination complaints and, pending their credibility, would seek to negotiate a financial settlement and other forms of remedies between the parties.[106] In rare instances, the Ontario Human Rights Tribunal would have to seek judicial review from the courts to enforce violations of the *Ontario Human Rights Code*.[107] This innovative structure created an

99 The other provinces that passed bill of rights included Alberta (1972), Quebec (1975). See Greene (n 55) 52.

100 *Human Rights Code*, RSO 1990, c. H.19 (Ontario Human Rights Code).

101 Clément (n 60) 96–97.

102 For a list of the five Ontario anti-discrimination laws that were combined and replaced with the Ontario Human Rights Code refer to 'Appendix 2 – Human Rights: The Historical Context' (*Ontario Human Rights Commission*) http://test.ohrc.on.ca/en/teaching-human-rights-ontario-guide-ontario-schools/appendix-2-%E2%80%93-human-rights-historical-context accessed 14 May 2020.

103 Clément (n 60) 97.

104 The human rights codes at the provincial, territorial and federal levels operate on the basis of closed list protected grounds. A closed list of protected grounds means that the human rights tribunals can only interpret discrimination based on the protected grounds that is passed by the legislature. The human rights tribunal or commission, unlike the SCC and other public law courts interpreting the *Charter*, cannot read in new protected grounds into the human rights codes. New protected grounds must be added through statutes from the appropriate legislature. For example, 'gender identity' and 'gender expression' were added to the *Ontario Human Rights Code* in 2012 and 'genetic characteristics' were added as a prohibited ground of discrimination under the *Canada Human Rights Ac*t in 2017.

105 Clément (n 60) 77.

106 ibid.

107 See James Walker, 'Decoding the Rights Revolution: Lessons from the Canadian Experience' in Stephen J Heathorn and David Goutor (eds), *Taking Liberties: A History of Human Rights in Canada* (Oxford University Press 2013); Dominique Clément, William Andrew Silver and Daniel Trottier, *The Evolution of Human Rights in Canada* (Canadian Human Rights Commission Ottawa 2012); Clément (n 60); Dominique Clemént, 'Equality Deferred: The Origins of the Newfoundland Human Rights State' [2012] Acadiensis 102; Dominique Clemént, 'Rights Without the Sword Are but Mere Words: The Limits of Canada's Rights Revolution' in Janet Miron (ed), *A History of Human Rights in Canada: Essential Issues* (Canadian Scholars' Press 2009).

independent process for handling discrimination complaints in the private sector with little reliance on the courts.[108]

The *Ontario Human Rights Code, 1962* set a new legal standard for anti-discrimination laws in Canada. Tarnopolsky refers to the *Ontario Human Rights Code* as the 'next major step' in the Canadian human rights movement because it consolidated a growing list of individual human rights legislation into a single enforceable act.[109] Clément argues that the passing of the *Ontario Human Rights Code* was a 'landmark achievement' for three reasons.[110] First, the *Ontario Human Rights Code* established comprehensive administrative processes and enforcement mechanisms to support the implementation of the human rights protections. Second, the legislation included a specific focus on human rights education in addition to response mechanisms. Finally, the *Ontario Human Rights Code* created a range of unique remedies that extended beyond punishment, including compensation, an apology, employment reinstatement, and settlement agreements.[111]

In the years that followed the passing of the *Ontario Human Rights Code*, other provinces passed similar human rights codes that provided anti-discrimination protections in the private sector. By 1977, every province had introduced a human rights code[112] and the *Canadian Human Rights Act*[113] was passed at the federal level.[114]

The human rights movement that led to the passing of human rights codes across Canada had two important implications for the development of the notwithstanding clause in

108 Greene (n 55) 52.

109 WS Tarnopolsky, 'Discrimination and the Law in Canada' (1992) 41 UNBLJ 215, 228.

110 Clément (n 60) 77.

111 ibid.

112 The following list includes the year that each province established a human rights commission to enforce their human rights codes or bill of rights: British Columbia 1973, Alberta 1972, Saskatchewan 1972, Manitoba 1971, Ontario 1962, Quebec 1976, New Brunswick 1971, Nova Scotia 1967, Prince Edward Island 1976, Newfoundland and Labrador 1969. See 'Provincial & Territorial Human Rights Agencies' (*Canadian Human Rights Commission*) https://www.chrc-ccdp.gc.ca/eng/content/provincial-territorial-human-rights-agencies.

113 *Canadian Human Rights Act*, RSC 1985, c. H-6.

114 Greene (n 55) 53.

the 1982 *Charter*. First, the provinces created a comprehensive, effective, and enforceable human rights regime to respond to discrimination in the private sector. This development further revealed the gap in human rights protections and enforcement mechanisms within the public sector. Second, the human rights codes passed by Alberta,[115] Saskatchewan,[116] and Quebec[117] included override clauses similar to the notwithstanding clause.[118] These clauses stated that every provincial statute was inoperative if it conflicted with the any part of the human rights code unless the statute expressly declared that it was to operate notwithstanding the human rights code. However, unlike the *Charter's* notwithstanding clause, the provincial notwithstanding clauses could be applied to all sections of the human rights codes and included no expiration limit. The inclusion of an early version of the notwithstanding clause in provincial human rights codes influenced its inclusion in the *Charter*. The proposed inclusion of the notwithstanding clause in the *Charter* was brought forward by Alberta Premier Peter Lougheed who had included it in the 1972 *Alberta Bill of Rights* ten years earlier.[119]

2.2 Developing the 1982 *Charter* and the Patriation of Canada's Constitution

The story of Canada's *Charter* is often limited to the narrative of political compromise between federal and provincial leaders. The perceived famous, or to others infamous, 'kitchen accord', where section 33 was sketched out during a breakfast meeting, dominates the story of the notwithstanding clause.[120] The historical narrative of political compromise, however, misrepresents the complex developments that led to the notwithstanding clause's inclusion and obscures the role that civil society organisations played in the shaping of the *Charter*.

115 *Alberta Bill of Rights*, RSA 2000, c A-14 (Alberta) s 2.

116 *The Saskatchewan Human Rights Code*, s 44.

117 *An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision*, RSQ 1996, c 10 (Quebec) s 52.

118 'CBC News In Depth: Notwithstanding Clause FAQs' (*CBC News*, 25 January 2005) https://www.cbc.ca/news2/background/cdngovernment/notwithstanding.html.

119 Peter Lougheed, 'Charting the Future: Canada's New Constitution' *CBC Archives* <https://www.cbc.ca/archives>; English (n 97) 494.

120 English (n 97) 506.

2.2.1 The Patriation of the Charter as Trudeau Seniors 'Magnificent Obsession'[121]

The story of Canada's 1982 Constitution, the government's fourteenth attempt at constitutional reform since 1927, is often traced back to 1966.[122] In 1966, in response to advocacy from Quebec Premier Daniel Johnson Sr., Prime Minister Lester B. Pearson enlisted the newly elected Quebec Liberal Member of Parliament (MP) Pierre Elliott Trudeau (herein Trudeau Senior[123]), to lead the federal constitutional reform strategy. Trudeau Senior quickly ascended within the federal Liberal Party to Minister of Justice. In April 1968 he became Canada's fifteenth Prime Minister and held that position until 1979.[124]

The success of the 1982 Constitution is often attributed to Trudeau Senior, who pursued his 'magnificent obsession'[125] of constitutional reform for almost twenty years.[126] Trudeau Senior's constitutional reform odyssey began in September 1967 when he publicly presented his constitutional vision as Minister of Justice at the Canadian Bar Association meeting in Quebec City. At this meeting, he stated:

> I am thinking of a Bill of Rights that will be designed to limit the exercise of all government power, federal and provincial. It will not involve any gain by one jurisdiction at the expense of the other […] Instead, the power of both the federal government and the provincial governments would be restrained in favour of the Canadian citizen who would, in consequence, be better protected in the exercise of this fundamental rights and freedoms.[127]

In preparation for the 1968 'Federalism for the Future' conference six months later, Minister of Justice Trudeau Senior publicly released his policy paper 'A Canadian Charter of Human

121 Christina McCall and Stephen Clarkson, *Trudeau and Our Times. Volume 1: The Magnificent Obsession* (McClelland and Stewart, Toronto 1991).

122 Dodek (n 38) 18.

123 Pierre Elliott Trudeau is the father of the 2015 and 2019 elected Canadian Prime Minister Justin Trudeau. To distinguish his leadership as Prime Minister he will be referred to as Trudeau Senior. See ibid 19.

124 Trudeau Senior's term as Prime Minister is commonly recognized as 1968 to 1984. This was interrupted in 1979 by Joe Clark, a conservative Prime Minister, who led a minority government from June 1979 to March 1980. See ibid.

125 McCall and Clarkson (n 121).

126 Dodek (n 38) 19.

127 Pierre Elliott Trudeau, 'A Constitutional Declaration of Rights', *Federalism and the French Canadians* (Macmillan of Canada 1977) 57.

Rights'.[128] This policy paper 'strongly influenc[ed] the drafting of the text of the Charter that would eventually be adopted in 1982' by setting out the structure of the constitution and categories of rights.[129] Subsequently, the federal government, led by Prime Minister Trudeau Senior, entered a period of constitutional negotiations that ultimately failed. In the period of 1968 to 1979 there was a series of first Minister's conferences and public consultations on the constitutional reform project.[130] This period of constitutional reform negotiations culminated in the tabling of Bill C-60 the *Constitutional Amendment Bill* on June 20, 1978.[131] Bill C-60 sought to replace the majority of the *Constitution Act, 1867* with a new constitution. Along with proposing a charter of rights, Bill C-60 set out the constitutional entrenchment of the SCC and replacement of the Senate of Canada with a new House of Federation.[132] Bill C-60 and this decade of attempts at constitutional reform failed in 1979 when Trudeau Senior lost the federal election and resigned as Liberal leader.[133]

However, the 1979 election loss and resignation of Trudeau Senior was short-lived. Less than nine months following the election loss, in 1979, Trudeau Senior was re-elected as Prime Minister with a strong majority.[134] This occurred after the conservative minority government dissolved Parliament following the defeat of their budget bill.[135] In the first few months of his tenure in 1980, Trudeau Senior was pre-occupied with the Quebec Secession referendum, campaigning in support of the 'No Campaign'. After the referendum and the defeat of Quebec's secession attempt in May 1980, Trudeau Senior and his Cabinet refocused

128 Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Queen's Printer 1968).

129 Dodek (n 38) 20.

130 Trudeau (n 128).

131 House of Commons, *Debates*, 30th Parl, 3rd Sess, No 6 (June 20, 1978) at 6573 (Hon James Jerome).

132 Dodek (n 38) 24.

133 ibid 24–25.

134 Trudeau Senior campaigned in five federal elections for the Prime Minister role. He won the federal elections in 1968, 1972 (minority), 1974 and 1980. He lost a federal election to Joe Clark and the Progressive Conservatives in 1979 but were promptly re-elected the following year.

135 Dodek (n 38) 25.

on their broader goal of national unity, which they believed could be achieved through a new constitution.[136]

In 1980, Prime Minister Trudeau Senior announced that he would be patriating Canada's Constitution once and for all.[137] He announced that the patriation of the Constitution would include both an amending formula and an entrenched charter of rights.[138] Trudeau Senior's goal of creating a charter of rights was in part due to the lack of individual rights protections that existed in Canada at that time.[139] It was from the enforcement challenges with the *Canadian Bill of Rights* that Trudeau Senior sought to create rights protections for Canadians beyond the reach of statutory legislation.

To achieve this goal of a patriated constitution, Trudeau Senior enlisted his Minister of Justice and future Prime Minister Jean Chrétien to lead Minister's Meetings to gain consensus on a draft of the Constitution. The first of the official Minister's 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.[140] As with earlier attempts, the federal and provincial governments could not reach an agreement.[141] However, unlike previous failed attempts, Trudeau Senior refused to accede to the unwillingness of the provinces. In doing so, Trudeau Senior sought patriation unilaterally without the consent of the provinces by tabling constitutional amendments in the House of Commons on October 2, 1980.[142] Shortly thereafter,

136 ibid.

137 Monahan, *Constitutional Law* (n 42) 19.

138 English (n 97) 462.

139 ibid.

140 ibid 471.

141 The failure of this first constitutional conference of the Ministers is often traced back to the infamous Kirby Memorandum. This memorandum was a leaked document reported by the Ottawa Citizen newspaper at the end of August. The Kirby Memorandum, written by Michael Kirby the head of the Federal-Provincial Relations Office for the Prime Minister. In this memorandum Kirby presented a strategy for unilateral patriation by the federal government in the instance that they could not complete the negotiation with the provinces. Predictably, the release of this document a few weeks prior to the first Ministers Meeting September 8th to 12th, 1980, had a significant negative impact on the discussions and ultimately contributed to their failure. See Dodek (n 38) 26.

142 English (n 97) 479–480.

a motion[143] was passed in the House of Commons to refer the draft of the 1982 Constitution to a Special Joint Committee of the Senate and House of Commons that would begin on November 6, 1980.[144]

2.2.2 The Special Joint Committee and the Civil Society 'Charter-Makers'[145]

The Special Joint Committee on the Constitution (1980-1981) is often overlooked in Canada's constitutional story. Often called '*Charter*-makers',[146] the participation of civil-society organisations and the public at the Special Joint Committee shaped key parts of the *Charter* as it exists today. The committee held hearings from November 6,1980 to February 13, 1981[147] and met several times a day over fifty-six days, with a total of 106 meetings. They received submissions from 914 individuals and 294 groups. The Special Joint Committee also heard oral testimony from over 104 individuals and group representatives.[148] The committee received unprecedented public attention for two reasons: it was the first parliamentary committee to ever be televised,[149] and it was the first time the Canadian public received access to a draft of the proposed constitution.[150] The combination of the televising, public draft, and civil society witness involvement led to the opening up of the constitution-making process to the public for the first time in Canadian history.[151]

The civil society organisation and individual witness presentations included an array of perspectives, such as presentations from the Canadian National Institute for the Blind, the National Association of Japanese Canadians, the Canadian Jewish Congress, the National Black Coalition of Canada, and the Canadian Association of Lesbian and Gay Men (the first

143 House of Commons, *Debates*, 32nd Parl, 1st Sess, No 3 (October 6, 1980) (Hon Jeanne Sauvé), 3288-3289.
144 Dodek (n 38) 29, 53.
145 ibid 12.
146 ibid.
147 ibid 3.
148 Peter W Hogg and Annika Wang, 'The Special Joint Committee on the Constitution of Canada, 1980-81', SCLR (2017) 7–8.
149 ibid 8.
150 ibid 4.
151 Dodek (n 38) 4.

same-sex representative group to appear before any parliamentary committee).[152] Although these groups differed in their specific advocacy, the majority shared the commonality of advocating for a much stronger entrenched charter of rights.[153]

Among the groups providing testimony to the Special Joint Committee, a strong coalition of feminist groups made submissions. This coalition was formed by four women's groups who all testified individually to the committee: the Advisory Council on the Status of Women; the National Action Committee on the Status of Women (NAC); the National Association of Women and the Law (NAWL); and the Canadian Committee on Learning Opportunities for Women.[154]

This feminist coalition approached the Special Joint Committee strategically with a set of reforms they advocated for collectively in their individual testimonies.[155] These women's organisations made clear their intent to reform the draft Constitution when Jill Porter the representative of the NAC started off her testimony by stating:

> Women could be worse off if the proposed Charter of Rights and Freedoms is entrenched in Canada's Constitution. Certainly the present wording will do nothing to protect women from discriminatory legislation, nor relieve inequities that have accumulated in judicial decisions.[156]

Along with advocating for the removal of section 1, among other reforms,[157] women's groups at the committee advocated for the creation of an independent gender equality clause separate

152 ibid 14, 46–47.

153 ibid 4.

154 ibid 51–52.

155 ibid 51.

156 McPhedran (n 37) 9.

157 NAC presented that the *Charter* draft would require at least three reforms to address the gaps identified by the feminist organisations. First, it was recommended that section 1 be removed because it was regarded as weakening the rights protections within the draft of the Charter. Second, the NAC recommended significant changes to the equality provisions of the Charter, to recognise positive rights to equality, in addition to negative ones. This expansion of the equality provisions included the incorporation marital status, sexual orientation and political belief. Finally, the NAC advocated for proportionate gender representation among SCC and other federal court appointments. See Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (University British Columbia Press 2004) 44–45.

from the equality clause. The gender equality clause, championed by NAWL,[158] sought to build on the model of the U.S. equal rights amendment (ERA).[159] Referred to as the 'Canadian ERA', women's group sought to entrench within the *Charter* an independent gender equality clause that guaranteed equal rights to men and women. The goal of this purpose clause would be to ensure that regardless of other sections of the *Charter* or interpretive vacuums, gender equality would remain paramount.[160] Despite this advocacy campaign by several women's groups, an independent gender equality clause was not included in the amendments made in response to the Special Joint Committee.

Although the feminist coalition failed to gain the addition of a gender equality clause, the Special Joint Committee hearings did result in several major changes to the draft of the *Charter*. The most significant reform achieved was the narrowing of section 1 of the *Charter*, also known as the reasonable limits' clause. At the time of the hearings, the text of section 1 was significantly weaker and provided the government with broader grounds to justify a rights infringement.[161] This design was criticised by multiple civil society organisations, which called section 1 the 'Mack Truck provision', because it was so broadly defined that you could drive your truck through it.[162] These organisations expressed concerns that the current state of the section 1 clause could make the charter 'virtually worthless'[163] and 'might destroy the entire

158 ibid 45.

159 The US ERA was a proposed amendment to add gender equality protections to the US Constitution. The amendment sought to create equal legal rights that are guaranteed to all constituents regardless of sex. First advocated for by women's groups in 1923, the ERA underwent serious consideration following a new wave of feminist activism in he 1960's. As a result, the US Congress and Senate passed the ERA amendment in 1972. The amendment, however, failed to achieve the required 38 States ratifications and expired. See B Brown, 'The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women' (1971) 80 Yale LJ 871; Martha F Davis, 'The Equal Rights Amendment: Then and Now' (2008) 17 Columb J Gender & L 419.

160 Kerri A Froc, 'Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment."' (2014) 19 Rev Const Stud 237, 242.

161 Hogg and Wang (n 148) 10.

162 Special Joint Committee on the Constitution 1980-1981, Proceedings, Issue 30, 32.

163 ibid 13.

purpose'.[164] Following the significant and sustained critique of section 1,[165] during the hearings on January 12, 1980 the Minister of Justice Chrétien tabled a new draft of the Constitution with track changes indicating the reforms the government would make before the end of the committee. In presenting the accepted amendments, Chrétien acknowledged the 'legitimacy' of the criticism by the civil society organisations and announced that the 'government is prepared to make major changes to the draft resolution so as to strengthen the protections of human rights and freedoms in the Charter'.[166] As part of these acceptable amendments, Chrétien included a newly drafted section 1 which mirrored the current language in the *Charter*.[167]

In addition to substantial changes to section 1, several other key amendments were made. These amendments included the addition of disability as a ground of discrimination, the shift of the equality grounds of discrimination from a closed to an open list, and adding an enforcement mechanism under section 24(1) and 24(2) of the *Charte*r.[168] There also were substantial changes to the legal rights included in the *Charter*.[169] Finally, the rights of First Nations, Métis, and Inuit Peoples in Canada were also added to the Constitution draft through an amendment at the committee stage.[170] Following pressure from the New Democratic party[171] and a national coalition of Indigenous groups across the country,[172] the government achieved an agreement to include Aboriginal rights in section 35 of the Constitution draft.

164 ibid 7.

165 Cabinet Committee on Priorities and Planning, Minutes, 26 November 1980, 26-80.

166 Joint Committee, Proceedings, Issue 30 (n 162) 10.

167 Dodek (n 38) 66–67.

168 See Hogg and Wang (n 148).

169 ibid 12–13.

170 Special Joint Committee on the Constitution 1980-1981, Proceedings, Issue 49, 9–10.

171 Prior to the end of the committee in January, the NDP leader Ed Broadbent privately informed Trudeau Senior that he will withdraw support for the constitutional reform package unless it included explicit references to Aboriginal rights. This added significant pressure to Trudeau Senior and his government to negotiate with the Indigenous representative groups.

172 These groups consisted of the three largest Indigenous representative groups: the Native Council of Council (NCC), the National Indian Brotherhood (NIB) and Inuit Committee on National Issues (ICNI).

Notably, during the Special Joint Committee stage, the notwithstanding clause was not included in the draft of the *Charter* shared with the public. There was no discussion nor commentary from civil society organisations or witnesses at the Special Joint Committee. The only time the possibility of a notwithstanding clause was mentioned at the joint special committee was when it was raised by Saskatchewan's Premier Allan Blakeney during his presentation on December 19, 1980. In his testimony, Blakeney recommended the addition of a notwithstanding clause—what he calls a non-obstante clause—when he stated:

> I could certainly go along with entrenching and with a non obstante clause, because basically the courts are good places to decide individual cases of human rights issues, but bad places to decide broad social policies in the guise of deciding issues of human rights. Therefore what we need is some basis whereby the legislatures can override if, in the course of deciding an issue about a single citizen, they have made a decision which affects broad public policy.[173]

Other than this comment by the Saskatchewan Premier, the notwithstanding clause received no other attention in the committee and was not included in the final draft produced by the Special Joint Committee.[174]

2.2.3 The Gender Equality Clause and Section 28 of the Charter

For women's groups, the wide-ranging amendments made to the *Charter* at the Special Joint Committee stage were considered inadequate.[175] Adding a multicultural heritage clause (now section 27 of the *Charter*)[176] and the decision to maintain a version of section 1 of the *Charter* were of great concern to women's groups. The women's groups were concerned with the possibility that the courts could permit infringements of gender equality under section 15, justified under these other *Charter* sections.[177] Based on these lingering concerns, a coalition

173 Joint Committee, Proceedings, Issue 30 (n 162) 39.

174 Dodek (n 38) 63.

175 ibid 65–70.

176 Women's groups were concerned by section 27 and its role in creating and independent clause that would require courts to consider Canada's multicultural heritage during Charter interpretation. These groups expressed apprehension that this clause could result in constitutional interpretation that derogates gender equality and allows cultural rights to trump gender equality. See Froc (n 160) 242.

177 ibid.

of women's groups began a campaign to have an independent gender equality clause added separately through the House of Commons.

These women's groups began this process by organising their own conference on the Constitution in 1981. This independent conference, organised by the Ad Hoc Committee of Women on the Constitution, was created following the government cancelling the State funded women's conference based on the suggestion of the federal Cabinet.[178] The Women's Conference on the Constitution was held February 14, 1981 and attended by 1300 women.[179] At this conference, the participants passed a range of resolutions on amendments that should be made to the post-Joint Special Committee on the Constitution *Charter* draft.[180] Among these resolutions was one requiring the addition of a 'Statement of Purpose […] providing that the rights and freedoms under the Charter are guaranteed equally to men and women with no limitations'.[181] This resolution supporting an independent gender equality clause in the *Charter* received almost unanimous consent by the attendees and provided significant leverage as the members of the Ad Hoc Committee of Women on the Constitution (Ad Hoc Committee) began negotiations with the government.[182]

Between February and April 1981, the women's advocates in the Ad Hoc Committee engaged in an extensive advocacy campaign at Parliament Hill to have a gender equality clause added to the *Charter* by the House of Commons.[183] Besides lobbying members of Parliament, the members of the Ad Hoc Committee worked directly with federal Department of Justice officials to draft the final text of section 28.[184] During this process, several concessions were made by Ad Hoc Committee members to make the addition more 'sellable […] to their political

178 ibid.

179 ibid 243.

180 ibid.

181 Anne F Bayefsky and Mary A Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Carswell 1985), 635.

182 Froc (n 160) 243.

183 ibid 244.

184 ibid 245.

bosses'.[185] Thus, rather than being added at the beginning of the *Charter* as argued by the women's groups, the gender equality clause was included in section 28. Despite these political pressures, the women's groups managed to maintain a reference to 'male and female persons' and add the term 'notwithstanding' at the beginning of the clause.[186] Through these behind-the-scenes negotiations, the Ad Hoc Committee developed a draft of the gender equality clause that the government accepted.

On April 23, 1981, the House of Commons voted to accept the amendments to the *Charter* draft from the Joint Special Committee on the Constitution. There were two significant additional amendments to the charter of rights draft made at this stage that were not included in the joint committee amendments: the unanimous addition of an explicit reference to the right to gender equality in section 28 and adding the 'supremacy of God' in the preamble.[187] The unanimous support for adding section 28 was achieved after the significant mobilisation of feminist grassroots activists that extended beyond the joint committee.[188] The vote on the amended resolution on the Constitution was agreed upon on the basis that it would be sent to the SCC as a reference question to ascertain the legality of unilateral constitutional amendments. The reference case was in response to the simultaneous legal challenges being brought forward by the provinces to challenge the unilateral moves by the federal government to pass constitutional reform without unanimous provincial consent.[189]

2.2.4 'Substantial Provincial Consent' and the Notwithstanding Clause Compromise

Re: Resolution to Amend the Constitution was heard by the SCC in May 1981 and the court released their decision on September 28, 1981.[190] The SCC held that although the federal

185 ibid.

186 ibid.

187 House of Commons, *Debates*, 32nd Parl, 1st Sess, 23 April 1981, 9470–9472.

188 McPhedran (n 37).

189 Dodek (n 38) 72–73.

190 *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753, 34 Nfld & PEIR 1.

government had the 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.[191] 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 the previous provincial stakeholders from the first Ministers Meeting in 1980. The first days of negotiations went poorly, with few concessions being made on either side. It was not until the proposal of a notwithstanding clause by Alberta Premier Peter Lougheed that there was a breakthrough. Lougheed had first heard of the notwithstanding clause from his provincial Attorney General Merv Leitch ten years before the drafting of the Constitution.[192] In 1971, while drafting the *Alberta Bill of Rights,* Leitch suggested creating a clause that would allow the provincial government to propose legislation in contradiction with the *Alberta Bill of Rights* or to override court decisions that invalidated government legislation with the bill. Viewing the notwithstanding 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.[193]

Several years later during the 1980 constitutional amendments debate, Merv Leitch reached out to Lougheed to suggest that a notwithstanding clause be included within the proposed constitutional charter of rights.[194] Lougheed then presented the concept to the other Premiers and government stakeholders in October 1980. The proposed notwithstanding clause was immediately viewed favourably by the provinces, many of whom were primarily seeking

191 ibid 759–886.

192 Lougheed (n 119).

193 *Alberta Bill of Rights*.

194 Lougheed (n 119).

to maintain parliamentary supremacy 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.[195]

On November 4, 1981, there was a significant development in the negotiations through what is now known as the kitchen accord. The kitchen accord was a compromise agreement reached 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.[196] First, the provinces would agree to including a charter of rights in exchange for the Vancouver amendment formula.[197] Second, the provinces would agree to the removal of the optout with compensation clause through which individual provinces could reject the constitutional amendments—in exchange, the federal government would include a notwithstanding clause in the charter of rights.[198] The notwithstanding clause would include a five year sunset clause and could only apply to section 2 (fundamental freedoms), sections 7-14 (legal rights), section 15 (equality rights), and section 28 (gender equality) of the *Charter*. Third, the provinces negotiated that the protections for Aboriginal and treaty rights in the Constitution be removed.[199]

At the time of the negotiations, both Chrétien and Trudeau Senior were opposed to the inclusion of the notwithstanding clause in the charter of rights. They ultimately acquiesced to the provinces' proposal because they viewed it as a necessary concession to secure 'substantial provincial support'.[200] With tentative support from Trudeau Senior, achieved through the

195 English (n 97) 494.

196 ibid 506.

197 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.

198 English (n 97) 506.

199 Dodek (n 38) 76.

200 English (n 97) 506.

persuasion of Chrétien, the Newfoundland and Labrador delegation drafted a constitutional amendment proposal. The nine other provincial and federal stakeholders, excluding Quebec, spent the rest of the evening preparing the finalised agreement.[201] Premier of Quebec, René Lévesque was not present as he had returned to his hotel in Quebec, across the river from the hotel in Ottawa where all the remaining Premiers and federal officials were staying. Upon his return to the Ottawa in the morning, Lévesque was informed of an agreement reached the night before.[202] Shortly thereafter, on November 5, 1981, the Newfoundland and Labrador Premier Brian Peckford read out the finalised agreement and it was signed by Trudeau Senior and the nine provincial Premiers.[203] Quebec was the sole province who 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'.[204]

Despite the lack of support from Quebec, Trudeau Senior gained the 'substantial provincial consent' required to request that the UK Parliament pass the constitutional amendments and patriate Canada's Constitution. Trudeau Senior and his Cabinet returned to the House of Commons with the newly drafted Constitution agreement from the November Accord. Anticipating public outcry, the federal government released a factsheet on the notwithstanding clause to contextualise its purpose and application.[205] The new November Accord draft of the Constitution was substantially different from the one developed in response to the civil society and public feedback. The addition of the notwithstanding clause that could be applied to multiple sections of the *Charter* was viewed as incompatible with the Special Joint Committee recommendations for a stronger charter of rights. Further, the application of

201 ibid 507.

202 'The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home Its Constitution' *CBC* https://www.cbc.ca/history/EPISCONTENTSE1EP17CH1PA3LE.html.

203 English (n 97) 507.

204 'The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home Its Constitution' (n 202).

205 'Factsheet: The Notwithstanding or Override Clause as Applied to the Charter of Rights and Freedoms, Document 800-15/022' in Anne F. Bayefsky (ed), *Canada's Constitution Act 1982 and Amendments: A Document History* (McGraw-Hill Ryerson, 1989).

the notwithstanding clause to the gender equality clause in section 28 and the complete removal of the Aboriginal rights in section 35 undermined the years of constitutional advocacy by women's and Indigenous groups.[206] There was significant outcry and mobilization against the removal of Aboriginal rights and the undermining of section 28 through the notwithstanding clause.[207]

Regarding the notwithstanding clause, women's groups once again mobilised to have the clause's applicability removed from section 28 of the *Charter*. When first asked about applying the notwithstanding clause to the women's equality section by MP Pauline Jewett during question period, Trudeau Senior expressed a lack of clarity as to whether it would apply to section 28.[208] It was not until three days later that Trudeau Senior clarified that the notwithstanding clause was intended to apply to section 28. In response to another question by the leader of the opposition Joe Clark on whether the November Accord would be altered to include applicability to section 28, Trudeau Senior stated: 'I am not saying that […] I did say that the officials of the federal government did meet on Thursday and Friday, and my understanding of that meeting is that this particular section would be subject to the notwithstanding clause'.[209] Trudeau Senior also implied that it would be up to the leaders of the opposition to lobby for the clause's removal at a later date, as a formal constitutional amendment.[210] In addition to the question period transcript, there were also changes to the *Charter* draft in the *House of Commons Journals*. Section 28 was revised to read 'Notwithstanding anything in this *Charter* except section 33'.[211] Section 33 was also changed

206 Dodek (n 38) 76.

207 Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Women's Press 1983) 90.

208 House of Commons, *Debates*, 32nd Parl, 1st Sess, 6 November, 1981, 12594–12595.

209 House of Commons, *Debates*, 32nd Parliament, 1st Session, No. 11 (9 November 1981), 12635.

210 House of Commons, *Debates*, 32nd Parl, 1st Sess, 9 November, 1981, 12634.

211 'The Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, as Altered by the 5 November 1981, First Ministers' Agreement on the Constitution', in Canada's Constitution Act 1982 and Amendments: A Document History, Ed. Anne F. Bayefsky (Toronto: McGraw-Hill Ryerson, 1989), 911.

to include a phrase that would allow legislation to operate 'notwithstanding […] section 28 of this *Charter* in its application to discrimination based on sex referred to in section 15'.[212]

There was significant mobilization against the undermining of section 28 through the notwithstanding clause.[213] The women's groups who had secured the addition of section 28 to the *Charter* viewed the application of the notwithstanding clause as 'absurd and treacherous'.[214] As they mobilised to block the entrenchment of these changes made behind closed doors in the November Accord, the women's groups faced a significant challenge. In order to have section 28 of the *Charter* removed from the purview of the notwithstanding clause, they would have to achieve the consent of all nine provinces who signed the initial agreement. The mass mobilisation of women's groups across the country succeeded in shifting public opinion against the federal government and their provinces who negotiated this weakened charter of rights.[215] The groups' public campaign was successful, and the Premiers agreed to remove section 28 from the scope of the notwithstanding clause. The final Premier to agree to the change was Saskatchewan Premier Allan Blakeney. The reasons given by the Premier for his hesitancy was a concern with section 28 being interpreted to render unconstitutional all affirmative action programs for women.[216]

Thus, the federal government and provinces ceded to the significant public pressure and agreed to amend the charter of rights. On November 24 and 26, respectively, in 1981, the House of Commons voted unanimously to remove section 28 from the notwithstanding clause applicability and reinsert section 35 on Aboriginal rights into the Constitution.[217] Subsequently,

212 ibid.

213 Kome (n 207) 90.

214 Marilou Mcphedran, Judith Erola and Loren Braul, '"28 – Helluva Lot to Lose in 27 Days": The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation' in Steve Patten and Lois Harder (eds), *Patriation and its consequences: constitution making in Canada* (University of British Columbia Press 2015).

215 Dodek (n 38) 77.

216 Roy J Romanow, *Canada ... notwithstanding: The Making of the Constitution, 1976-1982* (Carswell 1984) 213.

217 House of Commons, *Debates*, 32nd Parl, 1st Sess, 24 November 1981 (n 39) 13345; House of Commons, *Debates*, 32nd Parl, 1st Sess, 26 November, 1981, 13200.

the House of Commons voted 246 to 24 in favour of passing the package of constitutional amendments on December 2, 1981.[218]

Following this vote on the final draft of the constitutional package in early December, 1981, the House of Commons and the Senate of Canada sent a joint address to the UK Parliament. On March 29, 1982, the UK Parliament passed the *Canada Act, 1982,*[219] which expressly patriated the Canadian constitution.[220] 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 Canadian history, a set of rights and freedoms.[221] 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.[222]

2.3 A Structural Analysis of the Notwithstanding Clause

Undoubtedly, the process of gaining the necessary federal and provincial government consensus would have not been possible without political compromise on the notwithstanding clause.[223] 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 renewable period of up to five years.[224] There are five components of the notwithstanding clause in section 33.

218 House of Commons, *Debates*, 32nd Parl, 1st Sess, 2 December 1981, 13663.

219 English (n 228) 157.

220 *Canada Act 1982*, c 11 (U.K.).

221 Sharpe and Roach (n 25).

222 'The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home Its Constitution' (n 202).

223 Hogg, *Constitutional Law of Canada* (n 7) 878.

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

First, under section 33(1), the notwithstanding clause requires the invoking statute to be an express declaration. For the 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.[225] In *Ford* (1988), the SCC affirmed that the notwithstanding clause could be applied in an omnibus use—that is, applied to numerous statutes through one act.[226]

Second, under section 33(1), the notwithstanding clause can only be invoked via legislation introduced and passed in a federal, provincial, or territorial[227] 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 legislative invocation requirement ensures that the clause cannot be invoked by the executive without a full consideration and vote in the legislature.

Third, the notwithstanding clause cannot be applied retroactively. In *Ford,* the SCC held that the notwithstanding clause cannot be applied in a way that has retrospective effect. If a government wants to invoke the notwithstanding clause to apply to existing legislation, they must re-enact each statute and add a notwithstanding clause provision within the legislation.[228] Federal, provincial, and territorial legislatures cannot pass legislation that declares the notwithstanding clause affective over all legislation passed during a period of time – as was the issue in *Ford*.[229]

Fourth, the notwithstanding clause solely applies to certain rights in the *Charter*. Per section 33(1) of the *Charter*, the notwithstanding clause can operate notwithstanding sections

225 Hogg, *Constitutional Law of Canada* (n 7) 881.

226 *Ford* (n 18) [35].

227 See note 5.

228 *Ford* (n 18).

229 ibid.

2 and section 7 to 15 of the *Charter*.[230] Section 2 encapsulates the fundamental freedoms including freedom of conscience and religion, freedom of expression, freedom of peaceful assembly, and freedom of association.[231] 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.[232] The initial application of the notwithstanding clause to section 28 was removed before the *Charter* draft was finalised through a unanimous vote of the House of Commons.[233]

The drafters of the notwithstanding clause consciously decided to ensure that the notwithstanding clause could not be applied to certain other rights of the *Charter*, particularly democratic rights (section 3 to 5) that were regarded as a safeguard to the inappropriate use of the notwithstanding clause. The other *Charter* provisions that cannot be subverted by section 33 are: mobility rights (section 6), language rights (sections 16-22), minority language education rights (section 23), the enforcement provisions (section 24), multicultural heritage (section 27), guaranteed equality of men and women (section 28), and denominational school rights (section 29). For the invocation of the notwithstanding clause to be considered valid, the federal or provincial legislature must directly refer to the *Charter* right it seeks to override. In *Ford*, the SCC affirmed that the notwithstanding clause could invalidate numerous *Charter* rights concurrently.[234]

The fifth 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 notwithstanding clause all agreed to the placement of a temporal restriction. As a result, the notwithstanding clause automatically expires within five years of coming into force

230 *Canadian Charter of Rights and Freedoms* s 33(1).

231 ibid 2.

232 ibid 15.

233 House of Commons, *Debates*, 32nd Parl, 1st Sess, 24 November 1981, (n 39) 13345.

234 *Ford* (n 18) [231].

but remains perpetually renewable.[235] 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 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.[236]

2.4 A Comparative Analysis of the Notwithstanding Clause

At the time of its passing in the 1982 *Charter*, the notwithstanding clause was recognised as a 'uniquely Canadian invention'.[237] Despite the novelty of the notwithstanding clause at the international level, the concept was not new in Canada. During the Canadian rights revolution as provinces began to pass human rights codes, the legislatures sought to safeguard their own legislative supremacy. Thus, the model for the notwithstanding clause originated from the early human rights legislation in Canada. Early models of the notwithstanding clause were incorporated into the *Canadian Bill of Rights* (1960), the *Alberta Bill of Rights* (1972), the *Quebec Charter of Rights and Freedoms* (1975), the *Saskatchewan Human Rights Code* (1979), and the *Ontario Human Rights Code* (added through an amendment in 1982).

The inclusion of the notwithstanding clause in Canada's *Charter* was distinct because it was entrenched in the Constitution. At the time of its passing, section 33 was the only recognised notwithstanding clause in an entrenched Constitution around the world. Over forty years later, the *Charter's* notwithstanding clause remains a unique legal provision. The two exceptions to this are the adoption of provisions similar to the notwithstanding clause identified in Australian and Israeli legislation.[238]

235 *Canadian Charter of Rights and Freedoms* s 33(3); Hogg, *Constitutional Law of Canada* (n 7) 881.

236 Hogg, *Constitutional Law of Canada* (n 7) 881.

237 Roy and Brosseau (n 1) 2.

238 See Table 1: Comparative Uses of the Notwithstanding Clause.

First, in 2006, the Australian State of Victoria adopted a version of the notwithstanding clause in the *Charter of Human Rights and Responsibilities Act*.[239] The inclusion of a notwithstanding clause allows the Victoria legislature in 'exceptional circumstances' to declare that legislation or provision of legislation will apply even if it is incompatible with the guaranteed rights in the *Charter of Human Rights and Responsibilities Act.* Second, Israel adopted legislation including provisions similar to the notwithstanding clause. In 1994, a notwithstanding clause was included in section of the *Basic Law: Freedom of Occupation*.[240] This notwithstanding clause provides the Israel legislature with the authority to enact legislative provisions that violate the right to work under freedom of occupation. The structure of Israel's notwithstanding clause is similar to Canada's, by which it must be passed by a majority of the legislature, must expressly state the provisions it applies to, and expires after four years through a sunset clause. The most significant difference between the two notwithstanding clauses is that Israel's can only be applied to the right to work, whereas Canada's can be applied to fundamental freedoms (conscience and religion, expression, peaceful assembly and association), legal rights, and equality rights.[241] Thus, Canada's notwithstanding clause has not served as a model for constitutionalism globally, with few similar provisions in other jurisdictions, and none as broadly applicable to rights protections.[242]

239 *Charter of Human Rights and Responsibilities Act* 2006 (Victoria, Australia) s 31.

240 *Basic Law: Freedom of Occupation*, 1994 (Israel), s 8.

241 Lorraine E Weinrib, 'The Canadian Charter's Override Clause: Lessons for Israel' (2016) 49 Israel LR 67.

242 See Table 1: Comparative Uses of the Notwithstanding Clause.

SECTION TWO: POLITICAL USES AND JUDICIAL RESPONSES TO THE NOTWITHSTANDING CLAUSE

CHAPTER THREE

3. A Tool of the 'Last Resort'[243]: Political Uses of the Notwithstanding Clause from 1982-2018

In 1982, when the provincial Premiers and federal Ministers added the notwithstanding clause to the *Charter*, it was described as a safety valve for legislatures from judicial supremacy that would be rarely used except to 'correct absurd situations'.[244] In a House of Commons speech introducing the amended draft of the *Charter* following the November Accord, Justice Minister Jean Chrétien encouraged rare political use of section 33 by stating:

> 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.[245]

Through Chrétien and other Canadian politicians, the drafters of the *Charter* continuously re-affirmed this intended rare notwithstanding clause practice. Trudeau Senior expressed this by stating:

> I don't fear the notwithstanding clause very much. It can be abused as anything can, but the history of the Canadian Bill of Rights Diefenbaker had adopted in 1960, it has a notwithstanding clause and it hasn't caused any great scandal. So I don't think the notwithstanding clause deters very significantly from the excellence of the Charter.[246]

Premier Richard Hatfield of New Brunswick then announced on the final day of the *Charter's* drafting:

> I am concerned about the fact that there are provisions for opting out in important areas. I want to give you an undertaking that I will do everything possible to urge the

243 The three drafters of the notwithstanding clause, Jean Chrétein, Roy Romanow, and Roy McMurtry, released a statement in 2018 in response to the Ontario Premier Doug Ford's invocation of the notwithstanding clause. In their statement they stated: 'The clause was designed to be invoked by legislatures in exceptional situations, and only as a last resort after careful consideration'. 'Chretien, Romanow and McMurtry Attack Ford's Use of the notwithstanding Clause' *Macleans* (14 September 2018) https://www.macleans.ca/politics/ottawa/chretien-romanow-and-mcmurtry-attack-fords-use-of-the-notwithstanding-clause/.

244 Roy and Brosseau (n 1) 5.

245 House of Commons, *Debates*, 20 November 1981, (n 10), 13042–13043.

246 Transcript of an Interview with Then Prime Minister Trudeau by Jack Webster, CHAN-TV, Vancouver, 24 November 1981, 5.

> Legislature of New Brunswick not to use that opportunity, consistent with my firm view that if we are going to have rights, they must be shared by all Canadians, regardless of where they live.[247]

Roy McMurty, Ontario Minister of Justice and one of the original drafters of the Kitchen Accord, also shared his expectation that the notwithstanding would be infrequently used because of the political accountability safeguards:

> The fact is that the clause does provide a form of balancing mechanism between the legislators and the courts in the unlikely event of a decision of the courts that is clearly contrary to the public interest. On the other hand, political accountability is the best safeguard against any improper use of the "override clause" by any parliament in the future.[248]

Finally, Thomas S. Axworthy, a key public servant during the constitutional negotiations, stated:

> [T]he non-obstante clause will not be employed lightly; the 1960 Federal Bill of Rights had a similar override provision and it was only employed once in two decades (in 1970 with the Public Order Temporary Measures Act), and the provinces have shown a similar disinclination to use the override provisions contained in their provincial human rights legislation.[249]

My next two chapters have two goals. First, I seek to establish a comprehensive account of the invocations of the notwithstanding clause since 1982. I provide a comprehensive and updated record of all the tabled pieces of legislation that have included a notwithstanding clause. Although there have been several attempts by other scholars to provide a historical account of the notwithstanding clause's political uses, they are now either out of date or limited in scope. Chapter 3 catalogues the political uses of the notwithstanding clause from 1982 to 2018, while chapter 4 catalogues the political uses from 2018 to 2022. Second, I seek to contrast the two periods of notwithstanding clause political use (1982 to 2018 and 2018 to 2022) and determine whether there has been a fundamental shift in the political uses of the

247 Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, 114.

248 Roy McMurtry, 'The Search for a Constitutional Accord - a Personal Memoir. (Canada)' (1983) 8 Queen's LJ 28, 65.

249 Thomas S Axworthy, 'Colliding Visions: The Debate over the Charter of Rights and Freedoms 1980–81' in Joseph Weiler and Robin M Elliot (eds), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Carswell 1986) 24.

notwithstanding clause since 2018. Both the development of an updated record and an analysis of the potential shift in political use of the notwithstanding clause will act as an important foundation for my upcoming analysis of judicial responses to the notwithstanding clause.

3.1 Establishing a Catalogue of Notwithstanding Clause Political Uses

There is no consolidated and up-to-date list of all the uses of the notwithstanding clause. Although the notwithstanding clause has been a fascination of Canadian and international scholars, many of the authors who have written on section 33 include no substantive archive of all its uses. Of particular concern is that there are inconsistencies within the notwithstanding clause literature on the number of times section 33 has been invoked.

Take for example the 2013 textbook on Constitutional Law written by Monahan and Shaw.[250] In their textbook, the authors recognise only five of the thirteen notwithstanding clause invocations that had occurred up to that point.[251] While asserting that notwithstanding clause use has been rare, the authors failed to mention its inclusion in 1982 Yukon legislation, as well as the majority of its Quebec invocations. Another notwithstanding clause scholar, Reid, bases his proposal of a 'democratic override' on an incomplete account of the notwithstanding invocations until the year of publication.[252] Although Reid recognised the 1986 Saskatchewan invocation, the 1982 Quebec omnibus invocation, and the 1988 invocation in response to *Ford*, he failed to mention nine other notwithstanding clause acts passed before 1996.[253]

Despite these inconsistencies in the literature, there are two existing catalogues of the notwithstanding clause's political uses. First, Kahana in 2001 identifies sixteen invocations of

250 Monahan and Shaw (n 50).

251 ibid 447–450.

252 Scott Reid, 'Penumbras for the People: Placing Judicial Supremacy under Popular Control' in Anthony A Peacock (ed), *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Oxford University Press Canada 1996) 186.

253 ibid 201.

the notwithstanding clause.[254] The author provides tables that divide the uses of the notwithstanding clause into six categories: (1) Quebec pension plans; (2) Quebec education; (3) Quebec agriculture operations and French language; (4) Yukon; (5) Saskatchewan; and (6) Alberta.[255] Kahana's catalogue of notwithstanding clause uses also includes a documentation of the renewals of the notwithstanding clause.[256] Notably, Kahana does not distinguish between the effective and ineffective invocations of the notwithstanding clause. Rather, he identifies all pieces of legislation in which the notwithstanding clause was included at the point of tabling, categorizing the section 33 uses by region and theme, rather than ultimate effectiveness.[257]

The second catalogue of notwithstanding clause uses is written by French-Canadian legal scholars Rousseau and Côté.[258] In their 2017 catalogue of notwithstanding clause uses, these authors focus solely on the province of Quebec. The authors assert that they are providing a Quebec-only catalogue because they argue that there is a distinct Quebec notwithstanding clause practice that has thus far been overlooked by English scholars.[259] Through the Rousseau and Côté catalogue, eighteen invocations of the notwithstanding clause were identified between 1975 and 2014. These eighteen invocations include renewals of original legislation that used the notwithstanding clause.[260] While the Kahana catalogue splits up the invocations by jurisdiction and then by theme, the Rousseau and Côté catalogue engages in a different thematic evaluation of justification categories. The three justification categories measured are: State imperative references[261]; social objectives[262] (split between situational issues and social

254 Kahana (n 12).

255 ibid 260–267.

256 ibid.

257 ibid.

258 Rousseau and Côté (n 12).

259 ibid 351.

260 ibid 379.

261 State imperatives refers to the 'imperative need for the State to properly function unimpeded as a governing entity in an executive way'. See ibid 380.

262 The category of social objectives refers to 'cases where the notwithstanding clause was used not only to ensure the pragmatic functioning of the State apparatus, but also to secure that the specific policy objectives conveyed by the purported legislation covered by the

progress); and identity issues references[263] (split between individual identity and collective identity).[264] Rousseau and Côté's contribution to the literature on the notwithstanding clause is significant, particularly because it is an analysis focused exclusively on Quebec. Their analysis of a distinct Quebec practice resulted in the creation of the most detailed catalogue of uses of the *Charter's* notwithstanding clause by Quebec seen in the academic literature.

While the two catalogues by Kahana and Rousseau and Côté comprise an important foundation on the history of the notwithstanding clause, they have shortcomings that I seek to address through my updated catalogue. One shortcoming is that Kahana's catalogue of notwithstanding clause uses across Canada does not extend beyond 2000.[265] Although Rousseau and Côté's catalogue is more recent and extends to 2014, it is limited in geographic scope by only focusing on the Quebec uses of the notwithstanding clause.[266] Thus, my account of the political use of the notwithstanding clause will extend from 1982 to 2022 and include section 33 uses from all Canadian provinces and territories.[267]

Through my doctrinal analysis of the political uses of the notwithstanding clause from 1982 to 2022, I have identified a total of twenty-five pieces of legislation that included the notwithstanding clause at the point of tabling in the legislature (see Figures 1-3). The federal government has never tabled legislation that invokes the notwithstanding clause. The provincial and territorial jurisdictions that have thus far included the notwithstanding clause in

clause would not be halted by judicial scrutiny under a charter of rights'. This category is split into two sub-categories. First, situational issues refers to 'a discrete situation targeting a specific and restricted issue involving a limited category of persons or activities which, as a matter of scale, does not aim to affect the whole society or a significant part of it at once, the whole with a more technical and logistical perspective for a specific problem resolution'. Second, social progress issues refers to 'cases where the protected act came with a strong policy-driven intent to steer global social changes that would target the entire Quebec society or a significant part of it, often with a perspective of attaining large-scale social justice'. See ibid 382.

263 The identity issues category refers to 'the relevant identity characteristics referred to by the National Assembly when employing the notwithstanding clause were Quebec French language and Catholic heritage'. This category is divided between individual identity and collective identity justifications. See ibid 394.

264 ibid 376–379.

265 Kahana (n 12).

266 Rousseau and Côté (n 12) 423–431.

267 The federal government has never tabled legislation including the notwithstanding clause.

tabled legislation are the Yukon, Alberta, Saskatchewan, Ontario, Quebec, and New Brunswick. Of this list, the only governments who have successfully passed effective notwithstanding clause legislation are Quebec and Ontario.

I have further sub-divided the twenty-five total pieces of legislation that include the notwithstanding clause into three categories: promulgated and effective; promulgated and infective; and non-promulgated. The first category encompasses the notwithstanding clauses acts that were promulgated and effective. This category includes any pieces of legislation that came into force where the notwithstanding clause was not later deemed *ultra vires* or unnecessary (see Table 3). This category of eighteen successful notwithstanding clause invocations compromises of two Ontario and sixteen Quebec uses of section 33.

The second category comprises of notwithstanding clause acts that were promulgated but ineffective (see Table 4). In this category there are two notwithstanding clause acts passed by Saskatchewan and Alberta respectively. In Saskatchewan, the notwithstanding clause was included in 1986 back-to-work legislation following a loss at the Saskatchewan Court of Appeal.[268] Ultimately, the SCC found the back-to-work legislation to be constitutional and the notwithstanding clause invocation was rendered unnecessary.[269] In Alberta, the notwithstanding clause was invoked in legislation that sought to re-define the definition of marriage in 2000.[270] At the time of its passing, and then later re-affirmed in a 2004 SCC reference case, the legislation was *ultra vires*.[271]

The third and final category includes non-promulgated notwithstanding clause bills. There are five pieces of legislation in this category, each from a different jurisdiction (see Table 5). Although all the bills in this category included the notwithstanding clause at the first reading

268 *Retail, Wholesale and Department Store Union, Local 544 v Saskatchewan,* 1985 19 DLR (4th) 609, [1985] 5 WWR 97 (SKCA).

269 *RWDSU v Saskatchewan,* [1987] 1 SCR 460, 38 DLR (4th) 277 *[RWDSU]*.

270 *Marriage Amendment Act,* RSA 2000, c 3 (Alberta).

271 *Reference re Same-sex Marriage,* 2004 SCC 79 [*Same-Sex Marriage Reference*].

stage, none ever came into force. Within this category are also two bills that received royal assent but never came into force.

In addition to my catalogue, I conducted additional analyses on the type of rights limitation (targeted or broad), timing of the application (pre-emptive or responsive), thematic purpose, and renewals. Beginning with the type of rights limitation, this category is divided between broad and targeted invocations. Broad invocation refers to an invocation that shields the legislation from all applicable sections of the *Charter*. Targeted invocation refers to the use of the notwithstanding clause in a targeted manner based on the specific clauses they perceive their legislation to violate. In Table 7, I identify sixteen targeted applications of the notwithstanding clause compared to nine broad applications. The analysis of this category reveals that there are significantly more targeted applications of the notwithstanding clause than there are broad.

The next category of analysis is the timing of the notwithstanding clause invocation and whether it was applied pre-emptively or in response to a court decision. The results of this analysis identify that the notwithstanding clause has been invoked nineteen times pre-emptively. This is compared with the responsive invocations, which totalled five. An analysis of the responsive notwithstanding clause invocations reveals that only one responded to a SCC decision, while the others were invoked in response to a lower court decision while the case was pending further appeals. In this table, I also examined the thematic purpose of the invocation. This analysis identified nine purposes of notwithstanding clause invocation based on the political practice since 1982 (see Table 7).

The final analysis I conducted is a documentation of the renewals of the notwithstanding clause. Under section 33(5) of the *Charter*, the notwithstanding clause must be renewed every five years. Although many scholars fail to mention the existence of notwithstanding clause renewals, it has occurred multiple times since 1982. There have been

ten pieces of legislation with renewed notwithstanding clause invocations, often renewed multiple times (See Table 2).

3.2 A Contextual Examination of Section 33's Political Uses 1982 to 2018

An empirical examination of the political use of the notwithstanding clause alone cannot provide a complete understanding of the application of the rare use practice. To fully comprehend the political uses of the notwithstanding clause I will engage in a contextual analysis of all twenty-four identified notwithstanding clause uses. The rest of this chapter conducts a doctrinal analysis of the political uses of the notwithstanding clause between 1982 and 2018. This analysis will be contrasted in chapter 4 with the political uses of the notwithstanding clause between 2018 and 2022.

3.2.1 Quebec Political Uses of the Notwithstanding Clause Between 1982 and 2018

Immediately following the adoption of the *Charter*, Quebec passed the first legislation invoking the notwithstanding clause. Quebec protested the forced imposition of the *Charter* on their province by passing *An Act Respecting the Constitution Act, 1982* on June 23, 1982.[272] The notwithstanding clause was used in an omnibus manner, applying to every statute ever passed by the Quebec National Assembly and immunising them from sections 2 and 7 to 15 of the *Charter*. The blanket application was done by re-enacting all past Quebec statutes adopted before April 17, 1982, the day of the *Charter* enactment, and adding in a notwithstanding clause.[273] The legislation also retrospectively applied the notwithstanding clause to any legislation passed by the Quebec government from April 17 to June 23, 1982.[274] In addition to *An Act Respecting the Constitution Act,* the National Assembly of Quebec automatically included the notwithstanding clause in all new pieces of legislation after June 23, 1982.[275]

272 *An Act Respecting the Constitution Act, 1982*, ss 1, 2, 5–7.

273 ibid 7.

274 Ultimately this retrospective application of the notwithstanding clause in section 7 would be deemed unconstitutional by the SCC in *Ford* (1988). See *Ford* (n 18).

275 Hogg, *Constitutional Law of Canada* (n 7) 879.

The practice of routinely enacting the notwithstanding clause ended on December 2, 1985, with the election of a new Liberal government.[276] This newly elected government also allowed the use of the notwithstanding clause imposed by *An Act Respecting the Constitution Act, 1982* to expire in 1987.[277] Despite ending the omnibus application of the notwithstanding clause, the Quebec government continued to use the notwithstanding clause often.

One of the most controversial applications of the notwithstanding clause by Quebec was its use in the response to the SCC decision on the constitutionality *An Act to Amend the Charter of the French Language, 1976* (this legislation is famously known as Bill 101).[278] Bill 101 was a controversial statute passed by the previous Parti Québécois government in 1976.[279] This legislation was considered controversial because it enacted sweeping language reforms across all sectors of Quebec society.[280] Most relevant to the notwithstanding clause is the inclusion of provisions prohibiting the use of English on outside commercial signs.[281]

The use of the notwithstanding clause in Bill 101 was challenged based on its constitutionality in *Ford v Quebec*. In 1988, the SCC in *Ford* found the Bill 101 provisions requiring French-only commercial signs to be an unjustified violation of freedom of expression rights under the *Charter*.[282] The SCC further determined that both the notwithstanding clause that had been applied to the legislation in an omnibus manner through *An Act Respecting the Constitution Act, 1982* and the notwithstanding clause inserted through *An Act to Amend the*

276 ibid 839.

277 The notwithstanding clause within *An Act Respecting the Constitution Act* expired June 23, 1987. See ibid 879.

278 ibid 880.

279 Marc Chevrier, *Laws and Languages in Québec: The Principles and Means of Québec's Language Policy* (Gouvernement du Québec, Ministère des relations internationales 1997) 4.

280 Edward McWhinney, *Quebec and the Constitution 1960-1978* (University of Toronto Press 1979) 70–71.

281 *Charter of the French Language*, RSQ 1976, CQLR c C-11 (Quebec) ss 58, 69.

282 *Ford* (n 18).

Charter of the French Language (1983)[283] had expired and could not shield the legislation from *Charter* scrutiny.[284]

Following *Ford*, the re-elected Premier Robert Bourassa of the Quebec Liberal Party responded immediately by tabling the notwithstanding clause in Bill 178, *An Act to Amend the Charter of the French Language*, on December 21, 1988. This legislation was passed less than a week following the *Ford* decision and Bourassa's decision to invoke the notwithstanding clause was made exclusively at the executive level. There was no debate raised on the invocation in the legislature.[285]

At the time of Bill 178's passing, Bourassa's invocation of the notwithstanding clause was criticized for being an unnecessary limitation of rights, particularly given the parameters set by the SCC.[286] In *Ford*, the SCC held that it would be constitutionally permissible for Quebec to require that French be more prominent on commercial signs, so long as English was also be present.[287] Rather than seeking to legislate the prominence of French on bilingual commercial signs, Bill 178 mandated French-only outdoor commercial signs.[288] Although Bourassa sought to justify the suspension of rights as a means to secure 'social peace',[289] it was regarded by many critics as an unnecessary restriction of fundamental freedoms.[290]

Despite this initial controversial invocation, the Bourassa government allowed the Bill 178 notwithstanding clause invoked to expire in 1993. Instead, his government passed new

283 *An Act to Amend the Charter of the French Language*, RSQ 1988, c 54, (Quebec).

284 *Ford* (n 18) 734.

285 It is important to note that several Cabinet Minister's at the time resigned from their positions in protest regarding the invocation of the notwithstanding clause in response to *Ford*. Robert Yalden, 'Liberalism and Language in Quebec: Bill 101, the Courts, and Bill 178' (1989) 47 UT Fac LR 973.

286 ibid 973–974.

287 *Ford* (n 18).

288 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3rd ed., University of Toronto Press 2004) 145.

289 Yalden (n 285) 993–994.

290 ibid 973–974.

legislation requiring that the French language on commercial signs show 'marked predominance' in comparison to the English language.[291]

Although the Quebec 1982 omnibus use and the 1988 *Ford* response are the best-known uses of the notwithstanding clause in the province, they are not the only occasions Quebec has used this unique constitutional tool. Between 1982 and 2018, Quebec enacted the notwithstanding clause in another eleven pieces of legislation, through seven statutes.[292] These other invocations, all of which were promulgated and effective, can be broadly divided into three categories: pension plans; education; and miscellaneous.

First, between 1982 and 2018 the Quebec government invoked the notwithstanding clause in five acts related to pensions. Four of those invocations were enacted through *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic Sectors, 1986*.[293] The overarching purpose of these multiple invocations was to protect pension plan structures that pre-existed the *Charter*. The differential pension plan structures were designed to safeguard the rights of teachers who were formerly secularized clerics, who did not previously have access to pension plans. The acts created lower pension eligibility requirements for female employees than males to access pension benefits and thus, required protections from challenges under the equality clause of the *Charter*.[294]

First, *An Act Respecting the Civil Service Superannuation Plan, 1986,* included the notwithstanding clause at section 114.1.[295] The government of Quebec established benefits for male civil servants who were sixty-two after a minimum of ten years of service. Deferred

291 *An Act to Amend the Charter of French Language,* RSQ 1993, c. 40.

292 See Table 3: Promulgated and Effective Notwithstanding Clause Legislation.

293 *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic,* RSQ 1986, c 44 (Quebec).

294 Rousseau and Côté (n 12) 391.

295 *An Act Respecting the Civil Service Superannuation Plan,* RSQ 1986, c R-12 (Quebec).

benefits were also available to male civil servants at the age of sixty-five. In contrast, the minimum age for female workers is sixty, for both regular and deferred benefits.[296]

Second, *An Act Respecting Teachers Pension Plan, 1986,* included the notwithstanding clause at section 78.1.[297] The legislation established differing pension eligibility for teachers based on gender at sections 32 and 51. Male and female teachers would receive benefits at the differing ages of sixty-five and sixty respectively. Male teachers could be eligible for pension benefits after ten years of teaching and reaching the age of sixty-two. Under the same pension structure, female teaches could be eligible for ten years of service and reaching the age of fifty-eight.[298]

Third, *An Act Respecting the Government and Public Employees Retirement Plan, 1986,* included the notwithstanding clause in section 223.1.[299] The legislation was vulnerable to equality challenges for implementing the payments from the first two pension plans listed above invoking the notwithstanding clause.[300] Finally, *An Act Respecting the Pension Plan of Certain Teachers, 1986,* applied the notwithstanding clause to the whole Act.[301] Section 19 sets out a complex set of differential pension benefits. Some of these provisions include establishing male employee pension age requirements of sixty-five and female employee pension age requirements of sixty.[302] Other provisions of the Act incorporate the pension eligibility of the three other 1986 pension plan legislations.[303]

During the legislative consideration of the pension-plan related Acts, the Parliamentary Assistant of the Minister Delegate of Administration and Public Service justified the invocation

296 ibid 114.1.

297 *An Act Respecting the Teachers Pension Plan,* RSQ 1986, c R-11 (Quebec).

298 ibid 19.

299 *An Act Respecting the Government and Public Employees Retirement Plan,* RSQ 1986, c R-10 (Quebec).

300 ibid 98, 115.4.

301 *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic.*

302 ibid 19.

303 Kahana (n 12) 282.

of the notwithstanding clause by acknowledging the need to avoid the 'eventual litigation' and safeguard historical rights.[304] The pension plan structures that benefited female employees were designed to address the historical disadvantage these employees faced. In the past, the Quebec government imposed lower paying part-time work conditions on female teachers and forced them to resign if they ever married.[305]

In later years, while renewing the notwithstanding clauses, various Quebec government officials provided additional reasons for the application of the notwithstanding clause. These reasons included protecting the rights of formerly secularised teachers,[306] providing certainty and general security to former clerics,[307] and procedural simplicity.[308] During these notwithstanding clause renewals the Quebec government faced no opposition in the legislature.[309]

Besides this bulk invocation in 1986, one other act invoked the notwithstanding clause to apply to pension-related differentiation. In 2001, the notwithstanding clause was invoked in *An Act Respecting the Pension Plan of Management Personnel*, applying the rights suspension to section 15 of the *Charter*.[310] The notwithstanding clause was applied to the whole act for the differentiated pension plan structures based on gender.[311]

304 Quebec, National Assembly, *Journal Des Débats de La Commission Permanente Du Budget et de l'administration*, 33th Leg, 1st Sess, Vol 29, No 23 (16 June 1988) (Jacques Chagnon), CBA-1225 [translated by Rousseau and Côté].

305 Rousseau and Côté (n 12) 391.

306 Quebec, Assemblée Nationale, *Journal Des Débats de La Commission Permanente Du Budget et de l'administration*, 34th Leg, 1st Sess, Vol 31, No 69 (8 May 1991) (Daniel Johnson), CBA-2975.

307 Quebec, National Assembly, *Journal Des Débats de La Commission Des Institutions*, 35th Leg, 2nd Sess, Vol 35, No 21 (28 May 1996) (Paul Bégin), CI-21 [Rousseau and Côté Translation].'

308 Quebec, National Assembly, Journal Des Débats de La Commission Des Finances Publiques, 37th Leg, 1st Sess, Vol 38, No 71 (8 December 2004) (Monique Jérôme-Forget), CFP-71.

309 Quebec, National Assembly, *Journal Des Débats de La Commission Des Finances Publiques*, 41th Leg, 1st Sess, Vol 44, No 12 (5 November 2014) (Martin Coiteux), CFP-12/2.

310 *An Act Respecting the Pension Plan of Management Personnel*, RSQ 2001, c 31 (Quebec).

311 ibid 139, 148.

The second category of notwithstanding clause invocations by Quebec relates to education. Between 1986 and 1992, the notwithstanding clause was included in six acts.[312] The intended purpose of these notwithstanding clause uses was to uphold the historical education rights that had been granted to Catholic and Protestant communities in Quebec.[313] The notwithstanding clause was applied to specific institutions and appointments that were given only to certain religious denominations. To pre-empt constitutional challenges, the notwithstanding clause immunised the acts from challenges under sections 2(a) and 15 of the *Charter*.[314]

The invocations in this category began in 1986 when the notwithstanding clause was included in three existing education acts.[315] First, *An Act Respecting the Conseil Supérieur de l'Éducation* created a council to oversee aspects of Quebec education.[316] The notwithstanding clause was included under section 10 requiring a number of members to be drawn from Catholic and Protestant communities. Second, *The Education Act for Cree, Inuit and Naskapi Persons* granted special privileges to Catholic and Protestant representatives to inspect schools (s. 23) and establish school boards (s. 39).[317] The notwithstanding clause was included at section 11 to apply to additional privileges provided to religious officials. Third, *An Act Respecting the Ministère de l'Éducation* requires the Quebec Minister of Education to uphold Quebec's separate religious education scheme (s. 8) and meet standards of consultation with

312 The six education-related acts that included the notwithstanding clause: *An Act Respecting the Conseil Supérieur de l'Éducation, 1986*; *The Education Act for Cree, Inuit and Naskapi Persons, 1986*; *An Act Respecting the Ministère de l'Éducation, 1986*; *Education Act, 1988*; *An Act Respecting School Elections, 1989* and *An Act Respecting Private Education, 1992*.

313 Rousseau and Côté (n 12) 397.

314 Kahana (n 12) 262.

315 *Act to Again Amend the Education Act and the Act Respecting the Conseil supérieur de l'éducation and to Amend the Act Respecting the ministère de l'Éducation*, RSQ 1986, c 101, ss 10–12; *Education Act*, RSQ 1988, c 84, CQLR c I-131, ss 726, 727. ss 10–12; *Education Act*, RSQ 1988, c C-84 (Quebec) ss 726–727.

316 *An Act Respecting the Conseil Supérieur de l'Éducation*, RSQ 1986, c C-60 (Quebec).

317 *The Education Act for Cree, Inuit and Naskapi Persons,* RSQ 1986, c I-14 (Quebec).

Catholic and Protestant groups (s. 7).[318] Similar to the first two acts, the notwithstanding clause was included at section 12 to insulate the differentiated privileges based on religion.

The fourth act amended during this period to add the notwithstanding clause was *The Education Act, 1988*.[319] This legislation was passed on December 23, 1988, and included the notwithstanding clause to shield the special privileges given to Catholic and Protestant religious officials in section 6. The fifth act passed that included the notwithstanding clause, *An Act Respecting School Elections*, had no explicit differentiating clauses based on religion.[320] Rather, due to anticipated *Charter* challenges against the whole denominational school regime, the Quebec government applied the notwithstanding clause to the whole Act. The sixth and final education-related notwithstanding clause legislation is *An Act Respecting Private Education*.[321] This legislation required private school educational institutions to undergo the same general rules set out by the other notwithstanding clause legislation that apply to religious denominational schools.

These six education-related notwithstanding clause acts were justified under the narrative of legislative supremacy and collective interests.[322] The Quebec government made clear that they were prioritising the collective interest of the majority of Quebec society who sought to preserve the historical rights that were provided to Catholic and Protestant communities. This collective interest was positioned against the individual religious freedom rights guaranteed in the *Charter*.

The Quebec government also justified the use of the notwithstanding clause in education-related legislation by undermining the authority of the judiciary. In 1986, the

318 *An Act Respecting the Ministère de l'Éducation*, RSQ 1986, c M-15 (Quebec).

319 *Education Act.*

320 *An Act Respecting School Elections,* RSQ 1989, c E-2.3 (Quebec).

321 *An Act Respecting Private Education,* RSQ 1992, c 68 (Quebec).

322 Quebec, National Assembly, *Journal Des Débats de La Commission Permanente de l'Éducation*, 32th Leg, 5th Sess, Vol 28, No 6 (5 December 1984) (Yves Bérubé), CE-370.

Minister of Education stated that section 33 was being used to avoid 'being dragged into endless litigation' and 'rulings that could be rendered according to considerations that would neither complete nor satisfactory in our perspective'.[323] Representatives of the Quebec government asserted that they used the notwithstanding clause to reassert legislative supremacy, ensuring that their policies could not be subverted by the courts. This was evidenced by their statement, 'we do want to have faith in the courts […] but we cannot have them substitute themselves to the political power when dealing with matters of political nature'.[324] The Quebec Minister of Education two years later stated: 'this is the very purpose of the notwithstanding clause, […] to allow a positive respect of the religious and moral values of the two great religious families that shaped the soul of Quebec people'.[325]

Of the eleven pension and education notwithstanding clause acts, all but one was renewed by the Quebec government.[326] These acts represent the only renewals of the notwithstanding clause that have occurred in Canadian history. As evidenced in Table 2, of the eleven acts passed, there are four notwithstanding clause acts still in force as of 2022.[327] These four Acts, together with the 2019 *Laicity of the State Act* and the 2021 *Protecting Elections and Defending Democracy Act*, make up the six acts with active notwithstanding clauses in 2022.

323 Quebec, National Assembly, *Journal Des Débats de La Commission Permanente de l'Éducation*, 33th Leg, 1st Sess, Vol 29, No 32 (17 December 1986) (Claude Ryan), CE-1795 [Rousseau and Côté Translation].'

324 Quebec, National Assembly, *Journal Des Débats de l'Assemblée Nationale*, 34th Leg, 3rd Sess, Vol 33, No 16 (28 April 1994) (Jacques Chagnon), 576 [Rousseau and Côté Translation].

325 Quebec, National Assembly, Journal Des Débats de La Commission Permanente de l'Éducation, 33th Leg, 2nd Sess, Vol 30, No 47 (20 December 1989) (Claude Ryan), CE-2328–CE-2330 [Rousseau and Côté Translation].

326 The only pension or education-related notwithstanding clause act not renewed is *An Act Respecting Private Education*. See Table 2: Renewals of the Notwithstanding Clause Invocations.

327 The renewed and in force legislation is: *An Act Respecting the Pension Plan of Certain Teachers 1986*; *An Act Respecting the Government and Public Employees Retirement Plan, 1986*; *An Act Respecting Teachers Pension Plan, 1986*; *An Act Respecting the Civil Service Superannuation, 1986.*

The third and final category of Quebec notwithstanding clause uses is best understood as miscellaneous. Within this category, along with the 1982 omnibus and 1988 Bill 178[328] invocations, is *An Act to Amend the Act to Promote the Development of Agriculture Operations*. The *Agriculture Operations Act* sought to revitalize the agriculture sector by offering targeted subsidies to farmers aged eighteen to forty.[329] The notwithstanding clause was included in section 16 to immunise the legislation from challenges under section 15 of the *Charter* because of concerns around age discrimination. The 1986 Quebec Minister of Agriculture outlined the government's reasoning for invoking the notwithstanding clause:

> The absolute character of the Canadian Charter […] fails to provide the necessary flexibility […] for beneficial population-oriented policies to function […] a wide use of the notwithstanding clause in agricultural laws is thus necessary for Quebec to retain its jurisdiction in the matter […] the government's objective, beyond party lines, is to enact a policy designed to help young farmers, and an age-based discrimination is to help young farmers, and an age-based discrimination is necessary in that perspective.[330]

Ultimately, this act was replaced less than a year later.[331] The replacement act did not include the notwithstanding clause.

3.2.2 The Yukon Political Uses of the Notwithstanding Clause Between 1982 and 2022

In the Yukon, the notwithstanding clause in the *Land Planning and Development Act* was the second ever to be tabled in Canadian history.[332] First tabled on November 29, 1982, the *Land Planning and Development Act* was government-sponsored legislation that sought to fulfil a governing Yukon Party campaign promise of land for Yukoners.[333] The legislation would achieve the fulfilment of this promise by setting up an eight member Yukoner-led Land

328 *An Act to Amend the Charter of the French Language.*

329 *An Act to Amend the Act to Promote the Development of Agriculture Operations,* RSQ 1986, c 54 (Quebec).

330 Quebec, National Assembly, *Journal Des Débats de La Commission Permanente de l'Agriculture, Des Pêcheries et de l'Alimentation,* 33th Leg, 1st Sess, Vol 29, No 11 (12 June 1986) (Michel Pagé), CAPA-489-490 [Rousseau and Côté Translation].

331 *Act Respecting Farm Financing,* RSQ 1987, c 86 (Quebec).

332 *The Land Planning and Development Act*, RSY 1982, c 22 (Yukon) [*Land Planning and Development Act*].

333 Yukon, The Yukon Legislative Assembly, *Official Reports of Debates (Hansard)*, 25th Leg, 2nd Sess, (29 Nov 1982) (Hon. Donald Taylor) [Yukon Debates 29 Nov 1982]; Yukon, The Yukon Legislative Assembly, *Official Reports of Debates (Hansard)*, 25th Leg, 2nd Sess, (1 Dec 1982) (Hon. Donald Taylor), 342 [Yukon Debates 1 December 1982].

Planning Board made up of Yukon public servants, Yukon residents, federal government public servants, and two members nominated by the Council for Yukon Indians.[334] Per the legislation, the role of the Land Planning Board was to 'make recommendations to the Executive Council Member and the federal Minister on matters respecting land use planning in Yukon'.[335]

Despite the seemingly simple intent of the *Land Planning and Development Act*, it was heavily criticised by the opposition parties and the federal government. The territorial MP from the New Democrat Party, Mr. Dave Porter, was among the most critical of the proposed legislation, referring to the government's move as 'childish tactics', 'absolutely goofy', and 'political suicide'.[336] The criticisms from Mr. Porter, echoed by other elected representatives, centred on the lack of jurisdiction and the inevitable damage the legislation would cause to the territory's relationship with the federal government.

It must be noted that the relationship between the federal government and the territories is starkly different than that of the provinces. While provinces derive their authority from the Constitution, the territories fall under the control of the federal government and have their authority delegated to them.[337] The federal government retained authority over territorial land until the early 2000s.[338] The *Land Planning and Development Act* was passed in 1982, over twenty years before the Yukon gained control over their own land. Therefore, the creation of a land planning board to make decisions and recommendations around Yukon land was criticised by the opposition for being *ultra vires* the authority delegated to the territorial government at the time.[339] The federal Minister of Indian Affairs and Northern Development, John Munro,

334 *Land Planning and Development Act* (n 332) s 4(1).

335 ibid 13.

336 Yukon Debates 29 Nov 1982, (n 333) 340.

337 Catherine Graham and Eli Yarhi, 'Territorial Government in Canada', *The Canadian Encyclopedia* (November 30, 2020) https://www.thecanadianencyclopedia.ca/en/article/territorial-government.

338 ibid.

339 It must be noted that the territorial government did have sole authority over a small amount of land in the territory (approximately 362 square-miles). Thus, the Land Planning Board would be able to advise on this land, while the rest of the Yukon land (approximately 180,000 square-miles) remained fully under the control of the federal government. See [Yukon Debates 1 December 1982] (n 333) 342.

made a statement following the introduction of the legislation making clear that the federal government had no obligation nor intention to collaborate with the territories through the process being arranged.[340]

The legislation invoked the notwithstanding clause in section 39 to immunise provisions 'relating to the nomination of persons to be members of the Board or Committees by the Council for Yukon Indians' from legal challenges under the *Canadian Bill of Rights* and section 15 of the *Charter*.[341] During a Committee of the Whole proceeding, the sponsoring Minister Mr. Tracey confirmed the inclusion of the notwithstanding clause by stating:

> If we did not have this section in here, anyone could take the government to court and shoot this bill down because it is racially discriminating; it does allow for a specific group of people, the native people of the territory, to have a guaranteed appointment to a board which we do not guarantee to anyone else. In order to be able to do that, we had to put this section in here, saying "notwithstanding" the Bill of Rights or the Canada Act.[342]

The inclusion of the notwithstanding clause went unchallenged by the opposition members. However, the other elected members of the territorial government sought to highlight its inclusion and ensure that such a significant decision to suspend constitutional rights was adequately considered by the legislature. This is best reflected in the statement made by New Democrat Mr. Roger Kimmerly:

> While I am a member of the legislature, I cannot let a clause like this go by without some comment. It is an extremely complex and serious matter in my view […] I do wish to make some comments about the general philosophy or the general prospect of this kind of clause because it is fundamental to our concept of freedom and democracy in this country […] The issue of aboriginal rights puts a new dimension on this concept. The issue of affirmative action programs also put a new dimension on the concept, although aboriginal rights for the purposes of Yukon and this bill are, in my view, far more important.[343]

340 The statement made by Minister John Munro was read into the *Hansard* by the opposition member Mr. Porter. See ibid 340–341.

341 *Land Planning and Development Act* (n 332) s 39.

342 Yukon, The Yukon Legislative Assembly, *Official Reports of Debates (Hansard)*, 25th Leg, 2nd Sess, (2 Dec 1982) (Hon. Donald Taylor) 363.

343 ibid 362–363.

The *Land Development and Planning Act* was passed and received royal assent on December 9, 1982.[344] Per section 41, the legislation would come into force on a day to be fixed by the Commissioner in Executive Council.[345] Ultimately, the legislation never came into force and the notwithstanding clause was never promulgated.[346] Although there is little documentation on the reasons why the legislation did not come into force, it is possible that the lack of jurisdiction and federal government's negative response could have impacted the decision.

3.2.3 Saskatchewan Political Uses of the Notwithstanding Clause Between 1982 and 2018

The next province which sought to invoke the notwithstanding clause outside of Quebec was Saskatchewan in 1983. Saskatchewan included the notwithstanding clause in back-to-work legislation following a court loss. In 1983, following the failure to negotiate and finalise contract discussions with the major dairy unions, the unions arranged a rotating strike.[347] Before the rotational strike began, the provincial government responded by passing the *Dairy Workers (Maintenance of Operations) Act*.[348] This legislation temporarily barred the dairy workers from proceeding with their strike and was challenged by the dairy unions.[349]

The dairy union challenge rested on section 2(d) of the *Charter* that guaranteed freedom of association. The union argued for a broader interpretation of this section that included the right to bargain and strike.[350] This constitutional challenge occurred less than two years following the passing of the *Charter* and thus raised key issues that required the courts to clarify

344 Yukon, The Yukon Legislative Assembly, *Official Reports of Debates (Hansard)*, 25th Leg, 2nd Sess, (9 Dec 1982) (Hon. Donald Taylor) 446.

345 *The Land Planning and Development Act* (n 332) s 41.

346 For a list of legislation passed by the Yukon government before 2002 that did not come into force, see Yukon Legislature, 'Non-Consolidated Not in Force Acts (Pre- RSY 2002)' (*Government of Yukon*) https://legislation.yukon.ca/ncnf.html.

347 *RWDSU* (n 269) 466–467.

348 *Dairy Workers (Maintenance of Operations) Act*, RSS 1983-84, c D-1.1.

349 *RWDSU* (n 269) 466–467.

350 ibid 475.

the scope of labour rights in the *Charter*. Although the Saskatchewan Queen's Court Bench (SKQB) dismissed the union claim, the Saskatchewan Court of Appeal (SKCA) upheld the challenge and declared the legislation unconstitutional.[351]

In addition to appealing this SKCA decision to the SCC, the Saskatchewan government passed new legislation invoking the notwithstanding clause less than six months following the SKCA loss.[352] This legislation, titled *An Act to Provide for Settlement of a Certain Labour-Management dispute between the Government of Saskatchewan Government Employees' Union (SGEU Dispute Settlement Act),*[353] was introduced and passed in a special condensed two-day sitting.[354]

The notwithstanding clause was included under section 9. This section stated that the whole act would operate notwithstanding section 2(d) of the *Charter* and the *Saskatchewan Human Rights Code*.[355] The reasoning to justify the notwithstanding clause invocation was shared by Minister of Justice Sid Dutchak:

> There is great uncertainty as to the constitutionality of any attempt to end strikes by back-to-work legislation in this province, Mr. Speaker. The appeal courts in Canada have taken conflicting positions as to whether the guarantee of freedom of association in the charter protects the right to strike. The issue is presently under the consideration of the Supreme Court of Canada. It is our belief that whatever the interpretation is given to freedom of association should not stand in the way of effective operation of this particular Bill. […] Publicly accountable legislators must be the final arbiters of matters of essential economic and social policy. This is entirely consistent with our centuries-old constitutional and legal history, and I submit that our new charter should not be read outside of this contextual framework. […] I wish to emphasize that we are using section 33 in a careful, limited, and responsible fashion. The application of section 33 in the Bill applies only to the extent necessary to ensure the effective operation of this Act.[356]

351 ibid 468.

352 The SKCA decision was released on June 3, 1985 and the notwithstanding clause response legislation was passed January 31, 1986.

353 *An Act to Provide for Settlement of a Certain Labour-Management Dispute Between the Government of Saskatchewan and the Saskatchewan Governments' Employees Union*, RSS 1984-85-86, c 111 (Saskatchewan).

354 The two-day sitting was special because provincial members of Parliament were required to return of the legislature and participate in the sittings that focused only on this bill during a break period.

355 *SGEU Dispute Settlement Act*, s 9.

356 Saskatchewan, Legislative Assembly of Saskatchewan, *Official Reports of Debates (Hansard)*, 20th Leg, 5th Sess, (31 Jan 1986). 4341–4342.

Thus, the government argued that the invocation of the notwithstanding clause was a necessary step to protect the interests of the majority from the disruptive few union leaders.[357]

Members of the opposition were strongly opposed to the legislation and the inaugural invocation of the notwithstanding clause in Saskatchewan. Although the opposition representatives were not wholly opposed to the notwithstanding clause, they viewed its invocation in back-to-work legislation inappropriate. The opposition representative Mr. Ned Shillington expressed this view during the second reading debate:

> Section 33 was a controversial section when it was inserted. Those who argue in favour of its insertion stated there would be some social issues which wouldn't fit within the four corners of the charter of rights. One might suggest, as an example, the settlement of Indian land claims. It was that social policy which was sought to be accommodated by section 33 […] The worst fears and the worst criticisms of section 33 have turned out to come true with this legislation. That's exactly what is happening. Section 33 was never contemplated as a means of settling a strike of government workers. That, indeed, was among the most potent criticisms which were levied against its inclusion. And that's what's been done today. Mr. Speaker, this government has violated the public's sense of decency and the freedoms of this country, and they're admitted that they know they are doing it when they include section 33.[358]

The opposition regarded the notwithstanding clause as a tool to be used in rare situations to protect minority group rights. They opposed the use of the notwithstanding clause to protect the interests of the majority at the expense of the rights of minority groups, such as union leaders and dairy workers. Despite these concerns raised by the opposition, the Saskatchewan government went ahead with promulgating the *SGEU Dispute Settlement Act* in less than two days. The legislation received royal assent and came into force the day after it was introduced in the legislature on January 31, 1986.[359]

The use of the notwithstanding clause was later rendered unnecessary by the SCC in 1987. The SCC delivered a split decision that allowed the government appeal.[360] The SCC in

357 ibid 4342.

358 ibid 4345.

359 ibid 4389.

360 The majority of the judges found that the Saskatchewan back-to-work legislation was constitutional per the *Charter*, however, the majority judges were split as to their reasoning. Justice Wilson was the sole dissenter. See *RWDSU* (n 269) 461–462.

RWDSU v. Saskatchewan ruled that the back to work legislation did not violate the *Charter* and thus the application of the notwithstanding clause was not required.[361]

3.2.4 Alberta Political Uses of the Notwithstanding Clause Between 1982 and 2018

The only other prairie province that attempted to invoke the notwithstanding clause is Alberta. In Alberta, the provincial legislature has tabled legislation invoking the notwithstanding clause twice. First, in 1998, the Alberta government introduced the *Institutional Confinement and Sexual Sterilization Act* (Bill 26).[362] The legislation was tabled in response to the constitutional challenges brought forward by individuals living with disabilities who were subjected to forced sterilisation. The legislation sought to invoke the notwithstanding clause and apply it to sections 2 and 7 to 15 *Charter*

In 1996, Leilani Muir successfully sued the Alberta government for almost one million dollars to compensate for her forced sterilization while institutionalized by the government as a child.[363] Predicting class-action lawsuits that would cost the province upwards $760 million dollars, Alberta Premier Ralph Klein sought to mitigate the potential financial loss to the province through legislation.[364] In 1998, his government introduced Bill 26 with the goal of limiting compensation to sterilisation victims to $150,000.[365] While introducing the legislation, Alberta Minister of Justice Mr. Jon Havelock stated:

> This bill balances the interests of those who are bringing claims against the government for wrongful sterilization or wrongful confinement in provincial institutions and the interests of all Albertans by removing obstacles to compensation and by establishing compensation principles which will assist in resolving claims in a fair and consistent manner.[366]

361 Roy and Brosseau (n 1) 7.

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

363 '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.

364 *Institutional Confinement and Sexual Sterilization Act* (n 362).

365 'Alberta Backs Down on Sterilization Compensation' (n 363).

366 Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 2nd Sess, (10 Mar 1998) 775.

Less than a day later, Bill 26 was withdrawn for consideration after extensive public criticism. In announcing the withdrawal of the legislation, the Justice Minister stated:

> Our intent in introducing that bill was to find a balanced approach between the interests of those who were sexually sterilized and the interests of all other Albertans today. Our intent was to show compassion by providing those who suffered with a fair and reasonable way to obtain fair and reasonable compensation without having to spend years and considerable resources in taking this through the courts. That is why Bill 26 contained a provision to invoke the notwithstanding clause. Again, our intent was not to take away anyone's rights but to find a fair balance and provide our fellow Albertans with a compassionate way of obtaining fair compensation.
>
> Our government has listened to the concerns of Albertans, Mr. Speaker. We understand that Albertans want us to deal compassionately with those Albertans who suffered. We also understand that they want us to provide fair and reasonable compensation. We feel that Bill 26 addresses the issues of compassion and compensation. However, it appears to deprive the victims of another important element, and that is the element of choice.[367]

In tandem with the government's decision to withdraw the legislation, Alberta entered compensation negotiations with the 700 other victims.[368]

The second and only other attempted invocation of the notwithstanding clause in Alberta occurred two years later with the *Marriage Amendment Act, 2000*.[369] This legislation, first introduced February 23, 2000, was a private members bill. The bill was to amend the provincial definition of marriage to be exclusively heterosexual by amending the existing *Marriage Act* to add 'marriage means marriage between a man and a woman'.[370]

The *Marriage Amendment Act* was considerably short, with only five clauses. The notwithstanding clause was included in section 5 to immunise the legislation from sections 2 and 7 to 15 of the *Charter*. The inclusion of the notwithstanding clause in the *Marriage Amendment Act* was largely symbolic. In 2000, the country was undergoing a shift in recognising the equality protections to prohibit discrimination based on sexual orientation. A key site of reform in this social movement was marriage equality. By 2005, when the federal

367 Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 2nd Sess, (11 Mar 1998) 812–813.

368 'Alberta Backs Down on Sterilization Compensation' (n 363).

369 *Marriage Amendment Act*, RSA 2000, c 3 (Alberta).

370 ibid, s 4.

government legalised same-sex marriage, five provinces and one territory had ended the opposite-sex marriage requirements.[371] Alberta passed the *Marriage Amendment Act* in response to cross-country activism and strategic litigation that ultimately resulted in the legalisation of same-sex marriage in all jurisdictions in 2005.[372]

The *Marriage Amendment Act* faced a range of challenges from both elected government and opposition representatives. Based on the status of the legislation as a private members bill, it could undergo no legislative debate until the committee stage.[373] During the committee stage, government representatives who opposed marriage equality questioned its constitutionality under the division of powers. For example, the Progressive Conservative representative Mr. Rob Renner stated:

> Frankly, I don't think this bill accomplishes what it sets out to do. I think the bill is somewhat meaningless, and for that reason I have been giving a lot of thought to whether or not we should support this bill. The fact of the matter is that this is and ends up being very much a feel-good bill.[374]

In addition to concerns over jurisdiction, members from all parties were strongly opposed to the use of the notwithstanding clause to target the rights of a minority group. The Minister of Justice opposed the legislation for this reason. He shared with his caucus colleagues: 'the notwithstanding clause should be used carefully and specifically because we're dealing with the concept of individual rights. I'm a firm believer that we are all as individuals born with rights. We have all the rights that might be accorded a person'.[375] The New Democrat Leader of Opposition Dr. Raj Pannu drew on the 1998 failed attempt to invoke the notwithstanding clause:

> The fact that Bill 202 sailed through second reading in this Legislature last week shows that this government and the government caucus have learned nothing from the public uproar following the introduction of Bill 26 two years ago […] Apparently the roar of

371 *Same-Sex Marriage Reference* (n 271) [65].

372 *Civil Marriage Act*, SC 2005, c 33 (Canada).

373 Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 4th Sess, (23 Feb 2000), 2.

374 Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 4th Sess, (1 Mar 2000), 204.

375 ibid 206.

> Albertans did not help them to learn from the past as we are presented with Bill 202, the Marriage Amendment Act.[376]

Dr. Pannu went on to to discuss the broader threat that the notwithstanding clause poses to Canada's constitutional democracy:

> To use the notwithstanding clause on this issue is damaging to our democracy. Many gay and lesbian adults are in marriage-like relationships […] Beyond the usual discrimination of having to remain invisible, threats of violence, or lost jobs, they now have Bill 202 wishing to further strip them of their rights as Albertans, as Canadians, and as human beings.[377]

Despite the opposition by the Minister of Justice, members of the governing party, and opposition members, the *Marriage Amendment Act* was passed in a 32 to 15 vote.[378]

Four years after the *Marriage Amendment Act* was passed, the SCC indirectly deemed the legislation *ultra vires*.[379] In the decision *Reference Re Same-Sex Marriage, 2004* the SCC held that per section 91(26) of the *Constitution Act, 1867* the federal government had the exclusive jurisdiction over the capacity to marriage.[380] Following this reference decision by the SCC, the federal government passed the *Civil Marriage Act, 2005*, which came into force July 20, 2005. The *Marriage Amendment Act* being *ultra vires* could not stop the legalisation of same-sex marriage through federal legislation. The notwithstanding clause within the *Marriage Amendment Act* which came in force on March 23, 2000, would have expired a few months before the *Civil Marriage Act, 2005* came into force.[381]

The inclusions of the notwithstanding clause in the Alberta *Marriage Amendment Act* and the Quebec *Act Respecting the Pension Plan of Management Personnel, 2001*, represent the last invocations of the notwithstanding clause that occurred for a significant period. It was

376 ibid 204.

377 ibid 208.

378 Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 4th Sess, (15 Mar 2000) 404.

379 *Same-Sex Marriage Reference* (n 271).

380 ibid 18.

381 ibid 32.

not until 2018 that the notwithstanding clause was tabled in any new legislation.[382] Following this eighteen-year period with no new notwithstanding clause invocations, it was then tabled in six bills in four jurisdictions: Saskatchewan, Ontario, Quebec, and New Brunswick. In chapter 4, I outline the post-2018 uses of the notwithstanding clause and contrast the uses of the notwithstanding clause between the two periods of 1982 to 2018 and 2018 to 2022.

3.3 Analysing the Notwithstanding Clauses Political Uses from 1982 to 2018

Through an empirical and contextual analysis of the notwithstanding clause uses between 1982 and 2018, I identify three major trends. First, this period was dominated by Quebec using the notwithstanding clause as a tool to reject the imposition of the *Charter* and assert their distinct culture within a period of secessionist politics. Second, the rest of the Canadian federal, provincial, and territorial legislatures other than Quebec largely embraced the notwithstanding clause practice of rare use. Third, at the advent of the *Charter* jurisprudence, the notwithstanding clause was invoked by certain provinces based on uncertainty of scope of *Charter* rights yet to be litigated. I will examine each identified trend in turn.

3.3.1 The Notwithstanding Clause as a Tool Within Quebec's Secessionist Politics

From the notwithstanding clause's inception in 1982 until 1995, Quebec was dominated by secessionist politics. During this period, Quebec held two referendums on secession from Canada in 1980 and 1995 respectively, and there were two major constitutional reform attempts centred on Quebec being recognised as a distinct society.[383] Since its enactment, the notwithstanding clause was also a site where Quebec pursued secessionist policies and reinforced their status as a distinct society.

382 It must be recognised that during this 2000-2018 period, Quebec invoked the notwithstanding clause fourteen times to renew it in existing legislation. See Table 2: Renewals of the Notwithstanding Clause Invocations.

383 See literature on the Meech Lake Accord (1987) and Charlottetown Accord (1992): Dawson (n 22); Patrick J Monahan, 'Unwravelling a Seamless Web', *Meech Lake: The Inside Story* (University of Toronto Press 1991); 'Meech Lake Accord: Document', *The Canadian Encyclopedia* (2006) https://www.thecanadianencyclopedia.ca/en/article/meech-lake-accord-document accessed 29 December 2020; Marjory Lebreton, 'Mulroney and Meech' *The Globe and Mail* https://www.theglobeandmail.com/opinion/letters/mulroney-and-meech/article22403630/ accessed 2 December 2020.

First, from the outset, Quebec invoked the notwithstanding clause to pursue secessionist policies. This was most evident through the passing of *An Act Respecting the Constitution Act, 1982,* promulgated two months after the adoption of the *Charter*.[384] Through this legislation, Quebec re-enacted all their existing statutes to add the notwithstanding clause declaration. Additionally, the Quebec legislature included the notwithstanding clause declaration in every statute passed between June 23, 1982 and December 2, 1985. It is estimated that during this three-year period over 350 notwithstanding clause acts were passed.[385] During this period, Quebec utilised the notwithstanding clause as a protest tool against what they perceived to be the forced imposition of the *Charter* on their province by English Canada.[386] The notwithstanding clause was used by Quebec to continuously reinforce their rejection of the *Charter,* which they have yet sign to this day in 2022. Following the 1995 failed Quebec referendum,[387] the notwithstanding clause was only enacted once between 1995 and 2018.[388] Consequently, the reliance on the notwithstanding clause by the Quebec government lessened significantly following the end of major secessionist policies in Quebec.

Second, Quebec used the notwithstanding clause to reinforce their status as a distinct society in Canada. Even after the practice of including the notwithstanding clause in every statute ended in 1985, political leaders in Quebec continued to use the notwithstanding clause. Between 1986 and 2018, the Quebec government included the notwithstanding clause in thirteen other acts and passed multiple renewals of existing notwithstanding clause acts.[389] The

384 *An Act Respecting the Constitution Act, 1982.*

385 In 1982, Quebec passed 100 pieces of legislation after passing *An Act Respecting the Constitution Act, 1982*. The Quebec government then passed 83, 89 and 69 pieces of legislation in 1983, 1984 and 1985 respectively. See National Assembly Library, "Notice 62767 - Lois du Québec", online: https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageNotice.aspx?idn=46233.

386 For further analysis of Quebec's response to the imposition of the *Charter,* see Guy Laforest, 'The Internal Exile of Quebecers in the Canada of 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 Press 2009).

387 Dawson (n 22).

388 *An Act Respecting the Pension Plan of Management Personnel.* Notably this statement excludes any notwithstanding clause renewals that occurred between 1995 and 2018.

389 See Table 3: Promulgated and Effective Notwithstanding Clause Legislation.

Quebec notwithstanding clause invocations between 1982 and 2018 sought primarily to reinforce Quebec's status as a distinct society in the areas of language and education.

Regarding language, Quebec invoked the notwithstanding clause following *Ford* to immunise their unilingual commercial sign law from *Charter* scrutiny.[390] Quebec used the notwithstanding clause as a tool to safeguard its strict language-related legal provisions to ensure that Quebec's distinct linguistic culture was preserved in a predominantly English-speaking country. Regarding education, Quebec promulgated six notwithstanding clause acts in the area of education. Quebec has a unique relationship between religious institutions in the education sector and sought to safeguard its distinct approach within this field. The safeguarding of Quebec's distinct culture in education was achieved through applying the notwithstanding clause to education-related appointments designated only for certain religious denominations.

In sum, between 1982 and 2018, Quebec rejected the notwithstanding clause rare use practice, unlike the rest of Canada, that largely embraced it. This period, which was dominated by secessionist politics until 1995, resulted in Quebec using the notwithstanding clause as a tool to pursue secessionist policies and reinforce their status as a distinct society.

3.3.2 The Application of the Section 33 Rare Use Political Practice Outside of Quebec

Outside of Quebec, the empirical and contextual evidence points to a crystallization of a practice of rare use. To begin, between 1982 and 2018 there were only four tabled pieces of legislation that included the notwithstanding clause outside of Quebec. The only provinces outside of Quebec that successfully promulgated legislation with the notwithstanding clause were Saskatchewan[391] and Alberta.[392] The pressure of a rare use practice was present throughout the passing and consideration of these acts. For example, in Saskatchewan when

390 *An Act to Amend the Charter of the French Language.*

391 *SGEU Dispute Settlement Act.*

392 *Marriage Amendment Act*, RSA 2000, c 3 (Alberta).

defending the use of the notwithstanding clause in back-to-work legislation, Minister of Justice Sid Dutchak drew on the rare use practice to emphasize that the government was not detracting from political practice:

> Back-to-work legislation has been used many times in the past. Some jurisdictions allow no strike action whatsoever by public employees. I wish to emphasize that we are using section 33 in a careful, limited, and responsible fashion. The application of section 33 in the Bill applies only to the extent necessary to ensure the effective operation of this Act.[393]

Similarly, legislators from Alberta sought to reinforce the rare use practice when presented with notwithstanding clause legislation. In this instance, the notwithstanding clause that was proposed by a private members bill was opposed by members of his own party, including the Minister of Justice. During the consideration of this bill, the Minister of Justice reminded his colleagues of the encouraged rare use practice, stating that: 'the notwithstanding clause should be used carefully and specifically because we're dealing with the concept of individual rights'.[394]

Another example of the rare use practice in Alberta stems from the province's attempted invocation of the notwithstanding clause in 1998. In Alberta, the government withdrew their notwithstanding clause legislation from consideration less than a day after introducing it in the legislature.[395] *The Institutional Confinement and Sexual Sterilization Act*, which targeted victims of a government sterilisation program, experienced swift public backlash. The negative public response stemmed from widespread opposition to using the notwithstanding clause to suspend the rights of individuals living with disabilities. After withdrawing the legislation, the Alberta Premier admitted to the legislature that 'if the notwithstanding clause is ever contemplated, [again] indeed, there will be a tremendous amount

393 Saskatchewan, Legislative Assembly of Saskatchewan, *Official Reports of Debates (Hansard)*, 20th Leg, 5th Sess, (31 Jan 1986) (n 356) 4341–4342.

394 'Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 4th Sess, (1 Mar 2000) (n 374) 206.

395 *Institutional Confinement and Sexual Sterilization Act (n 362).*

of open and honest and public discussion [before it is invoked]'.[396] He also shared that his government would give the use of the notwithstanding provision much more consideration because 'the seriousness and the power of this particular clause became [crystal] clear'.[397]

To conclude, despite Quebec's extensive use of the notwithstanding clause between 1982 and 2018, the invocations of the notwithstanding clause in other Canadian jurisdictions remain extremely limited. During this period, in the four instances where the notwithstanding clause was included in tabled legislation in other Canadian provinces, elected representatives either promoted or challenged the legislation by drawing on arguments around rare political use of the notwithstanding clause. Furthermore, during this period of all the tabled notwithstanding clause bills outside of Quebec, none were successfully promulgated and effective. The actions of political representatives in jurisdictions outside of Quebec contributed to the crystallization of the section 33 rare use practice after the *Charter* was passed.

3.3.3 The Section 33 Rare Use Practice is Not a Constitutional Convention

I am not suggesting that the practice of rare notwithstanding clause use amounts to a constitutional convention. Per Hogg, constitutional conventions[398] are 'rules of the constitution that are not enforced by the law courts'.[399] They form part of Canada's unwritten Constitution and combined with constitutional law make up the 'total constitution of the country'.[400] The recognised Canadian constitutional conventions primarily relate to the

396 Alberta, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24th Leg, 4th Sess, (1 Mar 2000) (n 374) 206.

397 ibid.

398 See the following leading authorities on constitutional conventions Andrew Heard, *Canadian Constitutional Conventions, The Marriage of Law and Politics*, 2nd ed (Toronto: Oxford University Press, 2013); Robin Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' (2001) 80:1-2 Can Bar Rev 67; Adam Perry and Adam Tucker, 'Top-Down Constitutional Conventions' (2018) 81:5 *Mod L Rev* 81 765; Malcom Rowe and Nicolas Deplanche. 'Canada's Unwritten Constitutional Order: Conventions and Structural Analysis' (2020) 98:3 *Can B Rev* 98 430.

399 Hogg, *Constitutional Law of Canada* (n 7) 1-22.1. See also the definition of constitutional convention by Geoffrey Marshall: 'conventions are "binding rules of constitutional behavior which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognize their existence), nor by the presiding officers in the Houses of Parliament'. Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution* (London: Hutchinson, 1959) at 23-24.

400 *Re: Resolution to Amend the Constitution*, (n 190) 883-884.

exercise of authority by the executive and managing the relationship between the branches of government under the separation of powers.[401] Current SCC Justice Malcolm Rowe and Nicolas Déplanche identify three fundamental characteristics of constitutional conventions: (1) their normative nature as non-derogable binding rules on political actors; (2) the source of their binding authority derives from the recognition of the actors to which they apply; (3) they are not enforceable by courts.[402] In reference to the final characteristic, constitutional conventions are distinct because they are rules that incur political, rather than legal consequences. As such, the courts will not enforce constitutional conventions, viewing any breach as an issue of legitimacy instead of legality.[403]

Recognising the fundamental role that conventions play in Canada's constitutional order, the Canadian courts have developed a test to identify constitutional conventions. The SCC, drawing on the scholarship of Sir Ivor Jennings,[404] created a three-part threshold for non-legal rule to meet the level of a constitutional convention.[405] First, there must be at least one precedent established by the institutions of government. The court will consider both positive and negative precedents in making this assessment.[406] Second, the actors must believe they are bound by the rule. This second condition is a high threshold whereby there the political actor must explicitly recognise the constitutional convention.[407] Finally, there must be a rationale for the rule with an underlying broad principle.[408] In relation to the notwithstanding clause, I do not argue that the practice of rare use has reached the state of a

401 Rowe and Déplanche, (n 398) 434.

402 Ibid 433.

403 Recently scholars Farrah Ahmed, Richard Albert and Adam Perry have challenged the presumption that constitutional conventions are not enforced by the courts. For further analysis, see Farrah Ahmed, Richard Albert, & Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17:4 ICON 1146; Farrah Ahmed, Richard Albert, & Adam Perry, 'Judging constitutional conventions' (2019) 17:3 ICON 787.

404 Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1959) at 136.

405 *Re: Resolution to amend the Constitution* (n 398) 888.

406 Ibid 888-891.

407 Ibid 888.

408 Rowe and Déplanche, (n 398) 436.

constitutional convention. The notwithstanding clause practice of rare use fails to meet all three criteria of constitutional conventions from the *Patriation Reference*.[409]

First, there are conflicting precedents on the practice of the notwithstanding clause. Although the rare use norm has been largely adhered to in English Canada, it has been openly rejected by Quebec. Quebec has rejected the rare use practice of the notwithstanding clause by applying it to all existing statutes, invoking it routinely between 1982 and 1985 and invoking it in a total of 16 notwithstanding clause acts over 40 years.[410] Furthermore, there is evidence that Ontario is no longer adhering to the rare use practice – having tabled legislation invoking the clause three times since 2018.[411] Thus, a balance of the positive and negative precedents likely leads to a conclusion that there is no clear precedent of an existing constitutional convention of notwithstanding clause rare use.

Second, there is no evidence that Canadian federal and provincial political actors believe they are bound by a convention of rare notwithstanding clause use. Instead, I argue that the rare use practice of the notwithstanding clause is a result of the structural design of section 33 – which is distinct from a normative constitutional convention.

The notwithstanding clause was designed as a dialogic tool in itself. The rare use practice is encouraged and achieved through the design of section 33, rather than the existence of a constitutional convention. Section 33 was designed to create an element of political risk every time the notwithstanding clause is invoked. The accountability mechanisms attached to the notwithstanding clause by excluding its application to democratic rights and requiring renewal every five-years, embed political risk as an inherent limit on its

409 Ibid 891-894.

410 See catalogue of notwithstanding clause uses in Appendix tables.

411 *The Efficient Local Government Act* (2018); *Protecting Elections and Defending Democracy Act* (2021); *Keeping Students in Class Act* (2022).

use. Thus, the rare use practice arises out of the structural design of section 33, rather than the existence of a constitutional convention of a section 33 rare use political norm.

This analysis of the structural design of section 33 is supported by evidence that political leaders do not believe they are bound to a constitutional convention of rare notwithstanding clause use. When the notwithstanding clause was entrenched in the *Charter*, the federal and provincial leaders at the time emphasized to the Canadian public and future political leaders that it should be used rarely. Jean Chrétien argued it would be 'politically very difficult' for a government to invoke the notwithstanding clause because of the embedded section 33 democratic process requirements.[412] He referenced the existing practice with similar notwithstanding clauses in human rights codes to indicate that it will likely be rarely used and applied in non-controversial situations.[413] He made no mention of an intention for his government or future governments to be bound by a rare use political norm. Rather, he reviewed empirical evidence of past use of similar notwithstanding clauses and asserted that he expects there to be a practice of rare use as a consequence of the structural design of section 33.

There is also no evidence of other political leaders at the time of the *Charter's* entrenchment viewing themselves as being bound by a constitutional convention of rare section 33 use. Trudeau Senior referenced the limited historical use of the human right codes notwithstanding clauses to express that even though 'it can be abused as anything can' he '[does not] fear the notwithstanding clause very much'.[414] Further, New Brunswick Premier Richard Hatfield expressed his personal belief that the notwithstanding clause should not be used in his province. After the passing of the *Charter,* he shared that he 'will do everything possible to urge the Legislature of New Brunswick not to use that opportunity, consistent

412 Debates 20 November 1981 (n 10) 13042–13043.

413 Ibid.

414 Transcript of an Interview with Then Prime Minister Trudeau by Jack Webster, CHAN-TV, Vancouver, 24 November 1981, 5.

with my firm view that if we are going to have rights, they must be shared by all Canadians'.[415] The evidence from statements of political leaders at the time of the notwithstanding clause's entrenchment do not point to a belief that they or future political leaders are bound to a rule of rare notwithstanding clause use. Rather, the statements of federal and provincial political leaders refer to empirical facts and the structural design of section to predict future use. The political leaders also express their own personal aversion to the notwithstanding clause, which does not demonstrate a belief that they are bound to a rare use convention.

The political practice since the entrenchment of the notwithstanding clause further demonstrates that there is no evidence that political leaders believe they are bound by a rare use convention. As mentioned, the provinces of Quebec and more recently Ontario have openly rejected the existence of a rare use norm through frequent use of the notwithstanding clause. Further, the provinces of Yukon, Alberta, Saskatchewan, and New Brunswick have all tabled notwithstanding clause legislation and in doing so did not express a belief that they were bound by a rare use constitutional convention. As discussed throughout this chapter, when tabling a notwithstanding clause bill, political leaders sought to justify the notwithstanding clause invocation anticipating potential political consequences arising from the design of section 33. This anticipatory response to the embedding of democratic accountability mechanisms within section 33, is distinct from a normative constitutional convention. The structural design of section 33, combined with the actions of political leaders over the past four decades of notwithstanding clause existence, does not support a conclusion that political actors believe they are bound by a rare use constitutional convention. Thus, the second threshold requirement for a constitutional convention is not met.

415 Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, 114.

Finally, the third criterion to establish a constitutional convention is that there must be a rationale for the rule with an underlying broad principle. In the context of the notwithstanding clause, there are two competing broad principles: parliamentary supremacy and entrenching constitutional rights. The drafters of the notwithstanding clause considered these principles in designing section 33 to be a dialogic tool for legislatures to respond to judicial interpretation of *Charter* rights, while also being accountable to democratic processes. The existence of a constitutional convention of rare notwithstanding clause use is both seemingly redundant and risks skewing the balance between the conflicting principles. Consequently, it is unlikely that the rationale threshold would be met and even if it was the other two required constitutional convention thresholds are not met.

Based on this analysis. I conclude that the rare use practice of the notwithstanding clause does not amount to a constitutional convention. The notwithstanding clause development and practice thus far does not meet the three criteria to establish a constitutional convention established in the *Patriation Reference*. The rare use practice of the notwithstanding clause arises both in response to the political risk embedded din the design of section 33 and the personal aversion of political leaders to use a rights suspending device.

3.3.4 The Use of the Notwithstanding Clause Based on Interpretive Uncertainty

When the *Charter* was first adopted, there was significant uncertainty surrounding the definition and scope of the notwithstanding clause. The *Charter* rights and freedoms were expressed in the written text broadly and were designed to have their parameters determined through constitutional interpretation by the judiciary.[416] Thus, in the decade following the *Charter* adoption there was significant ambiguity on the scope of *Charter* rights, as they were being interpreted for the first time by the courts. During this period, the notwithstanding clause was invoked by certain provinces based on uncertainty regarding *Charter* rights that were yet to be litigated. This approach to notwithstanding clause invocation is most evident in the Yukon's 1982 use and Saskatchewan's 1987 use of section 33.

416 Patrick J Monahan, 'Judicial Review and Democracy: A Theory of Judicial Review' (1987) 21 UBC LR 87, 88.

First, in the Yukon, the notwithstanding clause was passed in a 1982 bill that received royal assent but never came into force. The notwithstanding clause included in the *Land Planning and Development Act* was being used to immunise the membership of the statutorily created Land Planning Board from scrutiny under the *Canadian Bill of Rights* and section 15 of the *Charter*.[417] The legislators were particularly concerned that the legislative requirement of having two members nominated by the Council for Yukon Indians would be struck down by the courts for being discriminatory by only allowing the seats to be taken up by Indigenous Peoples.[418] This legislation was considered and passed before section 15 even came into force in 1985 because its coming into effect was delayed by three years to allow governments to update their laws to be in accordance with equality rights. Thus, there was no jurisprudence to guide the legislature in determining whether such a provision within the *Land Planning and Development Act* was discriminatory under section 15(1) or if it fell under the protections of section 15(2) as an affirmative action program. There was also additional uncertainty on the scope of Aboriginal rights under section 35 of the *Constitution Act, 1982*, to be determined by constitutional conferences that ultimately failed by 1987.[419] The lack of clarity on both equality rights and Aboriginal rights was noted during the legislative debates by New Democrat Mr. Roger Kimmerly, who stated:

> The issue of aboriginal rights puts a new dimension on this concept. The issue of affirmative action programs also put a new dimension on the concept, although aboriginal rights for the purposes of Yukon and this bill are, in my view, far more important.[420]

417 *The Land Planning and Development Act* (n 332) s 39.

418 *ibid* s 4(1).

419 Marquardt S, 'The Aboriginal Peoples of Canada and Their Rights under Canadian Constitutional Law' (1989) 22 Law & Poli Africa, Asia & Latin America 251, 257.

420 Yukon Debates 2 Dec 1982 (n 342) 362–363.

Therefore, largely based on the uncertainty regarding rights under the *Charter* and *Constitution Act, 1982*, the Yukon legislature passed the notwithstanding clause bill to safeguard Indigenous Peoples representation on the Land Planning Board.

Second, the notwithstanding clause invocation by Saskatchewan also stemmed from an uncertainty on the scope of *Charter* rights. Saskatchewan invoked the notwithstanding clause in the promulgated legislation following their initial back-to-work legislation[421] being declared an unjustified infringement of the freedom of association right under section 2(d) of the *Charter*.[422] While awaiting an appeal to the SCC, the Saskatchewan government passed new legislation invoking the notwithstanding clause.[423]

During the legislative consideration of the *SGEU Dispute Settlement Act*, the Minister of Justice Sid Dutchak justified including the notwithstanding clause almost exclusively on the ambiguity on the scope of section 2(d) of the *Charter*. He noted that appeal courts in Canada had taken divergent views on the parameters of freedom of association and his government believed that the back-to-work legislation was not unconstitutional.[424] Ultimately, the Saskatchewan government was correct that the scope of section 2(d) did not extend to their back-to-work legislation and the use of the notwithstanding clause was rendered unnecessary by the SCC in *RWDSU v. Saskatchewan.*[425] Thus, the use of the notwithstanding clause by Saskatchewan in 1986, similar to the use by the Yukon in 1982, was based on the uncertainty regarding the newly entrenched constitutional rights in the early years of *Charter* interpretation and is not a trend seen in the notwithstanding clause political use after the first decade of the *Charter*.

421 *Dairy Workers (Maintenance of Operations) Act*, RSS 1983-84, c. D-1.1.

422 *RWDSU* (n 269) 468.

423 The two-day sitting was special because provincial members of Parliament were required to return of the legislature and participate in the sittings that focused only on this bill during a break period.

424 Saskatchewan Debates 31 Jan 1986 (n 356) 4341–4342.

425 *RWDSU* (n 269) 461–462.

3.4 Conclusion

In the next chapter, I examine the post-2018 invocations of the notwithstanding clause. Since 2018, four legislatures tabled seven notwithstanding clause bills. Five of these attempted invocations came from Saskatchewan, New Brunswick, and Ontario. I will critically analyse whether the post-2018 uses represent a shift away from the notwithstanding clause rare use practice and the potential implications of this shift in an age of rising populism.

CHAPTER FOUR

4. A Shift in Approach? The Post-2018 Political Uses of the Notwithstanding Clause

In this chapter I present the post-2018 invocations of the notwithstanding clause and critically analyse whether section 33 is no longer a tool of the last resort. I argue that the notwithstanding clause is at a crossroads by which there is a potential shift from being a secessionist tool used by Quebec towards being exercised as a political tool by several Canadian provinces in an increasingly polarised world.

4.1 A Contextual Examination of Section 33's Political Uses from 2018 to 2022

In the period between 2018 and 2022, four provincial governments tabled legislation invoking the notwithstanding clause in Saskatchewan, Ontario, Quebec and New Brunswick. Until that point, the provinces of Ontario and New Brunswick had never tabled legislation that included the notwithstanding clause. These six back-to-back attempted invocations occurred after an 18-year hibernation period of the notwithstanding clause, in which it had not been newly invoked since 2001. I will now examine each province's post-2018 notwithstanding clause invocations.

4.1.1 Quebec Political Uses of the Notwithstanding Clause Between 2018 and 2022

The first post-2018 and the fifteenth overall Quebec notwithstanding clause invocation is the *Laicity of the State Act* passed on June 16, 2019.[426] The legislation's purpose is to assert religious neutrality or laicity[427] to ensure a balance between 'the collective rights of the Quebec Nation and human rights'.[428] To achieve its purpose, the *Laicity of the State Act* adopts an extensive approach to religious neutrality by prohibiting those working in public service from

426 *Laicity of the State Act.*

427 The term laicity in this context refers to a political society that is founded upon necessary religious neutrality, or in more colloquial words: the separation between the Church and the State.

428 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/.

wearing visible religious symbols such as a hijab, kippa or turban.[429] It applies to Quebec Crown prosecutors, judges, public service employees, police officers, prison guards, teachers, and principals. Bill 21 also applies to all lawyers and notaries working in the public sector as well as private sector lawyers and notaries working on government mandates if they need to interact with others. The legislation includes a grandfather clause that exempts teachers who are already employed from the restriction;[430] however, those who wear religious symbols cannot apply for a promotion or change school boards. In addition to the regulations for public service employees, the legislation also requires that all individuals uncover their face to receive a public service[431] for identification or security purposes.[432]

To pre-empt what they perceived to be inevitable *Charter* challenges, the Quebec government invoked the notwithstanding clause immunizing the *Laicity of the State Act* under sections 2 and 7 to 15 of the *Charter*.[433] 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 we have to protect our collective identity […] To separate religion and politics is important in Quebec'.[434] The *Laicity of the State Act* is the first time the clause was invoked in Quebec to insulate religious neutrality legislation from *Charter* scrutiny.

429 This is a non-exhaustive list. For a full list of professions prohibited from wearing religious symbols at work see Schedule II of *Laicity of the State Act.*

430 Leblanc (n 410).

431 Receiving a public service includes requiring individuals to uncover their face to take public transportation. See Benjamin Shingler, 'Quebec Government's Proposed Secularism Law Would Ban Public Workers from Wearing Religious Symbols', *CBC Montreal* (28 March 2019), online: https://www.cbc.ca/news/canada/montreal/quebec-notwithstanding-religious-symbols-1.5073945.

432 *Laicity of the State Act* s 8.

433 ibid 34.

434 Benjamin Shingler, 'Notwithstanding Clause Could Stop Debate over Quebec's Secularism Bill before It Starts' *CBC News Montreal* (27 March 2019) https://www.cbc.ca/news/canada/montreal/quebec-notwithstanding-religious-symbols-1.5072645.

Four constitutional challenges were initiated against the *Laicity of the State Act*. These challenges were brought forward by a combination of individual claimants, civil society organisations, and teachers' unions.[435] First, Ichrak Nourel Hak.[436] the National Council of Canadian Muslims, and the Canadian Civil Liberties Association launched a combined constitutional challenge.[437] This coalition challenged the legislation on the division of powers, the unwritten principle of minority rights, ambiguity and the unwritten principle of the rule of law, and section 28 of the *Charter*.[438] Second, Coalition Inclusion Quebec challenged the legislation on the division of powers, unwritten principles of freedom of speech, and incoherent construction.[439] Third, advancing a narrower challenge, the English Montreal School Board (EMSB) argued that the legislation contravenes the minority education right under section 23 and the gender equality right under section 28 of the *Charter*.[440] Fourth, the labour union Fédération Autonome de l'Enseignement (FAE) argued that the notwithstanding clause cannot immunise legislation from Canadian international human rights obligations and that the legislation should be struck down for international human rights violations under the *International Covenant on Civil and Political Rights* (ICCPR).[441]

After the Quebec Superior Court (QCSC) and the Quebec Court of Appeal (QCCA) rejected an injunction claim by a coalition of the above civil society organisations, this case

435 Jonathan Montpetit, 'One Law, Many Challenges: How Lawyers Are Trying to Overturn Quebec's Religious Symbols Ban' *CBC News Montreal* (12 December 2019) https://www.cbc.ca/news/canada/montreal/bill-21-quebec-court-challenges-1.5393074.

436 Ichrak Nourel Hak is a Université de Montréal student in the process of training to become a teacher. Hak wears a hijab, due to her religious Islamic beliefs, and will be unable to teach in Quebec under the *Laicity of the State Act*.

437 *Ichrak Nourel Hak et al v Attorney General of Québec* (Application for Judicial Review for Declaratory Judgment, and Notice of Constitutional Question on 17 June 2019).

438 ibid [9]–[10].

439 Daniel Rowe, 'Coalition Inclusion Quebec Is the Fourth Group to Challenge Bill 21 in Court' *CTV* News Montreal (27 September 2019) https://montreal.ctvnews.ca/coalition-inclusion-quebec-is-the-fourth-group-to-challenge-bill-21-in-court-1.4613151.

440 *English Montreal School Board et al v Procureure générale du Québec* (Application for Judicial Review for Declaratory Judgment, and Notice of Constitutional Question on 21 October 2019*)* [64]–[84].

441 Montpetit (n 417); Tracey Lindeman, 'Teachers Union the Latest Group to Sue Quebec over Religious Symbols Ban' *CBC Montreal* (18 November 2019) https://www.cbc.ca/news/canada/montreal/teacher-union-quebec-religious-symbol-ban-1.5363919.

was heard at the QCSC in the Fall of 2020.[442] The four challenges were combined into one case and the QCSC in *Hak v. Procureur général du Québec* largely upheld the constitutionality of the *Laicity of the State Act*. Justice Marc-André Blanchard recognised that although the law violates the rights of religious minorities, the invocation of the notwithstanding clause permitted the legislation to be interpreted as constitutional. Justice Blanchard relied on *Ford* to hold that the notwithstanding clause is essentially 'legally unassailable' through judicial review.[443] Despite its legal unassailability, Justice Blanchard was critical of the *Laicity of the State Act*. Justice Blanchard asserted that in seeking to apply the law at 'all costs' the government demonstrated an 'indifference towards the rights and liberties of those affected'.[444] The judge also explicitly acknowledged the disproportionate impacts of the law on Muslim women:

> 'The effects of Law 21 will be felt negatively above all by Muslim women […] On the one hand by violating their religious freedom, and on the other hand by also violating their freedom of expression, because clothing is both expression, pure and simple, and can also constitute a manifestation of religious belief'.[445]

In *Hak*, Justice Blanchard identified two exceptions from the application of the notwithstanding clause. First, per section 23 of the Charter, which safeguards minority education rights, the religious symbols ban cannot be applied in the province's English schools.[446] Justice Blanchard determined that the English school board decision to prioritise the fostering of diversity through their hiring practices falls within the scope of the minority education rights in the *Charter*.[447] Second, the religious symbols and face covering ban cannot

442 *Hak c Procureure générale du Québec,* (Decision on Application of Provisional Stay on 18 June 2019); *Hak c Procureure générale du Québec,* (Decision on Appeal of Application for Provisional Stay 12 December 2019); *Ichrak Nourel Hak et al Attorney General of Québec,* 2020 SCC 26448.

443 *Hak c Procureur général du Québec,* 2021 QCCS 1466 [7].

444 ibid [756].

445 ibid [807].

446 *Canadian Charter of Rights and Freedoms* s 23.

447 *Hak QCSC 2021* (n 425) [939]–[1003].

apply to elected representatives in the National Assembly.[448] Justice Blanchard interpreted the *Charter* section 3 citizenship 'right to vote' and 'to be qualified for membership therein' to safeguard the elected members' ability to exercise their religious rights in the National Assembly.[449] For example, to deny Muslim women who wear a niqab the ability to do so in the National Assembly would be akin to barring them from running for elected office and representing their constituents if elected.

The QCSC decision in *Hak* was released on April 20, 2021. Both the CCLA and the Quebec government appealed the decision, which was heard by the Quebec Court of Appeal in November 2022.[450]

The 2019 *Laicity of the State Act* was not the only notwithstanding clause legislation passed by the Quebec government during Premier Legault's first term. On May 13, 2021, the Quebec Minister Responsible for the French Language Simon Jolin-Barette[451] introduced Bill 96, titled *An Act Respecting French, the Official and Common Language of Quebec*.[452] The stated purpose of this bill was to 'affirm that the only official language of Québec is French. It also affirms that French is the common language of the Québec nation'.[453] The impetus for this legislation was linked to recent studies which found that the French language was at risk of a decline in use. A 2018 study conducted by the Office Québécoise de la langue française (OQLF) found that the use of French in the household was on track to decline from 82 percent in 2011 to a projected 75 percent in 2036. This study also found that only 25 percent of Quebec

448 *Canadian Charter of Rights and Freedoms* ss 3–5.

449 *Hak QCSC 2021* (n 425) [881]–[921].

450 Jonathan Montpetit and Benjamin Shingler, 'Quebec Superior Court Upholds Most of Religious Symbols Ban, but English-Language Schools Exempt' *CBC Montreal* (20 April 2021) https://www.cbc.ca/news/canada/montreal/bill-21-religious-symbols-ban-quebec-court-ruling-1.5993431 accessed 24 July 2021; 'Hearings on constitutionality of Quebec's secularism law underway in Court of Appeal' *CBC Montreal* (7 November 2022) https://www.cbc.ca/news/canada/montreal/bill-21-appeal-begins-1.6640434 , accessed December 10, 2022.

451 Simon Jolin-Barette was the Minister of Justice who introduced the *Laicity of the State Act* in 2019.

452 Bill 96 (n 15).

453 See explanatory notes in ibid.

workplaces use both official languages equally and another 18.7 percent use exclusively French.[454] Citing a concern that French language in Quebec will always be 'vulnerable because of the Quebec situation in North America', Premier Legault affirmed that its now his government's turn to take on the 'responsibility for the survival of our language'.[455]

The government of Quebec sought to achieve this goal of the preservation and promotion of the French language through expansive reforms to Quebec educational institutions, public services, municipalities, workplaces, and the Canadian Constitution. Many of these proposed reforms and language restrictions in Bill 96 mirror the changes made to Quebec society through Bill 101 (1976).[456] There are extensive language reforms enacted through this bill. Regarding education, Bill 96 caps the number of students enrolled at English Collège d'enseignement général et professionnels (CEGEPS)[457] at 17.5 percent of the student population.[458] In federal workplaces and any businesses with between twenty-five and forty-nine employees, the employers will have to meet a range of language requirements, including having the French language predominant on any commercial signs.[459] Regarding public services, Bill 96 removes the requirement that provincially appointed judge be bilingual[460] and establishes that all provincial communications with immigrants be in French after their first six months in Quebec.[461] To support these public service requirements, Bill 96 greatly expands access to free French language training to anyone in the province. To enforce the language

454 Kate McKenna, 'Quebec Seeks to Change Canadian Constitution, Make Sweeping Changes to Language Laws with New Bill' *CBC Montreal* (13 May 2021) https://www.cbc.ca/news/canada/montreal/quebec-bill-101-language-revamp-1.6023532 accessed 24 July 2021.

455 ibid.

456 *Charter of the French Language.*

457 In Quebec all students are required to attend CEGEPS as part of their formal education. Often referred to as a pre-university program, students complete two years of education in CEGEPS before going to university if they choose.

458 Bill 96 (n 15) s 88.0.2-88.0.7.

459 ibid 47.

460 ibid 12.

461 ibid 22.3.

requirements, Bill 96 creates a French Language Ministry and the position of French Language Commissioner.[462]

The final and most consequential proposed change in Bill 96 is the amendment of the Canadian Constitution. Bill 96 seeks to amend the Canadian Constitution unilaterally to recognise that 'Quebecers form a nation' and that 'French shall be the only official language of Quebec. It is also the common language of the Quebec nation'.[463] The constitutional amendment requirements are set out in sections 38 to 49 of Part V of the *Constitution Act, 1982*. In addition to the general procedures for amendment in section 38,[464] there are also supplemental special amendment and unanimous provincial consent procedures. The special amendment procedures are the most relevant to the proposed constitutional amendments by Quebec in Bill 96. The special amendment procedure is under section 43 of the *Constitution Act, 1982*, and applies to proposed constitutional amendments that would not apply to all provinces.[465] Any proposed constitutional amendment requires the consent of the House of Commons, Senate, and the provinces it applies to. Through Bill 96, Quebec seeks to pass the special amendment unilaterally, only requiring the support of the National Assembly, the House of Commons, and the Senate of Canada. All major federal parties have indicated support for Quebec's proposed unilateral constitutional amendment.[466] However, many critics have argued that the proposed constitutional amendment that would recognise the nationhood of Quebec is beyond the scope of the special amendment procedure (section 43) and would require

462 ibid 185-204.5.

463 ibid 159.

464 *Constitution Act, 1982* s 38(1).

465 ibid 43.

466 Jonathan Montpetit, 'Quebec's Proposed Changes to Constitution Seem Small, but They Could Prompt Historic Makeover' *CBC* (19 May 2021) https://www.cbc.ca/news/canada/montreal/quebec-canada-constitution-changes-language-bill-1.6031828 accessed 24 July 2021.

the general amendment procedure (section 38) approved by at least seven provinces representing 50 percent of the Canadian population.[467]

To safeguard Bill 96 from constitutional challenges, the Quebec government included the notwithstanding clause at section 118.[468] The notwithstanding clause invocation in Bill 96 would be applied broadly to set aside the effects of sections 2 and 7 to 15 of the *Charter*. Referencing Bill 96, Premier Legault stated: 'the notwithstanding clause is a legitimate tool that balances between individual rights and collective rights […] We have the right and we have a duty to use the notwithstanding clause when the basis of our existence as a francophone people on the American continent is at stake'.[469]

Bill 96 was tabled in the National Assembly on May 13, 2021. The proposed legislation received unanimous consent (121-0) at the first reading stage.[470] On October 7, 2021, the Quebec government announced their intent to prorogue the provincial legislature until October 19, 2021, to plan for the province's post-COVID-19 pandemic recovery.[471] In doing so, Bill 96 would no longer be an active bill under consideration and would have to be re-introduced in the new legislative session. Premier Legault, in announcing his government's decision to prorogue the legislature, affirmed his intent to re-introduce Bill 96 and have it passed in the next legislative session.[472] On May 21, 2022, Quebec passed Bill 96 and it came into force the

467 Tom Mulcair, 'Tom Mulcair: On Language, Quebec Can't Amend Constitution Unilaterally' *Montreal Gazette* (20 May 2021) https://montrealgazette.com/opinion/columnists/tom-mulcair-on-language-quebec-cant-amend-constitution-unilaterally accessed 24 July 2021; Emmett Macfarlane, 'Quebec's Attempt to Unilaterally Amend the Canadian Constitution Won't Fly' *Policy Options* https://policyoptions.irpp.org/magazines/may-2021/quebecs-attempt-to-unilaterally-amend-the-canadian-constitution-wont-fly/ accessed 24 July 2021; Christopher Nardi, 'Can a Province Unilaterally Rewrite Parts the Constitution, as Quebec Seeks to Do?' *National Post* (20 May 2021) https://nationalpost.com/news/politics/can-a-province-unilaterally-rewrite-parts-the-constitution-as-quebec-seeks-to-do accessed 24 July 2021.

468 Bill 96 (n 15) s 118.

469 McKenna (n 437).

470 'Bill 96, An Act Respecting French, the Official and Common Language of Québec' (*National Assembly of Québec*) http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-96-42-1.html accessed 24 July 2021.

471 'Quebec Premier to Prorogue Legislature, with New Session Starting Oct. 19' *CBC News Montreal* (7 October 2021) https://www.cbc.ca/news/canada/montreal/premier-to-prorogue-national-assembly-1.6204067 accessed 8 October 2021.

472 ibid.

same day.[473] The next day y a coalition of Anglophone speakers announced that they would be challenging the constitutionality of the legislation.[474] Since its promulgation, two provisions of *An Act Respecting French, the Official and Common Language of Québec* were temporarily suspended by way of interim injunction. On August 12, 2022, the Quebec Superior Court of Justice suspended provisions in the Act that required corporations to produce French versions of legal documents via a self-paid certified translator. The provisions were suspended for their potential impact on access to justice.[475]

Therefore, since 2018, Quebec has tabled two bills including the notwithstanding clause and both were promulgated. *An Act Respecting French, the Official and Common Language of Quebec* represents the sixteenth and final Quebec act that invoked the notwithstanding clause. Including renewing legislation, it would be the forty-first bill to include the notwithstanding clause in the province.[476]

4.1.2 Saskatchewan Political Uses of the Notwithstanding Clause Between 2018 and 2022

After its first notwithstanding clause invocation in 1986, the province of Saskatchewan would not attempt to invoke the notwithstanding clause again for thirty years. In 2017, the notwithstanding clause was introduced in legislation following a court loss in the Saskatchewan Court of Queen's Bench (SKQB) decision *Good Spirit School Division v Christ the Teacher Roman Catholic Separate School Division No.212 and The Government of Saskatchewan* (*Good Spirit*).[477] In *Good Spirit*, the SKQB considered the constitutionality of provincial

473 'Bill 96, An Act Respecting French, the Official and Common Language of Québec' (n 453).

474 'Legal Challenge against Bill 96 Coming, Montreal Lawyer Says' *CBC News Montreal* (23 May 2022) https://www.cbc.ca/news/canada/montreal/legal-challenge-bill96-1.6463375 accessed 26 May 2022.

475 *Mitchell v Procureur général du Québec*, 2022 QCCS 2983.

476 See Table 2: Renewals of the Notwithstanding Clause Invocations.

477 *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212,* 2017 SKQB 109 [*Good Spirit*].

government denominational school funding[478] for non-Catholic students.[479] Denominational schools as education minority rights were entrenched in section 93 of the of the *Constitution Act, 1867*. The inclusion of this section, similar to the notwithstanding clause, represents a constitutional compromise by the founders of Canada to gain the support of the provinces.[480] In 1982, minority education rights were further constitutionally enshrined in section 29 of the *Charter*.[481] Consequently, denominational school protections cannot be struck down for contravening the *Charter*, because it too is part of the constitutional framework under section 29 of the *Charter* and section 93 of the *Constitution Act, 1867*.

In *Good Spirit,* the SKQB Justice Layh held the denominational school funding for non-Catholic students violates the *Charter*.[482] First, Justice Layh held that the funding of non-Catholic students at denominational Catholic schools is not a protected right under section 93 of the *Constitution Act, 1867* and section 17 of the *Saskatchewan Act*. This determination resulted in the government funding decision being required to undergo *Charter* scrutiny because it was not a protected minority education right.[483] Second, Justice Layh found that under *Charter* scrutiny, the government funding of non-Catholic students at a denominational Catholic school violates sections 2 and 15 of the *Charter* and could not be reasonably justified under section 1 of the *Charter*.[484] As a remedy, the SKQB declared denominational school

478 Denominational schools refer to publicly funded separate schools for Catholic and Protestant religious minorities that are constitutionally protected.

479 'Court Ruling Bars Sask. Gov't from Funding Non-Catholic Students in Catholic Schools' *CBC News Saskatoon* (21 April 2017) https://www.cbc.ca/news/canada/saskatoon/saskatchewan-catholic-student-funding-1.4078955.

480 At the time of confederation the four provinces who signed initially created and signed the Constitution Act, 1867 were Upper Canada (now known as Ontario), lower Canada (now known as Quebec), Nova Scotia, New Brunswick. See Edward R Lewis, 'A School Divided: A Historicist Legal Analysis of Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212' (2019) 28 Dal J L Stud. 207, 213.

481 Section 29 of the *Charter*, under the heading 'rights respecting certain schools preserved', states: 'Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools'. See *Canadian Charter of Rights and Freedoms* s 29.

482 *Good Spirit SKQB 2017* (n 459) [7].

483 ibid [258], [359].

484 ibid [446], [474].

funding provided for non-minority faith students to be unconstitutional and stayed the implementation of this remedy until June 30, 2018.

Less than a year after this SKQB decision, the Saskatchewan government released a statement declaring that they would be invoking the notwithstanding clause to temporarily set aside the ruling by the SKQB.[485] They argued that the SKQB decision would force 10,000 non-Catholic students out of Catholic schools. The government justified the use of the notwithstanding clause as a necessary step to ensure stability for parents and guarantee they could continue to send their children to denominational schools during the appeal processes. In an official statement released on May 1, 2017, the Saskatchewan Premier Brad Wall stated:

> We support school choice including public, separate and faith-based schools […] We will defend school choice for students and parents. By invoking the notwithstanding clause we are protecting the rights of parents and students to choose the schools that work best for their families, regardless of their religious faith.[486]

On November 8, 2017, Bill 89, titled *The School Choice Protection Act,* was tabled in the provincial legislature, and included the notwithstanding clause in section 2.2.[487] This section declared that the legislation would operate notwithstanding sections 2 and 15 of the *Charter*.[488]

At the second reading stage, the opposition raised concerns over the need for the notwithstanding clause. In response, the Minister of Education announced during a presentation to the legislative committee that the Saskatchewan government would be introducing an amendment to alter the coming into force of Bill 89 from royal assent to proclamation.[489] The Minister shared that an application for a stay of the decision was filed and the government would only proclaim Bill 89 into force if the stay application was rejected.[490]

485 'Government Will Use Notwithstanding Clause to Protect School Choice for Parents and Students' (*Government of Saskatchewan*, 1 May 2017) https://www.saskatchewan.ca/government/news-and-media/2017/may/01/notwithstanding-clause.

486 ibid.

487 The School Choice Protection Act.

488 ibid 2.2.

489 Saskatchewan, Legislative Assembly of Saskatchewan, *Standing Committee on Human Services*, 28th Leg, 2nd Sess, (23 May 2018) 733.

490 ibid.

Following the amendment announcement, the opposition members shifted their support for the legislation and its inclusion of the notwithstanding clause.[491] The bill, along with the amendment, was passed and received royal assent on May 30, 2018.[492]

Despite receiving royal assent in 2018, the government of Saskatchewan never made a proclamation to bring the legislation into force. This decision was influenced by the granting of the application for a stay of the SKQB decision pending an appeal. On March 25, 2020, the Saskatchewan Court of Appeal (SKCA) overturned the SKQB decision.[493] They found that the SKQB judge made significant and fundamental errors of the law.[494] In 2021, the SCC dismissed the appeal from the SKCA, rendering the notwithstanding clause and the coming into force of Bill 89 unnecessary.[495] Thus, in Saskatchewan, both of the tabled notwithstanding clause bills received royal assent, but only one was promulgated. For both notwithstanding clause bills, the invocation of section 33 was later deemed unnecessary by the courts because the legislation did not infringe on sections 2 and 7 to 15 of the *Charter*.

4.1.3 New Brunswick Political Uses of the Notwithstanding Clause Between 2018 and 2022

On November 22, 2019, the New Brunswick Minister of Education and Early Childhood Development Dominic Cardy announced that his government would be invoking the notwithstanding clause for the first time in the province's history. The notwithstanding clause was included in *An Act Respecting Proof of Immunization* (Bill 11). The purpose of Bill 11 was to remove non-medical exemptions for mandatory immunization requirements for public schools and licensed early learning childcare facilities.[496]

491 Saskatchewan, Legislative Assembly of Saskatchewan, *Official Reports of Debates (Hansard)*, 28th Leg, 2nd Sess, (23 May 2018) 2.
492 Saskatchewan, Legislative Assembly of Saskatchewan, *Official Reports of Debates (Hansard)*, 28th Leg, 2nd Sess, (30 May 2018) 2.
493 *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212,* 2020 SKCA 34 [*Good Spirit*].
494 ibid [6].
495 *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212,* 2020 SKCA 34, leave to appeal to SCC refused.
496 Bill 11, *An Act Respecting Proof of Immunisation* (n 16).

Bill 11 was the second attempt in New Brunswick at passing mandatory immunization legislation in 2019. The first attempt began on June 7, 2019, when Minister Cardy introduced *An Act Respecting Proof of Immunization* (Bill 39).[497] The purpose of Bill 39 was to remove non-medical exemptions—such as religious, philosophical and other non-medical grounds—from the mandatory public-school immunization requirements.[498]

Bill 39 passed the second reading stage on June 11, 2019, and was sent to the Standing Committee on Law Amendments, which arranged public hearings.[499] These committee hearings were dominated by anti-vaccination activists and groups, who flooded the extra spots originally reserved for invited experts and organisations but were not taken up.[500] Vaccine Choice Canada, an organisation known for spreading anti-vaccination misinformation, mobilised dozens of parents both within and outside of New Brunswick to present testimony on what they perceive to be vaccine injuries. For example, New Brunswick resident Lily Smallwood testified to the committee about her experience with children who she perceived to have developed auto-immune diseases because of vaccine-related injuries.[501]

This flooding of the committee hearings by anti-vaccination activists and groups was compounded by a lack of pro-vaccine mobilisation on the part of individuals and organisations. As noted by Member of Legislative Assembly (MLA) Glen Savoie, 'what this became was a forum for anti-vaxxers to get their message out'.[502] Elected members of the Law Amendments Committee rarely challenged the anti-vaccination testimonies and at times were supportive of

497 Legislative Assembly of New Brunswick, Standing Committee on Law Amendments, *First Report of the Standing Committee on Law Amendments* (20 November 2020) (Chair: Honourable Ms. Anderson-Mason) 1.

498 Bill 39, *An Act Respecting Proof of Immunization*, 2nd Sess, 59th Leg, New Brunswick, 2019.

499 New Brunswick, Legislative Assembly of New Brunswick, *Official Reports of Debates (Hansard)*, 59th Leg, 2nd Sess, (11 June 2019) 18.

500 Jacques Poitras, '5 Takeaways from Hearings on Mandatory Vaccinations' *CBC New Brunswick* (4 September 2019) https://www.cbc.ca/news/canada/new-brunswick/mandatory-vaccination-hearings-1.5269118.

501 New Brunswick, Legislative Assembly of New Brunswick, Standing Committee on Law Amendments, *Minutes of Proceedings and Evidence*, 59th Leg, 3rd Sess, (29 August 2019) 1–5.

502 Poitras, '5 Takeaways from Hearings on Mandatory Vaccinations' (n 482).

misleading statements made by anti-vaccination individuals and groups. For example, in response to the testimony by Ms. Smallwood about her family's experiences with perceived vaccine-related injuries, some MLAs applauded her for her 'courage'[503] and stated that her reasoning against vaccination 'kind of explains everything'.[504] Following the testimony at the Law Amendments Committee, MLAs from all parties shifted their support against Bill 39. The legislature collectively opted to forgo voting on the legislation and let it die on the order paper[505] before the Law Amendments Committee submitted their report on the hearings.[506]

Still determined to pass legislation removing non-medical exemptions for mandatory public-school vaccinations, Minister Cardy re-introduced the legislation as Bill 11 on November 22, 2019.[507] The sole section of Bill 11 that differed from Bill 39 was its inclusion of the notwithstanding clause.[508] New Brunswick has a short history with the notwithstanding clause. In 1982, when the *Charter* was being drafted, New Brunswick Premier Richard Hatfield supported the notwithstanding clause's inclusion;[509] however, he was less supportive of its application within his own province. He stated:

> I am concerned about the fact that there are provisions for opting out in important areas. I want to give you an undertaking that I will do everything possible to urge the Legislature of New Brunswick not to use that opportunity, consistent with my firm view that if we are going to have rights, they must be shared by all Canadians, regardless of where they live.[510]

503 New Brunswick Standing Committee on Law Amendments 29 August 2019 (n 483) 6.

504 ibid 7.

505 Bill 39 died on the order paper when the Second Session of the 59th Legislative Assembly was prorogued on November 19, 2019.

506 The Law Amendments Committee tabled their report, despite the failure of Bill 39 on November 20, 2019. See First Report of the Standing Committee on Law Amendments (n 479) 1–2.

507 'Status of Legislation - An Act Respecting Proof of Immunization (Bill 39)' https://www1.gnb.ca/legis/bill/editform-e.asp?ID=1450&legi=59&num=3 accessed 14 June 2020.

508 Bill 11, *An Act Respecting Proof of Immunisation* (n 16).

509 Hugh Segal, 'How We Got the Charter: A Reality Check' (2007) Policy Options 56, 56–59.

510 'Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981' (n 247) 114.

This statement would ring true, as New Brunswick had no invocations of the notwithstanding clause in the decades following the *Charters* patriation. It was not until 2019, when Minister Cardy introduced Bill 11, that this legislative tradition ended.

Minister Cardy justified the inclusion of the notwithstanding clause in Bill 11 through a cost-efficiency approach. Minister Cardy told reporters that the purpose of the notwithstanding clause's inclusion was to pre-empt what he calls 'an organized, well-financed lobby out there that's intent on derailing efforts to protect vulnerable children'.[511] He argued that the invocation of this legislative tool would avoid 'expensive court costs' resulting from *Charter* challenges 'by folks who've got nothing but conspiracies and medieval fantasies to base their arguments upon'.[512] The legislation was intended to come into effect for the following school year in September 2021.[513]

After passing the first and second reading stages, Bill 11 was sent to the Standing Committee on Economic Policy.[514] At this committee, which had no public consultations, Minister Cardy framed Bill 11 as a decision on conflicting rights between unvaccinated children and immunocompromised children who cannot attend public schools because of risk of infectious diseases from unvaccinated children.[515]

During the committee hearings, no questions were asked about the notwithstanding clause's inclusion. The lack of debate on the notwithstanding clause during the committee hearings was even more apparent when the committee unanimously voted to amend the legislation and remove it. The amendment, introduced by MLA Chuck Chiasson, proposed that

511 Jacques Poitras, 'New Brunswick Uses notwithstanding Clause in 2nd Bid to Pass Vaccination Bill' *CBC New Brunswick* (22 November 2019) https://www.cbc.ca/news/canada/new-brunswick/cardy-notwithstanding-clause-mandatory-vaccination-bill-1.5369965.
512 ibid.
513 'N.B. Invokes notwithstanding Clause in Bill Making Vaccination Mandatory' *CTV News Atlantic* (22 November 2019) https://atlantic.ctvnews.ca/n-b-invokes-notwithstanding-clause-in-bill-making-vaccination-mandatory-1.4698400?cache=.
514 New Brunswick, Legislative Assembly of New Brunswick, Standing Committee on Economic Policy, *Minutes of Proceedings and Evidence*, 59th Leg, 3rd Sess, (9 June 2020).
515 ibid 13.

section 4 of Bill 11, which contained the notwithstanding clause, be removed.[516] The sole comments on the proposed amendment were those of Minister Cardy, who stated that he perceived the amendment to be a 'friendly amendment to the government side'.[517] The amendment was then passed unanimously by the committee with no further debate and the notwithstanding clause was removed from the bill.

Despite there being no additional comments or discussion in the committee transcripts to explain the decision to remove the notwithstanding clause, there are two details that could contextualise the decision. First, before introducing the amendment during the Economic Policy committee, MLA Mr. Chiasson expressed concerns that the government was moving too fast to remove the rights of Canadians, 'instead of addressing the failures of the system is in place'.[518] He went on to state:

> Once a freedom is gone, it is gone for good. If we are going to take away rights and freedoms, we had better have tried every other alternative, and we had better had a darn good reason. I fear that we are headed down a slippery slope. We do not need to head down at this time because there are alternatives.[519]

Second, the removal of the notwithstanding clause could have represented a concession to ensure that the legislation was passed. Based on the subject matter of the legislation, all the major political parties announced that they would allow a free vote, where their members would vote individually based on their consciences. Several individual Liberal party members announced that they would only vote to pass Bill 11 if the notwithstanding clause was removed.[520] This was particularly relevant to the governing Conservative party, who at the time

516 New Brunswick, Legislative Assembly of New Brunswick, Standing Committee on Economic Policy, *Minutes of Proceedings and Evidence*, 59th Leg, 3rd Sess, (16 June 2020) 10.

517 ibid 11.

518 ibid 9.

519 ibid.

520 Jacques Poitras, 'MLAs Vote to Drop notwithstanding Clause from Mandatory Vaccination Bill' *CBC News New Brunswick* (16 June 2020) https://www.cbc.ca/news/canada/new-brunswick/mandatory-vaccination-bill-11-notwithstanding-clause-1.5614659.

held a razor-thin minority government.[521] The governing Conservative party may have viewed the dropping of the notwithstanding clause from Bill 11 as a necessary step towards guaranteeing its broad support across parties in the legislature.

After this amendment was passed, Bill 11 returned to the legislature on June 18, 2020 for third reading and was defeated 22-20. [522] Although the reasons for rejecting the legislation differed between legislators, the general themes included lack of evidence and concerns over the restriction of parental rights.[523] Although the notwithstanding clause was never invoked through Bill 11, its inclusion in the legislation is of significance because it represents the inaugural notwithstanding clause bill tabled in any Atlantic province in Canada.

4.1.4 Ontario Political Uses of the Notwithstanding Clause Between 2018 and 2022

Prior to 2018, Ontario had never tabled legislation including the notwithstanding clause. In 2018, Ontario Premier Doug Ford invoked the notwithstanding clause to set aside a court decision after it declared his recently passed legislation unconstitutional. This legislation, *The Better Local Government Act*, was passed August 14, 2018, and cut the size of the Toronto City Council from forty-seven to twenty-five wards, doubling the average ward population from 61,000 to 110,000.[524] The legislation also cancelled the elections for regional chairs in Peel, York, Niagara, and Muskoka.[525]

This legislation received royal assent and came into force in the middle of the Toronto municipal election, 105 days after the election campaign period had started on May 1, 2018,

521 On the date of the introduction of Bill 11, the New Brunswick legislature seat allocation was the Progressive Conservative Party: 20 (governing party), Liberal Party: 20, Green Party: 3, People's Alliance: 3, Independent: 1, and Vacant: 2.

522 New Brunswick, Legislative Assembly of New Brunswick, *Official Reports of Debates (Hansard)*, 59th Leg, 3rd Sess, (18 June 2020) 18–19.

523 Jacques Poitras, 'Mandatory Vaccination Bill Defeated 22-20' *CBC News New Brunswick* (18 June 2020) https://www.cbc.ca/news/canada/new-brunswick/mandatory-vaccination-bill-defeated-new-brunswick-1.5617496.

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

525 Robert Benzie, 'Ford Defends Unilateral Moves to Slash Toronto Council, Axe Regional Chair Elections' *The Hamilton Spectator* (27 July 2018) https://www.thespec.com/news-story/8766190-ford-defends-unilateral-moves-to-slash-toronto-council-axe-regional-chair-elections/.

and sixty-nine days from the election date of October 22, 2018.[526] The *Municipal Elections Act, 1996* was amended to extend the nomination period until September 14, 2018,[527] while maintaining the original election date of October 22, 2018. It required the already registered 509 candidates in municipal, regional, or school board elections to give notice to the appropriate clerk for their constituency that they were planning to continue their candidacy of the new ward structure.[528] To justify the legislation to cut the size of the Toronto City Council, Ford labelled the council 'the most dysfunctional political arena' in Canada (See Figure 4).[529]

The Toronto City Council challenged the decision, and less than a month after the *Better Local Government Act* was passed, *2018,* the legislation was declared unconstitutional by the Ontario Superior Court (ONSC) on September 10, 2018.[530] In *City of Toronto v Ontario*, Justice Belobaba maintained that altering the size of Toronto City Council was not in itself undemocratic or *ultra vires* the provinces constitutional jurisdiction.[531] Instead, the timing of the legislation made it unconstitutional.[532] Justice Belobaba 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 *[Charter]'*.[533] It was further held that these breaches of freedom could not be justified under section 1 of the *Charter*.[534]

The response from the Ford government was swift and severe. Within hours of the ONSC decision, Ford announced he would be invoking the notwithstanding clause to set aside

526 *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 [105].

527 The original nomination deadline was July 27, 2018, the date that Ford announced his intervention in the Toronto municipal election.

528 *A Better Local Government Act*, SO 2018, c 11 amending *Municipal Elections Act*, 1996, SO 1996, c 32.

529 '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.

530 *City of Toronto ONSC* (n 506).

531 ibid [15]–[16].

532 ibid [9].

533 ibid [10].

534 ibid.

the effects of the ruling.[535] Ford expressed his opposition to the 'deeply deeply concerning'[536] ONSC ruling by undermining the independent authority of judicial review. This was evidenced when Ford stated: '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'.[537] Ford even went so far as to say that he 'won't be shy' about using the clause in the future.[538]

On September 12, 2018, two days after the ONSC decision, the government tabled the *Efficient Local Government Act*, 2018.[539] This bill amended four acts to invoke the notwithstanding clause to apply to sections 2 and 7 to 15 of the *Charter*.[540] Representatives of the Ontario Government presented to both the Ontario legislature[541] and the Ontario Court of Appeal (ONCA)[542] that they would only pass this legislation and invoke the notwithstanding clause if the ONCA did not grant their motion to stay the ONSC decision pending an appeal.

Ultimately, Ford was not required to pass the *Efficient Local Government Act* because on September 19, 2018, nine days after the ONSC decision, the ONCA granted the motion and stayed[543] Justice Belobaba's decision.[544] In their interim decision, the ONCA held that although the legislation could have been perceived to be unfair, 'unfairness alone does not establish a

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

536 Shawn Jeffords, 'Doug Ford to Invoke Notwithstanding Clause After Judge Strikes Down Bill to Reduce Toronto Council' *The National Post* (10 September 2018) https://nationalpost.com/news/decision-expected-today-in-toronto-council-legal-challenge.

537 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.

538 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.

539 Bill 31, *the Efficient Local Government Act, 2018* (n 14).

540 The four acts intended to be amended by the *Efficient Local Government Act, 2018* are *City of Toronto Act*, 2006.; *Municipal Act,* 2001; *Municipal Elections Act, 1996*; *Education Act,*1990.

541 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 24 (19 September 2018) (Honourable Ted Arnott) 1011–1012.

542 *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 [8].

543 The decision to stay the lower court's decision results in the freezing of the court's decision until a formal appeal process can be completed.

544 *Toronto (City) ONCA* (n 524).

Charter breach'.[545] In evaluating the prima facie case, the ONCA determined that there was a strong likelihood that the ONSC judge erred in the law and the Ontario government appeal would succeed.[546] The ONCA was sceptical of the ruling that the *Better Local Government Act* substantially interfered with section 2 of the *Charter*. The ONCA held that Justice Belobaba inappropriately 'stretched the wording and purpose' of section 2(b) far beyond the right to freedom of expression and into democratic rights that were not protected in municipal elections.[547] The ONCA also held that the concerns over the size of the wards and effective representation was one of policy, not judicial review under section 2(b) of the *Charter*.[548]

The ONCA staying the lower court's decision pending a completed appeal process resulted in the Ford government no longer needing to invoke the notwithstanding clause in new legislation in response to the ONSC.[549] The municipal election occurred on October 22, 2018, under the new requirements of the *Better Local Government Act*. The former mayor of Toronto John Tory was re-elected, and the Toronto city council is now operating with twenty-six members.[550] A year following the staying of the ONSC decision, the ONCA released the complete appeal decision in favour of the government of Ontario. In this 3-2 decision, the ONCA held that although disruptive the *Better Local Government Act* did not amount to a constitutional infringement.[551]

The decision was appealed and the SCC granted leave to the appeal on March 26, 2020.[552] On October 1, 2021, the SCC released a split decision (5-4) in favour of the Ontario

545 ibid [11].

546 ibid.

547 ibid [12].

548 ibid [18].

549 Jeff Gray, 'Ford's Court Win Sets off Fresh Battles in Toronto Civic Election' *The Globe and Mail* (19 September 2018) https://www.theglobeandmail.com/canada/toronto/article-ontario-court-of-appeal-sides-with-premier-ford/.

550 'Members of Council' (*City of Toronto*, 8 August 2017) https://www.toronto.ca/city-government/council/members-of-council/ accessed 30 April 2020.

551 *Toronto (City) ONCA* (n 508).

552 *Toronto (City) v. Ontario (Attorney General),* 2019 ONCA 732, leave to appeal to SCC granted.

government.[553] The majority opinion, co-written by Chief Justice Wagner and Justice Brown, held that the provincial government's intervention in the already-commenced Toronto City Council municipal election was constitutional.[554] The majority held that the intervention in the election sixty-nine days before election day did not substantially interfere with the freedom of expression rights of the electoral participants.[555] In dissent, Justice Abella wrote on behalf of the four Justices, finding that the actions of the Ontario legislature were unconstitutional. Central to the finding of the dissenting minority opinion was the timing of the intervention in the Toronto municipal election. They held that it was not that the Ontario government did not have constitutional authority to change the municipal wards, but that it could not be done in the middle of an ongoing election.[556] The minority opinion held that this intervention infringed freedom of expression rights under section 2(b) of the *Charter* in a way that could not be reasonably justified.[557]

Although the *Efficient Local Government* was the first time the notwithstanding clause was introduced in Ontario, it would not be the last. In 2021, the Ontario government included the notwithstanding clause in the *Protecting Elections and Defending Democracy Act*.[558] The *Protecting Elections and Defending Democracy Act* was passed and the notwithstanding clause was successfully invoked for the first time in Ontario. This invocation by Ontario also represents the only other promulgated and effective use of the notwithstanding clause outside of Quebec.[559]

553 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

554 ibid [4].

555 ibid.

556 ibid [89]–[90].

557 ibid [156]–[157] and [162].

558 *Protecting Elections and Defending Democracy Act.*

559 See Table 3: Promulgated and Effective Notwithstanding Clause Legislation; Table 4: Promulgated and Ineffective Notwithstanding Clause Legislation; Table 5: Non-Promulgated Notwithstanding Clause Legislation.

The notwithstanding clause was invoked in the *Protecting Elections and Defending Democracy Act*. The context for this invocation stems from changes to the rules on third-party political advertising in Ontario elections. In 2017, the Ontario *Election Finances Act, 1990* was amended to included third-party spending limits in the six months preceding the issuance of the election writ.[560] Third parties were limited to an overall spending cap of $600,000 and a constituency spending cap of $24,000. In addition to the creation of a spending cap, the legislation also expanded the definition of political advertising beyond direct candidate or party advertising to also include issues-based advertising.[561] This 2017 set of amendments represent the first time Ontario limited spending on political advertising.[562]

Shortly thereafter, in January 2018, a coalition of unions launched a challenge claiming the limits on political advertising infringed their freedom of expression rights.[563] Before this legal challenge was heard by the court of first instance, further amendments were made to the *Election Finances Act*. In May 2021, Bill 254, the *Protecting Ontario Elections Act*, was passed and came into force. The amendments to the *Election Finances Act* included doubling the restricted spending period from six months to one year. Despite the extension of the spending limit period, the overall spending cap was left at $600,000.

The coalition of unions which challenged the constitutionality of the 2017 amendments to the *Election Finances Act* was invited to update their claims, given the 2021 amendments.[564] On June 8, 2021, Justice Edward Morgan released his decision, ruling for the claimants.[565] In *Working Families Ontario v. Ontario*, Justice Morgan held that the spending cap limits were a

560 *Working Families Ontario v Ontario,* 2021 ONSC 4076 [2].

561 ibid [4].

562 ibid [2].

563 ibid [5].

564 ibid [8].

565 *Working Families Ontario* (n 542).

self-evident violation of freedom of expression rights and this case centred on whether this rights limitation could be demonstrably justified.[566]

At the section 1 stage, Justice Morgan followed the existing SCC jurisprudence recognising that election spending limits can be necessary to safeguard the egalitarian model of democracy.[567] This approach to democracy recognises that in addition to protections for freedom of expression, the value of equality of speaking opportunities is also an important consideration for the courts.[568] Justice Morgan found that the 2021 amendments to the *Election Finances Act* met the first two *Oakes* test requirements of being a pressing and substantial objective and rationally connected to the objective. The legislative sections, however, failed the *Oakes* test minimal impairment and proportionality requirements. First, the respondents failed to justify the extension of the spending limit period from six months to one-year without also increasing the spending cap. Although experts who testified to the court expressed that the one-year period was reasonable, they also all concluded that the six-month period was 'appropriate and effective'.[569] This evidence led Justice Morgan to conclude that the provision that extended the spending limit period to one-year could not meet the minimal impairment requirement.[570]

Second, Justice Morgan held that the impugned provisions also violate the *Oakes* test proportionality requirements. He found that the extension of the spending limit period was 'disproportionate in terms of the deleterious effects that it imposes, as the expert evidence shows that it is twice as long a period, and thus twice as deleterious, as it need be to accomplish

566 ibid [34]–[35].

567 *Harper v Canada (Attorney General)*, 2004 SCC 33; *Fraser v Canada (Attorney General)*, 2020 SCC 28; *Ford* (n 18); *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577; *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385; *Figueroa v Canada (Attorney General)*, 2003 SCC 37.

568 *Working Families Ontario* (n 542) [30]–[31].

569 ibid [65].

570 ibid [75].

its salutary effects'.[571] Consequently, Justice Morgan ruled that the 2021 amendments to the *Election Finances Act* violated of the freedom of expression *Charter* rights and could not be reasonably justified under the section 1.

In crafting a remedy, Justice Morgan struck down all the impugned sections rather than limiting the remedy to the election spending period section. The striking down of the legislation came into effect immediately.[572] Based on the upcoming Ontario election date scheduled for June 2, 2022, a suspended declaration of invalidity was explicitly declined by Justice Morgan.[573]

One day after the release of the ONSC decision in *Working Families*, the Ontario government announced their intent to invoke the notwithstanding clause and immediately recalled the legislature to pass a new bill.[574] The next day, the government introduced the *Protecting Elections and Defending Democracy Act*[575] and re-enacted all the provisions struck down by the ONSC in *Working Families Ontario.*[576] Under section 4, the legislation invoked the notwithstanding clause to temporarily set aside the ONSC decision and immunise the legislation from challenges under sections 2 and 7 to 15 of the *Charter*.[577] The legislation also declared itself to operate notwithstanding the *Ontario Human Rights Code*.[578]

To justify the notwithstanding clause invocation, Ontario Attorney General Doug Downey described it as a way to 'protect the individual rights of Ontario voters and protect our

571 ibid [80].

572 ibid [90].

573 ibid [91]–[92].

574 'Ford Government Set to Invoke notwithstanding Clause after Court Rejects Election Finance Changes' *CBC Toronto* (9 June 2021) https://www.cbc.ca/news/canada/toronto/ontario-government-notwithstanding-clause-bill-wednesday-1.6059588.

575 *Protecting Elections and Defending Democracy Act.*

576 *Working Families Ontario* (n 542).

577 *Protecting Elections and Defending Democracy Act* s 4.

578 ibid.

elections from American-style super-PACs and unaccountable pop-up organizations that can currently operate with unlimited money and no rules'.[579] Downey went on to state:

> The use of section 33 needs to be intentional and it needs to be principled. What could be more principled than protecting the rights of voters to be free from big-money influence so they can hear from the members of all parties and independents who put their names on a ballot and not be swamped with special interests with no accountability?[580]

He emphasised that 'section 33 is in the charter' and 'the charter, by definition, can't override itself, as it would cease to exist'.[581] He rejected that 'section 33 is sacrosanct and should be left in its glass case', and that like the rest of the *Charter* that has developed as a living tree, so too should the use of section 33.[582]

The legislation passed the third reading stage (63-46 vote) and received royal assent on June 14, 2021,[583] and came into force the same day.[584] The notwithstanding clause in the *Protecting Elections and Defending Democracy Act* was criticised by labour unions and civil society organisations. The executive director of the CCLA was critical of the application of the notwithstanding clause in the context of democratic elections. In a statement released on June 9, 2021, Bryant stated:

> Given the subject of the law, and its impact on the next provincial election, this is a cravenly self-interested abuse of this extraordinary power. No Ontario Premier has ever invoked this nuclear constitutional option, until this one, who has a rash constitutional tantrum whenever a court dares to enforce Ontarians' constitutional rights – first with the Toronto election, in 2018, and now the Ontario provincial election […] The notwithstanding clause was designed to be a democratic safety valve, not a brazen power grab to tilt election rules in a government's favour.[585]

579 Ontario, Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 42nd Leg, 1st Sess, (12 June 2021) 14100–14101.

580 ibid 14101.

581 ibid.

582 ibid.

583 Ontario, Legislative Assembly of Ontario, *Official Reports of Debates (Hansard)*, 42nd Leg, 1st Sess, (14 June 2021) 14207.

584 *Protecting Elections and Defending Democracy Act* s 5.

585 'CCLA Statement on Notwithstanding Clause' (*Canadian Civil Liberties Association (CCLA)*, 9 June 2021) https://ccla.org/notwithstandingclause/ accessed 29 July 2021.

Following the decision, the Ontario Working Families coalition was also critical of the notwithstanding clause invocation. Patrick Dillon, the business manager of the Provincial Building and Construction Trades Council of Ontario, stated: 'The government decided they are above the law, so they brought legislation back to show the people of Ontario that everybody else in Ontario needs to comply with the law but not the governing party of the province of Ontario'.[586]

The Working Families Coalition in November 2021 challenged the constitutionality of the *Protecting Elections and Defending Democracy Act.* The union argued that despite its notwithstanding clause invocation, the act was unconstitutional because it restricted political advertising rights that fall outside the scope of the section 33 under section 3 of the *Charter*.[587] Although they were unsuccessful at the Ontario Superior Court, Working Families appealed the decision, which was heard at the Ontario Court of Appeal in June 2022.[588]

At the end of 2022, the Ontario government invoked the notwithstanding clause for the third time in its history in the context of a labour dispute. The Ontario government was engaged in collective bargaining with the Canadian Union of Public Employees (CUPE) who represent 55,000 education assistants, early childhood educators, custodians, and administrative assistant. The collective bargaining had reached an impasse as the union was demanding a 11.7% annual and the Ontario government was only offering an annual wage increase of 2% for wage earners making less than $40,000 a year and 1.5% for the rest of the workers.[589] CUPE

586 Don Wall, 'Dillon Says Working Families Weighing Options after Ford "Tramples" Rights' *Construct Connect* (21 June 2021) https://canada.constructconnect.com/dcn/news/associations/2021/06/dillon-says-working-families-weighing-options-after-ford-tramples-rights accessed 29 July 2021.

587 Canadian Civil Liberties Association, 'CCLA makes its case against Ontario's third party advertising restrictions' (18 November 2021) https://ccla.org/fundamental-freedoms/ccla-makes-its-case-against-ontarios-third-party-advertising-restrictions/, accessed 10 December 2022.

588 Canadian Civil Liberties Association, 'CCLA Intervening at Ontario Court of Appeal on Importance of Political Expression and the Right to Vote' (18 November 2021) https://ccla.org/fundamental-freedoms/ccla-intervening-at-ontario-court-of-appeal-on-importance-of-political-expression-and-the-right-to-vote/, accessed 10 December 2022.

589 'Ontario is using the notwithstanding clause to stop a school strike. Here's what it is and how it works' CBC Toronto (31 October 2022) https://www.cbc.ca/news/canada/toronto/ontario-notwithstanding-cupe-strike-1.6635564, accessed 10 December, 2022.

then engaged its first day legal strike action where all 55,000 education-related workers walked off the job to picket.[590]

The following working day, the Ontario government tabled a notwithstanding clause bill titled the *Keeping Students in Class Act*.[591] Tabled on Monday October 31, 2022, this notwithstanding clause bill passed third reading and received royal assent less than three days later on November 3, 2022.[592]

The legislation was Ontario's first and second overall Canadian application of the clause to strike activity.[593] The *Keeping Students in Class Act* was back-to-work legislation that mandated the end of the strike and that the bargaining unit members would return to work. Instead of imposing binding arbitration, as is often seen with back to work legislation deemed constitutional, the *Keeping Students in Class Act* imposed a collective agreement on the bargaining unit. The imposed four-year collective agreement provided 2.5% annual wage increases to workers making less than $43,000 a year and 1.5% wage increases for workers making above this amount.[594] The notwithstanding clause, included under section 13, broadly applied to section 2 and 7 to 15 of the *Charter*.[595]

The union leaders were undeterred by the invocation of the notwithstanding clause in the *Keeping Students in Class Act.* On November 4, 2022, the day after the act's passing, CUPE members staged a walk out that they labelled a political protest, rather than strike activity.[596] The union threatened that the walk-out would continue until the *Keeping Students in Class Act*

590 Peter Zimonjic and Jennifer Chevalier, 'The notwithstanding clause — what it is, why it was used and what happens next' CBC Politics (6 November 2022) https://www.cbc.ca/news/politics/notwithstanding-clause-explained-ford-1.6641293, accessed 10 December, 2022.

591 *Keeping Students in Class Act*, SO 2022, c 19.

592 Legislative Assembly of Ontario, 'Keeping Students in Class Act Status' https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-28/status, accessed 10 December 2022.

593 See also *SGEU Dispute Settlement Act*.

594 *Keeping Students in Class Act*, s 5, Schedule 1.

595 *Keeping Students in Class Act*, s 13.

596 'Strike or political protest? Ontario takes education workers' union to labour board amid Friday walkout' CBC Toronto (4 November 2022) https://www.cbc.ca/news/canada/toronto/cupe-strike-education-ontario-schools-closed-1.6640386, accessed 10 December 2022.

was repealed.[597] The following working day on November 7, 2022, Premier Ford and CUPE reached an agreement where the government would repeal the *Keeping Students in Class Act* in exchange for the union ending their walkout.[598] The notwithstanding clause was repealed a week later on November 14, 2022 through the *Keeping Students in Class Repeal Act*.[599] By the end of the month, Ontario and CUPE had reached a collective agreement that provided a $1 hourly wage increase (approximately 3.59% annual wage increase).[600]

The *Keeping Students in Class Act* represents the final Ontario notwithstanding clause act passed in 2022. Despite never having been used by Canada's largest province prior to 2018, Premier Ford in his tenure has tabled notwithstanding clause legislation three times in four years – two of which were fully promulgated and effective. It seems as though Ford's 2018 threat that he 'won't be shy' to use the notwithstanding clause in the future has proven true.[601]

4.2 A Shift in Political Uses of the Notwithstanding Clause and its Consequences for Judicial Interpretation of Section 33

I will now engage in a comparative analysis of the pre- and post-2018 political uses of the notwithstanding clause. Through an examination of the post-2018 notwithstanding clause uses based on geography, frequency, timing, and thematic application, I critically analyse whether section 33 is no longer a tool of the last resort. I argue that the post-2018 uses of the notwithstanding clause represent a break with the pre-2018 practice of the notwithstanding clause that was dominated by Quebec secessionist politics. Instead, the post-2018 uses of the notwithstanding clause are, in part, connected to growing political polarization in Canada, and

597 *Ibid.*

598 Isaac Callan and Colin D'Mello, 'Ontario education worker strike called off with union members to vote on tentative deal' *Global News* (21 November 2022) https://globalnews.ca/news/9292987/ontario-cupe-negotiations-sunday-november-20/, accessed 10 December 2022.

599 *Keeping Students in Class Repeal Act*, SO 2022, c 20.

600 Katherine DeClerq, 'Ontario education support workers vote to ratify new contract' CTV News Toronto (5 December 2022) https://toronto.ctvnews.ca/ontario-education-support-workers-vote-to-ratify-new-contract-1.6180879, accessed 10 December 2022.

601 Crawley (n 520).

that this may create a growing impetus for courts to place substantive controls on section 33's application.

4.2.1 Geography and the Post-2018 Uses of the Notwithstanding Clause

Since 2018, the notwithstanding clause greatly expanded its jurisdictional application spread across the country. During this four-year period, it was introduced to provincial populations that totaled over twenty-five million Canadians, well over half of the Canadian population.[602] Geographically, four of the seven invocations were done by provinces which had never tabled legislation invoking the notwithstanding clause. Both Ontario and New Brunswick invoked the notwithstanding clause for the first time in 2018 and 2020 respectively.[603] For New Brunswick, it was the first inclusion of the notwithstanding clause in tabled legislation across the Atlantic provinces. Before the 2018 invocation, Saskatchewan's only other invocation of the notwithstanding clause in 1986 was deemed unnecessary by an SCC ruling.[604]

4.2.2 Frequency and the Post-2018 Uses of the Notwithstanding Clause

The frequency of the notwithstanding clause invocations between 2018 and 2021 has not occurred since the first decade of the *Charter*. Immediately following the passing of the *Charter*, the province of Quebec invoked the notwithstanding clause in every statute until 1985.[605] Following the ending of this automatic blanket inclusion, the Quebec government invoked the notwithstanding clause fifteen additional times between 1985 and the early 1990's.[606] After this first decade, the frequency of the invocations of the notwithstanding clause

602 This calculation included the 2019 populations of Ontario, Quebec, Saskatchewan and New Brunswick. See Statistics Canada, 'Population Estimates, Quarterly' (28 December 2017) https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901 accessed 25 November 2020.

603 It should also be noted that Ontario invoked the notwithstanding clause successfully in 2021. See *Protecting Elections and Defending Democracy Act.*

604 *SGEU Dispute Settlement Act*.

605 Hogg, *Constitutional Law of Canada* (n 7) 879.

606 See Table 2: Renewals of the Notwithstanding Clause Invocations; Table 3: Promulgated and Effective Notwithstanding Clause Legislation; Table 4: Promulgated and Ineffective Notwithstanding Clause Legislation; Table 5: Non-Promulgated Notwithstanding Clause Legislation; Table 6: Legislative Status of Notwithstanding Clause Invocations; Table 7: Comparing Applications of the Notwithstanding Clause Invocations.

dropped significantly. The actual and attempted invocations of the notwithstanding clause went from fifteen between 1982 and 1992, to three between 1993 and 2002, and finally, to zero between 2003 and 2012. It was not until 2018 that the decade of 2013 to 2022 saw any invocations. Consequently, the post-2018 invocations represent a rise in the frequency of notwithstanding clause use not seen since it was first passed in 1982.

4.2.3 Timing of Invocation and the Post-2018 Uses of the Notwithstanding Clause

Since 1982, only six of the twenty-five notwithstanding clause bills were tabled in response to a court decision.[607] Of these six, four were post-2018 invocations of the notwithstanding clause. In Saskatchewan and Ontario, the provincial governments tabled legislation invoking the notwithstanding clause following a loss at the court of first instance.[608] In Quebec, both the 2019 and 2021 invocations of the notwithstanding clause partially responded to a court decision.

First, although the 2019 invocation of the notwithstanding clause in the *Laicity of the State Act* was seemingly pre-emptive, it falls within a grey area between pre-emptive and responsive legislation. *An Act Respecting the Laicity of the State* was not the first time Quebec tried to implement limitations on wearing religious symbols.[609] In 2017, the Quebec government, led by the Liberal Party, legislated the banning of religious symbols that resemble face coverings on public transportation and when accessing other provincial services.[610] This legislation was placed under an injunction in 2017 following a legal challenge.[611] Following the 2019 election, the Quebec government under CAQ already knew that the courts of first

607 See Table 7: Comparing Applications of the Notwithstanding Clause Invocations.

608 Bill 31, *the Efficient Local Government Act* (n 14); *The School Choice Protection Act*; *Good Spirit SKQB 2017* (n 459); *City of Toronto ONSC* (n 506); *Protecting Elections and Defending Democracy Act*.

609 *Laicity of the State Act.*

610 Bill 96, *An Act respecting French, the official and common language of Québec*, 1st Sess, 42nd Leg, Quebec, 2021.

611 *National Council of Canadian Muslims (NCCM) v Attorney General of Quebec*, 2017 QCCS 5459.

instance in Quebec were prepared to strike for *Charter* infringements. Thus, the 2019 invocation of the notwithstanding clause was not wholly pre-emptive.

Second, the Quebec 2021 invocation of the notwithstanding clause in *An Act Respecting French, the Official and Common Language of Quebec* was in part a response to the 1988 *Ford* decision. This SCC decision held that the requirement of French unilingual commercial signs violated section 2(b) and could not be justified under section 1 of the *Charter*. Immediately following this decision, the Quebec government in 1988 invoked the notwithstanding clause in *An Act to Amend the Charter of the French Language* to set aside the effects of the decision and allowed it to expire in 1993. The 2021 invocation of the notwithstanding clause through *An Act Respecting French, the Official and Common Language of Quebec* once again seeks to set language requirements for commercial signs and relies on the notwithstanding clause to immunise this section among others from sections 2 and 7 to 15 of the *Charter*.

In sum, post-2018 invocations make up four of the seven responsive uses of the notwithstanding clause. This analysis reveals that the post-2018 notwithstanding clause uses have become more directed at responding to the court's declarations of invalidity. Since 2018, there has also been an increased use of the notwithstanding clause as a form of court insurance. The notwithstanding clause used as court insurance provides political leaders with certainty of guarantee for their policies that may in the future undergo, or is already undergoing, a constitutional challenge. The practice of the notwithstanding clause as insurance safeguards legislation that is declared unconstitutional by a lower court but has not yet completed the appeal processes. In Canadian history, there are three documented cases of using the notwithstanding clause as insurance. First, in 1986, Saskatchewan invoked the notwithstanding clause in legislation following a loss at SKQB regarding back-to-work legislation.[612]

612 *SGEU Dispute Settlement Act.*

Ultimately, the SKCA and the SCC overturned the lowest court's decision, finding that the back-to-work legislation did not violate section 2(d) the *Charter*.[613]

Second, following their loss at the SKQB in 2017,[614] the Saskatchewan government announced their decision to invoke the notwithstanding clause using the justification of providing certainty for parents.[615] The use of the notwithstanding clause in the *School Choice Protection Act* was purported as a form of insurance, to provide certainty of guarantee for government policies from declarations of unconstitutionality. The Saskatchewan government delayed the coming into force of the legislation until the executive proclaimed it into force and successfully gained a stay of the SKQB decision pending the appeal.[616] Ultimately, however, the notwithstanding clause was never brought into force. The SKCA overturned the decision of the SKQB, and the SCC did not grant leave to appeal.[617]

Third, in Ontario, Premier Ford announced his intent to invoke the notwithstanding clause mere hours after a 2018 loss at the ONSC. In *City of Toronto*, the ONSC invalidated the provincial legislation that sought to intervene in the already launched Toronto-city elections.[618] The Ontario government responded by introducing the *Efficient Local Government Act* that invoked the notwithstanding clause and simultaneously sought a stay of the decision pending an appeal.[619] Following the granting of this stay, and the completion of the Toronto-city election, the Ontario government saw no need to invoke the notwithstanding clause and

613 *Retail, Wholesale and Department Store Union, Local (SKCA)* (n 268); *RWDSU* (n 269).

614 *Good Spirit SKQB 2017* (n 459).

615 *The School Choice Protection Act.*; 'Government Will Use Notwithstanding Clause to Protect School Choice for Parents and Students' (n 467).

616 Standing Committee on Human Services 23 May 2018 (n 471) 733.

617 *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212,* 2020 SKCA 34, leave to appeal to SCC refused.

618 *City of Toronto ONSC* (n 506).

619 Bill 31, *the Efficient Local Government Act, 2018* (n 14).

allowed the *Efficient Local Government Act* to remain on the order paper.[620] The ONCA ultimately overturned the ONSC decision, which was affirmed by the SCC in 2021.[621]

The practice of using the notwithstanding clause as a form of court insurance, raises important considerations for the use of the notwithstanding clause in undermining dialogue between the courts and the legislatures. The dialogue theory, developed by Hogg and Bushell, argues that following a court declaration of constitutional invalidity, the legislatures engage in a form of dialogue.[622] The legislatures consider all judicial declarations of invalidity and either allow it to stand or provide a legislative response. A legislative response would include provisions that seek to respond to the court's reasoning.

The use of the notwithstanding clause as a form of court insurance can be critiqued for undermining the relationship between the courts and legislatures by absolving the government from having to consider the rights-based issues raised by a court declaration of invalidity. The actions of Saskatchewan and Ontario represent uses of the notwithstanding clause as tools to absolve the government from having to consider and respond to the rights infringements declared by the courts. The government can bypass any participation in dialogue with the courts by invoking the notwithstanding clause using the justification of certainty. Consequently, the notwithstanding clause insurance approach, which has been used more since 2018, can weaken the dialogic relationship between the courts and legislatures.

4.2.4 Thematic Applications and the Post-2018 Uses of the Notwithstanding Clause

This thematic analysis examines the motive for the invocation of the notwithstanding clause. The reasons provided since 2018 to justify the invocations of the notwithstanding clause include applications to divisive democratic and social issues so far unseen in Canadian history.

620 *Toronto (City) ONCA* (n 524).

621 *Toronto (City) ONCA* (n 508).

622 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)' (1997) 35 Osgoode Hall LJ 76.

The novel post-2018 notwithstanding clause uses include targeting democratic processes, discrimination against religious minorities, and avoiding the costs of judicial review from an anti-vaccination coalition.

First, Ontario invoked the notwithstanding clause to interfere with an already commenced municipal democratic election.[623] The application of the notwithstanding clause to a democratic process has never occurred in Canadian history. The notwithstanding clause can only apply to certain rights. This structural design of the notwithstanding clause bars the application of the notwithstanding clause to sections 3 to 5 of the *Charter* to ensure that any use of the notwithstanding clause is accountable to democratic elections.[624] By excluding the Toronto City Council elections from falling within the democratic rights protections of the *Charter*, the SCC has permitted the applicability of the notwithstanding clause to certain democratic processes – namely, municipal elections. Thus, the Ontario attempted invocation of the notwithstanding clause in 2018 to the Toronto municipal election represents a new development in notwithstanding clause applicability.

Second, the Quebec government invoked the notwithstanding clause to target religious minorities under the guise of State laicity.[625] The government had little to no evidence to support their decision to restrict the rights of religious minorities and invoked the notwithstanding clause knowing it would be struck down under the *Charter*. Through the *Laicity of the State Act*, individuals wearing visible religious symbols, including hijabs or turbans, were prohibited from taking up employment in the public sector, including jobs as teachers, police officers and prosecutors. Unlike other Quebec uses of the notwithstanding clause, which sought to safeguard religious minority rights of Protestants and Catholics, the

623 Bill 31, *the Efficient Local Government Act, 2018* (n 14).

624 *Canadian Charter of Rights and Freedoms* s 33.

625 *Laicity of the State Act.*

Laicity of the State Act did the opposite.[626] This legislation barred public servants from wearing religious symbols and had a disproportionate effect on non-Christian religious minorities.

The 2019 invocation of the notwithstanding clause was not the first time section 33 was applied to suspend the rights of minority groups. In 1998, the Alberta government tabled notwithstanding clause legislation to limit the compensation available to individuals with disabilities sterilised through government programs.[627] Additionally, in 2000, the Alberta government promulgated notwithstanding clause legislation, which barred same-sex couples from getting married. Although this legislation was deemed *ultra vires* by the SCC, it was passed with the direct intent to discriminate against other based on sexual orientation.[628] What distinguishes the 2019 Quebec targeting of minority religious rights through the notwithstanding clause is that it was both promulgated and effective. In contrast, the 1998 Alberta invocation was never promulgated, and the 2000 Alberta invocation was never effective.

Third, in New Brunswick, the notwithstanding clause was applied to avoid the costs associated with judicial review from a mobilised anti-vaccination coalition.[629] In addition to using the notwithstanding clause for the socially divisive issue of childhood vaccinations, the proposal of and attempt use of section 33 for financial reasons is an unprecedented shift in application of the notwithstanding clause. The only parallel notwithstanding clause use was Alberta's attempted invocation of the notwithstanding clause in 1998 to limit compensation for sterilisation victims. Predicting class-action lawsuits that could cost the province upwards of $760 million dollars, the Alberta government sought to mitigate the financial loss to the province through legislation.[630] Only after extensive public criticism did the government

626 ibid.

627 Bill 26, *Institutional Confinement and Sexual Sterilization Act* (n 362).

628 *Marriage Amendment Act.*

629 Bill 11, *An Act Respecting Proof of Immunisation* (n 16).

630 Bill 26, *Institutional Confinement and Sexual Sterilization Act* (n 362).

withdraw the legislation from consideration and enter negotiations with the 700 other victims.[631] The intent of invoking the notwithstanding clause in Alberta was to limit the total settlement amount. Unlike the 2020 New Brunswick use of the notwithstanding clause, there was no intent to completely subvert individuals living with disabilities from seeking judicial review for government infringement on their bodily autonomy and constitutional rights. An invocation of the notwithstanding clause to avoid judicial review costs, even one that fails (as seen in Alberta and New Brunswick), raises important questions on the rule of law and the rights of all individuals to seek judicial review as a check on government powers.

4.2.5 Rise in Canadian Populism and Post-2018 Uses of the Notwithstanding Clause

Populism is best understood as a political movement that 'considers society to be ultimately separated into two homogeneous and antagonistic groups, the pure people versus the corrupt elite'.[632] A populist political movement constructs a unified people and criticises the existing political status quo on behalf of this constructed unified people.[633] The defining features of a populist political movement are anti-elitism, an emphasis on popular sovereignty, and a preference for direct democracy.[634] Per Mudde, a populist political movement is based on a 'thin-centred ideology' with no core values and is predominately vague and moralistic based on the will of the constructed unified people.[635]

Although there are several types of populist political movements,[636] there has been a rise of right-wing populism globally since the 2010s.[637] This rise in right-wing populism has

631 'Alberta Backs Down on Sterilization Compensation' (n 363).

632 Cas Mudde, 'The Populist Zeitgeist' (2004) 39 Gvt & Opp 541, 543.

633 Paul Blokker, 'Varieties of Populist Constitutionalism: The Transnational Dimension' (2019) 20 German LJ 332, 333.

634 Bojan Bugaric, 'Could Populism Be Good for Constitutional Democracy?' (2019) 15 Annual Rev L & Soc Sci 41, 44.

635 Mudde (n 599) 544–546.

636 The types of populism include: agrarian, socioeconomic, xenophobic, reactionary, authoritarian, and progressive. See Bugaric (n 601) 44.

637 Identified right wing nationalist movements since 2010 include Hungary with Viktor Orban since 2010, United States with Donald Trump from 2016-2020, Brazil with Jair Bolsonaro since 2019, and Poland with Andrzej Duda since 2015. See Chris Erl, 'The People and The Nation: The "Thick" and the "Thin" of Right-Wing Populism in Canada' (2021) 102 Soc Sci Q 107, 110.

been criticised by legal scholars for undermining constitutional democracies.[638] Canada has not been immune from the global rise in right-wing populism. The elections of Doug Ford in Ontario (2018),[639] Francois Légault in Quebec (2018),[640] and the creation of the federal People's Party of Canada[641] have been identified as manifestations of the rise of right-wing populism in Canada. I argue that since 2018, there has been a shift in notwithstanding clause use away from the rare use political practice that dominated in English Canada. The post-2018 shift in use of the notwithstanding clause is also, in part, connected to growing political polarization in Canada.

To begin, there has been a shift away from the rare use practice that dominated notwithstanding clause use in English Canada from 1982 to 2018. This shift away from notwithstanding clause is most evident through the increase in frequency of the notwithstanding clause and its geographic spread. Within English Canada, in the thirty-six-year period prior to 2018, there were four notwithstanding clause bills, and none were promulgated and effective. Since 2018, there have been four notwithstanding clause bills. The 2021 invocation of the notwithstanding clause by Ontario in the *Protecting Elections and Democracy Act*[642] is the first promulgated and effective legislation in English Canada. In addition to the rise in frequency, there has also been an expansion of notwithstanding clause use across Canada. Before 2018, the notwithstanding clause had only been introduced in the

638 Kurt Weyland, 'Populism's Threat to Democracy: Comparative Lessons for the United States' (2020) 18 Persp Poli 389; AW Heringa and Hoai-Thu Nguyen, 'Endangered Liberal Democracies and How to Safeguard Them' in Sascha Hardt, AW Heringa and Hoai-Thu Nguyen (eds), *Populism and democracy* (Eleven International Publishing 2020); Mueller JW, 'Populism and Constitutionalism', in Kaltwasser CR and others (eds), *The Oxford handbook of populism* (Oxford University Press 2017); Weyland. Gábor Halmai, 'Is There Such Thing as "Populist Constitutionalism"? The Case of Hungary' (2018) 11 J Hum & Soc Sci 323.

639 Stuart Trew and Greg Albo (eds), 'Hard Right Turn in Ontario', *Conservatism, Populism and Crisis* (Canadian Centre for Policy Alternatives 2019).

640 Stuart Trew and Greg Albo (eds), 'François Légault, Quebec's Centre Right of Attention', *Conservatism, Populism and Crisis* (Canadian Centre for Policy Alternatives 2019).

641 'Maxime Bernier: Can Populism Become Popular in Canada?' *BBC News* (23 September 2019) https://www.bbc.com/news/world-us-canada-49719947 accessed 15 May 2022; Erl (n 604) 108.

642 *Protecting Elections and Defending Democracy Act.*

Yukon, Alberta, Saskatchewan, and Quebec. Since 2018, this list has expanded to include Ontario and New Brunswick.[643] For New Brunswick, Bill 11 was the first inclusion of the notwithstanding clause in tabled legislation across the Atlantic provinces. Thus, the significant rise in frequency and geographic expansion of the notwithstanding clause since 2018 marks a shift away from the rare use practice that previously dominated English Canada.

The shift in notwithstanding clause use since 2018 is also linked to the rise of right wing populism in Canada. The features of the post-2018 notwithstanding clause uses linked to the rise of right-wing populism are the timing of the invocations and the thematic applications of the notwithstanding clause. First, since 2018, there has been a significant rise in the notwithstanding clause being used in response to court decisions. Only six of the total twenty-four notwithstanding clause bills responded to a court decision.[644] Of these six, four were post-2018 invocations of the notwithstanding clause. The post-2018 trend of an increased use of the notwithstanding clause in response to a court decision is influenced by the rise in right-wing populism in Canada. Populism is characterised as a political movement that constructs a unified people to mobilise against an existing elite. In this context, Canadian political leaders who are populists can use the notwithstanding clause as a tool for their constructed unified population against what they argue is an unelected and unaccountable judiciary. The 2018 Ontario notwithstanding clause invocation demonstrates Ford's right-wing populist approach. Following a court declaration that his legislative intervention in the already begun Toronto municipal election was unconstitutional, Ford exemplified the populist prioritisation of popular sovereignty and preference for direct democracy. Ford undermined the independent role of judicial review, stating: '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

643 It should also be noted that Ontario invoked the notwithstanding clause successfully in 2021. See ibid.

644 See Table 7: Comparing Applications of the Notwithstanding Clause Invocations.

elected by 2.3 million people, [Justice Belobaba] was appointed by one man'.[645] The language employed by Ford reflects his populist approach to political leadership whereby he used the notwithstanding clause as a tool to champion his constructed Ontario electorate against the judiciary.

Second, the thematic applications of the notwithstanding clause since 2018 also demonstrate the influence of right-wing populism. Since 2018, the notwithstanding clause has been applied to divisive social and democratic issues, including municipal democratic elections, childhood vaccinations and religious minority rights. Before 2018, the majority of notwithstanding clause uses applied to non-divisive issues such as pension plans and representation in institutional organisations (educational and land planning). Notably, there were applications of the notwithstanding clause that could be characterised as divisive social issues, such as the Alberta applications of the notwithstanding clause to same-sex marriage and the Saskatchewan invocation in back-to-work legislation. However, in Alberta the application was largely symbolic with no actionable consequences, and in Saskatchewan the application was based on *Charter* interpretation uncertainty.

In contrast, none of the post-2018 invocations are symbolic or related to *Charter* uncertainty. The notwithstanding clause uses were directed at achieving specific purposes on divisive social and democratic issues. In Quebec, the notwithstanding clause was used to target religious minorities and bar them from working in the public service. In Ontario, the notwithstanding clause intervened in an already begun municipal affecting almost three million voters. In New Brunswick, the notwithstanding clause was tabled to avoid the costs of judicial review from an anti-vaccination coalition claiming *Charter* infringements from mandatory childhood vaccinations. The post-2018 notwithstanding clause uses were applied to divisive social and democratic issues in an increasingly polarised Canadian political landscape. Populist

645 Lilley (n 519).

political movements seek to create and benefit from political polarization by creating an us versus them binary.[646] The polarization is thus intentional and employed strategically by populist political leaders.[647] The notwithstanding clause is a tool increasingly employed by Canadian populist political leaders to exacerbate polarization for their own benefit.

Regarding Quebec, the notwithstanding clause since its inception has been in part used within a populist political movement. Both before and after the *Charter*, Quebec political leaders pursued secessionist politics through a populist nationalist political movement. This populist nationalist movement sought to create the binary of Quebec against the rest of English Canada to achieve their goal of Quebec secession. Prior to 2018, the notwithstanding clause was employed several times to pursue the secessionist project, most notably as a protest against the imposition of the *Charter* and to create strict French language requirements. After 1995 and the failed secession referendum, Quebec uses of the notwithstanding clause declined, including its application to secessionist-like politics. Since 2018, Quebec may be moving into a new phase of notwithstanding clause use, still motivated by populist political movements. The use of the notwithstanding clause to Bill 96 to create stricter French-language requirements may mirror past Quebec uses of the notwithstanding clause in pursuing their secessionist politics. However, I argue that the use of the notwithstanding clause in the *Laicity of the State Act* to target religious minorities represents a break in the dominant use of section 33 to pursue secessionist politics from 1982 to 2018. This use of the notwithstanding clause, despite being promoted under the guise of collective identity through laicity, has been criticised for pursuing collective identity based on notions of racial and religious superiority. Although the Quebec government is not enacting the legislation to pursue an overt secessionist project, they are still

646 Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Harvard University Press 2019) 5 https://www.degruyter.com/document/doi/10.4159/9780674243576/html accessed 15 May 2022.

647 Kenneth M Roberts, 'Populism and Polarization in Comparative Perspective: Constitutive, Spatial and Institutional Dimensions' [2021] Gvt & Opp 1, 4.

motivated by a populist political movement. In this instance, however, the constructed identity of the people is a Quebec population within the dominant Christian religion against visible religious minorities. This application of the notwithstanding clause could represent a shift in Quebec applications of the notwithstanding clause, away from secessionist politics that dominated its use until 2018. However, both pre- and post-2018 uses of the notwithstanding clause by Quebec are influenced by populist political movements.

4.3 Conclusion

To conclude, I presented the post-2018 invocations of the notwithstanding clause. I then engaged in a comparative analysis of the pre- and post-2018 political uses based on geography, frequency, timing, and thematic application. Through this critical analysis, I argued that the post-2018 uses of the notwithstanding clause represent a break with the pre-2018 practice of the notwithstanding clause that was dominated by Quebec secessionist politics. I ended by arguing that the post-2018 uses of the notwithstanding clause are, in part, connected to growing political polarization in Canada. This shift in notwithstanding clause use may create a growing impetus for courts to place substantive controls on section 33's application, which will be explored throughout the rest of this thesis.

CHAPTER FIVE:

5. Judicial Interpretation of the Notwithstanding Clause Between 1982 and 2022

This chapter critically analyses the limited case law on the interpretation of the notwithstanding clause. First, I summarize Canada's approach to *Charter* interpretation. I examine the *Charter*'s interpretive methods of textualism, originalism, progressive interpretation, generous interpretation, and purposive interpretation. This examination sets the stage for my analysis of the notwithstanding clause case law and my argument that the application of ordinary approaches to constitutional interpretation can limit the scope of the notwithstanding clause. In the following chapters I propose four non-exhaustive limits on the notwithstanding clause based on Canadian constitutional interpretation approaches. Second, I present the existing jurisprudence on the interpretation of section 33. The leading case is *Ford v Quebec,* which sets out the form-only approach to the notwithstanding clause interpretation. I also discuss the other SCC cases that comment on the notwithstanding clause *obiter*. I conclude by arguing that the SCC interpretive approach to the notwithstanding clause should be revisited. My critique of the SCC interpretive approach to section 33 is three-fold. First, the reasoning in *Ford* that justified the adoption of the 'form-only' approach to the notwithstanding clause was based on an erroneous textual interpretation of section 33. Second, the SCC in *Ford* failed to apply the established methods of *Charter* interpretation. Third, the outcome of *Ford* may have been influenced by the existing political climate and thus responded to the threat of Quebec secession.

5.1 The Canadian Approach to *Charter* Interpretation

The modes of interpretation applied by the judicial branch to constitutional cases differ from those used in statutory cases.[648] Constitutional interpretation differs from statutory

648 The leading scholars who argue that statutory interpretation differs from constitutional interpretation, include: Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (LexisNexis Canada 2018); Peter Hogg, *Constitutional Law of Canada* (2nd edn, Thomson Carswell 2004) 729. It must be noted that scholars such as Stéphane Beaulac argues that the interpretation of Canada's Constitution is not

interpretation, in part due to the design of constitutional texts.[649] The language in the Canadian Constitution is written in an open-textured manner and constructed to apply as the supreme law[650] over a long period.[651] The constitutional amendment process established in the *Constitution Act, 1982* makes future broad constitutional amendments unlikely.[652] Thus, the constitutional interpretive methods should be able to apply the constitutional text to a wide range of novel legal issues.[653]

In addition to the distinctions in interpretive approaches between statutory and constitutional texts, there is also a distinction made between the types of constitutions being interpreted, most notably the *Constitution Act, 1867* and *Constitution Act, 1982*. The *Constitution Act, 1867,* is predominantly interpreted under the division of powers and has distinct approaches to constitutional interpretation to determine the pith and substance of legislation.[654] Judicial interpretation of the *Charter* within the *Constitution Act, 1982*, evaluates and balances entrenched individual rights. The notwithstanding clause is within the *Charter* and thus judicial interpretation of the *Charter* will be the focus of the rest of this chapter.[655]

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fundamentally different than the construction of statutes. He argues that there has been convergences of interpretative methodologies and inter-legality that has resulted in there not being fundamental differences in the interpretation of Canada's Constitution and the construction of statutes. See Stéphane Beaulac, 'Constitutional Interpretation: On Issues of Ontology and of Interlegality' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017); Beaulac S, 'Texture Ouverte', Droit International et Interprétation de La Charte Canadienne' (2013) 61 SCLR 191; GA Beaudoin, EP Mendes and Stéphane Beaulac (eds), 'L'interprétation de La Charte: Reconsidération de l'approche Téléologique et Réévaluation Du Rôle Du Droit International', *Charte canadienne des droits et libertés* (4th edn, LexisNexis Butterworths 2005).

649 *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 64.

650 *Constitution Act, 1982* s 52(1).

651 Hogg, *Constitutional Law of Canada* (n 615) 729.

652 The constitutional amendment process is outlined in Part V of *Constitution Act, 1982.*

653 Grant Hutchison, 'A Constitutional "Work in Progress"? The Charter and the Limits of Progressive Interpretation' (2004) 23 SCLR 413, 418.

654 Peter Hogg, 'Canada: From Privy Council to Supreme Court' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007) 58.

655 Any legislation by a federal, provincial or territorial government that invokes the notwithstanding clause must be within their constitutional authority established by the division of powers. The process of evaluating the constitutionality legislation under the division of powers is a separate interpretive process that does not include considerations for whether the notwithstanding clause is invoked. Thus far, since 1982, only the *Marriage Amendment Act, 2000655* by Alberta was declared ultra vires by the SCC. It is also suspected that the Yukon *Land Planning and Development Act, 1982*, legislation that received royal assent, was not brought into force because of concerns regarding its constitutionality

When adopted in 1982, the *Charter* as a new constitutional document and the first entrenched bill of rights in Canadian history required the courts to develop approaches to *Charter* interpretation drawing on existing methods and adopting new ones. In evaluating whether a *Charter* right has been unjustifiably infringed, the Canadian courts rely on distinctive[656] *Charter* interpretation approaches. I will now summarize the Canadian approach to *Charter* interpretation by examining five modes of interpretation: textualism, originalism, progressive interpretation, generous interpretation, and purposive interpretation. Following this introduction of the interpretive approaches, I discuss how these interpretive approaches are often used concurrently and the courts attempts to interpret them harmoniously when they conflict. The goal of this section is to present a comprehensive picture of *Charter* interpretation that will guide my subsequent overview and critique of existing jurisprudence on section 33.

5.1.1 A Textual Approach to Charter Interpretation

A textualist *Charter* interpretation refers to 'an interpretive approach which relies strictly on a provision's wording in order to interpret the right(s) conferred'.[657] An interpretation of the text of the *Charter* requires that all words in the text be given meaning.[658] A textual analysis can also be done to determine whether there are textual ambiguities that must be resolved and to inform the other *Charter* interpretation methods.[659]

under the division of powers. See *Marriage Amendment Act*; *Same-Sex Marriage Reference* (n 271); *The Land Planning and Development Act* (n 332).

656 Zoltán Pozsár-Szentmiklósy argues that Canada's approach to *Charter* interpretation is a form of 'methodological exceptionalism' because the *Charter* interpretive methods are embedded within Canada's legal tradition at a general level. See Zoltan Pozsar-Szentmiklosy, 'The Canadian Approach to Fundamental Rights Disputes: Methodological Exceptionalism in Constitutional Interpretation and Proportionality Reasoning' (2017) ELTE LJ 65, 7.

657 Department of Justice Canada, 'Charterpedia - General Principles for the Interpretation and Application of the Charter' (*Government of Canada*) https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/principles-principes.html accessed 13 January 2021.

658 *R v Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235.

659 Department of Justice Canada (n 624).

In some cases, the SCC has relied mainly on a textualist approach to interpret sections of the *Charter*.[660] For example, the SCC has applied a textualist approach to interpreting language rights under the *Charter*. The SCC in *Société des Acadiens v Association des Parents* reasoned that a textualist approach to language rights is justified because these rights are, similar to the notwithstanding clause, 'founded on political compromise'.[661] The SCC reasoned that:

> The courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But […] the courts should approach them with more restraint than they would in construing legal rights.[662]

The SCC contrasted this approach to language rights with the interpretive approach required for legal rights that are 'rooted in principle' and 'are so broad as to call for frequent judicial determination'.[663] Thus, a textualist approach to *Charter* interpretation is primarily utilised by the courts when the text is clear. However, when the text is open-textured, as it often is when *Charter* rights, then a textual approach must often be supplemented by other dominant interpretive approaches, such as the purposive or progressive approaches.[664]

5.1.2 An Originalist Approach to Charter Interpretation

First, according to Hogg, an originalist approach to interpretation seeks to 'ascertain the "original understanding" – the meaning intended by the original framers – and to give effect to that understanding'.[665] The underpinning foundations of this methodological approach seek to ensure constant and consistent interpretation of a Constitution regardless of the court membership.[666] An originalist approach to interpretation provides democratic legitimacy to judicial review by seeking to ensure the unelected judiciary does not interpret the Constitution

660 *Haig v Canada*, [1993] 2 SCR 995, 105 DLR (4th) 577; *R v Potvin*, [1989] 1 SCR 525, 47 CCC (3d) 289; *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513.

661 *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549, 27 DLR (4th) 406 [63].

662 ibid [65].

663 ibid [63].

664 Department of Justice Canada (n 624).

665 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 82.

666 ibid.

beyond the intent of the elected constitutional drafters.[667] If the Constitution needs to be adapted to meet new legal challenges not anticipated by the drafters, originalists purport that the new legal challenge must be addressed through constitutional amendment, rather than interpretation.[668]

The process for determining the original intent of the constitutional text drafters relies mainly on legislative history. Legislative history refers to 'documentary evidence of the events that occurred during the drafting and enactment of a statute'.[669] In Canada, this includes Hansard, earlier versions of the statute, government policy papers and reports of royal commissions, law reform commissions, or parliamentary committees.[670] Although in statutory interpretation legislative history is not usually permissible as an aid to interpretation, it is admissible as an aid to interpretation in constitutional interpretation.[671] In *Charter* cases, legislative history is admissible for both the challenged statute and the constitutional text.[672] In *Charter* interpretation, the judiciary faces a challenge in ascertaining the intention of the drafters because of an oversaturation of documentation and the complex legislative history of the *Charter's* drafting.[673] The development of the *Charter* was a multi-year process that included a range of government, civil-society organisations, and public servant actors.

In part, based on challenges in identifying the intent of the drafters, an originalist approach to *Charter* interpretation has been largely rejected in Canada. The rejection of originalism makes Canadian *Charter* interpretation distinct from U.S. constitutional interpretation, where originalism is applied by some members of the judiciary.[674] In *BC Motor*

667 ibid.

668 ibid 83.

669 Hogg, *Constitutional Law of Canada* (n 615) 60–1.

670 ibid 60–1 & 2.

671 ibid 746.

672 ibid 60–2.

673 ibid 60–5.

674 For a summary of the U.S. approach to the doctrine of original intent, see Ian Binnie, 'Constitutional Interpretation and Original Intent' (2004) 23 SCLR 345; Antonin Scalia, 'Romancing the Constitution: Interpretation as Invention' (2004) 23 SCLR 337.

Vehicles Reference, the SCC interpreted principles of fundamental justice under section 7 of the *Charter* for the first time and rejected an originalist approach to constitutional interpretation.[675] In this case, the government counsel sought to argue that the meaning of 'fundamental justice' did not encompass any meaning that could include substantive due process.[676] The government relied on evidence from the Special Joint Committee on the Constitution (1980-1981)[677] where the Minister of Justice testified that the section 7 language of 'fundamental justice' was selected over 'due process' with the intent to avoid the development of similar due process jurisprudence to that which has developed in the U.S.[678]

In their decision, the SCC acknowledge the uniformly presented intent of the government drafters[679] but still rejected an originalist approach to interpretation. Instead, the SCC broadly defined 'fundamental justice' including substantive justice and procedural justice.[680] To justify the rejection of originalism, the SCC reasoned that there were inherent challenges in determining the original intent of the drafters:

> The Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative? Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, i.e., the intention of the legislative bodies which adopted the Charter. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.[681]

675 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536

676 Binnie (n 641) 368.

677 For a summary of the Special Joint Committee see chapter 2 and Dodek (n 38).

678 ibid 195–200.

679 *Re B.C. Motor Vehicle Act* (n 642) [504]–[505].

680 ibid [512].

681 ibid [508].

The SCC also argued that an overreliance on an originalist interpretation of the *Charter* could stunt its growth and ability to be adapted to meet the wide range of legal challenges the courts are asked to interpret under the *Charter*:

> Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. […] If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.[682]

The SCC, relying on other interpretive approaches, determined that other sections of the *Charter*, the common law, international conventions, and the foundational purpose of the *Charter* required the court to recognise the broader scope of 'principles of fundamental justice'.[683] The *BC Motor Vehicles Reference* is a leading precedent as it relates to *Charter* interpretation and a Canadian rejection of originalism that has remained largely unchanged throughout the case law.[684]

5.1.3 A Progressive Approach to Charter Interpretation

A progressive approach to *Charter* interpretation is a defining feature of *Charter* interpretation and is largely seen as antithetical to an originalist interpretive approach.[685] A progressive interpretive approach stems from the living tree doctrine established by the Privy Council in *Edwards v Canada*.[686] In *Edwards*, where Canada's highest court of appeal recognised the personhood of women in the *Constitution Act, 1867*,[687] Lord Sankey introduced the living tree doctrine:

682 ibid [509].

683 ibid [500]–[504].

684 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 84. Hogg, *Constitutional Law of Canada* (n 615) 60–10.

685 Hogg, *Constitutional Law of Canada* (n 615) 729–730.

686 *Edwards v Canada (Attorney General)*, [1930] AC 124 (JCPC) *[Edwards]*.

687 In *Edwards* the case centered on whether the term persons in the Constitution Act, 1867 applied to women. The challenge came from five women, also known as the 'famous five' who were seeking appointments to the Senate of Canada, a position that constitutionally required the nominated candidates to be persons. At the SCC, the court rejected the claim and the notion that women could be considered

> The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada […] Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.[688]

Following *Edwards,* the living tree doctrine was applied to constitutional interpretation. Before the *Charter,* the living tree doctrine was mostly applied in federalism cases.[689] Once the SCC became Canada's final court of appeal in 1949, the court continued to apply the living tree doctrine to constitutional interpretation.[690] In 1984, the SCC extended the living tree doctrine to apply to the interpretation of the newly entrenched *Charter*.[691] Applying the living tree doctrine has enabled the SCC to adapt and grow the *Charter* to a range of legal issues not considered by the drafters of the constitutional texts.[692]

The living tree doctrine from *Edwards* is mainly associated with a progressive approach to *Charter* interpretation.[693] A progressive approach to *Charter* interpretation, recognised as a 'dominant theory of interpretation',[694] is best understood as 'language [being] given a "progressive interpretation" so that it is continuously adapted to new conditions and new ideas'.[695] The progressive approach has enabled the SCC to grow and adapt the *Charter* to evolve with society, particularly as it relates to the rights of minorities. For example, a progressive interpretive approach was engaged by the SCC in recognising equality protections

persons. This rejection was made in part based on an originalist interpretation of the *Charter*. On appeal at the Privy Council, the court completely rejected this interpretation of the *Constitution Act, 1867* and in response to the question why the word 'person' should include women, the court stated 'the obvious answer is why should it not'. See ibid.

688 ibid 106–107.

689 Hutchison (n 620) 415.

690 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 85.

691 *Law society of Upper Canada v Skapinker,* [1984] 1 SCR 357, 9 DLR (4th) 161 [336].

692 For a comprehensive summary and analysis of the living tree doctrine, see WJ Waluchow, 'The Living Tree' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017).

693 Hogg, *Constitutional Law of Canada* (n 615) 730.

694 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 87.

695 Hogg, *Constitutional Law of Canada* (n 615) 60–8.1.

against sexual orientation discrimination.[696] Despite forty-years having gone by since the passing of the *Charter*, the application of the progressive interpretation continues. As stated by former Chief Justice Beverly McLachlin:

> While the Charter is no longer in its infancy, these are still early years in its life. The Charter is still a work in progress, an unfinished project. Perhaps, it will always be. Future generations will have a role to play in shaping it. To borrow Viscount Sankey's expression, the Charter is very much a living tree.[697]

Canada's embracing of a progressive approach to *Charter* interpretation is also linked to the rejecting of an originalist interpretive approach.[698] Not only is an originalist approach difficult because of documentary challenges, but also because some of the *Charter* drafters intended for the courts to adopt a progressive approach.[699] Many participants in the Special Joint Committee on the Constitution, including civil servants, Cabinet Ministers, and provincial representatives, intended the courts to adopt a progressive interpretation and not be limited to the original intent of the framers in 1982.[700] This paradox undermines the application of an originalist approach to *Charter* interpretation. If the original intent of many of the *Charter* drafters is for courts to apply progressive interpretation to the *Charter*, then any claim that judicial interpretation must be frozen to conceptions of the constitutional text in 1982 is antithetical.

5.1.4 A Purposive Approach to Charter Interpretation

The purposive approach, recognised as the 'cornerstone of *Charter* interpretation',[701] seeks to ensure that the interpretation of the *Charter* fulfils the purpose of the rights being considered

696 In the *Same-Sex Marriage Reference*, the SCC drew on the progressive interpretive approach to reject that the constitutional term of marriage should be frozen in time. See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan*] [518].

697 Beverly McLachlin, 'Coming of Age: Canadian Nationhood and the Charter of Rights' (Association of Canadian Studies Conference, 20 Years Under the Charter, Ottawa, 17 April 2002).

698 For a review and analysis of the rejection of originalism in Canada, see Binnie (n 641).

699 Hogg, *Constitutional Law of Canada* (n 615) 60–8.1, 60–9.

700 ibid 60–9. A more detailed analysis of the Special Joint Committee is at Patrick J Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Carswell 1987) Chapter 5.

701 Department of Justice Canada (n 624).

and the *Charter* structure.[702] Central to this approach is interpretation of the meaning of a right through a consideration of the context from which it arose—including the linguistic, philosophical and historical contexts.[703] According to the SCC, this approach requires that the courts determine the purpose of the *Charter* right in question with regard to the to the 'nature of the interests it is meant to protect'.[704] To determine the purpose of a right or freedom, Hogg identifies several interpretive aids that guide courts in their abilities to determine the purpose of a right. The purposive approaches to interpretive aids include an evaluation of the language used in the text of the right; the context drawn from the text of the right; the history of the right before the *Charter* entrenchment; the legislative history of the right; and the developed case law.[705]

Purposive interpretation of the *Charter* stems from the majority decision written by Justice Dickson in *Big M Drug Mart* who determined that the purposive approach: '[sets] out the basic approach to be taken in interpreting the Charter'.[706] He established that the purpose of the right or freedom in question should be sought with reference to:

> The character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.[707]

He emphasized that *Charter* interpretation should be generous rather than legalistic, and should be 'aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter 's protection'.[708] Justice Dickson concludes by cautioning against overshooting the actual purpose of the right and freedom and stating that the right should instead 'be placed

702 ibid.

703 ibid.

704 *Hunter* (n 616) 157.

705 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 89–90.

706 *R v Big Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*] [116]–[117].

707 ibid.

708 ibid [117].

in its proper linguistic, philosophic and historical contexts'. [709] Since *Big M Drug Mart,* the purposive interpretive approach has been affirmed by the SCC in multiple subsequent decisions.[710]

5.1.5 A Generous and Liberal Approach to Charter Interpretation

A generous and liberal approach to *Charter* interpretation refers to a method defined by a 'generosity requiring the absence of rigid and pedantic formalism so as to give individuals the full measure of their rights'.[711] The generous interpretation method is often linked to the progressive interpretive approach, as the two often work in tandem to assist the courts in *Charter* interpretation.[712] The generous interpretation also stems from the living tree doctrine in *Edwards*, in which Lord Sankey established that the Constitution must be given 'a large and liberal interpretation' and not be interpreted 'to cut down [the Constitution through] a narrow and technical construction'.[713] Thereafter, the generous interpretation method was applied to federalism cases[714] and later used to guide the interpretation of pre-*Charter* individual constitutional rights claims.[715] The SCC first applied the generous approach to the *Charter* in 1984 through *Hunter v Southam*. In *Hunter*, the SCC held that the *Charter* calls for a 'generous interpretation, avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to'.[716] The generous interpretive approach to the *Charter* is largely applied to rights guarantees with the

709 ibid [116]–[117].

710 *Hunter* (n 616) [156]; *Re B.C. Motor Vehicle Act* (n 642) [499]; *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624, 151 DLR (4th) 577.

711 Joanna Harrington, 'Interpreting the Charter' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017) 23, 8.

712 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 88.

713 *Edwards* (n 653) 136.

714 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 87.

715 *Quebec v Blaikie et al*, [1979] 2 SCR 1016, 101 DLR (3d) 394 [1029].

716 *Hunter* (n 616) 156.

effect of limiting the power of the State. The SCC does not apply the generous approach to the State's ability to justify a rights violation under section 1 of the *Charter*.[717]

5.1.6 Conflicting Interpretive Approaches to the Charter

Although I have discussed five approaches to *Charter* interpretation, three are considered dominant modes of *Charter* interpretation: the purposive approach, the progressive approach, and the generous approach. These three dominant *Charter* interpretive approach may conflict, and the courts have sought to apply these interpretive approaches in a harmonious manner.

First, it is possible for the purposive and generous approach to the *Charter* to conflict. If the courts apply a generous and liberal interpretation of a *Charter* right, to give it the broadest scope possible, they may overshoot its purpose. Hogg has argued that the courts have responded by developing a hierarchy of interpretive approaches whereby the generous interpretive approach is subsidiary to the more dominant approaches to *Charter* interpretation of progressive[718] and purposive approaches.[719] He makes this argument based on an evaluation of section 1 of the *Charter*. He argues that the high justificatory standard required by the approach is 'inconsistent with the insistence that the guaranteed rights be given a generous (broad) scope'.[720] Hogg argues that there is a close relationship between the interpretation of the scope of a right and the section 1 analysis.[721] The broader a right is interpreted to be results in a more deferential section 1 analysis. He argues that the section 1 high justificatory standard established by *Oakes* created a corresponding burden for the courts to avoid an overly broad interpretation of the right at issue.[722] If the courts applying a generous interpretive approach define rights too broadly, it can undermine the high justificatory standard established by *Oakes*

717 *R v Oakes [1986]*, 1 SCR 103, 53 OR (2d) 71 [*Oakes*].

718 Harrington (n 678) 23, 8.

719 Department of Justice of Canada (n 624). Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 89–90. This interpretation precedent has been established in case law *Big M* (n 673) [16]–[17]; *R v Grant, 2009 SCC 32*; *R v Suberu*, [2009] 2 SCR 460 [24].

720 Hogg, *Constitutional Law of Canada* (n 615) 732.

721 Peter W Hogg, 'Interpreting the Charter of Rights: Generosity and Justification"(1990)' 28 Osgoode Hall LJ 817, 819.

722 ibid.

because the courts will adopt a more deferential stance. Hogg argues that the purposive approach resolves this dilemma and 'works in perfect harmony with the stringent standard of justification under section 1'.[723] A generous approach to *Charter* interpretation must be constrained by the purposive approach, to avoid undermining the section 1 analysis.[724] Thus, the generous approach to constitutional interpretation is limited in its applicability to ensure that a right is not interpreted beyond its purpose that can be identified from a range of interpretive aids.[725]

Second, the progressive and purposive approaches to *Charter* interpretation are both equally dominant.[726] The courts have sought to reconcile these equally dominant modes of interpretation by applying them harmoniously.[727] A purposive approach to a *Charter* right must be adapted to meet the existing realities of modern context. However, the progressive interpretation approach cannot adapt the interpretation of a right so far that it is beyond the right's purpose.

5.2 The Section 33 Jurisprudence and the 'Form-Only' Approach

5.2.1 The 'Form-Only' Approach to the Notwithstanding Clause

The SCC has only ever considered the interpretive approach to the notwithstanding clause once, in *Ford v Quebec*. In *Ford*, the SCC considered the constitutionality of Quebec's *Charter of the French Language*. This legislation, widely known as Bill 101, mandated French-only commercial signs with the goal of protecting Quebec's distinct linguistic culture.[728] The SCC found that the unilingual commercial sign requirements unjustifiably violated section 2(b) of

723 ibid 821.

724 ibid 820.

725 Pozsar-Szentmiklosy (n 623) 69.

726 ibid 75.

727 ibid.

728 See chapter 3 for a summary of the legislative history of the French-only commercial signs legislation and the response to the *Ford* decision, including Quebec's invocation of the notwithstanding clause.

the *Charter*.[729] Less than a week following the decision on December 15, 1988, the government of Quebec responded by passing *An Act to Amend the Charter of the French Language, 1988* (Bill 178), invoking the notwithstanding clause to set aside the effects of *Ford* for five- years.[730]

In addition to the declaration of invalidity on section 2(b) of the *Charter*, the SCC in *Ford* also established an interpretive approach to the notwithstanding clause. The *Charter of the French Language* was first enacted in 1977, before the existence of the notwithstanding clause. Following the adoption of the *Charter*, the notwithstanding clause was applied to the *Charter of the French Language* twice. First, the notwithstanding clause was added to section 214 of the *Charter of the French Language* through *An Act Respecting the Constitution, 1982*. The first addition of the notwithstanding clause occurred on June 23, 1982, and applied the notwithstanding clause to all the provisions in the *Charter of the French Language.* This first notwithstanding clause invocation was done in an omnibus manner, by which *An Act Respecting the Constitution, 1982* re-enacted all existing statutes and applied the notwithstanding clause each act. Although *An Act Respecting the Constitution, 1982* was passed on June 23, 1982, it was designed to retrospectively come into force on April 17, 1982.[731]

Second, the notwithstanding clause was re-applied to the *Charter of the French Language* less than two years later through *An Act to Amend the Charter of the French Language, 1984*.[732] This second notwithstanding clause invocation only applied to section 58 of the *Charter of the French Language* and was set to expire February 1, 1989.[733] Section 58 of the *Charter of the French Language* requires that 'public signs and posters and commercial

729 *Ford* (n 18).

730 *An Act to Amend the Charter of the French Language.*

731 *An Act Respecting the Constitution Act, 1982.*

732 *An Act to Amend the Charter of the French Language,* RSQ 1984, c 56, (Quebec).

733 *An Act to Amend the Charter of the French Language* s 52.

advertising shall be solely in [French]'.[734] This second notwithstanding clause invocation was not applied to section 69 of the *Charter of the French Language*, which requires that 'only the French version of a firm name may be used in Québec'.[735]

After determining that both section 58 and section 69 of the *Charter of the French Language* unjustifiably infringed section 2(b) of the *Charter*, the SCC in *Ford* considered whether the 1982 or 1984 applications of the notwithstanding clause were valid. By the time of the SCC's *Ford* decision in 1988, the first notwithstanding clause invocation which had applied to the whole Act,[736] had expired in 1987. Thus, the only non-expired notwithstanding clause invocation was the second application through *An Act to Amend the Charter of the French Language, 1984* that applied only to section 58 of the *Charter of the French Language.*

In their evaluation of the notwithstanding clause's second application[737] in the *Charter of the French Language*, the SCC developed the leading interpretive approach to section 33. The court adopted a form-only approach to interpreting the notwithstanding clause, stating that:

> Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case. The requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review.[738]

The SCC declined to review whether the government sufficiently justified their invocation of the notwithstanding clause. This rejection of a substantive review of the notwithstanding clause was based on the reasoning that 'there is no warrant in s. 33 for such [substantive] considerations

734 *Charter of the French Language* s 58.

735 ibid 69.

736 The notwithstanding clause had been applied to the whole *Charter of the French Language* act through *An Act Respecting the Constitution Act, 1982.*

737 As the first notwithstanding clause invocation through *An Act Respecting the Constitution Act, 1982* that applied to the whole act had expired, the SCC in *Ford* only considered the second application to a provision of the act.

738 *Ford* (n 18) 740.

as a basis of judicial review of a particular exercise of the authority conferred by s. 33'.[739] Instead, the SCC adopted a form-only approach to the notwithstanding clause, stating that:

> The essential requirement of form laid down by s. 33 is that there must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the Canadian Charter. A section 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the Charter which contains the provision or provisions to be overridden.[740]

The SCC held that all that was required under section 33 was 'a reference to the number of the section, subsection or paragraph containing the provisions or provisions to be overridden'.[741]

Through the form-only approach the SCC made two findings on the interpretation of the notwithstanding clause. First, the notwithstanding clause can be applied in an omnibus manner. In *Ford*, the SCC held that it is permissible for legislatures to pass multiple notwithstanding clauses in relation to the same legislation but with overlapping effective dates.[742] In making this evaluation, the SCC affirmed the constitutionality of the omnibus application of the notwithstanding clause to multiple *Charter* rights and multiple acts through a single statute.[743] Thus, Quebec's expired application of the notwithstanding clause to the *Charter of the French Language* through *An Act Respecting the Constitution Act* was affirmed as valid by the SCC.[744]

Second, the notwithstanding clause cannot be applied retrospectively. The first notwithstanding clause application through *An Act Respecting the Constitution Act* was passed on June 23, 1982, but was designed to come into force several months before its enactment on April 23, 1982. Although the first notwithstanding clause invocation had expired, rather than declaring the issue moot, the SCC declared that 'it is better that all questions concerning their validity should be settled in these appeals because of their possible continuing importance in

739 ibid 743.

740 ibid 741.

741 ibid.

742 ibid 736.

743 ibid 742–743.

744 ibid 741.

other cases'.[745] The SCC ruled that section 33 could not be invoked retrospectively, and that the coming into force of the notwithstanding clause in the *Charter of the French Language* was June 23, 1982.

To determine that the notwithstanding clause could not be invoked retrospectively, the SCC began with an evaluation of the text of section 33. The SCC found that both the English and French text of the notwithstanding clause is ambiguous on whether it can be retroactively applied.[746] Using the ambiguity of the text as a justification, the SCC then drew on longstanding common law principles against legislative retroactivity applied legislation. Using literature written by Pierre André-Côté,[747] along with the precedents set by the 1898 UK case *Re Athlumney*[748] and the 1977 SCC case *Gustavon Drilling Ltd. v. Minister of National Revenue,*[749] the SCC extended the common law principle against legislative retroactivity to apply to the notwithstanding clause application. Consequently, the SCC ruled that the retroactive invocation of the notwithstanding clause through *An Act Respecting the Constitution Act, 1982* was of no force or effect.[750] Rather than coming into force on April 23, 1982, the notwithstanding clause in *An Act to Amend the Charter of the French Language, 1984* came into force the day it was promulgated and thus expired on June 23, 1987. This interpretation against retroactive application of the notwithstanding clause narrowed its broad application permitted under the SCC's form-only approach.

Ultimately, in *Ford*, the SCC recognised that the first notwithstanding clause applied to the *Charter of the French Language* through *An Act Respecting the Constitution Act, 1982*

745 ibid 742.

746 ibid.

747 Pierre-André Côté, *The Interpretation of Legislation in Canada* (Université de Montréal Centre de recherche en droit public, Éditions Yvon Blais 1984).

748 *Re Athlumney*, [1898] 2 QB 547.

749 *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271, 66 DLR (3d) 449.

750 *Ford* (n 18) 745.

had expired.[751] The only active section 33 application at the time of the *Ford* ruling was the notwithstanding clause applied to the *Charter of the French Language* through *An Act Amending the Charter of the French Language*. This second notwithstanding clause application was limited to section 58 of the *Charter of the French Language*. Section 69 of the *Charter of the French Language*, which required businesses to list only their French name on commercial signs, was not shielded by the second and only remaining active notwithstanding clause invocation. The SCC determined that section 69 unjustifiably infringed section 2(b) of the *Charter* and struck this provision from the Act.[752]

5.2.2 Post-Ford Responses and Jurisprudence

The SCC's form-only approach to notwithstanding clause interpretation has been criticized by legal scholars. Russell is critical of the SCC's permittance of the omnibus application of the notwithstanding clause. In response to *Ford,* Russell argues that the omnibus application of the notwithstanding clause through a single act should be prohibited through constitutional reforms because this practice undermines the ability of the notwithstanding clause to create opportunities for responsible and accountable discussions of rights issues.[753]

Cameron is critical of the SCC's timid approach to the notwithstanding clause in *Ford.* Her critique centers on the almost unlimited power conferred to the notwithstanding clause by the SCC's form-only interpretive approach. Cameron argues 'that the power to override constitutionally protected rights has no meaningful boundaries. In the absence of "discoverable and manageable" constraints on its use, the override is as unstable as the circumstances that brought it into existence'.[754]

751 ibid 735–736.

752 ibid 742.

753 Peter H Russell, 'Standing Up for Notwithstanding' (1991) 29 Alta L Rev 293, 301–302.

754 Jamie Cameron, 'The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?' (2004) 23 SCLR 152.

Weinrib criticizes the SCC for their failure to embed safeguards within the application of the notwithstanding clause. She argues that the SCC should have adopted a more rigorous interpretive approach to the notwithstanding clause and that *Ford* has 'far reaching consequences' on the institutional framework for rights protections in Canada.[755] She regards *Ford* as a decision sparse in interpretive critique[756] and 'rich in ironies'.[757] Her main critique of *Ford* is from a democratic-legitimacy perspective.[758] She criticizes the SCC for not requiring more clear identification and discussion on the rights being overridden by the notwithstanding clause.[759] She argues that through more focus on the *Charter's* right being overridden in the legislation, the legislature would have to engage in a more 'rich democratic debate' over the merits of this legislative power that should be limited to exceptional circumstances.[760] She argues that a requirement of more clear legislative parameters for the invocation of the notwithstanding clause is necessary to increase its democratic legitimacy.[761]

Despite these academic critiques, the form-only interpretive approach to the notwithstanding clause established by *Ford* has remained the leading precedent on section 33. As of 2022, *Ford* is the only case in which the SCC has directly engaged with the interpretation of the notwithstanding clause. However, since *Ford*, the SCC has indirectly engaged with the notwithstanding clause *obiter*. In *Sauvé v Canada* (*Sauvé II*), the SCC referred to the notwithstanding clause in its decision, ruling that the disenfranchisement of individuals incarcerated for over two years was unconstitutional.[762] In *Sauvé II*, the SCC relied on the notwithstanding clause to determine that legislation infringing democratic *Charter* rights

755 Lorraine Eisenstat Weinrib, 'Learning to Live with the Override' (1990) 35 McGill LJ 541, 552.

756 Weinrib states 'the most remarkable feature of the Court's discussion is the sparseness of its interpretive technique'. See ibid 553.

757 ibid 570.

758 ibid 571.

759 ibid 559.

760 *ibid.* Also see Weinrib's earlier commentary on the democratic underpinnings of the *Charter* in Lorraine Weinrib, 'The Supreme Court of Canada and Section One of the Charter' (1986) 10 SCLR 469.

761 Weinrib, 'Learning to Live with the Override' (n 722) 559.

762 *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé II*].

should not be accorded deference because the right to vote 'is fundamental to our democracy and the rule of law and cannot be lightly set aside'.[763] The SCC interpreted this non-deferential section 1 approach to democratic rights based on the exclusion of democratic rights from the purview of section 33. According to Chief Justice McLachlin in the majority decision, 'a broad and purposive interpretation of the [section 3] right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause'.[764]

In *City of Toronto v Ontario*, a 2021 case discussed in chapter 4, the SCC discussed the notwithstanding clause in the context of unwritten constitutional principles. *City of Toronto* was an SCC split decision (5-4) on the constitutionality of the Ontario government's 2018 intervention in the already begun Toronto municipal election.[765] The majority opinion co-written by Chief Justice Wagner and Justice Brown held that the Ontario government's intervention sixty-nine days before the municipal election day did not substantially interfere with the freedom of expression rights of the electoral participants.[766] The majority then addressed a second argument put forward by the City of Toronto claimant that the unwritten constitutional principle of democracy could safeguard the already commenced municipal elections from interference. The majority dismissed the argument, holding that that there is 'no free standing right to effective representation outside of [section] 3 of the *Charter*' and that the unwritten constitutional principle of democracy cannot be used to narrow provincial authority over municipalities or extend the *Charter's* section 3 democratic rights to municipalities.[767]

763 ibid [9].

764 ibid [11].

765 *Toronto (City) v. Ontario (Attorney General) SCC* (n 535).

766 ibid.

767 ibid [5].

Besides determining that the unwritten constitutional principle of democracy could not extend to municipal elections, the SCC majority went a step further to comment on the applicability of unwritten constitutional principles more broadly. The majority departed from the existing case law and narrowed the applicability of unwritten constitutional principles.[768] The majority opinion held that unwritten constitutional principles could only supplement the written text of the Constitution, rather than be used to "serve as bases for invalidating legislation".[769] Chief Justice Wagner and Justice Brown on behalf of the majority stated:

> And in our view, because they are unwritten, their "full legal force" is realized not in supplementing the written text of our Constitution as "provisions of the Constitution" with which no law may be inconsistent and remain of "force or effect" under s. 52(1) of the Constitution Act, 1982. Unwritten constitutional principles are not "provisions of the Constitution". Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms — its provisions — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.[770]

The majority directly engaged with a discussion of section 33 of the *Charter* and unwritten constitutional principles. The majority noted that an interpretation of the Constitution that would permit the use of unwritten constitutional principles to invalidate legislation would be a "judicial error of particular significance" to sections 33 and 1 of the *Charter*.[771] In the context of section 33, the majority asserted that such a recognition of the unwritten constitutional principle of democracy would remove the ability of the legislature to respond to a declaration of invalidity by using the notwithstanding clause in regards to sections 2 and 7 to 15. Based on an interpretation of section 33 of the *Charter*, the majority stated that such an interpretation of unwritten constitutional principles would effectively undo 'this undeniable aspect of the constitutional bargain'.[772]

768 The leading case law authorities on unwritten constitutional principles include, but are not limited to: *Reference re Secession* (n 23); *Re Manitoba Language Rights,* [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Language Reference*]; *Renumeration of Judges* (n 26).

769 *Toronto (City) v. Ontario (Attorney General) SCC* (n 535) [63].

770 ibid [54].

771 ibid [60].

772 ibid.

In dissent, Justice Abella wrote on behalf of the four Justices, finding that the actions of the Ontario legislature were unconstitutional because of the timing of the intervention in the Toronto municipal election.[773] The minority opinion held that this mid-election intervention unjustifiably infringed section 2(b) freedom of expression rights.[774]

The four dissenting Justices also criticised the majority's decision to read down the existing binding jurisprudence on unwritten constitutional principles. After a review of the extensive unwritten constitutional principles case law, the minority opinion determined that it was an inescapable conclusion that in rare cases 'unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure"'.[775] The dissenting Justices were highly critical of the majority's 'imprudent' decision to 'foreclose the possibility of unwritten constitutional principles being used to invalidate legislation in all circumstances'.[776] The dissenting Justices also determined that as this case did not concern an application of section 33 there was no need for the majority to conclude that unwritten constitutional principles would circumvent the authority of the notwithstanding clause.[777]

In the lower courts, there is also limited jurisprudence on the notwithstanding clause. When the notwithstanding clause is threatened or not directly applied to the legislation being challenged, the lower courts do not engage in an analysis of section 33.[778] For example, in the ONCA's consideration of a stay application, the Ontario government counsel presented the Ontario government's threat to use the notwithstanding clause to overrule the decision if it was

773 ibid [89]–[90].

774 ibid [156]–[157] and [162].

775 ibid [170].

776 ibid.

777 ibid [182].

778 See the SKCA treatment of cases where the notwithstanding clause was invoked or was threatened to be invoked during the appeal process in *Good Spirit SKCA 2020* (n 475); *Retail, Wholesale and Department Store Union SKCA* (n 268).

not favourable to them. The ONCA did not engage with the notwithstanding clause in their decision and responded by stating:

> In oral argument, counsel for the Attorney General stated that he had been instructed to advise this court that if a stay were granted, the government would not take Bill 31, the *Efficient Local Government Act, 2018,* currently before the Legislature, to a final vote at this time. Bill 31 would replace Bill 5 and include an override declaration pursuant to s. 33 of the *Charter*. We note that this undertaking was given, but add that it plays no part in our decision.[779]

Generally, the lower courts have adopted a judicial restraint approach and will only engage with the notwithstanding clause if it is directly raised by the claimants.

The only lower court decision since *Ford* that has directly engaged with the notwithstanding clause is the QCSC in *Hak*. In *Hak*, the QCSC adopted the form-only approach from *Ford*, determining that the notwithstanding clause was essentially 'legally unassailable' through judicial review.[780] Unlike *Ford*, the QCSC expressly rejected a claimant's request for the court to conduct a full analysis to first determine whether the *Laicity of the State Act* violated sections of the *Charter* in a way that is not demonstrably justified under section 1.[781] Instead, Justice Blanchard of the QCSC did not engage in a *Charter* analysis because of the active notwithstanding clause invoked in the legislation.

In *Hak*, the QCSC did identify two exceptions to the form-only approach adopted by *Ford*. These exceptions were based on an interpretation of other sections of the *Charter* that the notwithstanding clause cannot apply to. First Justice Blanchard held that under section 23 of the *Charter* the religious symbols ban cannot apply to the English schools in the province.[782] Justice Blanchard determined that the English school board decision to prioritise the fostering of diversity through their hiring practices falls within the scope of the section 23 minority

779 *Toronto (City) ONCA* (n 524) [5].

780 *Hak QCSC 2021* (n 425) [4].

781 ibid [796]–[800].

782 ibid [939]–[1003].

education rights.[783] Second, Justice Blanchard found that under the section 3 *Charter* right to vote, the religious symbols and face covering ban cannot apply to elected representatives in the National Assembly.[784] Justice Blanchard interpreted the section 3 citizenship 'right to vote' and 'to be qualified for membership therein' to safeguard the elected members ability to exercise their religious rights in the National Assembly.[785]

Thus, in 2022, *Ford* remains the leading precedent on the interpretation of the notwithstanding clause. There is limited lower court jurisprudence applying *Ford* and the SCC has not yet faced another direct challenge to the applicability of the notwithstanding clause. In the coming years, the SCC will likely hear direct challenges to the interpretation of the notwithstanding clause from *Hak*[786] and the recently launched challenge to the Ontario invocation of the notwithstanding clause to limit election financing.[787] In the next section, I will argue that the *Ford* form-only approach to the notwithstanding clause should be revisited and that these two upcoming cases present an opportunity for the SCC to develop their interpretive approach to section 33.

5.3 A Need to Revisit Ford's Form-Only Approach

The SCC's interpretive approach to the notwithstanding clause should be revisited for three reasons. First, the reasoning in *Ford* that justified the adoption of the 'form-only' approach to the notwithstanding clause was based on an erroneous textual interpretation of section 33. Second, the SCC in *Ford* failed to apply established methods of *Charter* interpretation. Third, the outcome of *Ford* may have been influenced by the existing political climate and thus responded to the threat of Quebec secession.

783 ibid.

784 ibid [881]–[921].

785 ibid.

786 *Hak QCSC 2021* (n 425).

787 'CCLA Statement on Notwithstanding Clause' (n 567).

5.3.1 Erroneous Textual Interpretation of Section 33

The SCC's reasoning in Ford that applied a form-only approach to the notwithstanding clause to permit its omnibus application was based on an erroneous textual analysis. In *Ford*, the SCC adopts a form-only approach and rejects a substantive analysis of section 33's application. The rejected substantive analysis includes both a review of how the legislature lists the right to be overridden by the notwithstanding clause and if the notwithstanding clause can be invoked in an omnibus manner. The SCC adopts the form-only approach based on a textual analysis of section 33. Because the text of section 33 does not explicitly bar the omnibus application of the notwithstanding clause, the SCC in *Ford* affirmed such an application so long as the legislation met the basic criteria of the section 33 text.

I argue, however, that the textual analysis that formed the basis of permitting an omnibus application of the notwithstanding clause was erroneous. To begin, the text of section 33 is:

> 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.
>
> (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).[788]

Unlike the other sections of the *Charter* that are primarily expressed in broad rights language, the text of section 33 is more specific. The text of section 33 is clear on several points. First, the text is clear as to who has the authority to invoke the notwithstanding clause. It may only

788 *Canadian Charter of Rights and Freedoms* s 33.

be invoked by 'Parliament or the legislature of a province', therefore excluding municipal governments and unilateral executive invocation. Notably, the text of section 33 does not explicitly mention territorial legislatures, however it is largely understood to include them because section 30 of the *Charter* extends any federal or provincial authority to territorial legislatures, and the Yukon passed legislation including the notwithstanding clause in 1982.[789] Second, section 33 can only be invoked through an express declaration enacted as a legislative provision in a promulgated legislative Act. Section 33(1) requires that a notwithstanding clause invocation be an express declaration that identifies the Act or provisions of the Act it is invoked in, and the *Charter* sections it will operate notwithstanding. Third, the text of section 33 is clear that the notwithstanding clause can only be applied to sections 2 and 7 to 15 of the *Charter*. Fourth, the text is clear as to how an Act invoking the notwithstanding clause should operate. According to section 33(2), a notwithstanding clause Act would have the same effect, as would an Act without the notwithstanding clause, 'but for' the provision of the *Charter* referred to in the declaration. Fifth, the temporal parameters of the notwithstanding clause are outlined in section 33(3). Any notwithstanding clause operation will cease to have effect five years after it comes into force. Notably, the text of this subsection makes clear that the legislature can set an earlier date of expiration for the notwithstanding clause, as the Quebec government has done several times.[790] The final aspect of the text of section 33 relates to renewals. Section 33(4) permits the legislatures to re-invoke the notwithstanding clause declaration and section 33(5) makes clear that any notwithstanding clause renewal remains subject to a new five-year limitation.

This analysis demonstrates that the text of section 33 is more specific than many other sections of the *Charter*. Section 33 represents a provision in the *Charter* where a reliance on

789 It should be noted that although the *Land Planning and Development Act, 1982* received royal assent it was never brought into force. An analysis of why this legislation was not brought into force exists in chapter 3.

790 See Table 3: Promulgated and Effective Notwithstanding Clause Legislation.

textual interpretation is appropriate. The text of section 33 is specific and careful in its design and the courts should be respect this specificity. However, there remain aspects of section 33 that are open-textured. I argue that unlike the determination by the SCC in *Ford*, there is textual doubt as to whether the notwithstanding clause may be applied in an omnibus manner. A textual analysis of section 33, in fact, suggests the opposite of the conclusion made by the SCC in *Ford*.

To begin, unlike many of the other subsections of section 33, there is no clear authorisation of the application of the notwithstanding clause to multiple Acts through a single invoking act. In contrast to sections 33(4) and 33(5), which state that a notwithstanding clause can be renewed continuously, this omission regarding omnibus application is highly relevant. Further, the text of section 33(1) and 33(2) exclusively uses the singular when referring to the application of the express notwithstanding declaration to 'the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of this *Charter*'.[791] The text of section 33 relies on the singular for the term 'a provision' for both the invoking notwithstanding clause and the provision for sections 2 and 7 to 15 of the *Charter*.[792] I argue that the text, both in its omissions and use of the singular in reference to the notwithstanding clause act and the *Charter* provisions, points away from the ability to apply the notwithstanding clause in an omnibus fashion.

The SCC in *Ford* held that the text of the notwithstanding clause directly permitted omnibus application.[793] Upon closer review of the section 33 reasoning in *Ford*, there was no consideration of the text in relation to an omnibus application of the notwithstanding clause. Instead, the SCC focused almost exclusively on whether additional requirements could be placed on the application of the notwithstanding clause in regard to the applicable sections of

791 ibid s 33(1).

792 ibid.

793 *Ford* (n 18) [33]–[34].

the *Charter*.[794] The SCC only considered if legislatures could be required to list the overriding rights in the text of the *Charter*, rather than solely referring to numbered sections.[795] The SCC rejected this proposed interpretation of listing rights by relying exclusively on the text of 33(1), by stating:

> If it is intended to override only a part of the provision or provisions contained in a section, subsection or paragraph then there would have to be a sufficient reference in words to the part to be overridden. In so far as requirements of the democratic process are relevant, this is the form of reference used in legislative drafting with respect to legislative provisions to be amended or repealed. There is no reason why more should be required under s. 33. A reference to the number of the section, subsection or paragraph containing the provisions or provisions to be overridden is a sufficient indication to those concerned of the relative seriousness of what is proposed. It cannot have been intended by the word "expressly" that a legislature should be required to encumber a s. 33 declaration by stating the provision or provisions to be overridden in the words of the Charter, which, in the case of the standard override provision in issue in the appeal, would be a very long recital indeed.[796]

The SCC did not directly engage with whether section 33 requires individual acts for each notwithstanding clause declaration. Such an interpretation of the text would align with the democratic accountability requirements embedded in the text of the notwithstanding clause, by requiring legislatures to consider, debate, and vote on the temporal suspension of rights for each of its applications. The flawed textual analysis of section 33 conducted by the SCC in *Ford* weakens its status as an authoritative precedent for future notwithstanding clause cases.

5.3.2 The Interpretive Gap on Section 33

The SCC in *Ford* failed to apply the established methods of *Charter* interpretation. The analysis and subsequent establishment of a momentous precedent allowing the omnibus and broad use of a constitutional tool to suspend entrenched rights was made with little to no in-depth examination of the clause itself through the dominant *Charter* interpretive methods. The SCC in *Ford* based their reasoning almost wholly on an analysis of the text in section 33 of the

794 ibid [23]–[34].

795 ibid [30].

796 *Ford* (n 18).

Charter, which I argued in the previous section was erroneous. The decision included no application of the dominant *Charter* interpretive methods of the purposive, progressive, and generous approaches and there was no consideration of interpretive aids such as the legislative history that led to the notwithstanding clause, the Hansard and committee hearing text that contributed to its drafting, or the guidance provided by political leaders to clarify its intended interpretation.

The SCC's failure to consider the three dominant modes of *Charter* interpretation is particularly evident considering the court's complete lack of engagement with the effect of their decision on Canada's constitutional rights framework. In *Ford*, the SCC seemed unaware of the consequences of the ruling on Canada's rights regime.[797] At no point did the SCC consider the potentially disastrous effects of omnibus application of the notwithstanding clause on the larger constitutional rights framework established by the *Charter*. The National Assembly suspended the fundamental *Charter* rights of their constituents in every existing Quebec statute and the SCC did not acknowledge the seriousness of this legislative practice, despite challenges raised by several parties.[798] The SCC failed to evaluate the impacts on the larger Constitutional rights framework by relying on a claim of neutrality through textual analysis.[799] The form-only approach adopted by the SCC in *Ford* is concerning when one considers the courts role within Canada's separation of powers as an interpreter of the Constitution and protection provider for the inalienable rights of Canadians from government overreach. Despite the SCC finding that a textual analysis permits the omnibus application of the notwithstanding clause, I argue that this textual analysis is erroneous. A purposive interpretive approach would be relevant in identifying whether an omnibus application of the notwithstanding clause fits within the purpose of the notwithstanding clause.

797 ibid 740.

798 ibid 742.

799 ibid 740.

Even in their analysis of the retrospective application of the law, the SCC did not apply constitutional methods of interpretation. Unlike the omnibus application of the notwithstanding clause, the SCC found that section 33 was open textured on whether the notwithstanding clause could be applied retrospectively. To resolve this identified textual gap, the SCC engaged in a substantive analysis of section 33. However, rather than applying the recognised methods of *Charter* interpretation, the SCC relied on methods of statutory interpretation. The SCC relied on a guide on legislative interpretation by Pierre André-Côté,[800] and the non-constitutional cases of *Re Athlumney*[801] (UK) and *Gustavon Drilling Ltd. v. Minister of National Revenue.*[802] Through a reliance on these precedents and the secondary source, the SCC extended the common law principle against legislative retroactivity to apply to the notwithstanding clause application. In this consideration of the applicability of the notwithstanding clause, the SCC considered no dominant *Charter* interpretive guides, nor did they consider any legislative aids, choosing instead to treat this powerful constitutional tool akin to a statute.

In sum, the SCC in *Ford* did not consider or apply the dominant *Charter* interpretation methods or rely on any interpretive aids, such as legislative history or previous drafts of the *Charter*. A form-only approach to section 33's applicability was not developed with consideration of the dominant *Charter* interpretation methods. This limited approach to the notwithstanding clause undermines the precedential value of the notwithstanding clause for future decisions. This limited textual and arguably statutory analysis of the notwithstanding clause necessitates the SCC revisiting the interpretation of the notwithstanding clause.

5.3.3 Quebec Secession and the Shifting Use of Section 33

The outcome of *Ford* may have been influenced by the existing political climate and thus responded to the threat of Quebec secession. The SCC's decision in *Ford* occurred at the height

800 Côté (n 714).

801 *Re Athlumney* (n 715).

802 *Gustavson Drilling* (n 716).

of the Quebec secession political movement. The development of the *Charter* and the political movement to patriate Canada's Constitution largely responded to Quebec secession. Although the Quebec secession political movement has a long history,[803] its relation to the *Charter* and notwithstanding clause begins in 1980 with the first Quebec secession referendum. During the 1980 referendum, Trudeau Senior, Canada's Prime Minister at the time, campaigned against Quebec secession on a promise that if the province voted to remain in Canada, he would pursue the patriation of Canada's Constitution and unify Canadians under an entrenched bill of rights. The 1980 referendum was a success for Trudeau Senior, with 59.56% of Quebecers voting to remain in Canada.[804] Trudeau Senior interpreted this referendum result as a mandate to pursue constitutional reform that was ultimately successful in 1982.

The patriation of Canada's Constitution, however, was not the end of secessionist politics in Canada. The exclusion of Quebec from the one of the final negotiations that led to the final draft of the *Charter* resulted in Quebec refusing to sign the 1982 Constitution. There was a renewed interest in Quebec secession because many Quebecers viewed the 1982 Constitution as an imposition on their province without its consent. The notwithstanding clause became a tool to assert Quebec's rejection of the 1982 Constitution. Immediately following the adoption of the *Charter*, Quebec passed *An Act Respecting the Constitution Act, 1982*.[805] This legislation re-enacted all existing Quebec statutes and inserted a notwithstanding clause applying to sections 2 and 7 to 15 of the *Charter*. Following the passing of *An Act Respecting the Constitution Act, 1982,* Quebec routinely invoked the notwithstanding clause in all statutes passed until December 2, 1985.[806] The *Charter of the French Language* being considered in

803 McWhinney (n 280); Gerard Bouchard and Charles Taylor, 'Building the Future: A Time for Reconciliation' (Government de Québec: Consultation Commission on Accommodation Practices Related to Cultural Differences, 2008).

804 See literature on the Meech Lake Accord (1987) and Charlottetown Accord (1992): Dawson (n 22); Monahan, 'Unwravelling a Seamless Web' (n 383); 'Meech Lake Accord: Document' (n 383); Lebreton (n 383).

805 *An Act Respecting the Constitution Act, 1982.*

806 Hogg, *Constitutional Law of Canada* (n 7) 839.

Ford was a statute that had the notwithstanding clause applied to it twice, once in 1982 through the omnibus application and once in 1984.[807] The SCC's consideration of the notwithstanding clause in *Ford* was thus immersed in its use as a tool within secessionist politics.

Furthermore, the decision in *Ford* was released on December 15, 1982, in the middle of the consideration of the Meech Lake Accord constitutional reform package. The Meech Lake Accord was the first major attempt at constitutional reform after the 1982 patriation. It was initiated in 1985 following the election of Brian Mulroney as Prime Minister of Canada. This politician from Quebec sought to unify Canada by having the French province finally adopt the 1982 Constitution. To do so, he embarked on constitutional negotiations first with Quebec and then with the rest of the Canadian provinces. From the outset, Quebec listed five key reforms to the 1982 Constitution that needed to be met for them to finally pass a resolution signing onto it, including Quebec gaining constitutional recognition as a 'distinct society'.[808] Mulroney took these Quebec conditions and incorporated them into the negotiations with the other provinces. On June 3, 1987, after sixteen hours of negotiation, Mulroney and all the other provincial Premiers agreed to a set of constitutional amendments they labelled the Meech Lake Accord.[809]

Based on some of the proposed constitutional amendments affecting matters under section 41 of the *Constitution Act, 1982*, the Meech Lake Accord required unanimous consent from all ten provinces.[810] The first provincial resolution ratifying the Meech Lake Accord was passed by Quebec on June 23, 1987.[811] This first Quebec resolution was relevant because it

807 *An Act Respecting the Constitution Act, 1982; An Act to Amend the Charter of the French Language.*

808 The five Quebec conditions were (1) Quebec have constitutional recognition as a 'distinct society', (2) a greater role in immigration matters, (3) a role in selecting the Quebec Supreme Court judges, (4) Quebec can opt-out of federal spending programs with financial penalties and (5) Quebec would achieve a constitutional veto over amendments affecting the provinces interests. Russell, *Constitutional Odyssey* (n 288) 133–134.

809 ibid 139.

810 ibid 141.

811 ibid.

started the three-year clock on the *Constitution Act, 1982*, section 39. Following the passing of the first resolution in Quebec, the Meech Lake Accord could not be fully ratified before June 23, 1988, and its consideration could not extend past the three-year mark of June 23, 1990.[812]

Following this first resolution in Quebec, eight of the ten provinces and the House of Commons ratified the constitutional amendment package by mid-1988.[813] The final two provinces, Manitoba and New Brunswick, in addition to the already ratified Newfoundland and Labrador, all experienced a change in government during this period with new provincial leaders who were not as supportive of the Meech Lake Accord as their predecessors.[814] After additional constitutional negotiations with Mulroney and the provinces, the hold-out province of New Brunswick ratified the Meech Lake Accord and the already-ratified province of Newfoundland and Labrador withdrew its support.[815] Consequently, the Meech Lake Accord was still missing the ratification from two provinces with less than eight days to the three-year deadline of June 23, 1990.[816] Ultimately, the Meech Lake Accord failed, in part as a result of the *Ford* decision and its aftermath.[817] However, at the time of *Ford*, the Meech Lake Accord

812 *Constitution Act, 1982,* Part V, s 39.

813 The provinces that had ratified the Meech Lake Accord by this point were British Columbia, Alberta, Saskatchewan, Ontario, Quebec, Nova Scotia, Prince Edward Island and Newfoundland and Labrador. See Russell, *Constitutional Odyssey* (n 288) 145.

814 In New Brunswick the Liberal candidate Frank McKenna won all of the seats in the legislature. In New Brunswick the NDP government lost the election and the Conservatives and Liberal parties made up the majority of seats in the minority government. Both parties were either neutral or strongly opposed to the Meech Lake Accord. Finally, in Newfoundland and Labrador the Conservative leader Brian Peckford retired in 1989 and his party was defeated by the Liberal Party led by Clyde Wells. The new Premier Wells became one of the most vocal opponents of the Meech Lake Accord. See ibid 141–142.

815 ibid 151–152.

816 The province of Newfoundland and Labrador rescinded their support for the Meech Lake Accord on April 6, 1990 and the province of New Brunswick finally ratified the Meech Lake Accord on June 15, 1990. See ibid 148–151.

817 By mid-1988 the Meech Lake Accord was on track to being ratified by all ten provinces but was significantly impacted by Quebec's use of the notwithstanding clause in response to the SCC's *Ford* decision. After the SCC struck sections of the Charter of the French Language for infringing *Charter* freedom of expression rights, Quebec invoked the notwithstanding clause to re-enact the legislation and enforce unilingual commercial sign requirements. The actions of Bourassa led to the derailment of the Meech Lake Accord. It has been referred to as the 'single most damaging' to the success of the accord. Bill 178 was passed at the end of December 1988. During this period the Meech Lake Accord was only awaiting the ratification from the provinces of Manitoba and New Brunswick. Manitoba was on track for considering the package of constitutional amendments with the Premier Gary Filmon tabling the resolution on December 16, 1988. This Manitoba resolution was withdrawn almost immediately on December 19, 1988, less than one day following Bourassa's announcement that he would be invoking the notwithstanding clause. In withdrawing the constitutional amendment resolution, Manitoba announced that they would be setting up an all-party taskforce to hold public hearings on the Meech Lake Accord. At the time, Premier Filmon linked the revocation of Manitoba's tabled

was under consideration in provincial legislatures across the country and had been ratified by Quebec on June 23, 1987.[818]

I argue that *Ford* emerged from the political context of the Quebec secession movement. The dual factors of the ongoing secessionist political movement in Quebec and the Meech Lake Accord being under consideration could have influenced the decision of the SCC to adopt a form-only approach to the notwithstanding clause in *Ford*. The Quebec secessionist political movement was ongoing, and the perceived imposition of the *Charter* further fueled support for the movement in the province. The notwithstanding clause became a tool for Quebec secessionist politicians to assert Quebec's independence from Canada by suspending as much of the 1982 Constitution as they could through section 33. The SCC likely recognised the potentially volatile political situation in Quebec and considered if a restriction in Quebec's use of the notwithstanding clause would further fuel the Quebec secessionist movement. The politically volatile situation was likely regarded as even more precarious because of the existing cross-Canada consideration of the Meech Lake Accord that was already ratified by Quebec before the *Ford* decision was released. The adoption of the 'form-only' approach could have been regarded by the SCC as a way to avoid further fueling an already volatile and precarious situation on the status of Quebec secession. Therefore, the SCC could have been influenced by the precarity of Quebec's relationship with the rest of Canada, the province's use of the notwithstanding clause to reject the *Constitution Act, 1982,* and the active consideration of the Meech Lake Accord at the time of the decision. This political context could have

resolution to Quebec's actions by arguing that such an extreme restriction of English minority language rights in Quebec violated the spirit of the Meech Lake Accord itself. Although seemingly unconnected Quebec's use of the notwithstanding clause angered the other Canadian provinces, who were becoming increasingly weary of acquiescing to the province's demands, including that of recognition as a distinct society, to have the provinces finally sign onto Canada's Constitution. Per Monahan, after the invocation of the notwithstanding clause in Qubec's Bill 178, 'there was virtually no chance that the Meech Lake Accord would be ratified'. Following this, Manitoba and Newfoundland and Labrador declined to ratify the Meech Lake Accord resulting in its failure. See Dawson (n 22); Russell, *Constitutional Odyssey* (n 288); Monahan, 'Unwravelling a Seamless Web' (n 383).

818 Russell, *Constitutional Odyssey* (n 288) 141.

influenced the SCC in taking a highly deferential approach to interpreting section 33, to indirectly support the *Charter's* overarching purpose of national unity.

Since *Ford*, the political movement for Quebec secession has not disappeared, but it has experienced reduced support since the loss of the 1995 referendum. In 1995, following the failure of the Meech Lake Accord and Charlottetown Accord constitutional reform packages, Quebec underwent a second secession referendum. This second 1995 referendum failed in a 50.6% to 49.4% vote.[819] Consequently, if the SCC were to revisit the interpretation of the notwithstanding clause, the overwhelming threat of Quebec secession would no longer looming as it was in 1988. Furthermore, as I argued in the previous chapter, the use of the notwithstanding clause has shifted. Since 2018, the notwithstanding clause has been applied to divisive democratic and social issues so far unseen in Canadian history.[820] This shift in notwithstanding clause political uses also represents a shift away from the use of the notwithstanding clause as a tool for secessionist politics that dominated its use in its first decade of existence. The potential influence of the threat of Quebec secession and the post-2018 novel uses of the notwithstanding clause is another factor that supports a need to revisit the interpretive approach to the notwithstanding clause established by the SCC in *Ford*.

5.4 Conclusion

In this chapter, I critically analyzed the existing methods of *Charter* interpretation and the limited case law on the interpretation of section 33. I argued there is a need to revisit the SCC's form only approach to the notwithstanding clause. My critique of the SCC interpretive approach to section 33 was three-fold. First, the reasoning in *Ford* that justified the adoption of the 'form-only' approach to the notwithstanding clause was based on an erroneous textual

819 See literature on the Meech Lake Accord (1987) and Charlottetown Accord (1992): Dawson (n 22); Monahan, 'Unwravelling a Seamless Web' (n 383); 'Meech Lake Accord: Document' (n 383); Lebreton (n 383).

820 *Laicity of the State Act*; *Protecting Elections and Defending Democracy Act*; Bill 31, the *Efficient Local Government Act* (n 14); Bill 11, *An Act Respecting Proof of Immunisation* (n 16); *School Choice Protection Act*; Bill 96, *An Act Respecting French, the Official and Common Language of Québec* (n 15).

interpretation of section 33. Second, the SCC in *Ford* failed to apply the established methods of *Charter* interpretation. Third, the outcome of *Ford* may have been influenced by the existing political climate and thus responded to the threat of Quebec secession. In the following chapters, I will present my proposed interpretive approach to the notwithstanding clause. First, the omnibus application of the notwithstanding clause should be prohibited. Second, the application of the notwithstanding clause to freedom of expression should be limited by the unwritten principle of democracy. Third, section 33 should not be permitted to subvert customary international law *jus cogens* norms, such as torture. Fourth, section 28 of the *Charter* immunizes gender equality protections from the notwithstanding clause.[821] Finally, I conclude by examining the relationship between sections 1 and 33 of the *Charter* to argue that section 1 cannot be applied to limit the scope of section 33. At the same time, I present that section 1 plays an important role within my analysis on limiting the scope of the notwithstanding clause through judicial interpretation.

821 *Canadian Charter of Rights and Freedoms* s 28.

SECTION THREE: SHORTCOMINGS IN CURRENT THEORETICAL APPROACHES TO THE NOTWITHSTANDING CLAUSE

CHAPTER SIX:

6. Scholarship Responses to Section 33: The Limits of Dialogue Theory and Strength of Judicial Review

Since its inception, the notwithstanding clause has been a topic of fierce debate within the academic literature. In their responses, Canadian and international scholars have proposed reforms to the text of the clause and recommended the adoption of notwithstanding-like clauses in other constitutional democracies. The literature on Canada's notwithstanding clause has largely celebrated the inclusion of the notwithstanding clause in the *Charter*. Weinrib asserts that the notwithstanding clause 'frees Canada from the crisis of judicial legitimacy that mars other rights protecting systems'.[822] Roach argues that the notwithstanding clause is 'far from a dead letter', as it plays an influential role in keeping the both the judiciary and legislature accountable.[823] Weiler characterises 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.[824] Finally, Russell describes the notwithstanding clause 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'.[825]

Canada's notwithstanding clause has been used to expand existing or develop new theoretical approaches to judicial review. This chapter focuses on two leading theoretical approaches that incorporate Canada's notwithstanding clause: dialogue theory and theory of weak form judicial review. Both judicial review theories incorporate the notwithstanding

822 Weinrib, 'Learning to Live with the Override' (n 722) 571.

823 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law 2001) 148.

824 Paul C Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 U Mich JL Reform 51, 54.

825 Russell, 'Standing Up for Notwithstanding' (n 720) 301.

clause in their analysis of judicial review. I will present each theory and argue that their reliance on the notwithstanding clause has theoretical shortcomings. First, dialogue theory's incorporation of the notwithstanding clause as a tool that facilitates dialogue overlooks how the notwithstanding clause can undermine dialogue between the courts and the legislatures. Second, weak-form judicial review theories that rely on the notwithstanding clause overlook how minority rights are particularly vulnerable to the structural design of section 33.

6.1 Dialogue Theory and Canada's Notwithstanding Clause

Following the adoption of the 1982 Constitution, the enforcement role of the courts was transformed because of the entrenched set of rights. This transformation is credited with shifting Canada's position on the spectrum from weak-form judicial review towards one that is more strong-form. The transformation of the role of the courts and their approach to judicial review was accomplished primarily through two sections in the 1982 Constitution: section 52(1) of the *Constitution Act, 1982*[826]and section 24(1) of the *Charter*.[827] Section 52(1) is the constitutional supremacy clause and applies to laws inconsistent with the *Charter* because of the legislation's purpose or effect. Section 52(1) allows the courts to render a law they deem to be in violation of the *Charter* null and void.[828] Section 52(1) does not provide a personal remedy for a rights violation.[829] Section 24(1) provides a case-by-case remedy for unconstitutional acts by government officials. Under section 24(1) the constitutionality of the law is not challenged, rathe the specific acts of government officials are challenged.[830]

826 *Constitution Act, 1982* s 52(1).

827 *Canadian Charter of Rights and Freedoms* s 24(1).

828 *R v Ferguson* 2008 SCC 96 [*Ferguson*] [35]. Under section 52(1) the courts have six remedies available, that range in severity, to respond to unconstitutional legislation: striking down a law in its entirety; declaring partial invalidity of a law; reading down legislation to give the law a narrower constitutional interpretation; reading in and extending benefits of legislation to groups that are excluded from legislation; providing in rare circumstances constitutional exemptions and a temporary suspension of invalidity.

829 ibid [59].

830 The courts have developed three remedies they can apply: declaratory relief; an injunction; and damages. See ibid [35] and [409]–[411].

Before determining what remedy is appropriate, the courts must first determine whether a rights violation, that cannot be justified under the section 1 of the *Charter*, occurred. This determination is made through a two-step process. First, the courts must determine whether a *Charter* right is being infringed. The burden of proof rests with the claimant to prove that their *Charter* rights were violated.[831] Once a rights violation has been proven, the burden of proof shifts to the government for the second step to determine whether the established constitutional rights violation can be justified under section 1 of the *Charter*.[832] To evaluate the applicability of section 1, the courts developed a legal framework in *R v Oakes* (the *Oakes* test) to determine whether a rights violation is a reasonable limit 'prescribed by law as can be demonstrably justified in a free and democratic society'.[833] 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 remedies available under section 52(1) of the *Constitution Act, 1982* and section 24(1) of the *Charter* to redress the unjustifiable rights violation.

The enactment of sections 52(1) of the *Constitution Act, 1982* and 24(1) of the *Charter* transformed judicial review in Canada. This transformation of judicial review led to significant responses from the academic legal community. Of these academic responses on the transformation of judicial review in Canada, none was more influential than dialogue theory.

Dialogue theory was first proposed by Peter Hogg and Allison Bushell following the advent of the *Charter*. These scholars sought to directly engage with the critique that judicial review under the *Charter* is illegitimate because it is undemocratic.[834] The democratic critiques of judicial review under the *Charter* largely stemmed from the American influence of anti-

831 *R v Sharpe* 2002 SCC 2 [*Sharpe*] [415]–[416].

832 *Canadian Charter of Rights and Freedoms* s 1.

833 *Oakes* (n 684) [69].

834 Hogg and Bushell (n 589) 77.

majoritarian objections to the strong-form judicial review.[835] Hogg and Bushell use an empirical review of *Charter* case law to argue that nearly all of the legislation struck down by the courts can be and often is followed by new legislation that accomplishes the same objective without infringing rights.[836] The authors refer to this process of legislative response to judicial review as dialogue between the courts and legislatures. Hogg and Bushell define dialogue as situations where judicial decisions leave open the possibility for legislatures to respond to the decision with reversal, modification, or avoidance.[837]

Through dialogue theory, the authors assert that Canadian judicial review is distinct and weaker than traditional strong-form judicial review models because it rarely defeats legislation.[838] They argue that the democratic legitimacy critiques of the *Charter* are untenable because the *Charter* strengthens democratic processes through dialogue facilitation between the courts and legislatures.[839] The notwithstanding clause plays a foundational role in the operation of dialogue theory. In the 1997 theory, Hogg and Bushell present four features that facilitate dialogue between these two branches of the legislature and judiciary: (1) the notwithstanding clause; (2) the reasonable limits clause under section 1; (3) the qualified rights under section 7, 8 and 9; and (4) the various remedies available to respond to equality clause violations.[840] The authors argue that 'each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the Charter as articulated by the courts'.[841]

835 ibid 77–78.

836 ibid 79–81.

837 ibid 79.

838 Peter W Hogg, Allison A Bushell Thornton and Wade K Wright, 'Charter Dialogue Revisited - or "Much Ado about Metaphors".' (2007) 45 Osgoode Hall LJ 1, 4.

839 Hogg and Bushell (n 589) 105.

840 ibid 82.

841 ibid.

The notwithstanding clause is recognised as a 'structural device for dialogue'[842] because of its 'power of legislative override'.[843] Hogg and Bushell included the notwithstanding clause as a dialogic feature because the unique and deliberate design of section 33 permits the courts to have the final say in interpreting the *Charter*, while allowing the legislatures to have the final say with a legislative response.[844] Although the notwithstanding clause has limits embedded within its text, sections 2 and 7 to 15 remain the most litigated sections of the *Charter*.[845]

The authors empirically reviewed sixty-five primarily SCC cases in which legislation was struck down because of breaches of *Charter* rights. The analysis found that in forty-four (two-thirds) of the cases the legislative body responded by amending the law and passing it as a legislative sequel. The authors argue that the results of the empirical analysis demonstrate that in most cases the legislature only had to make minor amendments to ensure that the legislative response respected the *Charter*, while maintaining the objective of the original legislation.[846]

Following its introduction in 1997, dialogue theory was 'explosive'[847] and quickly became a 'runaway theory'.[848] Dialogue theory led to an extensive number of academic responses, which sought to build upon and critique this new constitutional theory.[849] The reach of dialogue theory extended beyond academics to the judiciary. The first application of dialogue theory by the SCC occurred in *Vriend v Alberta, 1998 (Vriend)*. In *Vriend*, the SCC

842 Kent Roach, 'Dialogic Judicial Review and Its Critics' (2004) 23 SCLR 49, 60.

843 Hogg and Bushell (n 589) 82.

844 ibid 83.

845 Roach (n 808) 63.

846 Hogg, Thornton and Wright (n 804) 26.

847 Jamie Cameron, 'Collateral Thoughts on Dialogue's Legacy as Metaphor and Theory: A Favourite from Canada' (2016) 35 UQLJ 157.

848 ibid 128.

849 Cameron (n 813); Roach (n 789); Christopher P Manfredi, 'The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003' (2004) 23 SCLR 122; Meghan Campbell, 'Reigniting the Dialogue: The Latest Use of the notwithstanding Clause in Canada' [2018] Pub L 1; Carissima Mathen, 'Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on Charter Dialogue Revisted' (2007) 45 Osgoode Hall LJ 125; Jeremy Waldron, 'Some Models of Dialogue between Judges and Legislators' (2004) 23 SCLR 9.

read-in sexual orientation as a protected ground under the *Alberta Human Rights Code*. Justice Iacobucci drew on dialogue theory to address critiques of SCC judicial review as 'wrongfully usurping the role of the legislatures'.[850] In doing so, Justice Iacobacci stated:

> The Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, supra) […] This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[851]

Justice Iacobucci went on to to justify the SCC's decision to intervene and read-in sexual orientation into Alberta's human rights code through dialogue theory:

> When a court remedies an unconstitutional statute by reading in provisions, no doubt this constrains the legislative process and therefore should not be done needlessly, but only after considered examination. However, in my view, the "parliamentary safeguards" remain. Governments are free to modify the amended legislation by passing exceptions and defences which they feel can be justified under s. 1 of the Charter. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response, as I outlined above (see also Hogg and Bushell, supra). Moreover, the legislators can always turn to s. 33 of the Charter, the override provision, which in my view is the ultimate "parliamentary safeguard".[852]

Since *Vriend*, the Canadian courts have continued to draw upon dialogue theory. In the nine years that followed the introduction of dialogue theory 27 judicial decisions, including ten from the SCC, referred to the concept of *Charter* dialogue.[853]

Dialogue theory is a persuasive account of the relationship between the courts and legislatures. The adoption of the *Charter* transformed the relationship between the legislative and judicial branches. However, judicial review in Canada remains weaker than traditional approaches to strong-form judicial review, such as in the U.S. Dialogue theory accounts for the unique placement of Canada on the spectrum between weak-form and strong-form judicial review. The empirical review of early SCC cases is powerful evidence of the dynamic

850 *Vriend v Alberta*, [1998] 1 SCR 493, 67 Alta LR (3d) 1 [*Vriend*] [563].

851 ibid [565]–[566].

852 ibid [578].

853 See Hogg, Thornton and Wright (n 804) 5, 52–53. Christopher Manfredi has provided a more critical analysis of the SCC uses of dialogue theory. See Manfredi (n 815).

relationship between the courts and legislatures facilitated through the four features that facilitate dialogue: the notwithstanding clause; the reasonable limits clause under section 1; the qualified rights under section 7, 8 and 9; and the remedies available to respond to equality clause violations.[854]

My critique of dialogue theory centres on the inclusion of the notwithstanding clause as a dialogic tool. Within the original dialogue theory introduction, Hogg and Bushell acknowledge that there are situations where dialogue is impossible. The authors list three situations when the courts have the last say on legislation: where section 1 does not apply; where the objective of the law is unconstitutional; where political forces preclude legislative action.[855] In both their original piece in 1997 and their 2007 ten-year review the authors did not consider legislative actions that could impede dialogue.[856] The lack of analysis of the role of section 33 uses in obstructing dialogue has also received little attention in subsequent dialogue theory literature.[857] I argue that Hogg and Bushell's analysis of the notwithstanding clause has shortcomings because the authors overlook how the notwithstanding clause can undermine dialogue between the courts and the legislatures. I argue that both pre-emptive and responsive uses of the notwithstanding clause erode dialogue between the legislative and judicial branches.

First, I argue that pre-emptive uses of the notwithstanding clause pose a risk to dialogue between the courts and legislatures. To begin, eighteen of the twenty-four notwithstanding clause bills have been pre-emptive uses of section 33.[858] Pre-emptive use of the notwithstanding clause can halt dialogue process before it begins by denying claimants the

854 Hogg and Bushell (n 589) 82.

855 ibid 92–96.

856 Hogg and Bushell (n 589); Hogg, Thornton and Wright (n 804).

857 The sole exception is that Kent Roach briefly notes that 'preemptive uses of section 33 are problematic from a dialogic perspective'. See Roach (n 808) 61.

858 See the Appendix for a catalogue of notwithstanding clause uses.

ability to bring forward *Charter* claims. For example, Because of its concern about the costs of litigation, New Brunswick pre-emptively invoked section 33 to limit the ability of anti-vaccination groups to seek judicial review of legislation.[859] If the notwithstanding clause had been successfully invoked, the effect would have been to hamper litigants' ability to bring *Charter* claims, depriving the courts of any voice on *Charter* issues. A pre-emptive use of the notwithstanding clause requires claimants to rely on weaker constitutional arguments outside of sections 2 and 7 to 15 of the *Charter*. For example, the use of section 33 in *An Act Respecting the Laicity of the State*[860] has required challenging claimants to draw on weaker and less litigated aspects of Canada's Constitution, such as section 28 of the *Charter* and unwritten constitutional principles.[861] As a result, the use of the notwithstanding clause seriously limits the ability of claimants to seek judicial review and facilitate dialogue between the courts and legislatures.

A pre-emptive use of the notwithstanding clause has potentially disastrous effects on minority groups. Hogg and Bushell argue that an important aspect of dialogue theory is that minority groups can bring forward claims that 'the legislative body would have preferred not to have to deal with'.[862] These authors assert that a '*Charter* decision forces a difficult issue into the public arena that might otherwise have remained dormant, and compels Parliament or a legislature to address old laws that had probably lost much of their original public support'.[863] By using the notwithstanding clause, legislatures are obstructing this process by limiting the ability of minority group claimants to bring forward challenges. These minority group claimants either choose not to pursue claims or must rely on much weaker arguments that thus

859 Poitras, 'New Brunswick Uses notwithstanding Clause in 2nd Bid to Pass Vaccination Bill' (n 493). Bill 39, *An Act Respecting Proof of Immunization* (n 480).

860 *Laicity of the State Act.*

861 See chapter 4 for a summary of the court challenges against *An Act Respecting the Laicity of the State*.

862 Hogg and Bushell (n 589) 87.

863 ibid 96.

far have not been recognized by the courts. Pre-emptive uses of the notwithstanding clause have the added consequence of weakening dialogue process between the courts and legislatures by barring minority groups from bringing forward cases on issues with less popular support or are considered too controversial by the legislature.

Although some might argue that the use of the notwithstanding clause would bring just as much or even more attention to a rights-based issue than a SCC case, this claim is not supported by the history of the notwithstanding clause. Examining the notwithstanding clause practice reveals that the majority of notwithstanding clause invocations and renewals have garnered little attention. Through a review of notwithstanding clause uses between 1982 and 2001, Kahana argues that except for a few controversial invocations, most of the notwithstanding clause invocations and their renewals have garnered little attention.[864] He identifies two causes for the lack of public response: invisibility and inaccessibility.[865] He argues for reforms to the notwithstanding clause to improve its visibility and accessibility. He proposes the reforms of ending the pre-emptive applications and limiting responsive invocations to SCC decisions, because only an SCC decision can garner enough attention to achieve visibility and accessibility of the notwithstanding clause to achieve adequate democratic deliberation on its use.[866] Applying Kahana's research to any counterargument that claims that a notwithstanding clause invocation will bring a rights issue to the forefront as much as a court challenge is flawed. Kahana's research illustrates that for the most part, uses of the notwithstanding clause garner little public attention or response.

Also relevant to my argument that pre-emptive uses of the notwithstanding clause undermine dialogue is the existing uncertainty on judicial review of promulgated

864 Kahana (n 12) 259.

865 Invisible because they addressed issues not on the public agenda and inaccessible because they dealt with complex policy questions. See ibid 272–273.

866 ibid 276.

notwithstanding clause legislation. The text of section 33 is open-textured on whether claimants can seek judicial review for a court declaration that *Charter* rights were violated even if the legislation is immunised by the notwithstanding clause. Through a textual analysis of section 33 of the Charter and section 52(1) of the *Constitution Act, 1982*,[867] Webber argues for an interpretation of the notwithstanding clause that narrows its applicability to remedy only. Under his proposed interpretation, the notwithstanding clause only applies to set aside the remedy after the courts conduct a full *Charter* analysis and determine if there is an unjustified rights infringement. [868] However, this proposed interpretive approach to the notwithstanding clause has not been adopted by the courts where uncertainty remains on whether claimants can seek a rights violation declaration for notwithstanding clause legislation. In *Ford*, the SCC first considered if the *Charter of the French Language* unjustifiably violated section 2(b) of the *Charter* and then determined whether the notwithstanding clause invocation was valid. In contrast, the QCSC in Hak declared the notwithstanding clause 'legally unassailable' through judicial review[869] and rejected a claimant's request for the court to conduct an analysis to first determine whether the *Laicity of the State Act* violated sections of the *Charter*.[870] Thus, if a pre-emptive invocation of the notwithstanding clause bars claimants from seeking a court declaration of a rights infringement, the effect of the notwithstanding clause on dialogue is even more disastrous.

Second, responsive uses of the notwithstanding clause can also undermine dialogue between the legislatures and the courts. There has been a rise in responsive uses of the notwithstanding clause since the first presentation of dialogue theory in 1997. When Hogg and Bushell first proposed dialogue theory they recognised the responsive use of the

867 Section 52(1) of the *Constitution Act, 1982* is the constitution's supremacy clause.

868 Grégoire Webber, 'Notwithstanding Rights, Review, or Remedy? On the notwithstanding Clause and the Operation of Legislation' (2021) 71 UTLJ 510.

869 *Hak QCSC 2021* (n 425) [4].

870 ibid 796–800.

notwithstanding clause following *Ford*.[871] In the footnotes, the authors also acknowledged the notwithstanding clause responsive use by Saskatchewan in 1986, but noted that it was ultimately deemed unnecessary by the SCC.[872] Since 2018, there have been three responsive uses of the notwithstanding clause. All three of these responsive uses of the notwithstanding clause were tabled in response to decisions by lower courts and only one of the notwithstanding clause acts came into force.[873] The rising trend of responsive uses of the notwithstanding clause could undermine dialogue. In the post-2018 invocations, provincial governments invoked the notwithstanding clause responsively with little engagement with other less extreme forms of dialogue, such as crafting responsive legislation. Rather than considering the decision by the courts and seriously engaging in dialogue by putting forward a legislative response that considers the interpretation regarding *Charter* rights protections, these governments used the notwithstanding clause as a first response. Instead, without even waiting until the end of the appeal processes or receiving the results of their application for a stay of the decision pending an appeal, these governments tabled legislation including the notwithstanding clause following an unfavourable lower court decision. Through this practice, the notwithstanding clause acts as a form of insurance that guarantees the outcome sought by the government regardless of the rights interpretation determined by the courts. This post-2018 shift towards using the notwithstanding clause as a form of insurance can weaken the dynamic relationship between the courts and legislatures. By tabling notwithstanding clause legislation following an

871 Hogg and Bushell (n 589) 83.

872 ibid footnote 25.

873 First, the *Saskatchewan School Choice Protection Act, 2018*, in response to SKQB decision. Second, Ontario through *the Efficient Local Government Act*, in response to a ONSC decision. Finally, Quebec's *An Act Respecting the Laicity of the State*, invoked the notwithstanding clause both preemptively and responsively. This legislation falls into an invocation grey area because less than a year prior to its passing, the QCSC granted an injunction to block similar Quebec legislation due to the harm to Muslim women and their constitutional rights protections. Following the election of a new Quebec government in 2019, rather than continuing with litigating the 2018 State secularism legislation, decided to pass new more expansive legislation and protect it from similar constitutional challenges by invoking the notwithstanding clause. See *The School Choice Protection Act*; *Good Spirit SKQB 2017* (n 459); Bill 31, the *Efficient Local Government Act* (n 14); *City of Toronto ONSC* (n 506); *National Council of Canadian Muslims* (n 578); *Laicity of the State Act.*

unfavourable lower court decision, the legislature is sending the message that they will go ahead with the legislation regardless of the findings of the appeal processes. Invoking the notwithstanding clause as court insurance undermines the role of dialogue theory whereby the democratic process is strengthened by the court's interpretation of the *Charter* and the legislature responding by passing legislative sequels that respect the parameters of the Constitution.

A key example of the weakening of the relationship between the courts and the legislatures is the inaugural tabling of notwithstanding clause legislation in Ontario. Following a striking down of his election intervention legislation by the ONSC, Premier Doug Ford announced his intent to use the notwithstanding clause to set aside the effects of the decision. This announcement, made less than a few hours following the decision, focused solely on the authority of the courts to strike down his legislation. Ford attacked the ONSC judge and stated: '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'.[874] In his response, Ford did not seek to put forward a different interpretation of *Charter* rights and did not mention the issues raised in the decision on the freedom of expression rights of both voters and candidates seeking election. Ford did not acknowledge that the ONSC left the option for Ontario to re-enact the legislation as is, so long as it is after the already commenced municipal election is completed. He also threatened that he 'won't be shy' to use the notwithstanding clause in the future.[875]

In the ONCA stay application hearings, the Ontario government counsel told the court that the government had already tabled the notwithstanding clause legislation and they would

874 Lilley (n 519).

875 Crawley (n 520).

invoke section 33 if the ONCA decision was not in their favour.[876] The use of the notwithstanding clause as court insurance presents a paradox for the notwithstanding clause. Dialogue theory argues that *Charter* remedies strengthen democratic processes by almost always providing legislatures with the option to pass responsive legislation to achieve the same objective as the legislation declared unconstitutional. The rise in using the notwithstanding clause as lower court insurance poses a new challenge to dialogue theory. Section 33 is increasingly becoming a tool used to subvert dialogue process. The responsive use of the notwithstanding clause is increasing despite the rise of suspended declarations of invalidity[877] and the options to apply for a stay of the decision pending an appeal. The use of the notwithstanding clause as a form of court insurance weakens dialogue theory by reducing the legislatures' interest in considering the court's *Charter* interpretation.

As a final point within dialogue theory, there is an unacknowledged reliance on the notwithstanding clauses' rare use practice. The drafters of the *Charter* sought to establish a section 33 rare use practice by asserting that the notwithstanding clause should be used only as a tool of the last resort.[878] Through dialogue theory's reliance on rare use practice, if the notwithstanding clause becomes increasingly used, dialogue theory would be seriously undermined. I have argued that the post-2018 uses of the notwithstanding clause represent a shift away from the rare use practice that dominated English Canada's approach to section 33 between 1982 and 2018. In Quebec, however, the rare use practice was never embraced and has been challenged since its inception. In this post-*Charter* period, Quebec enacted the notwithstanding clause in all existing statutes through *An Act Respecting the Constitution Act,*

876 In their ruling to grant the motion to stay the ONSC decision, the ONCA noted that the counsel for the Attorney General stated that he had been instructed to present that if a stay were granted, the government would not take the *Efficient Local Government Act, 2018* (Bill 31), that was at the time in the second reading stage at the Legislature, to a final vote. The ONCA noted in their decision that this information was presented but clarified that it did not impact their decision to stay the ONSC decision pending an appeal. After the ONCA decision was rendered the Ontario Government did not pass the *Efficient Local Government Act, 2018*. See *Toronto (City) ONCA* (n 524) [8].

877 Peter Hogg, 'Discovering Dialogue' (2004) 23 SCLR (2nd) 3, 3–5.

878 Debates 20 November 1981 (n 10) 13042–13043.

1982[879] and included the notwithstanding clause in hundreds of subsequent acts between 1982 and 1985.[880] The omnibus application and routine use of the notwithstanding clause undermines the process of dialogue between the legislatures and the courts. If the notwithstanding clause is invoked pre-emptively in every statute, as it was by Quebec for three years, there is almost no opportunity for the courts to engage in a constitutional analysis on the most litigated sections of the *Charter*.[881] When the courts do rule on constitutional challenges, there is low incentive for the Quebec government to respond to the courts' interpretations without resorting to the notwithstanding clause. A blanket use of the notwithstanding clause makes the setting aside of court decision of invalidity easier for governments because the political consequences of section 33 have already been eroded by its routine invocation. A shift towards increased use of the notwithstanding clause could pose a risk to the foundations of dialogue theory.

While the notwithstanding clause is a necessary facet of dialogue theory, there has been little academic commentary on how the notwithstanding clause can undermine and inhibit dialogue between the courts and legislatures. I have argued that this eroding effect of the notwithstanding clause on dialogue occurs with both the pre-emptive and responsive uses of section 33. As the post-2018 notwithstanding clause uses potentially represent a rise in its use outside of Quebec in the rest of Canada, particularly in response to lower court decisions, this is a gap in dialogue theory that requires further analysis.

6.2 Weak-Form Judicial Review and Canada's Notwithstanding Clause

Although weak-form judicial review theories pre-existed the notwithstanding clause since the entrenchment of section 33, significant analysis has been conducted on its impact on the strength of Canada's judicial review model. I argue that weak-form judicial review theories

879 *An Act Respecting the Constitution Act, 1982.*

880 Hogg, *Constitutional Law of Canada* (n 615) 839.

881 Roach (n 808) 63.

that rely on the notwithstanding clause overlook how minority group rights are particularly vulnerable to the clause's invocation.

To begin, strong-form and weak-form judicial review are constitutional theories that examine strength in the relationship between the courts and the legislatures. Strength within judicial review measures the difficulty associated with a legislature overriding a constitutional court decision, without relying on a constitutional amendment'.[882] Strong-form judicial review describes countries where legislatures are limited in their ability to override constitutional court decisions they disagree with.[883] The most prominent example of strong-form judicial review is the United States, where the federal and State governments have almost no options to overrule constitutional interpretation by the courts, except for a constitutional amendment.[884] Weak-form judicial review describes countries where the legislatures have few barriers to overriding constitutional court decisions they disagree with.[885] Weak-form judicial review countries include Australia, New Zealand, and the United Kingdom.[886]

The adoption of the *Charter* transformed judicial review in Canada and shifted Canada's placement on the spectrum of weak-form and strong-form judicial review. The individual rights protections entrenched in the *Charter*, in addition to the court enforcement powers, shifted Canada from a weak-form judicial review model to one that was more strong-form.[887]

882 Dixon R, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32 Oxford J Leg Stud 487, 490; Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illustrations of the Countermajoritarian Difficulty"(1995)' (2013) 94 Mich L Rev 245.

883 Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Course Book, Princeton University Press 2009).

884 Dixon (n 848).

885 Mark Tushnet, 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 23 SCLR 213.

886 See Paul Rishworth, 'Reasonable Limits on Fundamental Freedoms-A Study of Section 1 of the Canadian Charter of Rights and Freedoms' (1984) 5 Auckland UL Rev. 340; Joanna Harrington, 'The British Approach to Interpretation and Deference in Rights Adjudication' (2004) 23 SCLR 269; George Williams, 'Human Rights and Judicial Review in a Nation Without a Bill of Rights: The Australian Experience' (2004) 23 SCLR 305.

887 *Canadian Charter of Rights and Freedoms* s 24(1).

In evaluating this shift, legal scholars focus on the role of the notwithstanding clause in creating a distinct positioning of Canada on the spectrum of judicial review. The notwithstanding clause is considered a constitutional tool that blurs the traditional binary between strong-form and weak-form judicial review. The notwithstanding clause provides a tool for federal and provincial governments to temporarily set aside judicial declarations of invalidity,[888] but its political use has been limited. Several leading constitutional scholars has considered the role of the notwithstanding clause on Canada's categorization on the spectrum of judicial review.

First, Gardbaum recognises Canada as an example of his novel theory of the commonwealth model of constitutionalism. In this theory, Gardbaum presents a third constitutional model in addition to the already established models of judicial supremacy and parliamentary supremacy.[889] He argues that this third model provides a new balance between the traditional dichotomy of parliamentary and judicial supremacy by shifting the relationship of the courts and legislatures while maintaining adequate protections for constitutional rights.[890]

Gardbaum uses the constitutional models of Canada, New Zealand, and the United Kingdom to present his normative theory of the new commonwealth constitutionalism.[891] Models of the new commonwealth constitutionalism have three main criteria: a legalised bill of rights; enhanced judicial power to enforce rights; and a structure that gives the final say to the legislature.[892] To him, Canada is an ideal example of the new commonwealth constitutionalism model. First, Canada's constitutional structure meets the criteria of a legalised bill of rights through the *Charter*. Second, sections 24(1) of the *Charter* and 52(1) of

888 This override power is limited to sections 2 and 7 to 15 of the *Charter*. See ibid 33(1).

889 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 Am J Comp L 707, 708 - 709.

890 Stephen Gardbaum, 'Reassessing the new Commonwealth model of constitutionalism' [2001] 8 Intl J Cont L 167, 168.

891 ibid 170.

892 ibid 169.

the *Constitution Act 1982* ensure that the criteria of broader rights enforcement powers to the judiciary is met. Finally, the notwithstanding clause, a tool Gardbaum regards as the critical and distinctive structural feature of the *Charter*, meets the criteria that by ensures the legislature has the final say.[893]

Despite this initial celebration of the Canadian constitutional structure, Gardbaum later expressed concerns on the limited political use of section 33. In a 2010 re-assessment of the new commonwealth constitutionalism model, he notes that the limited use of the notwithstanding clause has undermined Canada's categorisation as an example of the commonwealth constitutionalism model. Despite these concerns over limited use of section 33, he argues that Canada remains an example of the new commonwealth constitutionalism model and recommended various reforms to the notwithstanding clause to encourage more frequent use.

Second, Dixon challenges the claim that the notwithstanding clause makes the Canadian constitutional model a weaker form of judicial review than the American strong-form constitutionalism.[894] She argues that Canada is a strong-form judicial review jurisdiction. She bases this assertion on the argument that the limited use of section 33 has resulted in the notwithstanding clause having little direct effect on the strength of judicial review in Canada.[895] Dixon concedes, however, that based on the dialogic aspects of the notwithstanding clause, section 33 may have indirect effects on the strength of Canada's judicial review.[896]

Third, Tushnet criticizes the claims that Canada's notwithstanding clause is an 'ingenious institutional arrangement' that addresses the democratic debilitation caused by the counter-majoritarian difficulty.[897] He argues that the practice of section 33 reveals that the

893 ibid 170.

894 Dixon (n 848), 490.

895 ibid 493.

896 ibid 495.

897 Tushnet, 'Policy Distortion and Democratic Debilitation' (n 848) 250.

notwithstanding clause has not addressed the counter-majoritarian difficulty in Canada.[898] Tushnet argues that the notwithstanding clause has failed to address the counter-majoritarian difficulty because of its political origins and the development of the rare use practice.[899] Tushnet concludes by speculating that the failure of section 33 in Canada undermines the applicability of similar notwithstanding-like clauses to address the counter-majoritarian difficulty.[900]

Fourth, Cameron challenges the perceived myth that the notwithstanding clause helps solve the 'consequences of substituting judicial supremacy with parliamentary supremacy'.[901] Cameron asserts that the limited political use of the notwithstanding clause has resulted in it failing to meet its designation as a middle ground between competing poles of supremacy.[902] She offers a pessimistic view of the notwithstanding clause by arguing that its rare use, along with other factors, has made it essentially politically unavailable.[903] To her, the notwithstanding clause is not 'an unqualified success' but should be characterized as a concept of 'self-delusion'.[904]

I argue that among the scholars that consider the role of the notwithstanding clause in weak-form judicial review, the literature overlooks the unique vulnerability of minority groups to section 33. These scholars fail to account for the susceptibility of minority groups to the weakening of judicial review through the notwithstanding clause. To address this gap in the weak-form judicial review literature, I draw on John Hart Ely's critique of due process approaches to judicial review to argue that minority groups are uniquely vulnerable to the structural design of section 33.

898 ibid 276.
899 ibid 295–296.
900 ibid 300.
901 Cameron (n 721) 148.
902 ibid.
903 ibid 139.
904 ibid 166.

When the *Charter* was adopted, the drafters explicitly rejected a process-oriented approach to constitutional rights, instead entrenching both procedural and substantive rights within Canada's Constitution. The adoption of a substantive approach to judicial review was criticised by proponents of a process-oriented approach, most notably Monahan.[905] Monahan argues that the *Charter* now provides courts with the authority to make political decisions on matters of public policy masked as objective legal decisions.[906] To him, it is a mistake to assume that the rights guaranteed in the *Charter* are based on objective standards dealt with by the courts on solely legal grounds.[907] Rather, Monahan asserts that many *Charter* provisions are vague and invite the courts to make political decisions balancing the interests of society against individual rights.[908] He regards the section 1 *Oakes* test as proof of the political character of judicial review as it requires an inherently normative assessment.[909] 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.[910] Such an approach results in the judiciary overstepping its role and having to make substantive choice values on public policy.[911]

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 largely on upholding the integrity of political processes, 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. The courts' role should be to advance

905 Monahan, 'Judicial Review and Democracy' (n 398).
906 ibid 88.
907 Sharpe and Roach (n 25) 28.
908 Monahan, 'Judicial Review and Democracy' (n 398) 88.
909 ibid 106–115.
910 ibid 114–115.
911 ibid.

democracy by removing barriers limiting public debate and accessing political processes.[912] He views this limited approach to judicial review as a way for constitutional adjudication to act in aid of democracy, rather than its current form as a derogation from it.[913]

Monahan's critique of substantive approaches to judicial review mirrors that proposed by American legal scholar Jeremy Waldron.[914] 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, rather than by democratically elected legislatures. Second, he argues that judicial review is democratically illegitimate because it is an inappropriate method of final decision-making.[915] To Waldron, modern liberal society is characterized by what he considers 'rights disagreements'.[916] He asserts that these rights disagreements are best dealt with by the legislatures as they are democratically elected with the freedom to debate the moral and other implications of the final decision over the scope of certain rights.[917] Similar to Monahan, Waldron proposes that judicial review be limited to ensuring democratic processes that guarantee access to the political systems.[918] This process-oriented approach is juxtaposed against what he calls the outcome oriented approach, which he states represents decisions that seek to ensure a 'good, just, or right' outcome.[919] He argues that it is politically and democratically illegitimate to privilege the decision-making role of a small group of unelected

912 ibid 89.

913 It should be noted that Monahan, conceded in 2006 that the *Charter* had made a significant contribution to Canadian democracy. He comes to this conclusion through an empirical study and analysis of constitutional cases. This study led him to conclude that the courts through judicial review under the *Charter* have taken on an appropriate approach to judicial review by operating as a "meaningful and substantive limit on the authority of government while avoiding many of the pitfalls made by critics". See Patrick Monahan, *Constitutional Law* (3rd ed., Irwin Law 2006) 390–393.

914 Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346.

915 ibid 1346.

916 ibid 1353.

917 ibid 1381.

918 ibid 1372.

919 ibid 1373.

and unaccountable judges over the wills of a democratic legislature representative of the people.[920]

In responses to proponents of a process-oriented approach to judicial review,[921] American legal scholar Ely put forward a strong defence of a substantive approach to judicial review in constitutional democracies. Ely criticizes the process-oriented approach by arguing that democracy within a constitutional system requires more than "a voice and a vote" for minority groups.[922] 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 *Carolene Products*, the United States Supreme Court recognised that although the courts must maintain a presumption of constitutionality and deference to government legislation, in some cases they may need to intervene in cases that curtail individual rights.[923] In footnote number four, Justice Stone acknowledged that legislation that creates barriers to accessing political processes or discriminates against already vulnerable minority groups should undergo more judicial scrutiny under the Fourteenth Amendment.[924]

Ely built on the precedent set by footnote number four by arguing that it would be a mistake to assume that the sole role of the courts should be to guarantee access to political processes. He argues that, as such, an assumption ignores how 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".[925] He uses the examples of discrimination enacted by the majority against non-

920 ibid 1353.

921 It should be noted that Ely's published his work before both Monahan and Waldron. However, he was responding to similar process-oriented arguments presented by both scholars.

922 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 135.

923 *United States v Carolene Products Co*, 304 US 144 (1998), footnote 4.

924 ibid.

925 Ely (n 888) 135.

citizens, the impoverished, and members of the LGTBQ2S+[926] community 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.[927]

The academic debates on substantive and process-oriented approaches to judicial review are particularly relevant in the context of the notwithstanding clause. Although the *Charter* explicitly adopted a substantive approach to judicial review, the notwithstanding clause was designed based on a process-oriented approach. Section 33 includes embedded democratic accountability safeguards that mirror the process-oriented approach. Ely's argument provides an important foundation to analyse the shortcomings of the current literature on weak-form judicial review and the notwithstanding clause. Building on Ely's theory, I argue that the weak-form judicial review literature that examines the role of the notwithstanding clause as a counter-majoritarian solution has overlooked the unique vulnerability of minority groups to section 33.

I argue that to achieve their goal of limited use of the notwithstanding clause, the drafters embedded democratic accountability safeguards within section 33 that mirror a process-oriented approach to judicial review. Through a structural analysis of section 33, I identify two democratic accountability safeguards: (1) democratic accountability through the legislative process, and (2) democratic accountability through the electoral process. I argue that the design of the notwithstanding clause mirrors a process-oriented approach because the two identified democratic accountability safeguards are only aimed at ensuring access to political processes through the legislature and elections. After identifying the two democratic accountability safeguards, I apply the critique of process-oriented judicial review by Ely. I

926 LGTBQ+ refers to Lesbian, Gay, Transgender, Bisexual, Queer or Questioning and Two-Spirit.

927 Ely (n 888) 161–162.

argue that minority groups[928] are uniquely vulnerable to these two democratic accountability safeguards that focus on preserving democratic processes to potentially remove governments that invoke the notwithstanding clause. Consequently, based on the structural design of section 33, minority groups are more vulnerable to being targeted through its invocation.

6.2.1 Democratic Accountability Through the Legislative Process

Any notwithstanding clause invocation requires the legislature to "expressly declare in an Act of Parliament or of the legislature […] that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*".[929] Section 33 prohibits the executive from invoking the notwithstanding clause without its express inclusion in a bill passed through the legislative process by simply majority.

The legislative process requirement of an express invocation of the notwithstanding clause passed by the legislative branch, seeks to add an element of transparency to the notwithstanding clause invocation. Prior to an invocation of the notwithstanding clause, 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 the legislative process. As argued by Campbell, the legislative process 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 justify their decision.[930] The legislative process requirement plays an important role in limiting the unfettered power of the notwithstanding clause. Further, section 33(1) requires that an invocation of the notwithstanding clause is passed by a simple majority in the legislature, including

928 My analysis relies on the definition of minority group by sociologist Louis Wirth: 'any group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination'. See Louis Wirth, 'The Problem of Minority Groups' in R Linton (ed), *The Science of Man in the World Crisis* (Columbia University Press 1945).

929 *Canadian Charter of Rights and Freedoms* s 33(1).

930 Campbell (n 815) 2.

consideration at all the reading and committee stages of a bill's consideration. Unlike the *Emergencies Act*, which can be enacted by the executive before tabling in the legislature,[931] the notwithstanding clause cannot be invoked by the executive.

It should be noted that the purported legislative process requirement embedded within section 33 has seemingly had little effect on the practice of invoking the notwithstanding clause. A review of the notwithstanding clause past uses reveals that often, the legislative process has resulted in little to no deliberation or consideration of the use of the notwithstanding clause. For example, in 1998, Quebec successfully invoked the notwithstanding clause in *An Act to Amend the Charter of the French Language* following a SCC declaration in *Ford* that the requirement of French-only outdoor commercial signs violated section 2 of the *Charter*.[932] The legislation was passed less than a week following the *Ford* decision, and once tabled, there was no debate raised on the invocation in the legislature.[933] This example demonstrates that the notwithstanding clause legislative process requirement may not have the deliberative and transparency impacts purported, especially when the government with a majority in the legislature is the one tabling the notwithstanding clause invocation.

Despite the practical challenges identified with the legislative process requirement, I argue that the purported visibility and transparency benefits for the public at large have limited application in the context of minority groups. Minority groups are uniquely vulnerable to the legislative process, by which their interests are not a priority of elected legislatures. Ely's critique of the due process approach is particularly relevant to the section 33 legislative process requirement because he argues that often elected legislators will continuously ignore the rights of minorities who lack political representation and are not required as a voting bloc for their

931 Library of Parliament, 'The Emergencies Act: Parliament's Role During a National Emergency' (2022) https://hillnotes.ca/2022/02/22/the-emergencies-act-parliaments-role-during-a-national-emergency/ accessed 8 May 2022. Also see *The Emergencies Act*, SC 1988, c C-29.

932 *An Act to Amend the Charter of the French Language.*

933 Yalden (n 285).

re-election.[934] The notwithstanding clause legislative process requirement does not sufficiently protect minorities groups as it is influenced by similar structural flaws highlighted by Ely. As highlighted by Ely, many issues for minority groups are not a concern of the majority and often are unpopular among most voters. To elected representatives who are statistically often not members of a minority group, there could be little concern for the interests or rights of minority groups.

Furthermore, the public who forms the majority could be either apathetic to or actively support the targeting of minority groups. These instances create situations in which governments can invoke the notwithstanding clause to target minority groups with little opposition in the legislature or need for a fulsome deliberation. Canadian *Charter* case law demonstrates that the rights of minorities are often related to issues that can be controversial and steeped in stigma.[935] The controversial nature of many of the minority groups rights can result in the public being outwardly supportive of the limitation of their rights through the notwithstanding clause. Throughout Canadian history there are countless examples of popular support for discriminatory policies, such as Japanese internment camps[936] and the creation of residential schools for Indigenous children.[937]

In the contemporary era, one need not look further than the use of the notwithstanding clause in the Quebec *Laicity of the State Act*. In Quebec, the Coalition Avénir Québec (CAQ) party, which won the election and passed the *Laicity of the State Act,* made the limitation of minority religious rights a central part of their election campaign. The prohibition of religious symbols in the public service became a key election issue, with all parties running in the

934 Ely (n 888) 135.

935 An exemplative case of a controversial minority rights case is *Suresh*, whereby the SCC considered the section 7 rights of non-Canadian citizen accused of terrorism who was at risk of harm if deported. This case occurred right after the terrorist attacks of September 11, 2001, at a period where Muslim men, particularly those accused of terrorism, were not regarded favourably by the public. See *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 [*Suresh*].

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

937 Truth and Reconciliation Commission of Canada (n 62).

election presenting stances on whether religious symbols should be banned in the public service. In spite of, or potentially because of, the CAQ's commitment to ban religious symbols in the public service, they won both the 2019 and 2022 elections in a landslide.[938] Further polling conducted in March 2019 confirmed the popularity of the policy in Quebec with 74 percent of those polled saying they supported the ban being applied to judges, prosecutors, police, and prison guards and 69 percent saying they supported the ban being applied to teachers.[939] These recent experiences in Quebec reveal the shortcomings of the notwithstanding clause legislative process requirement when it comes to minority groups.

6.2.2 Democratic Accountability Through the Electoral Process

Democratic accountability through the electoral process was structurally embedded in the notwithstanding clause to limit its unfettered use. These democratic accountability mechanisms are two-fold. First, section 33(3) of the *Charter* creates a five-year sunset clause for the notwithstanding clause. In 1982, acknowledging the vast override powers of section 33, the drafters of the notwithstanding clause agreed to place a temporal restriction on the notwithstanding clause. Any notwithstanding clause invocation will automatically expire within five years of coming into force.[940] The intended purpose of the five-year sunset clause was to limit the unchecked powers of the legislature to set aside constitutionally entrenched rights. By requiring review and renewal on five-year intervals, democratic elections act as a check on section 33 by ensuring that the notwithstanding clause is reviewed every election cycle, thus making it subject to removal or expiration through the election of different political leaders.[941]

938 'Provincial General Election Official Results' (*élections Québec*) https://www.electionsquebec.qc.ca/en/results-and-statistics/ accessed 10 December 2022.

939 '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.

940 *Canadian Charter of Rights and Freedoms* s 33(3).

941 Hogg, *Constitutional Law of Canada* (n 7) 881.

The five-year sunset clause cyclically increases the visibility of any active notwithstanding clause invocations. In theory, although not always in practice, the required renewal of the notwithstanding clause would result in a resurrection and reconsideration of its necessity. In many instances, governments have allowed the notwithstanding clause to expire, ultimately avoiding the renewal of the debate over the merits of its invocation.[942] The inclusion of a five-year expiration period intrinsically ties the use of the notwithstanding clause to elections so that its renewal must be considered by each successive government during their mandate. This democratic accountability requirement 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.

Second, the democratic accountability mechanism of the sunset clause is reinforced by the exclusion of democratic *Charter* rights from the scope of section 33. Per section 33(1), the notwithstanding clause solely applies to section 2 and 7 to 15 of the *Charter*.[943] Section 33 is explicit in its exclusion of 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 and require federal and provincial legislative bodies to hold elections every five years. Legislatures may not employ the notwithstanding clause to limit constituents' access to elections or to delay the elections beyond their five-year terms. The drafter's purposeful exclusion of democratic rights from the applicability of the notwithstanding clause sought to make free and fair elections a key protection for constituents from the notwithstanding clause. Through elections, citizens can exercise democratic accountability for a government's use of the notwithstanding clause. Central to the design of the notwithstanding clause is the risk of political consequences with perceived improper use of the notwithstanding clause. This design of political risk assumes

942 I discuss the notwithstanding clause invocations that were permitted to expire in chapters 3 and 4. Also see Salvino (n 11).

943 *Canadian Charter of Rights and Freedoms* ss 7–14.

that an unjustified invocation of the notwithstanding clause will be viewed unfavourably by the electorate who values individual rights, and the invoking party will be removed through the ballot box. Ultimately, these two structural elements of the notwithstanding clause, the sunset clause, and the exclusion of democratic rights form the democratic accountability requirement through the electoral process. The combined effect of these two structural elements seeks to give the final say on the notwithstanding clause to the electorate.

Although the democratic accountability mechanism is a powerful limit on the unfettered use of the notwithstanding clause, it has significant shortcomings in the context of minority groups. First, by definition, minority groups lack meaningful representation in the legislature and have minimal impact through the ballot box. Second, many minority groups face several barriers to voting, including minority groups who experience higher rates of poverty and homelessness, lack of identification, election dates on religious holidays, or an inability to physically access voting stations. Third, there are minority groups that have no ability to access the ballot box due to their status as non-citizens, such as refugees and permanent residents. These minority groups have limited or no ability to directly influence elections. Therefore, based on issues of demographics, access, or an inability to vote because of legal status, minority groups are often unable to meaningfully influence elections.

Recognizing the demographic and electoral barriers they face, minority groups are often required to rely on the public to take an interest in their rights. In the context of the notwithstanding clause, minority groups are in the same dilemma that was discussed regarding the second structural safeguard of the legislative process requirement, whereby the political costs of the notwithstanding clause are inadequate when the public is either apathetic or actively supportive of the curtailment of their rights. The example of Quebec's recent invocation of the clause targeting religious minority groups through the *Laicity of the State Act*

has broad popular 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 through which elected legislators and then the public can vote on the limitation on the rights of minorities seems antithetical to the purpose of constitutional rights entrenchment. This is a view articulated by Ely, who argues 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 non-citizens and individuals living in poverty as demonstrative of the vulnerability of minority groups to the majority who continuously out vote them to maintain legislative control and enact policies that either ignore their interests or are directly harmful to them.[944] In the Canadian context, by creating the *Charter*, the political leaders at the time affirmed that there are fundamental rights that require constitutional protection 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 substantive judicial review to ensure that they were respected by the legislative and executive branches. In the years since the entrenchment of minority rights in the *Charter*, minority groups have continuously turned to the courts seeking protections for their fundamental *Charter* rights that the government has infringed.[945] The process of substantive judicial review under the *Charter* 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, section 33 can be invoked to circumvent this process. The government's ability to use the notwithstanding clause to immunize themselves pre-emptively or reactively from the *Charter* reduces the

944 Ely (n 888) 161–162.

945 See *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Syndicat Northcrest*]; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani*]; *Vriend* (n 816); *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438, 64 OAC 124 [*Sauvé I*].

constitutionally entrenched minority rights protections to those of a symbolic nature that are ultimately unenforceable. The creation of democratic accountability mechanisms through the electoral process, although well-intentioned, is ill-suited for minority groups who face numerous demographic and access barriers in voting. Minority groups are then 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, although the *Charter* drafters embedded democratic accountability mechanisms within section 33, the second electoral accountability mechanism was not drafted with consideration of the unique vulnerability of minority groups within the electoral process.

The existing literature on weak-form judicial review on the notwithstanding clause overlooks the unique vulnerability of minority groups to section 33. The susceptibility of minority rights is a potential consequence of the notwithstanding clause's weakening of Canada's approach to judicial review not considered by weak-form judicial review scholars who wrote on its role as a counter-majoritarian tool. Any literature that seeks to grapple with the impact of the notwithstanding clause on the strength of judicial review must also contend with the risk of consequences for minority rights protections, a key tenet of Canada's constitutional democracy.

6.3 Conclusion

In this chapter, I focused on two leading theoretical approaches that incorporate Canada's notwithstanding clause: dialogue theory and theory of weak form judicial review. First, I argued that dialogue theory's incorporation of the notwithstanding clause as a dialogic tool overlooks how the notwithstanding clause can undermine dialogue between the courts and the legislatures. Second, I argued that weak-form judicial review theories that rely on the notwithstanding clause overlook how minority rights are particularly vulnerable to the structural design of section 33.

In the following chapters, I present my argument that the courts should adopt a new interpretive approach to the notwithstanding clause. I argue that the notwithstanding clause should be interpreted in a manner that would prevent it from being invoked to distort or undermine other provisions of the Constitution that fall outside of sections 2 and 7 to 15 of the *Charter*, as well as the underlying constitutional framework. My proposed interpretive approach would ensure that the notwithstanding clause cannot be employed as a trojan horse to threaten the entire constitutional structure and fundamental tenets of democracy. My proposed interpretive approach will present four additional limitations that should narrow the scope of the notwithstanding clause's application. First, an omnibus application of the notwithstanding clause should be prohibited. Second, the application of the notwithstanding clause to freedom of expression should be limited by the unwritten principle of democracy. Third, section 33 should not be permitted to subvert customary international law *jus cogens* norms, such as torture. Fourth, section 28 of the *Charter* immunizes gender equality protections from the notwithstanding clause. Following this examination of proposed limits on the notwithstanding clause developed through constitutional interpretation, I will conclude by examining the relationship between section 33 and section 1 of the *Charter*.

SECTION FOUR: THE FUTURE OF THE NOTWITHSTANDING CLAUSE: PROPOSING A NEW INTERPRETIVE APPROACH

CHAPTER SEVEN

7. Revisiting *Ford*: Prohibiting an Omnibus Application of the Notwithstanding Clause

In chapter five, I argued that the SCC's 'form-only' approach established by *Ford* should be revisited. My critique of *Ford* was three-fold. First, the reasoning that justified the adoption of the 'form-only' approach was based on an erroneous textual interpretation of section 33. Second, the SCC failed to apply the established methods of *Charter* interpretation. Third, the outcome of *Ford* may have been influenced by the existing political climate and thus responded to the threat of Quebec secession. Building on my critique of *Ford*, I argue that the 'form-only' approach should be revisited and new interpretative approach to the notwithstanding clause should be developed.

My proposed interpretive approach to the notwithstanding clause seeks to restrict its use while still allowing it to be invoked as a safety valve by legislatures. I argue that the notwithstanding clause should be interpreted in a manner that would prevent it from being invoked to distort or undermine other provisions of the Constitution that fall outside of sections 2 and 7 to 15 of the *Charter*, as well as the underlying constitutional framework. My proposed interpretive approach would ensure that the notwithstanding clause could not be employed as a trojan horse to threaten the entire constitutional structure and fundamental tenets of democracy.

My proposed interpretive approach will present four limitations that could narrow the notwithstanding clause's application. First, an omnibus application of the notwithstanding clause should be prohibited. Second, applying the notwithstanding clause to freedom of expression should be limited by the unwritten principle of democracy. Third, section 33 should not be permitted to subvert customary international law *jus cogens* norms, such as torture.

Fourth, section 28 of the *Charter* immunizes gender equality protections from the notwithstanding clause.

I develop these four proposed limitations on the notwithstanding clause through the application of ordinary principles of Canadian constitutional interpretation, including textual, purposive, and progressive approaches. There is no overarching principle that underlies each of my four proposed limits, nor do I argue that I am proposing an exhaustive approach on limits to section 33. Rather, I argue that judicial review can limit section 33 through ordinary approaches to Canadian constitutional interpretation and explore four proposed limits. The four proposed limits all relate to each other by being drawn from ordinary interpretative approach, but their source varies and they are not united substantively.

This chapter examines the first proposed limit on the notwithstanding clause, which argues that section 33 cannot be applied in an omnibus manner. I argue that the SCC erred in their interpretation permitting the omnibus application of the notwithstanding clause. Through a textual and purposive analysis, I propose a prohibition of the omnibus application of the notwithstanding clause through a single statute. If a legislature seeks to apply the notwithstanding clause to multiple statutes, each application must undergo the democratic legislative processes required by section 33(1).

7.1 Interpretating the Omnibus Application of the Notwithstanding Clause

As I argued in chapter 5, the SCC in *Ford* erred in permitting an omnibus application of the notwithstanding clause. The SCC held that an omnibus application is permitted so long as the 'essential requirement[s] of form laid down by section 33' are respected and there is 'an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the Charter'.[946] The SCC based their reasoning on a textual analysis of section 33. I argue that this textual analysis was flawed. Through my own textual

946 *Ford* (n 18) [33].

analysis, I argue that the text of section 33, both in its omissions and use of the singular in reference to the notwithstanding clause act and the *Charter* provisions, points against the ability to apply the notwithstanding clause in an omnibus fashion. Based on the factors I have identified, some might also counterargue that the text of section 33 is open textured as to whether it can be applied in an omnibus manner.

In this chapter, I directly engage with whether the notwithstanding clause can be invoked in an omnibus manner and if the precedent from *Ford* should be revisited. I supplement my textual analysis of section 33 with a purposive analysis of the notwithstanding clause. In *Ford*, the SCC omitted any application of the dominant *Charter* interpretation methods, choosing instead to rely only on a textual analysis of section 33. In this chapter, I argue that a purposive interpretation of section 33 also supports the finding that the notwithstanding clause should not be invoked in an omnibus manner. I conclude by arguing that both a textual and purposive interpretation of section 33 support a finding that the notwithstanding clause should not be applied in an omnibus manner. If a legislature seeks to apply the notwithstanding clause in all existing statutes, each notwithstanding clause invocation must be done through a separate bill that goes through the legislative process.

7.2 A Textual Analysis of Section 33 and an Omnibus Application

In chapter 5, I engaged in a textual analysis of section 33. Although the text is specific on several aspects of applying the notwithstanding clause,[947] I argued that the text of section 33 is not specific about the omnibus application of the notwithstanding clause. I based this argument on two aspects of the text of section 33. First, the text of section 33 did not specifically permit an omnibus application of the notwithstanding clause. Second, the text of the notwithstanding clause uses the singular to refer to an 'Act or a provision thereof' that has the notwithstanding

947 I argued that the section 33 text was specific as it relates to the invoking institutional authority; the requirement of an express declaration; the limited rights the notwithstanding clause can be applied to; the operation of the notwithstanding clause; the five-year temporal parameters; and the renewal option.

clause applied to it.[948] Based on these two factors, I argue that a textual interpretation of the notwithstanding clause is open-textured or can be interpreted as prohibiting an omnibus application of the notwithstanding clause.

7.3 A Purposive Analysis of Section 33 and an Omnibus Application

To support my textual interpretation of section 33, I also apply a purposive interpretation to the notwithstanding clause to determine whether an omnibus application should be permitted. The purposive approach seeks to determine the purpose of the *Charter* text in question, with regard to the 'nature of the interests it is meant to protect'.[949] The meaning of the *Charter* text must be interpreted through a consideration of the context from which it arose, including the linguistic, philosophical, and historical contexts.[950] This context may be determined through a consideration of interpreted aids, including the language used in the text, the context drawn from the text, the history of the text before the *Charter* entrenchment, the legislative history, and the developed case law.[951]

For section 33, there are interpretive aids relevant to interpreting its purpose. First, there was no public consultation on the notwithstanding clause provision. The *Charter* draft underwent significant public consultation that shaped its drafting. The Special Joint Committee on the Constitution, 1980-1981, considered almost one-thousand submissions and heard from over one-hundred witnesses from civil society organisations and governments.[952] The civil society organisations helped strengthen the language of the *Charter* and achieved heightened safeguards for individual rights from government intrusion.[953] The civil society organisations successfully advocated for the narrowing of section 1 of the *Charter*, to reduce the ability for

948 *Canadian Charter of Rights and Freedoms*, 33(1) & 33(2).

949 *Hunter* (n 616) [157].

950 Department of Justice Canada (n 624).

951 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 89–90.

952 Hogg and Wang (n 148) 7–8.

953 ibid 46–47.

the government to justify a rights intrusion.[954] During these public consultations, however, the notwithstanding clause was not in the draft of the *Charter* and thus received no commentary by the civil society organisations or other participating actors.[955]

Second, the notwithstanding clause is largely seen as having resulted from a 'political compromise' without which the entrenchment of the *Charter* would not have been possible.[956] The text was agreed upon by all the provinces and the federal government, except for Quebec.[957] The original text of the notwithstanding clause was written on the napkin during an informal 'kitchen accord' discussion among Jean Chrétien, Roy Romanov, and Roy McMurtry.[958] Following the departure of the Quebec Premier and delegation, the proposed notwithstanding clause was presented to the remaining Premiers and federal representatives. The draft was approved the next morning without the approval of the Quebec Premier.[959] Particularly relevant to the draft is the rushed nature of the clause's inclusion and the individuals involved in the decision to include it. There were no women, Indigenous leaders, people living with disabilities, nor racialised individuals who participated in the discussion of the inclusion or the specific drafting of the text.[960]

Third, the drafters of the notwithstanding clause made a range of public statements on its intended purpose. To pre-empt public outcry over the notwithstanding clause, when introducing the text of the finalised *Charter,* the government released a factsheet on the notwithstanding clause to contextualise its purpose and application.[961] Similar to the text of section 33, the factsheet refers to the enacting Act only in a single tense:

954 Dodek (n 38) 56.

955 ibid 63.

956 Roy and Brosseau (n 1).

957 English (n 97) 506.

958 ibid.

959 ibid 507.

960 English (n 97).

961 'Factsheet: The Notwithstanding or Override Clause as Applied to the Charter of Rights and Freedoms, Document 800-15/022' (n 205).

> A notwithstanding clause is one which enables a legislative body (federal or provincial) to enact expressly that a particular provision of an Act will be valid, notwithstanding the fact that it conflicts with a specific provision of the Charter of Rights and Freedoms. The notwithstanding principle has been recognized and is contained in a number of bills of rights, including the Canadian Bill of Rights (1960), the Alberta Bill of Rights (1972), The Quebec Charter of Rights and Freedoms (1975), the Saskatchewan Human Rights Code (1979) and Ontario's Bill 7 to Amend its Human Rights Code (1981).
>
> How it would be applied
>
> Any enactment overriding any specific provisions of the Charter would contain a clause expressly declaring that a specific provision of the proposed enactment shall operate, notwithstanding a specific provision of the Charter of Rights and Freedoms.
>
> Any notwithstanding enactment would have to be reviewed and renewed every five years by the enacting legislature if it were to remain in force.[962]

Besides the text of the factsheet, Justice Minister Jean Chrétien provided insights on the government's intended application of the notwithstanding clause:

> The agreement signed by the Prime Minister and nine Premiers does not emasculate the charter. […] 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.[963]

He stated that the purpose of the notwithstanding 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'.[964] According to Chrétien, this stated purpose would be achieved in two ways:

> First that it will be politically very difficult for a government to introduce without very good reason a measure which applied notwithstanding the Charter of Rights and Freedoms in the Constitution. Second, a sunset provision of five years provides a degree of control on the use of an override clause in allowing public debate on the desirability of continuing the deliberations further.[965]

Chrétien went on to present several bill of rights that include notwithstanding clauses to argue that:

> 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 […] It is because of the history of the use of the override

962 ibid.

963 Debates 20 November 1981 (n 10) 13042–13043.

964 ibid.

965 ibid.

> clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments.[966]

Chrétien also quoted a statement from the CCLA general counsel Allan Borovoy:

> The process is a rather ingenious marriage of a bill of rights notion and a parliamentary democracy. The result is a strong charter with a escape valve for the legislatures. The "notwithstanding" clause will be a red flag for opposition parties and the press. That will make it politically difficult for a government to override the Charter. Political difficulty is a reasonable safeguard for the Charter.[967]

Through his speech introducing the notwithstanding clause, Chrétien asserted that the notwithstanding clause was designed to be applied and interpreted recognising the additional democratic safeguards embedded within the clause. These democratic safeguards extend beyond the exclusion of democratic rights from the scope of section 33, to include the political consequences of its invocation.

The three identified legislative aids of the lack of public consultation on section 33, the political compromise to achieve section 33, and the public statements by the notwithstanding clause drafters are all relevant to a purposive interpretation of section 33. These legislative aids can guide an interpretation to ensure there is consideration of the linguistic, philosophical, and historical contexts from which the notwithstanding clause arose.[968]

Turning to the purposive interpretive analysis, this approach seeks to determine the purpose of the *Charter* provision with regard to the 'nature of the interests it is meant to protect'.[969] A central purpose of the notwithstanding clause was its role as a political compromise to achieve the entrenchment of the *Charter*. The political compromise balanced the province's interests in safeguarding parliamentary supremacy and the federal government's goal of an entrenched bill of rights. First, the notwithstanding clause political compromise safeguarded aspects of parliamentary supremacy that the provinces feared they could lose with

966 ibid.

967 ibid.

968 Department of Justice Canada (n 624).

969 *Hunter* (n 616) 157.

the adoption of the *Charter*. The provinces, led by Saskatchewan Premier Alan Blakeney sought to ensure greater balance between the legislative and judicial branches.[970] Blakeney's view on this is best represented in his statement:

> [The Constitution] contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so w[e]ll for so many centuries.[971]

The notwithstanding clause represents a uniquely Canadian constitutional tool with no equivalent in other jurisdictions. Since its entrenchment, Canada's unique constitutional tool has been incorporated into leading theoretical approaches to Canadian constitutional law[972] and has been recognised in the case law. For example, in *Vriend*, the SCC recognised the notwithstanding clause as the 'ultimate parliamentary safeguard',[973] playing a central role in the dialogic relationship between the legislatures and the courts because it 'establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts'.[974] The role of the notwithstanding clause as a responsive tool available to the legislatures has continuously been affirmed and recognised by the SCC in subsequent decisions.[975] The interpretive aids of the text of section 33, the legislative history, and the case law reveal an overarching purpose of the notwithstanding clause to maintain a unique relationship between the courts and legislators that safeguards aspects of parliamentary supremacy. Despite the limited use of the notwithstanding clause in its first forty years of existence, the overarching purpose of the notwithstanding clause to safeguard parliamentary supremacy remains.

970 English (n 97) 506.

971 'Federal-Provincial Conference of First Ministers on the Constitution' (n 247) 114.

972 For an analysis of these two academic theories of dialogue theory and weak-form judicial review, see chapter 6.

973 *Vriend* (n 816) [178].

974 ibid [137].

975 *Big M* (n 673) [20]; *Re B.C. Motor Vehicle Act* (n 642) [119]; *Fraser* (n 549) [141].

Second, the political compromise of parliamentary supremacy balanced the federal government's interest in an entrenched bill of rights by embedding democratic accountability safeguards into the structural design of section 33. The section 33 political compromise was not unilaterally in favour of the provinces. The provincial and federal drafters agreed that the applicability of the notwithstanding clause would be narrow. As recognised by Chrétien and other drafters of the *Charter*, the notwithstanding clause was intended to act as a 'safety valve' to 'correct absurd situations'.[976] The drafters of this text assured the public through the notwithstanding clause factsheet and statements, including one by Trudeau Senior,[977] that they expected the clause to be rarely invoked based on their experience with the existing notwithstanding-like clauses in the statutory bills of rights.[978]

To achieve their intended limited use of the notwithstanding clause, the drafters embedded safeguards within the text of the notwithstanding clause. These safeguards were also part of the political compromise to achieve the adoption of the *Charter*. The drafters sought to limit the use of the notwithstanding clause to exceptional situations by creating democratic accountability safeguards.

First, democratic accountability through the legislature requires every notwithstanding clause invocation to 'expressly declare in an Act of Parliament or of the legislature […] that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*'.[979] Section 33 prohibits the executive from invoking the notwithstanding clause without its express inclusion in a bill passed through the legislative process by simply majority. The drafters of section 33 designed the notwithstanding clause to be accountable to the checks and balances of the democratic processes. Any notwithstanding

976 Debates 20 November 1981 (n 10) 13042–13043.

977 'Transcript of an Interview with Then Prime Minister Trudeau by Jack Webster' (n 246) 5.

978 For a summary of statements by the drafters of the Charter regarding the notwithstanding clause, see Roy and Brosseau (n 1).

979 *Canadian Charter of Rights and Freedoms* s 33(1).

clause invocation requires a high degree of transparency by mandating legislatures to expressly state the rights it seeks to override, and this declaration must be passed not by the executive but by the legislature.

Second, democratic accountability through the electoral processes encompasses the five-year sunset clause and the limited rights that the notwithstanding clause can apply to. Regarding the sunset clause, any notwithstanding clause invocation will automatically expire within five years of coming into force.[980] The intended purpose of the five-year sunset clause was to limit the unchecked powers of the legislature to set aside constitutionally entrenched rights. By requiring review and renewal on five-year intervals, democratic elections act as a check on section 33 by ensuring that the notwithstanding clause is reviewed every election cycle, thus making it subject to removal or expiration through the election of different political leaders.[981] Regarding the rights limitations, per section 33(1), the notwithstanding clause solely applies to section 2 and 7 to 15 of the *Charter*.[982] Section 33 is explicit in its exclusion of democratic rights enumerated in section 3, 4, and 5 of the *Charter*. Legislatures may not employ the notwithstanding clause to limit constituents' access to elections or to delay elections beyond their five-year terms. The drafters' purposeful exclusion of democratic rights from the applicability of the notwithstanding clause sought to make free and fair elections a key protection for constituents from the notwithstanding clause. Chrétien, in his speech introducing the notwithstanding clause, declared that the notwithstanding clause was intentionally designed to make it 'politically very difficult for a government to introduce without very good reason a measure'.[983] He also shared that the five-year sunset clause was included to provide 'a degree of control on the use of an override clause in allowing public

980 ibid 33(3).

981 Hogg, *Constitutional Law of Canada* (n 7) 881.

982 *Canadian Charter of Rights and Freedoms*, ss 7–14.

983 Debates 20 November 1981 (n 10) 13042–13043.

debate on the desirability of continuing the deliberations further'.[984] The deliberate design of democratic accountability safeguards has been recognised by the SCC on several occasion, including in *Sauvé II*[985] and *Reference Re Secession of Quebec*.[986]

The dual aspects of the political compromise that led to the notwithstanding clause are the safeguarding of aspects of parliamentary supremacy and the embedded democratic accountability safeguards. The notwithstanding clause does not guarantee absolute parliamentary supremacy, but significantly limits its applicability. The democratic accountability safeguards set clear restrictions on the use of the notwithstanding clause and should be considered in a purposive interpretation on section 33.

I argue that a purposive interpretation of section 33 should prohibit an omnibus application. The purpose of the notwithstanding clause as a political compromise to safeguard aspects of parliamentary supremacy should be considered within the parameters of the democratic accountability safeguards. These democratic accountability safeguards were designed to incur political consequences for a notwithstanding clause invocation that is not considered justified by the electorate.

When one considers the two democratic accountability safeguards, it is apparent that allowing an omnibus application of the notwithstanding clause conflicts with the political compromise purpose of the notwithstanding clause. I suggest that a purposive interpretation of section 33 supports the requirement of individual notwithstanding clause invocations. This requirement would ensure that each invocation is individually tabled in the legislature, studied in committee, and considered at the legislative reading stages. Such an interpretation meets the dual section 33 political compromise purposes of parliamentary supremacy and democratic accountability. First, requiring individual notwithstanding clause invocations respects the

984 ibid.

985 *Sauvé II* (n 729) [36].

986 *Reference re Secession* (n 23) [47].

parliamentary supremacy purpose by maintain the legislatures' ability to temporarily set aside certain *Charter* rights. Although a requirement of individual invocations could lengthen the time required to pass each notwithstanding clause act, the significance of a rights suspension justifies the narrower interpretation. Second, requiring individual notwithstanding clause invocations also respects the purpose of the democratic accountability safeguards. A requirement of individual notwithstanding clause invocations supports the democratic accountability safeguards through the legislative and electoral processes because both the public and the legislature are more able to consider the suspension of rights on each act. Thus, through a purposive analysis, I have argued that an omnibus application of the notwithstanding clause should not be permitted. If the legislature intends to apply the notwithstanding clause to multiple statutes, they must do so through individual acts that ensure such a rights suspension is considered and debated in the legislature before its enactment.

7.4 Conclusion

In sum, I argue that the SCC in *Ford* erred in permitting the omnibus application of the notwithstanding clause. I applied both textual and purposive *Charter* interpretive methods to support my argument that the *Ford* precedent should be revisited and an omnibus application of the notwithstanding clause should be prohibited. If a legislature seeks to apply the notwithstanding clause in all existing statutes, as was done in Quebec through *An Act Respecting the Constitution Act*,[987] each notwithstanding clause invocation must be done through a separate bill that goes through the legislative process.

987 *An Act Respecting the Constitution Act, 1982.*

CHAPTER EIGHT

8. Safeguarding Freedom of Expression Essential to the Democratic System from the Notwithstanding Clause Through Unwritten Constitutional Principles

Canadian courts have long recognised that the Canadian Constitution extends beyond the written text of the constitutional documents to include both the common law and unwritten constitutional principles. Unwritten constitutional principles consist of 'conventions for which no authoritative textual source exists and which date to the era of pre-modern constitutionalism'.[988] Unwritten constitutional principles are found mostly in commonwealth jurisdictions and grew out of the British constitutional model.[989]

Canada's Constitution is best understood as a combination of a written and unwritten elements.[990] Section 52(2) of the *Constitution Act, 1982*, comprises of an iterative list of written constitutional documents, including the *Constitution Act, 1867*, and the *Statute of Westminster, 1931*.[991] Together with the written constitutional text are a combination of unwritten constitutional principles. The existence of unwritten constitutional principles in Canada is linked to the founding constitutional document, the *Constitution Act, 1867*. The drafters of the 1867 Constitution included in the preamble recognition that the founding Canadian provinces seek to be united 'with a Constitution similar in Principle to that of the United Kingdom'.[992]

In Canada, unwritten constitutional principles refer to 'unwritten norms that are essential to a nation's history, identity, values and legal system'.[993] The SCC has affirmed the existence and authority of unwritten constitutional principles,[994] calling them the 'lifeblood of

988 Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 106.

989 ibid.

990 John Gardner, 'Can There Be a Written Constitution?', *Law as a Leap of Faith* (Oxford University Press 2012).

991 Monahan and Shaw (n 50) 6–7.

992 Greene (n 55) 35; Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 93; Hogg, *Constitutional Law of Canada* (n 615) 411; Vanessa MacDonnell, 'Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making' (2019) 65 McGill LJ 175, 177.

993 Beverly McLachlin, 'Unwritten Constitution Principles: What Is Going On' (2006) 4 NZ J PIL 147, 149.

994 ibid.

the Constitution'.[995] The SCC has held that the Constitution 'would be impossible to conceive […] without [unwritten constitutional principles]'[996] because 'they are the vital unstated assumptions upon which the text is based'.[997]

The origins of unwritten constitutional principles derive from early theories of natural law. Former SCC Chief Justice Beverly McLachlin calls unwritten constitutional principles 'modern reincarnations' of the ancient natural law doctrines.[998] She argues that in constitutional democracies such as Canada, the 'legitimacy of the modern democratic state arguably depends on its adhesion to fundamental norms that transcend the law and executive action'.[999] She uses the example of the Holocaust to assert that there 'are certain fundamental norms that no nation should transgress'.[1000] McLachlin distinguishes modern unwritten constitutional principles from ancient natural law theories based on their sources. Whereas natural law doctrines are based in theology, unwritten constitutional principles derive from 'the history, values and culture of the nation, viewed in its constitutional context'.[1001]

McLachlin asserts that the central issue with unwritten constitutional norms is not whether they can be enforced but, which norms achieve the threshold of authoritative application. Engaging with this issue, she argues that the unwritten constitutional principles that can invalidate positive law derive from three sources: customary usage, inferences from written constitutional principles, and the norms set out or implied in international legal instruments to which the state has adhered.[1002] McLachlin argues that from these sources 'there exists fundamental norms of justice so basic that they form part of the legal structure of

995 *Reference re Secession* (n 23) [51].
996 ibid.
997 ibid [49].
998 McLachlin (n 959) 149.
999 ibid 151.
1000 ibid 153.
1001 ibid 149.
1002 ibid 156.

governance and must be upheld by the courts, whether or not they find expression in constitutional texts'.[1003]

8.1 The Unwritten Constitutional Principles Case Law

In the past three decades the courts have increasingly recognised the existence and authority of unwritten constitutional principles. The SCC has recognised several unwritten constitutional principles, such as constitutionalism,[1004] democracy,[1005] doctrine of paramountcy,[1006] federalism,[1007] judicial independence,[1008] parliamentary privilege,[1009] protection of minorities,[1010] the rule of law,[1011] and the separation of powers.[1012] In identifying these unwritten constitutional principles, the SCC has relied on several sources of authority. These sources of authority include 'the general object and purpose of the Constitution',[1013] the historical legacies of constitutions in Canada and the UK,[1014] the preambles of the 1867 and 1982 constitutions,[1015] the common law,[1016] the other written provisions of the Constitution,[1017] the overall constitutional structure,[1018] and logic.[1019]

1003 ibid 148.

1004 *Reference re Secession* (n 23).

1005 ibid.

1006 *Renumeration of Judges* (n 26).

1007 *Reference re Secession* (n 23).

1008 *Renumeration of Judges* (n 26); *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 [*Mackin*]; *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General)*, 2005 SCC 44.

1009 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212.

1010 *Reference re Secession* (n 23).

1011 ibid; *Re: Resolution to Amend the Constitution* (n 190); *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*].

1012 *Babcock v Canada (Attorney General)*, 2002 SCC 57 [*Babcock*]; *Renumeration of Judges* (n 26).

1013 *Manitoba Language Reference* (n 735) 751.

1014 *New Brunswick Broadcasting Co* (n 976).

1015 *Manitoba Language Reference* (n 735) 751; *Renumeration of Judges* (n 26); *New Brunswick Broadcasting Co* (n 976).

1016 *New Brunswick Broadcasting Co* (n 976).

1017 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 [*BC Trial Lawyers*]; *Renumeration of Judges* (n 26).

1018 *Reference re Secession* (n 23); *Renumeration of Judges* (n 26).

1019 *New Brunswick Broadcasting Co* (n 976).

Within Canadian constitutional law, the existence of unwritten constitutional principles is uncontested, but their application remains controversial. Through a series of rulings, the SCC has recognised that unwritten constitutional principles can both aid the interpretation of the written Constitution and independently strike down legislation. In the *Manitoba Language Reference*., the SCC relied on the unwritten constitutional principle of the rule of law to justify delaying a declaration of invalidity that would have invalidated all existing Manitoba statutes for being unilingual.[1020] This suspended declaration of invalidity provided time for the Manitoba legislature to correct the situation because 'the constitutional guarantee of rule of law will not tolerate such chaos and anarchy'.[1021] In *Morguard Investments Ltd. v. De Savoye* the SCC held that the unwritten constitutional principle of federalism and the associated principle of 'full faith and credit' requires a province to recognise judicial judgments of other provinces.[1022] In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) (1993),* the SCC determined that the unwritten principle of parliamentary privilege immunises the provincial legislative body from invalidation under the *Charter*.[1023]

The SCC released two major reference decisions on unwritten constitutional principles in 1995 and 1997 respectively. First, in *Re Secession of Quebec* (1995), the SCC considered whether a province could secede from Canada. Based on a lack of guidance in the written constitutional text, the SCC relied on unwritten constitutional principles to fill in the gaps. The SCC identified four vital unwritten principles which form the basis of Canada's Constitution: federalism. democracy, constitutionalism and the rule of law, and respect for minority rights.[1024] The SCC held that these principles are equal in value and interlinked.[1025] The SCC

1020 Through the *Constitution Act, 1982*, the existing *Manitoba Act, 1870* was constitutionalized. The requirement of bilingual statutes gained constitutional status and thus all existing unilingual statutes were unconstitutional. *Manitoba Language Reference* (n 735).

1021 ibid 758.

1022 *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256.

1023 *New Brunswick Broadcasting Co* (n 976).

1024 *Reference re Secession* (n 23).

1025 ibid [49].

established that the unwritten principle of democracy recognises that Canadian democracy extends beyond majoritarian rule to encapsulate the principles of constitutionalism and the rule of law, and respect for minority rights.[1026] The SCC affirmed 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'.[1027] 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'.[1028]

Second, in *Re Renumeration of Judges,* the SCC relied on the unwritten constitutional principles to invalidate written statutory text.[1029] *Re Renumeration of Judges* dealt with provincial legislation from several jurisdictions that sought to reduce the salaries of judges.[1030] Although there is reference to judicial independence in the constitutional text,[1031] the SCC relied almost wholly on the unwritten constitutional principle of judicial independence to create processes to safeguard judicial salaries. The SCC held that 'the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the Constitution Act, 1867'.[1032] The SCC held any reduction of judicial salaries by the legislature breached the unwritten principle of judicial independence.[1033] The SCC relied on the preamble of the *Constitution Act, 1867* as a source of authority because it states that Canada will have 'a Constitution similar in Principle to that of

1026 ibid [67].

1027 ibid [74].

1028 ibid.

1029 *Renumeration of Judges* (n 26).

1030 It must be noted that this salary reduction was part of legislation that targeted numerous sectors with pay decreases.

1031 See sections 99 of the *Constitution Act 1867* and section 11(d) of the *Constitution Act, 1982.*

1032 *Renumeration of Judges* (n 26) [107].

1033 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 73–74.

the United Kingdom'.[1034] The SCC recognised this pre-amble as the 'grand entrance hall to the castle of the Constitution' and 'the true source of our commitment to this foundational principle is located'.[1035] In addition to the preamble of the *Constitution Act, 1867*, the SCC held that the sources of authority for the principle of judicial independence are the constitutional text, the historical legacies of Canada, and the structure of the country's parliamentary democracy.[1036]

Relying on the unwritten constitutional principle of democracy, the SCC held that provinces must establish a judicial compensation commission, a proportion of which must be judges, that produces regular reports on the compensation of the judiciary. Within this structure, a reduction in judicial salaries must be preceded by a report from the commission. In the instance that a legislature seeks to enact changes that deviate from the commission's recommendation they must provide 'legitimate' reasons that justify such a departure.[1037] This reference decision was later affirmed by the SCC in *Mackin v New Brunswick*.[1038]

The monumental decisions in *Re Secession of Quebec* and *Re Renumeration of Judges* were followed by more applications of the unwritten constitutional principles by the courts. In *Lalonde v Ontario* (2001), the ONCA found that a decision made by the Ontario Health Services Restructuring Commission to close the only francophone hospital in Ottawa was inconsistent with the unwritten principle of protections of minorities.[1039] In *Trial Lawyers Association of British Columbia v. British Columbia (BC Trial Lawyers)* (2014), the SCC considered a claim that court fees violated access to justice protections in section 96 of the *Constitution Act, 1867*, sections 7 and 28 of the *Charter* and the unwritten principle of the rule of law.[1040] Through an interpretation of section 96, the SCC found that court fees that 'deny

1034 *Constitution Act, 1867 Preamble.*

1035 *Renumeration of Judges* (n 26) [109].

1036 The analysis occurred in ibid [93]–[109].

1037 ibid [180]–[185].

1038 *Mackin* (n 975).

1039 *Lalonde v Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505, 208 DLR (4th) 577.

1040 *BC Trial Lawyers* (n 984).

people access to the courts' are unconstitutional.[1041] The SCC reasoned that this interpretation of section 96 was informed by the unwritten constitutional principle of the rule of law.[1042]

The courts have also often rejected the application of unwritten constitutional principles or relied on them to insulate government authority. In *Babcock v Canada*, the SCC denied a claim that sought to invoke the unwritten constitutional principles of the rule of law, separation of powers, and independence of the judiciary to challenge restrictions on the access of cabinet documents. In rejecting the claim, the SCC found that these 'unwritten principles must be balanced against the principle of Parliamentary sovereignty'.[1043] In *British Columbia v. Imperial Tobacco Canada Ltd.*, the SCC rejected a challenge to the provincial government's fines on tobacco companies with the aim of offsetting healthcare costs associated with tobacco use. The SCC denied the claim that the unwritten constitutional principles of judicial independence and the rule of law can invalidate the provincial fines. The SCC held that these claimed constitutional principles needed to be weighed against the other unwritten constitutional principles and that they 'resisted the invitation to interpret the rule of law more expansively [because] to do so would cast the legitimacy of judicial review into doubt'.[1044] In *Charkaoui v. Canada*, the SCC adopted a similar position on the application of the rule of law principle to the legislature and rejected the claim that it could invalidate sections of the *Immigration and Refugee Protection Act*.[1045] In *British Columbia v Christie*, the SCC rejected the claim that the unwritten principle of the rule of law requires recognizing a 'general

1041 ibid [38].

1042 ibid [81].

1043 The SCC in *Babcock* was examined the constitutionality of the government's failure to disclose Cabinet documents in a civil suit. In this decision the SCC affirmed the decision by the Federal Court of Appeal who determined that 'the rule of law cannot be taken to invalidate a statute which has the effect of allowing representatives of the Crown to identify certain documents as beyond disclosure: that is, the rule of law does not preclude a special law with a special result dealing with a special class of documents which, for long standing reasons based on constitutional principles such as responsible government, have been treated differently from private documents in a commercial law suit". See *Babcock* (n 979) [55]–[56].

1044 *Imperial Tobacco* (n 978) [64].

1045 *Charkaoui* (n 978) [135]–[137].

constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations'.[1046]

The SCC has also stressed that the application of unwritten constitutional principles must be done with caution. In *Reference re Secession of Quebec*, unwritten principles 'could not be taken as an invitation to dispense with the written text of the Constitution'.[1047] Further, in *Re Renumeration of Judges*, the SCC recognised that the constitutional history of Canada has evolved to '[culminate] in the supremacy of a definitive written constitution'.[1048] The SCC noted that the preference for written constitutions is in part motivated by 'the promotion of legal certainty and through it the legitimacy of constitutional judicial review'.[1049] The SCC reasoned that given the concerns of certainty and judicial review legitimacy, when the courts apply unwritten constitutional principles, 'it is of the utmost importance to articulate what the source of those unwritten norms is'.[1050] As a result of this caution, lower courts have largely avoided the application of unwritten constitutional principles, deferring such a ruling to the SCC.[1051]

More recently, the SCC in *City of Toronto* has introduced uncertainty on the application of unwritten constitutional principles. In a split 5-4 decision, the Justices diverged on whether unwritten constitutional principles can be applied independently or if they can only be relied on as tools to aid in the interpretation of written text. The majority of the SCC, in an opinion written by Chief Justice Wagner and Justice Brown, departed from the existing case law and narrowed the applicability of unwritten constitutional principles.[1052] The majority opinion held

1046 *British Columbia (Attorney General) v Christie*, 2007 SCC 21 [*Christie*] [23].

1047 *Reference re Secession* (n 23) [53].

1048 *Renumeration of Judges* (n 26) [93].

1049 ibid.

1050 ibid.

1051 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 92.

1052 The leading case law authorities on unwritten constitutional principles include, but are not limited to: *Reference re Secession* (n 23); *Manitoba Language Reference* (n 735); *Renumeration of Judges* (n 26).

that unwritten constitutional principles can only supplement the written text of the Constitution, rather than be used to 'serve as bases for invalidating legislation'.[1053] The majority held that unwritten constitutional principles are 'not provisions of the Constitution' and thus cannot invalidate legislation under section 52(1) of the *Constitution Act, 1982*.[1054] Instead, the legal force of unwritten constitutional principles is to aid in determining how the written constitutional terms 'are to be given effect'.[1055] The majority opinion justified their reasoning in part on the design of the notwithstanding clause. They reasoned that an interpretation of the Constitution that would permit the use of unwritten constitutional principles to invalidate legislation would be a 'judicial error of particular significance' to sections 33 and 1 of the *Charter*.[1056] They held that role of section 33 in Canada's constitutional democracy could be undermined by recognising the independent authority of the unwritten constitutional principle of democracy to invalidate legislation.[1057]

The other four Justices in dissent forcefully rejected the majority's interpretation of the application of unwritten constitutional principles. The minority opinion relied on the extensive unwritten constitutional principles case law to reason that it was an inescapable conclusion that in rare cases, 'unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure"'.[1058] The dissenting Justices were critical of the majority's 'imprudent' decision to 'foreclose the possibility of unwritten constitutional principles being used to invalidate legislation in all circumstances' and held that there was no need to address the intersection between section 33

1053 *Toronto (City) v. Ontario (Attorney General) SCC* (n 535) [63].
1054ibid [54].
1055 ibid.
1056 ibid [60].
1057 ibid.
1058 ibid [170].

and unwritten constitutional principles because it was not raised in the case.[1059] The SCC's split decision on the application of unwritten constitutional principles and their relationships with the notwithstanding clause demonstrate the existing uncertainty in the case on their application. There is an active debate on the role of unwritten constitutional principles and with the rise in notwithstanding clause invocations for divisive social and democratic issues I anticipate that the SCC will revisit this debate in the coming years, as more notwithstanding clause litigation is commenced.

In sum, the SCC has affirmed that unwritten constitutional principles form a part of Canada's Constitution. The SCC has, on numerous occasions, turned to the unwritten principles to fill in 'gaps in the express terms of the constitutional text',[1060] including broadening or narrowing the interpretation of existing written constitutional provisions. In rare instances, the SCC has also invalidated statutory legislation based on unwritten constitutional principles.[1061]

8.2 Academic Responses to Unwritten Constitutional Principles

The expansion of the application of unwritten constitutional principles in the past three decades has not gone without critique, with scholars questioning the democratic legitimacy of unwritten constitutional principles. Democratic legitimacy critics argue that the judiciary's authority flows from the written text of the Constitution entrenched through democratic processes.[1062] Any interpretation that relies on unwritten constitutional principles goes beyond the authority

1059 ibid [170] and [182].

1060 *Renumeration of Judges* (n 26) [104].

1061 ibid.

1062 For early critiques of natural law see Jeremy Bentham, 'The Works of Jeremy Bentham' in John Bowring (ed), *Anarchical Fallacies: A Critical Examination of the Declaration of Rights* (WTait 1859); Herbert Lionel A Hart, *Are there any natural rights?* (Oxford University Press 1983). More recent democratic critics of unwritten principles are Jean Leclair, 'Canada's Unfathomable Unwritten Constitutional Principles"(2002)' 27 Queen's LJ 389; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: An Essay* (Princeton University Press 1997). Finally, although it is not his argument Mark Walters summarizes the democratic critique of unwritten constitutional principles in Mark D Walters, 'Written Constitutions and Unwritten Constitutionalism', *Expounding the Constitution: Essays in Constitutional Theory* (2008) 247–248.

granted to the courts by the democratic constitutional amendment process. Generally, it is considered more acceptable for the courts to apply unwritten constitutional principles to legal issues where the written text has a gap or is ambiguous. Those who criticise the application of unwritten constitutional principles from the perspective of democratic legitimacy are more concerned with the invalidation of written text through unwritten constitutional principles.[1063]

There are several Canadian legal scholars who express this democratic critique of unwritten constitutional principles.[1064] For example, Hogg writes that when an unwritten constitutional principle is enforceable in the same way as written provisions, 'it is hard to avoid the conclusion that the Constitution has been amended by a judicial fiat in defiance of the procedure laid down by the Constitution for it amendment'.[1065] Choudhry and Howse argue that the application of unwritten principles in cases such as *Re Secession of Quebec* is inconsistent with the existing positivist approach to Canadian constitutional law.[1066] Elliot is critical of the SCC deriving unwritten constitutional principle authority from preambles because preambles were traditionally considered interpretive aids, rather than sources of authority.[1067]

There are also scholars concerned with the process through which unwritten constitutional principles are identified and applied. Leclair argues that unwritten constitutional principles are only democratically legitimate if they are applied in a restricted and predictable fashion.[1068] His primary critique of the SCC's application of unwritten principles is that they failed to establish 'coherence' or 'certainty' within Canadian constitutional law.[1069] Leclair is

1063 Michael Pal, 'The Unwritten Principle of Democracy' (2019) 65 McGill LJ 269, 281.

1064 See note 73.

1065 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 91.

1066 Sujit Choudhry and Robert Howse, 'Constitutional Theory and the Quebec Secession Reference.(Canada)(Topic: Secession)' (2000) 13 Can J L & Juris 143, 151–154.

1067 Robin Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution.(Symposium on the 125th Anniversary of the Supreme Court of Canada: Legacy and Challenges)' (2001) 80 Can Bar Rev 67, 85–86.

1068 Leclair (n 1029).

1069 ibid 400–401.

concerned with issues of interrelatedness between multiple vaguely defined unwritten constitutional principles. He asserts that 'some of these principles are so abstract that by themselves, they provide no clear answer. Democracy and federalism, for instance, can be understood in many ways'.[1070] Similarly, Schneiderman argues that the courts invoke unwritten constitutional principles 'strategically' and through 'legally disingenuous' methods.[1071] His primary critique focuses on the SCC's use of unwritten constitutional principles to resolve constitutional crises while simultaneously avoiding creating a set of norms that can provide predictable unwritten principle guidance for future cases.[1072]

However, these critiques of unwritten constitutional principle application are not universal. MacDonnell argues that a review of the case law reveals that the Canadian application of unwritten constitutional principles is largely a 'marginal phenomenon'.[1073] Following an analysis of the case law, she concludes that unwritten constitutional principles are mainly used as a 'shield rather than a sword' because they are predominantly applied as an interpretive aid for existing written constitutional text.[1074] Dyzenhaus defends the democratic legitimacy of the application of the unwritten principles by drawing on the rule of law. Dyzenhaus seeks to respond to criticisms of unwritten constitutional interpretation by US Supreme Court Justice Antony Scalia. In his response, Dyzenhaus focuses exclusively on the unwritten principle of the rule of law.[1075] He argues that judges must uphold the rule of law in their interpretation of written constitutional and statutory text.[1076] This rule of law obligation stems from the broader structure of Canada's legal order that inherently requires all members

1070 ibid 410.

1071 David Schneiderman, 'Unwritten Constitutional Principles in Canada: Genuine or Strategic?' in Rosalind Dixon and Adrienne Stone (eds), *The invisible constitution in comparative perspective* (University Press 2018) 519.

1072 ibid 189.

1073 MacDonnell (n 958) 192.

1074 ibid 192–193.

1075 David Dyzenhaus, 'The Unwritten Constitution and the Rule of Law' (2004) 23 Supreme Court Law Review (2nd) 383, 384–391.

1076 ibid 383.

of society, including judges, to abide by a set of values under the rule of law and other unwritten constitutional principles. Dyzenhaus concludes by arguing that any objections to the legitimacy of unwritten constitutional interpretation are objecting to the rule of law and the role of the judiciary in enforcing an adherence to it.[1077]

McLachlin also addresses the democratic critique of unwritten constitutional principles, which she cautions 'should not be lightly dismissed'.[1078] McLachlin responds to democratic critiques by arguing that the judiciary has the authority to interpret and apply the Constitution, which includes written and unwritten principles. She states:

> When […] the written text is unclear or incomplete, recourse must be had to unwritten sources. The task of the judge, confronted with conflict between a constitutional principle of the highest order […] and an ordinary law or executive act […] is to interpret and apply the law as a whole – including relevant unwritten constitutional principles.[1079]

She also advises that judges who will be 'discharging this duty' must first try to interpret the challenged law in a way that reconciles it with unwritten constitutional principles. She does, however, recognise the caveat that in a limited number of cases the legislation may be irreconcilable with unwritten constitutional principles. McLachlin argues that in this instance judges must not shy away from enforcing fundamental norms because 'to do otherwise is to allow injustice to hide itself under the cloak of false legality'.[1080]

Finally, in response to critics who assert that the application of unwritten principles has been done in an incoherent and unpredictable manner, Johnson argues that the SCC has developed a clear unwritten constitutional principles interpretive method.[1081] Through an evaluation of twenty years of unwritten principles case law, Johnson identifies a distinct

1077 ibid 384.

1078 McLachlin (n 959) 159.

1079 ibid 160.

1080 ibid 161.

1081 Alyn James Johnson, 'The Judges Reference and the Secession Reference at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project' (2018) 56 Alta L Rev 1077.

methodology for their application. The interpretive method, which he labels 'reasoning from constitutional essentials', is defined as 'distilling the concrete legal rules that ae required by the abstract principles in order to make the system work in a coherent fashion'.[1082] He argues that employing this technique of unwritten principles interpretation is legitimate when the courts face a significant threat to the structure of the Constitution and when there is no clear guidance in the written text.[1083] When such a situation arises, the courts may adopt a 'pragmatic' approach and apply unwritten constitutional principles, derived 'through judicial reflection on the necessary interrelationships of the various components of constitutional architecture'.[1084]

In sum, the academic responses to unwritten constitutional principles have been varied. Whereas most legal scholars recognise the existence of unwritten constitutional principles, there is a divergence in the literature on their identification and application. Scholars have responded to democratic critiques of the unwritten constitutional principles by drawing on the rule of law and arguing that the SCC primarily relies on unwritten constitutional principles to inform the interpretation of written constitutional text.

8.3 The Notwithstanding Clause and Unwritten Constitutional Principles

I argue that unwritten constitutional principles fall outside the scope of section 33 and in rare circumstances can limit the application of the notwithstanding clause. To support my argument, I explore the case study of the application of the unwritten constitutional principle of democracy to the notwithstanding clause. I chose to explore the case study of the unwritten constitutional principle of democracy because of the structural design of section 33 that elevates democratic processes as an accountability mechanism. Other unwritten principles, such as respect for minority rights, may also impose limits on the scope of the application of

1082 ibid 1089.

1083 ibid 1114–1115.

1084 ibid 1114.

section 33, but whether they do is beyond the scope of this thesis. I have narrowed my argument to the relationship between the notwithstanding clause and the unwritten constitutional principle of democracy because it is a strong argument for my analysis based on the structural design of section 33 and the existing pre-*Charter* case law on freedom of expression. It may be possible for there to be additional arguments made on the applicability of the other unwritten constitutional principles to the notwithstanding clause; however, this will require further analysis that is outside the scope of this thesis.

As it relates to my substantive argument on constitutional interpretation limiting the scope of section 33, I argue that the unwritten principle of democracy encompasses implicit freedom of expression protections that cannot be temporarily suspended by the notwithstanding clause. The notwithstanding clause can still temporarily set aside the freedom of expression protections in section 2(b) of the *Charter*, so long as it does not impede on the freedom of expression protections safeguarded within the unwritten principle of democracy.

My argument is presented in four parts. First, the SCC in *Ford* has already applied external principles to limit the application of the notwithstanding cause. Second, the SCC recognition of an implied bill of rights in the *Constitution Act, 1867* supports my argument that freedom of expression and democracy are inextricably linked. Third, a purposive interpretation of section 33 supports the finding that the notwithstanding clause cannot be applied to limit freedom of expression in the context of democratic elections. Finally, I will conclude by applying my proposed interpretation of the unwritten constitutional principle of democracy to Ontario's 2021 invocation of the notwithstanding clause in the *Protecting Elections and Defending Democracy Act*.

8.3.1 Existing Limits on the Notwithstanding Clause Through External Principles

The SCC has already relied on principles outside the text of section 33 to limit the scope of the notwithstanding clause. In *Ford*, the SCC found that the English and French text of section 33 was open-textured.[1085] To fill this interpretive gap, the SCC relied on academic literature[1086] and case law[1087] to determine that the legal principle against retroactivity is voided only if it is expressly overridden by the text of the law in question.[1088] Applying this principle to section 33 of the *Charter*, the SCC adopted the narrower interpretation finding that the notwithstanding clause cannot be applied retroactively.[1089]

Through *Ford*, the SCC established that the courts could apply principles outside the written constitutional text to limits section 33's application. I argue that if courts have looked to principles outside the written constitutional text to limit the scope of the notwithstanding cause, other principles can also be applied to restrict the application of the notwithstanding clause, including unwritten constitutional principles. I argue that the unwritten constitutional principle of democracy represents another principle outside the text of section 33 that should constrain its application to freedom of expression rights.

8.3.2 The Existing Pre-Charter Case Law and the Application of the Duff Doctrine

The recognition of unwritten constitutional principles has a long and evolving history in Canada. Prior to the adoption of the *Charter*, a minority of SCC judges recognised the existence of an implied bill of rights in the unwritten constitutional principles of the *Constitution Act, 1867*. This pre-*Charter* recognition of unwritten constitutional principles is known as the Duff Doctrine. The Duff Doctrine is relevant to my argument because the SCC has already recognised freedom of expression protections that flow from the unwritten constitutional principle of democracy.

1085 *Ford* (n 18) [35].
1086 Côté (n 714) 96.
1087 *Re Athlumney* (n 715); *Gustavson Drilling* (n 716).
1088 *Ford* (n 18) [36].
1089 ibid.

In the century before the passing of the *Charter* the judiciary had limited authority to strike down discriminatory legislation because the Constitution Act, 1867 had no individual rights protections.[1090] The role of the SCC was limited mostly to striking down legislation that violated the division of powers requirements in sections 91 and 92 of the *Constitution Act, 1867*.[1091]

Despite this limited constitutional authority, claimants increasingly turned to the courts to seek judicial review of overtly discriminatory government legislation. In response to the growing number of discrimination claims, provincial and federal courts did not shift their interpretive approach to recognise individual rights protections in the *Constitution Act 1867*. This narrow interpretive approach resulted in the SCC upholding the disenfranchisement of Canadians of Asian origin in British Columbia,[1092] racial segregation of restaurants,[1093] taverns,[1094] and theatres[1095] in Quebec, and forbidding the employment of white women by individuals of Chinese origin in Saskatchewan.[1096] The few instances where the judiciary struck down discriminatory legislation occurred through a reliance on the division of powers[1097] or in rulings from the UK Privy Council.[1098]

In the early 1930's, a subset of SCC developed a new interpretive approach to the *Constitution Act, 1867*. This alternative approach to constitutional interpretation recognised an implied bill of rights within the unwritten constitutional principles underlying the *Constitution*

1090 Greene (n 55) 31–32.

1091 ibid 31.

1092 *Cunningham v Homma*, [1903] 9 AC 151 (JCPC).

1093 See Constance Backhouse, 'Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946' (1994) 17 Dal LJ 299, footnote 119; *Franklin v Evans,* [1924] 55 OLR 349, 26 OWN 65.

1094 *Christie v York Corporation [1940] SCR 139, 1 DLR 81*.

1095 See Backhouse (n 1060) 338; *Loew's Theatres v Reynolds,* [1921] QR 30 BR 459.

1096 See Lindsay Ferguson, 'Constructing and Containing the Chinese Male: Quong Wing v. The King and the Saskatchewan Act to Prevent the Employment of Female Labour' (2002) 65 Sask L Rev 549; *Quong-Wing v Regina,* [1914] 49 SCR 440, 18 DLR 121.

1097 *Union Colliery* (n 57).

1098 The Judicial Committee of the Privy Council in London served as Canada's highest appeal court until 1949. Following 1949 the Supreme Court of Canada became Canada's final court of appeal through the passing of the *Supreme Court Act.* See *Supreme Court Act; Edwards* (n 653).

Act, 1867. This implied bill of rights is known as the Duff Doctrine, named after SCC Chief Justice Lyman Duff who first introduced it in *Reference Re Alberta Statutes*.[1099] *Reference Re Alberta Statutes* concerned a legislative package proposed in Alberta to institute a social credit program in response to the 1930's economic Depression. The package of legislation included the controversial *Alberta Press Bill.*[1100] The *Alberta Press Bill* proposed creating a five-person board of legislators with the unfettered control of the press in Alberta. The board of legislators retained the ability to prohibit the publication of a newspaper, to require newspapers to publish corrections to perceived inaccurate articles and to block the publication by certain authors.[1101] Recognising its controversial nature, Alberta referred the legislative package to the SCC for constitutional review.[1102]

In 1938, the SCC unanimously held that the *Alberta Press Bill* was unconstitutional. The majority held that the legislative package was *ultra vires* provincial powers because banking falls under the jurisdiction of the federal government.[1103] In a concurring decision, three SCC judges identified additional reasons to strike the legislative package for being unconstitutional. Through the Duff Doctrine, the SCC concurring minority recognised a constitutional implied bill of rights that provides the courts with authority to strike down legislation that is contrary to the identified unwritten constitutional principles.[1104] In *Reference Re Alberta Statutes,* the SCC minority identified freedom of expression as an underlying

1099 *Reference Re Alberta Statutes* (n 59).

1100 *Bill 9, An Act to Ensure the Publication of Accurate News and Information*, 3rd Sess, 8th Leg, Alberta, 1937 (referred to as the *Alberta Press Bill*).

1101 Greene (n 55) 35.

1102 Under Canadian law the federal and provincial governments can submit to the Supreme Court of Canada a question or set of questions requesting an advisory opinion. These reference cases often request the court to provide guidance on the constitutionality of legislation around major legal issues. The authority for reference questions comes from when the federal Cabinet created the Supreme Court of Canada in 1875. During this process, they gave the federal Cabinet the authority to refer questions to the Supreme Court of Canada for opinions. The authority for reference questions was further codified in the *Supreme Court Act* (1949). See *Supreme Court Act;* Greene (n 55) 35.

1103 *Reference Re Alberta Statutes* (n 59) 100.

1104 Greene (n 55) 36–37.

unwritten constitutional principle that could be enforced by the courts to strike legislation that infringes this implied right.

Chief Justice Duff supported the finding of an implied right to freedom of expression through two arguments. First, the preamble of the *Constitution Act, 1867* provides authority for an implied right to freedom of expression. The preamble of the *Constitution Act, 1867* states that the four founding provinces '[d]esire to be federally united […] with a Constitution similar in Principle to that of the United Kingdom'.[1105] Chief Justice Duff argued that the British system, which Canada adopted, has unwritten constitutional principles that include freedom of the press and democracy. He argued that 'the province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern'.[1106]

Second, the written democratic constitutional provisions support the finding of an implied right to freedom of expression. Chief Justice Duff identified provisions of the *Constitution Act, 1867* that require members of the House of Commons to be both elected and representative of their constituencies. He argued that these democratic provisions of the *Constitution Act, 1867* can only be meaningful if freedom of expression is protected. He supported this argument by finding that the 1867 Constitution 'contemplates a parliament working under the influence of public opinion and public discussion'.[1107] Democratic institutions 'derive their efficacy from the free public discussion of affairs' which can be achieved through 'the freest and fullest analysis and examination from every point of view of political proposals'.[1108] He determines that freedom of expression 'is the breath of life for

1105 *Constitution Act, 1867*, preamble.

1106 *Reference Re Alberta Statutes* (n 59) 146.

1107 ibid 133.

1108 ibid.

parliamentary institutions'.[1109] Relying exclusively on the unwritten principle of freedom of expression, the Chief Justice Duff held that the *Alberta Press Bill* could be invalidated for an infringement of the implied bill of rights. Although it was only a concurring minority opinion subsequent recognition of the Duff Doctrine was an evolving process that stretched into the post-*Charter* era.[1110]

Prior to the adoption of the *Charter*, the Duff Doctrine was never recognised by an SCC majority. In *Saumur v. City of Quebec* (1953), the SCC in a 5-4 plurality decision struck down a city bylaw prohibiting the distribution of literature by Jehovah's Witness members.[1111] The majority, however, were split in their reasoning. One judge found that the bylaw violated provincial legislation that guaranteed religious freedom, and two judges found that it was *ultra vires*. The final two majority judges struck down the legislation based on the Duff Doctrine, finding that the bylaw violated freedom of religion and expression unwritten constitutional principles derived from Canada's implied bill of rights.[1112] In *Switzman v. Elbling* (1957), the SCC struck down Quebec's 'padlock law', which permitted law enforcement to lock up buildings they believed supported the distribution of communist materials.[1113] The SCC majority struck down the padlock law for being *ultra vires*. In a concurring opinion, three judges found that the legislation also violated the Duff Doctrine.[1114] In *Oil, Chemical and Atomic Workers, International Union, Local 16-601 v. Imperial Oil Limited* (1963) the SCC considered a case of democratic interference by the ruling provincial party.[1115] The ruling Social Credit party banned donations to political parties from labour unions after determining that the opposition New Democratic Party received most of their donations from unions. This

1109 ibid.

1110 Greene (n 55) 36.

1111 *Saumur v City of Quebec*, [1953] 2 SCR 299, [1953] 4 DLR 641.

1112 ibid.

1113 *Switzman v Elbling and AG of Quebec*, [1957] SCR 285, 7 DLR (2d) 337.

1114 ibid.

1115 *Oil, Chemical and Atomic Workers, International Union, Local 16-601 v Imperial Oil Limited*, [1963] SCR 584, 41 DLR (2d) 1.

legislation had the effect of directly undermining the opposition party in the lead up to a provincial election. In a 4-3 decision, the SCC upheld the legislation. The three dissenting judges drew on the Duff Doctrine to deem the legislation unconstitutional because the limits on freedom of expression barred unions from participating in the political process.[1116] In *Dupond v City of Montreal* (1978) the SCC considered a city bylaw that banned all public protests for a month. The claimant relied on the Duff Doctrine to argue that the protest ban violated the unwritten constitutional principle of freedom of expression.[1117] This claim was rejected by the SCC in a 6-3 decision. In the majority decision, Justice Jean Beetz directly rejected the Duff Doctrine by stating: 'none of the freedoms referred to is so enshrined in the constitution as to be above the reach of competent legislation'.[1118]

This series of pre-*Charter* cases was seen as setting a clear precedent against applying the Duff Doctrine to invalidate statutory legislation. In evaluating *Dupond*, Russell states that the ruling was 'virtually the final nail in the coffin [for claims to] constitutional limits on provincial laws affecting fundamental rights and freedoms'.[1119] Shortly after this decision, the *Charter* was entrenched and individual rights protections were added to the Constitution. The courts also gained robust enforcement mechanisms to safeguard these individual rights.[1120] The passing of the *Charter* resulted in claimants no longer needing to make claims to an implied bill of rights within the *Constitution Act, 1867* because they could now rely on a codified set of rights in the *Constitution Act, 1982*.

The SCC, however, produced one additional ruling on the Duff Doctrine after the *Charter* was passed. In *OPSEU v Attorney-General for Ontario* (1987), the SCC considered a challenge to the *Ontario Public Service Act* that prohibited public servants from engaging in

1116 ibid.

1117 *Attorney General of Canada and Dupond v Montreal*, [1978] 2 SCR 662, 84 DLR (3d) 420.

1118 ibid [34].

1119 Peter H Russell, *Leading Constitutional Decisions*, vol 140 (McGill-Queen's Press 1987) 379.

1120 *Canadian Charter of Rights and Freedoms* s 24(1); *Constitution Act, 1982* s 52(1).

political activities.[1121] In their decision, the SCC majority endorsed the Duff Doctrine for the first time in Canadian history. In *obiter*, Justice Beetz, the same judge who had dismissed the Duff Doctrine in *Dupond*, held that 'there is no doubt […] that the basic structure of our Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels'.[1122] He cited the minority judgements in *Reference Re Alberta Statutes* and *Switzman* to 'hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure'.[1123] In *OPSEU,* the SCC majority recognised that the preamble of the *Constitution Act, 1867* gives authority to the courts to prohibit legislatures from interfering with elections and free public discussion.

The ruling by the SCC in *OPSEU* is notable because the notwithstanding clause cannot be applied beyond the listed sections of the *Charter* in section 33(1). The notwithstanding clause can only be applied to limit freedom of expression rights that fall under section 2 of the *Charter* and would not apply to freedom of expression protections that flow from other parts of the Constitution, such as the unwritten constitutional principles that derive their authority from the preamble of the *Constitution Act, 1867*. Further, the drafters of the *Charter* were explicit in both the guidance on the notwithstanding clause and in the *Hansard* that the notwithstanding clause would not extinguish any existing rights that pre-dated the *Charter*. In presenting the final draft of the *Charter* to the House of Commons, Justice Minister Jean Chrétien clarified that the notwithstanding clause and the *Charter* do not preclude existing

1121 *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2, 41 DLR (4th) 1.

1122 ibid [151].

1123 ibid.

rights from being enforced.[1124] Thus, the freedom of expression rights linked to the unwritten constitutional principle of democracy, affirmed by the SCC in *OPSEU*, were not extinguished by the entrenchment of the *Charter*.

I argue that the SCC recognition of the implied right of freedom of expression supports my argument that freedom of expression in democratic elections cannot be suspended by the notwithstanding clause. The SCC has recognised that there is an unwritten constitutional principle of freedom of expression linked to the written democratic process provisions in the *Constitution Act, 1867*. The adoption of the *Charter* further strengthens this argument because additional democratic rights were added to the written constitutional text under sections 1, 3, 4, and 5 of the *Charter*. The SCC has recognised that there are democratic freedom of expression rights that derive authority from the unwritten constitutional principles that support the written democratic provisions of the Constitution. Although the notwithstanding clause can set aside freedom of expression under section 2(b) of the *Charter*, the democratic freedom of expression rights that were first recognised through the Duff Doctrine and affirmed by an SCC majority in *OPSEU* should not be set aside by the notwithstanding clause.

8.3.3 Purposive Interpretation of the Notwithstanding Clause and Democratic Accountability

A purposive interpretation of the notwithstanding clause also supports my argument that the unwritten constitutional principle of democracy can limit section 33's application to freedom of expression essential to the democratic system. In chapter 7, I conducted a purposive interpretation of the notwithstanding clause. I determined that the purpose of the notwithstanding clause is its role as a political compromise centred on safeguarding parliamentary supremacy within the parameters of democratic accountability. This section 33

1124 Jean Chrétien stated 'The compromise reached by the Prime Minister with the nine Premiers maintains the principle of a full, complete and effective constitutional Charter of Rights and Freedoms. It does not exclude rights which have been have previously been guaranteed'. See Debates 20 November 1981 (n 10), 13042–13043.

purpose was determined through an examination of the structural design and legislative history of the notwithstanding clause. These two interpretive aids can guide the purposive interpretation of the notwithstanding clause in the context of unwritten constitutional principles. I rely on these interpretive aids to argue that a purposive interpretation of section 33 supports my argument that the unwritten constitutional principle of democracy bars the use of section 33 to undermine democratic processes. The added unwritten constitutional principle protections for democratic processes should extend to freedom of expression essential to the democratic system. This analysis of the intent of the *Charter* drafters builds upon the existing Duff Doctrine case law that recognises the link between freedom of expression and the unwritten constitutional principle of democracy.

My purposive analysis is supported by an examination of the dual interpretive aids of the structural design and legislative history of the notwithstanding clause. First, the structural design of the notwithstanding clause supports a finding that the notwithstanding clause's purpose of safeguarding parliamentary supremacy is limited by democratic processes, including the unwritten principle of democracy. I previously identified two democratic accountability mechanisms embedded within the structural design of section 33. The first notwithstanding clause democratic accountability mechanism is the legislative process. Section 33(1) of the notwithstanding clause requires legislatures to invoke the notwithstanding clause to 'expressly declare in an Act of Parliament or of the legislature […] that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*'.[1125] The legislative process requirement of an express invocation of the notwithstanding clause in a bill passed by the legislative branch adds an element of transparency to the notwithstanding clause invocation by notifying other legislators and the public of the intended notwithstanding cause use. Section 33(1) also requires that an invocation

1125 *Canadian Charter of Rights and Freedoms* s 33(1).

of the notwithstanding clause is passed by a simple majority in the legislature, and thus cannot be invoked by the executive.

The second notwithstanding clause accountability mechanism is the electoral process. This democratic accountability mechanism is supported by the exclusion of democratic rights from section 33(1). Section 33(1) only permits the application of the notwithstanding clause to sections 2 and 7 to 15 of the *Charter*.[1126] Section 33 is explicit in its exclusion of democratic rights enumerated in sections 3, 4, and 5 of the *Charter*. These sections guarantee the right of every Canadian citizen to vote in elections and requires federal and provincial legislative bodies to hold elections every five years. The exclusion of democratic rights from the applicability of the notwithstanding clause makes free and fair elections a key protection for constituents from the notwithstanding clause. Through elections, voting citizens can exercise democratic accountability for a government's use of the notwithstanding clause. Central to the design of the notwithstanding clause is the potential risk of political consequences with a notwithstanding clause. This design of political risk assumes that an unjustified invocation of the notwithstanding clause will be viewed unfavourably by the electorate who values individual rights, and the invoking party will be removed at the next election.

The second democratic accountability mechanism of the electoral process is also supported by the inclusion of a five-year sunset clause in section 33(3) of the *Charter*. Any notwithstanding clause invocation will automatically expire within five years of coming into force.[1127] By requiring review and renewal on five-year intervals, democratic elections act as a check on section 33 by ensuring that the notwithstanding clause is reviewed every election cycle, making it subject to removal or expiration through the election of different political leaders.[1128] As recently argued by Leckey and Mendelsohn, the notwithstanding clause does

1126 ibid ss 7–14.

1127 ibid s 33(3).

1128 Hogg, *Constitutional Law of Canada* (n 7) 881.

not give the legislature the 'last word'[1129] but instead 'assigns to the electorate an important role in assessing the legitimacy and justifiability of a protected law's impact on rights'.[1130] Through an analysis of the sunset clause in section 33(3) of the *Charter* the authors determine that the notwithstanding clause 'reserves a role for the voting public' that is linked to notions of 'democratic responsibility'.[1131] The five-year sunset clause cyclically increases the visibility of any active notwithstanding clause invocation. The required renewal of the notwithstanding clause would cause a resurrection and reconsideration of its necessity. The inclusion of a five-year expiration period intrinsically ties the use of the notwithstanding clause to elections, so that its renewal must be considered during elections and by each successive government during their mandate. The combined effect of excluding democratic rights and including a five-year sunset clause elevates the electoral process to a democratic accountability mechanism on the notwithstanding clause.

Ultimately, these two democratic accountability mechanisms through the legislative process and electoral process support my argument that the unwritten constitutional principle of democracy can safeguard freedom of expression essential to the democratic system. The dual democratic accountability mechanisms demonstrate a clear structural design to constrain the notwithstanding clause through democratic processes. The combined effect of the democratic accountability mechanisms seeks to give the final say on section 33 to the electorate.

Second, the legislative history of the notwithstanding clause reveals that the embedding of democratic safeguards within the notwithstanding clause was an intentional design of the

1129 Robert Leckey and Eric Mendelsohn, 'The notwithstanding Clause: Legislatures, Courts, and the Electorate' (2022) 72 UTLJ 189, 196.

1130 ibid 190.

1131 ibid 199.

drafters. When introducing the notwithstanding clause to the House of Commons, Chrétien discussed two intended effects of the sunset cause:

> First that it will be politically very difficult for a government to introduce without very good reason a measure which applied notwithstanding the Charter of Rights and Freedoms in the Constitution. Second, a sunset provision of five years provides a degree of control on the use of an override clause in allowing public debate on the desirability of continuing the deliberations further.[1132]

Chrétien confirmed that the design of the notwithstanding clause sought to create a risk of political consequences with perceived improper use of the notwithstanding clause. This design of political risk presupposes that the electorate will vote to remove any government that uses the notwithstanding clause in a way that is perceived to be inappropriate. Thus, for each potential invocation, the government must consider the political risk it may incur. The drafters of the notwithstanding clause confirmed that this purposeful design seeks to limit the use of the notwithstanding clause through democratic accountability.

The interpretive aids of structural design and the legislative history of the notwithstanding clause support the interpretation that the purpose of the notwithstanding clause includes its role as a parliamentary supremacy tool tempered by the constraints imposed through democratic processes. An interpretation of the notwithstanding clause that would allow a suspension of freedom of expression in an election context is antithetical to this identified purpose. A purposive approach to the notwithstanding clause would recognise that the unwritten principle of democracy bars a legislature from attenuating the democratic accountability mechanisms by limiting freedom of expression essential to the democratic system.

8.3.4 Applying the Proposed Interpretive Approach and the Ontario Protecting Elections and Defending Democracy Act

I argue that the unwritten principle of democracy safeguards freedom of expression essential to the democratic system from the notwithstanding clause. Thus far I have supported this

1132 Debates 20 November 1981 (n 10) 13042–13043.

interpretive approach with three arguments. First, the SCC in *Ford* has already applied an external principle to limit the applicability of the notwithstanding clause. Second, the Duff Doctrine endorsed by an SCC majority in *OPSEU* recognised freedom of expression as an implied right within the unwritten principle of democracy. Third, a purposive interpretation that analyses the structural design and legislative history of the notwithstanding clause supports my argument that freedom of expression essential to the democratic system should be safeguarded by the unwritten constitutional principle of democracy.

In this final section, I present my proposed application of the unwritten principle of democracy to the notwithstanding clause. I first identify the scope of freedom of expression essential to the democratic system protected by unwritten constitutional principles. I then address the application of unwritten constitutional principles after the SCC's decision in *City of Toronto*. Finally, I apply my proposed theory to Ontario's invocation of the notwithstanding clause in *Protecting Elections and Defending Democracy Act*.

First, there is an inextricable link between the unwritten constitutional principle of democracy and freedom of expression. Within Canada's Constitution, democracy is protected through both written and unwritten constitutional principles. In addition to the existing democratic provisions in the *Constitution Act, 1867,* the *Charter* entrenches democratic rights in sections 3 to 5 and affirms Canada's status as a 'free and democratic society in section 1. In *Re Secession of Quebec*, the SCC identified four underlying constitutional principles of federalism, democracy, constitutionalism and the rule of law, and respect for minority rights that 'infuse[s] our constitution and breathe[s] life into it'.[1133] Citing *OPSEU* and the other Duff Doctrine dissents, the SCC held that the unwritten principle of democracy 'has always informed the design of our constitutional structure, and continues to act as an essential

1133 *Reference re Secession* (n 23) [50].

interpretive consideration to this day'.[1134] The SCC also explicitly recognised that the principle of democracy will permit less deference under a section 1 analysis because of the exclusion of democratic rights from section 33 application.[1135]

The SCC has recognised the role that freedom of expression plays in the unwritten constitutional principle of democracy. In *Reference Re Secession of Quebec* the SCC acknowledged that 'a functioning democracy requires a continuous process of discussion'.[1136] The SCC held that 'no one has a monopoly on truth' and 'a democratic system of government is committed to considering those dissenting voices'.[1137] This expanded interpretation of the unwritten constitutional principle of democracy built upon the finding in *Re Renumeration of Judges,* where the SCC addressed the Duff Doctrine. In this decision, the SCC affirmed that parliamentary democracy includes the social implications of 'wor[king] under the influence of public opinion and public discussion [. . .] [because] such institutions derive their efficacy from the free public discussion of affairs'.[1138] The SCC then recognised the 'interdependence between national political institutions and free speech'. Finding that political institutions 'are fundamental to the "basic structure of our Constitution"' held that 'governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy'.[1139]

In terms of determining what forms of freedom of expression cannot be set aside by the notwithstanding clause, I argue that this must be determined on a case-by-case basis by the judiciary. Although unwritten principles are malleable concepts, when they are employed, courts should justify their use clearly so that both their content and effect becomes clearer over

1134 ibid [62].
1135 ibid [65].
1136 ibid [68].
1137 ibid.
1138 ibid [102].
1139 ibid [103].

time. As with other *Charter* provisions, the process of constitutional interpretation is contextual and incremental. Thus, the determination of protected expression outside the scope of section 33 will develop incrementally through decisions of the courts and likely requires further academic exploration outside the purview of this thesis.

I will add this final point on the scope of freedom of expression under the unwritten constitutional principle of democracy that I argue limits the applicability of the notwithstanding clause. Although the parameters of freedom of expression under section 2(b) of the *Charter* have been set by cases, such as *Irwin Toy Ltd v Quebec*, *R v Keegstra*, *Canadian Broadcasting Corp v Canada* and *Thomson Newspaper Co v Canada*,[1140] freedom of expression has yet to be defined in the context of the unwritten constitutional principle of democracy. I suggest that the courts develop a broad sub-category of freedom of expression that is essential for the democratic system within the category of freedom of expression that cannot be set aside by the notwithstanding clause. An example of this distinction can be found in the existing case law of *Ford* and *Reference Re Alberta Statutes*. In *Ford*, the SCC held that the outright prohibition of English language on commercial signs violated commercial expression rights under section 2(b) of the *Charter*. In *Reference Re Alberta Statutes*, the SCC considered a set of legislation by the Alberta government that sought to directly interfere with the freedom of the expression by creating a five-person review board to censor the press from reporting on their policies.[1141] The restrictions on freedom of expression in these two cases are distinct. I argue that only *Reference Re Alberta Statutes* has the limits on freedom of expression essential for the democratic system that is safeguarded by the unwritten principle of democracy from the notwithstanding clause.

1140 *Irwin Toy* (n 549); *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1; *Canadian Broadcasting Corp v Canada*, 2011 SCC 2; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, 159 DLR (4th) 385; Department of Justice Canada, 'Charterpedia - Section 2(b) – Freedom of Expression' (2019) https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art2b.html.

1141 *Reference Re Alberta Statutes* (n 59).

Second, the 2021 SCC decision in *City of Toronto* has introduced uncertainty on the application of unwritten constitutional principles. In a split 5-4 decision, the SCC majority ruled that unwritten constitutional principles can only inform written constitutional text, rather than act as independent sources of authority to strike down legislation.[1142] The majority supported this finding by reasoning that the role of section 33 in Canada's constitutional democracy could be undermined if it could be circumvented by the unwritten constitutional principle of democracy.[1143] In a forceful four judge dissent, Justice Abella was critical of the majority's 'imprudent' decision to 'foreclose the possibility of unwritten constitutional principles being used to invalidate legislation in all circumstances'.[1144] The dissent argued that the majority ignored the case law that establishes that in rare cases, 'unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure"'.[1145] On the notwithstanding clause, the dissent did not address the intersection between section 33 and unwritten constitutional principles because it was not raised in the case.[1146] However, during the hearing, Justice Abella stated 'I don't think we would be going far afield from Parliament's intention if we did have an unwritten principle of democracy that […] may be protected from section 33'.[1147]

1142 *Toronto (City) v. Ontario (Attorney General) SCC* (n 535) [63].

1143 ibid [60].

1144 ibid [170] and [182].

1145 ibid [170].

1146 ibid [170] and [182].

1147 Justice Abella's full statement on the intersection of the notwithstanding clause and unwritten constitutional principles was: 'if we look at the Charter itself there is a section called "democratic rights", sections 3, 4 and 5, those are not subject to the override and so the unwritten principle of democracy not being subject to an override is consistent with the written text, which is cannot override the democratic rights in the Charter. So I am not sure how far we need to go with this in terms of whether we are upending constitutional structure, it is right in the Constitution that you cannot override democratic rights […] The fact is that this is the unwritten principle of democracy if we want to know what the intention of the legislature was, or of Parliament, they protected from override what they called democratic rights. So I'm not sure we have to go into it, but I don't think we would be going far afield from Parliament's intention if we did have an unwritten principle of democracy that […] may be protected from section 33, which we don't have to decide in this case anyways'. See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 (transcript of hearing on March 16, 2021), 36–37.

Through *City of Toronto,* the SCC has introduced uncertainty with a clear divergence between the majority and dissent on the applicability of unwritten constitutional principles. My argument aligns with the ruling of the dissent. Extensive case law establishes that unwritten constitutional principles can be independently applied in rare circumstances to justify striking down statutory legislation.[1148] The majority ruling of the *City of Toronto* did not engage with this existing case law and their holding is seemingly at odds with the existing SCC jurisprudence. Furthermore, this case concerned section 2(b) of the *Charter* and there was no active notwithstanding clause invocation being considered in the 2018 Ontario legislation. The majority's decision to comment on section 33 and unwritten constitutional principles was unnecessary and was an overly expansive decision on an issue not directly raised by the claimants. An examination of the relationship between the notwithstanding clause and unwritten constitutional principles should engage with in a range of interpretive aids and the dominant approaches to *Charter* interpretation. In *City of Toronto*, the majority's comments on the notwithstanding clause were cursory with no significant analysis of the relationship between section 33 and unwritten constitutional principles.

I also argue that following *City of Toronto,* the status of the application of unwritten constitutional principles remains uncertain. This 2021 decision was split 5 to 4 with the majority and dissenting opinions taking opposing stances on whether unwritten constitutional principles can act as independent authority to justify the striking down of legislation. The division of the SCC demonstrates that the application of unwritten constitutional principles remains unsettled and will likely require further consideration in future decisions. This is relevant in the context of the notwithstanding clause. There are multiple constitutional challenges being brought against notwithstanding clause legislation in Quebec and Ontario,

1148 *Renumeration of Judges* (n 26); *Lalonde* (n 1006); *BC Trial Lawyers* (n 984).

with some claimants basing their arguments on unwritten constitutional principles.[1149] The SCC will likely be required to conduct a comprehensive analysis of the relationship between the notwithstanding clause and unwritten constitutional principles. This future comprehensive analysis, unlike the brief comments on section 33 in *City of Toronto*, could result in the SCC adopting a different approach to the application of unwritten constitutional principles. Based on the division of the SCC in *City of Toronto* and the upcoming notwithstanding clause litigation, I argue that the jurisprudence on unwritten constitutional principles remains uncertain and will likely be developed in the next decade.

Third, in 2021, Ontario passed the *Protecting Elections and Defending Democracy Act* – successfully invoking the notwithstanding clause for the first time in the province's history. This legislation was passed in response to a lower court loss[1150] by re-enacting their election financing legislation that was deemed unconstitutional. The *Protecting Elections and Defending Democracy Act* re-amended the *Election Finances Act* to double the restricted election spending period from six months to one year and impose an overall spending cap of $600,000.[1151] This amendment to the elections financing regulations was criticised for undermining the ability of unions to engage in democratic expression through commercials and other means in the twelve-month period leading up to an election. The CCLA labelled the legislation 'a cravenly self-interested abuse of this extraordinary [notwithstanding clause] power' and argued that 'the notwithstanding clause was designed to be a democratic safety valve, not a brazen power grab to tilt election rules in a government's favour'.[1152]

I argue that the invocation of the notwithstanding clause in the *Protecting Elections and Defending Democracy Act* represents a rare instance where the unwritten constitutional

1149 'Legal Challenge against Bill 96 Coming, Montreal Lawyer Says' (n 457); Montpetit (n 417); 'CCLA Statement on Notwithstanding Clause' (n 567).

1150 *Working Families Ontario* (n 542).

1151 *Protecting Elections and Defending Democracy Act.*

1152 'CCLA Statement on Notwithstanding Clause' (n 567).

principle of democracy provides independent authority to strike down legislative provisions that interference with freedom of expression essential to the democratic system. The *Protecting Elections and Defending Democracy Act*, through its direct restriction on freedom of expression essential to the democratic system, undermines democratic processes that require freedom of expression to be meaningful. Labour unions and other civil society organisations are influential actors in democratic elections and can represent as a collective voice the concerns of a coalition of citizens. By limiting an organisation's ability to express their support or critiques of a political party in the lead up to a democratic election, the Ontario government has legislated themselves a potential unfair advantage in the 2022 election. A purposive interpretation of the notwithstanding clause affirms that democratic accountability mechanisms, including during electoral processes, are central to its purpose and must be maintained. The notwithstanding clause should not be permitted to undermine democratic processes that act as an accountability mechanism on its use and are recognised unwritten constitutional principles. Thus, I argue that the unwritten principle of democracy can be interpreted to strike the provisions of the *Protecting Elections and Defending Democracy Act* that infringe on freedom of expression essential to the democratic system.

8.4 Conclusion

In sum, I argued that the unwritten constitutional principle of democracy safeguards freedom of expression essential to the democratic system from the notwithstanding clause. I made this argument through an analysis of *Ford*, the Duff Doctrine case law, and a purposive interpretation of section 33. I conclude by applying my proposed interpretive approach to Ontario's only successful invocation of the notwithstanding clause in the *Protecting Elections and Defending Democracy Act.*

CHAPTER NINE

9. Jus Cogens Norms and the Notwithstanding Clause

Although the text of section 33 is clear as to which *Charter* rights it can be applied the text is silent on its relationship with international law. I argue that the notwithstanding clause cannot subvert the peremptory *jus cogens* norms that make up part of Canada's common law.

In this section, I have chosen to focus on the intersection of the notwithstanding clause and the international *jus cogens* norm against torture. Although there are a range of *jus cogens* norms that have been recognised by international bodies,[1153] I focus on the prohibition against torture because it has recently been recognised as a *jus cogens* norm by the SCC. I presuppose a connection between the recognition of a *jus cogens* norm by the domestic apex court and its effect in the domestic legal system. My case study on the prohibition against torture illustrates my argument that *jus cogens* norm can limit the application of the notwithstanding clause. Whether other *jus cogens* norms can be applied to limit the scope of the notwithstanding clause requires further academic exploration.

9.1 The Prohibition Against Torture and Canadian Domestic Law

Under Canadian law, torture is prohibited. The prohibition of torture is codified in both the *Criminal Code* and the *Charter*. Torture is listed as a criminal offence under section 269.1 of the *Criminal Code*[1154] and the constitutional protections against torture are listed under sections 7 and 12 of the *Charter*.

Section 7 of the *Charter* states that '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'.[1155] The SCC linked the prohibition of torture to section 7 of the

1153 Other recognised *jus cogens* norms include genocide; crimes against humanity; slavery; cruel, inhumane, and degrading treatment; State prohibition of the use of force. See *Nevsun* (n 31) [103]; International Law Commission, 'Report of the International Law Commission' (United Nations 2019) Supplement No. 10 (A/74/10), 163

1154 *Criminal Code*, RSC 1985, c C-46 s 269.1(1).

1155 *Canadian Charter of Rights and Freedoms* s 7.

Charter in *Suresh v Canada*.[1156] In *Suresh*, the SCC heard a *Charter* challenge brought by a refugee claimant being deported back to Sri Lanka, where he faced significant risk of being tortured.[1157] The SCC ruled that section 7 of the *Charter* bars the government from deporting a refugee claimant to a country where they are at risk of torture, unless they are a serious security risk to Canadians.[1158] The SCC held that torture may deprive an individual from their right to 'liberty, security and perhaps life',[1159] and in the context of domestic affairs, cannot ever be considered in accordance with section 7 principles of fundamental justice.[1160]

Torture is also explicitly prohibited under section 12 of the *Charter*, which states: 'everyone has the right not to be subjected to any cruel and unusual treatment or punishment'.[1161] Section 12 applies to everyone regardless of citizenship status and prohibits extreme or irreversible treatments or punishments. The SCC has found that a punishment is considered cruel and unusual under section 12 when it 'is so excessive as to outrage the standards of decency'.[1162] The SCC has explicitly determined that torture 'falls into this category'[1163] and that it is 'blatantly contrary to section 12 [of the *Charter*]'.[1164]

9.2 The Prohibition Against Torture and Canada's International Law Obligations

Canada's international law obligations are best understood as consisting of three levels. First, there is international treaty law.[1165] States sign, ratify, and implement specific international treaties to reflect their commitment to upholding human rights. Despite ratification by Canada at the international level, treaties are not automatically binding and must be incorporated into

1156 *Suresh* (n 901).
1157 ibid [78].
1158 ibid [5].
1159 ibid [44].
1160 ibid [51].
1161 *Canadian Charter of Rights and Freedoms* s 12.
1162 *Suresh* (n 901) [51].
1163 ibid.
1164 *Kazemi* (n 34) [52].
1165 Currie (n 28) 193–228.

Canadian law through legislative action.[1166] Canada has ratified and incorporated a range of international treaties that prohibit torture, including the *Convention Against Torture*.[1167] The Canadian legislature has incorporated the prohibitions against torture into Canadian law through a range of reforms including *Criminal Code* prohibitions[1168] and constitutional protections.[1169]

Second, there is customary international law. Customary international law derives its source of authority from article 38(1)(b) of the *Statute of the International Court of Justice*.[1170] International norms achieve customary international law status when they meet two requirements: State practice and *opinio juris*. First, State practice examines the behaviour of States and requires that their adherence to the norm be both general and uniform.[1171] Second, *opinio juris* refers to a State practice 'undertaken with a sense of legal right or obligation'. This second requirement of customary international law distinguishes regular State practice and those practices undertaken because of a perceived legal obligation.[1172] This 'psychological'[1173] requirement is considered essential by the International Court of Justice[1174] and can be ascertained through an examination of the express assertions by State officials.[1175] In 2020, the SCC held that the 'judicial decisions of national courts are also evidence of general practice or *opinio juris* and thus play a crucial role in shaping norms of customary international law'.[1176]

1166 *Suresh* (n 901) [60].

1167 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (adopted 10 December 1984 UNGA Res 39/46).

1168 *Criminal Code*, s 269.1.

1169 *Canadian Charter of Rights and Freedoms* ss 7, 12.

1170 *Statute of the International Court of Justice*, (came into force October 24, 1945) Can TS 1945 No 7, art 38(1).

1171 John H Currie, *Public International Law* (Irwin Law 2008) 188.

1172 ibid 195.

1173 Currie refers to *opinio juris* as a psychological element of customary international law because it examines State intent. See ibid 195–196.

1174 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14, 108–109.

1175 For a summary of the recognized forms of state official assertions see Currie (n 1137) 197.

1176 *Nevsun* (n 31) [79].

Once a practice crystallises into a customary international law norm it is automatically incorporated into Canada's common law. This process of customary international law incorporation, called the doctrine of adoption, requires no legislative action.[1177] In *R v Hape,* the SCC affirmed the doctrine of adoption and clarified that parliamentary sovereignty allows States to expressly derogate from customary international law, like any other common law rule.[1178] This finding was affirmed in *Nevsun Resources Ltd v Araya,* where the SCC held that legislatures are 'free to change or override [customary international law norms], but like all common law, no legislative action is required to give them effect'.[1179]

The third and final facet of Canada's international legal obligations are *jus cogens* norms. Within customary international law there are a subset of norms that are expected of States whether or not they committed to these international legal norms. These universal international legal norms are characterised as *jus cogens*.[1180] According to the SCC in *Nevsun,* 'customary international law is the common law of the international legal system' and 'within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, from which no derogation is permitted'.[1181] A norm takes on the status of *jus cogens* when there is a development of international practice that reflects a widely accepted status. *Jus cogens* norms apply to all States, regardless of meeting general practice or *opinio juris* requirements. Recognised *jus cogens* norms include genocide, crimes against humanity, slavery, and cruel, inhumane, and degrading treatment (also called torture).[1182] In addition to human rights obligations, *jus cogens* norms also encompass other international norms such as prohibiting the use of force.[1183]

1177 ibid [86]–[90].

1178 *R v Hape,* 2007 SCC 26 [39].

1179 *Nevsun* (n 31) [94].

1180 Currie (n 28) 160–193.

1181 *Nevsun* (n 31) [7].

1182 ibid [103].

1183 International Law Commission, (no 1137) 163

As a subset of customary international law, *jus cogens* norms are automatically incorporated into Canada's common law through the doctrine of adoption.[1184] What distinguishes a *jus cogens* norm from customary international law is that it is a 'peremptory norm […] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[1185] As a result, unlike customary international law, *jus cogens* norms cannot be overridden by conflicting legislation or express overriding legislation.

The SCC's recognition of the prohibition against torture as a *jus cogens* norm has been an evolving process. First, in *Suresh*, the SCC recognised three 'compelling indicia'[1186] that torture had reached the status of *jus cogens*: the extensive number of multilateral instruments that prohibit torture;[1187] there are no documented countries who have explicitly legalised torture;[1188] and the other international authorities who recognise torture as a peremptory norm.[1189] Despite this 'compelling indicia', the SCC stopped short of recognising torture as a peremptory norm in *Suresh*.[1190]

Twelve years later, the SCC in *Kazemi (2014)* explicitly acknowledged the *jus cogens* status of the prohibition against torture. In *Kazemi*, the SCC stated: 'our Court cannot entertain any doubt that the prohibition of torture has reached the level of a peremptory norm […] or jus cogens norm […] that is non-derogable'.[1191] The SCC in *Nevsun* further affirmed that torture is a *jus cogens* norm. In *Nevsun*, the SCC considered a class-action claim against a Canadian mining corporation for breaches of domestic torts and damages for breaches of the customary

1184 *Nevsun* (n 31) [90].
1185 *Vienna Convention on the Law of Treaties*, art. 53 affirmed by the SCC in *Kazemi* (n 34) [183].
1186 *Suresh* (n 901) [62].
1187 ibid.
1188 ibid [63].
1189 ibid [64].
1190 ibid [65]; *Kazemi* (n 34) [47].
1191 *Kazemi* (n 34) [47].

international law norms against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[1192] In evaluating the claim of torture, Justice Abella for the majority quoted a text by Currie that describes jus cogens norms as an 'absolute right, where no social goal or emergency can limit [it]'.[1193] *Nevsun* is considered a defining and watershed decision, through which the SCC recognised the evolution of international law beyond State-to-State relations and found that individuals may sue corporations for violating customary international law, including torture.[1194]

In sum, the SCC has recognised that the prohibition against torture has been elevated to the status of a jus cogens norm. As a *jus cogens* norm, Canada cannot derogate from the prohibition against torture, even with express legislation.

9.3 The Notwithstanding Clause and the International Prohibitions Against Torture

Under section 33 of the *Charter*, sections 7 and 12 of the *Charter* can be suspended for a renewable period of five years.[1195] Thus, section 33 could provide an avenue for legislatures to explicitly legalise torture by temporarily suspending these *Charter* rights. I will argue that the notwithstanding clause cannot be used to temporarily set aside customary international law *jus cogens* norms. This argument will be made by examining the prohibition against torture and its recognised status both internationally and within Canada as a peremptory norm.

To begin, an examination of the notwithstanding clause literature and other interpretive aids provides limited guidance on how the notwithstanding clause should be interpreted when it conflicts with international treaties and customary international law. First, the text of the notwithstanding clause makes no reference to international law.[1196] Second, a review of the statements made by the notwithstanding clause drafters provides little guidance on how they

1192 *Nevsun* (n 31) [3]–[4].

1193 John H Currie and others, *International Law: Doctrine, Practice, and Theory* (2 end, Irwin Law 2014) 627.

1194 *Nevsun* (n 31) [113]–[114].

1195 *Canadian Charter of Rights and Freedoms* s 33(1).

1196 ibid.

intended the notwithstanding clause to interact with Canada's international law commitments. Among the drafters of the notwithstanding clause, there are no direct statements that reference international law in the context of the notwithstanding clause.[1197] Thus, a review of the history of the notwithstanding clause cannot fill the gap left by the text of section 33 as it relates to international law.

Third, the SCC has not yet commented on the relationship between the notwithstanding clause and international law. The SCC in *Ford* adopted a 'form-only' approach, finding that the text of section 33 was sufficient as to the claims being brought forward in the case.[1198] The SCC also found that the text of section 33 was open-textured on retrospective applications of the notwithstanding clause and through an application of principles of statutory interpretation barred the use of section 33 retrospectively.[1199] This ruling, however, is unhelpful in my analysis on whether international peremptory norms can limit the scope of the notwithstanding clause.

Finally, there is limited academic commentary on section 33 and international law. Rousseau and Côté argue that Quebec has a distinct notwithstanding clause practice and distinct legal commentary on its use.[1200] They provide the example of the Quebec academic commentary on whether international law can be a measurement tool in evaluating the moral legitimacy of a notwithstanding clause invocation. The authors argue that while English Canada is largely silent on the issue of international law and the notwithstanding clause, it is an active debate among Quebec legal scholars that has yet to reach a consensus.[1201]

Other Quebec legal scholars have focused on the relationship between Canadian treaty obligations and the notwithstanding clause. Tremblay and Bellevance engage in a comparative

1197 For a summary of the statements on the notwithstanding clause by the drafters see Roy and Brosseau (n 1).

1198 *Ford* (n 18).

1199 ibid.

1200 ibid.

1201 Rousseau and Côté (n 12) 355–359.

study of the *Charter* and the *European Convention on Human Rights* (*ECHR*).[1202] The authors argue that the *ECHR* 'margin of appreciation' that provides a level of deference to European Union members is comparable to the notwithstanding clause within Canada's *Charter*.[1203] They reason that these two mechanisms represent important tools to safeguard the sovereignty of nations in having the final say as it relates to the application of laws.[1204] Tremblay and Bellevance support the existence of the notwithstanding clause because it provides legislative authority for Quebec to preserve its sovereignty following an unfavourable judicial decision by an unelected judge.[1205]

Another scholar, Paré, examines the intersection between the *International Covenant on Civil and Political Rights* (*ICCPR*) and the notwithstanding clause. She argues that 'the mere presence of section 33 in the Canadian *Charter* does not constitute a violation of Canada's international obligations'.[1206] The author is critical of international bodies making international rights determinations for the Canadian context. Paré draws on the example of the 1986 Saskatchewan invocation of the notwithstanding clause to bar strikes by dairy workers that the SCC ultimately deemed constitutional because section 2(d) of the *Charter* did not include the right to strike. This SCC finding contradicted the inclusion of strike action rights in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[1207] She argues against international treaty obligations being imposed to limit the scope of the notwithstanding

1202 *Convention for the Protection of Human Rights and Fundamental Freedom*, (European Convention on Human Rights as amended).

1203 Guy Tremblay and Sylvain Bellavance, 'La Suprématie Législative et l'édiction d'une Charte Des Droits Britannique' (1988) 29 Les C de D 637, 654.

1204 Tremblay and Bellavance (n 1169).

1205 ibid 654.

1206 Marie Paré, 'Legitimite de La Clause Derogatoire de La Charte Canadienne Des Droits et Libertes En Regard Du Droit International' (1995) 29 RJT 627, 635–641.

1207 *International Covenant on Economic, Social and Cultural Rights* (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 [*ICESCR*].

clause because it allows sovereign jurisdictions to override applications of international law that are not adapted to the Canadian context.[1208]

Finally, Gosselin considers the interaction of the notwithstanding clause and international law from an opposing perspective, examining how the notwithstanding clause can promote international human rights commitments. The author examines the ICESR and its inclusion of collective rights. Gosselin argues that the notwithstanding clause can act as a tool to allow a community, such as the nation of Quebec, to safeguard their collective rights from being undermined by individual rights challenges.[1209]

In sum, the text, historical context, and academic commentary on the notwithstanding clause provides limited guidance on how the courts should respond to a conflict between the notwithstanding clause and *jus cogens* norms. This gap is increasingly important, as customary international law has developed both at the international level and within the Canadian context over the course of the past two decades. I will seek to address this gap and argue that the notwithstanding clause cannot subvert peremptory *jus cogens* norms that make up part of Canada's common law. This argument is supported by three claims.

First, the drafters of the *Charter* made clear that the *Constitution Act, 1982* extinguished no existing rights and the notwithstanding clause could only temporarily set aside the rights encapsulated in section 33(1).[1210] Justice Minister Chrétien affirmed this at the time of the *Charter's* passing by stating: 'The agreement signed by the Prime Minister and nine Premiers does not emasculate the charter […] [The *Charter*] does not exclude rights which have previously been guaranteed'.[1211] Although there was no explicit discussion of the effect of the *Charter* on international law norms, the statement by Chrétien can be reasonably interpreted to

1208 Paré (n 1172) 651.

1209 Jacques Gosselin, *La Légitimité Du Contrôle Judiciaire Sous Le Régime de La Charte* (Cowansville, Québec: Éditions Y Blais 1991) 241–246.

1210 *Canadian Charter of Rights and Freedoms* s 33(1).

1211 Debates 20 November 1981 (n 10) 13042–13043.

also apply to existing international law obligations, whereby they were not extinguished by the *Charter*.[1212] Therefore, the origins of the *jus cogens* norm against torture pre-existed the passing of the *Charter* and should not be interpreted to have been extinguished by the crystallization of torture protections under section 7 and 12 of the *Charter*.

Second, the former SCC Chief Justice Beverly McLachlin has linked customary international law and *jus cogens* norms to unwritten constitutional principles. In a 2006 piece, McLachlin grappled with the scope of unwritten constitutional principles and argued for limited circumstances where these principles can be used by judges to override written text.[1213] While seeking to identify unwritten principles that can limit written text, McLachlin recognises three sources of authority for unwritten constitutional principles: customary usage, inferences from written constitutional principles, and norms set out or implied in international legal instruments to which the state has adhered.[1214] McLachlin argued that customary international law can inform the courts in determining which unwritten constitutional principles can limit the application of written law:

> Where a country adheres to international covenants, such as the UN Convention Against Torture or the International Covenant on Civil and Political Rights, it thereby signals its intentions to be bound by their principles. This may amplify indications from usage and convention and the written text of the constitution and to help to establish the boundaries of certain unwritten principles.[1215]

McLachlin's link between the unwritten constitutional principles and customary international law justifies the recognition that customary international law norms provide non-derogatory common law protections against torture outside of sections 7 and 12 of the *Charter* and thus outside the purview of the notwithstanding clause.[1216]

1212 The SCC recognised that 'modern international human rights law [is] the phoenix that rose from the ashes of World War II'. See *Nevsun* (n 31) [1].

1213 McLachlin (n 959).

1214 ibid 156.

1215 ibid 159.

1216 ibid 162.

Finally, the *jus cogens* status of the prohibition against torture has been recognised by the SCC.[1217] All *jus cogens* norms automatically form part of Canada's common law and cannot be derogated from through any State mechanism, including the notwithstanding clause.

Relying on this existing case law, I argue that the notwithstanding clause must also respect the non-derogatory nature of *jus cogens* norms. If the prohibition against torture was only a customary international law norm, the government retains the authority to override customary international law norms through express declarations, such as a notwithstanding clause invocation.[1218] However, *jus cogens* norms have a special status 'from which no derogation is permitted'.[1219] The language employed by the SCC is clear, there are no recognised justifications for violating a *jus cogens* norm, including the prohibition against torture. The SCC has recognised *jus cogens* norms as an 'absolute right, where no social goal or emergency can limit [it]'.[1220] Applying this case law to the notwithstanding clause, it can be reasonably interpreted that the notwithstanding clause also should not expressly override the *jus cogens* prohibition. Such a conclusion is reinforced by the text of the notwithstanding clause, which is explicit in what rights it can temporarily set aside and which does not mention the authority to override unwritten constitutional principles or *jus cogens* norms.[1221]

Therefore, the combination of no explicit permittance in the text of section 33 and the existing SCC case law on *jus cogens* norms, leads me to conclude that if a federal, provincial, or territorial legislature seeks to invoke section 33 to suspend the prohibitions against torture in sections 7 and 12 of the *Charter*, the notwithstanding clause could not set aside the common law prohibitions against torture that have crystallized into a *jus cogens* norm. The

1217 *Kazemi* (n 34) [47].

1218 *Hape* (n 1144) [39]; *Nevsun* (n 31) [94].

1219 *Nevsun* (n 31) [20].

1220 ibid [104].

1221 *Canadian Charter of Rights and Freedoms* s 33.

notwithstanding clause can be applied to certain *Charter* rights, including sections 7 and 12, but individuals can still draw on common law rights protections from *jus cogens* norms.

9.4 Conclusion

I argued that customary international *jus cogens* norms can limit the scope of the notwithstanding clause. I used the case study of the prohibition against torture as a *jus cogens* limit on the notwithstanding clause. I chose this case study because the SCC has recognised that the torture prohibition achieved the status of a peremptory norm. As of 2022, the SCC has only recognised a small number of egregious human rights violations as a *jus cogens* norm. However, the nature of customary international law and *jus cogens* norms is that they are continuously evolving based on the practices of State and non-State actors. Therefore, the *jus cogens* norms that cannot be derogated from by any law, including the notwithstanding clause, will continue to grow and be automatically incorporated into Canadian common law through the doctrine of adoption.

CHAPTER TEN

10. Gender Equality under Section 28 of the Charter and the Notwithstanding Clause

Section 33 of the *Charter* can only be applied to certain rights. In this chapter, I argue that the rights that fall outside the listed rights under section 33(1) can limit the application of the notwithstanding clause. To illustrate this argument, I provide a case study of section 28 of the *Charter*, which is an interpretive clause guaranteeing all *Charter* rights 'equally to male and female persons'.[1222] I focus on section 28 because it intersects with gender equality that is protected under section 15(1) of the *Charte*r and can be set aside by section 33. I also chose section 28 as a case study because of its unique relationship with section 33 that developed during the drafting of both provisions.

Under section 33(1), the notwithstanding clause can set aside sections 2 and 7 to 15 of the *Charter*. This design of the notwithstanding clause leaves a significant number of *Charter* rights outside the purview of section 33. The rights that cannot be suspended by the notwithstanding clause include democratic rights (sections 3 to 5), mobility rights (section 6), official language rights (sections 16 to 22), minority language education rights (section 23), and enforcement mechanisms (section 24 of the *Charter* or section 52 of the *Constitution Act. 1982*). Section 27 (multicultural heritage) and section 28 (gender equality clause) of the *Charter,* largely regarded as interpretive provisions, cannot be limited by the notwithstanding clause. Aboriginal rights entrenched under section 35 of the *Constitution Act 1982* were placed outside the *Charter* and do not fall under the purview of section 33.

This section 33 design has the effect of indirectly creating a hierarchy of rights within the *Charter*. This hierarchy creates two tiers of rights: rights that can be temporarily limited by

1222 *Canadian Charter of Rights and Freedoms* s 28.

the notwithstanding clause and rights that cannot.[1223] With this hierarchy of rights, section 28 of the *Charter* has been thought to be 'at the top' because it is excluded from application by both section 33 (notwithstanding clause) and section 1 (reasonable limits clause).[1224]

Whether or not it is appropriate to speak of a rights hierarchy, and if it is, whether section 28 is at the pinnacle of this hierarchy, there is no denying that the gender equality clause has a unique status within the *Charter*. Protections for gender equality both fall under sections 15(1) and 28 of the *Charter* – with only the former falling within the scope of section 33. I argue that provisions outside of the scope of section can limit its application. I employ the case study of section 28 of the *Charter* to propose that any use of the notwithstanding clause that seeks to immunise a legislative provision that may have a discriminatory purpose or effect on the ground of sex or gender would not be permitted. I make this argument through a multi-pronged analysis. First, a textual analysis of the *Charter* supports an interpretation that section 28 falls outside the scope of section 33. Second, the jurisprudence is unsettled on the relationship between sections 28 and 33. Third, an originalist, purposive, and progressive interpretation of the *Charter* supports my argument that section 28 safeguards gender equality from being undermined by the notwithstanding clause.

10.1 A Textual Analysis of Section 28 and Section 33 of the *Charter*

Section 28 of the *Charter* states: 'notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons'.[1225] The text of section 33 is clear that section 28 does not fall under the purview of section 33. Initially, the first draft of the notwithstanding clause included section 28, but this section was removed through a unanimous vote of the House of Commons days before the adoption of the *Charter*.

1223 Hogg refers to these two categories of rights as the 'common rights that are subject to the override' and the 'privileged rights that are not'. See Hogg, *Constitutional Law of Canada* (n 615) 737.

1224 Section 28 is considered outside of the purview of section 1 and section 33 of the *Charter*. This exclusion from these two rights limiting sections has led some scholars to propose that it is at the top of the rights hierarchy. See ibid.

1225 *Canadian Charter of Rights and Freedoms* s 28.

Section 33(1) clearly sets out that it can only temporarily set aside the rights under sections 2 and 7 to 15 of the *Charter*.[1226] The text of section 28 is similarly clear because it operates 'notwithstanding anything in this *Charter*', including section 33.[1227] As a result, the issue then becomes how section 28 should be interpreted in the context of section 33 through the dominant interpretive approaches to the *Charter*.

10.2 A Review of the Section 28 Jurisprudence

There is a paucity in the case law on the relationship between section 28 and the notwithstanding clause. This gap in the case law is partially caused by the limited attention section 28 has received in the jurisprudence. Following the passing of the *Charter*, section 15 had a three-year delay before it came into force. During the period of 1982 to 1985, section 28 was the only constitutional guarantee of equality between the sexes.[1228] After section 15 came into force, the majority of SCC decisions that safeguarded sex equality in Canada were grounded in the general equality rights provision. The post-1985 jurisprudence on section 28 has largely dismissed any independent authority deriving from the gender equality clause. Instead, the courts have determined that section 28 should be regarded as serving an 'interpretive, confirmatory, and adjunctive role'[1229] and that it is almost exclusively cited in conjunction with sections 15 and 7 of the *Charter*.[1230]

The courts have largely dismissed section 28 as having any substantive role to independently justify the application of a constitutional remedy. In *R v Hess*, Justice Wilson, writing for the SCC majority, established that the court viewed section 28 as playing a limited role in the *Charter* jurisprudence.[1231] She held that '[section 28] does not prevent the legislature

1226 ibid.

1227 ibid s 33.

1228 Department of Justice Canada, 'Charterpedia - Section 28 – Gender Equality Rights' (9 November 1999) https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art28.html accessed 31 March 2021.

1229 ibid.

1230 *R v Park*, [1995] 2 SCR 836, 169 AR 241; *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470.

1231 *R v Hess ; R v Nguyen*, [1990] 2 SCR 906, 74 Man R (2d) 1.

from creating [a statutory rape] offence that as a matter of biological fact can only be committed by one sex'.[1232] She then applied section 28 to interpret that both male and female accused are equally 'entitled to the protection of [section] 7' because it is not open to the government to suggest that a person should receive less than full Charter protection on account of his or her sex'.[1233] Subsequent *Charter* cases were similarly dismissive of section 28.[1234] As summarised by Froc, the jurisprudence has 'mainly consigned the [section 28] provision to irrelevance […] even when it is raised by the parties or is pertinent on the facts'.[1235]

In the context of section 33, the judiciary has not yet determined the relationship between sections 28 and 33. In a briefing note on section 28, the Canadian Department of Justice suggested: 'with respect to section 33, section 28 may mean that, even where a legislature or Parliament passes legislation allowing abrogation or infringement of section 2 or sections 7-15 of the *Charter*, it will not be able to do so in a way which disproportionately affects people on the basis of gender'.[1236] Despite this assertion, the SCC has provided no definitive guidance on the interaction between sections 28 and 33. One of the only judicial references to the interaction of sections 28 and 33 comes from the Quebec Superior Court. In *Syndicat de la fonction publique v Quebe*c, Justice Carole Julien acknowledged that scholars have widely accepted that section 28 protects gender equality from section 33, stating: 'due to the historical context of its adoption and the objectives pursued, section 28 would protect the right to equality of the sexes in a particular way. The legislator could not derogate from it by application of section 33'.[1237] In addition to this lower court finding, the SCC has

1232 ibid [47]–[48].

1233 ibid.

1234 *R v Morgentaler* [1993] 3 SCR 463, 107 DLR (4th) 537; *Re Blainey and Ontario Hockey Association*, 54 OR (2d) 513, 26 DLR (4th) 728; *Service Employees International Union, Local 204 v Ontario (Attorney General)*, 151 DLR (4th) 273, 35 OR (3d) 508.

1235 Froc (n 160) 256.

1236 Department of Justice Canada (n 1193).

1237 *Syndicat de la fonction publique c Quebec (PG)*, [2004] RJQ 524 [1422].

acknowledged that meaning must be attributed to the sections not included under section 33. In *Sauvé II*, the SCC held that: 'the framers of the *Charter* signalled the special importance of [democratic rights] not only by its broad, untrammelled language, but by exempting [them] from [the] legislative override'.[1238]

In sum, although the existing case law is generally dismissive of section 28, there has been no evaluation of its relationship with section 33. The paucity in the case law and the limited SCC interpretation on section 33 points to a possible role for section 28 in limiting the application of the notwithstanding clause to gender equality.

10.3 An Originalist Interpretation of Section 28 and Section 33

An originalist approach to *Charter* interpretation has been largely rejected in Canada.[1239] However, based on the dialogic role of the notwithstanding clause and its underlying purpose to safeguard parliamentary supremacy, the SCC may draw on an originalist interpretive approach. I argue that an originalist interpretive approach supports my argument that section 28 safeguards gender equality from the notwithstanding clause. A review of the legislative history of the notwithstanding clause is clear that both the feminist activists and the *Charter* drafters intended section 28 to safeguard gender equality from the purview of section 33. After a long-fought battle to have section 28 added to the final draft of the *Charte*r, women's activists were shocked to learn that the November Accord drafters had included it within the purview of the notwithstanding clause.[1240]

The notwithstanding clause has not been included in the draft of the *Charter* presented to the Special Joint Committee on the Constitution.[1241] Therefore, the women's groups who presented to the committee did not comment on the notwithstanding clause and their opposition

1238 *Sauvé II* (n 729) [11].

1239 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 82.

1240 Froc (n 160) 248.

1241 Joint Committee, Proceedings, Issue 30 (n 162) 39; Dodek (n 38) 63.

to its possible application to a gender equality clause such as section 28. Women's groups labelled the application of the notwithstanding clause to section 28 as 'treacherous' and 'a surtax on their hard won constitutional rights'.[1242] In response, women's groups engaged in cross-Canada mobilisation to amend this section of the *Charter* before it was passed.[1243] Ultimately, the feminist coalition succeeded in convincing the nine signatory provinces and a unanimous House of Commons to vote to remove section 28 from the notwithstanding clause.[1244] Marilou McPhedran, a leading figure in feminist constitutional advocacy, argued that the removal of section 28 from the notwithstanding clause 'was validated by [the] legal commentary of the time, which anticipated it would serve a protective legal tool for women'.[1245] In their cross-country advocacy to amend section 33, women's groups were clear that they did not regard section 28 as merely interpretive.[1246] Rather, the leaders of the women's groups asserted in a nationally circulated memo that section 28 would provide unique protections in the context of section 33:

> This weakening of clause 28 [through section 33] means that Canadian laws do not have to apply equally to women and men. By this action, our leaders have told the Canadian people that equality is not a rock-bottom principle in this society. The courts and the governments now have legal authorization to treat women and men differently…In the past, both the federal and provincial governments of this country have consistently shown themselves reluctant to move forward on women's rights. Why do they want this over-ride power unless they intend to exercise it.[1247]

The view that section 28 provides independent gender equality protections for women in the context of section 33 was also held by the *Charter* drafters. For example, Saskatchewan Premier Blakeney was opposed the removal of section 28 from the notwithstanding clause because of concerns that it could be interpreted to 'make unconstitutional all affirmative action

1242 McPhedran, Erola and Braul (n 214) 5; Mcphedran (n 37) 10.

1243 Dodek (n 38) 77.

1244 ibid 77–78.

1245 McPhedran (n 37) 10.

1246 Froc, K. (2015). The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms (Doctoral Dissertation) 218.

1247 Box 682, X-10-24 NAC Fond, University of Ottawa Archives and Special Collections.

programs for women'.[1248] If section 28 was intended by the drafters to be interpretive only and have no protective role over gender equality rights, it is hard to understand why the Saskatchewan Premier opposed its removal. In other words, it can be interpreted from Blakeney's hesitancy that he understood section 28 to have independent rights protections in the context of section 33. Along with Blakeney's actions, other drafters of the *Charter* have overtly acknowledged their intention to safeguard gender equality from the notwithstanding clause through section 28. In 1984, three prominent members of the Saskatchewan constitutional negotiation delegation—Roy Romanow, John Whyte and Howard Leeson—wrote an account on the development of the 1982 Constitution. On section 28, the authors wrote: 'on 10 November the federal government contacted the provinces and requested the removal of the application of section 33 to section 28. In effect, their proposal meant that sexual equality in section 15 could not be overridden'.[1249] The documentation provided by both the drafters of the *Charter* and the women's groups advocates points to an understanding that at the time of entrenchment it was understood that the removal of section 28 protected gender equality from the notwithstanding clause. Rather than merely an interpretive clause, the exclusion of section 28 from section 33 has concrete meaning that is relevant in an interpretation of section 33.

The democratic deliberation that led to the exclusion of section 28 from the notwithstanding clause is also relevant to an originalist interpretive analysis. Both the addition of section 28 to the *Charter* and the removal of its application by section 33 were done through the multiple democratic processes. First, after failing to persuade the executive to add section 28 to the *Charter* during the Special Joint Committee stage, women's groups turned to the legislature for support. The addition of section 28 to the *Charter* was subsequently achieved

1248 November 18, 1981 Telegram from (Then) Saskatchewan Justice Minister Roy Romanow to Jean Chrétien (File 6, Box 2007-03/002, Marilou McPhedran Fonds, York University, Archives and Special Collections).

1249 Romanow (n 216) 213.

through a unanimous motion in the House of Commons on April 23, 1981.[1250] Second, section 28 was removed from the notwithstanding clause through another unanimous motion in the House of Commons on November 24, 1981, and with the consent of all nine signatory provinces.[1251] These two instances demonstrate the strong democratic support that section 28 had in the drafting of the *Charter*. Arguably section 28 had more democratic backing than most other *Charter* sections, which were negotiated and drafted outside the legislature and receiving legislative support only through a mass constitutional package.

In sum, I argue that an originalist interpretive approach supports finding that section 28 provides substantive protections for gender equality from the notwithstanding clause. If the SCC adopts an originalist approach to interpreting sections 28 and 33, my proposed interpretive approach is supported. A review of the legislative history that considers the intent of the women's groups, the views of the *Charter* drafters, and the unanimous will of the House of Commons supports my argument.

10.4 A Purposive Interpretation of Section 28 and the Notwithstanding Clause

The legislative history of the exclusion of section 28 from the notwithstanding clause is also relevant to a purposive interpretive approach. A purposive approach interprets the meaning of a right through a consideration of the context from which it arose, including the linguistic, philosophical, and historical contexts.[1252] This approach requires the courts to determine the purpose of the *Charter* right in question, with regard to the 'nature of the interests it is meant to protect'.[1253] To determine the purpose of a right, the courts rely on a range of interpretive aids, including an evaluation of the language used in the text of the right, the context drawn

1250 Debates 23 April 1981 (n 187) 9470–9472.

1251 Debates 24 November, 1981 (n 39) 13345; Debates 26 November, 1981 (n 217) 13200.

1252 Department of Justice Canada (n 624).

1253 *Hunter* (n 616) 157.

from the text of the right, the history of the right before the *Charter* entrenchment, the legislative history of the right, and the developed case law.[1254]

I have already conducted a purposive interpretation of section 33 and identified its purpose as a political compromise to safeguard parliamentary supremacy within the parameters of democratic accountability. I will now conduct a purposive interpretation of section 28 in the context of a notwithstanding clause invocation. A purposive interpretation of section 28 should consider its structural design within the *Charter*, the intent of the section 28 and *Charter* drafters, and its legislative history. First, the exclusion of section 28 from a section 33 and section 1 application is relevant to its purpose in the context of section 33. The exclusion of section 28 from the notwithstanding clause was purposeful, as it was first included by the *Charter* drafters and then removed through a unanimous House of Commons vote. Second, as I demonstrated in the previous section, the intent of both the women's group who advocated on section 28 and the *Charter* drafters is clear. Both groups demonstrate an intent for section 28 to provide substantive protections from the notwithstanding clause. Third, the legislative history supports an interpretation that section 28 is more than an interpretative clause in the context of section 33. The House of Commons, with the support of nine provinces, unanimously voted to remove section 28 from section 33 of the *Charter*.[1255] The democratic will supporting the unanimous removal of section 28 from the notwithstanding clause should be recognised as a relevant development in legislative history that informs a purposive interpretation of section 28 in the context of section 33.

The combined effects of these three interpretive aids help identify the purpose of section 28 in the context of the notwithstanding clause. I argue that the purpose of section 28 in the context of the notwithstanding clause extends beyond an interpretive provision. Instead,

1254 Hogg, 'Canada: From Privy Council to Supreme Court' (n 621) 89–90.

1255 Debates 24 November, 1981 (n 39) 13345; Debates 26 November, 1981 (n 217) 13200.

the identified interpretive aids support an interpretation that section 28 provides substantive protections for gender equality if the notwithstanding clause is invoked in a way that disproportionately impacts women or undermines existing gender equality protections.

10.5 A Generous and Progressive Interpretation of Section 28 and the Notwithstanding Clause

A progressive interpretation of section 28, informed by a generous and liberal interpretive approach, also supports my argument that section 28 provides substantive protections for gender equality from section 33. A progressive approach to *Charter* interpretation refers to 'language [being] given a "progressive interpretation" so that it is continuously adapted to new conditions and new ideas'.[1256] The progressive approach has enabled the SCC to grow and adapt the *Charter* to evolve with society, particularly as it relates to the rights of minorities. A generous and liberal approach to *Charter* interpretation refers to avoiding 'the austerity of tabulated legalism' and giving 'individuals the full measure of the fundamental rights and freedoms referred to'.[1257] A generous and liberal approach is considered subsidiary to the purposive approach because it must be constrained within the parameters of a right's purpose. A right cannot be interpreted too broadly, or it might overshoot its purpose.[1258]

A progressive approach to section 28 recognises that this right can evolve to meet contemporary developments. Although section 28 has historically been recognised only as an interpretive approach to the *Charter*, this right is not frozen in time. As I have argued, since 2018 there has been a shift in notwithstanding clause invocations. The geographic spread of section 33 has greatly expanded beyond Quebec[1259] and the frequency of the invocations has

1256 Hogg, *Constitutional Law of Canada* (n 615) 60–8.1.

1257 *Hunter* (n 616) 156.

1258 Pozsar-Szentmiklosy (n 623) 69; Hogg, 'Interpreting the Charter of Rights' (n 688) 819.

1259 Since 2018, the notwithstanding clause has been tabbed in legislation for the first time in Ontario and New Brunswick. See Bill 39, *An Act Respecting Proof of Immunization* (n 480); Bill 31, *the Efficient Local Government Act* (n 14); *Protecting Elections and Defending Democracy Act.*

not occurred to the same extent since the first decade of the *Charter's* existence.[1260] The thematic application of the notwithstanding clause has also changed. In the first thirty years of the notwithstanding clause in Quebec, it was almost exclusively used as a secessionist tool.[1261] Outside of Quebec, the four section 33 invocations between 1982 and 2012 were primarily based on interpretive uncertainty in the early years of *Charter* jurisprudence.[1262] Recently, there has been a shift both in Quebec and the rest of Canada on the thematic applications of the notwithstanding clause. Since 2018, the notwithstanding clause has been used for a range of divisive social and democratic issues. This includes the Quebec notwithstanding clause invocation in the *Laicity of the State Act,* argued to have disproportionate effects on women who wear religious symbols.[1263] I argue that this shift in notwithstanding clause uses necessitates a progressive interpretive approach to section 28 that adapts its role to the contemporary challenges that arise with an increase in notwithstanding clause invocations. A progressive interpretation would expand the role of section 28 from an interpretive provision to one with substantive protections in the context of section 33.

A generous and liberal approach to *Charter* interpretation further supports a finding that section 28 includes substantive protections for gender equality when the notwithstanding is invoked. An interpretation of section 28 that limits its role to an interpretive section cuts down the provision 'through a narrow and technical construction'.[1264] Instead, section 28 should be given a 'large and liberal interpretation' that recognises its safeguarding role for gender equality when the notwithstanding clause is invoked. This generous interpretation

1260 Between 1982 to 1992 there were 15 notwithstanding clause invocations; 1993 to 2002 there were 3 notwithstanding clause invocations; 2003 to 2012 there were 0 notwithstanding clause invocations; and 2012 to 2022 there were 6 notwithstanding clause invocations. See chapter 4.

1261 See chapter 4.

1262 *The Land Planning and Development Act*; *SGEU Dispute Settlement Act*.

1263 'Bill 21' (*CCLA*) https://ccla.org/major-cases-and-reports/bill-21/ accessed 28 May 2022; 'LEAF Opposes Quebec's Bill 21 Which Will Exclude Muslim Women From Full Participation In Quebec Society' (*LEAF*) https://www.leaf.ca/news/leaf-opposes-quebecs-bill-21-which-will-exclude-muslim-women-from-full-participation-in-quebec-society/ accessed 28 May 2022.

1264 *Edwards* (n 653) 107.

supports a progressive interpretation that evolves Charter rights to meet the contemporary moment. It also does not overshoot the purpose of section 28. As I have argued, the structural design and legislative history of section 33 support a purposive interpretation that recognises the substantive protections embedded in section 28 when the notwithstanding clause is invoked. Thus, the dominant methods of *Charter* interpretation – the purposive, progressive, and generous approaches – all support a finding that section 28 includes substantive protections for gender equality in the context of section 33.

10.2 Applying Section 28 to a Notwithstanding Clause Invocation

Applying dominant constitutional interpretation approaches, I argue that section 28 includes substantive protections for gender equality in the context of section 33. Thus, section 33 can legitimately be used to restrict equality rights under section 15(1) but section 28 provides new avenues for restricting the federal or provincial government's ability to limit women's equality. Although delineating the full scope of the gender equality protections under section 28 is beyond the scope of this thesis, I argue that at a minimum the section 15(1) protections for the enumerated ground of sex are protected by section 28. The dominant approaches to *Charter* interpretation, particularly the purposive approach, support an interpretation that section 28 was designed to transplant the gender equality protections in section 15(1) to another *Charter* provision that would be applicable between 1982 and 1985[1265] and fall outside the scope of the notwithstanding clause.

Based on this purposeful design, I propose an application of section 28 that is uniquely available in the context of a section 33 invocation. I argue that when there is a notwithstanding clause act or provision that potentially impacts gender equality, the section 15(1) discrimination protections on the enumerated ground of sex are transplanted to section 28. Thus, any claimed limitation on the notwithstanding clause by way of section 28 would have

1265 Section 15 did not come into force until three years after the passing of the Charter.

to apply the applicable standard from section 15(1). If the claimants establish that the notwithstanding clause act or provision fails both the *prima facie* section 15(1) analysis and the justificatory section 1 analysis, then the notwithstanding clause application to the extent that it impacts gender equality will be struck.

The jurisprudence on section 15 is complex and often referred to as one of 'continual reinvention'.[1266] For a notwithstanding clause application that undermines gender equality to be barred under section 28, the claimants must establish the section 15(1) claim under the current leading authorities in *Fraser v Canada* and *R v Sharma*.[1267] For example, under this proposed interpretation the Quebec applications of the notwithstanding clause to differential pension schemes could be set aside by section 28 of the *Charter*. Quebec in a serious of currently in force notwithstanding clause acts[1268] have established pensions schemes whose conditions vary based on gender. Under my proposed approach to section 28, it is possible that the creation of overtly distinct pension schemes based on gender is a *prima facie* infringement of section 15(1). The acts almost certainty creates a distinction on the enumerated ground of sex, but the claimants may face difficulty in establishing that the advantages offered for female-identifying workers has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

Alternatively, Quebec's 2019 notwithstanding clause invocation in the *Laicity of the State Act* will face more challenges in establishing a section 15(1) violation on the basis of sex – achieving section 28 protection to limit the application of the notwithstanding clause. The *Laicity of the State Act* is designed as a secular law that is gender neutral – applied equally to

1266 Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19.

1267 To establish a *prima facie* section 15(1) violation, the claimant must meet the two-part test. First, that the impugned law creates a distinction based on an enumerated or analogous ground, and second, that this distinction has the effect of reinforcing, perpetuating, or exacerbating disadvantage. See *Fraser* (n 549); *R v Sharma*, 2022 SCC 39.

1268 *An Act Respecting the Civil Service Superannuation Plan*; *An Act Respecting the Teachers Pension Plan*; *An Act Respecting the Government and Public Employees Retirement Plan*; *Act Respecting the Pension Plan of Certain Teachers*; *An Act Respecting the Pension Plan of Management Personnel*.

men, women, and non-binary individuals. Although the claimants can likely establish a section 2(a) (freedom of religion), 2(b) (freedom of expression) and/or section 15(1) enumerated grounds of religion infringements, they will face more challenges establishing a section 15(1) claim on the enumerated ground of sex. Relying on evidence of disproportionate impacts of the law on Muslim women,[1269] the claimants may be able to establish a section 15(1) *prima facie* infringement on the basis of adverse impact discrimination.[1270] If established the section 15 claim is established and the government fails to meet its burden under section 1, the courts may set aside the notwithstanding clause applicability within the *Laicity of the State Act* to the extent that it infringes gender equality rights under the *Charter*.

The full scope of protections offered by section 28 of the *Charter* from the notwithstanding clause require further exploration. As the jurisprudence on section 15(1) of the Charter evolves, so too will the scope of protection that section 28 provides to gender equality.

10.3 Conclusion

To conclude, I argued that any use of the notwithstanding clause that seeks to immunise a legislative provision that may have a discriminatory purpose or effect on the ground of sex or gender would not be protected by a reliance on section 33 of the *Charter*. I make this argument based on a textual analysis of sections 28 and 33 of the *Charter*, a review of the section 28 jurisprudence and an application of the originalist, purposive, and progressive interpretive approaches. I argued that these interpretative approaches bar the use of the notwithstanding clause to immunise a legislative provision that may have a discriminatory purpose or effect on the ground of sex or gender.

1269 The Quebec Superior Court recognized the disproportionate and unique harms caused to Muslim women in the Laicity of the State Act. See *Hak QCSC 2021* (n 425) [67].

1270 Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground. See *Fraser* (n 549) [30]; *Sharma* (n 1251) [29].

CHAPTER ELEVEN

11. The Relationship Between Sections 1 and 33 of the Charter

This chapter focuses on the relationship between sections 1 and 33 of the *Charter*. I make two arguments. First, section 1 cannot constrain the application of section 33. Second, the interplay between sections 1 and 33 of the *Charter* relates to the practical application of my proposed interpretive approach to the notwithstanding clause.

11.1 Section 1 of the *Charter* as a Constraint on the Notwithstanding Clause

In the *City of Toronto* SCC hearings, the intervenor the International Commission of Jurists Canada (ICJC) presented what they deemed 'the proper interpretation of section 33 of the Charter'.[1271] This ICJC 'proper interpretation' of section 33 argued that an invocation of the notwithstanding clause requires 'the state [to] demonstrate an emergency or an overwhelming public purpose to impose a provision despite its […] breach of a Charter-protected right'.[1272] This ICJC interpretive theory relied on two arguments. First, the ICJC argued that the dominant purposes of *Charter* interpretation require the courts to give *Charter* rights a large, liberal, and purposive interpretation that should result in a more restrictive interpretation to section 33.[1273] Second, the ICJC asserted that the unwritten constitutional principles of the rule of law, democracy, and the protection of minorities supports their argument that section 1 requires emergency justification for the invocation of section 33.[1274] The ICJC argued that under section 1 of the *Charter*, the courts must evaluate each invocation of the notwithstanding clause and determine whether it meets a substantive standard of emergency use. During the hearing, some judges expressed scepticism on this proposed interpretative approach to the notwithstanding clause. Justice Brown, for example, immediately asked 'and where do you find that

1271 *City of Toronto SCC Transcript* (n 1114) [69].
1272 ibid [69]–[70].
1273 ibid [69].
1274 ibid [70].

[interpretation] in the text of section 33?'.[1275] He went on to criticise the ICJC for the lack of textual basis supporting their claim.

Although some judges at the *City of Toronto* SCC hearing were dismissive of such an interpretation of sections 1 and 33, the ICJC's claim is not novel in the academic literature. Several scholars have endorsed a similarly restricted interpretation of the notwithstanding clause since its inclusion in the *Charter*. Similar to the ICJC, these scholars have argued that section 1 of the *Charter* has additional requirements that must be met to justify the invocation of section 33. Although there are divergences on the justificatory standards that should be met, the general argument is that section 1 applies to the whole *Charter*, including the notwithstanding clause.[1276] In all SCC cases that involve *Charter* rights, if a rights violation is identified, the court must then engage in the section 1 analysis. The SCC has developed the two-part *Oakes test* to evaluate whether the rights violation 'can be demonstrably justified in a free and democratic society'.[1277] The logic purported by some notwithstanding clause scholars is that the courts must develop a set of section 1 criterion, similar to yet distinct from the *Oakes* test, to apply to each invocation of section 33.[1278]

Beyond this general approach, the theories on the specific criteria for a section 1 analysis of a notwithstanding clause invocation vary. Grover argues from the foundational premise that the 'state's use of the override (s.33) clause is […] constitutional only when in accord with s.1 […] where it can "be demonstrably justified in a free and democratic society"'.[1279] Grover asserts that section 1 of the *Charter* limits the notwithstanding clause through the principles of democracy and the rule of law. She puts forward that 'it is not possible constitutionally for a government to override [through section 33] a right or freedom under the

1275 ibid.

1276 *Canadian Charter of Rights and Freedoms* s 1.

1277 ibid.

1278 Hogg, *Constitutional Law of Canada* (n 615) 844.

1279 Sonja Grover, 'Democracy and the Canadian Charter notwithstanding Clause: Are They Compatible?' (2005) 9 Intl J HR 479.

Canadian Charter without justifying the impact anticipated as being consistent with the democratic way of life'.[1280] Grover draws on the *Charter* preamble, an analysis of sections 1 and 33, and the history of the framers' intent to argue that all aspects of government action, including the use of the notwithstanding clause, must be accountable under the rule of law.[1281] She concludes by arguing that section 1 can be interpreted to limit a section 33 invocation.

Grover argues that section 1 can limit the operation of the notwithstanding clause. I, however, disagree, and argue that Grover's theory is not tenable. I conclude that section 1 cannot limit the application of section 33 through three arguments. First, a textual analysis of sections 1 and 33 is open textured as to the interactions between these two provisions. Second, the legislative history is indeterminate on whether section 1 can limit the application of section 33. Third, an analysis of the section 33 and *Charter* structure as a whole can be interpreted to bar a limitation of section 33 through section 1.

11.1.1 A Textual Analysis of Sections 1 and 33 of the Charter

The text of both section 1 and section 33 is ambiguous as to the notwithstanding clause's relationship with section 1. Section 1 states that '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'. There is no mention of section 1 in the text of section 33.[1282] There is no indication in the text of section 33 that its invocation should fall under or outside the purview of section 1. Scholars such as Grover relied on this textual gap to argue that it establishes that 's.33 did not, and could not, neutralise the operation of s.1 of the Charter'.[1283] Instead, I argue there are other elements of the *Charter* that point to section 33 falling outside the purview of section 1.

1280 ibid 481.

1281 ibid 480–481.

1282 *Canadian Charter of Rights and Freedoms* s 33.

1283 Grover (n 1238) 481.

11.1.2 The Legislative History of Sections 1 and 33 of the Charter

The legislative history of the notwithstanding clause is similarly indeterminate on the relationship between sections 1 and 33 of the *Charter*. In making her argument in favour of a section 1 application to the notwithstanding clause, Grover draws on a historical analysis of the intent of the drafters.[1284] Relying almost exclusively on statements made by former Minister of Justice Jean Chrétien, the author infers that the drafters of the *Charter* intended for there to be democratic limitations on the notwithstanding clause and that these democratic limitations included those set by section 1.[1285] My own analysis of the legislative history of the notwithstanding clause, however, leads to a different conclusion.

In the drafting stages of the *Charter*, section 1 underwent significant changes during the Special Joint Committee on the Constitution.[1286] Nearly all the feedback on section 1 provided by civil society organisations was critical of the original draft of section 1, with at least nineteen groups directly attacking its inclusion.[1287] The criticisms of section 1 centred largely on its use of broad language, which would provide greater latitude for governments to justify a rights violation. The civil society groups deemed section 1 the 'Mack truck clause' because 'it was so broad you could drive your truck through it'.[1288] The government, led by Justice Minister Chrétien, became concerned that these criticisms of section 1 could undermine public support for the *Charter*. To avoid this development, Chrétien announced reforms to the *Charter*, including the rewriting of section 1.[1289] The amended version of section 1 presented by Chrétien underwent no further changes and was included in the final draft of the *Charter*.

1284 Grover (n 1238).
1285 ibid 480–481.
1286 Dodek (n 38) 83.
1287 ibid.
1288 ibid.
1289 ibid 65.

The proceedings of the Special Joint Committee are relevant to the current analysis because it expands on how the drafters intended the reasonable limits clause to be applied. In the committee proceedings, government representatives provided limited guidance on how section 1 should be applied and emphasized that they expected the courts to define the parameters of section 1. During the Special Joint Committee proceedings, Justice Minister Chrétien reaffirmed this expectation in an exchange with NDP MP Mr. Svend Robinson. Robinson asked: 'who would determine what is generally accepted as a limitation on the rights and freedoms and what test would they apple? Would it be a numerical test?'.[1290] In response, Chrétien answered: 'it will be the court who will decide. I understand the courts to operate, the precedents will determine the next move. It will be the court because we are not giving them other tests than these'.[1291] The commentary provided by Chrétien during the Special Joint Committee demonstrates the *Charter* drafters' intent that they expected the scope of section 1 rights limitations to be crafted by the courts.

The drafters of the *Charter* provided limited guidance on section 33's implementation in the context of section 1 of the *Charter*. At the time of the Special Joint Committee, the draft of the *Charter* did not include the notwithstanding clause.[1292] As a result, there was no significant discussion at the committee on the notwithstanding clause and no consideration for its possible interaction with section 1. Beyond the Special Joint Committee, there is no commentary in the historical records of the intention of the drafters on the expected interaction between section 1 and section 33. In the limited commentary on the notwithstanding clause provided by Chrétien and Trudeau Senior in the House of Commons, neither politician mentioned its relation to section 1,[1293] nor is there any inclusion of guidance on the interaction

1290 Special Joint Committee on the Constitution 1980-1981, Proceedings, Issue 3, Volume 27'.

1291 ibid.

1292 Dodek (n 38) 63.

1293 For a summary of *Charter* drafter commentary on the notwithstanding clause, see Roy and Brosseau (n 1).

between these two *Charter* clauses in the notwithstanding clause factsheet provided to the House of Commons after the finalisation of the 1982 Constitution draft.[1294]

11.1.3 An Analysis of the Charter as a Whole

Based on the indeterminate nature of the *Charter* text and legislative history, I analyse the structure of the *Charter* as a whole. The process for evaluating *Charter* claims is a two-step test, which first determines whether a *Charter* right has been infringed and then evaluates whether this infringement was done in a manner that can be justified under section 1.[1295] Under the *Charter*, this section 1 analysis is triggered only if the first step of this test is met.

The two-step process for evaluating the constitutionality of government legislation or actions under the *Charter* is relevant to evaluating the relationship between the notwithstanding clause and section 1. The mechanism of the notwithstanding clause operates in a unique way. The notwithstanding clause permits the legislature to declare legislation or parts of legislation to operate notwithstanding sections 2 and 7 to 15 of the *Charte*r.[1296] In doing so, the notwithstanding clause allows an Act or a provision to operate notwithstanding a declaration of invalidity, even if the courts have determined that a *Charter* right was infringed in a way that is not 'demonstrably justified' under section 1.[1297] The section 1 analysis is triggered only when a right is infringed. This *Charter* structure can be interpreted to create a link between *Charter* rights and section 1. When the notwithstanding clause allows an Act or provision to operate notwithstanding sections 2 and 7 to 15 of the *Charter*, this includes the section 1 analysis that is linked to the infringement. A section 1 analysis does not apply unless it is linked to a listed *Charter* right or freedom.

1294 'Factsheet: The Notwithstanding or Override Clause as Applied to the Charter of Rights and Freedoms, Document 800-15/022' (n 205).

1295 *Oakes* (n 684).

1296 *Canadian Charter of Rights and Freedoms* s 33(1).

1297 ibid s 1.

This argument is similar to that made by Hogg. Hogg is critical of the claims that section 1 can limit the application of section 33. He bases his analysis on the design and operation of the notwithstanding clause.[1298] Hogg rejects the claim that section 1 can limit the application of section 33 by arguing that there is a link between the rights guaranteed by the *Charter* and the section 1 limitation. He reasoned that:

> It is true that s.33 does not expressly state that s.1 of the Charter can be overridden. However, it is implicit in s.33 that, once a Charter provision has been overridden by an express declaration in a statute, the Charter provision has no application whatsoever to the statute, and therefore there is no need for any showing of a reasonableness or demonstrable justification under s.1.[1299]

Hogg draws on the SCC decision in *Ford* as another source of authority.[1300] He notes that in *Ford*, the SCC evaluated the section 33 temporal suspension of section 2(b) of the *Charter* and deemed its non-retroactive application to be permissible.[1301] In *Ford*, the SCC first determined that section 2(b) had been infringed by the *Charter of the French Langua*ge[1302] in a way that could not be justified under section 1. In their section 33 analysis, the SCC did not apply a section 1 analysis to the invocation notwithstanding clause.[1303] Based on this reasoning, Hogg concludes that section 1 cannot be applied to the notwithstanding clause.

My analysis of the text and operation of the notwithstanding clause aligns with that of Hogg. A section 1 analysis can only be triggered after a rights violation is established. The notwithstanding clause creates an exceptional circumstance whereby legislatures may declare legislation to temporarily operate notwithstanding certain *Charter* rights. Based on this design of section 33 and the *Charter* structure as a whole, I argue that if the notwithstanding clause

1298 Hogg, *Constitutional Law of Canada* (n 615) 844.

1299 ibid.

1300 *Ford* (n 18).

1301 Hogg, *Constitutional Law of Canada* (n 615) 844.

1302 *Charter of the French Language.*

1303 *Ford* (n 18).

allows a statute or a part of a statute to operate notwithstanding a *Charter* right, this extends to section 1 which operates in tandem with the *Charter* rights.

11.2 Section 1 of the Charter and my Proposed Interpretive Approach to the Notwithstanding Clause

The interplay between sections 1 and 33 of the *Charter* relates to the practical application of my proposed notwithstanding clause interpretive approach. Through my interpretive approach I have argued that the application of section 33 should be limited in four ways. First, the omnibus application of the notwithstanding clause should be prohibited. Second, the notwithstanding clause should not be permitted to set aside freedom of expression essential to the democratic system that is safeguarded by the unwritten constitutional principle of democracy. Third, the notwithstanding clause cannot be employed to permit torture, a recognised customary international law *jus cogens* norm. Fourth, section 28 of the *Charter* bars the use of the notwithstanding clause to undermine gender equality.

Section 1 of the *Charter* is relevant to my argument that substantive limits can be placed on section 33. Recognising that my proposed interpretive approach may be criticised for hollowing out the authority granted to the legislatures by section 33, I argue that section 1 tempers my narrowing of the notwithstanding clause application. My proposed interpretive approach on the unwritten constitutional principle of democracy, the *jus cogens* prohibition against torture, and gender equality only limits the applicability of the notwithstanding clause. My interpretive arguments do not bar a government from justifying a rights infringement under section 1 of the *Charter*. Instead, I argue that a legislature can only limit these rights of freedom of expression essential to the democratic system, torture, and gender equality if the infringement is 'demonstrably justified in a free and democratic society'.[1304] Thus, my argument is not that some *Charter* rights can never be limited, but rather that a select few rights

1304 *Canadian Charter of Rights and Freedoms* s 1.

listed under section 33(1) of the *Charter* require section 1 justification to be restricted. The consideration of the interplay of section 1 and 33 reinforces that my argument is only that carte blanche limitations in some areas of rights are not permissible.

An example of the interplay between sections 1 and 33 within my proposed interpretive approach is demonstrated through a consideration of anti-vaccination speech. The Covid-19 pandemic has caused an unprecedented rise in anti-vaccination speech both in public and online spaces. Notable examples include anti-vaccination protestors who have held demonstrations outside of hospitals leading to disruptions in accessing healthcare.[1305] In 2020, the New Brunswick government attempted to use the notwithstanding clause in response to an anti-vaccination coalition who mobilised against their proposed school immunisation requirement amendments.[1306]

Under my proposed interpretive approach, a government attempt to broadly bar all anti-vaccination speech using the notwithstanding cause would be prohibited by the unwritten constitutional principle of democracy. Anti-vaccination speech is democratic expression because it directly relates to government public health policy and is relevant to public discussions on government pandemic responses. Thus, my proposed interpretive approach would apply the unwritten constitutional principle of democracy to bar the use of the notwithstanding clause to temporarily suspend anti-vaccination protestors section 2(b) *Charter* rights.

My proposed interpretive approach, however, does not completely bar the government from limiting democratic expression. My interpretive approach bars the limitation of democratic expression through the notwithstanding clause but continues to permit the

1305 Jabakhanji Sara, 'Politicians, Medical Groups Condemn Protests Outside Hospitals across Canada' *CBC News Toronto* (13 September 2021) https://www.cbc.ca/news/canada/toronto/covid-hospital-protests-canada-1.6173437 accessed 28 May 2022.

1306 Bill 11, *An Act Respecting Proof of Immunisation* (n 16); Poitras, 'New Brunswick Uses notwithstanding Clause in 2nd Bid to Pass Vaccination Bill' (n 493).

government to justify the expression limitations under section 1 of the *Charter*. Consequently, a federal, provincial, or territorial legislature can still restrict anti-vaccination speech if they make a case that such a limitation could be demonstrably justified under section 1 through the analytical *Oakes* framework. In such a circumstance, a government likely could not justify a broad prohibition of all anti-vaccination speech but might justify a more targeted limitation that prohibits anti-vaccination protests outside of hospitals or vaccination clinics. This hypothetical demonstrates that my proposed interpretive approach to the notwithstanding clause is tempered by section 1 of the *Charter*.

11.3 Conclusion

In sum, I examined the relationship between sections 1 and 33 of the *Charter*. I made two arguments. First, section 1 cannot constrain the application of section 33. Second, the interplay between sections 1 and 33 of the *Charter* is relevant to the practical application of my proposed interpretive approach to the notwithstanding clause. My examination of a hypothetical application of the notwithstanding cause to limit anti-vaccination speech demonstrates how section 1 tempers the narrowing of section 33 through my proposed interpretive approach.

CHAPTER TWELVE

12. Conclusion: A Crossroads Moment for the Notwithstanding Clause

In this thesis I proposed a new interpretive approach to the notwithstanding clause. I argued that the courts should place substantive limits on the application of the notwithstanding clause. I proposed four areas where the application of the notwithstanding clause should be limited. First, an omnibus application of the notwithstanding clause should be prohibited. Second, the unwritten constitutional principle of democracy should limit the applicability of the notwithstanding clause to freedom of expression essential to the democratic system. Third, the notwithstanding clause should not be employed to permit torture because it is a customary international law *jus cogens* norm. Fourth, section 28 of the *Charter* safeguards gender equality from the notwithstanding clause.

Before presenting my interpretive approach, I reviewed the history of the notwithstanding clause and developed a comprehensive catalogue of its political uses between 1982 and 2022. Through my doctrinal analysis of the notwithstanding clause political uses, I identified twenty-four pieces of legislation that included the notwithstanding clause at the point of tabling in the legislature. Of these twenty-five invocations, only eighteen were promulgated and effective. The only governments that have successfully passed effective notwithstanding clause legislation are Quebec and Ontario. I conducted a comparative analysis of the notwithstanding clause invocations from 1982 to 2018 and 2018 to 2022. I argued that the seven post-2018 invocations of the notwithstanding clause represent a crossroads moment for the notwithstanding clause. The political use of the notwithstanding clause is potentially shifting from being a secessionist tool used by Quebec towards being a political tool used by several Canadian provinces in an increasingly polarised country. My argument that there is a shift in political uses of the notwithstanding clause was based on an examination of the geography, frequency, timing, and thematic application of section 33.

After an analysis of the political uses of the notwithstanding clause, I considered the existing jurisprudence on its interpretation. Since its entrenchment in the *Charter*, the courts have been largely silent on the notwithstanding clause. The leading decision in *Ford v Quebec* held that the courts should adopt a 'form-only' interpretive approach to the notwithstanding clause.[1307] Through this, the SCC held that the omnibus application of the notwithstanding clause is constitutional.[1308] The only SCC limitation applied to section 33 was to prohibit its retroactive application.[1309] *Ford* remains the defining precedent on judicial interpretation of section 33.

I argued that the SCC's 'form-only' approach to the notwithstanding clause should be revisited. My critique of *Ford* was three-fold. First, the reasoning that justified the adoption of the 'form-only' approach to the notwithstanding clause was based on an erroneous textual interpretation of section 33. Second, the SCC failed to apply the established methods of *Charter* interpretation. Third, the outcome of *Ford* may have been influenced by the existing political climate and the threat of Quebec secession.

Based on this critique, I argue that *Ford* should be revisited and propose my own theory of a new interpretative approach to the notwithstanding clause. My proposed interpretive approach recognises that the notwithstanding clause plays an important role as a safety valve for the Canadian Constitution that is very difficult to amend.[1310] The section 33 safety valve provides a constitutional tool for Canadian institutions to avoid the pressure-cooker-like environments seen in some strong-form judicial review jurisdictions. I argued, however, that

1307 *Ford* (n 18) [33].

1308 See *An Act Respecting the Constitution Act, 1982*; *Ford* (n 18).

1309 *Ford* (n 18) [35]–[36] .

1310 Canada's constitutional amendment formula and requirements are in sections 38 to 42 of the *Constitution Act, 1982*. Generally, for any major amendments to the Constitution requires the consent of seven of ten provinces representing over fifty percent of the Canadian Constitution and resolutions from the House of Commons and Senate. The consent of the provinces must be obtained by a resolution supported by the majority of the legislature. Due to these requirements, among others, the Constitution of Canada is considered difficult to amend by constitutional scholars. For further analysis, see Russell, 'The End of Mega Constitutional Politics in Canada' (n 22); Monahan, 'The Sounds of Silence' (n 22); Heard and Swartz (n 22); Dawson (n 22).

in light of the post-2018 invocations of the notwithstanding clause, the form-only approach should be revisited and a new interpretative approach to the notwithstanding clause should be developed.

My interpretive approach to the notwithstanding clause sought to restrict its use, while still allowing it to be invoked as a safety valve by legislatures. I argued that the notwithstanding clause should be interpreted in a manner that prevents it from being invoked to distort or undermine other provisions of the Constitution that fall outside of sections 2 and 7 to 15 of the *Charter*, as well as the underlying constitutional framework. My proposed interpretive approach seeks to ensure that the notwithstanding clause cannot be employed as a trojan horse to threaten the entire constitutional structure and fundamental tenets of democracy.

Though my proposed interpretive approach, I presented four limitations that narrow the scope of the notwithstanding clause's application. I develop these four non-exhaustive limits on the notwithstanding clause through the application of ordinary principles of Canadian constitutional interpretation. The four proposed limits all relate to each other by being drawn from ordinary interpretative approaches. However, there is no underlying unifying principle and their source varies.

First, I argued that the SCC erred in their interpretation of the omnibus application of the notwithstanding clause. Through a textual and purposive analysis, I argued that the omnibus application of the notwithstanding clause through a single statute should be prohibited. If a legislature seeks to apply the notwithstanding clause to multiple statutes each application must undergo the democratic legislative processes.

Second, the application of the notwithstanding clause to freedom of expression should be limited by the unwritten principle of democracy. Although per section 33, the notwithstanding clause can temporarily set aside the effects of section 2 of the *Charter*, I argued that this authority should be limited as it relates to freedom of expression and political

processes. My argument was presented in three parts. First, the SCC in *Ford* already applied unwritten principles to limit the application of the notwithstanding clause when they prohibited its retroactive application.[1311] Second, the Duff Doctrine implied bill of rights and more recently affirmed SCC case law recognises an unwritten principle of democracy and freedom of expression that flows from the *Constitution Act 1867*. Finally, the structural design of the notwithstanding clause and legislatures support an interpretation that uses of section 33 cannot undermine democratic elections.

Third, section 33 should not be permitted to subvert customary international law *jus cogens* norms, such as torture. Although the text of section 33 is unambiguous as to its application to sections 2 and 7 to 15 of the *Charter*, the text is silent on its relationship with international law. Among Canada's international legal obligations, customary international law are norms expected of States regardless of whether they committed to these human rights obligations through treaties.[1312] A subset of customary international law are universal *jus cogens* norms.[1313] *Jus cogens* norms apply to all States and cannot be 'derogated from'.[1314] Within the limited category of *jus cogens* norms are prohibitions against genocide, crimes against humanity, slavery, and cruel, inhumane, and degrading treatment (also known as torture).[1315] In my analysis, I critically analysed the intersection of the notwithstanding clause and international law to argue that the notwithstanding clause cannot suspend rights that are also *jus cogens* norms, such as torture.

Fourth, I argued that section 28 of the *Charter* immunizes gender equality protections from the notwithstanding clause.[1316] The drafters of the final draft of the *Charter* first applied

1311 *Ford* (n 18) [35]–[36].

1312 Currie (n 28) 160–193.

1313 ibid.

1314 *Kazemi* (n 34) 183.

1315 *Nevsun* (n 31) [103].

1316 *Canadian Charter of Rights and Freedoms* s 28.

the notwithstanding clause to sections 2, 7 to 15, and 28 of the *Charter*.[1317] Following outcry by women's rights leaders, the House of Commons unanimously voted to amend the draft to remove the applicability of the notwithstanding clause to section 28 of the *Charter*.[1318] I relied on a textual, purposive, and progressive interpretive approach to argue that the notwithstanding clause cannot be applied to shield gender discrimination from *Charter* scrutiny.

I concluded by examining the relationship between sections 1 and 33 of the *Charter*. I made two arguments. First, section 1 cannot constrain the application of section 33. Second, the interplay between sections 1 and 33 of the *Charter* is relevant to the practical application of my proposed interpretive approach to the notwithstanding clause. I examined a hypothetical application of the notwithstanding cause to limit anti-vaccination speech to argue that section 1 tempers the narrowing of section 33 through my proposed interpretive approach.

When I first began researching the notwithstanding clause in 2018, there had been no new invocations between 2002 and 2018. My interest in writing on the notwithstanding clause responded to three back-to-back notwithstanding clause invocations in 2018 by Saskatchewan,[1319] Ontario,[1320] and Quebec[1321] respectively. Throughout the course of my research the notwithstanding clause has been invoked an additional four times, bringing the total post-2018 invocations to seven.[1322] Litigation has been commenced to challenge the notwithstanding clause in three of these post-2018 invocations.[1323] In the next few years, the

1317 Dodek (n 38) 77–78.

1318 Debates 24 November, 1981 (n 39) 13345.

1319 *The School Choice Protection Act.*

1320 Bill 31, *the Efficient Local Government Act* (n 14).

1321 *Laicity of the State Act.*

1322 Bill 11, *An Act Respecting Proof of Immunisation* (n 16); *Protecting Elections and Defending Democracy Act*; Bill 96, *An Act Respecting French, the Official and Common Language of Québec* (n 15).

1323 Montpetit (n 417); 'CCLA Statement on Notwithstanding Clause' (n 567); 'Legal Challenge against Bill 96 Coming, Montreal Lawyer Says' (n 457).

SCC will likely hear its first challenges to a notwithstanding clause invocation since *Ford* in 1988.[1324]

My research proposing a new notwithstanding clause interpretive approach comes at a crossroads moment for section 33. This crossroads moment for the notwithstanding clause is two-fold. First, the notwithstanding clause is undergoing a potential shift in political use. There is an increased use of the notwithstanding clause outside of Quebec and there is a rise in thematic application of the notwithstanding clause to divisive social and democratic issues. Second, the notwithstanding clause is also at a crossroads moment within judicial review. In the coming years, the SCC will likely consider litigation challenging notwithstanding clause invocations and have the opportunity to revisit the form-only approach in *Ford*. My thesis sought to respond to both elements of this crossroads moment of the notwithstanding clause. I have sought to analyse and respond to the shift in political uses, as well as develop a proposed notwithstanding clause interpretation to be applied by the courts. My proposed interpretive approach sought to balance the Canadian constitutional structure and provide the federal, provincial, and territorial governments with a *Charter* safety valve. The four proposed limitations on the notwithstanding clause do not encompass an exhaustive list. Instead, I seek to prompt further analysis on the role of judicial interpretation in response to notwithstanding clause invocations. The adoption of the *Charter* in 1982 was a watershed moment in Canadian constitutional history that committed Canadian democracy to the protection and promotion of fundamental rights. The notwithstanding clause is a key element of the *Charter* seeking to build a bridge between rights protection and democracy. This thesis has argued that greater attention needs to be given to the proper interpretation of section 33 if the commitment to rights as a core element of Canadian democracy is to be maintained.

1324 *Ford* (n 18).

13. APPENDIX: TABLES AND FIGURES

Table 1: Comparative Uses of the Notwithstanding Clause

Jurisdiction	Year	Legislation and Section	Text of Notwithstanding Clause
Canada	1960	*Canadian Bill of Rights*, section 2.	Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to [list from 2(a) to 2(g) the rights in the bill of rights].
Alberta	1972	*Alberta Bill of Rights*, section 2.	Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding The Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.
Quebec	1975	*The Quebec Charter of Human Rights and Freedoms*, section 52.	No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.
Saskatchewan	1979	*The Saskchewan Human Rights Code*, section 44.	Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

Canada	1982	*The Canadian Charter of Rights and Freedoms*, section 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. (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).
Ontario	1982	*Ontario Human Rights Code*, section 47(2).	Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.
Israel	1994	*Basic Law: Freedom of Occupation*, section 8.	A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein.
Victoria (Australia)	2006	*Charter of Human Rights and Responsibilities Act*, section 31.	In addition, this Charter; (a) enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision.

Table 2: Renewals of the Notwithstanding Clause Invocations

Original Invoking Legislation	First Renewal	Second Renewal	Third Renewal	Fourth Renewal	Fifth Renewal	Sixth Renewal	Seventh Renewal
An Act Respecting the Pension Plan of Certain Teachers (1986), QC – An Act Respecting the Government and Public Employees Retirement Plan (1986), QC – An Act Respecting Teachers Pension Plan (1986), QC – An Act Respecting the Civil Service Superannuation Plan (1986), QC	An Act to Amend Various Legislative Provisions Respecting Pension Plans in the Public and Parapublic Sectors, RSQ 1991, c 14 (Quebec) s 1.	An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision, RSQ 1996, c 10 (Quebec) s 5.	An Act Respecting the Pension Plan of Management Personnel, RSQ 2001, c 31 (Quebec) s 235.	An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions, RSQ 2004, c 39 (Quebec) s 78.	An Act to Amend Various Pension Plans in the Public Sector, RSQ 2009, c 56 (Quebec) s 2.	An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions, RSQ 2014, c. 11 (Quebec) s 1.	An Act Amending Certain Acts Establishing Public Sector Pension Plans, RSQ 2019, c 25 (Quebec) s 1. (Still in force)
An Act Respecting the Conseil supérieur de l'Éducation (1986), QC – An Act Respecting the Ministère de l'Éducation, 1986 (s. 12).	Education Act, RSQ 1988, c C-84 (Quebec).	An Act Respecting Certain Declarations of Exception in Acts Relating to Education, RSQ 1994, c 11 (Quebec) s 1.	An Act Respecting Certain Declarations of Exception in Acts Relation to Education, RSQ 1999, c 28 (Quebec) s 1.	An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters, RSQ 2000, c 24 (Quebec) s 16. (Repealed)	X	X	X

The Education Act for Cree, Inuit and Naskapi Persons (1986), QC	Education Act, RSQ 1988, c C-84 (Quebec).	An Act Respecting Certain Declarations of Exception in Acts Relating to Education, RSQ 1994, c 11 (Quebec) s 1.	An Act Respecting Certain Declarations of Exception in Acts Relation to Education, RSQ 1999, c 28 (Quebec) s 1.	An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters, RSQ 2000, c 24 (Quebec) s 16.	An Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field, RSQ 2005, c 20 (Quebec) s 11. (Expired in 2008)	X	X
Education Act (1988), QC	An Act Respecting Certain Declarations of Exception in Acts Relating to Education, RSQ 1994, c 11, s 54.	An Act Respecting Certain Declarations of Exception in Acts Relation to Education, RSQ 1999, c 28, s 1.	An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters, RSQ 2000, c 24, s 44.	An Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field s 11. (Expired 2008)	X	X	X
An Act Respecting School Elections (1989), QC	An Act Respecting Certain Declarations of Exception in Acts Relating to Education, RSQ 1994, c 11, s 1. (Expired in 1999)	X	X	X	X	X	X
An Act Respecting the Pension Plan of Management Personnels (2001), QC	An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions, RSQ 2004, c 39, s 272.	An Act to Amend Various Pension Plans in the Public Sector, RSQ 2009, c 56, s 23.	An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions, RSQ 2014, c 11, s 15.	An Act Amending Certain Acts Establishing Public Sector Pension Plans, RSQ 2019, c 25, s 9. (Still in force)	–	–	–

Table 3: Promulgated and Effective Notwithstanding Clause Legislation

	Legislature	Year	Act Title
1.	Quebec	*Enacted:* 1982[1325] *Expired:* 1987[1326]	*An Act Respecting the Constitution Act, 1982*
2.	Quebec	*Enacted:* 1986[1327] *Renewed:* 1991, 1996, 2001, 2004, 2009, 2014, 2019[1328] (Still in force)	*Act Respecting the Pension Plan of Certain Teachers* (section 62)
3.	Quebec	*Enacted:* 1986[1329] *Renewed:* 1991, 1996, 2001, 2004, 2009, 2014, 2019[1330] (Still in force)	*An Act Respecting the Government and Public Employees Retirement Plan* (section 223.1)
4.	Quebec	*Enacted:* 1986[1331] *Renewed:* 1991, 1996, 2001, 2004, 2009, 2014, 2019[1332] (Still in force)	*An Act Respecting the Teachers Pension Plan* (section 78.1)

1325 *An Act Respecting the Constitution Act, 1982*.

1326 Hogg, *Constitutional Law of Canada* (n 615) 879.

1327 *Act Respecting the Pension Plan of Certain Teachers*, CQLR, c R-9.1 (Quebec) was enacted through *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic* s 62.

1328 The notwithstanding clause renewals were enacted through: *An Act to Amend Various Legislative Provisions Respecting Pension Plans in the Public and Parapublic Sectors*, RSQ 1991, c 14 (Quebec) s 1; *An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision*, RSQ 1996, c 10 (Quebec) s 5; *An Act Respecting the Pension Plan of Management Personnel* s 235; *An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions*, RSQ 2004, c 39 (Quebec) s 78; *An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions*, RSQ 2014, c. 11 (Quebec) s 1; *An Act to Amend Various Pension Plans in the Public Sector*, RSQ 2009, c 56 (Quebec) s 2; *An Act Amending Certain Acts Establishing Public Sector Pension Plans*, RSQ 2019, c 25 (Quebec) s 1.

1329 *An Act Respecting the Government and Public Employees Retirement Plan* was enacted through *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic* s 87.

1330 The notwithstanding clause renewals were enacted through: *An Act to Amend Various Legislative Provisions Respecting Pension Plans in the Public and Parapublic Sectors*, RSQ 1991, c 14 (Quebec) s 1; *An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision*, RSQ 1996, c 10 (Quebec) s 5; *An Act Respecting the Pension Plan of Management Personnel* s 235; *An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions* s 78; *An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions* s 1; *An Act to Amend Various Pension Plans in the Public Sector s 2; An Act Amending Certain Acts Establishing Public Sector Pension Plans* s 1.

1331 *An Act Respecting the Teachers Pension Plan.was enacted through An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic* s 97.

1332 The notwithstanding clause renewals were enacted through: *An Act to Amend Various Legislative Provisions Respecting Pension Plans in the Public and Parapublic Sectors*, RSQ 1991, c 14 (Quebec) s 1; *An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision*, RSQ 1996, c 10 (Quebec) s 5; *An Act Respecting the Pension Plan of Management Personnel* s 235; *An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions* s 78; *An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions* s 1; *An Act to Amend Various Pension Plans in the Public Sector s 2; An Act Amending Certain Acts Establishing Public Sector Pension Plans* s 1.

5.	Quebec	*Enacted:* 1986[1333] *Renewed:* 1991, 1996, 2001, 2004, 2009, 2014, 2019[1334] (Still in force)	*An Act Respecting the Civil Service Superannuation Plan* (section 114.1)
6.	Quebec	*Enacted:* 1986[1335] *Renewed:* 1988, 1994, 1999[1336] *Repealed*: 2001[1337]	*An Act Respecting the Conseil supérieur de l'Éducation* (ss.31-32)
7.	Quebec	*Enacted*: 1986[1338] *Renewed:* 1988, 1996, 1999[1339] *Repealed*: 2001[1340]	*An Act Respecting the Ministère de l'Éducation* (sections 17-18)
8.	Quebec	*Enacted*: 1986[1341] *Renewed*: 1991, 1996, 1999, 2000, 2005[1342] *Expired*: 2008[1343]	*The Education Act for Cree, Inuit and Naskapi Native Persons* (sections 720-721)

1333 *An Act Respecting the Civil Service Superannuation Plan* was enacted through *An Act Respecting the Pension Plan of Certain Teachers and Amending Various Legislation Respecting the Pension Plans of the Public and Parapublic* s 105.

1334 The notwithstanding clause renewals were enacted through: *An Act to Amend Various Legislative Provisions Respecting Pension Plans in the Public and Parapublic Sectors*, RSQ 1991, c 14 (Quebec) s 1; *An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision*, RSQ 1996, c 10 (Quebec) s 5; *An Act Respecting the Pension Plan of Management Personnel* s 235; *An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions* s 78; *An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions* s 1; *An Act Amending Certain Acts Establishing Public Sector Pension Plans* s 1.

1335 *An Act Respecting the Conseil Supérieur de l'Éducation* was enacted through *An Act to Amend the Education Act and the Act Respecting the Conseil supérieur de l'Éducation and to Amend the Act Respecting the Ministère de l'Éducation*, RSQ 1986, c 10 (Quebec) s 10.

1336 The notwithstanding clause renewals were enacted through the Education Act; An Act Respecting Certain Declarations of Exception in Acts Relating to Education, RSQ 1994, c 11 (Quebec) s 1; An Act Respecting Certain Declarations of Exception in Acts Relation to Education, RSQ 1999, c 28 (Quebec) s 1.

1337 *An Act Respecting the Conseil Supérieur de l'Éducation* was repealed in 2001 through *An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters,* RSQ 2000, c 24 (Quebec) s 16.

1338 *An Act Respecting the Ministère de l'Éducation; An Act to Amend the Education Act and the Act Respecting the Conseil supérieur de l'Éducation and to Amend the Act Respecting the Ministère de l'Éducation* s 11.

1339 The notwithstanding clause renewals were enacted through: *Education Act*; *An Act Respecting Certain Declarations of Exception in Acts Relating to Education* s 1; *An Act Respecting Certain Declarations of Exception in Acts Relation to Education* s 1.

1340 *An Act Respecting the Ministère de l'Éducation. was repealed in 2001 through An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters* s 18.

1341 *The Education Act for Cree, Inuit and Naskapi Persons* was enacted through *An Act to Amend the Education Act and the Act Respecting the Conseil supérieur de l'Éducation and to Amend the Act Respecting the Ministère de l'Éducation* s 12.

1342 The notwithstanding clause renewals were enacted through: the *Education Act*; *An Act Respecting Certain Declarations of Exception in Acts Relating to Education* s 1; *An Act Respecting Certain Declarations of Exception in Acts Relation to Education* s 1; *An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters*; *An Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field*, RSQ 2005, c 20 (Quebec) s 11.

1343 The notwithstanding clause expired on 1 July 2008 and was not renewed by subsequent legislation.

9.	Quebec	*Enacted:* 1986[1344] *Repealed*: 1987[1345]	*An Act to Amend the Act to Promote the Development of Agriculture Operations* (section 16)
10.	Quebec	*Enacted:* 1988[1346] *Expired:* 1993[1347]	*An Act to Amend the Charter of the French Language* (section 10)
11.	Quebec	*Enacted*: 1988[1348] Renewed: 1994, 1999, 2000, 2005[1349] *Expired:* 2008[1350]	*Education Act* (sections 726-727)
12.	Quebec	*Enacted:* 1989[1351] *Renewed:* 1994[1352] *Expired:* 1999[1353]	*An Act Respecting School Elections* (sections 283-284)
13.	Quebec	*Enacted:* 1992[1354] *Expired:* 1997[1355]	*An Act Respecting Private Education* (sections 175-176)
14.	Quebec	*Enacted:* 2001[1356] *Renewed:* 2004, 2009, 2014, 2019[1357] (Still in force)	*An Act Respecting the Pension Plan of Management Personnel* (section 240)
15.	Quebec	*Enacted:* 2019[1358] (Still in force)	*An Act respecting the laicity of the State* (sections 30)
16.	Quebec	*Enacted:* 2022[1359] (Still in force)	*An Act respecting French, the official and common language of Québec* (sections 118 & 200)
17.	Ontario	*Enacted:* 2021[1360] (Still in force)	*Protecting Elections and Defending Democracy Act* (section 4)

1344 *An Act to Amend the Act to Promote the Development of Agriculture Operations*.

1345 *An Act to Promote the Development of Agricultural Operations* was replaced by the *Act Respecting Farm Financing*. This replacement act did not include the notwithstanding clause.

1346 *An Act to Amend the Charter of the French Language*.

1347 In 1993, the Quebec government decided not to renew the notwithstanding clause, without explicitly repealing it. The legislation itself was not repealed, however, sections 58 and 68 were amended to remove the notwithstanding clause.

1348 *Education Act*.

1349 The notwithstanding clause renewals were enacted through*: An Act Respecting Certain Declarations of Exception in Acts Relating to Education* s 54; *An Act Respecting Certain Declarations of Exception in Acts Relation to Education* s 1; *An Act to Amend Various Legislative Provisions Respecting Education as Regards Confessional Matters*; *An Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field* s 11.

1350 The notwithstanding clause expired on 1 July 2008 and was not renewed by subsequent legislation.

1351 *An Act Respecting School Elections*.

1352 The notwithstanding clause was renewed in 1994 through *An Act Respecting Certain Declarations of Exception in Acts Relating to Education* s 1.

1353 The legislation expired in 1999 and was not renewed by subsequent legislation.

1354 *An Act Respecting Private Education*.

1355 The legislation expired in 1997 and was not renewed by subsequent legislation.

1356 *An Act Respecting the Pension Plan of Management Personnel*.

1357 The notwithstanding clause renewals were enacted through: *An Act to Amend the Act Respecting the Pension Plan of Peace Officers in Correctional Services and Other Legislative Provisions* s 272; *An Act to Amend Various Pension Plans in the Public Sector* s 23; *An Act Respecting the Implementation of Recommendations by the Pensions Plans in the Public Sector and Amending Various Legislative Provisions* s 15; *An Act Amending Certain Acts Establishing Public Sector Pension Plans* s 9.

1358 *Laicity of the State Act*.

1359 Bill 96, *An Act Respecting French, the Official and Common Language of Québec* (n 15).

1360 *Protecting Elections and Defending Democracy Act.*

18.	Ontario	*Enacted:* 2022[1361] *Repealed:* 2022[1362]	*Keeping Students in Class Act* (section 13)

1361 *Keeping Students in Class Act*.

1362 *Keeping Students in Class Repeal Act*.

Table 4: Promulgated and Ineffective Notwithstanding Clause Legislation

	Legislature	Year	Act Title
1.	Saskatchewan	Enacted:1986[1363] Declared unnecessary in 1987[1364]	*SGEU Dispute Settlement Act* (section 9)
2.	Alberta	Enacted: 2000[1365] Declared *ultra vires* in 2004[1366]	*Marriage Amendment Act* (section 1.1)

Table 5: Non-Promulgated Notwithstanding Clause Legislation

	Legislature	Year	Act Title
1.	Yukon	Tabled: 1982[1367]	*The Land Planning and Development Act*
2.	Alberta	Enacted: 1998[1368]	*Institutional Confinement and Sexual Sterilization Act*
3.	Saskatchewan	Tabled: 2018[1369]	*School Choice Protection Act*
4.	Ontario	Declared: 2018[1370]	*Efficient Local Government Act*
5.	New Brunswick	Tabled: 2019[1371]	*An Act Respecting Proof of Immunization*

1363 SGEU Dispute Settlement Act.

1364 *RWDSU* (n 269).

1365 *Marriage Amendment Act* (Alberta).

1366 *Same-Sex Marriage Reference* (n 271).

1367 *The Land Planning and Development Act* (n 332).

1368 Bill 26, *Institutional Confinement and Sexual Sterilization Act* (n 362).

1369 *The School Choice Protection Act*.

1370 Bill 31, *the Efficient Local Government A*ct (n 14).

1371 Bill 11, *An Act Respecting Proof of Immunisation* (n 16).

Table 6: Legislative Status of Notwithstanding Clause Invocations

	Act Title (year)	Juris-diction	1st Reading	2nd Reading	3rd Reading	Royal Assent	Coming into Force	Invalidity (Mootness or Ultra Vires)
1.	*An Act Respecting the Constitution Act* (1982)	QC	✓	✓	✓	✓	✓	–
2.	*An Act Respecting the Pension Plan of Certain Teachers* (1986)	QC	✓	✓	✓	✓	✓	–
3.	*An Act Respecting the Government and Public Employees Retirement Plan* (1986)	QC	✓	✓	✓	✓	✓	–
4.	*An Act Respecting Teachers Pension Plan* (1986)	QC	✓	✓	✓	✓	✓	–
5.	*An Act Respecting the Civil Service Superannuation Plan* (1986)	QC	✓	✓	✓	✓	✓	–
6.	*An Act Respecting the Conseil supérieur de l'Éducation* (1986)	QC	✓	✓	✓	✓	✓	–
7.	*The Education Act for Cree, Inuit and Naskapi Persons* (1986)	QC	✓	✓	✓	✓	✓	–
8.	*An Act Respecting the Ministère de l'Éducation* (1986)	QC	✓	✓	✓	✓	✓	–
9.	*An Act to Amend the Act to Promote the Development of Agriculture Operations* (1986)	QC	✓	✓	✓	✓	✓	–
10.	*An Act to Amend the Charter of the French Language* (1988)	QC	✓	✓	✓	✓	✓	–
11.	*Education Act* (1988)	QC	✓	✓	✓	✓	✓	–
12.	*An Act Respecting School Elections* (1989)	QC	✓	✓	✓	✓	✓	–
13.	*An Act Respecting Private Education* (1992)	QC	✓	✓	✓	✓	✓	–
14.	*An Act Respecting the Pension Plan of Management Personnels* (2001)	QC	✓	✓	✓	✓	✓	–
15.	*An Act Respecting the Laicity of the State* (2019)	QC	✓	✓	✓	✓	✓	–

16.	*An Act respecting French, the official and common language of Québec* (2022)	QC	✓	✓	✓	✓	✓	–
17.	*Land Planning and Development Act* (1982)	YK	✓	✓	✓	✓	**X**[1372]	–
18.	*Institutional Confinement and Sexual Sterilization Act* (1998)	AB	✓	**X**	**X**	**X**	**X**[1373]	–
19.	*Marriage Amendment Act* (2000)	AB	✓	✓	✓	✓	✓	**X**[1374]
20.	*SGEU Dispute Settlement Act* (1986)	SK	✓	✓	✓	✓	✓	**X**[1375]
21.	*The School Choice Protection Act* (2018)	SK	✓	✓	✓	✓	**X**[1376]	–
22.	*An Act Respecting Proof of Vaccination* (2020)	NB	✓	✓	**X**	**X**	**X**[1377]	–
23.	*The Efficient Local Government Act* (2018)	ON	✓	**X**	**X**	**X**	**X**[1378]	–
24.	*Protecting Elections and Defending Democracy Act* (2021)	ON	✓	✓	✓	✓	✓	–
25.	*Keeping Students in Class Act* (2022)	ON	✓	✓	✓	✓	✓[1379]	–

1372 The *Land Planning and Development Act* never came into force, despite receiving royal assent.

1373 The *Institutional Confinement and Sexual Sterilization Act* was dropped by the government after the first reading following significant public outcry.

1374 The *Marriage Amendment Act* came into force on March 23, 2000. It was later deemed *ultra vires* the jurisdiction of the province by the SCC in *Reference re Same-sex Marriage* (2004).

1375 The *SGEU Dispute Settlement Act* received royal assent on January 31, 1986. Its use of the notwithstanding clause was later deemed unnecessary by the SCC in *RWDSU* (1987).

1376 The *School Choice Protection Act* received royal assent on May 30, 2018. The coming into force of the legislation is contingent on proclamation. Due to the granting of a stay of the SKQB decision, a subsequent win in the SKCA and dismissal from the SCC, the government will not invoke the notwithstanding clause.

1377 *An Act Respecting Proof of Vaccination* (Bill 11) ultimately did not pass at the third reading stage on June 18, 2020. The notwithstanding clause provision had already been removed at the committee stage.

1378 The government of Ontario stated that they would only be proceeding with invoking the notwithstanding clause through the *Efficient Local Government Act* if they were not granted a stay by the ONCA. Upon achieving the stay of the ONSC decision, the government announced they would not be proceeding with the second reading of the legislation, opting to leave it on the order paper.

1379 Repealed within a week of coming into force through the *Keeping Students in Class Repeal Act*.

Table 7: Comparing Applications of the Notwithstanding Clause Invocations

	Act Title (year), jurisdiction	Rights Limitation[1380]	Timing of Application[1381]	Type of Limitation
1.	*An Act Respecting the Constitution Act* (1982), QC	Broad	Pre-emptively	Protest
2.	*An Act Respecting the Pension Plan of Certain Teachers* (1986), QC	Targeted (s.15)	Pre-emptively	Labour
3.	*An Act Respecting the Government and Public Employees Retirement Plan* (1986), QC	Targeted (s.15)	Pre-emptively	Labour
4.	*An Act Respecting Teachers Pension Plan* (1986), QC	Targeted (s.15)	Pre-emptively	Labour
5.	*An Act Respecting the Civil Service Superannuation Plan* (1986), QC	Targeted (s.15)	Pre-emptively	Labour
6.	*An Act Respecting the Conseil supérieur de l'Éducation* (1986), QC	Targeted (ss. 2(a) & 15)	Pre-emptively	Labour
7.	*The Education Act for Cree, Inuit and Naskapi Persons* (1986), QC	Targeted (ss. 2(a) & 15)	Pre-emptively	Education
8.	*An Act Respecting the Ministère de l'Éducation* (1986), QC	Targeted (ss. 2(a) & 15)	Pre-emptively	Education
9.	*An Act to Amend the Act to Promote the Development of Agriculture Operations* (1986), QC	Targeted (s.15)	Pre-emptively	Affirmative Action
10	*An Act to Amend the Charter of the French Language* (1988), QC	Targeted (s.2(b))	Response	Language
11.	*Education Act* (1988), QC	Targeted (ss. 2(a) & 15)	Pre-emptively	Education
12.	*An Act Respecting School Elections* (1989), QC	Targeted (ss. 2(a) & 15)	Pre-emptively	Education
13.	*An Act Respecting Private Education* (1992), QC	Targeted (ss. 2(a) & 15)	Pre-emptively	Education
14.	*An Act Respecting the Pension Plan of Management Personnels* (2001), QC	Targeted (s.15)	Pre-emptively	Labour
15.	*An Act Respecting the Laicity of the State* (2019), QC	Broad	Response	Religion and Minority Rights
16.	*An Act respecting French, the official and common language of Québec* (2022), QC	Broad	Pre-emptively	Language
17.	*Land Planning and Development Act* (1982), YK	Targeted (s.15)	Pre-emptively	Affirmative Action
18.	*Institutional Confinement and Sexual Sterilization Act* (1998), AB	Broad	Pre-emptively	Avoid Court-related Costs
19.	*Marriage Amendment Act* (2000), AB	Broad	Pre-emptively	Protest/Minority Rights
20.	*SGEU Dispute Settlement Act* (1986), SK	Targeted (s. 2(d))	Response	Labour
21.	*The School Choice Protection Act* (2018), SK	Targeted (ss. 2 & 15)	Response	Education/Minority Rights
22.	*An Act Respecting Proof of Vaccination* (2020), NB	Broad	Pre-emptively	Avoid Court-related Costs
23.	*The Efficient Local Government Act* (2018), ON	Broad	Response	Democratic Processes
24.	*Protecting Elections and Defending Democracy Act* (2021), ON	Broad	Response	Democratic Processes
25.	*Keeping Students in Class Act* (2022), ON	Broad	Pre-emptively	Labour

1380 Broad invocation refers to an invocation hat shields the legislation from all possible sections of the *Charter* (sections 2 and 7 to 15). Targeted invocations refer to an application that does not invoke the notwithstanding clause to apply to all applicable rights, but rather use it in a targeted manner based on the specific clauses they perceive their legislation to be in violation of.

Table 8: Notwithstanding Clause Invocations by Decade

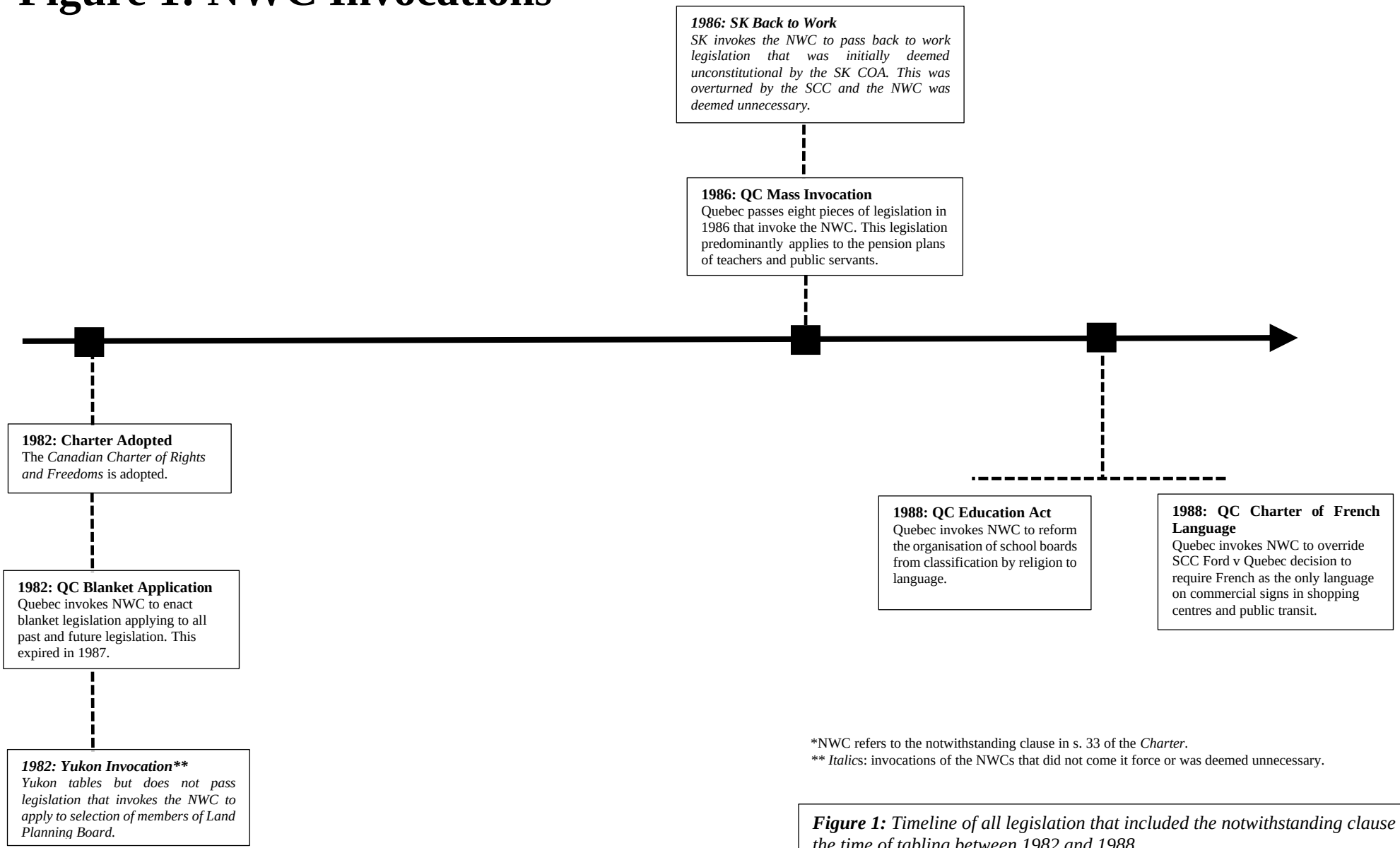
Decade Period	Number of Section 33 Inclusions in Tabled Legislation
1982 to 1992	15
1993 to 2002	3
2003 to 2012	0
2013 to 2022	7

Table 8: *Breaking down the attempted and actual invocations of section 33 by decade. It should be noted that the inclusion criteria are any Bill introduced in the legislature that includes a provision invoking the notwithstanding clause.*

1381 The next category of analysis examined the timing of the notwithstanding clause and whether it was invoked pre-emptively or in response to a court decision. The latter category is subdivided to account for a responsive invocation of the notwithstanding clause while still appealing the decision to a higher court.

Caitlin Salvino
1220950

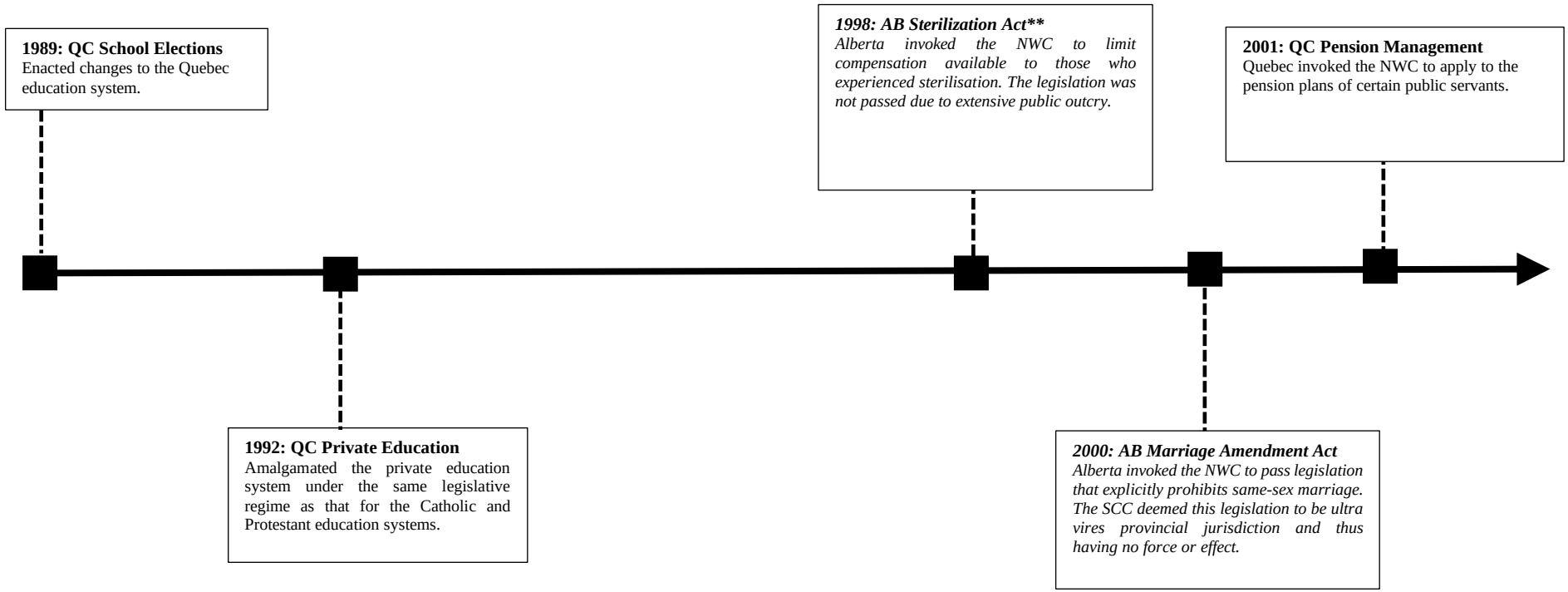
Figure 1: NWC Invocations



*NWC refers to the notwithstanding clause in s. 33 of the *Charter*.
** *Italics*: invocations of the NWCs that did not come it force or was deemed unnecessary.

Figure 1: *Timeline of all legislation that included the notwithstanding clause at the time of tabling between 1982 and 1988.*

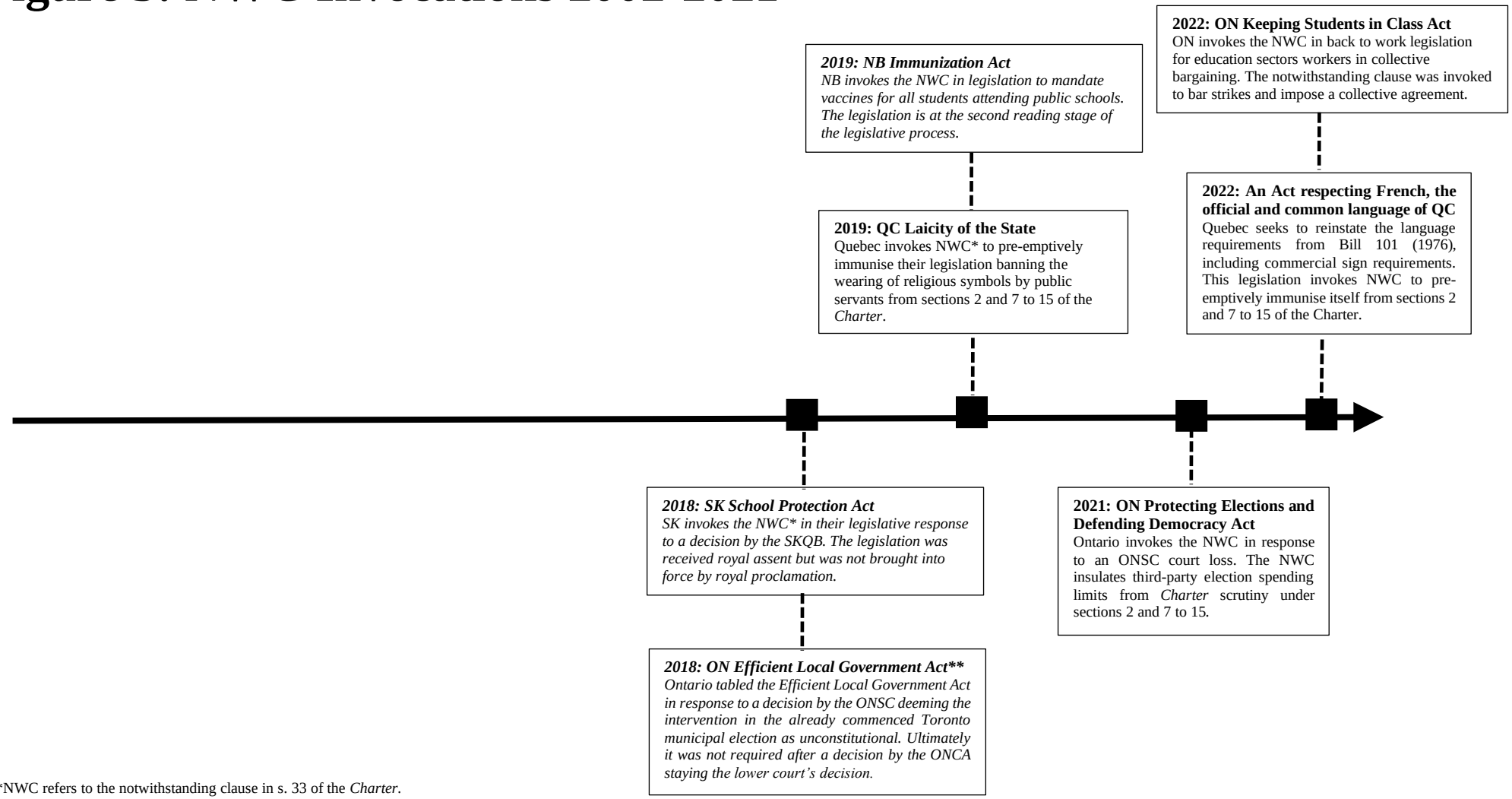
Figure 2: NWC Invocations 1989-2001



*NWC refers to the notwithstanding clause in s. 33 of the *Charter*.
** *Italic*s: invocations of the NWCs that did not come it force or was deemed unnecessary.

Figure 2: *Timeline of all legislation that included the notwithstanding clause at the time of tabling between 1989 and 2001.*

Figure 3: NWC Invocations 2002-2021



*NWC refers to the notwithstanding clause in s. 33 of the *Charter*.
** *Italic*s: invocations of the NWCs that did not come it force or was deemed unnecessary.

Figure 3: *Timeline of all legislation that included the notwithstanding clause at the time of tabling between 2002 and 2021.*

Figure 4: Timeline of the 2018 Ontario Intervention in the Toronto City

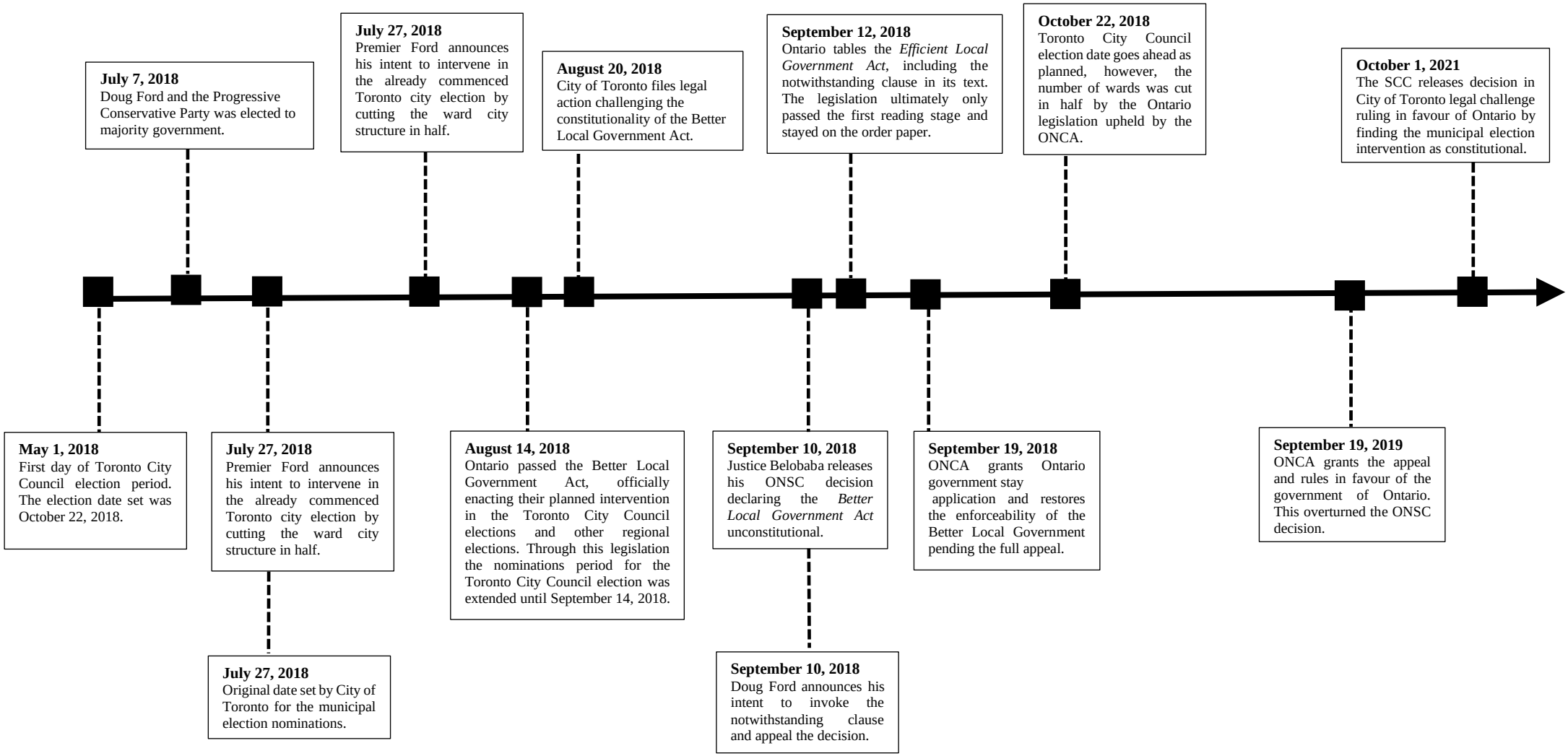


Figure 4: *Timeline showing the relevant events that occurred in the 2018 attempted invocation of the notwithstanding clause by Ontario.*

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