Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter*

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Section 33 of the Canadian Charter of Rights and Freedoms *has returned to the spotlight in Canadian constitutional law. Despite the relative paucity of times it has been invoked, section 33 retains a central, if contested, place in Canadian political and constitutional theory, as well as in contemporary political debate. However, constitutional times are changing, and the recent use of the clause by provincial governments suggests that a new chapter in the history of the notwithstanding clause is unfolding. This article connects this new constitutional history with an older one by locating the origins of section 33 in the common law, tracking its emergence as a uniquely Canadian tool of rights protection, and charting its presence in the political negotiations that led to the enactment of the* Charter. *What emerges in this retelling is a more complex history and set of background purposes to the notwithstanding clause than is often assumed. The article concludes with a call for the history of the notwithstanding clause to inform its application and operation as a matter of constitutional law. Too often section 33 of the* Charter *is approached in law and politics without a full sense of its history, and its rights-protecting purposes in particular. That should change.*

L'article 33 de la Charte canadienne des droits et libertés *est revenu sur le devant de la scène en droit constitutionnel canadien. Malgré le peu de fois où il a été invoqué, l'article 33 conserve une place centrale, bien que contestée, dans la théorie politique et constitutionnelle canadienne, ainsi que dans le débat politique contemporain. Cependant, les temps constitutionnels changent, et l'utilisation récente de la clause dérogatoire par les gouvernements provinciaux suggère qu'un nouveau chapitre de son histoire est en train de s'écrire. Cet article relie cette nouvelle histoire constitutionnelle à une histoire plus ancienne en situant les origines de l'article 33 dans la* common law, *en suivant son émergence en tant qu'outil canadien unique de protection des droits et en traçant sa présence dans les négociations politiques qui ont mené à la promulgation de la* Charte. *Ce qui ressort de ce récit, c'est que l'histoire et les objectifs de la clause dérogatoire sont plus complexes qu'on ne le croit souvent. L'article se termine par un appel à ce que l'histoire de la clause dérogatoire éclaire son application et son fonctionnement en matière de droit constitutionnel. Trop souvent, l'article 33 de la* Charte *est abordé en droit et en politique sans une connaissance approfondie de son histoire et, en particulier, de ses objectifs de protection des droits. Cela devrait changer.*

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Contents

I. Introduction

Section 33 of the *Canadian Charter of Rights and Freedoms*,[1] the so-called notwithstanding clause, occupies a curious place in Canadian constitutional law, politics, and culture. Certainly, the attention paid to the provision among scholars, politicians, and the public outstrips the number of times it has been used by the Parliament of Canada or provincial legislatures to "expressly declare" that a statute "shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of [the] Charter."[2] Notwithstanding the clause's prominent place in constitutional scholarship as a controversial mechanism of constitutional design to celebrate, lament, or puzzle over,[3] it has received relatively little judicial attention beyond the Supreme Court of Canada's consideration in *Ford v Quebec (Attorney General)*.[4] That appears destined to change. A number of provincial governments — Quebec, Ontario, and Saskatchewan — have either recently invoked the provision or mused about a willingness to do so.[5] Most prominently, the Quebec legislature employed the notwithstanding

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

2 *Ibid*, s 33(1). Parliament has never invoked the clause, and the question of how often it has been used by provincial legislatures is the subject of debate. Some count a number of instances in which the clause was inserted into legislation that was not proclaimed, pre-emptively added to legislation in ways that turned out to be unnecessary, or simply threatened to be used. Dwight Newman contends that "[t]he clause has been used much more commonly at the provincial level than many observers fully appreciate," totalling about twenty distinct instances (Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 209 at 212 [footnote omitted]).

3 The literature is too large to cite in its entirety but select leading works include Lorraine Eisenstat Weinrib, "Learning to Live With the Override" (1990) 35:3 McGill LJ 541; Peter H Russell, "Standing Up for Notwithstanding" (1991) 29:2 Alta L Rev 293; Peter W Hogg & 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) 35:1 Osgoode Hall LJ 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Barbara Billingsley, "Section 33: The *Charter's* Sleeping Giant" (2002) 21 Windsor YB Access Just 311; Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221; Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy" in Tom Campbell, Jeffrey Goldsworthy, & Adrienne Stone, eds, *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003) 263; Janet L Hiebert, "Notwithstanding the Charter: Does Section 33 Accommodate Federalism?" in Elizabeth Goodyear-Grant & Kyle Hanninman, eds, *Canada: The State of the Federation 2017: Canada at 150: Federalism and Democratic Renewal* (Montreal: McGill-Queen's University Press, 2019) 59; Richard Albert, "The Desuetude of the Notwithstanding Clause — And How to Revive It" in Emmett Macfarlane, ed, *Policy Change, Courts, and the Canadian Constitution* (Toronto: University of Toronto Press, 2018) 146.

4 [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford* cited to SCR]. The Supreme Court has mentioned s 33 in *obiter* in a handful of other cases but without significant analysis: see e.g. *Ontario (Attorney General) v G*, 2020 SCC 38 at para 137; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 15 [*Gosselin*].

5 John Rieti, "Premier Doug Ford to use notwithstanding clause to cut size of Toronto city council", *CBC News* (9 September 2018), online: <www.cbc.ca/news/canada/toronto/judge-ruling-city-council-

clause in *An Act Respecting the Laicity of the State*,[6] the subject of ongoing constitutional challenge, including in relation to the legislation's use of section 33.[7] More recently, Quebec added the notwithstanding clause to its controversial Bill 96, *An Act respecting French, the official and common language of Québec*.[8] All of which suggests that a new era in the history of the notwithstanding clause is underway.

What role, if any, should the origins of the notwithstanding clause play in this story and in the judicial interpretation of Canada's most controversial constitutional provision? This article addresses these questions. It does so neither by advocating interpretive originalism, nor by proposing that constitutional history can be reduced to simple narratives that dictate the meaning of constitutional provisions or their application to particular sets of facts. We maintain, however, that constitutional interpretation requires an understanding of the text, purpose, and context of constitutional provisions, an exercise that necessitates engagement with the circumstances, antecedents, and underlying ideas that animate our constitutional arrangements and the specific provisions that constitute them. This approach to constitutional interpretation is rightly bounded by the text of the provision, but deciding among multiple possible interpretations of the meaning of those words requires assessing the provision's purpose and its place within the larger constitutional context.[9] Constitutional histories are relevant not because they control interpretive outcomes, but because they elucidate, illuminate, and reveal the broader web of constitutional thought, culture, and experiences in which constitutional meanings necessarily reside. In other words, constitutional histories open trajectories of meanings often obscured or missed by focusing on the text alone. Such is the case with section 33 of the *Charter*.

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bill-election-1.4816664> [perma.cc/Q6XR-8N3F]; "Ford government pushes through controversial election spending bill with notwithstanding clause", *CBC News* (14 June 2021), online: <www.cbc.ca/news/canada/toronto/notwithstanding-clause-vote-ontario-1.6064952> [perma.cc/PMT9-UPR5]; "Sask government invokes notwithstanding clause over Catholic school ruling", *CBC News* (8 November 2017), online: <www.cbc.ca/news/canada/saskatchewan/sask-notwithstanding-schools-1.4392895> [perma.cc/TY3W-3MWK].

6 SQ 2019, c 12.

7 *Hak c Procureur général du Quebec*, 2021 QCCS 1466 at paras 770, 778. Noting what he characterized as the Quebec legislature's "flippant and reckless," "exorbitant and unnecessary" use of s 33 in this instance, Justice Blanchard called for appellate courts to revisit the constitutional law of s 33 [translation of the authors].

8 2nd Sess, 42nd Leg, Quebec, 2021 (adopted 24 May 2022), SQ 2022, c 14.

9 *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 at paras 8-13. See generally Eric M Adams, "Canadian Constitutional Interpretation" in Cameron Hutchison, ed, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis, 2018) 129.

This article engages with the history of Canada's notwithstanding clause as a necessary step in understanding the provision and its application. It argues that the history of the notwithstanding clause reveals important aspects of its purposes, which include respect for parliamentary sovereignty but also, crucially, constraints on that sovereignty in the name of the protection of rights. In histories of the *Charter*, the notwithstanding clause typically takes centre stage as a key element in the "compromise that enabled patriation."[10] However, that political story reflects only the conclusion of a much longer journey. Part II of the article traces that longer history, beginning in the medieval common law and emphasizing the influence of the notwithstanding clause in the *Canadian Bill of Rights*, among other pre-*Charter* human rights statutes.[11] In Part III, the article returns to the "constitutional lore" in which the notwithstanding clause emerges as one of the important ingredients in the "secret 'kitchen meeting'" between Roy Romanow, Roy McMurtry, and Jean Chrétien in a kitchenette in the National Conference Centre in Ottawa.[12] While debate continues on the respective influences of various provinces and politicians in putting together the controversial November Accord that secured the *Charter*'s enactment,[13] the essentially *political* character of the notwithstanding clause and its late-night provenance is usually taken as a given. That origin story has had a lasting impact on section 33's characterization as a constitutional compromise, perhaps an especially regrettable one, as has the assumption that it reflected a straightforward demand by provincial governments for the power to "ignore provisions of the [C]harter."[14] Even in those tense political debates, the purposes of the notwithstanding clause were always more plural and rights protecting than is often ac-

10 Barry L Strayer, "The Evolution of the *Charter*" in Lois Harder & Steve Patten, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 72 at 89 [Strayer, "The Evolution"]. See also Roy Romanow, John Whyte & Howard Leeson, *Canada … Notwithstanding*, 25th anniversary ed (Canada: Thomson Carswell, 2007) [Romanow, Whyte & Leeson].

11 *Canadian Bill of Rights*, SC 1960, c 44, s 2. On the *Bill of Rights*' notwithstanding clause, see Mark Carter, "Diefenbaker's *Bill of Rights* and the 'Counter-Majoritarian Difficulty': The Notwithstanding Clause and Fundamental Justice as Touchstones for the *Charter* Debate" (2019) 82:2 Sask L Rev 121 [Carter, "Diefenbaker's *Bill of Rights*"].

12 Lois Harder & Steve Patten, "Looking Back on Patriation and its Consequences" in Lois Harder & Steve Patten, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 3 at 5-6; Robert Sheppard, "Secret, all-night talks behind historic accord", *The Globe and Mail* (6 November 1981) 10; Robert Sheppard & Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Scarborough: Fleet Publishers, 1982) at 288-89, 302 [Sheppard & Valpy]; Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) at 44 [Russell, *Constitutional Odyssey*].

13 Contrast Brian Peckford, *Some Day the Sun will Shine and Have Not Will be No More* (St John's: Flanker Press, 2012), 251-81 [Peckford], with Roy McMurtry, *Memoirs and Reflections* (Toronto: University of Toronto Press, 2013) at 319 [McMurtry, *Memoirs*].

14 John English, *Just Watch Me: The Life of Pierre Elliott Trudeau, 1968-2000* (Toronto: Knopf Canada, 2009) at 494.

knowledged. In Part IV, the article engages with the recent scholarship debating and assessing the text, structure, and operational impact of the notwithstanding clause. The absence of constitutional history in much of that work contributes to the sense that the history of the notwithstanding clause has little to say about its application as a matter of constitutional law.[15] This article argues otherwise.

II. The Origins of Notwithstanding in Canadian Law

The *Charter* may have marked the first appearance of a notwithstanding clause within a national constitutional bill of rights,[16] but the language of notwithstanding was already a common feature in Canadian statute books. In law, the idea of a notwithstanding provision comes from the latin, *non obstante,* historically defined as "[w]ords … intended to preclude, in advance, any interpretation contrary to certain declared objects or purposes."[17] In the English common law, *non obstante* first described the king's power to declare that a statute would not apply to a particular person or scenario, a recognition of the Crown's ultimate sovereignty to carve exceptions, narrow legal applications, and create hierarchies in the legal order.[18] The idea of the power to declare an exemption to the normal operation of law likely came from the similar papal power to issue a papal bull "non obstante statuto," meaning "any law to the contrary notwithstanding."[19] Seeking to constrain monarchial power, England's 1688 *Bill of Rights* abolished the Crown's executive authority to unilaterally derogate from the law,[20] but continued the legal concept of notwithstanding by recognizing Parliament's power to do so explicitly by statute.[21]

15 See Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510 [Webber]; Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189 [Leckey & Mendelsohn]; Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Menhelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Const Forum Const 38.

16 Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49:4 Am J Comp Law 707 at 738.

17 Henry Campell Black, *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 2nd ed (St Paul, Minn: West Publishing, 1910) sub verbo "non obstante."

18 Dalzell Chalmers & Cyril Asquith, *Outlines of Constitutional Law* (London: Sweet & Maxwell, 1922) at 16.

19 *Ibid*. See also *R v Catagas* (1977), 81 DLR (3d) 396 at 398, 1977 CanLII 1636 (Man CA), citing O Hood Phillips, *Chalmers and Hood Phillips' Constitutional Laws of Great Britain, the British Empire and Commonwealth*, 6th ed (London: Sweet & Maxwell, 1946) at 16.

20 *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (UK), 1688, 1 Will & Mar, c 2 [*Bill of Rights* (UK)].

21 *Ibid*, II.

Notwithstanding provisions subsequently emerged as a widely employed legal tool to carve exceptions and create relations of paramountcy within and across statutes. To take one of many examples in Canada's current law, section 16(3) of the *Canada Evidence Act* governs the capacity of adults with mental disabilities to testify in court. This provision allows a person to testify if they are capable of communicating the evidence and promise to tell the truth "notwithstanding any provision of any Act requiring an oath or solemn affirmation."[22] In such provisions, the term "notwithstanding" tracks the straightforward dictionary definition of "in spite of."[23] Used in statutes, the term notwithstanding indicates an express intention by the legislature that one provision or statute take precedence over other sections of the legislation, or other statutes.[24]

Given the wide use of the language of notwithstanding in statute law, it should not be surprising that the term appears throughout the Canadian Constitution.[25] As with ordinary statutes, in constitutional text, references to notwithstanding clarify how conflicts between different constitutional provisions should be resolved. Despite the fact that, as a general principle of constitutional interpretation, the Constitution should be interpreted as a coherent whole in order to reconcile internal textual conflicts, inconsistencies inevitably persist.[26] Uses of notwithstanding attempt to deal explicitly with such conflicts. The opening words of section 91 of the *Constitution Act, 1867*, for example, declare that "notwithstanding anything in this Act," certain matters fall within the exclusive legislative authority of Parliament.[27] Section 101 of the *Constitution Act, 1867* provides similarly that Parliament's power to create and administer a "General Court of Appeal for Canada" extends "notwithstanding anything in this Act,"[28] wording that played a crucial role in the Supreme

22 RSC 1985, c C-5, s 16(3). For an interpretation of this provision see *R v DAI*, 2012 SCC 5.

23 *Oxford English Dictionary,* 3rd ed (Oxford: Oxford University Press, 2020) sub verbo "notwithstanding."

24 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2011) at 382-83; Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 326. See also *Re Engineered Buildings Ltd and City of Calgary* (1966), 57 DLR (2d) 322 at 324-26, 1966 CanLII 452 (Alta CA); *Order in Council (Re)* (1926), 36 Man R 34, 1926 CanLII 586 (Man CA); *Canada v Canada North Group Inc*, 2019 ABCA 314 at para 133 (Wakeling J, dissenting); *Mitchell Estate (Re)* (1996), 25 BCLR (3d) 249, 1996 CanLII 1053 (BC SC) at paras 13-17, 22. Other legislative wording with a similar legal impact includes "subject to" or "this prevails" — see Côté, *ibid* at 383.

25 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 51A, 91, 94, 101, 147, reprinted in RSC 1985, Appendix II, No 5; *Charter*, *supra* note 1, s 28 [*Constitution Act, 1867*].

26 *Gosselin*, *supra* note 4 at para 26; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 373, 100 DLR (4th) 212; The Honourable Justice Frank Iacobucci, "'Reconciling Rights' the Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 SCLR (2d) 137; Mark Carter, "An Analysis of the 'No Hierarchy of Constitutional Rights' Doctrine" (2006) 12(1) Rev Const Stud 19.

27 *Constitution Act, 1867*, *supra* note 25, s 91.

28 *Ibid*, s 101.

Court's decision that Parliament possessed the authority to make the Supreme Court of Canada the final court of appeal. Noting that the use of the language of notwithstanding in the provision was a matter "of first importance," Chief Justice Duff held that "[t]he primacy of Parliament … is just as absolute as under the enumerated clauses of section 91."[29] The *Charter* also contains multiple uses of notwithstanding. Section 28 insists that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."[30] In constitutional interpretation, there is nothing inherently unique about the use of the word notwithstanding. As ever, the interpretive task is to understand a provision's meaning as a product bounded by its text, illuminated by its purpose, and informed by its place within a larger constitutional structure and context.

A key aspect of the necessary context and constitutional backstory of the notwithstanding language contained in section 33 of the *Charter* is the appearance of notwithstanding clauses in a number of rights-protecting statutes enacted prior to the *Charter*, most notably the *Canadian Bill of Rights*.[31] These statutes provided the most direct antecedents to what would become section 33 of the *Charter*. The introductory clause to section 2 of the *Canadian Bill of Rights*, enacted in 1960, provides:

> 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.[32]

Early drafts of the *Canadian Bill of Rights* had not included the use of a notwithstanding provision,[33] and its emergence in the enactment was specifically intended to grant a greater protection of rights.

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29 *Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No 9, Entitled "An Act to Amend the Supreme Court Act"*, [1940] SCR 49 at 65, [1940] 1 DLR 289. Justice Rinfret agreed that the phrase "notwithstanding anything in this Act" gave Parliament "exclusive, paramount and plenary" power to make the Supreme Court the final appellate court in Canada (*ibid* at 74).

30 *Charter*, *supra* note 1, s 28. See Cee Strauss, "Section 28's Potential to Guarantee Substantive Gender Equality in *Hak c Procureur general du Québec*" (2021) 33:1 CJWL 84; Kerri A Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4 Const Forum Const 19.

31 SC 1960, c 44, s 2 [*Canadian Bill of Rights*]. See also *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 44 [*Saskatchewan Human Rights Code*]; *Alberta Bill of Rights*, SA 1972, c 1, s 2 [*Alberta Bill of Rights*]; *Charter of Human Rights and Freedoms*, SQ 1975, c C-12, s 52 [*Charter of Human Rights and Freedoms*].

32 *Canadian Bill of Rights*, *supra* note 31, s 2.

33 See e.g. Bill C-60, *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, 1st Sess, 24th Parl, 1958; Bill C-79, *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, 3rd Sess, 24th Parl, 1960.

Parliamentarians debating the *Canadian Bill of Rights* recognized that the *Act* offered a challenge to untrammeled theories of parliamentary supremacy. In introducing the *Canadian Bill of Rights* in Parliament, Prime Minister John Diefenbaker explained: "Experience has shown that freedom is not always safe in the custody of an overwhelmingly powerful government supported by an overwhelming majority. … Unless restrained … the pathways of power lead to the degradation of the rights of individuals."[34] A statutory bill of rights, he argued, would hold in check the state's propensity for authoritarian impulses and protect the legal rights, fundamental freedoms, and equality rights of Canadians.[35] Conversely, the erosion of the principles of parliamentary supremacy was precisely the ground on which the federal Liberals opposed the *Bill of Rights*.[36] "Our basic constitutional structure in Canada that we have inherited from Great Britain," Lester Pearson remarked, "is based on parliamentary sovereignty … The measure of our rights and liberties as Canadian citizens is the enlightenment, the tolerance and the good sense of our society."[37] "Incorruptible" courts and "free men" in Parliament, he argued, "is the tried and tested British way."[38]

For constitutional scholar and civil libertarian F R Scott, the British way no longer sufficed insofar as the protection of rights was concerned.[39] It was Scott who suggested the wisdom of including a notwithstanding clause in the *Bill of Rights*, in order to enhance the rights-protecting features of the *Act* and further circumscribe the authority of Parliament.[40] Scott specifically worried that the rights protections of the *Bill of Rights* would be easily diminished by subsequent legislation enacted by Parliament. Under the doctrine of parliamentary supremacy, since no past Parliament could bind a future one, any subsequent, inconsistent act of Parliament would take precedence over the *Bill of Rights*.[41] Seeking to prevent this, Scott proposed that the *Bill of Rights* should include a provision stating that "[t]his Act shall not be amended by any future statute except by express mention."[42] Bora Laskin, then Canada's leading constitutional scholar of the period, joined Scott in emphasizing the limited impact of the *Bill of Rights* especially in relation to "Parliament's authority to enact measures

34 *House of Commons Debates*, 24-1 (5 September 1958) at 4641.
35 *Ibid* at 4642; *House of Commons Debates*, 24-3 (1 July 1960) at 5649.
36 *House of Commons Debates*, 24-3 (4 July 1960) at 5657-5666.
37 *House of Commons Debates*, 24-1 (5 September 1958) at 4649-50.
38 *House of Commons Debates*, 24-3 (4 July 1960) at 5661.
39 See Eric M Adams, "Canada's 'Newer Constitutional Law' and the Idea of Constitutional Rights" (2006) 51:3 McGill LJ 435.
40 Carter, "Diefenbaker's *Bill of Rights*", *supra* note 11 at 40.
41 Andrew Brewin, "The Canadian Constitution and a Bill of Rights" (1966) 31:4 Sask Bar Rev 251 at 251.
42 Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: Queen's University Press, 2003) at 132 [MacLennan].

in the future which would derogate from or abridge the declared human rights and fundamental freedoms."[43] Laskin predicted that, although the *Bill of Rights* might serve an important symbolic political function, it would have little legal impact in protecting human rights and freedoms.

Seeking to strengthen the *Bill of Rights* in light of such criticism, Justice Minister Davie Fulton added a notwithstanding clause to the proposed *Bill of Rights*.[44] Fulton theorized that if the doctrine of parliamentary supremacy could not be done away with by mere statutory enactment, a notwithstanding clause would nonetheless compel future parliaments to override the *Bill of Rights* explicitly and, therefore, less frequently given the political cost in doing so. In setting out the rationale for the notwithstanding clause, Fulton explained:

> [N]o parliament can bind a subsequent parliament. Therefore, we did not want to pretend that our bill of rights would prevent a subsequent parliament from overriding it if it decided to do so. But what our bill of rights does do is to ensure that no subsequent parliament can override the bill of rights without that fact being clearly in its mind and out in the open, as it were, so that it cannot be done inadvertently or by concealment, either from parliament or the country.[45]

Under the notwithstanding clause, any future derogations from the rights and freedoms protected by the *Bill of Rights* would need to be explicit, deliberate, transparent, and subject to the exposure, debate, and criticism of the democratic process, rather than proceeding by implication, inadvertence, or subterfuge. Provincial legislatures followed this rationale in placing notwithstanding clauses for similar purposes in provincial human rights legislation, including the *Saskatchewan Human Rights Code*, the *Alberta Bill of Rights,* and Quebec's *Charter of Human Rights and Freedoms*.[46]

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43 Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37:1 Can Bar Rev 77 at 130. On Laskin's use of the *Canadian Bill of Rights* as a jurist see Eric M Adams, "Judicial Agency and Anxiety under the Canadian *Bill of Rights*: A Constitutional History of *R. v. Drybones*" (2019) 39:1 NJCL 63.

44 MacLennan, *supra* note 42 at 139.

45 House of Commons, Special Committee on Human Rights and Fundamental Freedoms, "Bill No C-79, Human Rights Measure Providing for Recognition and Protection of Human Rights and Fundamental Freedoms", 24-3 (27 July 1960) at 573. To date, Parliament has only enacted one statute — the controversial legislation invoking the *War Measures Act* to deal with the October Crisis — explicitly operating notwithstanding the *Canadian Bill of Rights*. That Act, *Public Order (Temporary Measures) Act, 1970*, SC 1970, c 2, s 12, states that it applies notwithstanding the *Bill of Rights*, although s 12(2) provides that the *Act* does not override some of the rights in sections 2(a) to (g) of the *Bill of Rights*. For discussion, see Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2nd ed (Toronto: McClelland and Steward Limited, 1975) at 345-46.

46 See Jeffrey Lawrence, *The Notwithstanding Clause: Its History and Future* (Ottawa: Library of Parliament Research Branch, February 1989) at 3. For an updated version, see Laurence Brosseau & Marc-André Roy, *The Notwithstanding Clause of the Charter* (Ottawa: Library of Parliament Research Branch, May 2018), online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/

As proposals for a constitutional bill of rights began to be developed in the 1970s, Paul C Weiler proposed adapting the notwithstanding clause from the statutory context for constitutional use. A legal scholar working in both Canada and the United States, Weiler saw the capacity of a notwithstanding clause to mediate the democratic deficiencies often associated with the unrestrained powers of judicial review under the American Constitution's Bill of Rights.[47] "In typical Canadian fashion," Weiler explained, he envisioned "a compromise, between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority over constitutional matters."[48] A notwithstanding clause in a constitutional bill of rights, he argued, would enable courts to boldly articulate and protect entrenched rights precisely because it would grant Parliament the opportunity to have "the final say."[49] Accordingly, "[i]f Parliament wants to overturn such a judicial ruling, it will have to face the issue squarely and commit itself on the merits."[50] In this regard, Weiler argued that invoking the notwithstanding clause would shine "the full glare of publicity which would attend any effort to override a Supreme Court ruling about the import of our Bill of Rights."[51] "[F]ew Canadian governments," he forecast, "would be prepared to take the flak for such a measure … unless one was thoroughly persuaded that the Court had erred and felt that there was widespread public support for that point of view."[52] As a further protection, he proposed a parliamentary requirement that use of the notwithstanding clause would not take effect unless "after it is first passed, an election intervenes and a new Parliament re-enacts the law in the same terms."[53] For Weiler, such a requirement would perpetuate and ensure democratic debate of the clause's use, and would effectively add the voting public as a salient constitutional actor alongside courts and legislatures in adjudicating its use.

Weiler's proposal drew attention from provincial governments as the constitutional negotiations surrounding the *Charter* intensified, and Ontario and

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BackgroundPapers/PDF/2018-17-e.pdf> [perma.cc/6T8Y-NMQ5]. See also *Saskatchewan Human Rights Code*, *supra* note 31; *Alberta Bill of Rights*, *supra* note 31; *Charter of Human Rights and Freedoms*, *supra* note 31.

47 On the influence of American progressivism on Bill of Rights skepticism in Canada see Eric M Adams, "The Dean Who Went to Law School: Crossing Borders and Searching for Purpose in North American Legal Education, 1930-1950" (2016) 54:1 Alta L Rev 1.

48 Paul C Weiler, "Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights" (1980) 60:2 Dalhousie Rev 205 at 232.

49 *Ibid* at 233.

50 *Ibid*.

51 *Ibid* at 234.

52 *Ibid*.

53 *Ibid*.

British Columbia consulted with Weiler directly on his proposal.[54] In particular, Roy McMurtry, the Attorney General of Ontario, championed the notwithstanding clause as a bridge to span the divides of political and constitutional differences in the constitutional negotiations.[55] He was not alone. As Alberta Premier Peter Lougheed recalled, it was his Attorney General, Merv Leitch, who introduced him to the concept of a notwithstanding clause when Leitch advised that Alberta's provincial *Bill of Rights* should include a similar *non obstante* clause to its federal counterpart. To which Lougheed recalled responding, "What the hell is a notwithstanding clause?"[56] In Lougheed's retelling, nine years later, during the tense First Ministers meetings of September 1980 regarding the possible adoption of a constitutional bill of rights, Leitch "engaged me in a private side discussion and suggested that I intervene by proposing a 'notwithstanding clause' along the lines of section 2 of the Alberta Bill of Rights."[57] Lougheed did so by placing the notwithstanding clause, as he put it, at the heart "of the constitutional drama that unfolded during the balance of 1980 and through 1981."[58] That drama, a good deal more than the legal history recounted here, has come to shape perspectives of the notwithstanding clause in Canadian constitutional law.

III. The Notwithstanding Clause and the *Charter*

The notwithstanding clause looms large in accounts of the political negotiations that led to the enactment of the *Charter*. In such narratives, the notwithstanding clause is usually cast as a surprise and novel, last-minute addition to the *Charter*. The reality is more complicated. Given the history set out above, it should be no surprise that mentions of the notwithstanding clause occurred throughout the debates leading to the enactment of the *Charter*. The idea that an entrenched bill of constitutional rights would couple the protection of rights and freedoms with some type of notwithstanding clause appears as early as 1968. As Minister of Justice, Pierre Trudeau's first proposal to adopt a charter of rights included a notwithstanding clause for emergency purposes.[59] The idea

54 Thomas S Axwothy, "The Notwithstanding Clause: Sword of Damocles or Paper Tiger?" (1 March 2007), online: *Policy Options* <policyoptions.irpp.org/fr/magazines/equalization-and-the-federal-spending-power/the-notwithstanding-clause-sword-of-damocles-or-paper-tiger/> [perma.cc/GV8B-VURC].

55 McMurtry, *Memoirs*, *supra* note 13 at 315-19.

56 The Honourable Peter Lougheed, "Why a Notwithstanding Clause?" (1998) 6 Points of Views 1 at 1 [Lougheed].

57 *Ibid* at 2.

58 *Ibid*.

59 Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 30. As Lorraine Weinrib writes, "at the very inception of the project of rights protection we find consideration

of a notwithstanding clause then appears again in 1979, this time in the constitutional proposals offered by *The Task Force on Canadian Unity*, an initiative of the federal government intended to suggest ways to counter the rising strains of Quebec nationalism.[60] Recommending that key individual and collective rights should be entrenched in the Constitution, the Commission proposed "including a clause in the constitution which would permit a legislature to circumvent a right (and incurring the odium of doing so), by expressly excepting the statute from respecting that right."[61]

Versions of the notwithstanding clause also appear in nascent drafts of what would evolve into the *Charter*. In June 1978, the federal government introduced *The Constitutional Amendment Bill* (Bill C-60). The proposed charter of rights that was included in this bill applied only to federal legislation, unless provinces opted in.[62] Negotiations on the draft in January 1979 included the proposal of a notwithstanding clause for provincial use.[63] The drafts of the charter of rights circulated and debated during the Federal-Provincial First Ministers' Conference on February 5-6, 1979, included early versions of the limitations and notwithstanding clauses.[64] Barry Strayer recalls that it was during these meetings that Premier Lougheed pressed for the inclusion of a notwithstanding clause "to break the logjam" of the negotiations.[65]

By the summer of 1980, the idea of a notwithstanding clause was sufficiently entrenched in the negotiations to warrant ongoing discussions among premiers and officials. In a report dated July 24, 1980, at the Continuing Committee of Ministers on the Constitution, the Sub-Committee of Officials on a Charter of Rights discussed "the practicability of including an override (non-obstante) clause in an entrenched Charter, thus allowing jurisdictions to

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of limitation and override." See Lorraine Eisenstat Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" (1992) 42:2 UTLJ 207 at 210 [Weinrib, "Of Diligence"].

60 *The Task Force on Canadian Unity: A Future Together Observations and Recommendations*, Catalogue No CP32-35/1979E-PDF (Ottawa: Minister of Supply and Services Canada, January 1979) (Co-Chairs: Jean-Luc Pepin & John P Robarts), online (pdf): <publications.gc.ca/collections/collection_2014/bcp-pco/CP32-35-1979-eng.pdf> [perma.cc/QGS2-QNRD].

61 *Ibid* at 108. The Commission favoured a constitutional bill of rights without any notwithstanding clause so long as the federal and provincial governments could agree on the list of rights and freedoms to include, but suggested a notwithstanding clause in the event such consensus could not be reached.

62 Romanow, Whyte & Leeson, *supra* note 10 at 235; Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol I (Toronto: McGraw-Hill Ryerson, 1989) at 397, s 131 of Bill C-60 [Bayefsky, vol I].

63 Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol II (Toronto: McGraw-Hill Ryerson, 1989) at 547 [Bayesfsky, vol II].

64 *Ibid* at 568. See Weinrib, "Of Diligence", *supra* note 59 at 217, 569-70; Romanow, Whyte & Leeson, *supra* note 10 at 237.

65 Strayer, "The Evolution", *supra* note 10 at 90.

enact laws that would expressly supersede particular rights."[66] The issue of the notwithstanding clause was again raised in negotiations on August 29, 1980, although "some doubt was voiced about the desirability" of the provision.[67] The sub-committee discussed the idea that a law enacted under the notwithstanding clause should be passed by at least 60% of the legislature and expire after a set period.[68]

Although Lougheed's later recollection was that many officials were "not knowledgeable about the concept,"[69] the documentary evidence suggests that the idea of a notwithstanding clause arose with reasonable frequency in the lead up to the final *Charter* negotiations in November 1981. The Premier of Saskatchewan, Allan Blakeney, entered those negotiations arguing that any entrenchment of rights should include a *non obstante* clause in order to grant governments full capacity to protect against the violation of human rights stemming "from the operation of the economic and social systems."[70] During a meeting of all premiers on October 18, 1981, the governments of Quebec and British Columbia facilitated the exchange of "no-author texts," seeking to find the terrain of constitutional consensus.[71] James Matkin, BC's Deputy Minister of Intergovernmental Relations, having consulted with Paul Weiler, his former colleague from the BC Labour Relations Board, included a notwithstanding clause in the proposal.[72] Crucially, as Lorraine Weinrib's work elaborates, the notwithstanding clause evolved alongside the limitation formula of what would become section 1 of the *Charter*: as the language of the clause on reasonable limits became stricter, momentum for the inclusion of a notwithstanding clause intensified.[73]

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66 Bayefsky, vol II *supra* note 63 at 661. The committee only had time for "a general canvassing of preliminary views … but most jurisdictions felt that, if it were possible to fashion a suitable override clause, this could perhaps be an acceptable approach to dealing with an entrenched Charter" (Bayefsky, *ibid* at 664).

67 *Ibid* at 680-81.

68 *Ibid* at 681.

69 Lougheed, *supra* note 56 at 2.

70 Romanow, Whyte & Leeson, *supra* note 10 at 241; The Honourable Allan E Blakeney, "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1 Const Forum Const 1 at 1 [Blakeney].

71 Bob Plecas, *Bill Bennett: A Mandarin's View* (Vancouver: Douglas & McIntyre, 2006) at 159 [Plecas]; Sheppard & Valpy, *supra* note 12 at 258-61; James G Matkin, "The Negotiation of the *Charter of Rights*: The Provincial Perspective" in Joseph M Weiler & Robin M Elliot, eds, *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 27 at 38 [Matkin].

72 Matkin, *supra* note 71 at 32, 38-39; Plecas, *supra* note 71 at 161. See also Paul C Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18:1 U Mich JL Ref 51 at 79-80 (see especially note 97); Peter H Russell, "The Paradox of Judicial Power" (1987) 12:3 Queen's LJ 421 at 436, note 20.

73 Weinrib, "Of Diligence", *supra* note 59 at 219-20.

Thus, the stage was set for the appearance of the notwithstanding clause in the November Accord, which formed the final basis for the adoption of the *Charter*. The Accord emerged out of the closed-door meetings that took place from November 2 to 5, 1981 among federal and provincial first ministers and officials. The dominant account of how the notwithstanding clause came to be included in the resultant agreement emphasizes the "secret 'kitchen meeting'" between Attorneys General Roy Romanow (Saskatchewan), Roy McMurtry (Ontario), and Jean Chrétien (Ottawa).[74] "On the counter beside the stainless-steel sink, under harsh fluorescent lighting, Romanow … jotted down seven points on two sheets ripped from a lined notepad," Ron Graham writes.[75] "To satisfy Trudeau, there would be patriation, an entrenched Charter, and no financial compensation in the amending formula. To satisfy the Gang of Eight [the aligned Premiers opposing a *Charter*], there would be a notwithstanding clause."[76] Images of the lined notepad on which Romanow sketched his notes, now housed at the Library and Archives Canada, capture the tenor of the hurried late-night drafting, the note's details sparse. "All the Charter But the 2nd Half of it ... Non Obstante," the note reads on page 1. "5 yr 'Sunset'" appears on page 2.[77] It was constitution making by short hand.

The role of that document in brokering the agreement that the federal government and all provinces, except Quebec, signed the morning of November 5, 1981, remains contested. The story of the Kitchen Accord, however, was immediately appealing to the press and public as a way of understanding, and giving life to, the controversial constitutional deal. It featured prominently in the *Globe and Mail*'s coverage of the negotiations, and Romanow, McMurtry, and Chrétien happily reenacted their meeting for a documentary the following afternoon.[78] "One of the great mysteries," Peter Lougheed complained in his interview with Ron Graham, "is how the hell they managed to convince the

74 Robert Sheppard, "Secret, all-night talks behind historic accord", *The Globe and Mail* (6 November 1981) 10; Russell, *Constitutional Odyssey*, supra note 12 at 44; Sheppard & Valpy, *supra* note 12 at 288-89.

75 Ron Graham, *The Last Act: Pierre Trudeau, the Gang of Eight, and the Fight for Canada* (Toronto: Allen Lane Canada, 2011) at 192.

76 *Ibid*.

77 The images can be seen on the *Canadian Encyclopedia* entry, "Patriation of the Constitution." Robert Sheppard, "Patriation of the Constitution" (last modified 4 May 2020), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/patriation-of-the-constitution> [perma.cc/HKG5-NRU6]. "What's this damn piece of paper Romanow's showing around?" Chrétien recalls BC's Intergovernmental Affairs Minister, Garde Gardom, asking him. "Can you really sell it or is this another bluff[?]" "I think I can sell it," Chrétien predicted. "Then you'll have a new constitution," Gardom replied. See Jean Chrétien, *Straight From the Heart* (Toronto: Key Porter, 2007) at 185.

78 Sheppard & Valpy, *supra* note 12 at 302; Graham, *supra* note 75 at 193.

Ottawa media that they engineered this thing."[79] "There were lots of pieces of paper flying around that afternoon," Lougheed continued, "but I didn't even know the Kitchen Accord existed until I read about it in the papers the next day."[80] Many of those scraps of paper had notations foreshadowing the notwithstanding clause.

The broader records and recollections of what transpired during the *Charter* negotiations suggest that the idea of a notwithstanding clause was circulated in discussions from the outset. Indeed, the Kitchen Accord's spare details confirm as much. Howard Leeson, an official from the Government of Saskatchewan, kept records indicating that debate on the notwithstanding clause started on November 3.[81] In his memoirs, Roy McMurtry suggests that he had privately brought up the necessity of a notwithstanding clause in a private meeting with Prime Minister Trudeau the day before. "I had become convinced," McMurtry writes, "that incorporating a 'notwithstanding clause' in the Charter had the best potential for an honourable compromise. … Although the clause offended Trudeau's absolutist view about the role of the Charter, I was relieved when … he informed me that he might consider it."[82] Downplaying the role of Chrétien, Romanow, and McMurtry, Brian Peckford, the Premier of Newfoundland, argues that the final agreement on patriation was the culmination of back-and-forth deliberations spearheaded by the Newfoundland delegation in a suite in the Château Laurier Hotel.[83] The notwithstanding clause featured prominently in these Newfoundland-led discussions as well.[84]

Saskatchewan Premier Allan Blakeney's account also emphasizes the importance of the notwithstanding clause.[85] "After a morning's bargaining," he recalled,

> [w]e checked the draft to see whether we all agreed on which provisions would be subject to the notwithstanding clause and which would not. That was it. The deal was made. Nobody was happy with the contents. The agreement was somehow anti-climactic. We had done our best. We had a deal. ...

79 Graham, *supra* note 75 at 193-194.

80 *Ibid*.

81 Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, 2011) at 42.

82 McMurtry, *Memoirs*, *supra* note 13 at 315-16. See also the Honourable R Roy McMurtry, "The Search for a Constitutional Accord — A Personal Memoir" (1982) 8:1&2 Queen's LJ 28 at 64-65 [McMurtry, "The Search"].

83 Peckford, *supra* note 13 at 257-59.

84 *Ibid* at 259.

85 Allan Blakeney, *An Honourable Calling: Political Memoirs* (Toronto: University of Toronto Press, 2008) at 186-89.

> Nobody got what he wanted. It was far from perfect, but nobody could figure out how to get any agreement to make it better.
>
> So a new constitution was born — and born, not out of the head of a legal scholar crafting elegant and hortatory prose, but out of a toughly bargained compromise that is so often the basis of democratic government.[86]

Although convinced to accept the deal with pressure from Ontario's Premier Bill Davis, Trudeau's memoirs describe the "mealy-mouthed" notwithstanding clause as violating his "sense of justice." "I think we may have to go for the compromise solution," Trudeau lamented to his inner circle on the fateful evening of November 4, "even though I don't like it."[87] In this respect at least, the Premier of Quebec, René Lévesque, agreed. "[A]ll this shady dealing, presided over in some kitchen," he writes in his memoirs, "had resulted in a dish that was basically mediocre in which Trudeau's initial designs had been considerably diluted."[88] Prime Minister Brian Mulroney would later add his voice of disapproval, characterizing section 33 as "that major fatal flaw of 1981, which reduces your individual rights and mine."[89] No other provision of Canada's Constitution comes even close to sharing section 33's strange constellation of principled supporters, reluctant acceptors, and vehement critics.

Some of that mixed reaction is premised on the view that the clause emerged out of the exigencies of political compromise, rather than principled constitutionalism. The notwithstanding clause "was the product, pure and simple, of a political deal, a trade-off in order to have any sort of charter," Barry Strayer writes.[90] As Janet Hiebert points out, this view is capable of multiple interpretations: was section 33 a compromise of political necessity, principles, or constitutional ideas, or all three?[91] Defenders of the clause counter that it was not a "spur-of-the-moment invention" but rather "built upon historical antecedents and deep thought by premiers of varying ideologies concerning the very nature of parliamentary democracy," albeit not in a way that has done much to alter the dominant narrative.[92] Regardless, the notwithstanding clause was destined

86 *Ibid* at 189-90.

87 Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart, 1993) at 322-24.

88 René Lévesque, *Memoirs*, translated by Philip Stratford (Toronto: McClelland & Stewart, 1995) at 332.

89 *House of Commons Debates*, 34-2 (6 April 1989) at 153.

90 See Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 267.

91 Janet L Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts our Understanding" in James B Kelly & Christoper Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 107.

92 Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy,*

to catch the public unprepared, given the "closed, exclusive, and secretive" nature of the November 1981 negotiations from which the clause first rose to the public's attention.[93] Other than a passing comment by Blakeney, the notwithstanding clause was not discussed during the more publicly-accessible proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution between November 1980 and February 1981.[94] For that reason, and perhaps due to lingering confusion about the coherence of a constitutional bill of rights that authorized a legislature to enact laws inconsistent with those very rights, many would come to see the clause, as Weinrib put it, as "a compromise of justice, rather than a just compromise."[95]

That was certainly the reaction of the many members of the women's movement fighting vociferously to entrench equality rights in the *Charter*. As Marilou McPhederan puts it, the Ad Hoc Committee of Canadian Women on the Constitution "rejected the accord's new override as an odious surtax on the price of their hard-won constitutional rights."[96] That committee, and a number of female federal and provincial politicians, succeeded in ensuring that the final wording of section 28 of the *Charter* guaranteeing rights "equally to male and female persons," would not be subject to section 33, by using yet another notwithstanding clause. Doing so only cemented the pervasive view that the purpose of the notwithstanding clause was essentially about the diminishment and legislative override of rights.

A constitutional history of the notwithstanding clause, however, illuminates its more complex array of purposes. It *was* a compromise in the sense that it was the subject of bargaining, but so too were other aspects of the *Constitution Act, 1982*, including the amending formula. The provision also carried different meanings in the minds of its proponents and critics. Matkin envisioned the notwithstanding clause as reconciling "the competing principles or interests behind the opposing positions of parliamentary supremacy and

Institutions (Cambridge: Cambridge University Press, 2019) 209 at 214.

93 Adam M Dodek, ed, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 76.

94 *Ibid* at 76; Adam Dodek, "The Canadian Override: Constitutional Model or *Bête Noire* of Constitutional Politics?" (2016) 49:1 Israel L Rev 45 at 53.

95 Lorraine E Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6:2 Rev of Const Stud 119 at 148.

96 Marilou McPhedran, Judith Erola & 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 Lois Harder & Steve Patten, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 203 at 207.

judicial review."[97] Blakeney viewed the clause as a method of protecting rights — including the right to basic health care — which had not been entrenched in the *Charter*.[98] Lougheed's position on the clause was that it allowed legislatures to depart from judicial interpretations of rights when there existed reasonable disagreement over equally important public objectives.[99] For McMurtry, the provision provided a "safety-valve" against "a rigid decision of the courts similar to those of the United States Supreme Court which struck down state legislation outlawing child labour."[100] McMurtry, influenced by Weiler's thinking, envisioned the notwithstanding clause as essentially responsive in nature: a mechanism that would ensure the capacity of legislative responses to at least some constitutional forms of judicial law making. As he lamented: "[n]othing during the debate that has followed the November accord has saddened me more than the irrational allegations that the 'notwithstanding clause' was prompted by provincial politicians determined to retain the option of trampling on individual freedom with Draconian legislation."[101]

The clause's proponents among the framers have often been reduced to expressing a desire for untrammelled parliamentary sovereignty, thereby feeding the interpretation of the clause's purpose as enabling the override of rights.[102] Of course, retaining some measure of parliamentary sovereignty was a significant element in the thinking of some proponents of the notwithstanding clause, but its origins have always reflected complex ideas on the relationship between legislatures, courts, and citizens on the best methods of promoting and securing rights. From the outset, the notwithstanding clause was premised on the central rights-protecting norm of insisting on explicitness and transparency in the legislative process where rights are concerned, and on the democratic engagement of the public in assessing, weighing, and debating potential rights infringements. Such purposes were only furthered by the notion of a sunset provision, an early and recurring feature of the constitutional discussions proposing the inclusion of a notwithstanding clause. What the notwithstanding clause promises is not simply an enabling of parliamentary power, but, in the minds of its architects, an entrenched and ongoing public deliberation between courts, legislatures, and the public on the nature of rights and their reasonable and justified limits.

97 Matkin, *supra* note 71 at 31.
98 Blakeney, *supra* note 70; Newman, *supra* note 92 at 216-17.
99 Lougheed, *supra* note 56; Newman, *supra* note 92 at 218.
100 McMurtry, "The Search", *supra* note 82 at 64.
101 *Ibid* at 64-65.
102 Webber, *supra* note 15 at 515.

IV: The Constitutional Law of the Notwithstanding Clause

Critics of the notwithstanding clause will point to the evidence that suggests the legacy of the notwithstanding clause has proven its political proponents wrong, or at the very least naïve as to its true effects. "I was confident that the clause would rarely be used," McMurtry predicted "given the strong public support I observed for a Charter of Rights."[103] But what happens when the infringements of rights are popular and recourse to majoritarian political preferences only reinforces the vulnerability minorities face? If the legitimacy of the notwithstanding clause is premised on its rarity of use, what happens when the constitutional culture shifts, and the political costs no longer serve to restrain governments from invoking its powers? What of the legal history of Quebec's first sweeping use of the clause to attach it to all of its enacted legislation and the Supreme Court of Canada's interpretation of section 33 in *Ford v Quebec* finding that the notwithstanding clause provides requirements "of form only"?[104] What of the current moment in which provincial governments, and perhaps future federal ones too, will not hesitate to invoke the clause preemptively to foreclose judicial review about rights-infringing legislation? What becomes of the *Charter* if use of the notwithstanding clause becomes routine?

As scholarly debate continues in light of these pressing concerns, recent work on the application of the notwithstanding clause and its proper interpretation and application largely steers clear of the clause's intellectual history. In important recent articles, Grégoire Webber favours an analysis exclusively attuned to the "lawyer's craft" of technical legal reasoning,[105] while Robert Leckey and Eric Mendelsohn seek to place the interpretation of section 33 within the larger analytic framework of the Constitution of Canada, "[w]hatever the notwithstanding clause's conceptual origins or the provincial premiers' hopes for it."[106] Webber is surely right that scholars and courts have thus far paid too little attention to the careful drafting of section 33, which neither explicitly exempts or overrides rights or judicial review, but rather compels the continued "operation" of legislation "but for" select provisions of the *Charter*.[107] For their part, Leckey and Mendelsohn situate section 33 within the broader purposes of the *Charter*, the constitutional role of superior courts, and the necessary implications of the sunset aspects of section 33, compellingly arguing

103 McMurtry, *Memoirs*, *supra* note 13 at 315.
104 *Ford*, *supra* note 4.
105 Webber, *supra* note 15 at 512.
106 Leckey & Mendelsohn, *supra* note 15 at 197.
107 Webber, *supra* note 15 at 511, 519.

that section 33 "does not make rights irrelevant or strip them of their legal character."[108] Both Webber's close textual reading of section 33, and Leckey and Mendelsohn's focus on the broader constitutional context, suggest that, in appropriate cases, courts retain an important role to play in assessing and adjudicating *Charter* rights infringements, notwithstanding the successful invocation of the notwithstanding provision. This article argues, however, that none of the three interpretive legs of the stool — text, purpose, and context — should be pried apart or isolated in interpreting and applying section 33. The historical record outlined here should lead us to reject the assumption that the text and constitutional context of the notwithstanding clause runs against its own history. On the contrary, the rights-protecting purposes of section 33 are carefully captured in the language of the provision and perfectly consistent with the broader aims of Canadian constitutionalism.

In rights-protecting statutes such as the *Canadian Bill of Rights*, notwithstanding clauses were added specifically to *reduce* the instances of legislative rights infringements by requiring Parliament to explicitly state in law its intention to operate outside the constraints of the rights and freedoms otherwise protected. Similarly, the concept of the notwithstanding sunset — originally imagined by Weiler, documented in the Kitchen Accord, and ultimately embodied in the textual mechanics of section 33(3) of the *Charter* — "hardwires into the Charter the idea that the use of the notwithstanding clause requires the electorate's ongoing, or at least episodic, democratic consent."[109] Thus, the text and operational mechanics of section 33 came to explicitly reflect its purposes: simultaneously enabling and constraining parliamentary sovereignty in relation to the limitation of select rights. In this respect, the text, purpose, and context, including the constitutional history of the notwithstanding clause, are aligned.

Nothing in this reasoning contradicts the Supreme Court of Canada's holding in *Ford* 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."[110] The text of section 33 undoubtedly sets formal requirements for the invocation of its constitutional powers in relation to the operation of laws; requirements without scope for judicial review of the reasons standing behind the legislative decision to invoke the notwithstanding clause. Neither is there anything in the

108 Leckey & Mendelsohn, *supra* note 15 at 214.
109 *Ibid* at 199.
110 *Ford*, *supra* note 4 at 740.

text to limit the timing (either before or after a judicial decision) by which a legislature can or cannot "expressly declare" that a law "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the *Charter*.[111] Nonetheless, it is notable how frequently the proponents of the notwithstanding clause assumed that it would necessarily exist in the context of a legislative response to a specific judicial decision. That is because the purpose of section 33, a purpose reflected in the carefully drafted text and supported by the *Charter*'s overall purpose and context, was not to write courts completely out of the adjudication of potential rights infringements, but rather to delineate specific roles for legislatures, the public, and the courts when section 33 is invoked.

The text of section 33 must be interpreted in a manner consistent with its purposes: a balance of both parliamentary sovereignty and rights protection. From the outset of the appearances of notwithstanding clauses in rights-protecting instruments, one of their principal purposes was to enhance deliberate deliberation about rights and their limits, demanding a legislative process that took rights seriously, imposed limits explicitly, and engaged with judicial reasoning with the dignity of reasonable disagreement. There was, in the notwithstanding clause's felicitous mechanisms and careful drafting, room for constitutional contributions to rights protection from legislatures, courts, and the voting public. That process, and those purposes, are undermined rather than promoted by an interpretation of section 33 that renders courts mute and moot when a legislature pre-emptively invokes the clause. Nothing in the text of the notwithstanding clause or its context or purposes suggests that it precludes judicial engagement with the question of whether a particular *Charter* right has been infringed and justifiably limited or not when a legislature has "expressly" declared that a law "shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the *Charter*.

Indeed, the mechanics of the sunset provision only make sense if courts retain a role in assessing and identifying, but not remedying, legislation that unjustifiably infringes one of the select *Charter* rights covered by section 33. A judicial finding that a law infringes a *Charter* right without justification and would have been invalid but for the invocation of the notwithstanding clause provides crucial information for both voters and governments alike as they contemplate their democratic choices during the five-year span that the notwithstanding clause operates. By the same token, a judicial finding that the legislation did *not*, in fact, need the protective shield of the clause since the law would not have infringed the *Charter*, will allow a government to let the sun set

111 *Charter*, *supra* note 1, s 33(1).

without having to pay the ongoing political cost for a deliberate infringement of *Charter* rights. Additionally, a judicial determination and the constitutional litigation surrounding it might inspire productive legislative alternatives for the legislature to consider that would fulfill its policy objectives without unjustifiably infringing rights. Similarly, a judicial interpretation of a rights infringement that would have otherwise invalidated the legislation but for the protective shield of the notwithstanding clause will bring the constitutional stakes at play into sharper relief and to broader public attention than the legislative process alone might afford. It will, through evidence, testimony, and legal argument inject the perspectives of the individuals and groups most directly impacted by the law into the constitutional debate. This may be especially the case, and will be particularly important, where the rights infringements are experienced and endured by a vulnerable minority. As the constitutional law of the notwithstanding clause takes further shape, it will be crucial for courts to see its richer rights protecting purposes when interpreting the application of its text. Such an approach to section 33 of the *Charter* fits within Canada's balanced constitutional arrangements more seamlessly than has often been assumed.

V. Conclusions

What are we to take from this constitutional history of notwithstanding? Those who advocated for or acquiesced to the inclusion of section 33 in the *Charter* did not share a monolithic view of the clause's role or purpose. The multiplicity of constitutional history reminds us that the present is not so different from the past: constitutionalism, like constitutional provisions themselves, is a meeting ground for the mediation of diversity. And yet, there are discernable threads in the history of the notwithstanding clause worth appreciating and emphasizing, especially the attempts to temper conceptions of parliamentary sovereignty by facilitating an ongoing engagement between courts, legislatures, and the public concerning the interpretation of rights and their limits.

This deeper constitutional history suggests that the notwithstanding clause is not best characterized as the last-minute invention of desperate politicians intent on brokering a deal — although politicking and compromise are certainly part of its story, as in so much constitution making. Rather, the notwithstanding clause emerges from its own constitutional history as a tool to express and define relationships within statutes and constitutions alike, and it is striking just how many of its conceptual proponents foregrounded the protection of rights — not their override, derogation, or denial — as the rationale for its existence. Those rationales included the revival of a long tradition of common law constitutionalism premised upon democratic deliberation as

an avenue through which to protect constitutional rights. That deliberation includes assumptions about the productive spotlight of a requirement of legislative explicitness, the legislative capacity to protect other important human rights not captured by judicial interpretation of the *Charter*, and the ongoing democratic debate necessary to resolve rights disagreements among courts and legislatures. Those purposes alone do not tell us how to understand and apply section 33 of the *Charter*, but neither are they irrelevant to an interpretive practice that should focus on finding constitutional meaning in the interplay of text, purpose, and context.

This article accordingly suggests that the notwithstanding clause, rather than standing as a constitutional outlier, a regrettably compromised bargaining chip, or a majoritarian cudgel, reflects the same balancing instincts, the same concern for the interplay between democracy, individual rights, and the broader public interest as Canadian constitutionalism more generally. Such an interpretation is not a gloss or wishful thinking placed upon a provision in contradiction to its history, but rather an emanation of its constitutional history. As the new chapters of section 33 of the *Charter* are written, we hope that the rights-protecting elements of its constitutional history remain an important part of the story.