Constitutional forum constitutionnel

Federalism and the Notwithstanding Clause

Carissima Mathen*

I. Introduction

In 1982, as part of the final negotiations over the *Constitution Act, 1982*, nine provincial governments and the Government of Canada agreed to a derogation clause by which any legislature could, by express declaration, ensure that a law operates "notwithstanding" certain rights in the *Charter of Rights and Freedoms*.[1] The clause was, and remains, controversial. By ceding the "last word" on entrenched rights to a simple legislative majority,[2] it appears to undermine the very reason for entrenching those rights in the first place.

Despite the provincial support for section 33 at the time of its enactment, outside the province of Quebec the clause was not often used between 1982 and 2018,[3] and rarely featured in political debate — even in the wake of controversial court rulings.[4] Since 2018, however,

* Professor of Law, University of Ottawa. I am grateful to Hoi Kong, Vanessa MacDonnell, Richard Mailey, Gregoire Webber, Margot Young, and Rob De Luca for their helpful comments. All errors remain mine.

1 *Canadian Charter of Rights and Freedoms*, s 33, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 33 covers the fundamental freedoms (section 2); legal rights (sections 7–14); and equality (section 15). It does not extend to the democratic rights (sections 3–5); mobility rights (section 6); or minority language and education rights (sections 16–24).

2 Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at para 21.

3 Scholars disagree slightly on the precise numbers but as of the time of writing, apart from the 1982 Quebec omnibus law, there appear to have been 23 unique statutes that have invoked section 33. Sixteen of those have been in Quebec. Between 1989-2017, section 33 appeared in just four bills. Dave Snow, "Political Revival: Scholarly Renaissance: Academic Writing on the Notwithstanding Clause, 1982-2023" (draft on file with author). See also Tsvi Kahana, "The Notwithstanding Clause in Canada: The First Forty Years" (2023) 60: 1 Osgoode Hall LJ 1.

4 *R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281 (striking down criminal abortion law); *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609 (excluding evidence in a murder case).

numerous provinces have used or threatened to use section 33, creating what one scholar has called a "revival."[5] It has been invoked both to pre-empt judicial review[6] and to respond to it,[7] although it has not yet been invoked by the federal Parliament. The spate of recent use has revived concerns about the clause's negative impact on minority groups.

This paper addresses a separate issue: section 33's effect on Canadian federalism. The notwithstanding clause was part of the 1982 bargain by which both provincial and federal government would have to cede supremacy vis-à-vis individual rights. Nevertheless, actors outside the invoking jurisdiction will struggle over how to respond section 33's increased invocation. There are several reasons for this. First, to most Canadians, federalism is an opaque concept. While people may grasp that legislative power is shared between Canada and the provinces, they are unlikely to appreciate all that that entails. This lack of nuance is heightened when people are looking for specific relief. Thus, for example, when frustrated by provincial governments, people are apt to seek federal help regardless of any limits imposed by the division of powers.[8]

Second, the use of section 33 against a group in one province communicates politically about the status of that group across Canada and creates pressure to respond outside that province. This may partially explain why numerous municipal governments outside Quebec passed resolutions condemning the province's religious clothing law known as Bill 21.[9] Such responses can complicate intergovernmental relations.[10]

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5 *Snow*, *supra* note 3. See Saskatchewan (*The School Choice Protection Act*, SS 2018, c 39); Ontario (*Election Finances Act*, RSO 1990, c E7, as amended by *Protecting Elections and Defending Democracy Act, 2021*, SO 2021, c 31; *Keeping Students in Class Act*, *2022*, SO 2022, c 19); and Quebec (Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, 2022 (assented to 16 June 2019) SQ 2019, c 12; Bill 96, *An Act respecting French, the official and common language of Québec*, 2nd Sess, 42nd Leg, 2022 (assented to 1 June 2022) SQ 2022, c 14). Ontario threatened to use the clause following *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151, 426 DLR (4th) 374; New Brunswick debated but ultimately did not include the clause in *An Act Respecting the Public Health Information Solution*, SNB 2019, c 22. At the time of writing, Saskatchewan had recently passed Bill 137, *An Act to amend the Education Act 1995 respecting parental rights,* 3rd Sess, 29th Leg, 2023 (assented to 20 October 2023) as *The Education (Parents' Bill of Rights) Amendment Act*, *2023* which *inter alia* declares that a requirement for parental consent vis-à-vis student pronoun use shall operate notwithstanding sections 7 and 15 of the *Charter.*

6 See Quebec's Bill 21 and Bill 96 and Ontario's *Keeping Students in Class Act*, *supra* note 5.

7 See Saskatchewan's *School Choice Protection Act* and Ontario's *Election Finances Act*, *supra* note 5.

8 An example is the country's current housing crisis. While housing is largely a provincial responsibility, there have been calls for federal leadership, and federal actors have been criticized for pointing out the limits of their jurisdiction: Nojoud Al Mallees, "Is Housing a Federal Government Issue? It Might Not Matter, Experts Say", *Global News* (10 August 2023), online: <https://globalnews.ca/news/9894669/housing-affordability-federal-liberal-responsibility/> [https://perma.cc/5AKH-JAJT]; Sarah Ritchie, "Canadians Split on Whether to Blame Provinces or Feds for Housing Crisis: Poll", *The Canadian Press* (23 August 2023), online: <https://www.cp24.com/news/canadians-split-on-whether-to-blame-provinces-or-feds-for-housing-crisis-poll-1.6530626> [https://perma.cc/4A3E-RPG2].

9 Bill *2*1, *supra* note 5. See also Jordan Kanygin, "Calgary Council Passes Motion Opposing Quebec's Bill 21", *CTV News* (30 September 2019), online: <https://calgary.ctvnews.ca/calgary-council-passes-motion-opposing-quebec-s-bill-21-1.4617962> [perma.cc/CF59-Z8ZK]; Ali Raza, "Brampton Calls on Cities Across Canada to 'Join the Fight' against Quebec's Bill 21", *CBC News* (15 December 2021), online: <www.cbc.ca> [perma.cc/M2FT-Y88J].

10 Benjamin Shingler, "Quebec Premier Shoots Back at Manitoba Premier's Attempt to Lure Quebecers", *CBC News* (28 November 2019), online: <https://www.cbc.ca/news/canada/montreal/manitoba-quebec-religious-symbols-ads-1.5376628> [https://perma.cc/VS8R-8ZF3].

The nature of federal politics supplies a third reason. Members of the House of Commons represent ridings with diverse constituencies; and Senators are appointed, in part, to represent one of the country's many regions. At least some of these legislators have political agendas tied to the protection of certain rights or minority groups. This, too, will push them to intervene in or speak out against the use of section 33.[11]

The remainder of this paper looks at possible responses to section 33 that could deeply affect the country's underlying federal structure. It discusses three responses — disallowance, judicial review, and amendment — that have either arisen in public discourse or, I argue, warrant serious consideration. My goal is to offer a more complex way of thinking of about section 33 focusing on its relationship to Canadian federalism and, by implication, to the future course of the country's democratic constitutionalism.

II. Disallowing Provincial Laws

A dramatic intersection between section 33 and federalism is the idea that the federal government could simply disallow provincial laws that invoke the clause in a manner that it deems problematic.[12] The disallowance power, provided for in Section 90 of the *Constitution Act, 1867*, permits the Governor General to block provincial legislation from taking effect.[13] Since Confederation, the power has been used over one hundred times although not since 1943.[14] Disallowance stems from an older, imperialist understanding of Canadian constitutionalism rooted in distrust of the regions and a belief in the moderating effect of the central government.[15]

Scholars of Confederation suggest that disallowance was at least partially intended to permit the federal government to protect citizens from "unjust, tyrannical or discriminatory provincial legislation."[16] But, in 1868, Prime Minister John A Macdonald suggested that disallowance should only be used where: a provincial law was, in whole or in part, "illegal or unconstitutional"; an otherwise valid law clashed with a concurrent federal one; or the law

11 Aaron D'Andrea, "Trudeau Weighing 'All Options' on Notwithstanding Clause Use Amid CUPE Ontario Strike", *Global News* (4 November 2022), online: <https://globalnews.ca/news/9253789/trudeau-notwithstanding-clause-cupe-ontario-strike/#:~:text=%E2%80%9CProactive%20use%20of%20the%20notwithstanding,options%E2%80%9D%20were%20on%20the%20table> [https://perma.cc/F64R-LAPG].

12 Andrew Coyne, "What Ottawa Should Say to the Provinces: See Your Notwithstanding Clause, Raise You Disallowance", *The Globe and Mail* (2 November 2022), online: <https://www.theglobeandmail.com/opinion/article-what-ottawa-should-say-to-the-provinces-see-your-notwithstanding/> [https://perma.cc/FV87-FBWT]; Keith Henderson & Brent Tyler, "Opinion: Disallowance and Bill 96", *Montreal Gazette* (25 April 2022), online: <https://montrealgazette.com/opinion/opinion-disallowance-and-bill-96> [https://perma.cc/QU5C-UX2Q]>.

13 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(10)(c), reprinted in RSC 1985, Appendix II, No 5.

14 Gerard La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Queen's Printer, 1965); Andrew Heard, "Constitutional Conventions and Written Constitutions: The Rule of Law Implications in Canada" (2015) 38: 1 DULJ 331–362. There is a companion power, reservation, under which Lieutenant-Governors may withhold royal assent on federal instruction. For discussion, see La Forest, ch 6.

15 La Forest, *supra* note 14. The *Constitution Act 1867,* s 55, also details a federal version of the principle. The disallowance of a federal law happened only once, in 1873.

16 Robert C Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991) at 114.

affected the Dominion generally.[17] Otherwise, provinces should be able to freely exercise their section 92 powers without fear of federal interference.

Unsurprisingly, then, over the period of time that it was employed disallowance largely protected federal jurisdiction from provincial intrusion. Federal actors avoided meddling in provincial affairs on the basis of policy disagreement alone.[18] In one controversy over New Brunswick schools, Macdonald stated that the question was whether the province had exceeded its powers under the Constitution — *not* federal views on the merits of the law itself.[19] He warned that if federal politicians were to disallow an otherwise valid provincial law based purely on their political opinion of it, that would result in a "violent wrench of the Constitution."[20]

This image of disallowance — as a "violent wrench" — persists. The provinces would view any use of it as an extreme provocation with the potential of to undermine federalism itself. Perhaps because of that political reality, for over 70 years the federal government has rarely openly mused about disallowance, let alone used it.[21] Numerous scholars accordingly now consider the power spent,[22] and the Supreme Court of Canada has described it as having fallen into "disuse."[23] Some even argued that there is now a constitutional convention against it.[24]

Some of the dismissal of disallowance resembles, in tone at least, the dismissal (until recently) of section 33. It is true that disallowance has been out of the picture for much longer, but nonetheless the comparison illustrates the danger in declaring the demise of any constitutional provision.[25] Circumstances, that may not have provided optimal conditions for the provision to be used, can change. In the case of disallowance, such a change would relate to how some view the notwithstanding clause as posing an acute threat to individual rights.

The argument in favour of disallowing provincial laws that cite section 33 rests on the idea that one of the purposes of the *Charter of Rights and Freedoms* is to curb the exercise of arbitrary political power.[26] Routine use of section 33 could obliterate that curb, with persons stripped of their rights for many years.[27] The legislature would enjoy the final say on these questions, unmoored from true debate[28] or the moderating effect of judicial rulings. In fact,

17 *Ibid* at 115.
18 *Ibid* at 120.
19 "Senate", *House of Commons Debates*, 1-5, No 1 (29 April 1872) at 75.
20 *Ibid* at 75–76.
21 In the failed Charlottetown Accord (1992), the power would have been removed altogether.
22 See the discussion in Peter W Hogg & Wade K Wright, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2021) at 5:13.
23 *The Queen v Beauregard*, [1986] 2 SCR 56, 30 DLR (4th) 481.
24 See discussion below on whether this convention exists.
25 Thanks to Vanessa MacDonnell for pointing this out.
26 *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 121; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 594-595.
27 Under section 33(3), the clause is in force for a maximum of five years, at which point it can be renewed through another express legislative enactment; *Charter*, *supra* note 1.
28 Leonid Sirota, "Not as Advertised" (3 January 2022), online (blog): *Double Aspect* <https://doubleaspect.blog/2022/01/03/not-as-advertised/> [https://perma.cc/SR6G-5EZR].

the legislature might prevent judicial rulings from being rendered at all. In consequence, it is feared, a great many people could be mistreated.[29]

And so, those who recoil against what they see as section 33's raw power politics might seize on an equivalent power play — disallowance — capable of making troubling provincial laws go away. The disallowance power would provide an immediate counterpoint to what could become a trend of derogating from fundamental constitutional rights. It would aid in enforcing certain norms, saying to sub-national governments: "You may go this far and no further." It could stave off serious crisis and instability for the country as a whole. And, perhaps, it could spur provinces to reconsider section 33 as a tool of quick resort.

Having said all that, the arguments against reinvigorating disallowance are so considerable that, in my view, they outweigh the arguments in its favour. First, there is a strong case that, insofar as it worked to protect federal jurisdiction, disallowance has long since been overtaken by judicial review.[30] The Supreme Court has said that its role as an "arbiter of jurisdictional disputes" is "inherent" to federalism itself. [31] For the federal order of government to now seize on disallowance as an alternative method to settle those kinds of disputes would seem to threaten not only the unwritten principle of federalism, but, arguably, the rule of law too.

There may also be a constitutional convention against disallowance, as mentioned above. In the past, constitutional conventions have been identified by looking to (a) the precedent of non-usage over a long period of time, (b) evidence that the relevant actors no longer view the practice as legitimate, and (c) the underlying reasons for the convention.[32] As applied to disallowance, there are arguments in favour of each of those criteria. At the same time, the precise contours of such a convention will be critical. If, for example, disallowance is not just about jurisdiction, but about protecting *individuals* from provincial excess,[33] a constitutional convention against the latter federal aim might not be as settled — especially where a province tries to pre-empt judicial review. Nevertheless, the existence of a constitutional convention is a serious possibility.

The broader issue with disallowance — highlighted by the above arguments — is its incompatibility with modern Canadian federalism. In the 19th century, Macdonald thought of the Dominion as a union in which provinces were little more than rump governments.[34] That position did not take hold and, indeed, was not the only animating idea for Confederation. The 1867 constitutional moment represented "a legal recognition of the diversity that existed among the initial members of Confederation."[35] It "manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments."[36]

29 Caitlin Salvino & Nathalie Des Rosiers, "Saskatchewan's Use of the Notwithstanding Clause Reveals its Fundamental Flaw", *Policy Options* (29 September 2023), online: <https://policyoptions.irpp.org/magazines/september-2023/saskatchewan-notwithstanding/> [https://perma.cc/5CTE-TFFJ].

30 Peter W Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 2003) at ch 5.3(e).

31 *Reference re Securities Act*, 2011 SCC 66 at para 55.

32 Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959) at 136; *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 888-909.

33 Vipond, *supra* note 16 at 40.

34 WPM Kennedy, "The Nature of Canadian Federalism" (1921) 2:2 Can Hist Rev 106.

35 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 43, 161 DLR (4th) 385 [*Secession Reference*].

36 *Ibid*.

The provinces are equal players in Confederation, not subordinate ones. Disallowance of provincial laws that include section 33 would inject a fundamental asymmetry into that equality.[37]

It is true that under the Constitution the federal Parliament may occasionally trump countervailing or conflicting provincial policies or laws.[38] Disallowance, though, empowers the executive. This points to a related flaw with disallowance: its tension with the unwritten constitutional principle of democracy. Democracy, which is central to Canada and its federal structure, contemplates that positive law emanates from "freely elected legislative bodies" at both levels.[39] Canadian federalism presupposes the existence of distinct yet connected and overlapping polities. Each polity is free to pursue their own projects within the boundaries set by the Constitution. Battles between these legislative orders are inevitable and must be carefully worked out. Subjecting the duly enacted law of a legislature to the executive fiat of another order of government is a profound offense to that structure.[40]

Disallowance has been described as the ultimate "nuclear option."[41] Nowhere would that be more evident than if the federal executive were to seize upon it to defeat provincial invocations of the notwithstanding clause. That does not mean that disallowance would never be used to counter such provincial laws, but the circumstances would have to be so extraordinary as to constitute a meaningful threat to the federation as a whole.

III. Judicial Review

The resurgence of section 33 will draw the courts into the debate over how it can be used. At the time of writing, the Quebec Court of Appeal had on reserve a challenge to Quebec's Bill 21.[42] The case is expected to reach the Supreme Court of Canada, which has not directly considered section 33 since its 1988 decision in *Ford*. There, it adopted a posture of maximal

37 One reviewer suggested that (a) section 33 itself could represent a separate grant of legislative power and (b) section 33 would have better identified disallowance as a carveout from its scope. To these interesting points I would say, first, that while section 33 was shaped by the reality of intergovernmental relations and, as this paper argues, clearly affects them, it *functions* primarily as a shield against judicial review. It is entirely self-contained within the *Charter*, which makes its *direct* link to the division of powers (or broader constitutional architecture) less obvious. The second argument relies on the *absence* of particular words in section 33, to set a favoured interpretation of a separate power (disallowance). Here, I favour a Dworkinian construct that rejects so-called "expectation intentions" (which looks to how drafters might have anticipated that a provision might be interpreted) where those conflict with the "semantic intentions" around the words that the constitution actually uses. See Ronald Dworkin, "Comment" in Antonin Scalia et al, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997) at 115.

38 See e.g. *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 (paramountcy); *Constitution Act, 1867*, *supra* note 9.

39 *Secession Reference*, *supra* note 35 at para 62.

40 As noted by AA Dorion, disallowance could also spur mischief in the provinces, tempting parties with only minority status in a legislature to prevail upon a sympathetic federal executive: "Parliamentary Debates on the Subject of Confederation of the British North American Provinces", *Province of Canada Parliamentary Debate*s, 8-3 (16 February 1865) at 258 as cited in La Forest, *supra* note 14 at 7–8.

41 Chantal Hébert, "Voters Deserve to Know Ottawa's Intentions Towards Quebec's Secularism Law", *Toronto Star* (19 June 2019), online: <thestar.com/politics/political-opinion/2019/06/19/no-good-reason-for-trudeau-to-rush-in-and-challenge-quebecs-secularism-law.html> [https://perma.cc/9KWQ-KWGL].

42 *Hak c Procureure Générale du Québec*, 2019 QCCA 2145 (CanLII).

restraint, largely declining to impose substantive limits on how the clause can be used.[43] While the Supreme Court has occasionally referenced the notwithstanding clause in other contexts,[44] *Ford* remains its only direct pronouncement on it.

A fierce academic debate has arisen over judicial review of section 33.[45] The Supreme Court will be asked to reconsider its decision in *Ford* and, perhaps, articulate new parameters around the clause,[46] or define new judicial tools to respond to it.[47] No matter what it decides (including if it simply reaffirms prior precedent),[48] the Court will enter into an extremely contentious political environment.

A single use of the notwithstanding clause directly implicates the invoking jurisdiction and those individuals whose rights are overridden. However, the Canadian legal system provides tools for other actors to join the overarching conversation. The most important of these tools is the Court's reference jurisdiction. References empower the executive branch of a government to put legal questions to courts outside of a live dispute.[49] A reference can skirt any particular invocation of section 33 — which is bound to be politicized — and consider more general questions. The federal Liberal government has mused about initiating a reference on whether it is proper to re-interpret section 33 to limit its "pre-emptive" use, i.e. using it prior to a judicial ruling.[50] A number of additional questions could also be posed, such as the relationship between section 33 and section 28 of the *Charter*,[51] and how the clause might be formally changed (discussed in section IV, below).

To be sure, some provinces are likely to react quite negatively to a federal reference, viewing it as an attempt to cabin their powers. References, though, are available to both orders of government. Provinces may appeal appellate references to the Supreme Court as of right.[52] This creates room for creative instances of collaboration.[53] A number of like-minded provinces

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

44 *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, at para 30.

45 For a good overview see Maxime St-Hilaire, Xavier Foccroulle Ménard & Antoine Dutrisac, "Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-)Rejoinder" (20 December 2022), online: *SSRN* < https://dx.doi.org/10.2139/ssrn.4295034> [perma.cc/QYM8-M5MH].

46 Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The Faulty Received Wisdom around the Notwithstanding Clause", *Policy Options* (10 May 2019), online: <policyoptions.irpp.org> [perma.cc/NH3W-7LA3].

47 Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and The Electorate" (2022) 72:2 UTLJ 189.

48 Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Const Forum 38, online: <https://canlii.ca/t/t005> [https://perma.cc/8U6E-7ZAH].

49 See generally Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019) at ch 4. The Court has asserted a discretion to refuse to answer reference questions, but does so very rarely.

50 Holly Lake, "Overdoing the Override Clause", *National Magazine* (6 September 2022), online: <www.nationalmagazine.ca> [perma.cc/XH8Z-ZQKK].

51 Kerri A Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28:4 Const Forum 19.

52 *Supreme Court of Canada Act*, RSC, 1985, c S-26, s 36 ("Appeals from references by lieutenant governor in council").

53 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1. For discussion of the general strategy, see Carissima Mathen, "Carbon Tax Court References a Chapter in Fed-prov Power Struggle", *Policy Options* (23 May 2019), online: <policyoptions.irpp.org> [perma.cc/C4FF-HZD5].

might put questions to their respective courts of appeal, ensuring the benefit of input from a variety of judges across the country.

The Parliament of Canada has never invoked the notwithstanding clause. As discussed in the next section, a number of questions about such use might be fruitfully addressed in a reference. Such a proceeding could illuminate important aspects of the notwithstanding clause without directly involving provincial sensitivities around federal overreach.

The reference function rests on a venerable line of constitutional law and procedure. Because they do not depend on a live dispute, references provide at least the opportunity to shift attention away from specific, highly contentious uses of the notwithstanding clause. In that way, a properly framed reference might lessen the attendant "heat" on the judicial branch, and could provide space for it to consider important issues outside of the tumult of a live dispute. That said, references often do become politicized,[54] and given the current state of debate over section 33, the prospects for dispassionate debate are slim.

Nevertheless, the advisory function of the courts could take up the slack that is created when pre-emptive use of the clause appears to frustrate the ordinary course of constitutional review. While it would have to be carefully deployed, the advisory mechanism could act as a valuable signal for exactly what is at stake when the notwithstanding clause is used. It could assist in allowing consideration of both the scope and meaning of the notwithstanding clause, and the appropriate place of the courts in settling such questions.

IV. Formal Constitutional Change

This final section examines how Canada's federal structure provides opportunities to think about changing section 33 itself. Section 33 was inserted into the Constitution. In theory it could be amended or even "uninserted," and there have been calls to do so for many years.[55] The increasing resort to section 33 will make such calls more insistent.

Amendments to the notwithstanding clause might include a requirement for a legislative super-majority, or a prohibition on so-called pre-emptive use.[56] Or, it could be removed from the *Charter* altogether. Textual changes to the Constitution of Canada must proceed via one of the amending formulae set out in Part V of the *Constitution Act, 1982*.[57] None of the sections in Part V mention the *Charter*, which implies that most changes to it would be subject to the

54 Mathen, *supra* note 49 at 118-126, 184-190.

55 See Thomas S Axworthy, "The Notwithstanding Clause: Sword of Damocles or Paper Tiger?", (2007) 28: 3 *Policy Options* 58, online (pdf): <http://irpp.org> [perma.cc/4W7G-H2WM]; the comments of the Canadian Civil Liberties Association in Peter Zimonjic & Jennifer Chevalier, "The Notwithstanding Clause — What it is, Why it was Used and What Happens Next", *CBC News* (6 November 2022), online (pdf): <https://policyoptions.irpp.org/wp-content/uploads/sites/2/assets/po/equalization-and-the-federal-spending-power/axworthy.pdf> [perma.cc/WHH2-8WG5].

56 Trying to limit pre-emptive use raises additional questions. Would it suffice that there has been *a* judicial decision, or must there be a *final* decision from the Supreme Court of Canada? Suppose that court declines to grant leave? If the legislature anticipates that a law will be struck down because of an older precedent (as the Ontario government argued in 2022 vis-à-vis *Federation of Labour v Saskatchewan*, 2015 SCC 4), would using section 33 in that case still be considered pre-emptive?

57 *Constitution Act, 1982*, ss 38–45, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

general amending formula in section 38.[58] Section 38 requires resolutions from both Houses of Parliament, and the legislatures of at least two-thirds of the provinces (seven provinces) representing fifty percent or more of the population of the provinces — hence it is known colloquially as "the seven-fifty rule."

While formally amending or even repealing section 33 is theoretically possible, it is extremely unrealistic. The uneven distribution of the population across Canada makes it almost impossible to proceed without the agreement of the largest provinces: Ontario and Quebec. The federal government is bound by its own "regional veto" statute to not propose an amendment under section 38 absent broad regional consensus.[59] Some even argue that a constitutional convention now requires a public referendum before any broad constitutional change.[60] In any event, one cannot hope to open up the Constitution on a single issue; any efforts to do so would quickly be met by demands for other changes.

While altering section 33 via the seven-fifty rule is unlikely, jurisdictions might consider discrete changes to their relationship with the clause. Although the general formula is required to remove section 33 from the *Charter* altogether (or to permanently and universally alter its terms), there is no obvious reason why individual jurisdictions would lack the power to make such a decision for themselves. Section 33, after all, is designed to be entirely within the discretion of the enacting legislature. Its use or non-use has little bearing, in any jurisdictional sense, on any other actor in the federation. It should follow that a single jurisdiction could decide to alter its own relationship to section 33. While this may take the form of ordinary law, the bilateral formula in section 43 of Part V may also be available.[61] As a result, any province could insert additional pre-conditions, require additional democratic hurdles, or, even, simply take the notwithstanding clause off the table.

No province would lightly decide to do any of these things. Such a decision would be deeply influenced by political considerations. Still, different groups and communities could see advantages in pressing for this sort of change. Electoral campaigns might feature a debate on whether to chart a different course on the notwithstanding clause. Two recent events demonstrate that majority sentiment on rights issues is not always easy to predict. The first occurred in Ontario in the fall of 2022. After retuning to power with a majority, the provincial government invoked section 33 for the third time in Ontario's history — abandoning a col-

58 Under section 41(c), the unanimity formula applies to changes to "the use of the English or French language" but changes in single provinces are subject to the some-but-not-all provision in section 43. This means that the alteration of certain *Charter* language rights operating at the federal level is probably subject to unanimity.

59 *An Act respecting constitutional amendments*, SC 1996, c 1 prohibits federal Ministers from proposing changes under, *inter alia,* section 38 unless the amendment is supported by Ontario, Quebec, British Columbia, and representative majorities in both the Prairie and Atlantic regions of Canada.

60 Richard Albert, "The Conventions of Constitutional Amendment in Canada" (2016) 53:2 *Osgoode Hall LJ* 399.

61 See *Association of Parents for Fairness in Education, Grand Falls District 50 Branch v Société des Acadiens du Nouveau-Brunswick et al*, [1986] 1 SCR 549 at 579, 27 DLR (4th) 406, 69 NBR (2d) 271 *per* Justice Beetz (speaking in the context of the *Charter*'s linguistic rights); Dwight Newman, "The Bilateral Amending Formula as a Mechanism for the Entrenchment of Property Rights" (2013) 21:2 *Const Forum* 17 (arguing that section 43 can permit individual provinces to entrench property rights in the *Charter*); and other supportive commentary cited by Newman at fn 16.

lective bargaining process to force a contract on low-paid education workers.[62] Under swift public rebuke, including the threat of a general strike, Ontario repealed the law in less than a week.[63] The entire saga reflected a political miscalculation about which side of the conflict would generate public sympathy. The second event is the somewhat cool response in Saskatchewan to the 2023 *Parents' Bill of Rights Act*.[64] In a provincial poll conducted just prior to the bill's passage, a majority of respondents objected to including section 33 in it.[65] This reaction was particularly striking given that the underlying issue (whether parents should be informed of a child's pronoun use) appears to enjoy broad support.[66] The implication is that even where they support a law's goal, a majority may not necessarily support using the notwithstanding clause to shield that law from judicial scrutiny. In other words, majorities are not always indifferent to the fate of minority groups — and they might be open to a broader discussion about the future of section 33.

To date, section 33 has only been used by provinces. However, the clause occasionally has emerged as a factor in federal politics and some federal parties have promised to use it.[67] The more that provinces become comfortable with invoking section 33, the greater the pressure will be on Parliament to do so as well. Federal use of the notwithstanding clause would raise very difficult questions of political morality in such federal areas as criminal or immigration law. To be sure, there can be reasonable disagreement about when an invocation at the federal level might be warranted.[68] But the implications for the criminal justice system (among other federal policy areas) should not be dismissed. Many of the *Charter* rights enjoyed by criminal defendants produce judicial outcomes that are exceptionally controversial.[69] If the notwithstanding clause becomes perceived as the way out of such controversies it will become more difficult for federal politicians to resist using it. The resulting damage to the justice system could be severe.[70]

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62 *Keeping Students in Class Act*, *supra* note 5.

63 Kristin Rushowy, "Ford Government Kills Controversial Bill that Ordered CUPE School Staff Back to Work, as Talks Continue", *Toronto Star* (14 November 2022), online: <www.thestar.com> [perma.cc/S3G4-TLJR].

64 Rushowy, *supra* note 5.

65 Jason Warick, "Poll Suggests Respondents Divided on Sask. Government's School Pronoun Policy", *CBC News* (11 October 2023), online: <https://www.cbc.ca/news/canada/saskatoon/poll-suggests-respondents-divided-on-sask-government-s-school-pronoun-policy-1.6993208> [https://perma.cc/KT9A-JYB9]

66 David Korzinsky, "Vast Majority Say Schools Should Inform Parents if Children Wish to Change their Pronouns, Are Split Over Issue of Parental Consent" (28 August 2023), online: *Angus Reid Institute* <https://angusreid.org/canada-schools-pronouns-policy-transgender-saskatchewan-new-brunswick/> [https://perma.cc/SMV6-AWXU]

67 Aaron Wherry, "The Case for Making the Notwithstanding Clause Politically Awkward Again", *CBC News* (1 June 2022), online: <www.cbc.ca> [perma.cc/X4JD-6DAE]; "Business of Supply — Opposition Motion (Use of the Notwithstanding Clause)", *House of Commons Debates*, 44-1, No 159 (13 February 2023).

68 Sarah Burningham, "Notwithstanding Extreme Intoxication", *Policy Options* (22 March 2022), online: <https://policyoptions.irpp.org/magazines/notwithstanding-extreme-intoxication/> [https://perma.cc/22V3-RF86].

69 David Fraser, "Premiers Want Ottawa to Fix the Bail System, but are Provinces Doing Enough?", *Canadian Press* (17 January 2023), online: <ottawa.citynews.ca> [perma.cc/74KN-FKLX]; Antoni Nerestant, "Quebec City Mosque Shooter Must Get Chance at Parole after 25 Years, Supreme Court Rules", *CBC News* (27 May 2022), online: <www.cbc.ca> [perma.cc/BF98-5V9A].

70 Recognizing this does not mean subscribing to a notion of judicial infallibility. Courts do not always get it right. But departing from the settled procedures by which Parliament can respond to a particular ruling, for example, through subsequent legislation, has the potential to introduce both instability and injustice.

Given that Parliament has yet to use section 33, there may be greater opportunity to shape a federal position on it and to make that a salient political question. An ordinary federal law changing Parliament's relationship to section 33 could set out pre-conditions to its use or remove the clause from the federal toolkit. It might usefully address the bicameral nature of the invocation and flesh out the role of the Senate. For example, Parliament could decide that the House may not override a negative resolution from the Senate. No Parliament can bind a future one, but it could send a clear signal about the clause and the circumstances under which it should be used.[71]

While the legislative responses discussed in this section relate to single jurisdictions, they would have national import. They might spur broader conversation about the underlying norms and commitments of our system of government. They could do so while respecting the essential diversity of the federation. The responses would be consistent with the constitutional fact that every jurisdiction gets to make its own decisions responding to the concerns and priorities of its population. But, hopefully, such initiatives would speak to the idea that not every decision about the notwithstanding clause need descend into pure power politics. The possibilities noted in this section hold space for dialogue, persuasion by example, and the recognition that Canada is bound by a particular ethos in which all, regardless of region, province, or political position have an equal stake.

V. Conclusion

Of the many issues roiling the Canadian constitutional landscape, none is more consequential than the notwithstanding clause. Section 33's resurgence carries obvious risks for those persons and groups who are subject to it. In this paper I have discussed the additional implications of that resurgence for Canadian federalism. I have tried to show that the clause is not just a question for the jurisdictions that invoke it, or for the individuals it affects. Each use of section 33 can reverberate throughout the country.

I have explored different ways that actors might respond to problematic uses of section 33. I conclude that, while the impetus for provincial disallowance is understandable, and fits into one established narrative around its intended purpose, it would wreak extensive damage to the federal structure and unwritten principles of the Constitution. I have also examined possible ways to initiate legal proceedings over a broad array of questions about section 33. One of the most fruitful is the judicial advisory function — a venerable tradition of Canadian constitutional law that provides at least the space for courts to consider pertinent legal issues outside of the passions of a particular case. Finally, while formally amending the *Charter* to remove or alter section 33 universally is not feasible at the current time, the particular nature of the notwithstanding clause affords discrete jurisdictions the opportunity to (re)consider how they engage with the clause. Such a move would have particular force, and great practical value, were it to come from the Parliament of Canada.

71 Vanessa MacDonnell made the intriguing suggestion that such a statute might be regarded as having quasi-constitutional status: see her "A Theory of Quasi-Constitutional Legislation" (2016) 53:2 Osgood Hall LJ 508.