Constitutional forum constitutionnel

Weaving Section 33 into the Charter *Project: Citizen-Led Oversight as a Potential Way Out of the Legitimacy Conundrum*

Ian Peach & Richard Mailey*

"Governments' willingness to derogate from rights, without even cursory justifications for doing so, calls us as advocates to depart from business as usual. Advocates committed to defending fundamental rights and freedoms have a responsibility in the face of these developments … to help the court to define its constitutional duty in these new conditions. They shouldn't be shy: advocates working on challenges to governments' actions under the new paradigm have likely wrestled with these issues for longer than have the judges before whom you plead."[1]

I. Introduction

Can we fairly assess moments of political upheaval when we're living inside them? And more specifically, is it too early to define and react against the creeping normalization that seems to be taking place, in some provinces, around the *Charter*'s notwithstanding clause?[2]

* Ian Peach is the Consultation Manager for the Wolastoqey First Nation in New Brunswick; Richard Mailey is the Director of the Centre for Constitutional Studies at the University of Alberta. We are grateful to Margot Young and Hoi Kong for organizing the workshop that this collection grew out of, and for guest editing this issue. We are also grateful to Hoi, Jean Leclair, and Colton Fehr for their comments on the paper, and to Aubrey Abaya, Rob de Luca, and Laura McKenzie for helpful conversations. All errors and inconsistencies are our own.

1 Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause" (2019) 28:4 Const Forum Const 1 at 2.

2 As is well known, since 2019, Quebec and Ontario have each invoked the notwithstanding clause several times. In Quebec, Bills 21 (*An Act respecting the laicity of the State*, SQ 2019, c 12) and 96 (*An Act respecting*

While it is tempting to diagnose the recent uptick in provincial recourse to section 33 as a moment of upheaval or even crisis, it may be more advisable, we suggest, to treat it as an opportunity for constructive reflection. In this paper, we accordingly offer some tentative reflections not on where we now find ourselves on the spectrum from crisis to normalcy vis-à-vis section 33, but on how to pave the way for a future in which a more responsible, deliberatively informed approach to section 33 could become the norm. In doing so, our hope is to at least partially bridge the divide between section 33's proponents[3] and critics[4] by proposing ways of better redeeming section 33's promise while more cleanly reconciling it with the values that underpin the *Charter*. Our sense is that such reconciliation is indeed possible, but only if we are honest about the extent of the tension between section 33 and the broader *Charter* project. To reduce this tension, we propose some steps that could be taken to enhance the level of democratic debate and independent oversight that accompany a government's invocation of section 33 — a task that could be achieved, we further suggest, through ordinary legislation rather than the more arduous route of formal constitutional amendment.

II. The Problem: Finding (Some) Integrity in Political Compromise

To begin with an obvious framing question, then: what are the core goals of the *Charter* project? There are, of course, many reasonable responses to this question. Our own response, which we will be working off here, is that the *Charter* is less about rights *per se* and more about the justification of government action. In this respect, our thinking is heavily influenced by Etienne Mureinik, a South African constitutional theorist and lawyer who spent his career struggling with the question of how lawyers and courts could resist legalized injustice — injustice that is perpetrated through apparently legal means, e.g. through enactment of formally valid law.[5] A constitutional bill of rights, Mureinik wrote, facilitates such resistance

French, the official and common language of Québec, SQ 2022, c 14) used section 33 to insulate bans on religious symbols in public sector workplaces and various measures to promote the French language against judicial invalidation on (certain) *Charter* grounds. In Ontario, section 33 was deployed for the government's controversial, mid-election redistricting of Toronto City Council (Bill 31, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001, the Municipal Elections Act, 1996 and the Education Act and to revoke two regulations*, 1st Sess, 42nd Leg, Ontario, 2018) and was then used to effectively overrule the Superior Court's invalidation of political advertising limits on free expression grounds (*Protecting Elections and Defending Democracy Act, 2021*, SO 2021, c 31) and to pre-emptively insulate back to work legislation against judicial invalidation (*Keeping Students in Class Act, 2022*, SO 2022, c 19, as repealed by *Keeping Students in Class Repeal Act, 2022*, SO 2022, c 20).

3 The notwithstanding clause has many defenders, both inside and outside of Canada. See e.g. Peter H Russell, "Standing up for Notwithstanding" (1991) 29:2 Alta L Rev 293; Benoît Pelletier, "The Notwithstanding Clause and the Separation of Powers", *Policy Options* (18 November 2022), online: <policyoptions.irpp.org> [perma.cc/E565-4L7A].

4 Few scholars have argued against the notwithstanding clause as cogently or fervently as John Whyte. See John D Whyte, "Sometimes Constitutions are Made in the Streets: the Future of the *Charter*'s Notwithstanding Clause" (2007) 16:2 Const Forum Const 79; John D Whyte, "On Not Standing for Notwithstanding" (1990) 28:2 Alta L Rev 347.

5 Mureinik's legal and constitutional theory is articulated in a number of now classic journal articles. In particular, see Etienne Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10:1 SAJHR 31; Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8:4 SAJHR 464 [Mureinik, "Charter of Luxuries"].

not by stopping the state from perpetrating constitutionally defined injustice, but by ensuring that the state is answerable for conduct that appears to cross the threshold from just to unjust, and by exposing its rationale for such conduct to plausibly independent scrutiny. To quote Mureinik on this point:

> The formal content of a bill of rights is often less useful than the fact that it brings under scrutiny the justification of laws and decisions. Apartheid flourished because it was impossible to ask parliament to justify its laws; the Population Registration Act could not have survived an inquiry into its rationality. Conversely, it will be impossible fully to undo apartheid without a legal order which makes every law, every government decision, indeed every decision having governmental effect, amenable to scrutiny; one which empowers the judges to demand to know the reasons for the law, or the decision. Hence the emerging consensus that the next order be a constitutional order, with a bill of rights at its centre.[6]

Rightly or wrongly,[7] this is the trajectory that the SCC's *Charter* jurisprudence has followed, reading a kind of "give and take" logic into section 1. The gist of this logic is that while Canadians "have" *Charter* rights, these rights are little more than thresholds that, when crossed, trigger a governmental duty to justify crossing the threshold, and an entitlement to independent analysis of the government's explanation for why it crossed the threshold. This is precisely Mureinik's point: that constitutional rights matter because of the justificatory process that their infringement triggers, not because they provide us with cast iron entitlements to engage in protected activities (although rights analysis may result in recognition of such an entitlement if justification is lacking).[8]

This understanding of the *Charter* project as a commitment to justificatory analysis has also gone hand in hand with the development of the idea that the *Charter* promotes a dialogic relationship between the judicial and legislative branches of government vis-à-vis rights protection.[9] In essence, this theory envisions a sort of "call and response" approach to the justification of government action. When a government law or action is challenged in the courts for violating *Charter* rights, part of the government's defence will be an argument that the law or action can be justified as a reasonable limit on rights, even if it is found to violate them. After explaining whether a law violates *Charter* rights, then, courts also have to explain whether, and why, the law is or is not a "reasonable limit" on those rights. If the law is invalidated, this judicial explanation gives the legislature or Parliament the opportunity to recraft its law to advance its policy objectives in a way that might now be considered by the courts to

6 Mureinik, "Charter of Luxuries", *supra* note 5 at 471.

7 We say "rightly or wrongly" here as a nod to Grégoire Webber's brilliant and insightful paper, "What *Oakes* Could Have Said (or How Else to Read a Limitations Clause)" (21 November 2022), online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=4214646> [perma.cc/G736-CLX6]. In this paper, Webber challenges the generalized proportionality model that was read into section 1 of the *Charter* in *R v Oakes*. That model is clearly now a firmly entrenched part of our constitutional law — and we therefore accept it wholesale here — but it is important to acknowledge that it is less a self-evident extension of the idea of rights than it is one model of rights protection among many.

8 For a Canadian perspective on this phenomenon, see Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge, UK: Cambridge University Press, 2009).

9 For the original articulation of this idea, see 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; see also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Andrew Petter, "Taking Dialogue Theory Much too Seriously (or Perhaps *Charter* Dialogue Isn't Such a Good Thing after all" (2007) 45:1 Osgoode Hall LJ 147.

be reasonable, assuming that the legislature still insists on advancing the policy objectives of the invalidated law.

If the legislature or Parliament takes this action, it is possible that the courts will get another chance to pronounce on the reasonableness of the revised law, at least if litigants see the revisions as inadequate. Potentially, several iterations of this back-and-forth between courts and legislatures are possible, hence the idea of a dialogue. At its best, the requirement that each branch explain the rationale for their response to the other branch through this dialogic process builds understanding among the governed population of the rationale for the governmental action and its consistency with the Constitution, which serves to reinforce the legitimacy of government.[10]

Framing the *Charter* in terms of these ideas — as an attempt to cultivate or at least deepen a culture of dialogic inter-institutional justification in Canada vis-à-vis fundamental rights — creates a window of opportunity for justifying section 33, but poses a challenge, too. The challenge is that on one quite standard reading, the core function of section 33 is precisely to cut justification out of the equation of governing under the *Charter*, specifically by permitting governments to infringe rights for five-year stints without justification, or at least, without allowing courts to provide section 52 remedies if they regard justification as lacking.[11] This raises the question: if the *Charter* is fundamentally about justification — if justification is its *raison d'être*, as we claim here — how can it be reconciled with a constitutional provision that seems to allow governments to do things without the need to justify their actions before a plausibly independent adjudicator?

One answer might be that section 33 serves to reconcile the *Charter* and its nationalizing implications with the decentralizing impulses of Canadian federalism.[12] To be sure, this might be one piece of the philosophical puzzle, but one can equally question the extent of the *Charter*'s challenge to Canadian federalism. In this regard, the key point is that courts, in their *Charter* jurisprudence, simply decide what laws are unconstitutional — not how laws should be redrafted to rectify unconstitutionality, and not what goals they should be used to pursue. This generally leaves governments with ample leeway, we suggest, to draft new laws to advance their policy objectives while meeting the *Charter*'s justificatory bar in the way that they think best. Far from undermining federalism, this promotes regionally diverse approaches to rights

10 See Hogg & Bushell, *supra* note 9; Roach, *supra* note 9. It is worth noting that the success of this back-and-forth dialogue hinges completely on the receptiveness of each party to the other's contributions. There is nothing, structurally, that compels this; rather, it is a question of inter-institutional comity.

11 Is the suspension of otherwise available section 52 remedies what the notwithstanding clause does? For a debate on this point, see Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510 (suggesting that the effect of the notwithstanding clause is to suspend the normal operation of section 52 for laws that are inconsistent with certain parts of the Constitution); Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189 (suggesting that the notwithstanding clause, as a constitutional power, effectively cures what would otherwise be inconsistencies that give rise to section 52 remedies).

12 The relationship between federalism and section 33 is discussed in Leckey & Mendelsohn, *supra* note 11 at 205–06. See also Janet L Hiebert, "Notwithstanding the Charter: Does Section 33 Accommodate Federalism?" in Elizabeth Goodyear-Grant & Kyle Hanniman, eds, *Canada at 150: Federalism and Democratic Renewal* (Kingston: McGill-Queen's University Press, 2019) at 59–84.

protection insofar as each province can still draft legislation that may look very different from that of other jurisdictions. Granted, the range of legislative options will sometimes be narrowed by the courts, but rarely if ever to the point of significantly stymying local experimentation and the promotion of culturally distinct value systems via provincial law.[13]

This is not the only issue with federalist readings of section 33, though. Another, perhaps stickier issue is implicit in Carissima Mathen's contribution to this volume, and can be summarized in one word: *imbalance*.[14] Put simply, while section 33 has the potential to promote subsidiarity and the proliferation of culturally distinct approaches to rights protection across Canada, an uptick in nationally controversial uses has real potential to upset the balance and stability that federal arrangements are supposed to yield, perhaps even to the point of constitutional crisis. The fact that some political commentators have talked seriously about dealing with recent uses of section 33 through the threat of disallowance[15] — the 80-year-dormant federal power to essentially cancel provincial laws — is indicative of how section 33 can function as a double-edged sword for federalism. It is good for furthering certain forms of regional diversity, sure. But when it is widely perceived to undermine constitutional essentials (and indeed, *to cause real harm*) it will tend to fuel intergovernmental conflict, thereby jeopardizing the unity side of the federalist equation (unity *and* diversity, not diversity at the expense of unity).

Even if you believe firmly in the federalist credentials of section 33, however, there are still good reasons for seeking a supplementary justification that is *internal* to the *Charter* — a justification that explains why section 33 is more than a federalist exception to the *Charter*'s dominant commitment to the "demonstrable justifiability" of rights infringements. As it turns out, a perfect example of such a justification is supplied by Robert Leckey and Eric Mendelsohn's recent article, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate."[16] The key flourish that Leckey and Mendelsohn add to the intellectual discourse on section 33 is the idea that subsection 33(3) — the five-year sunset clause — creates an alternative means for the independent assessment of governmental rationales for rights infringements.[17] Simply put, the sunset clause does this by guaranteeing that legislators who have voted to invoke section 33 will face an election — and hence, the *independent*, *extra-governmental scrutiny* of the electorate — before having the opportunity to renew the invocation. As Leckey and Mendelsohn explain:

> [S]ubsection 33(3) hardwires into the *Charter* the idea that use of the notwithstanding clause requires the electorate's ongoing, or at least episodic, democratic consent. By drawing attention to the role of the voting public, subsection 33(3) invokes an idea of democratic responsibility. Through the democratic

13 See Roach, *supra* note 9. As a proviso, we would add here that courts should at least sometimes be ready to afford provinces a certain "margin of appreciation" where a rights-infringing law reflects specific dimensions of their distinct value systems and cultures. We also add that courts may sometimes overstep the mark in a way that goes beyond merely "narrowing" the potential for the relative independence of legislative goal-setting and experimentation.

14 See Carissima Mathen, "Federalism and the Notwithstanding Clause" (2023) 32:3 Const Forum Const.

15 The clearest example of this is Andrew Coyne, "What Ottawa should say to the provinces: See your notwithstanding clause, raise you disallowance", *The Globe and Mail* (2 November 2022), online: <www.theglobeandmail.com> [perma.cc/8NNE-Q5AW].

16 Leckey & Mendelsohn, *supra* note 11.

17 *Ibid* at 196–203, in particular.

> process, the public has occasion to express judgments about past legislative decisions to use the notwithstanding clause and about future-oriented commitments by political actors as to whether to renew or repeat its use.[18]

While important, conferring the status of a functional constitutional actor on the electorate is an insufficient step in the direction of reconciling section 33 with the *Charter* project, since the electorate evidently lacks the analytical frame and focus that enables the judiciary to assess the legitimacy of rights violations in a sufficiently rights-sensitive way. To take us a step further, then, Leckey and Mendelsohn suggest that the electorate should be supported — and can be supported, according to a reasonable reading of section 33 — by a purely declaratory judicial assessment of an impugned law's impact on rights. To quote Leckey and Mendelsohn again:

> In appropriate cases, on application by a plaintiff with standing, a court may scrutinize a protected law in the light of arguments and evidence, declaring whether the law limits *Charter* rights and, if so, whether such limits are demonstrably justifiable in a free and democratic society. Such a declaration would not stop the law's operation. But that traditional *Charter* analysis could enhance the electorate's ability to play the constitutional role assigned to it by subsection 33(3).[19]

Now, the process of justification has been, in a certain sense, triangulated. If a government invokes the notwithstanding clause pre-emptively, a court can provide an independent but non-binding analysis that will furnish the legislature *and* the electorate with a deeper appreciation — one hopes — of the law's impact on rights, and of its justifiability. While this is not a direct legal constraint on the legislature's ability to derogate from its constitutional rights commitments, it has proven to be an effective one elsewhere. Indeed, in the UK, where courts are limited to providing exclusively declarative relief for human rights violations, legislators have proven more or less consistently responsive to the "wisdom" of the courts.[20] Of course, the nature of federal politics in Canada means that a Canadian legislature could buck this trend, but this will often be a strategic error — especially if minor revisions would put the law into compliance with the court's understanding of the *Charter* and its reasonable limits, and especially in jurisdictions where public respect for the courts remains stubbornly high.

At the same time, though, we see two problems with this approach to reconciling section 33 with the *Charter*'s justificatory thrust. The first problem is that voters may not know or care about any of this, because their alleged "constitutional role" under section 33(3) is little more than a nifty theoretical construct. The upshot of this is that clinging to the idea that voters are making an informed and independent assessment at the ballot box may do little more than give a veneer of legitimacy for legalized injustice. This is not to say that voters are ill-equipped to decide on where the line is between justice and injustice, but that section 33 does little if anything to encourage the type of informed decision-making that is needed to sanction the infringement of fundamental rights. Even if the courts have weighed in at some point to provide a level of legal clarity, the oblique nature of the public input that follows at election time

18 *Ibid* at 199.

19 *Ibid* at 190.

20 To quote Jeff King on this point, from as recently as 2015: "[D]espite some lengthy delays and the possible exception of prisoner voting … there has been no case to date where the Government or Parliament affirmatively chose not to remedy incompatible legislation." Jeff King, "Parliament's Role Following Declarations of Incompatibility under the *Human Rights Act*" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (London, UK: Hart Publishing, 2015) 165 at 3, online (pdf): *UCL Discovery* <discovery.ucl.ac.uk> [perma.cc/B3W2-93DJ].

means that voters may be focused on other issues (healthcare, education, etc.), or may be voting along party lines. Worse still, voters may be well aware of the notwithstanding invocation and yet grossly undervalue the law's impact on fundamental rights, or the legal and constitutional importance of fundamental rights. This last risk is especially pertinent, we suggest, since the fact that respect for fundamental rights is often not at the forefront of majoritarian politics is the very reason for having a constitutional bill of rights in the first place.

The second problem with the Leckey and Mendelsohn line is with the realism of expecting a court to take on a challenge to a law that includes a notwithstanding declaration, rather than simply declaring the question to be moot on the grounds that there is no effective remedy for the infringement if it exists. Canadian courts are already having challenges managing the volume of live cases that come before them, and asking them to add another class of cases to their dockets — albeit a relatively small one — when they could simply declare them moot seems unreasonable.[21] Of course, courts in Canada do currently hear occasional reference cases (cases where legally effective remedies are also unavailable), but these are both rare and addressed exclusively by appeal courts. By contrast, having busy trial courts take on applications for purely declaratory relief where laws are partially shielded from invalidation by section 33 is a very different situation. In addition, having courts stray into hearing challenges to laws when no directly effective remedy is possible risks undermining the legitimacy of the judicial branch as a whole, even if it fits with a reasonable understanding of section 33's text. What level of faith would claimants have in the court system if the outcome of their case is essentially, "you're right, but on this occasion we're not going to do anything to help you"?

A full appreciation of these problems leaves us with a challenge, which the next section of the paper tries to address. The challenge is: can we redeem the promise of section 33 as an attempt to democratize the independent assessment of constitutionally suspect state conduct? As drafted, section 33 may do an inadequate job of redeeming this promise, but we suggest that there is room for those who hold section 33 powers — Canada's federal, provincial, and territorial governments — to enact legislation that corrects or at least reduces these defects. The possible contours of such legislation will be the focus of the paper's next section.

III. A Potential Solution: Citizen Deliberation on Invocations of Section 33

If we accept that there is room for governments to make section 33 more consistent with the overall *Charter* project of deepening our culture of dialogic justification vis-à-vis fundamental rights, the question then becomes: how? To achieve this goal, we propose that governments craft legislation that creates procedural obligations for the use of section 33, so that government rationales for using section 33 are subjected to independent scrutiny prior to its invocation, not just at the time of the next election (if the use of section 33 happens to be an election issue). We are of the view that an obligation on governments to provide an independently-assessed and pre-emptive justification for using section 33 will better foster meaningful civic

21 See e.g. "Delay No Longer. The Time to Act is Now: A Call for Action on Delay in the Civil Justice System" (2023), online (pdf): *The Advocates' Society* <www.advocates.ca> [perma.cc/PY74-GXQU]; Blair Rhodes, "Number of cases tossed due to delays hits all-time high in N.S. courts", *CBC News* (4 August 2023), online: <www.cbc.ca> [perma.cc/LP86-XS22].

and institutional debate about the legitimacy of their actions — more so, we suggest, than checking section 33 powers obliquely via electoral politics.

There are various means available to achieve the objective of requiring government to justify its use of section 33.[22] These exist along a continuum of engagement and, as a consequence, of both complexity and uncertainty of result. At one end of the spectrum is the argument that since invoking section 33 requires legislation, the most basic assurance of dialogue and debate already exists in the form of referral — after second reading of a bill that purports to use section 33 — to a legislative or parliamentary committee.[23] We would suggest that this a relatively poor protection, however, especially in the case of majority governments in which the government has a majority of members on the committee.

This problem could be addressed in various ways, though. The most minor but still somewhat meaningful improvement in the process would be for the legislature or Parliament to establish rules dictating the minimum time for the committee to spend in, or the minimum number of, public hearings. Going further, the legislature or Parliament could also require that the government have only a minority of members on the committee and that the chair of the committee be an opposition member (as with the federal Public Accounts and Access to Information, Privacy, and Ethics Committees).[24] If legislatures or Parliament chose to go this route, they could also ban legislative or parliamentary secretaries from sitting on committee, as the presence of legislative or parliamentary secretaries blurs the separation between executive and legislative branches of government, and hence the efficacy of oversight.

We would argue, however, that laws mandating independent assessment of a government's justification for its use of section 33 should go further and require the use of citizen-centred processes, such as citizens juries or constituent assemblies. Both of these processes are examples of deliberative democracy, in which a group of citizens is selected for the sole purpose of analyzing a specific and usually contentious political issue. As Bozentko, Maciolek, Reeves, and Van Drie explain in a recent opinion piece, citizens' juries are small groups of citizens, randomly selected.[25] While the groups are too small to be truly "representative" of the population, they serve as a microcosm of the public, intended to bring a more diverse range of considerations, thought processes, and opinions to the policy-making table than is often the case with elected politicians.[26] The powerful intuition driving such initiatives is that a small,

22 A number of such options are proposed in Jean Leclair, "Rebuilding the legitimacy of the notwithstanding clause", *Policy Options* (30 April 2019), online: <policyoptions.irpp.org> [perma.cc/2Y37-6UWN]. We are grateful to Jean for referring us to this piece, and for his insightful comments on an earlier draft of this article.

23 See e.g. "Legislative Process", online: *House of Commons Canada* <www.ourcommons.ca> [perma.cc/84J8-QNEV].

24 Canada, House of Commons, "Standing Committee on Public Accounts: Committee Members", online: <www.ourcommons.ca/Committees/en/PACP/Members> [perma.cc/ETJ5-G8CM]; Canada, House of Commons, "Standing Committee on Access to Information, Privacy, and Ethics: Committee Members", online: <www.ourcommons.ca/Committees/en/ETHI/Members> [perma.cc/B8LK-NJV5].

25 Kyle Bozentko et al, "The Wisdom of Small Crowds: the Case for Using Citizens' Juries to Shape Policy", *RealClearPolicy* (8 June 8 2021), online: <www.realclearpolicy.com> [perma.cc/HR7X-V65R]. See also Allan C Hutchinson, *Democracy and Constitutions: Putting Citizens First* (Toronto: University of Toronto Press, 2021) at 142–156. This paper takes particular inspiration from Professor Hutchinson's book.

26 *Ibid*.

plausibly representative group of people can work together constructively to address tangible political problems. The jurors may not be experts on the particular policy in question, but when given the opportunity to engage with policy questions in discussion with their peers, they are often able to produce good results.[27]

Constituent assemblies have both commonalities and contrasts with citizens' juries. As with citizens' juries, constituent assemblies randomly select citizens to participate in policy reform ventures (most commonly, they are used in constitutional reform exercises, where existing politicians' rational self-interest could form a barrier to the proposal of more seismic changes).[28] Unlike citizens' juries, though, constituent assemblies are larger bodies. They are therefore capable of being more truly representative of the population, although this may also make achieving consensus on their recommendations less likely. A constituent assembly is thus more likely to need to vote to decide upon what recommendations it makes in the end. Both mechanisms, however, could hold hearings with experts and citizens to bring participants to a common base of knowledge and understanding of the issue they have been tasked with making recommendations about and the implications of alternative courses of action. Furthermore, for these processes to have real impact on the project of justification of rights infringements, the legislation could possibly include a rule that the government must withdraw any section 33 legislation that the jury or assembly rejects.[29] A formal rule of this sort may not be necessary, though, as the pressure put on the government by such an independent deliberative body — sometimes in addition to pressure from a court — may have a significant impact on legislative decisions on whether to use section 33.

Without resolving specific questions of structure or selection method (at least for now), we suggest that a citizens' jury seems the most appropriate of these two citizen-centred review processes. A citizens' jury is a smaller group than a constituent assembly, so it could operate more like a legislative or parliamentary committee process, and it could hold hearings and engage in manageable deliberations. We would also recommend that the citizens' jury hearing process be broadcast and/or webcast, so that citizens can learn about the evidence the jury hears and, therefore, the basis for its decision. Mind you, this question of the "best" process is a detailed question best debated another day, and each jurisdiction would of course be free to determine its particular preferred process to draft into its legislation.[30]

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27 *Ibid*. Admittedly, many argue that criminal juries do not produce good results, but there is disagreement on this point, and it is a separate issue from the question of whether small groups of citizens with access to relevant analysis and evidence can make considered judgments on the legitimacy of rights infringements.

28 See e.g. Citizens' Assembly on Electoral Reform, *Making Every Vote Count: The Case for Electoral Reform in British Columbia, Final Report* (Vancouver: Citizens' Assembly on Electoral Reform, 10 December 2004), online (pdf): <citizensassembly.arts.ubc.ca/resources/final_report.pdf> [perma.cc/36QH-97JJ]; Jonathan Rose, "Putting the Public Back in Public Policy: The Ontario Citizens' Assembly on Electoral Reform" (2007) 30:3 Canadian Parliamentary Rev 9; Patrick Monahan, Lynda Covello, & Jonathan Batty, *Constituent Assemblies: The Canadian Debate in Comparative and Historical Context* (Toronto: York University Centre for Public Law and Public Policy, 1992).

29 See footnote 36, below, on potential constitutional objections to such a rule.

30 It is important to note here that there are also many potential risks and issues that are associable with the types of processes we're proposing. Consideration of these issues is beyond the scope of this short, mainly exploratory paper, but an overview can be found in Michael Pal, "The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions and the Law of Democracy" (2012) 38:1 Queen's LJ 259.

At this point, we can imagine at least three objections to our proposal that are worth addressing. The first objection, put simply, is that our suggestions are a classic instance of naïve, wishful thinking. The gist of this objection is that our proposals depend on provincial governments acting to check their own constitutional powers, which is unrealistic in a political climate that is now partly defined, in some provinces, by a governmental resistance to self-limitation and oversight.[31] While this is undoubtedly true, we do not think it negates the real impact that our proposals could potentially have on Canada's constitutional culture. In this regard, our ultimate hope would be for something along the following lines. A government or multiple governments wanting to raise the profile of a debate over the legitimacy of section 33 could introduce legislation to establish stringent procedural requirements of the type we describe. Under the right conditions, this could create a national public debate that could drive other jurisdictions to introduce equivalent legislation. If this strategy succeeded, such legislation could become a broadly-enough used mechanism that it could become politically costly not to have such a mechanism in place.[32] Some provinces may still hold out, but they would be doing so against the grain of an emerging pan-Canadian norm that many of their citizens may come to accept, and that may influence electoral behaviour over time. A direct and substantive legal limit on section 33 might be nice, of course, but we are interested instead — as noted above — in a solution that sustainably feeds off and perpetuates the inner logic of the notwithstanding clause itself, and that better reconciles section 33 with the *Charter* project as we understand it.[33]

This leads us to a second objection, which questions the constitutionality of our proposals. Here, the issue is whether provinces can legally limit their own constitutional powers in the way we've described. For some, we imagine that this might seem like an unconstitutional con-

31 On the link between this resistance and the brand of populism that has recently been sweeping certain parts of the globe (Canada included), see Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016). See also Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 Const Forum Const 9.

32 A colleague suggested that since our proposal would alter the way the notwithstanding clause functions, it could be questioned in the same way that the proposal to add consultative elections to the process of selecting individuals to become Senators was questioned — and declared unconstitutional — by the Supreme Court of Canada in the *Reference re Senate Reform*, [2014] 1 SCR 70. While we understand how Senate elections would fundamentally alter the political relationship between the House of Commons and the Senate, and would therefore alter the "architecture" of the Constitution, we do not see adding procedures to seek democratic input into the process of designing and considering legislation as analogous. Over the course of Canadian political history, new processes have often been added into the basic parliamentary procedure by which legislation is passed. For example, British Columbia, Ontario, and Prince Edward Island have all used citizen-centred processes in considering reforming the electoral processes and basis of representation in their legislatures, and therefore reforming electoral legislation, without the constitutionality of those processes being questioned. Moreover, applying an independent oversight procedure to a government's use of section 33 would actually be consistent with the underlying architecture of the section, of which democratic oversight is an element; this is why the operation of a law protected from *Charter* scrutiny by section 33 must be revisited after five years and, hence, after an intervening election.

33 We should also emphasize, in case this isn't sufficiently clear from the paragraph above, that the goal of such legislation would not be effective self-constraint (after all, a new government bent on using section 33 with reduced oversight could easily change the law to facilitate this). Rather, the goal, as suggested above, is to start a national conversation on the role that citizens ought to play in assessing invocations of section 33, and to create a deliberative counter-culture that runs against the grain of the governmental populism that is now evident in some provinces.

stitutional amendment, because it potentially alters the balance of power that was entrenched in 1982 without proper recourse to the Constitution's amending procedure. For us, though, it is quite clear that such acts of provincial self-limitation are already a commonly accepted feature of the Canadian system. The evidence of this is especially abundant with respect to governments' roles in the constitutional amendment process. It is accepted, for example, that provinces can limit their own ability to ratify constitutional amendments by requiring the use of pre-ratification referenda to test the popularity of amendments.[34] It is also widely accepted — although some scholars have admittedly questioned this — that the federal Parliament acted constitutionally by passing the regional veto law, which prevents federal proposals of amendments without the prior consent of five regions of Canada: Ontario, Quebec, British Columbia, the Prairies, and the Maritimes.[35] In both of these cases, legislative institutions took steps to legally limit their own access to their constitutionally allocated powers. They can do this, we suggest, because their constitutional powers define what they can do, but not what they must or should do.[36] If provinces want to take steps to ensure that their powers are wielded more responsibly than they otherwise may be, they can absolutely do so. And when the political composition of a given legislature changes, these steps can be rolled back or modified to reflect the new legislature's own understanding of its constitutional role and responsibilities.

This brings us, finally, to objection number three. This objection turns on the idea that by proposing the creation of citizen-led bodies, we are leaning too hard on an American understanding of the people's distinct constitutional role that is largely foreign to Canada's system of responsible government. To be fair, the idea that the people themselves possess a distinct constitutional role — a role not reducible to that of their elected representatives — is far more American than Canadian (see the US Constitution's preamble as an obvious example). However, while this idea may have been far removed from Canadian constitutional discourse at one point in history, it has clearly wormed its way into our thinking over the last 40 years. As Leckey and Mendelsohn suggest, for example, the sunset clause in section 33 appears to reflect a sense of the people as the ultimate arbiters of constitutional legitimacy, at least vis-à-vis certain constitutional rights issues. Moreover, the constitutional politics of the 1980s and 90s frequently made use of the idea that "we the people" had a role to play that could not be fully captured or exhausted through the existing channels of institutional power. Pierre Trudeau's "people's package" obviously exploited this idea in 1980–81, but so did the Special Joint Committee on the Constitution and the nation-wide referendum on the Charlottetown Accord, as well as other Charlottetown era initiatives like the Renewal of Canada conferences and the

34 For a description of such laws, see e.g. Richard Albert, "The Difficulty of Constitutional Amendment in Canada" (2015) 53:1 Alta L Rev 85 at 97–100.

35 *Ibid*.

36 Our claim here can be contrasted with Richard Albert's concerns that the regional veto law alters the balance of power that is contemplated by Canada's amending formula, and does so, unconstitutionally, without recourse to the formal amending formula (the same might be true, Albert suggests, of a provincial law that would make a pre-ratification referendum binding, rather than advisory). On this point, see Richard Albert, "Quasi-Constitutional Amendments" (2017) 65:4 Buffalo L Rev 739. Even if Albert is right about the constitutional issues with the regional veto law, it seems to us that the only modification that we would need to make to our proposed law is to make the recommendations of a citizens jury advisory, thereby preserving the legislature's formal power to invoke section 33 as it pleases.

Spicer Commission.[37] All of which is to say that even if Canadians once accepted a somewhat neater conflation between the people and their representatives, the practices of the last 40 years indicate waning faith in that conflation, and a qualified openness to a heavily federalized version of the doctrine of popular sovereignty that has historically defined the American constitutional imagination.

IV. Conclusion

Where does this leave us? Clearly, what we are suggesting is not a quick fix, and it is of limited assistance to those whose lives have been directly affected by recent invocations of section 33. In this respect, our proposal is evidently no substitute for the type of creative lawyering that the article's introductory quote calls for, not to mention robust political activism. Rather, what we are proposing is a way of thinking beyond our current predicament to a future in which the notwithstanding clause actually works as it should — as a means for legislatures to exceptionally express sincere and reasonable disagreement with courts over the best way to interpret *Charter* rights and their limits. Such inter-institutional disagreement is fine and desirable, but making the notwithstanding clause a coherent part of the *Charter* means that inter-institutional disagreement must be paired with extra-governmental oversight and scrutiny, in some form or other. We believe that this is consistent not only with the broader *Charter* project, but also with the nod to popular, extra-governmental consent that one finds in section 33's sunset clause. Juristocracy may be the antithesis of section 33, then, but so is the *de facto* legislative and therefore executive supremacy that our proposals seek to counteract.

37 A comprehensive account of these initiatives is provided by Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004).