CAN JUDICIAL SUPREMACY BE STOPPED?

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The *Charter of Rights and Freedoms* has created a judicial juggernaut that has increasingly eclipsed the powers of the legislative branch of government in Canada. The primary check on judicial power is the legislative override of the Charter, the section 33 notwithstanding clause, which was included for that very purpose. Rather than being perceived as an integral part of the Charter, the notwithstanding clause, even the prospect of its use, has recently been widely construed as an attack on the Charter. This is the main reason invoked by Prime Minister Chrétien for voting against the Canadian Alliance motion calling on Parliament to use "all necessary steps" to affirm the heterosexual nature of marriage. In more than 20 years since the adoption of the Charter in 1982, the notwithstanding clause has never been used at the federal level. It has only been used 16 times at the provincial and territorial levels, 13 of them in Quebec. Quebec originally opposed the Charter's adoption, but ironically its use of the notwithstanding clause on the explosive language issue undermined its legitimacy in English-speaking Canada. The University of Calgary's Ted Morton looks at the notwithstanding clause with a view to rehabilitating it rather than allowing it to fall into disuse, as the power of disallowance did in the British North America Act.

La *Charte des droits et libertés* a créé un mastodonte judiciaire qui a progressivement éclipsé les pouvoirs du corps législatif du gouvernement canadien. L'unique frein au pouvoir des tribunaux réside dans la clause dérogatoire de la Charte prévu à l'article 33, qui fut précisément intégrée à cette fin. Mais au lieu d'être considérée comme partie intégrante de la Charte, la seule perspective de faire appel à cette clause dérogatoire est largement interprétée comme une attaque en règle contre la Charte elle-même. C'est d'ailleurs la principale raison invoquée par le Premier ministre Chrétien pour voter contre la proposition de l'Alliance canadienne appelant à utiliser « toutes les mesures nécessaires » à l'affirmation du caractère hétérosexuel du mariage. En un peu plus de 20 ans depuis l'adoption de la Charte en 1982, la clause nonobstant n'a jamais été utilisée par Ottawa. Elle l'a été 16 fois seulement par les provinces et territoires dont 13 par le Québec, qui s'était à l'époque opposé à l'adoption de la Charte. Ironiquement l'usage que cette dernière province a fait de la clause nonobstant, à propos de l'explosive question de la langue, a sensiblement amoindri sa légitimité aux yeux du Canada anglais. Ted Morton, de l'Université de Calgary, plaide en faveur d'une réhabilitation de la clause nonobstant avant qu'elle ne tombe en désuétude, comme ce fut le cas du pouvoir de désaveu prévu à l'Acte de l'Amérique du Nord britannique.

Judicial activism continues unabated, and with it, judicial power grows apace. Despite a decade of academic and political criticism, the Supreme Court of Canada continues to expand the scope and frequency of policy making under the Charter.

The success rate for Charter cases decided by the Supreme Court in 2002 was over 60 percent — double the rolling average for the past decade. The pretence of judicial-legislative dialogue was shattered by the Supreme Court's prisoner-voting ruling last December. The same-sex marriage juggernaut continues to roll through the lower courts, despite Supreme Court precedents to the contrary. In the last 18 months, judges have used the Charter to revamp health policy, labour law and welfare benefits and have dismantled much of Harris's common-sense revolution in Ontario. In the 2002 *Gosselin* ruling, the claim to a constitutional right to welfare was defeated by one vote — with the chief justice explicitly reserving the right to change her mind — and thus the meaning of the constitution — in the future.

For the cluster of rights advocacy groups that both promote and benefit from the courts' Charter activism — the Charter revolution is far from over. Nor will it be over until its partisans are deprived of their primary weapons of political influence. These include:

- compliant if not co-operative judges,
- federal funding of rights advocacy groups through the Court Challenges Program,
- public acquiescence in judicial supremacy,
- monopoly of orthodoxy in the law schools and legal profession, and
- public stigmatization of the section 33 notwithstanding clause.

My comments here are restricted to this last issue: Can the notwithstanding clause — the legislative override — be resurrected?

The failure to check excessive judicial activism under the Charter is surprising, because the Canadian framers anticipated this problem and provided a direct remedy: the section 33 notwithstanding power. Section 33 of the Charter allows a government, federal or provincial, to protect its legislation from judicial review under sections 2 (fundamental freedoms), 7-14 (legal rights) and 15 (equality rights). To do this, a government must insert a clause in the contested piece of legislation declaring that it "shall operate notwithstanding" any provisions of the Charter. The use of section 33 is limited by a five-year sunset clause, at which time it ceases to have any legal effect. Alternatively, it may be renewed for another five-year period. Since it was intended to serve as an instrument for legislatures to respond to incorrect or unacceptable judicial decisions, it is commonly referred to as the "legislative override" power as well as "opting out."

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Section 33 was one of the compromises worked out between Prime Minister Trudeau and seven of the eight provinces that opposed his "constitutional patriation" plans in 1980-81. Eight provinces (all but Ontario and New Brunswick) opposed Trudeau's proposed charter of rights because it transferred so much power to judges, especially the Supreme Court. They thought that this empowerment of the judiciary conflicted with Canada's long-standing tradition of parliamentary democracy, and that it would undermine the capacity of the provinces to be self-governing. They feared that federally appointed superior court judges would use the Charter to unfairly strike down provincial policies.

Their acceptance of the Charter in November, 1981 was conditional upon Trudeau's acceptance of the legislative override power. As described by former Alberta premier, Peter Lougheed, "The final 'deal' on November 5, 1981 was, as is almost always the case, a trade-off. Essentially Trudeau got his Charter of Rights and the western premiers got both the Alberta amending formula and a notwithstanding clause." Without the notwithstanding clause, there would have been no *Charter of Rights*.

The notwithstanding device was not new. A similar clause was part of John Diefenbaker's *Canadian Bill of Rights* in 1960. In Alberta, when the newly elected Tories took office in 1972, they enacted an *Alberta Bill of Rights*, which included a notwithstanding clause. Similarly, the *Quebec Charter of Human Rights* and *Saskatchewan Human Rights Code* also contained a notwithstanding clause prior to the adoption of the Charter.

Because of his personal familiarity with the notwithstanding device, Lougheed took the lead suggesting it as a way to break the federal-provincial deadlock over the proposed charter of rights in 1980-81. As Lougheed later explained: "The then premiers of Manitoba and Saskatchewan and the premier of Alberta took the position in the constitutional discussions that we needed to have the supremacy of the legislatures over the courts…we did not [want] to be in a position where public policy was being dictated or determined by non-elected people."

Contrary to what critics believed, section 33 was not a "right wing" conspiracy. The then NDP premier of Saskatchewan, Allan Blakeney, was even more adamant about including an override provision than Lougheed, and successfully insisted on other changes in the wording of the Charter to pre-empt judicial activism. Looking back in a 1997 interview, Blakeney explained, "I had real reservations about a constitutional Charter of Rights and Freedoms, because of its ongoing tendency to have the courts heavily involved in decisions which are essentially political and hence brings about a politicization of the courts."

Nor was the Liberal government opposed to section 33, since it gave the federal government the same power, something that its provincial supporters had not demanded. When Trudeau's then justice minister, Jean Chrétien, introduced the amendments in the House of Commons on November 20, 1981, he defended section 33 on principle, not just as a "necessary evil." Section 33, Chrétien explained, would serve as a "safety valve" to ensure "that legislatures rather than judges would have the final say on important matters of public policy."

Commenting at the time of the November 1981 compromise, Alan Borovoy, founder and long-time executive counsel of the Canadian Civil Liberties Association, positively assessed section 33:

> *Canada at the moment is a parliamentary democracy in which the will of Parliament is supreme. If there were no notwithstandings in the proposed Constitution, this*

supremacy would shift to the judges who would decide whether or not a law offended the Constitution…By making it legally possible but politically difficult to override the Charter, they have married the two notions…The result is a strong Charter with an escape valve for the legislatures.

Since then, academic commentators have provided a variety of descriptions of section 33 that capture its attempt to balance the power of accountable governments and nonelected judges. Professor Paul Sniderman of Stanford University has elaborated on this in a book published by Yale University Press in 1996:

The root issue is who shall have the final word: the courts in their role as ultimate authorities on the Charter, or the parliaments, in their role as ultimate representatives of the public? Regimes following the American model have invested final decision-making power in courts; regimes following the English model have put it in Parliament. What distinguishes the Canadian regime is its deliberate effort to forestall an authoritative answer to the question of who shall have the final word. The Canadian political order invests final institutional power simultaneously in the courts, above all the Supreme Court, and in parliaments, both federal and provincial.

While it has since become stylish to dismiss the notwithstanding clause as an unfortunate concession, no less an authority on constitutional matters than University of Toronto's Professor Peter Russell has given it high marks:

The override gave Canada an opportunity to get the best out of British and American constitutionalism…to strike a shrewd balance between the wisdom derived from these two parts of our heritage…The Charter…establishes a prudent system of checks and balances which recognizes the fallibility of both courts and legislatures and gives closure to the decisions of neither.

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Alberta Premier Peter Lougheed with Prime Minister Pierre Trudeau in 1981. Lougheed insisted on the notwithstanding clause as the trade-off for the Charter of Rights. Without the legislative override, there would have been no deal, and no Charter.

Despite such an auspicious birth, the notwithstanding clause soon fell upon hard times. Outside Quebec, it has been used only three times in 22 years. In addition to Quebec's omnibus use of section 33 between 1982 and 1985, the notwithstanding clause has been used 16 times by four different governments: Yukon (1), Saskatchewan (1), Alberta (1), and Quebec (13). As of 2001, eight instances were still in force. Almost all have been preemptive uses to prevent judicial review. Policy areas include back to work legislation, land-use planning, pension plans, education, agricultural operations, and same-sex marriage (Alberta's 2000 Defense of Marriage Act).

As evidenced by the recent House of Commons debate over homosexual marriage, its many critics have stigmatized it to the point that some commentators claim that it has fallen into desuetude and is no longer politically acceptable — much like the federal disallowance power. How did this happen?

Like so many other anomalies in Canadian politics, the demise of section 33 can be traced to Quebec. In English-speaking Canada there was a widespread backlash against Quebec's use of the notwithstanding clause to suppress the language rights of English-speaking Quebecers. For the past 20 years, the Mulroney and then the Chrétien governments have avoided legitimating

Quebec's use of the notwithstanding clause by refusing to use it themselves.

A second contributing factor has been the public disillusion with parliamentary institutions and elected politicians that afflicts all Western democracies. Voters' declining confidence in elected governments has been accentuated in Canada by executive dominance. As several surveys have shown, many Canadians trust judges more than they do politicians.

These are the conventional explanations for section 33's demise, and they are accurate as far as they go. Less obvious, but no less true, is that the Supreme Court of Canada — like its American counterpart — is part of the national governing coalition. It reflects and protects the coalition of interests that appointed its judges. Since the coming into force of section 15 in 1985, the Dickson, Lamer and McLachlin Courts have served as a partner of — not a check on — the Mulroney and Chrétien governments.

As Trudeau anticipated, a judicial ally armed with the Charter allows the Feds to achieve indirectly — through judicial fiat — what they could not achieve directly, or at least not without unacceptable political costs. Skeptics are constantly chided that the Court uses the Charter to protect minorities. Of course it does. The question is: which minorities?

When the Court engages in judicial activism to advance a policy demand of a minority interest favoured by the Liberals — such as the anglophone minority in Quebec, feminists and more recently gay rights activists — the Liberals happily do what the Court tells them to do, proclaiming that they have no choice.

At the provincial level, the non-use of section 33 (other than Quebec) is more surprising, since it was provincial premiers who fought for it. Provincial reluctance to invoke the notwithstanding clause is partially explained by the same factors that have inhibited its use at the federal level — the Quebec stigma and lack of legitimacy.

I will suggest another less obvious contributing factor: the fallacy of assuming that legislators have an interest in defending the prerogatives of legislatures; i.e., that politicians put long-term institutional interests ahead of short-term partisan interests such as re-election. It is politically safer to pass the buck to the judiciary, even though democratic accountability and the policy autonomy of your provincial legislature are eroded in the process.

This incentive is accentuated by the familiar "staying power of the policy status quo." Politically speaking, it is easier for a government do refuse to give a group a "new right" than to take away an "existing right." In the first instance, the government is simply ignoring a claim for special treatment. In the latter case, they can be portrayed as attacking the group. This is especially true when the issue involves cross-cutting cleavages — such as gay rights or abortion — that divide caucuses and party members.

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Can section 33 be resurrected? At the federal level, the answer is probably no; and certainly not by the Liberals, for whom the Supreme Court is an important ally. The Canadian Alliance is committed in its policy book to the responsible use of the notwithstanding clause, but its ascendancy to government does not appear imminent. The more likely scenario is at the provincial level. Again, Quebec is the model.

The project is two-pronged. First the myth of judicial infallibility must be challenged and unmasked. The Court's defenders blythely claim that the Charter means whatever the judges say it means. If this were true, then it would mean one of two things: either the Charter cannot be misinterpreted, or the judges are infallible. Both, of course, are absurd claims. The concept of judicial infallibility is contrary to both common sense and history. (The US Supreme Court once ruled that African slaves were not human beings; the Canadian Supreme Court that women were not persons.) As a former chief justice of the United States dryly observed, the judges are not final because they are infallible. They are infallible because they are final.

The second prong of the challenge is for a provincial premier to craft compelling public rhetoric that makes the exercise of section 33 a legitimate defense of provincial rights and democratic self-government. The Supreme Court (in its *Vriend* decision) and Professor Peter Hogg — the originator of the "dialogue theory" — have provided some assistance by identifying the notwithstanding clause as a legitimate instrument of judicial-legislative dialogue.

Here we can learn something from former Ontario Liberal premier Oliver Mowat's successful battle against the federal power of disallowance in the 1880s. Federal disallowance could not be tolerated, Mowat argued, because it destroyed the political liberty of provincial voters. Mowat pointed out that if the opposition in the provincial legislature could appeal to their political allies in Ottawa to use disallowance to reverse every policy vote they lost, then "responsible government is at an end." The ultimate question," Mowat thundered, was "who shall govern the province — the majority or the minority? — the ministry to whom the electors

have entrusted the Government, or the minority whom they refused to trust?"

In the 19th century, Mowat's appeal to "responsible government" could carry the battle. But not so today. Executive-dominated legislatures have fallen into disrepute. Courts and judges have filled the vacuum. Rather than seeing governments as embodying the spirit of democracy, many Canadians see them as unaccountable and unresponsive. The depth of this disillusionment is captured by Pierre Trudeau's successful packaging of the Charter of Rights as "the people's package" — an oxymoron of the first order.

Within this new context, the most promising approach to resurrecting the notwithstanding clause comes from Scott Reid: to rehabilitate the notwithstanding clause, you must first democratize it. Section 33 can only be as legitimate as the institution that wields it. The failure of section 33 to serve as an effective brake on judicial supremacy reflects the public's low esteem of legislatures. Reid's solution is to transfer the exercise of the notwithstanding clause to "the only institution that commands more popular respect than the court system — the popular will itself."

Under this approach, the decision to use the notwithstanding clause would be put to a provincial referendum at the next practical date (usually a provincial or municipal election). This could be mandatory or optional. The referendum could be held either before or after the notwithstanding clause was invoked by the government. If use of the notwithstanding clause is optional, there is a compelling case for giving the opposition (or any grouping of say 20 percent of the MLAs) as well as the government the power to call for a referendum. In the referendum, the people of the province would be asked to choose between the Court's policy and the government's policy, or perhaps a new compromise.

Democratizing the notwithstanding clause is not politically impossible. In 1999, the Alberta government appeared to be adopting Reid's solution. Alberta's Bill 38, "Constitutional Referendum Amendment Act," was introduced and went to second reading before the government abandoned the plan. This decision was driven by internal caucus politics, not by public opinion. I concur with Reid that the example of the national referendum over the Charlottetown Accord suggests that [a majority of] "Canadians may be unwilling to vest supreme power in their politicians, but they have no fear of exercising the power to ratify or veto their own fundamental laws by direct means."

A democratic override promises to provide a more effective check on judicial excess and overreach. But it is also defensible on principle. It is consistent with the norm that constitutional rules should command a substantial degree of public consensus and support before being adopted. Most of the controversial Charter decisions are *de facto* amendments to constitutional meaning. (E.g., adding sexual orientation to section 15, extending the section 3 right to vote to prisoners, and extending section 6 rights to enter or remain in Canada to noncitizens.) Why should they not be subjected to the same high threshold of public acceptance as formal amendments? Two provinces — B.C. and Alberta — already require referendums to approve formal constitutional amendments. Why shouldn't judicial amendments be subjected to the same test?

This is particularly true for a Supreme Court that loves to invoke Lord Sankey's "living tree" metaphor to support its novel interpretations of Charter meaning. The judges' claim that they are simply keeping the constitution in tune with the changing times should be put to the test of popular ratification. Judges are drawn from the elite lawyering class — one-tenth of 1 percent of Canadians — unelected and appointed until age 75. The pretence that they are an accurate barometer of changing public opinion verges on farce.

Popular control of judge-made policy can also be defended on the basis of rights theory. Noted legal theorist Jeremy Waldron has recently provided an influential rights-based critique of constitutional rights. According to Waldron, giving judges the final word on the meaning of constitutional rights is inconsistent with the most important of all rights, what he calls the "right of rights" — the democratic right of ordinary people to participate in an equal manner in public decision making. Giving judges the final say makes everyone else second-class citizens.

In sum, there is no shortage of raw materials to construct a powerful public rhetoric for subjecting judicial review to popular control by transferring the decision to invoke the notwithstanding clause from the politicians to the people.

The most compelling arguments against the democratic override are the inherent dangers of referendums and plebiscites. My colleague Rainer Knopff has offered a powerful critique of populism as the mirror danger of rights-talk. The experience of Quebec has taught us the tendency of referendums to polarize society around shallow and simplistic slogans. On the other hand, the experience of Switzerland and some US states shows us these tendencies are not inevitable.

On balance, I would certainly cast my lot with letting the people decide, and I strongly suspect the majority of Canadians would as well, were they given the opportunity. Of course, the whole thrust of Charter litigation has been to keep decisions like homosexual marriage as far from the people as possible, so it remains to be seen whether Canadians will ever be given the opportunity to reclaim their most basic right, the right to self-government.

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