Innovations: A Journal of Politics Volume 8, 2008-2009

2008

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INNOVATIONS: A Journal of Politics

Volume 8 – 2008-2009

NOTWITHSTANDING THE OVERRIDE: PATH DEPENDENCE, SECTION 33, AND THE *CHARTER*

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Abstract – Section 33 of the *Canadian Charter of Rights and Freedoms* – the "notwithstanding clause" – remains controversial. Although the clause exists as a legitimate constitutional instrument, it has been used infrequently, and never by the federal government. This paper examines arguments put forward to explain the infrequent use of the clause. Of all the explanations offered, the historical-institutionalist concept of "path dependence" is most compelling. Ever since the Quebec government used the notwithstanding clause in response to *Ford v. Quebec* (1988), subsequent Prime Ministers have demonized the clause in order to gain political capital. The depiction of section 33 as inherently antithetical to the logic of a *Charter of Rights* has been so successful that few political leaders will risk using the clause, even when public opinion is in favour. With the *Charter* being seen as a "symbolic rights-giver," this demonization has led to the gradual erosion of section 33's legitimacy as an acceptable legislative instrument.

Introduction

Few constitutional instruments in Canada attract as much derision and scholarly discussion as the notwithstanding clause. The clause (sometimes referred to as the "legislative override"), enshrined in section 33 of the *Canadian Charter of Rights and Freedoms*, allows Parliament or the provincial legislatures to pass a law and declare it notwithstanding certain sections of the *Charter*. Although the clause remains a legitimate constitutional instrument, its lack of use is staggering; it has only been used once as a direct response to a judicial ruling, and never by the federal government. This lead one commentator to conclude it has become so unpopular it may be "unconstitutional by convention."[1]

Why has section 33 been invoked with such infrequency? As a legitimate piece of the *Charter* itself, what has prevented politicians from using it? This paper will use the approach of "path dependence" to explore the roots of the political demonization of section 33. Because the *Charter* is perceived as a "rights-giving" symbol, anything that seemingly takes away those rights will be viewed with suspicion. Following the Quebec government's use of the notwithstanding clause in 1988, successive Prime Ministers have consistently demonized the notwithstanding clause by portraying it as "anti-*Charter*" in order to gain electoral votes. This paper argues that the Prime Ministerial demonization of section 33 since *Ford* has led it to be perceived as "anti-*Charter*," and "taking away" constitutional rights. Because the depiction of section 33 as inherently antithetical to the logic of a *Charter of Rights* has been so successful, the likelihood of political leaders using section 33 became increasingly unlikely.

[1] Janet L. Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts our Understanding" (paper presented at the Annual Meeting of the Canadian Political Science Association, Saskatoon, Saskatchewan, 2007), 1.

This paper examines the typical explanations – categorized as "Judicial Success," "Government Agency," "Public Opinion," and "Path Dependence" – that have been put forward regarding the infrequent use of section 33. Of these approaches, "Path Dependence" comes closest to explaining the systemic non-use of the notwithstanding clause. By viewing public demonization through the lens of historical institutionalism, one can better understand why section 33 is used so rarely. However, one gains a fuller understanding of this path dependence when examining this path dependence in tandem with the political demonization by Prime Ministers. With the *Charter* being seen as a "symbolic rights-giver," this demonization has led to the gradual erosion of section 33's legitimacy as an acceptable legislative instrument.

What is the Notwithstanding Clause? Why does it Exist?

In order to understand why the clause is used so infrequently it is necessary to understand both the reasons behind its inclusion in the *Charter*, and to describe the situations when it was used. Section 33(1) of the Charter states

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This allows Parliament or a provincial legislature to pass a law with the explicit provision that it will not be subject to the aforementioned *Charter* sections, which include the fundamental freedoms, legal rights, and equality rights. It is subject to a five-year "sunset clause," meaning it must be re-passed by the legislature within five years. The notwithstanding clause has been called a "uniquely Canadian compromise of two rival constitutional models – the American model of strong judicial review, and the British model of parliamentary sovereignty."[2] Indeed, it is one of a kind: it has no equivalent in international or western rights declarations.[3]

There is a significant scholarly debate regarding the merits of the clause and the legal limits of its use.[4] However, regardless of the philosophical, legal, or political objections to section 33, it remains a legitimate and available instrument of the Canadian Constitution.[5] The clause was included in the *Charter* as part of a compromise between the federal and provincial governments during the discussions leading to the Patriation of the Canadian Constitution in 1982. Prime Minister Trudeau made no secret of his personal disdain for the clause, claiming it violated his sense of justice.[6] However, provincial Premiers, particularly those from the western provinces, were adamant that there be something in the *Charter* which would maintain Parliamentary supremacy.[7] Given the tenacious debate regarding section 33, "one might have

[2] Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy," *Wake Forest Law Review* 38 (2003): 453.
[3] Sonja Grover, "Democracy and the Canadian Charter Notwithstanding Clause: Are they Compatible?," *International Journal of Human Rights* 9, no. 4 (December 2005): 488.
[4] See Tsvi Kahana, "Understanding the Notwithstanding Mechanism," *University of Toronto Law Journal* 52, no. 2 (Spring 2002): 221-274; Peter Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy," *Policy Options* (February 2007): 65-68; See Lorraine Weinrib, "Learning to Live with the Override," *McGill Law Journal* 35, no. 3 (May 1990): 541-571; John D. Whyte, "On Not Standing for Notwithstanding," *Alberta Law Review* 28, no. 2 (1989-1990): 348-357.
[5] Howard Leeson, "Section 33, The Notwithstanding Clause: A Paper Tiger?," *Choices* 6, no. 4 (June 2000): 1-24.
[6] Hiebert, "Compromise and the Notwithstanding Clause", 4.
[7] Ibid., 11-12; Leeson, "Section 33, The Notwithstanding Clause," 9-10.

expected its use to be frequent and controversial after the proclamation of the *Charter*."[8] In fact, this has proven to be only half-correct. When invoked, the notwithstanding clause has certainly been controversial. However, its use has been anything but frequent.

Quebec was the first jurisdiction to use the clause, in 1982. The Parti Québécois, in an act of defiance, used section 33 to apply to all legislation, past and present, passed by the National Assembly.[9] Many commentators have condemned this "omnibus" use of the notwithstanding clause,[10] but the Supreme Court of Canada upheld its constitutionality.[11] The Saskatchewan Government was next to invoke section 33, as part of back-to-work legislation in 1986. This use was highly contentious, particularly because it was "the first time outside Quebec that the notwithstanding clause had been used prospectively, that is, not in response to a court decision but in anticipation of it."[12] Although the need for the clause was premised on a 1984 Saskatchewan Court of Appeal decision, the government's use of the clause was not in direct response to that decision.[13]

The one time the clause was used in direct response to a Supreme Court ruling was in 1988. In *Ford v. Quebec* the Supreme Court authored a unanimous decision that, in addition to upholding the omnibus use of section 33, struck down Quebec's "French-only" sign law as infringing freedom of expression. After francophone Québécois set to the streets to protest the decision, Liberal Premier Robert Bourassa declared that he would introduce legislation containing the impugned sections of the old law, supported by section 33.[14] The Quebec government's decision was highly criticized in English Canada and is cited by many as the reason for the failure of the constitutional amendments contained in the Meech Lake Accord.[15] As Peter Russell notes, "the notwithstanding clause's use and non-use through the Charter's first quarter-century has not been an encouraging story for its fans. Indeed, the most famous – or infamous – use of the legislative override seems to bolster the case of its detractors."[16] Section 33 has been used since 1988, but never again in response to a Court striking down legislation. Although used rarely, it has been invoked in 16 pieces of legislation in total, nearly all of which (13) were in Quebec and done without public recognition.[17]

While the clause has been used more frequently than is commonly acknowledged, "the fact remains that it has been used very rarely."[18] Perhaps most importantly, in all cases except *Ford*, section 33 has been invoked preemptively; it has not since been enacted in response to an adverse court ruling.[19] Although academics have debated its proactive versus retroactive use,[20]

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[8] Leeson, "Section 33, The Notwithstanding Clause," 14.
[9] Ibid.
[10] See Russell, "The Notwithstanding Clause."; Weinrib, "Learning to Live with the Override."
[11] "Ford v. Quebec (A.G.)," in *2 S.C.R.* (Supreme Court of Canada, 1988).
[12] Leeson, "Section 33, The Notwithstanding Clause," 14.
[13] Ibid.
[14] Ibid.
[15] Patrick Monahan, *Meech Lake: The Inside Story* (Toronto, ON: University of Toronto Press, 1991); Russell, "The Notwithstanding Clause."
[16] Russell, "The Notwithstanding Clause," 66.
[17] Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter," *Canadian Public Administration* 44, no. 3 (September 2001): 257-259.
[18] Goldsworthy, "Judicial Review, Legislative Override, and Democracy," 466.
[19] Because the Saskatchewan government used to override in recognition of a 1984 Court of Appeal decision, it could be argued that the legislation was in some ways a response to a court decision. Even with this interpretation the override has only been used retrospectively on two occasions, and never since 1988.

the Supreme Court has upheld the constitutionality of both uses in *Ford*. Given that the opportunity to invoke section 33 in response to a court ruling exists, this legislative inertia seems puzzling. If the notwithstanding clause remains a legitimate constitutional instrument, why has it been used so infrequently? In particular, why has it not been used to response to a court ruling with which the government disagrees?

Why has it Not Been Used?

Although there are various interpretations concerning this non-use, scholars have very rarely attempted to explain this question in a systematic way. More often than not, the question of infrequent use tends to come up in discussions regarding judicial activism and democratic dialogue.[21] In the few cases in which authors have explicitly approached the question, they have failed to come to a distinct conclusion.[22] The following sections will discuss the four prevailing interpretations.

Judicial Success

The simplest explanation claims that the legislatures have not needed to use section 33 because the courts have generally been on the right track.[23] Proponents claim the courts have generally done a good job protecting rights:

> On the whole the judiciary's interpretation of the Charter has not been counter majoritarian and has not put pressure on elected legislators to exercise their power to insulate their laws from Charter-based judicial review.[24]

Implicit in this argument is the assumption that if the courts were to issue an adverse ruling, the governments would readily invoke the clause. However, in many cases governments have voiced their displeasure with a particular court decisions, pontificated over using the section 33, yet chosen not to invoke the clause. In *RJR MacDonald Inc. v. Canada (Attorney General),*[25] the Supreme Court struck down a law that prohibited tobacco advertising and required health warnings on tobacco packaging. Despite many calls to use the clause, the government eventually chose to modify the law.[26] After *R. v. Sharpe*,[27] the infamous child pornography case, nearly 70 members of the governing federal Liberal caucus asked the government to consider the use of section 33, and the opposition Reform Party tabled a motion to do the same. However, "[t]he

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[20] Kahana, "The Notwithstanding Mechanism and Public Discussion."; Kahana, "Understanding the Notwithstanding Mechanism."; Weinrib, "Learning to Live with the Override."

[21] See Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures," *Osgoode Hall Law Journal* 35, no. 1 (Spring 1997): 75-124; Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Oxford, UK: Oxford University Press, 2001); F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto, ON: Irwin Law, 2001).

[22] See Goldsworthy, "Judicial Review, Legislative Override, and Democracy."; Leeson, "Section 33, The Notwithstanding Clause."; Russell, "The Notwithstanding Clause."

[23] For a discussion of this perspective, see Leeson, "Section 33, The Notwithstanding Clause," 19.

[24] Cited in Russell, "The Notwithstanding Clause," 67.

[25] "RJR-MacDonald Inc. v. Canada (A.G.)," in *1 S.C.R.* (Supreme Court of Canada, 1998).

[26] Leeson, "Section 33, The Notwithstanding Clause," 19.

[27] "R. v. Sharpe," in *169 D.L.R. (4th)* (Supreme Court of British Columbia, 1999).

Liberal government staunchly and consistently resisted this appeal to use section 33."[28] More recently, the Alberta government considered invoking the notwithstanding clause in response to the *Vriend*[29] decision, which "read in" sexual orientation to the *Alberta Human Rights Act*. Although the decision "met with vehement public reaction in Alberta,"[30] and many in the government caucus were wary of the result, Premier Klein decided in the end to let the ruling stand.[31]

Clearly, there have been cases in which governments have been opposed to a judicial ruling, but unwilling to invoke the clause. There is therefore little evidence to support the argument that section 33 has not been used simply because there has been no reason to do so.

Government Agency

An alternative interpretation has been to attribute the lack of use of the clause to the will of particular governments. This perspective relies heavily on perceived agency of political actors. In contrast to structuralist explanations, which "find the behavior of agents highly constrained and, as a result, conclude that the dominant structural factors at work in given context largely determine political outcomes,"[32] agent-centred approaches presuppose that political actors "have the ability to shape [their] destiny."[33] With respect to the use of section 33, this agent-centred approach is prominent in the thought of Kent Roach and Hogg & Bushell.[34] From this perspective, governments have the ability to use the notwithstanding clause, and there is nothing constraining them. Although Roach calls section 33 "the equivalent of shouting to win an argument,"[35] he attributes its sparse use to decisions made by individual governments, rather than institutional factors: "When the elected government is firmly committed to responding to the Court's Charter decision, it can do so."[36] Likewise, Hogg and Bushell claim, "if the democratic will is there, the legislative objective will still be able to be accomplished."[37]

Roach rejects structural explanations for non-use of the clause on two specific occasions. When discussing *RJR-MacDonald*, he discards the theory that public opposition to the notwithstanding clause played a factor. He claims the government failed to use the clause because it did not want to upset the tobacco companies, thus "the government bears a good share of the blame for not using the override".[38] Likewise, when analyzing the Alberta government's failure to use section 33 to response to *Vriend*, he blames past indiscretions on the part of the

[28] Rainer Knopff and Andrew Banfield, "It's the Charter Stupid! The Charter and the Courts in Federal Partisan Politics," in *The Canadian Charter of Rights and Freedoms at Twenty Five Years*, ed. Joseph Eliot Magnet (Markham, ON: Butterworths, 2009).
[29] "Vriend v. Alberta," in *1 S.C.R.* (Supreme Court of Canada, 1998).
[30] Joseph F. Fletcher and Paul Howe, "Public Opinion and Courts," *Choices* (May 2000): 38.
[31] Roach, *The Supreme Court on Trial*, 95. Alberta did use section 33 in the 2001 *Marriage Act*. However, this case was not in response to a court decision, but in anticipation of one after the Supreme Court struck down Ontario legislation in "M. v. H.," in *2 S.C.R.* (Supreme Court of Canada, 1999). Subsequently, the Supreme Court ruled that the definition of marriage was the exclusive jurisdiction of the federal government, effectively ruling Alberta's *Marriage Act* unconstitutional on grounds of federalism in "Reference re Same-Sex Marriage," in *3 S.C.R.* (Supreme Court of Canada, 2004).
[32] David L. Imbroscio, "Structure, Agency, and Democratic Theory," *Polity* 32, no. 1 (Autumn 1999): 46.
[33] Stuart McAnulla, "Structure and Agency," in *Theory and Methods in Political Science*, ed. David Marsh and Gerry Stoker (New York, NY: Palgrave, 2002), 271.
[34] Bushell, "The Charter Dialogue Between Courts and Legislatures."; Roach, *The Supreme Court on Trial*.
[35] Roach, *The Supreme Court on Trial*, 176.
[36] Ibid., 195.
[37] Bushell, "The Charter Dialogue Between Courts and Legislatures," 105.
[38] Roach, *The Supreme Court on Trial*, 186.

government,[39] rather than generalized opposition to the clause, calling the failure to use section 33 a "self-inflicted wound."[40] Hogg and Thornton similarly claim, "it is clear that this outcome was not forced on government, but rather was its own choice."[41] "Government Agency" proponents believe that governments have the capability to use section 33, should they wish; the reason governments have not used it to respond to adverse judicial decisions is because of particular (and widely differing, depending on the context) political situations, rather than an over-arching institutional bias against section 33. Hogg and Thornton note, "In the dialogue between courts and legislatures, 'notwithstanding' is therefore at least a possible legislative response to most judicial decisions."[42]

However, there are several inconsistencies in this analysis. With *RJR-MacDonald*, Roach claims public disapproval was not a sufficient factor for determining government inaction. Yet with *Vriend*, he cites public approval of the decision as one of the reasons the government did not respond.[43] Moreover, Roach believes public disdain for the use of the clause affected government decision-making: "Two-thirds of Albertans in a poll conducted for the government supported the decision not to use the notwithstanding clause."[44] On one hand, he seems to recognize that there are institutional incentives working against using section 33. Yet on the other hand, he returns to an agent-centred explanation:

> Those who criticize *Vriend* as judicial activism should accept that the elected government *could have* restored the status quo with the use of the override [emphasis added].[45]

Roach is not alone in offering the view that governments can and should be able to use the clause more easily. Peter Russell (a proponent of section 33) agrees with this approach: "[M]aintaining a sensible attitude to use of the Charter's notwithstanding clause is more a matter of having brains than of having guts."[46] Presumably, if a government chooses to use the notwithstanding clause, there are no institutional disincentives against doing so.

While governments are certainly capable of acting, the "Government Agency" approach misses the broader institutional dynamics at work. It does not sufficiently explain why, even when public opinion is in favor of using the clause to respond to a judicial decision, governments do not use it. This is not to say that governments are inept and lack the ability to respond, nor that they should automatically resort to section 33 at the behest of the popular majority. Institutional constraints should not be used as an excuse to defend any government action or inaction. However, by simply blaming governments for not acting, agent-centred analyses fail to recognize the consistent backing down of governments, even when they feel section 33 is

[39] Several months earlier, the Alberta government had proposed using section 33 with legislation limiting financial payments to citizens who had previously undergone mandatory sterilization. With public opinion strongly against the move, the government eventually backed down (see Ibid., 195.).
[40] Ibid., 195-196.
[41] Peter W. Hogg and Allison A. Thornton, "The Charter Dialogue Between Courts and Legislatures," *Policy Options* (April 1999): 21. This article was an update of Hogg and Bushell's previous 1997 article. Bushell changed her last name to Thornton between articles.
[42] Ibid.
[43] Roach, *The Supreme Court on Trial*, 195.
[44] Ibid., 196.
[45] Ibid.
[46] Russell, "The Notwithstanding Clause," 68.

necessary. Nearly twenty years of non-response by 10 provincial legislatures and the federal Parliament cannot be treated as isolated events.

By contrast, theories of new institutionalism give greater weight to structural factors. These theories recognize that institutions create regularities in human behavior, and argue, "scholars can achieve greater analytic leverage by beginning with institutions rather than individuals."[47] The failure of "Government Agency" to adequately explain the non-use of the notwithstanding clause suggests that examining the structural factors may provide better answers. Elements such as public opinion and historical use of section 33, when viewed through institutionalist perspectives, may be able to shed important light on why the clause has been so rarely used.

Public Opinion

Public opinion is one structural factor that can constrain government. When the public perceives a mechanism (such as the powers of reservation or disallowance) as beyond the pale of democratic politics, defending its use becomes very difficult.[48] In this vein, some scholars contend that the notwithstanding clause is rarely used as a response to a court decision because the public does not approve of the clause in general. James Kelly claims the use of section 33 "has proven to be very unpopular with the electorate, and governments have been reluctant to use this explicit check on judicial power as a result."[49] Further, Hiebert claims, "[m]any consider Parliament's ability to insist temporarily on the primacy of its judgment over judicial rulings, to be inconsistent with the purpose of a bill of rights."[50] Indeed, some evidence appears to support this claim. In the abstract, over 60 per cent of Canadians favor the courts rather than the legislatures having the final say with respect to *Charter* rights.[51] On the face of it, public opinion seems to be a reasonable explanation for government disuse of section 33.

However, other data suggests that "public opinion" cannot by itself explain the non-use of the notwithstanding clause. Russell notes, "[p]oliticians' fear that the electorate will punish any government that uses the notwithstanding clause is not based on any solid empirical evidence about public opinion."[52] Although the public prefers the judiciary to have the "final say" on rights issues in the abstract, this proportion declines when the question is framed in terms of specific issues, such as legislation regarding unions, language rights, or assisting the poor.[53] When asked whether judicial discretion to decide *controversial* decisions should be reduced, the public is evenly split.[54] Political events confirm this. Public opinion was generally thought to be supportive of the use of section 33 by the federal government after the *RJR-*

[47] B. Guy Peters, *Institutional Theory in Political Science*, 2nd ed. (London, UK: Ashford Color Press, 2005), 155-156.
[48] F. L. Morton, "Dialogue or Monologue?," *Policy Options* (April 1999): 23-26; Russell, "The Notwithstanding Clause," 68.
[49] James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver, BC: UBC Press, 2005), 226.
[50] Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal, QC/Kingston, ON: McGill-Queen's University Press, 2002), 28.
[51] Goldsworthy, "Judicial Review, Legislative Override, and Democracy," 465; Paul M. Sniderman, Joseph F. Fletcher, Peter Russell, and Philip E. Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven, CT: Yale University Press, 1996), 163-167.
[52] Russell, "The Notwithstanding Clause," 68.
[53] Sniderman, Fletcher, Russell, and Tetlock, *The Clash of Rights*, 163-167.
[54] Fletcher and Howe, "Public Opinion and Courts," 17.

Macdonald (tobacco), *Sharpe* (child pornography), and *Daviault*[55] (sexual assault) cases,[56] yet it was not used. Although derided in English Canada, the use of section 33 in response to *Ford* was looked upon favorably in Quebec.[57] Since public opinion is often supportive of the notwithstanding clause, it cannot be the main factor is explaining legislative non-response.

Perhaps the biggest blow to the "public opinion" perspective comes from recent survey data. A SES research poll found that awareness of the clause's existence was very low, with nearly half the population not knowing what it was. When questioned on who should get the final word, the split between those who favored the courts having the final say was almost identical to those who favor the current arrangement.[58] While public opinion can hypothetically affect governmental decision-making on a case-by-case basis, the evidence that it has been the sole element preventing the use of section 33 is wanting. However, if one is to conclude, as Russell does, that "[t]he politics of any given use will depend on the policy concerns at issue,"[59] why have controversial policy issues not resulted in retroactive section 33 use for two decades? To understand this, it is necessary to go back to the one time in which the clause was used in response to a judicial ruling.

Path Dependence

With "Judicial Success," "Government Agency," and "Public Opinion" approaches offering tentative explanations at best, there must be other factors that explain infrequency of section 33 use. Many scholars have implicitly adopted an approach rooted in historical institutionalism, which pays particular attention to critical historical junctures.[60] Historical institutionalists adopt the concept of "path dependence," which states that the policy choices made during institutional formation or policy initiation will largely influence future policies. Historical institutionalists note, "Earlier events matter much more than later ones, and hence different sequences may produce different outcomes. In these processes, history matters."[61] For Manfredi, the one critical event that explains non-use of section 33 is the Quebec government's response to the Supreme Court's 1988 decision in *Ford*. Although the use of the notwithstanding clause following *Ford* was supported in Quebec, it was condemned in English Canada. After *Ford*, it was difficult for politicians to legitimately defend the clause: "The opposition to any use of the notwithstanding clause is [partly] the product of a historical accident… Canadians experienced a use of section 33 that they found objectionable before the Supreme Court rendered a politically unpopular Charter decision."[62] Presumably, for advocates of the "path dependence" approach, if *RJR-MacDonald* had occurred before *Ford*, politicians might be more comfortable using the notwithstanding clause.

The "path dependent" position finds support among many prominent *Charter* scholars. Janet Hiebert claims, "section 33 has now, except for the francophone majority in Quebec,

[55] "R. v. Daviault," in *3 S.C.R.* (Supreme Court of Canada, 1994).
[56] Hiebert, *Charter Conflicts*, chapters 4-5; Roach, *The Supreme Court on Trial*, 185-196.
[57] Leeson, "Section 33, The Notwithstanding Clause," 18.
[58] Graeme Hamilton, "At 25, Charter is Misunderstood," *National Post*, February 8, 2007.
[59] Russell, "The Notwithstanding Clause," 68.
[60] Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94, no. 2 (June 2000): 251-267.
[61] Ibid.: 253.
[62] Manfredi, *Judicial Power and the Charter*, 194.

generally assumed the mantle of being constitutionally illegitimate."[63] Jeffrey Goldsworthy supports the argument, claiming, "[this] was arguably the result of fortuitous events in Canadian history, rather than a general law of political dynamics."[64] Russell concludes, "[t]here can be no doubt that the Bourassa government's use of the Charter's notwithstanding clause to protect Quebec's French-only sign law gave the clause a bad name in English Canada."[65] The logic of a path dependent approach is therefore compelling. It goes beyond simpler accounts of "public opinion," recognizing that over time the institutional incentives against using the clause are more important than the will of the electorate on the legitimacy of section 33 for a particular court ruling. However, adopting a "path dependent" approach requires more than positing the existence of one event and allowing that event to tell history's story. It is not enough to simply cite *Ford* as the reason for the clause's illegitimacy. Bourassa's use of section 33 may have led Canadians down a particular path, but which actions have been regular in the subsequent steps down this path? One consistency is the public demonization of section 33 by Prime Ministers for political gain.

Public Demonization of the Notwithstanding Clause

Since *Ford*, no government has responded directly to a judicial ruling by invoking the notwithstanding clause. Bourassa's decision to invoke section 33, and the condemnation of this decision in English Canada, is often posited as the reason that subsequent governments have not used it. However, there is another trend that has developed with respect to section 33: public demonization by Prime Ministers. Beginning with Brian Mulroney after *Ford*, politicians of many parties have decided to criticized very existence of the notwithstanding clause for reasons of political expedience.

When section 33 does enter public debate, partisan officials have consistently demonized it in order to enhance their political capital.[66] This demonization strategy began immediately after the Bourassa government's response to *Ford*. In the midst of intense constitutional negotiation regarding the ratification of the Meech Lake Accord, Prime Minister Brian Mulroney chose not to attack Bourassa (whose government had already ratified the Accord), but instead attacked the existence of section 33 itself. Taking aim at Pierre Trudeau, the main architect of the *Charter*, Mulroney argued that the clause "limits our most fundamental freedoms… Never before has the surrender of rights been so total and abject."[67] Mulroney blamed Trudeau for simply allowing the clause to be in the *Charter*, claiming section 33 made the *Charter* "not worth the paper it's written on."[68] It is interesting to note that Jean Chrétien, who was Minister of Justice when the *Charter* was enacted, defended the inclusion of the clause at this time.[69] Whereas Mulroney felt he could benefit for attacking the clause, Chrétien claimed section 33 remained a legitimate part of the *Charter*.

As path dependent explanations would predict, the legitimacy of the notwithstanding clause did not improve with its lack of use. Although he had previously publicly defended the clause in opposition, Chrétien the Prime Minister chose not to use it following the *RJR-*

[63] Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal, QC: McGill-Queen's University Press, 2002), 469.
[64] Goldsworthy, "Judicial Review, Legislative Override, and Democracy," 469.
[65] Russell, "The Notwithstanding Clause," 67.
[66] See Knopff and Banfield, "It's the Charter Stupid!."
[67] Leeson, "Section 33, The Notwithstanding Clause," 14.
[68] Cited in Knopff and Banfield, "It's the Charter Stupid!."
[69] Ibid.

MacDonald and *Sharpe* cases. Years later, Chrétien followed in Mulroney's footsteps by publicly demonizing the clause. By the time of the 2000 federal election campaign, Jean Chrétien claimed that the notwithstanding clause was "a nice way to destroy the Charter of Rights."[70] Responding to Reform and Alliance musings regarding the potential use of the clause to subdue judicial activism, Chrétien made section 33 an object of public demonization in order to score points with the electorate:

> The demonization temptation proved too strong to resist for the Chrétien Liberals. A clause that was clearly a *part* of the Charter, and had been for Chrétien an acceptable and defensible part, now became a "nuclear bomb" of hostility to Charter values, a symptom of truly dark forces.[71]

Ironically, section 33, a legitimate part of the *Charter*, was now being posited as anti-*Charter* by one of the architects of the *Charter*.[72]

Chrétien's successor Paul Martin felt similarly compelled to perform an about-face and criticize the clause. Six days after becoming Prime Minister in 2003, Martin speculated that if a judicial ruling on same-sex marriage forced religious institutions to redefine marriage in a way adverse to their principles, he would invoke section 33.[73] However, during the 2004 election campaign, Martin followed in the footsteps of Mulroney and Chrétien by publicly condemning the notwithstanding clause. Knopff and Banfield note, "the Liberals consistently painted the Conservative openness to section 33 as hostility to the Charter itself and thus to fundamental Canadian values. As a necessary corollary, section 33 was depicted as an outright sin that the pro-Canadian values Liberals would *never* commit."[74] What is significant once again is that Martin posited the clause as being antithetical to the *Charter*, ignoring the fact that it is part of the *Charter*. Rather than framing the use of section 33 as the application of a particular *Charter* provision, he claimed that to use section 33 would be to "trifle with the *Charter of Rights* at great peril to the social cohesion of the country."[75] Liberal Justice Minister Irwin Cotler and federal NDP leader Jack Layton soon followed suit in publicly denouncing section 33.[76]

In the 2006 federal election campaign, Martin once again took efforts to demonize the clause and paint it as contrary to the *Canadian Charter of Rights and Freedoms*. During an English-language leaders' debate, he made the unexpected promise that if re-elected he would "strengthen the Charter" by bringing forth a constitutional amendment to preclude the federal government from invoking the notwithstanding clause.[77] Depicting his opponents as radicals who could use the clause to change the laws regarding same-sex marriage and abortion, Martin claimed section 33 was "a 'dangerous' loop hole that gives the Prime Minister too much power to pick and choose which rights Canadians will keep and which will be taken away."[78] Following in the footsteps of Prime Ministers Mulroney and Chrétien, Martin felt it politically expedient to publicly question the legitimacy of the clause. Just like his predecessors, he did so

[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Campbell Clark, "Liberals Highlight Left-Right Fault Line," *Globe and Mail*, June 4, 2004, A8.
[76] Knopff and Banfield, "It's the Charter Stupid!."
[77] Hiebert, "Compromise and the Notwithstanding Clause", 15.
[78] Mark Kennedy, "Martin Says Harper will Change Abortion Law," *Daily Bulletin*, January 12, 2006, 5.

in a way that framed section 33 as being anti-*Charter*, rather than placing the debate in terms of the policy issue (same-sex marriage) at hand.

From Mulroney to Martin, Canadian Prime Ministers (with the exception of Kim Campbell's brief tenure) have questioned the legitimacy of the notwithstanding clause. Whatever the logic of framing a clause contained in the *Charter* as being fundamentally opposed to it, public officials have felt it necessary to do so. The above analysis suggests Prime Minister Mulroney's condemnation of the clause is equally as important as Bourassa's use of the clause when operating from the framework of historical institutionalism. "Path Dependent" explanations must take into account the one element that has consistently followed *Ford*: public demonization of section 33 by prominent politicians. But why do politicians feel this need for demonization? As noted above, there is no empirical evidence to support the claim that the Canadian public has steadily become more critical of the section 33 since *Ford*; if anything, they have become more ignorant of its existence. Since the notwithstanding clause is a legitimate part of the *Charter*, why is it presented as being incompatible with the document itself? The answer lies in the manner in which the Canadian public perceives the *Charter* as a "rights-giver." The Canadian public's approval of the *Charter* in the abstract as a symbolic icon makes it very difficult for politicians to maintain the legitimacy of a mechanism that ostensibly takes those rights away.

The Charter as Symbolic Rights-Giver

Various studies have indicated that the Canadian public is very supportive of the *Charter* in the abstract. Sniderman *et al*. found both elites and the public at large to be "overwhelmingly positive in their views of the *Charter*."[79] Fletcher and Howe demonstrate that over 80 per cent of Canadians who have heard of the *Charter* say it is a good thing, and that the *Charter* was *more* popular in 1999 than it was in 1987.[80] Even among elites, however, this positive view of the *Charter* does not "proceed from an agreed theory or understanding of it."[81] When asked contextual questions regarding conflicting rights, Canadians are unable to articulate this support. Strong support for the *Charter* exists at a very abstract, symbolic level. This leads Russell to refer to the *Charter* as "an object of worship" and "a symbol of everything right and good." He speculates that this symbolic attachment to the *Charter* may partially explain why the notwithstanding clause has fallen into disuse.[82]

In this vein, it is easier to understand why public officials are able to demonize section 33 with such success. Although it is a legitimate part of the Constitution, the notwithstanding clause does not logically fit with a *Charter* whose symbolic value is as a "rights-giver." As Whyte argues, "The most basic features of our constitutional arrangement do not, as it happens, create a logical or principled argument for the legislative override of the *Charter of Rights*."[83] Further, the wording of section 33 presents the notwithstanding clause "as a power to override the *Charter* itself, rather than disputed judicial interpretations of the *Charter*."[84] When posited as "taking away" rights, the clause seems antithetical to a *Charter of Rights*, ignoring that all rights are subject to reasonable limits. With public support for the *Charter* as a "rights-giving"

[79] Sniderman, Fletcher, Russell, and Tetlock, *The Clash of Rights*, 169.
[80] Fletcher and Howe, "Public Opinion and Courts," 6 and 29.
[81] Sniderman, Fletcher, Russell, and Tetlock, *The Clash of Rights*, 171.
[82] Russell, "The Notwithstanding Clause,", 65.
[83] Whyte, "On Not Standing for Notwithstanding," 354.
[84] Goldsworthy, "Judicial Review, Legislative Override, and Democracy," 467.

document extremely high, it is easy to understand why public officials will demonize section 33 as a "rights denying" mechanism, even if doing so means a potential limitation of their powers.

Janet Ajzenstat explains that by contending Parliament should sometimes prevail, section 33 "powerfully inculcates the idea that we have to choose between Parliament and rights guarantees… Parliamentary sovereignty or rights: that is how Canadians have come to see matters."[85] By building on public support for the *Charter* as a rights-giving symbol, public officials have been able to successfully implicate section 33 as a dangerous perversion of Canadian rights, and as being fundamentally opposed to the *Charter*. Hiebert hints that this was a difficult sell from the beginning. She claims, "Just as it was difficult to appear to be arguing against the *Charter*… it was also difficult to argue for a version of a rights project inconsistent with the constitutional discourse (and wisdom) of the day."[86]

Some commentators have taken issue with such demonization. Goldsworthy argues, "legislators, the electorate, or both, are the victims of a kind of false consciousness. They are deluded by the specious objectivity of constitutional rights."[87] Others see the deification of the *Charter* and the subsequent demonization of the clause as damaging to the tradition of parliamentary democracy in Canada.[88] As Knopff and Banfield conclude, "The *Charter* and its enhancement of judicial power have fuelled the demonization temptation rather than moderating it."[89] Nevertheless, this demonization persists, and it seems unlikely that it will diminish in the near future. That section 33 is a legitimate part of the *Charter* itself is therefore of little consequence. Politicians have found it beneficial to use it as an object of derision to enhance their electoral prospects. When examined from a path dependent framework, public demonization since *Ford* has successfully precluded use of the notwithstanding clause as a means of response to an adverse judicial decision. By framing section 33 as being against the inherent logic of the *Charter*, legislators have made its future use very unlikely.

Conclusion

The evidence presented above illustrates that section 33 has been used very infrequently, and only once as a direct response to a judicial decision. There are many explanations for such sparse use, but very few are compelling. "Judicial Success," the argument that judicial decision-making has been satisfactory, ignores both public and partisan outrage to cases such as *RJR-MacDonald* and *Sharpe*. Theories of "Government Agency," which place the blame squarely at the feet of governments, do not adequately take account of broader institutional patterns. Further, while explanations based around "Public Opinion" recognize some institutional constraints, their hypotheses are not always reflected in the empirical evidence, and they neglect cases in which public opinion was broadly supportive of using the clause. The most satisfactory argument for explaining non-use is the "Path Dependence" argument, which claims that the Quebec government's contentious use of section 33 began to process of eroding the legitimacy of the notwithstanding clause, a process which has been subsequently reinforced by successive Prime Ministers. When one examines the political demonization of the notwithstanding clause that has occurred since *Ford*, this path dependent argument becomes much stronger. After being

[85] Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal, QC/Kingston, ON: McGill-Queen's University Press, 2007), 54.
[86] Hiebert, "Compromise and the Notwithstanding Clause", 13.
[87] Goldsworthy, "Judicial Review, Legislative Override, and Democracy," 470.
[88] See Ajzenstat, *The Canadian Founding*; Manfredi, *Judicial Power and the Charter*; Morton and Knopff, *The Charter Revolution and the Court Party*.
[89] Knopff and Banfield, "It's the Charter Stupid!."

consistently portrayed as antithetical to the *Charter*, a very popular symbol of Canadian identity, it is little wonder that section 33 has fallen into disuse.

Examining the way in which politicians have juxtaposed section 33 and the *Charter* reveals the institutional constraints that have developed around the clause, effectively precluding its use as a legitimate instrument. Agent-centred analyses suggesting, "the fault, if any, rests with individuals" fail to recognize "legislative paralysis is institutional in character."[90] The failure of governments to invoke section 33 since *Ford* can be better understood when viewed from a path-dependent perspective that understands political demonization of section 33 as the logical use of a national symbol (the *Charter*) in an attempt to gain political capital. From this perspective, the future use of the notwithstanding clause in response to judicial decisions remains increasingly unlikely.

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[90] Morton and Knopff, *The Charter Revolution and the Court Party*, 166.

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