SECTION 33 ON TRIAL:

THE BILL 21 CASE AT THE SUPREME COURT OF CANADA

CONTENTS

INTRODUCTION

The goal of this book is to serve as a guide for those interested in the case challenging Quebec's secularism law – Bill 21. The legal challenge has travelled through the courts under several names: *English Montreal School Board v Attorney General of Quebec*, *World Sikh Organization v Attorney General of Quebec*, and most recently *Hak v Attorney General of Quebec*. When the Supreme Court of Canada hears the case in March 2026, it will be one of the most important constitutional cases in a generation. Journalists, lawyers, academics, politicians, and members of the public are all watching closely.

The charity that authored this book, the Canadian Constitution Foundation, is intervening in the case on a narrow issue (see Chapter 5). But this guide is not an advocacy document. Our goal is to provide readers with a balanced and accessible explanation of the issues at stake.

At the center of the Bill 21 litigation is Quebec's secularism law and the role of Section 33 of the *Canadian Charter of Rights and Freedoms*, commonly called the notwithstanding clause. But the case is in fact more like a many-tentacled octopus of issues. Grab any tentacle and you encounter debates about the availability of remedies once Section 33 is invoked, the status of pre-*Charter* rights, the scope of judicial review, Canada's constitutional architecture, and even competing visions of democracy and the role of courts.

The facts of the case are relatively straightforward. The deeper constitutional disputes are not. Even for lawyers, the doctrinal questions raised by Section 33 are complex. Each issue is its own rabbit

hole. This book does not attempt to explore every thread in full detail. Instead, it aims to provide readers with the background necessary to understand the key debates surrounding Section 33 and how they converge in the Bill 21 case.

The notwithstanding clause is one of the most controversial provisions of the *Charter*. To its defenders, it is an essential democratic safety valve built into the constitutional design of 1982. It preserves a space for elected legislatures to make final decisions about contested questions of rights in certain circumstances. To its critics, it represents a dangerous mechanism that allows governments to sidestep constitutional protections and expose minorities to majoritarian politics.

Behind these disagreements lies a deeper constitutional question that has animated debate since the *Charter* was adopted: who should have the final say in a constitutional democracy? Should courts be the ultimate arbiters of rights, or should legislatures retain the authority to depart from judicial interpretations in limited circumstances?

Scholars and political actors alike answer that question in different ways. Some view Section 33 as part of a dialogue between courts and legislatures, in which each institution contributes to the evolving meaning of constitutional rights. Others see it as confirming that legislatures remain co-equal interpreters of the Constitution and may act on their own understanding of rights, subject primarily to electoral accountability.

The Bill 21 litigation brings these debates into sharp focus. The case asks the Supreme Court to clarify the legal consequences of invoking Section 33: whether courts may still review legislation and issue declarations about rights, whether legislatures may invoke the clause before any court ruling, and whether other parts of the Constitution limit its use.

This book explores those questions in six chapters. It begins with the origins of Section 33 and the constitutional negotiations that produced it. It then examines the early jurisprudence, including the Supreme Court's landmark decision in *Ford v Quebec*.[1] We then turn to

the modern revival of the clause, the legal challenge to Bill 21 itself, and the arguments now before the Supreme Court.

Our hope is that this guide provides readers with the context needed to understand what is really at stake in the fight over Section 33.

— *Chapter 1* —

THE ORIGINS OF THE NOTWITHSTANDING CLAUSE

What is Section 33 of the Charter

Section 33, commonly known as the notwithstanding clause, is one of the most debated and poorly understood provisions in Canada's constitutional architecture. It permits Parliament or a provincial legislature to enact legislation that operates "notwithstanding" certain fundamental freedoms, legal rights, and equality guarantees in the *Charter*. Far from being an accident or a loophole, Section 33 was deliberately entrenched as part of the constitutional compromise of 1982, preserving a space for democratic decision-making alongside judicial review. It reflects a foundational choice out of the *Charter* negotiations about who ultimately governs in a constitutional democracy: courts or the elected representatives of the people.

Section 33 of the *Canadian Charter of Rights and Freedoms* provides:

> ***33 (1)*** *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.*
>
> ***(2)*** *An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.*

> ***(3)*** *A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.*
>
> ***(4)*** *Parliament or the legislature of a province may re-enact a declaration made under subsection (1).*
>
> ***(5)*** *Subsection (3) applies in respect of a re-enactment made under subsection (4).*

The limits of Section 33 are found directly in its wording and are formal limits.

First, the power of the notwithstanding clause is confined to specific *Charter* rights. Subsection (1) allows Parliament or a provincial legislature to declare that legislation operates notwithstanding "a provision included in section 2 or sections 7 to 15." That means it can apply only to fundamental freedoms (section 2), legal rights (sections 7–14), and equality rights (section 15). It cannot be used to override other parts of the *Charter*, like democratic rights (sections 3–5), mobility rights (section 6), language rights (sections 16–23). The text itself draws that boundary.

Second, the override must be express. Subsection (1) requires that a legislature "expressly declare" that an Act or provision shall operate notwithstanding the specified *Charter* rights. Courts cannot infer its use. Silence is not enough. If a legislature wishes to override rights, it must say so clearly and publicly.

Third, the override is temporary. Subsection (3) provides that a declaration "shall cease to have effect five years after it comes into force," unless an earlier date is specified. This sunset clause ensures that the override cannot be indefinite without renewal. Subsections (4) and (5) permit re-enactment, but only for another five-year period at a time, requiring governments to revisit and affirm the decision. In practical terms, this ties the override to the electoral cycle and democratic accountability.

Finally, subsection (2) clarifies the legal effect: legislation subject to a valid declaration operates "as it would have but for" the *Charter* provision referenced. This confirms that Section 33 does not amend or suspend the *Charter* itself; it temporarily shields specific legislation from judicial invalidation based on the listed rights.

Taken together, the text imposes four structural limits:

1. subject-matter limits (only certain rights);
2. procedural limits (express declaration);
3. temporal limits (five-year sunset);
4. and institutional limits (it does not alter the *Charter*, only the effect of judicial review on particular legislation).

Section 33 is unique in the world

Section 33 is unusual. Section 33 is unique among the constitutions of countries with constitutional democracies. Other constitutional democracies with entrenched bills of rights provide no equivalent mechanism. The late constitutional scholar Peter Hogg remarked that the notwithstanding clause "seems to be a uniquely Canadian invention."

That said, partial analogues exist.

For example, certain international human rights conventions contain more limited notwithstanding clauses. Article 4 of the *International Covenant and Civil and Political Rights*[2] contains a notwithstanding clause. Article 27 of the *American Convention on Human Rights*[3] also contains a notwithstanding clause, as does article 15 of the *European Convention on Human Rights.*[4]

In the United Kingdom, parliamentary sovereignty permits Parliament to pass laws that conflict with rights recognized under the *Human Rights Act*.[5] The *Human Rights Act* requires courts to interpret laws compatibility, or issue declarations of incompatibility, but it does not allow courts to strike down primary legislation. If a law is declared incompatible with the *Human Rights Act*, it is left to parliament to decide whether to amend the law.

Similarly, in New Zealand the *Bill of Rights Act*[6] affirms rights but does not empower courts to strike down legislation, preserving legislative supremacy by default.

And in Israel, override mechanisms have been proposed or debated in relation to its Basic Laws.[7] This issue has been a key part of internal political debate in Israel as part of a suite of judicial reforms that were proposed in 2022.[8] The override clause was dropped from that reform package in June 2023.

What makes Canada's Section 33 distinctive is that it is written directly into a constitutional bill of rights as an express, time-limited legislative derogation override. Section 33 represents neither pure parliamentary supremacy nor absolute judicial supremacy, but a hybrid model unique in its design.

The patriation of the Constitution and the 1981 negotiations

The inclusion of Section 33 cannot be understood apart from the political drama of the 1981 patriation negotiations. When Prime Minister Pierre Trudeau sought to patriate the Constitution and entrench a written charter of rights, several provinces feared a dramatic transfer of power from elected legislatures to the judiciary. The proposed *Canadian Charter of Rights and Freedoms* would empower courts to invalidate provincial and federal laws that violated rights and freedoms guaranteed in the *Charter*. Premiers, particularly in western Canada and Quebec, worried that this would constitutionalize contested policy questions and weaken parliamentary supremacy, which is a foundational principle inherited from the British tradition.

The negotiations reached a breaking point in November 1981. After months of stalemate and a reference to the Supreme Court on whether unilateral patriation was lawful, first ministers gathered in Ottawa to attempt a final compromise. The breakthrough came when federal Justice Minister Jean Chrétien, Ontario Attorney General Roy McMurtry, and Saskatchewan Attorney General Roy Romanow reached what has since been called the "Kitchen Accord,". The deal

preserved the *Charter* but added a legislative override — what became Section 33 — to secure provincial consent.

For several premiers, the override was the price of agreement. The override clause drew on earlier proposals from Alberta and Saskatchewan, which had advocated for a means of preserving legislative supremacy within a rights framework.

Notably, Quebec did not ultimately consent to the *Constitution Act, 1982,* though the override had been one of its long-standing demands. The result was a uniquely Canadian model of constitutionalism: a charter with strong judicial review, tempered by an explicit, time-limited legislative override. Section 33 emerged not as a rejection of rights protection, but as the political condition for its entrenchment — a reflection of Canada's federal character and its ongoing negotiation between courts and legislatures.

The Primary Documents Project[9] recently explored newly available archival materials from the 1980–1982 constitutional negotiations in the paper: *Mapping the Limitations of the Notwithstanding Clause*.[10] This paper argues that the drafting history of Section 33 of the *Charter* shows that the notwithstanding clause was never intended to be an unlimited override power. Rather than treating Section 33 as a blunt legislative supremacy tool, the article portrays it as a carefully negotiated compromise that preserved legislative flexibility while embedding structural limitations rooted in constitutionalism and accountability. The archival evidence supports the view that electoral accountability was meant to function as a key check on misuse. The override was expected to operate transparently so that voters could respond to its use in subsequent elections.

How premiers and politicians involved in the negotiations talked about Section 33

There was tense disagreement over the inclusion of the notwithstanding clause, and the politicians involved in those negotiations made public statements at the time, and subsequently, that reflect different

interpretations of the scope of the clause and its intended purpose. Those different positions will undoubtedly be advanced selectively by those advocating for a particular interpretation of Section 33 and a particular outcome in the Bill 21 case.

Progressive Conservative Alberta Premier Peter Lougheed was a forceful proponent for the inclusion of the notwithstanding clause during the *Charter* debates. Lougheed believed legislatures needed the power to respond when judicial interpretations diverged from democratic consensus or impeded major socioeconomic reforms. In his 1991 Merv Leitch Lecture *Why a Notwithstanding Clause?*,[11] Lougheed explained that the clause "allows effective political action on the part of legislators to curb an errant court." For Lougheed, the clause was not symbolic. It was a real political tool available for use in those rare circumstances where the legislature was in disagreement with judicial interpretation regarding matters of public policy. He elaborated that his government was prepared to use the notwithstanding clause to shield legislation that prevented hospital workers from striking, had the Supreme Court ruled that it was contrary to the *Charter*. The notwithstanding clause has been recently employed by the Danielle Smith government in Alberta for a similar purpose: to end a strike by teachers following a 2015 Supreme Court finding that found a right to strike protected by section 2(d) of the *Charter*.

During those tense 1981 negotiations, Jean Chrétien, then the Liberal federal Minister of Justice, strongly advised Prime Minister Pierre Trudeau to accept the inclusion of the notwithstanding clause to save the negotiations over the *Charter*. Chrétien and Trudeau both opposed the clause. But according to accounts of the "Kitchen Accord," Chrétien told Trudeau: "Pierre, if you don't take the notwithstanding clause, you don't have the *Charter*."[12] The notwithstanding clause was a part of the bargain. In a 1981 memo[13] from Chrétien to the Liberal caucus, Chrétien described the planned clause's inclusion in the *Charter* as "the need for a safety valve to correct absurd situations." Since then,[14] Chrétien has repeatedly stated his view that Section 33 was meant for emergencies.[15]

During the 1981 debates, Ontario Premier Bill Davis supported a *Charter* without a notwithstanding clause and tried to limit the clause so that it wouldn't apply to section 2's fundamental freedoms (religion, expression, peaceful assembly and association). Davis later reflected on the intended purpose of Section 33 in 2018, stating: "The sole purpose of the notwithstanding clause was only for those exceptionally rare circumstances when a province wanted to bring in a specific benefit or program provision for a part of their population ... that might have seemed discriminatory under the *Charter*."[16] This retrospective comment from Davis suggests a belief that the notwithstanding clause was negotiated with a much narrower intention than Lougheed suggested in his famous 1991 speech.

Another player in the negotiations, NDP Saskatchewan Premier Allan Blakeney, offered yet another perspective. Blakeney was opposed to the *Charter* as an instrument of centralizing federal power that risked empowering judicial elites to overturn provincial legislation that protected rights that had been left out of the *Charter*, such as the right to housing. In later reflections, Blakeney openly stated that he was a fan of using Section 33 to correct activist judicial interpretations of the *Charter* and "to protect a fundamental right that is not included in the *Charter*."[17] Scholars have since noted that there is no hint in Blakeney's writings on Section 33, nor in his memoirs, that he thought section 33 would be reserved for "absurd situations" or "exceptional situations." Professor Geoff Sigalet has written that Blakeney's reflections are infused with democratic hostility to judicial elites as final arbiters of important rights questions; "Indeed, of all the framers, Blakeney seemed the blithest about using Section 33 to teach courts lessons about the importance of rights not found in the *Charter*."[18]

While not from the 1981 debates themselves, later commentary underscores how controversial the clause was perceived to be by some political leaders. Former Prime Minister Brian Mulroney described Section 33 as "that major fatal flaw of 1981, which reduces your individual rights and mine," arguing that a constitution that did not

fully protect inalienable rights was "not worth the paper it is written on."[19] Former Prime Minister Justin Trudeau has echoed his father's long-standing dislike of the clause. He has said the clause is "not a great thing" to have in the *Charter*, describing it as a "loophole that allows a majority to override fundamental rights of a minority."[20]

Together, these statements reveal the practical tensions at the heart of the 1981 negotiations: some premiers sought assurance that their legislative authority would not be eclipsed by judicial review, while other figures like Trudeau worried that the clause would nullify rights and freedoms. Some premiers viewed it as a narrow and limited tool of last resort; others saw it as more expansive. These tensions remain at the heart of the dispute in the Bill 21 case.

— *Chapter 2* —

THE EARLY JURISPRUDENCE: *FORD* AND HISTORICAL USES OF SECTION 33

Early uses of the notwithstanding clause – Quebec takes a maximalist approach

The earliest uses of Section 33 came swiftly and dramatically. In the immediate aftermath of patriation in 1982, the government of Quebec, led by Premier René Lévesque, took a maximalist approach. Having refused to consent to the *Constitution Act, 1982*, Quebec responded by inserting blanket notwithstanding declarations into virtually all its legislation between 1982 and 1985.[21] Through omnibus legislation, the National Assembly declared that every statute would operate notwithstanding sections 2 and 7–15 of the *Charter*. This was not a targeted response to specific court decisions; it was a sweeping assertion of legislative sovereignty. Quebec also enacted override declarations retroactively, applying Section 33 to laws already on the books.[22]

Ultimately, the Supreme Court concluded in *Ford v Quebec (Attorney General)*[23] that while omnibus declarations of Section 33 are valid, the general interpretative rule of the clause is that declarations cannot be retroactive.

Quebec's blanket use of Section 33 has never been replicated elsewhere in Canada. It also demonstrated two important features

of the clause. First, the text imposes no requirement that it be used sparingly or only in response to judicial invalidation. Second, courts confirmed that Section 33 does not require substantive justification beyond the formal requirements of express declaration and temporal limits. Quebec's early approach therefore established that the override power, however controversial politically, was legally robust if properly invoked.

Other provincial uses of the notwithstanding clause

Several other early invocations of section 33 occurred or were attempted in the 1980s through to the early 2000s, though none matched Quebec's sweeping approach.

In 1986, the Saskatchewan government invoked the clause to shield back-to-work legislation[24] from *Charter* challenges during a public sector labour dispute. The action reflects a pre-emptive use, because it was taken in response to a Saskatchewan Court of Appeal ruling that had struck down similar previous legislation.[25]

In 1998, Premier Ralph Klein attempted Alberta's first use of the notwithstanding clause in Bill 26, which prescribed a formula to settle claims by persons who had been sexually sterilized through a provincially run program decades prior. Section 33 was pre-emptively invoked to limit damages in lawsuits from those sterilization survivors. Bill 26 was met with an intense and immediate storm of protest.[26] Within 24 hours, a chastened Alberta announced it was withdrawing the bill.

Alberta did ultimately invoke the notwithstanding clause in 2000 when the Klein government passed legislation amending the province's *Marriage Amendment Act*[27] to define marriage as between a man and a woman. Alberta pre-emptively invoked the notwithstanding clause to prevent courts from ruling that the law must allow same-sex marriage. However, in 2004, the Supreme Court of Canada released *Reference re Same-Sex Marriage*[28] which held that Parliament has exclusive jurisdiction over the legal capacity for marriage, including ex-

tending it to same-sex couples. Any provincial legislation attempting to define marriage was *ultra vires* (outside the power of) the province.

It is also important to note that not every early use of Section 33 provoked outrage. One of the least controversial invocations occurred in Saskatchewan in 2017 in relation to Catholic separate schools. A 2017 lower court ruling stated that funding non-Catholic students in Catholic schools violated the *Charter*. This was an unpopular ruling because some rural communities only had a single, Catholic school. The Saskatchewan government used the notwithstanding clause to pass the *School Choice Protection Act*[29] shielding the funding from the court ruling while the decision was under appeal. This use of Section 33 was not framed as an attack on rights, but as a means of protecting the rights of students and parents, as well as preserving a long-standing constitutional compromise. The political reaction was muted, and **i**n March 2020, the Saskatchewan Court of Appeal found no *Charter* infringement. The Saskatchewan case illustrates some important points: the use of Section 33 is not always polarizing, and it sometimes functions as a stabilizing tool, used to protect historic constitutional arrangements from unintended *Charter* disruption.

Taken together, these historic uses complicate the modern caricature of section 33 as either a constitutional emergency button or a rights-destroying weapon. From the outset, governments treated it as a real and legally available component of Canada's constitutional architecture, to be deployed in different contexts for different purposes, with political judgment ultimately serving as the primary constraint.

Ford v Quebec – a watershed moment in 1988

We have alluded to the Supreme Court's decision in *Ford v Quebec (Attorney General)*, which is currently the most important case interpreting the scope of Section 33. *Ford* was a constitutional watershed in 1988, and it laid out many of the principles used for interpreting the scope of Section 33, as well as the availability of pre-emptive invocations of the clause.

The case arose after the Quebec government passed Bill 101, the *Charter of the French Language*.[30] This law required the exclusive use of French on commercial signs and required businesses to use only the French versions of their names. Business owners challenged the law under Section 2(b) of the Canadian *Charter*, arguing that the prohibition on other languages violated freedom of expression. Quebec had used Section 33 to apply to Bill 101 as part of its standard practice at the time of applying a blanket omnibus invocation of the notwithstanding clause to all legislation.

In *Ford*, the Supreme Court unanimously agreed with both lower courts that the law violated freedom of expression and that Quebec's blanket ban on languages other than French could not be justified under Section 1, the clause of the *Charter* that allows for reasonable limits on rights. The decision invalidated the sign provisions. But Part V of the *Ford* judgment dug into the meaning of the notwithstanding clause. It remains today the Court's only authoritative ruling on the meaning of that clause.[31]

The Court in *Ford* laid out the form requirements for invoking Section 33. The court famously wrote:

> *Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case.*

The *Ford* court also described what the form requirements include:

> *The essential requirement of form laid down by s. 33 is that there must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the Canadian Charter. A section 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the Charter which contains the provision or provisions to be overridden. Of course, if a legislature intends to override only a part of a provision contained in a section*

> *then there would have to be a sufficient reference in words to the part to be overridden.*

Many argue that this confirms that Section 33 does not require more than an explicit reference to the *Charter* provisions, and there is no need for the legislature to justify its decision substantively.

The *Ford* decision concluded, as noted above, that omnibus invocation of the notwithstanding clause is acceptable. At the time, it was the "well-established legislative policy practice" of Quebec to include Section 33 in every Quebec statute. This policy was realized in part by omnibus legislation that introduced "into all Quebec statutes enacted prior to a certain date" a declaration invoking the notwithstanding clause." Objections to such omnibus use amounted to questioning the "permissible legislative policy in the exercise of the override authority rather than what constitutes a sufficiently express declaration of override." There was, according to the formal/substantive distinction adopted by the Court, "no warrant in s. 33 for such considerations as a basis of judicial review of a particular exercise of the authority conferred by s. 33."

While omnibus uses of Section 33 were recognized by the *Ford* Court as acceptable, retroactive uses were not. The Court compared the French and English versions of the text, exploring the significance of the word "shall" in the expression "shall operate notwithstanding" and the equivalent French word "a" in the phrase "a effet indépendamment." The Court noted an ambiguity in the legislative use of these words between "either a prospective or an imperative meaning or both," and concluded that the clause cannot be given retroactive effect.

Quebec's response to *Ford* was swift. The National Assembly re-enacted the French language legislation as Bill 178 and expressly invoked Section 33 to shield it from further *Charter* challenge.

The *Ford* decision stands as the only guiding Supreme Court case on the interpretation of Section 33, affirming that its limits are textu-

al: express declaration, specified rights, temporal expiry. Beyond that, the only restraint on its use has been the stigma legislatures may face when they use it. The upcoming Supreme Court Appeal of the Bill 21 case will almost certainly shape the future of the notwithstanding clause. The legacy of *Ford* will play a central role in how the Court frames the legal questions about the future of Section 33.

Framing today's debate over section 33

What the Supreme Court will be asked to decide in the Bill 21 case is whether *Ford's* limits on judicial review are indeed definitive, or whether a court may, for example, issue a declaratory judgment about rights infringements even when the notwithstanding clause has been invoked. The outcome will shape the practical operation of Section 33: whether it truly closes the door on judicial commentary about rights at all, or whether some form of constitutional analysis remains open to courts.

Today, Section 33 sits at the centre of a renewed constitutional debate, and the disagreement is not merely about its use, but about what it represents. Competing camps of scholars frame the notwithstanding clause in fundamentally different ways.

Dialogic versus Coordinate Theory

The theoretical debate has produced rival views of Section 33: the dialogic view, and the coordinate view. This debate is explored in detail in Roberto Borrelli's paper *Constructing Separate, Neutrality and Equality: A Coordinate Use of the Notwithstanding Clause by the Government of Saskatchewan*.[32]

Scholars in the dialogic camp argue that section 33 is part of a dialogue between courts and the legislature. In this view, Section 33 is part of a broader system in which courts interpret rights, legislatures respond, sometimes by abandoning or amending legislation while in other case by invoking Section 33, and constitutional meaning evolves over time. From this perspective, neither courts nor legislatures hold

absolute supremacy; instead, Section 33 reflects a uniquely Canadian compromise between parliamentary supremacy and judicial supremacy. The clause is seen less as a blunt override and more as a constitutional tool embedded within a dynamic, iterative system.

Peter Hogg and Alison Bushell first articulated this concept in their landmark article in 1997, *The Charter Dialogue Between Courts and Legislatures.*[33] "The effect of the *Charter* is rarely to block a legislative objective, but rather to influence the design of implementing legislation," Hogg and Bushell wrote. "This process is best regarded as a *'dialogue'* between courts and legislatures." According to Hogg and Bushell: "Under the *Charter*, the law is in large part what judges say it is. On the other hand, the notwithstanding clause gives legislatures a powerful tool for overriding what judges say, while the record of *Charter* cases suggests that what goes on in practice is a dialogue between the nominated judges and elected legislators."[34]

Lorainne Weinrib,[35] another prominent voice in dialogic theory, called Section 33 "a coherent element in a coherent structure of rights protection," that permits legislatures to "nullify rights...in the name of majoritarian...values," while ensuring that the Supreme Court can "articulate the content of [] rights...on legally cognizable grounds" beforehand. For his part, Kent Roach[36] describes Section 33 as "a carefully structured outlet" that "allows a legislature to reverse a [Supreme] Court decision" by temporarily "derogating from rights" when they are "unacceptable to the majority" and, therefore, "preserving" their judicial interpretation over the long term.

The other viewpoint is the coordinate view. This view treats courts and legislatures as co-equal interpreters of the Constitution, rather than placing courts in a position of ultimate interpretive supremacy. Under this theory, Section 33 is not an anomaly or emergency escape mechanism; it is part of the Charter's design for allocating constitutional authority between institutions. Under this view, the notwithstanding clause is used to interpret rights with the hope of better protecting them. It is noteworthy that coordinate theorists do

not describe the notwithstanding clause as an "override", and in fact dispute that characterization, commenting[37] that that the word "override" appears nowhere in the text.

In support of this view, Christopher Manfredi[38] wrote in 1993 that the notwithstanding clause "does not permit legislatures to override rights, but to override the[ir] judicial interpretation," thereby "encouraging a more politically vital discourse on the meaning of rights and their relationship to competing constitutional visions" in different policy circumstances. Dwight Newman[39] has argued the notwithstanding clause is part of the Constitution's architecture, and that "nothing in the text of the clause" suggests its use is limited to being a tool of "last resort" or an "escape hatch". According to Newman, the notwithstanding clause "relocates who is constitutionally empowered to interpret [] rights," giving legislatures "the authority to substitute their view of a...rights interpretation for the view at which courts have arrived" or will arrive.[40]

Geoff Sigalet[41] is another explicit defender of Section 33. Sigalet argues that the notwithstanding clause reflects the fact that constitutional interpretation is not the exclusive domain of courts. Legislatures also have a legitimate role in interpreting and applying constitutional rights when they enact laws. The clause confirms that constitutional supremacy in Canada does not mean judicial supremacy. In this framework, legislatures may reach their own good-faith conclusions about the meaning of *Charter* rights and act on those conclusions through legislation that includes a Section 33 declaration. A central part of Sigalet's view is that legislative disagreement with judicial interpretations of rights can be constitutionally legitimate, and that parliament has the final word, with electoral accountability as the primary constraint.

Theoretical Debate on Declaratory Relief

One of the major issues that the Supreme Court will be canvassing in the Bill 21 case is whether judicial review remains available after

Section 33 has been invoked, and whether courts may still "speak". One side of this debate argues that the dialogue requires courts to still have the power to issue a declaration that rights have been violated, even if the legislation cannot be struck down. The other side of this debate argues that parliamentary supremacy gives the last word to the legislature, and that courts may not speak after Section 33 has been used. An excellent summary of this debate can be found in Kristopher E.G. Kinsinger's *The Evolving Debate Over Section 33 of the Charter*.[42]

For example, in a 2019 essay, Grégoire Webber, Eric Mendelsohn and Robert Leckey[43] argue that even after Section 33 is invoked courts may still interpret the *Charter* and declare rights infringements. Such a practice could yield certain advantages. Specifically, the authors argue that judicial review of legislation which invokes the notwithstanding clause could alert the electorate to laws that are substantively inconsistent with the *Charter*, allowing citizens (and in particular minorities that might have little opportunity to make their voices heard by the democratic branches of government) to hold state actors to account. Leonid Siroata has expressed a similar view, arguing there is nothing in the text of the *Charter* that would preclude a declaration.[44]

In response,[45] Maxime St-Hilaire and Xavier Foccroulle Ménard contend that a purposive interpretation of section 33 which accounts for the broader architecture of the Canadian Constitution precludes the clause from being read in a strictly textualist manner. They argue that *Ford* confirms the exclusion of substantive review and that "the function of section 33 is to allow legislators to exempt legislative provisions from any judicial debate on their respect for the constitutional rights from which they derogate." Sigalet,[46] on the other hand, argues that it is the text of the *Charter* that precludes judicial review after invocation. Sigalet argues that the text of Section 33(2) demands that courts operate from a perspective that laws operate "but for" *Charter* rights – they operate as if certain Charter entitlements do not exist, thereby precluding a substantive judicial review.

At bottom, this theoretical debate over Section 33 is not simply about the clause itself. It is about the deeper question the framers confronted in 1981: who should have the final word in a constitutional democracy: courts or elected representatives?

Section 33 as a threat to minority rights

Another framing of the debate over Section 33 is focused on the clause as a threat to minority rights. Critics argue that the very purpose of entrenched constitutional rights is to protect individuals and minorities from majoritarian politics. Allowing legislatures to override those rights, even temporarily, is viewed as undermining the *Charter*'s core promise. In this view, recent invocations represent a normalization of rights suspension and risk weakening Canada's rights culture. Some characterize the clause as a loophole or escape hatch, suggesting it was intended for exceptional circumstances but is now being used strategically to insulate governments from judicial review.

For example, Deborah Coyne has described the override as contrary to the spirit of constitutionalism, arguing that constitutional supremacy means courts — not legislatures — must have the final word on rights interpretation. She has characterized expanded use as inconsistent with entrenched constitutional protection, and called for its repeal.[47]

Jamie Cameron has been a strong critic of the notwithstanding clause, and has described[48] herself as having a "pessimistic" view of it. She argues that the clause "was never more than wishful thinking," and that it cannot be invoked "without violating principles of constitutionalism that predate the *Charter* and legitimize the judiciary's power to enforce its entitlements." Her work characterizes Section 33 as an override and notes that it has resurfaced recently "ominously, as a rights-negating mechanism."[49]

Emmett Macfarlane has repeatedly characterized[50] expanded use of Section 33 as corrosive to Canada's rights framework. His concern is not that Section 33 is illegitimate, but that its expanded use erodes

minority protection and shifts Canada toward majoritarian constitutionalism. He has been particularly critical of pre-emptive use. "The problem with a pre-emptive use is that rather than merely asserting the position of the legislation, you're trying to prevent the courts from even having a say or registering a judicial finding that the legislation is constitutionally problematic," MacFarlane has said, and that "governments, as a rule, should not be bringing it forward in a pre-emptive action."[51]

— Chapter 3 —

THE MODERN REVIVAL OF SECTION 33

Between 1982 and 2010, the notwithstanding clause was invoked roughly two dozen times, depending on how one counts Quebec's omnibus override statutes in the 1980s. By the early 2000s, Section 33 had acquired a reputation as politically toxic. But since 2010, and especially after 2018, the landscape has shifted. The raw number of invocations since 2010 does not yet eclipse the concentration of early Quebec uses. But the clause has been used more frequently outside of Quebec and the Prairies, including for the first time in Ontario and New Brunswick, and in arguably more controversial circumstances.

At the heart of the Bill 21 case is Quebec's invocation of Section 33 in its secularism law, *An Act Respecting The Laicity Of The State*[52] (Bill 21) in 2019. But this was not Quebec's only recent use. Section 33 was also invoked by the province in its language reform legislation, *An Act Respecting French, the Official and Common Language of Quebec*[53] (Bill 96), in 2022.

Quebec was not alone in its acceleration. Ontario's Ford government has used and threatened to use it multiple times. In 2018, Doug Ford announced[54] that he would use Section 33 to cut the size of Toronto City Council ahead of that year's election, if the Court of Appeal were to find that his plan was a *Charter* violation. He did not end up invoking the clause, because the Court of Appeal stayed the lower court decision. But Ford did use the clause in 2021 to re-enact

election spending limits[55] on third parties that had been struck down by a court, and he pre-emptively invoked it in back-to-work legislation for education workers in 2022,[56] although this legislation was repealed within days.

Saskatchewan invoked the notwithstanding clause in 2023 to shield legislation requiring parental consent for pronoun changes at school which was being challenged as a *Charter* violation (see Chapter 4). This was a pre-emptive use of the clause, and the case, *UR Pride v Saskatchewan*,[57] raises many of the same issues that are raised in *Hak*.

In 2023, New Brunswick introduced a bill on proof of immunization using the notwithstanding cause pre-emptively. The notwithstanding clause was removed from the bill prior to the defeat at third readings.

Alberta has invoked it multiple times in rapid succession under Premier Danielle Smith. Her Alberta government has used or planned to use the clause for multiple bills related to transgender issues,[58] including restricting access to transgender surgeries and cross-sex hormone therapy for transgender-identifying youth under 16, parental consent for school pronoun usage, and restrictions on participation in amateur sports. The Smith Alberta government also invoked the clause in late 2025 to order striking teachers back to work and impose a contract.[59]

Whether these modern uses amount to an "escalation" depends on what is being measured. In absolute historical totals, the 1980s remain the high-water mark because of Quebec's sweeping early applications. But measured by cadence, political visibility, and use in provinces that had never used it before, the 2020s represent a meaningful revival. Section 33 is no longer confined to a couple of provinces or exceptional historical moments. It has become a recurring instrument in live constitutional conflicts across multiple jurisdictions. More striking still is the normalization of pre-emptive invocation. Governments are openly legislating with the override before a final judicial ruling,

treating it as an available policy tool rather than a last resort after constitutional defeat.

For decades, scholars maintained that the most powerful constraint on Section 33 was political rather than legal. The Supreme Court appeared to confirm in *Ford* that the clause is subject only to formal requirements, and that courts would not police its substance. The real check, it was said, would be public opinion. The assumption was that governments would fear electoral backlash for derogating from *Charter* rights and that would cause them to refrain from using it in only very rare circumstances. That theory appeared plausible during the long dormancy of the late 1990s and 2000s.

The modern period raises the question whether that political constraint is loosening or whether more frequent use has been made necessary by present circumstances, including the rulings of so-called "activist" judges.

In some instances, notably Ontario's 2022 labour legislation, backlash was swift and effective, forcing repeal. In others, like Quebec's secularism law or Saskatchewan and Alberta's legislation about transgender issues, governments have proceeded despite widespread controversy. The override has not become costless, but neither is it uniformly radioactive. Its deployment now depends less on constitutional taboo and more on political calculation.

A 2025 study by the Fraser Institute[60] concludes that the notwithstanding clause has become increasingly normalized in Canadian politics since about 2018. Examining both the recent use of the clause by provincial governments and media coverage of those uses, the study finds that governments are now more willing to invoke (or threaten to invoke) Section 33 as a routine legislative tool rather than treating it as an extraordinary constitutional measure. While the clause still attracts criticism, the study suggests that public controversy surrounding its use has become less uniform and more dependent on political context and media framing. In particular, the analysis indicates that public perception appears increasingly divided: some commentary

continues to portray the clause as a drastic override of rights, while other coverage treats it as a legitimate mechanism of democratic accountability built into the *Charter*.

The story of the modern revival, then, is perhaps not simply one of numerical increase in frequency. It may be a shift in constitutional culture. Certainly, Section 33 has moved from a rarely touched compromise provision to an active site of contestation about the balance between courts and legislatures. The central question remains the same as it was in 1982: who has the final word? What has changed is that elected governments are increasingly willing to answer that question for themselves.

— Chapter 4 —

QUEBEC'S SECULARISM LAW AND SECTION 33

The background of Bill 21

In 2019, the government of François Legault enacted Quebec's secularism law, formally titled *An Act Respecting The Laicity Of The State*[61] (Bill 21). Legault's Coalition Avenir Québec (CAQ) party had campaigned openly on enacting a secularism law. "Laicity" refers specifically to a legal framework that clearly separates religion and the government. The first section of the law asserts that Quebec is a "lay State." The legislation states that the laicity of the state is based on four principles: (1) the equality of all citizens; (2) the separation of State and religions; (3) the religious neutrality of the State, and; (4) freedom of conscience and freedom of religion.

The law prohibits public officials in positions of authority including teachers, police officers, prosecutors, and judges from wearing visible religious symbols while performing their duties. The law also requires individuals to receive certain public services with their faces uncovered.

The legislation was introduced shortly after Legault's election and was framed as fulfilling a long-standing political commitment to enshrine state secularism in law and to clarify the religious neutrality of public institutions. Supporters in Quebec often ground the law in the French republican tradition of laicity, noting that several Europe-

an states have enacted laicity laws, and that many have been upheld by the European Court of Human Rights. See, for example *S.A.S. v France*[62] and *Belcacemi and Oussar v Belgium*.[63] In Quebec's historical context, the concept of laicity is also intertwined with the Quiet Revolution and a deliberate move away in recent decades from the Catholic Church's historical institutional dominance over education and social services.

Bill 21 has sharply divided opinion in Canada. Many classical liberals and civil liberties advocates argue that it intrudes directly on freedom of religion and expression, particularly for members of minority faiths whose religious commitments require visible symbols. They view it as a state-imposed restriction on individual conscience that disproportionately burdens religious minorities.

By contrast, many defenders in Quebec (where the law is popular[64]) see it not as targeting religion, but as protecting institutional neutrality and reinforcing a shared civic identity. On this view, state actors wielding public authority should present themselves as religiously neutral to preserve public confidence in the impartiality of government. The clash is therefore not simply legal, but philosophical: between a liberal model that prioritizes individual religious expression within public life and a republican model that prioritizes a religion-free public sphere as a condition of equality.

When Quebec introduced Bill 21 in 2019, it pre-emptively invoked the notwithstanding clause. The law would clearly violate *Charter* protections for freedom of expression, religion, and to be free from discrimination, and the invocation of section 33 is designed to allow the law to continue to operate notwithstanding what a court might say about those rights.

Practical impacts of Bill 21

The law's consequences have been concrete and tangible for many religious minorities. The statute has effectively barred observant religious people from entering or continuing in certain professions. For

example, Muslim women who wear a hijab have reported[65] losing their teaching jobs or choosing not to pursue teaching careers because of the law. Similarly, public servants already in positions covered by the law who wish to continue practising their religion visibly must choose between employment and religious expression, a dilemma that has been described by critics as producing "second-class citizenship."[66]

The legal challenge in Quebec Superior Court

Just one day after the law was enacted in 2019, civil liberties groups including the Canadian Civil Liberties Association and the National Council of Canadian Muslims, alongside individual claimants such as education student Ms. Ichrak Nourel Hak, filed applications seeking to stay the law and ultimately to challenge its validity despite the notwithstanding clause.[67] The case was consolidated with several other challenges brought by other impacted groups. At the Quebec Superior Court, that case was called *Hak v Attorney General of Quebec*.[68]

Hak was always about many different issues. The applicants at the lower court sought damages, an injunction, and a declaration that the law was invalid, in whole or in part. These are the claims made in any ordinary *Charter* challenge. What made *Hak* different was that Quebec had invoked Section 33. As a result, the core constitutional question was not simply whether the secularism law infringed freedom of religion or equality and what remedies would be just and appropriate: it was whether courts retain any meaningful role when a legislature has validly activated the notwithstanding clause.[1]

The applicants argued that even if section 33 shields the law from being struck down under the *Charter*, courts should still be able to issue "declaratory" or "moot" declarations as part of the court's power to issue a remedy under section 24 of the *Charter*. That is, a court could formally declare that a law violates *Charter* rights, even though

[1] There were other sub-issues canvassed as well, but those will be explored in greater detail in the description of the Supreme Court case.

it cannot invalidate or suspend the law because of the use of section 33. Such a declaration would have no immediate legal effect on the statute's operation, but it would preserve judicial analysis, inform public debate, and potentially affect renewal decisions after the five-year sunset.

The government, by contrast, argued that once Section 33 is properly invoked, courts are constitutionally barred from engaging in *Charter* analysis under the overridden rights entirely. To permit declaratory findings of unconstitutionality, even without striking down the law, would be to undermine the very purpose of the override: to block judicial review of those rights for a defined period and leave the matter to voters to decide in the subsequent election.

A second issue concerned pre-emptive use of Section 33. Bill 21 invoked the clause at the moment of enactment, before any court had ruled on its constitutionality. The applicants argued that the structure of the *Charter* contemplates judicial review first and legislative override second, and that Section 33 was meant as a response to judicial invalidation, not as a tool to bypass review entirely. The government maintained that the text of Section 33 imposes no sequencing requirement, that *Ford* made it clear that the requirements are form only, and that nothing in its wording requires a prior court judgment.

Justice Blanchard of the Quebec Superior Court largely sided with the government on both structural questions. He held that Section 33 is subject only to formal requirements and that courts cannot conduct a full *Charter* analysis simply to issue advisory declarations. In effect, the court accepted that once Section 33 is validly invoked, the judiciary's role under those sections is suspended for the life of the declaration.

On pre-emptive use, the court rejected the argument that a legislature must wait for judicial review before invoking the clause, concluding that the constitutional text contains no such limitation.

But Justice Blanchard did find that Bill 21 could not apply to English-language school boards, relying on Section 23 minority lan-

guage education rights in the *Charter*. Because Section 33 does not apply to Section 23, the override could not shield that part of the law. Justice Blanchard also held that Bill 21 could not constitutionally apply to Members of the National Assembly (MNAs). Justice Blanchard found that restricting what elected MNAs can wear while sitting in the legislature interfered with the constitutional principle of parliamentary sovereignty and privilege. In other words, the executive and legislature, through ordinary statute, cannot undermine the constitutional status of the National Assembly itself.

The result in the first case was that, while certain narrow aspects of Bill 21 were struck down on constitutional grounds not shielded by section 33, the central *Charter* claims under Sections 2 (freedom of expression, religion etc.) and 15 (equality) were insulated from judicial remedy.

What makes *Hak* constitutionally significant is not only the controversy surrounding Quebec's secularism law. It is that the case tests the outer boundaries of Section 33 itself: whether courts may speak when they cannot act, and whether legislatures may use the notwithstanding clause) before judges have had the chance to rule.

The Appeal in Hak

The consolidated appeal in the case was called *World Sikh Organization of Canada v Attorney General of Quebec*.[69] The case name changed because the World Sikh Organization of Canada, one of the parties in the consolidated case, was the first of the parties to file for appeal. To avoid confusion, throughout this book we refer to the case as the Bill 21 case.

On appeal, the Quebec Court of Appeal largely affirmed Justice Blanchard's understanding of Section 33. The Court of Appeal agreed that Quebec's invocation of Section 33 was valid in form. The statute contained an express declaration referring to Sections 2 and 7–15 of the Canadian *Charter* (and parallel provisions of the Quebec *Charter*), and it complied with the five-year sunset requirement. Following

the logic of *Ford*, the court held that Section 33 imposes formal, not substantive, constraints. Once properly invoked, courts cannot strike down legislation on the basis of the overridden rights.

The Court of Appeal also confirmed the permissibility of pre-emptive invocation. Nothing in the text of Section 33 requires a prior judicial ruling before a legislature may declare that a law operates notwithstanding *Charter* rights. At paragraph 258, the Court of Appeal affirmed the lower court holding that pre-emptive use is not prohibited by the text of Section 33, writing: "It must therefore be concluded that the trial judge correctly applied the teachings of the *Ford* decision in concluding that the derogation provisions provided for in sections 33 and 34 of the *Act* satisfy the formal requirements of section 52 of the *Quebec Charter* and 33 of the *Canadian Charter*."

The most contested issue on appeal was the availability of declaratory relief ("moot declarations"). The appellants argued that even if Bill 21 could not be invalidated, the courts should still determine whether it infringes *Charter* rights and issue formal declarations to that effect. The Court of Appeal rejected that approach, concluding that the use of Section 33 shields the law from judicial review and declaratory relief. The Court wrote at paragraph 340 that: "The words are unequivocal: by the use of s . 33 of the *Canadian Charter*, the legislator removes the law from judicial review – and it is understood that this refers to judicial review of the law's conformity with the provisions from which it is thus derogated." The Court further explained that the existence of 24(1) of the *Charter*, which allows courts to grant remedies, does not mean the court can issue declaratory relief once Section 33 has been properly invoked. The court wrote at paragraph 368:

> *the conclusion is inescapable: the use of section 33 of the Canadian Charter shields the law from judicial review of its conformity with the provisions referred to in the derogation declaration and excludes any potential remedy (even merely declaratory and, a fortiori , pecuniary), as subsection 24(1) cannot serve as a basis for such review or remedy.*

The Court of Appeal also articulated, at paragraph 351, that the response to an unpopular invocation of section 33 is a democratic one: "In the absence of such constitutional review, the correctness of the political and legal choice made by the legislator in resorting to Section 33 of the *Canadian Charter* is therefore left to the citizens, who will make their point of view known through the tools of parliamentary democracy (e.g. elections, pressure on the members of parliament, petitions to the legislator)."

A Competing Theory – The UR Pride Litigation in Saskatchewan

As the Bill 21 case was making its way through the courts, a parallel case addressing many of the same questions about Section 33 emerged in Saskatchewan. In 2023, the government of Premier Scott Moe introduced the "Use of Preferred First Name and Pronouns by Students" policy, which required parental consent before students under 16 could change their names or pronouns at school. The UR Pride Centre for Sexuality and Gender Diversity challenged the policy under the *Charter* and sought an interlocutory injunction to prevent it from taking effect. In September 2023, the Saskatchewan Court of King's Bench granted that injunction.[70]

The Saskatchewan government responded by withdrawing the policy and introducing legislation called the *Parents Bill of Rights*,[71] which imposed the same parental consent requirements but included an express declaration under Section 33. This amounted to a pre-emptive use of the notwithstanding clause, since the court had not yet ruled on the merits of the *Charter* challenge.

UR Pride then brought a renewed challenge to the legislation. Like the applicants in *Hak*, they sought declaratory relief. Their argument was that even if Section 33 prevents a court from striking down the law, the court should still determine whether the legislation violates *Charter* rights and issue a declaration to that effect. Such a declaration would not invalidate the statute, but it would articulate

the rights analysis and inform public debate when the five-year declaration comes up for renewal.

The Saskatchewan government argued that once Section 33 has been invoked, courts should not conduct a *Charter* review under the provisions referenced in the declaration. Relying on *Ford* and the trial decision in *Hak*, it submitted that Section 33 removes the court's role in adjudicating those *Charter* claims for the duration of the declaration.[72]

The Court of King's Bench rejected that position. Justice Megaw concluded that Section 33 does not eliminate the court's jurisdiction to consider whether legislation infringes *Charter* rights or to issue declaratory relief. The court reasoned that *Ford* addressed the formal requirements for invoking Section 33 but did not decide whether courts retain authority to review legislation and make declarations once such a declaration is in place. As Justice Megaw wrote, "the decision in *Ford* does not provide any direction on whether or not such invocation necessarily removes a court's ability to review and provide comment on the legislation at issue." The court ultimately concluded that the use of Section 33 "does not serve to oust the jurisdiction of the court to determine, and provide declaratory relief, as to whether or not the subject legislation is in breach" of the *Charter* provisions referenced in the declaration.

This approach differs sharply from the reasoning adopted by the Quebec Superior Court in *Hak* and the Appeal Court in *World Sikh Organization*. In those cases, the Quebec courts held that Section 33 shields legislation from both invalidation and declaratory relief under the referenced *Charter* provisions. By contrast, the Saskatchewan court concluded that while Section 33 prevents remedies such as striking down the law, it does not prevent courts from determining whether the legislation infringes *Charter* rights and issuing a declaration to that effect.

The Saskatchewan Court of Appeal[73] affirmed that approach. It held that the question of whether courts retain jurisdiction to deter-

mine *Charter* breaches after a Section 33 declaration has been made has not yet been definitively resolved by the Supreme Court of Canada. In its view, concluding that courts lack such jurisdiction would be "at odds with Canada's constitutional architecture." The Court of Appeal therefore held that declaratory relief remains available, although it left the question of whether such relief should ultimately be granted to the lower court.

The result is a clear divergence between the two lines of authority. In the Bill 21 case, the courts held that Section 33 bars both invalidation and declarations under the referenced *Charter* rights. In *UR Pride*, the courts held that while Section 33 prevents courts from setting aside legislation, it does not prevent them from determining whether the law violates *Charter* rights and declaring that breach.

This disagreement goes to the heart of Section 33's effect on judicial power. Does the clause temporarily remove courts from adjudicating the referenced rights entirely? Or does it simply prevent courts from invalidating legislation while leaving them free to articulate the constitutional limits of those rights? A further question follows from this debate: if courts retain jurisdiction to declare *Charter* breaches, might other remedies, including damages, also remain available?

Like the Bill 21 case, the *UR Pride* case is now on its way to the Supreme Court of Canada. Leave to appeal was granted in November 2025.[74] The two cases present competing visions of how Section 33 operates within Canada's constitutional structure, and the conflict between them will require resolution by the Court.

— Chapter 5 —

THE CORE ISSUES AT THE SUPREME COURT – MOOT DECLARATIONS AND PRE-EMPTIVE USE

A Who's Who of Canadian Constitutional Law

The Bill 21 case will be heard by the Supreme Court of Canada the week of March 23, 2026. By the time the Court renders its decision, the case will have yet another name: *English Montreal School Board, et al. v Attorney General of Quebec, et al*.[75] That is the name that will appear in law reports, textbooks, and future constitutional debates.

The case is technically a consolidation of six appeals. The result is an unusually large collection of parties and interveners.

Thirteen appellants challenge Quebec's secularism law and seek various remedies. They include:

- English Montreal School Board, Mubeenah Mughal, and Pietro Mercuri
- World Sikh Organization of Canada and Amrit Kaur
- Ichrak Nourel Hak, National Council of Canadian Muslims (NCCM), and Canadian Civil Liberties Association
- Fédération autonome de l'enseignement

- Andréa Lauzon, Hakima Dadouche, Bouchera Chelbi, and the Legal Committee of the Coalition Inclusion Québec
- Lord Reading Law Society

The respondents include representatives of the Quebec government as well as civil society organizations that support the legislation:

- The Attorney General of Quebec
- Jean-François Roberge, Minister responsible for Laicity and the French Language
- Simon Jolin-Barrette, Minister of Justice
- François Paradis, Speaker of the National Assembly of Quebec
- Mouvement laïque québécois
- Pour les droits des femmes du Québec

In addition, 51 interveners have been granted leave to participate. Interveners are not parties to the case. They are "friends of the court" who assist the Court by presenting legal arguments that the primary parties may not advance.

The interveners span a remarkable range of perspectives: civil liberties organizations, feminist groups, religious associations, minority-language advocates, labour organizations, and constitutional scholars. The first twenty-three pages of the factums filed with the Court consist solely of the list of parties and counsel.

The hearing in Ottawa this March is likely to feel as much like an academic symposium as a traditional Supreme Court appeal. The sheer number and diversity of participants reflect the reality that the case has grown far beyond a dispute over Quebec's secularism law. At stake now is the scope of Section 33 and the broader balance of authority between courts and legislatures in Canada's constitutional order.

Main Arguments of the Parties and Interveners

This chapter examines the principal arguments advanced before the Supreme Court. Earlier chapters described the core disputes over pre-emptive use and declaratory relief. The discussion that follows explores the legal foundations behind those debates.

In particular, the arguments before the Court address five major questions:

- Whether Section 33 may be invoked pre-emptively, before a court has ruled on the constitutionality of legislation;
- Whether courts may still issue declaratory judgments about *Charter* breaches once Section 33 has been invoked;
- Whether other *Charter* provisions—particularly Sections 23, 27, and 28—limit the operation of section 33;
- Whether pre-*Charter* rights, unwritten principles, or jurisdictional doctrines constrain legislation enacted with a Section 33 declaration;
- Whether remedies such as *Charter* damages may still be available despite the use of Section 33.

These issues form the heart of the constitutional debate now before the Court.

The Arguments on Pre-Emptive Use

One of the central disputes before the Supreme Court is whether Section 33 may be invoked pre-emptively, before any court has ruled that legislation violates *Charter* rights. The parties and interveners di-vide sharply on this question.

The Attorney General of Quebec[2] argues that pre-emptive use is fully consistent with both the text of section 33 and the Supreme Court's decision in *Ford v Quebec (Attorney General)*. Quebec's posi-

[2] Quotes from the Quebec AG factum have been translated from French to English.

tion is that *Ford* settled the basic interpretive question: Section 33 imposes formal requirements only. If a legislature expressly declares that legislation operates notwithstanding Sections 2 or 7–15, and complies with the five-year sunset, the constitutional conditions have been met. At paragraph 153 of its factum, Quebec emphasizes that *Ford* confirmed that Section 33 can be exercised "even pre-emptively… against all the rights and freedoms covered by s. 33 of the Canadian *Charter*."[76]

Quebec further argues that this conclusion follows from the text of the clause itself. Nothing in Section 33 requires a prior judicial ruling before the declaration may be used. As the Attorney General puts it at paragraph 178, there is "no requirement that there must first be a judgment concluding that there has been an unjustified infringement." On this view, the timing of the declaration is a political choice left to legislatures, not a legal condition imposed by courts.

Several interveners support this interpretation. The Mouvement Laïque Québécois argues that Section 33 should be understood according to the same formal approach described in *Ford*.[77] Likewise, the Attorneys General of Alberta[78] and Ontario[79] emphasize that the clause was part of the constitutional compromise that accompanied the adoption of the *Charter*. In their view, allowing legislatures to invoke Section 33 before litigation concludes is consistent with that settlement and preserves the role of elected bodies in resolving contested questions of rights.

Other participants in the case invite the Court to take a different approach. The Fédération autonome de l'enseignement (FAE),[3] argues that the Court should reconsider *Ford* in light of how section 33 has been used in recent years. According to FAE, the increasing use of preventive or omnibus declarations risks insulating legislation from meaningful constitutional scrutiny. FAE therefore argues that the Court should recognize substantive limits on the use of Section

[3] Quotes from the FAE factum have been translated from French to English.

33, including a requirement that governments demonstrate a genuine legislative objective before invoking it.[80]

Several interveners echo these concerns. Egale Canada describes pre-emptive use as "constitutionally suspect," arguing that it prevents courts from performing their ordinary role of assessing *Charter* compliance.[81] The Public Interest Litigation Institute goes further, submitting that *Ford* was "unsound in principle" in allowing pre-emptive invocation at all. In its view, Section 33 should only be used after a court has ruled that legislation violates the *Charter*.[82] Similarly, the Samara Centre for Democracy argues that pre-emptive use weakens democratic accountability because it prevents courts from first articulating the rights implications of the legislation.[83]

The dispute over pre-emptive use therefore reflects two fundamentally different conceptions of Section 33. One treats the clause as a mechanism that legislatures may deploy whenever they choose, provided the formal requirements are satisfied. The other treats it as a response to judicial findings of unconstitutionality, and a tool that should be used only after courts have identified a *Charter* violation. Resolving that disagreement will require the Supreme Court to determine whether *Ford* definitively settled the issue, or whether the scope of Section 33 should be reconsidered in light of contemporary constitutional practice.

Arguments on Declaratory Relief

Perhaps the most contested issue before the Supreme Court concerns the availability of declaratory relief once Section 33 has been invoked. The question is whether courts may still determine that legislation violates *Charter* rights and issue a declaration to that effect, even if Bill 21 itself cannot be set aside.

The Attorney General of Quebec argues that such declarations should not be available. In Quebec's view, once Section 33 has been validly invoked, courts should not conduct *Charter* review under the provisions referenced in the declaration. Quebec submits that issuing

declarations in these circumstances would serve no practical legal purpose and would amount to an advisory exercise. As the Attorney General puts it at paragraph 207 of its factum, such declarations would be "without effect and purely theoretical." Quebec further argues that allowing courts to conduct full constitutional analysis despite the use of Section 33 would undermine the function of the clause and consume judicial resources in disputes that cannot produce a meaningful legal remedy. It warns that this approach could require "lengthy and costly constitutional debates" even though any declaration "would have no immediate effect and might never have any effect."

The appellants and several interveners take the opposite position. They argue that courts retain jurisdiction to determine whether legislation violates *Charter* rights and may issue declaratory judgments even where Section 33 has been invoked.

Ichrak Nourel Hak argues that legislation enacted with a Section 33 declaration remains subject to constitutional scrutiny. In her submission, courts must retain the authority to examine whether legislation is consistent with Canada's constitutional structure. At paragraph 59 of her factum she writes that "such scrutiny can never be entirely absent. In our constitutional democracy, the simple majority adoption of a law that invokes the notwithstanding clause cannot displace judicial oversight to ensure, at a bare minimum, that the law is consistent with the structure of our Constitution."[84]

The FAE advances a related argument grounded in democratic accountability. FAE accepts that the political consequences of invoking Section 33 ultimately lie with voters, but argues that meaningful democratic accountability requires access to a judicial analysis of the law's constitutional implications. As the federation puts it at paragraph 151, although the "sanction for the use of the notwithstanding clause lies in the ballot box," voters must be able to act "with full knowledge of the facts." FAE therefore argues that declaratory judgments are necessary to maintain the form of institutional dialogue described in *Charter* scholarship, writing at paragraph 152 that

"a declaratory judgment must be possible in order to ensure dialogue between the legislative and judicial branches."

Similar reasoning appears in the submissions of the Lauzon challengers, who argue that courts retain a duty to articulate the constitutional limits of legislation even where the practical remedies available to them are constrained. At paragraph 92 of their factum they submit that courts, as guardians of the Constitution, must protect its guarantees "to the fullest extent permitted by the notwithstanding clause."[85]

Several interveners also support the availability of declaratory relief. The Trial Lawyers Association of British Columbia argues that Section 33 cannot be interpreted as removing the core jurisdiction of superior courts to adjudicate constitutional questions.[86] The David Asper Centre for Constitutional Rights likewise argues that courts retain a duty to determine whether *Charter* rights have been infringed and to declare those breaches.[87] The Canadian Labour Congress advances a similar position, relying on dialogue theory to argue that judicial articulation of rights remains important even where the legislation itself continues to operate.[88]

Other interveners support Quebec's position. Droits Collectifs Québec argues that judicial review should be limited to verifying that the formal requirements of section 33 have been satisfied. In its view, allowing courts to issue declarations about *Charter* breaches would undermine the constitutional compromise reflected in Section 33 and intrude on the role assigned to legislatures.[89]

The disagreement therefore turns on how Section 33 affects the role of courts in constitutional adjudication. One view holds that once a declaration has been enacted, courts should not conduct *Charter* analysis under the provisions referenced in that declaration. The competing view is that courts may still determine whether legislation violates *Charter* rights and articulate that conclusion in a declaratory judgment, even though the statute itself remains in force. The Supreme Court's resolution of this question will determine whether

judicial articulation of rights continues during the period in which a Section 33 declaration is in effect.

Limiting Section 33 Through Other Charter Provisions

Another line of argument advanced in the case focuses on the relationship between Section 33 and the rest of the *Charter*. Several parties and interveners argue that the clause cannot be interpreted in isolation. Although Section 33 expressly refers to Sections 2 and 7–15 of the *Charter*, they contend that other constitutional provisions—particularly Sections 23, 27, and 28—continue to shape the legal analysis and may constrain legislation enacted with a Section 33 declaration.

Section 23: Language and Culture

The first of these arguments centres on Section 23 of the *Charter*, which protects minority-language education rights. Because section 23 is not among the provisions referenced in section 33, several participants argue that legislation enacted with a section 33 declaration cannot interfere with the institutional autonomy or cultural mission of minority-language school boards.

The English Montreal School Board advances this position most directly. It argues that Bill 21 intrudes into the protected sphere of minority-language education by affecting the ability of English-language school boards to shape the environment and cultural identity of their schools. On this view, Section 23 protects not only access to instruction in a minority language, but also the broader vitality of minority-language communities.[90]

Several interveners make similar arguments. The Association des conseils scolaires des écoles publique de l'Ontario submits that Section 23 must be interpreted to protect both language and the cultural environment necessary for minority-language education to flourish.[91] The Commission nationale des parents francophones advances a comparable position, arguing that Section 23 should be interpreted robustly in order to safeguard the institutional and cultural life of mi-

nority-language communities.[92] Likewise, the Quebec Community Groups Network[93] and the Commissioner of Official Languages of Canada[94] argue that Section 23 protects collective linguistic rights that cannot be undermined by legislation enacted with a Section 33 declaration.

Section 27: Multiculturalism

A related argument relies on Section 27 of the *Charter*, which provides that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Some interveners argue that this provision influences how courts should interpret legislation affecting religious expression and minority communities.

Organizations such as the Chinese Canadian National Council for Social Justice & Chinese and Southeast Asian Legal Clinic[95] and the Ontario Human Rights Commission[96] argue that Section 27 reinforces a constitutional commitment to multiculturalism. In their view, courts interpreting legislation enacted with a Section 33 declaration should still consider whether the law undermines that constitutional value.

Section 28: Gender Equality

Perhaps the most far-reaching of these arguments concerns Section 28 of the *Charter*. Section 28 states that the rights and freedoms set out in the *Charter* "are guaranteed equally to male and female persons, notwithstanding anything in this *Charter*." Several parties and interveners argue that this provision creates a substantive guarantee of gender equality that continues to operate even where legislation is enacted with a Section 33 declaration.

The English Montreal School Board argues that the wording of Section 28 reflects a clear constitutional guarantee of equality between men and women, and that the historical context of its adoption

supports the view that it can invalidate legislation that produces unequal enjoyment of rights.

Several interveners support this interpretation. The National Association of Women and the Law argues that legislation resulting in unequal enjoyment of *Charter* rights by women cannot be sustained through reliance on Section 33.[97] West Coast LEAF likewise submits that Section 28 should be interpreted as a substantive and intersectional equality guarantee that continues to constrain legislation enacted with a Section 33 declaration.[98] The Canadian Human Rights Commission advances a similar position, arguing that international law as well as the text and history of Section 28 support a robust and substantive interpretation.[99] The Clinique pour la justice migrante adds that Section 28 may provide an independent basis for challenging discriminatory legislation, even in the face of an invocation of Section 33.[100]

The Quebec Attorney General and several aligned interveners oppose this interpretation. Quebec argues that Section 28 is not a freestanding equality right, but rather an interpretive provision ensuring that the rights elsewhere in the *Charter* are guaranteed equally to men and women. As the Attorney General puts it at paragraph 217 of its factum, Section 28 "does not confer an autonomous right to gender equality in itself, but rather… guarantees equality between the sexes in the exercise of the other rights and freedoms referred to in the Canadian *Charter*."

Pour les droits des femmes du Québec advances a different argument supporting the legislation itself. In its view, the objectives of Bill 21 are consistent with the promotion of gender equality. The organization argues that certain religious symbols reflect patriarchal norms and that restricting their use by state actors may serve the broader goal of protecting women's equality.[101]

Pre-Charter Rights and Jurisdictional Arguments

Another set of arguments before the Court focuses on rights and constitutional principles that pre-date the *Charter*. The most developed version of this argument is advanced by the World Sikh Organization (WSO). It contends that Bill 21 violates protections for religious minorities that existed long before 1982 and therefore fall outside the reach of Section 33.[102]

According to WSO, the protection of linguistic and religious minorities is a foundational feature of Canada's constitutional order. It argues that this commitment is reflected not only in the text and structure of the *Constitution Act, 1867*,[103] but also in the historical debates surrounding Confederation and in the *Constitution Act, 1982*[104] itself. WSO traces this principle even further back to an 1852 law[105] that guaranteed "the free exercise and enjoyment of religion, profession and worship, without discrimination or preference." In its submission, that statute embodies a constitutional guarantee of religious equality that continues to exist as federal law today. On this view, legislation enacted with a Section 33 declaration cannot affect this protection because it is independent of the *Charter* and predates it.

Related arguments are advanced by the Task Force on Linguistic Policy and Andrew Caddell. They argue that the adoption of the *Charter* did not extinguish earlier constitutional protections. In their view, unwritten constitutional principles and the implied bill of rights remain part of Canada's constitutional framework. Courts therefore retain authority to review legislation that conflicts with those foundational principles, even where Section 33 has been invoked.[106]

Other interveners frame the issue in terms of federalism. The Canadian Conference of Catholic Bishops[107] and the Christian Legal Fellowship[108] argue that Canada's constitutional structure is historically pluralist and accommodating of religion. In their submission, Bill 21 imposes a model of state secularism that intrudes into areas beyond provincial authority. If legislation is outside provincial jurisdiction, they argue, Section 33 cannot cure that defect.

A related jurisdictional argument appears in the submissions of Ms. Hak, who argues that Bill 21 resembles criminal law. Because the statute imposes prohibitions backed by penalties for a public purpose, she contends that it falls within the federal criminal law power rather than provincial jurisdiction.

Although these submissions rely on different doctrines—pre-Confederation statutes, unwritten principles, and federalism—they share a common premise: even where Section 33 applies to *Charter* rights, it cannot alter other parts of Canada's constitutional structure.

The authors of this book note, however, that the constitutional text also matters. Section 33 was enacted against the background of the Constitution Act, 1867 and the broader constitutional order. If the framers had intended to preserve religious liberty as a pre-*Charter* protection immune from Section 33, it is not obvious why freedom of religion was included in Section 2(a) of the *Charter*—one of the provisions expressly referenced in Section 33.

International Law and Jus Cogens

Several interveners also rely on international law. These submissions argue that Canada's constitutional interpretation should take account of international human rights norms and treaty commitments.

For example, the South Asian Legal Clinic of Ontario argues that Section 33 cannot be used in a manner that conflicts with jus cogens norms—peremptory principles of international law such as the prohibition on racial discrimination.[109] Amnistie internationale Canada Francophone similarly argues that Section 33 must be interpreted consistently with Canada's international obligations, including treaties such as the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination Against Women.*[110]

In their view, these international commitments impose limits on how legislation affecting fundamental rights may operate. They argue that discrimination based on race, sex, or religion cannot be insulat-

ed from judicial scrutiny and that individuals must retain access to a competent tribunal and an effective remedy.

These submissions reflect a broader interpretive approach in which constitutional meaning is informed not only by domestic constitutional text but also by international human rights norms and evolving global standards.

Remedies After Invocation

Another major issue concerns the remedies that remain available once legislation has been enacted with a Section 33 declaration. Section 24(1)of the *Charter* provides that anyone whose *Charter* rights have been infringed may apply to a court of competent jurisdiction for "such remedy as the court considers appropriate and just in the circumstances."

The question before the Court is how this remedial provision interacts with Section 33. If courts retain authority to review legislation and determine whether *Charter* rights have been infringed, what remedies—if any—remain available?

Some interveners argue that courts retain the full range of remedies under Section 24(1), including damages. In their view, damages can provide accountability and compensation even where the legislation itself continues to operate. The British Columbia Civil Liberties Association, for example, argues that Section 33 "does not bar rights claimants from accessing relief that can mitigate against *Charter* harms," and that courts may grant *Charter* remedies so long as they do not render the legislation inoperative.[111]

The Criminal Lawyers' Association (Ontario) advances a related position. It argues that courts may not invalidate legislation enacted with a Section 33 declaration but may still grant other forms of relief under Section 24(1).[112]

Other participants disagree. The Manitoba Attorney General argues that while courts may examine the constitutionality of legisla-

tion, the availability of remedies must be limited. In its view, allowing courts to award damages would undermine the role Section 33 plays in the constitutional framework.[113]

The Canadian Constitution Foundation—the authors of this book—advance a similar concern. They argue that if legislatures may be exposed to damages claims every time they enact legislation with a Section 33 declaration, the political compromise reflected in Section 33 would lose much of its practical effect. On this view, Section 33 displaces both invalidation and remedies based on the *Charter* provisions referenced in the declaration.[114]

Substantive Limits and The Federal Government's Radical Proposal

Some of the most far-reaching submissions before the Court propose new substantive limits on the use of Section 33. Accepting these arguments would require revisiting the Supreme Court's interpretation of Section 33 in *Ford v Quebec (Attorney General)*.

The FAE argues that the Court should reconsider the scope of section 33 and recognize substantive conditions governing its use. In particular, FAE suggests that legislatures should be required to demonstrate that the use of Section 33 pursues a genuine and urgent legislative objective. Although the *Charter* does not expressly impose such conditions, FAE argues that its "neutral wording… does not in any way preclude a broad judicial interpretation that allows for such conditions." This, to be sure, is a radical proposal untethered to the text of Section 33.

Other interveners rely on unwritten constitutional principles. Organizations such as the Community Legal Assistance Society[115] and Federation of Ontario Law Associations[116] argue that principles such as democracy, the rule of law, and minority protection limit how Section 33 can operate. On this view, constitutional interpretation must account not only for the text of the *Charter* but also for the deeper principles underlying Canada's constitutional order.

Perhaps the most striking proposal comes from the Attorney General of Canada. Appearing as an intervener, the federal government argues that Section 33 cannot be used in a manner that "irreparably impairs" *Charter* rights. It proposes a framework under which courts would assess whether the use of Section 33 permanently destroys a right, prevents its restoration, or undermines the basic conditions of a free and democratic society. The examples offered include extreme scenarios such as slavery, arbitrary executions, or bans on independent media.[117]

Adopting such an approach would significantly reshape the role of Section 33. Courts would be asked to determine whether a particular use of the clause crosses a threshold of constitutional excess. Although Section 33 would remain part of the *Charter*'s text, its operation would become subject to judicial supervision through standards not expressly found in the provision itself.

Five provincial premiers—from Ontario, Quebec, Alberta, Saskatchewan, and Nova Scotia—have publicly criticized this proposal. They argue that Section 33 was a central component of the constitutional settlement that accompanied patriation. In their view, introducing judicially defined limits of this kind would alter that compromise by allowing courts to determine when legislatures have gone too far in using a mechanism the Constitution itself provides.[118]

— Chapter 6 —

THE IMPLICATIONS OF THE BILL 21 CASE: POSSIBLE SCENARIOS AND JUDICIAL VISIONS

The Supreme Court's decision in the Bill 21 case, *English Montreal School Board*, will not simply determine the fate of Quebec's secularism law. It will determine the future of Section 33. The Court now faces a constitutional fork in the road.

There are, broadly speaking, three possible paths: (1) Full textual deference to the override power as per *Ford*; (2) the imposition of procedural constraints; or (3) the creation of substantive constitutional limits on the use of Section 33.

Which path the Supreme Court chooses will depend less on technical doctrine and more on deeper commitments, about interpretation, institutional role, and ultimately about human nature itself.

Path One: Full Deference to the Override

Under this approach, the Court could reaffirm the orthodox reading of Section 33 articulated in *Ford*: the notwithstanding clause imposes only formal requirements. If a legislature expressly declares that a

law operates notwithstanding sections 2 or 7–15, and the declaration complies with the five-year sunset, courts step back.

This path reflects the parliamentary supremacy tradition inherited from the United Kingdom and embedded in Canada's constitutional culture prior to 1982. It views Section 33 as the price of patriation, a carefully negotiated balance between entrenched rights and democratic control.

It is also aligned with textualism. The Constitution specifies which rights may be overridden and which may not. It imposes a sunset clause. It requires express declaration. It does not mention substantive limits, proportionality review, or irreparable impairment tests. Choosing this path would signal judicial restraint. It would affirm that courts do not revise constitutional compromises because they distrust political actors.

Path Two: Procedural Constraints

The second possibility is more subtle. The Court could introduce procedural limits around its use. For example, the Court might limit or scrutinize pre-emptive use, preserve declaratory jurisdiction even where remedies are barred.

This approach does not directly rewrite Section 33. Instead, it narrows it through judicially crafted limits. This could be described as an energetic "living tree" approach to constitutional interpretation that sees the *Charter* as an evolving instrument and seeks to harmonize Section 33 with broader *Charter* values. Or it could be described as an endorsement of a particular view of dialogic theory that allows the conversation between the courts and the legislature to keep going after invocation of the notwithstanding clause.

Yet these procedural constraints carry consequences. If courts impose sequencing requirements or provide continued declaratory review, they subtly reassert judicial primacy. Section 33 becomes less an allocation of authority and more a contested exception to judicial supremacy.

Path Three: Substantive Constitutional Limits

The third path is the most transformative. Under this approach, the Supreme Court could recognize substantive limits on the use of Section 33. It might accept the federal government's "irreparable impairment" theory, accept FAE's call for substantive limits requiring an urgent and genuine public purpose for invocation, or rely on unwritten constitutional principles to restrain use of the notwithstanding clause.

The Court could also accept arguments that other parts of the constitution - like Sections 23, 27 or 28 – restrain the use of the notwithstanding clause. They could accept various jurisdictional arguments, or pre-*Charter* limits. A recognition of the availability of damages would also place a practical limit on the ability of legislatures to use Section 33.

Whatever rationale, these arguments represent hard limits on the use of Section 33 and would dramatically alter the balance struck in 1982. It would convert Section 33 from a political override into a judicially-supervised one. Adopting this path would represent a decisive shift toward judicial guardianship and away from legislative finality.

The Interpretative Divide

These three paths are not merely doctrinal options. They reflect deeper interpretive commitments and approaches. A divide on the Supreme Court's approach to *Charter* interpretation was recently revealed in the decision *Taylor v Newfoundland*.[119] In that case, the justices fell into three camps. There is one camp committed to a purposive, integrated *Charter* reading, with an orientation towards the "living tree" doctrine and structural purposivism as the deeper doctrine. There is a camp committed to textual discipline with a disciplined purposivism that has a strong resistance to structural interference and overreach. And then there is a camp where purposive interpretation is led by *Charter* values – things like democracy and federalism. These competing approaches canvassed in the *Taylor* decision are likely to guide how the justices of the Supreme Court think about Section 33.

The Deeper Clash: Visions of the world and human nature

Underlying these doctrinal choices is something even deeper: a divide about views of human nature. In his book *A Conflict of Visions*,[120] social theorist and economist Thomas Sowell described a conflict of visions about human nature. He described constrained and unconstrained visions about humanity's future.

The unconstrained vision sees politics as capable of moral progress guided by enlightened institutions. It assumes that human nature is improvable and that wise decision-makers — often judges — can steer society toward justice.

The constrained vision sees human nature as fixed and flawed. It assumes power must be divided and checked, not perfected. Institutions matter more than intentions. Trade-offs are inevitable.

Applied to Section 33, the unconstrained vision distrusts democratic majorities and sees judicial supervision as essential. The constrained vision distrusts concentrated judicial authority and values constitutional compromise. The notwithstanding clause reflects the constrained insight that judges, like legislators, are human and capable of error. It distributes authority rather than perfecting it.

If the Court views its role as steering the *Charter* toward an idealized rights regime, it may gravitate toward substantive limits. If it views its role as respecting constitutional architecture and institutional boundaries, it will likely reaffirm deference.

— Chapter 7 —

CONCLUSION – THE STAKES

The Bill 21 litigation is about far more than Quebec's secularism law. At its core, the case asks the Supreme Court of Canada to clarify the role Section 33 plays in Canada's constitutional order.

This book has explored the origins of the notwithstanding clause, the Supreme Court's early interpretation of it in *Ford*, and the modern revival of its use by provincial governments. It has also outlined the central legal questions now before the Court: whether Section 33 may be invoked pre-emptively, whether courts may still issue declaratory judgments after it is used, whether other constitutional provisions limit its reach, and what remedies (if any) remain available.

The stakes extend far beyond Quebec or Bill 21 itself. The Supreme Court's decision will shape the practical operation of Section 33 for the future. It will help determine whether the clause largely removes courts from adjudicating certain *Charter* questions for a defined period, or whether judicial analysis continues even when legislation enacted with a Section 33 declaration remains in force.

The ruling will also influence how governments view the clause in the future. The federal Parliament has never invoked Section 33. For decades the clause was treated as politically radioactive. In recent years, however, several provinces have used it openly and sometimes pre-emptively. Whether this trend represents a temporary political moment or a lasting shift in Canadian constitutional culture may depend in part on what the Supreme Court says next.

When the Charter was adopted in 1982, Section 33 was the product of a constitutional compromise between judicial review and democratic decision-making. The Bill 21 case will test how that compromise operates in practice. The Court's answer will help define the balance between courts and legislatures in Canada's constitutional system for generations to come.

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