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"Something to Declare": Declaratory Relief as a Bulwark to Populist Uses of section 33 of the *Canadian Charter of Rights and Freedoms*

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ARTICLE

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This article situates this academic divide in its sociopolitical context. It examines justifications for section 33's increased use in Ontario, New Brunswick, Quebec, and Saskatchewan. These uses reflect a populist ideology at odds with Canada's institutional and sociocultural commitment to the *Charter*. Judicial declarations of rights violations are proposed as a viable bulwark against these risks. The Supreme Court can—and should—consider these consequences within the remit of established judicial norms. Through constitutional interpretation and the exercise of judicial role morality, courts can preserve their authority to issue declarations of inconsistency, reaffirming their essential role in defining and protecting rights.

LA DÉCISION DE la Cour suprême du Canada dans l'affaire *Commission scolaire anglophone de Montréal, et al c Procureur général du Québec, et al*, soit le défi constitutionnel à la loi sur la laïcité du Québec, jettera de la lumière sur le recours du Québec à l'article 33 de la *Charte canadienne des droits et libertés* — la clause dérogatoire. Ces dernières années, cette disposition autrefois rarement utilisée a suscité un regain d'intérêt tant dans la doctrine que dans le débat public. Alors qu'un courant de pensée soutient que le recours à l'article 33 rend les lois qu'il protège non justiciables pour violation de la *Charte*, une école de pensée plus récente affirme que les tribunaux peuvent accorder un « redressement déclaratoire » : des déclarations selon lesquelles une loi serait inconstitutionnelle n'eût été l'invocation de la clause.

Cet article situe ce débat doctrinal dans son contexte sociopolitique. Il examine les justifications avancées pour le recours accru à l'article 33 en Ontario, au Nouveau-Brunswick, au Québec et en Saskatchewan. Ces recours reflètent une idéologie populiste en contradiction avec l'engagement institutionnel et socioculturel du Canada envers la *Charte*. Des déclarations judiciaires de violation des droits sont proposées comme rempart viable contre ces risques. La Cour suprême peut — et devrait — tenir compte de ces conséquences dans le cadre des

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Tim Gulliver[*]

> *It is already difficult to come out….I am scared that my friends will be endangered, especially those with unsupportive parents, and that transphobia will be enabled in my school and other Saskatchewan public schools.*
>
> A.B., 14 years old, Saskatoon[1]

> *Dear Ms. Fatemeh,*
>
> *I really miss you. Its* [sic] *not fair that you cant* [*sic*] *teach?! I actually think your hijab is awesome!!! Your* [sic] *the best teacher ever!!!*
>
> Elin Wilson, Grade 3, Chelsea[2]

> *The sense of a text is not behind the text, but in front of it.*
>
> Paul Ricoeur[3]

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* B.Soc.Sc. (Ottawa), B.C.L./J.D. Candidate (McGill), McCall MacBain Scholar. My gratitude to Nandini Ramanujam, Jérémy Boulanger-Bonnelly, Bennett Jensen, Robert Boissonneault, and Trevor Gulliver for their comments and feedback. I am equally grateful to the anonymous peer reviewers and the Editorial Board of the *Ottawa Law Review* for improving my work. All errors are my own.

1 *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan* (*Education*), 2023 SKKB 204 (Affidavit, AB) at para 19.

2 Letter from Elin Wilson to Fatemeh Anvari (9 December 2021) in Kimberly Molina, "Quebec Teacher Removed from Classroom for Wearing Hijab under Law Banning Religious Symbols", online: <cbc.ca/news/canada/ottawa/fatemeh-anvari-removed-from-grade-three-classroom-1.6278381>.

3 Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (Fort Worth: The Texas Christian University Press, 1976) at 87.

I. INTRODUCTION

Some of the most fraught Canadian human rights debates of the past decade—Quebec's Bill 21[4] and Saskatchewan's "*Parents' Bill of Rights*"[5]—have been largely shielded from judicial scrutiny. The culprit? The invocation of a once seldom-used provision in the *Canadian Charter of Rights and Freedoms*—the notwithstanding clause.[6] Scholarly debate has since erupted about what section 33—the product of a last-minute constitutional compromise—means. Though the Supreme Court of Canada offered some guidance in its 1988 *Ford*[7] decision, questions persist about whether courts can examine if a law shielded by the clause violates *Charter* rights, and if so, whether it can issue "declaratory relief"—a statement that the law would be unconstitutional, but for the invocation of section 33.

On one hand, the "Nothing to Declare" camp argues that the notwithstanding clause makes the content of the statutes it shields non-justiciable. The clause is a carve-out from an entrenched bill of rights, giving the legislature the first, final, and only word.[8] On the other hand, a newer school of thought argues in favour of an interpretation that permits courts to perform judicial review and, at their discretion, issue declarations of incompatibility with a *Charter* right, without rendering the law inoperable.[9] In other words, the judiciary always gets to take a shot at defining rights, and though section 33 prohibits striking down the law altogether, courts nonetheless may have "Something to Declare".[10]

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4 This paper refers to the *Act respecting the laicity of the State* through its colloquial name, "Bill 21" (see CQLR c L-0.3 [Bill 21])

5 *The Education* (*Parents' Bill of Rights*) *Amendment Act*, SS 2023, c 46 [*Parents' Bill of Rights*].

6 *Canadian Charter of Rights and Freedoms*, s 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

7 *Ford v Quebec* (*Attorney General*), 1988 CanLII 19 (SCC) [*Ford*].

8 This view finds support in *Organisation mondiale sikhe du Canada c Procureur général du Québec*, where the court held that when section 33 is invoked, "any notion of redress—including declaratory relief—is excluded", and that debates about its operation are primarily "political rather than legal questions" (see 2024 QCCA 254 at paras 234, 315 [*Hak* QCCA]).

9 See for e.g. Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The faulty received wisdom around the notwithstanding clause", *Policy Options* (19 May 2019), online: <policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause>; *Saskatchewan* (*Minister of Education*) *v UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74 [*UR Pride* SKCA].

10 This view finds support in *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, where the court held that "the use of the Notwithstanding Clause does not serve to oust the jurisdiction of the court to determine, and provide declaratory relief" and does not constitute judicial activism (see 2024 SKKB 23 at paras 28–33, 147, aff'd 2024 SKCA 74 [*UR Pride* SKKB, 2024]).

These debates have occurred alongside a rise in populist ideology and rhetoric, abroad but also at home. Populism, like section 33, is the subject of rich and vibrant scholarship. Yet there has been surprisingly little academic discussion about whether the increased use of section 33 can be attributed to populist politics, and what the potential consequences for liberal constitutionalism and human rights might be. These two phenomena—one legal, one sociopolitical—are not distinct, but interrelated. Law, society, and politics intermingle, and each must be examined in light of the other.[11] This paper will reveal that section 33's renewed use, especially in its pre-emptive and omnibus form, is partially attributable to the rise in populism, posing serious challenges for the *Charter* and the human rights it safeguards. This emerging populist reading of our Constitution compels a serious response, of which judicial declarations of inconsistency can and should be a part. In the midst of the Supreme Court of Canada's April 2026 hearing of the Bill 21 appeal, with another potential appeal to follow on the "*Parents' Bill of Rights*" later in 2026, these contrasting visions of Canadian constitutionalism, both pulling from plausible arguments about an open-ended constitutional question, are coming to a head.[12] This paper provides primarily socio-legal arguments to support the claim that "Something to Declare" should prevail. This interpretation—a credible textual interpretation of section 33 most loyal to the posture of rights protection traditionally embraced by the judicial branch—should prevail, especially given the dangerous consequences of the alternative populist conception.

Part II sketches out a brief history of the notwithstanding clause, describing and classifying its contemporary uses, and summarizing debates about its normative merits and technical operation. In Part III, this paper analyzes section 33's contemporary uses and reveals how, and to what extent, the notwithstanding clause can be used to pursue populist constitutional objectives. Part IV examines the ramifications of this development, keeping in mind that populist uses of section 33 carry with them ideological baggage that threatens Canada's institutional and cultural commitment to the *Charter* and to human rights. To respond, I present declaratory relief as a workable bulwark, evaluated through theoretical and practical lenses. I conclude in Part V with a discussion on how this view can be expressed within the remit of established judicial norms, both through

11 See generally *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) [*Secession Reference*].

12 *Hak* QCCA, *supra* note 8, leave to appeal to SCC granted, 41231 (23 January 2025).

constitutional interpretation techniques and, more broadly, in the exercise of judicial role morality on human rights matters.

II. THE NOTWITHSTANDING CLAUSE'S PAST AND PRESENT

A. Historical Genesis

Described as a "uniquely Canadian invention",[13] section 33 of the *Charter* is the result of a "historical compromise" between provincial and federal governments during the constitutional negotiations of the early 1980s.[14] These negotiations led to the *Constitution Act, 1982*,[15] which patriated the Canadian Constitution, laid out an amendment formula, and included an entrenched bill of rights—the *Charter*.[16] Unlike the 1960 *Canadian Bill of Rights*,[17] which was merely a regular statute, the *Charter* empowered courts to exercise powers of judicial review on purported government violations of rights, marking a major shift in favour of human rights protection in Canada.[18]

During these negotiations, several provincial premiers, including Saskatchewan's Allan Blakeney and Alberta's Peter Lougheed, insisted on a *non obstante* clause in exchange for supporting the constitutional package. Blakeney believed such a clause would allow legislatures to "act in

13 Peter W Hogg, *Constitutional Law of Canada*, 4th ed (Scarborough, ON: Carswell, 1997) at 916; Dwight Newman, "Key Foundations for the Notwithstanding Clause in Institutional Capacities, Democratic Participatory Values, and Dimensions of Canadian Identities" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 69 at 71 [Newman, "Key Foundations"].

14 Thomas S Axworthy, "An Historic Canadian Compromise: Forty Years after the Patriation of the Constitution, Should We Cheer a Little?" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 25 [Axworthy, "Canadian Compromise"]; Caitlin Salvino, "A Tool of the 'Last Resort': A Comprehensive Account of the Notwithstanding Clause Political Use from 1982-2021" (2024) 16:1 JPPL 11 at 12 [Salvino, "Last Resort"].

15 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

16 Axworthy, "Canadian Compromise", *supra* note 14; Salvino, "Last Resort", *supra* note 14 at 12.

17 *Canadian Bill of Rights*, SC 1960, c 44.

18 Caitlin Salvino, "Notwithstanding Minority Rights: Rethinking Canada's Notwithstanding Clause" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 401 at 404 [Salvino, "Minority Rights"]; Axworthy, "Canadian Compromise", *supra* note 14 at 44. The one and only time that the *Canadian Bill of Rights* rendered a law inoperable followed the Supreme Court of Canada's decision in *R v Drybones*, 1969 CanLII 1 (SCC) [*Drybones*] (see *ibid* at 298).

furtherance" of other rights omitted from the *Charter*, such as moral, social, or other positive rights.[19] Lougheed argued judicial pronouncements on rights were not the sole permissible interpretation, and that the clause would "permit a certain responsiveness to interpretations of rights".[20]

The federal government's reluctant acquiescence to this compromise was followed by the establishment of a political norm against use of the notwithstanding clause.[21] Then-Justice Minister Jean Chrétien characterized the compromise as a "safety valve" unlikely to be used except to "correct absurd situations" in "non-controversial circumstances".[22] Even supporters of section 33, such as Lougheed, expected that it "would only be used on important matters after serious reflection".[23] Underlying this "political norm of rare use"[24] was an assumption that governments would not override rights lightly, both because it is morally objectionable and as it would engender a political sanction from the electorate. Indeed, with the notable exception of Quebec, section 33 had never been brought into

19 Robert Leckey, "Legislative Choices in Using Section 33 and Judicial Scrutiny" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 111 at 121; Guillaume Rousseau & François Côté, "Bill 21 and Bill 96 in Light of a Distinctive Quebec Theory of the Notwithstanding Clause: A Distinct Approach for a Distinct Society and a Distinct Legal Tradition" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 231 at 240 [Rousseau & Côté, "Bill 21 and Bill 96"]; Mary Eberts, "Notwithstanding v. Notwithstanding: Sections 28 and 33 of the Canadian Charter of Rights and Freedoms" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 338 at 342. Blakeney long insisted that the inclusion of certain rights—mostly negative rights—in the *Charter* was not to signal their greater importance compared to other rights, but rather because "they were not on the list of rights where courts have a useful role to play in their enforcement" (see Allan E Blakeney, "The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1 Const Forum Const 1 at 6).

20 Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Gregoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 209 at 218 [Newman, "NWC & Dialogue"]. See also The Honourable Peter Lougheed, "Why A Notwithstanding Clause?" (1998) 19:1 Points View 1.

21 Michael Behiels, "The Making of a Deal: Trudeau, Patriation, and the Charter", *Policy Options* (1 December 2011), online: <policyoptions.irpp.org/magazines/the-year-in-review/the-making-of-a-deal-trudeau-patriation-and-the-charter>; Salvino, "Last Resort", *supra* note 14 at 12–13.

22 *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13042–43 (Hon Jean Chrétien).

23 Axworthy, "Canadian Compromise", *supra* note 14 at 39.

24 Salvino, "Last Resort", *supra* note 14 at 11–12.

force before 2017.[25] This norm was so strong that some even asked whether it had become a "constitutional convention".[26] In any case, the consensus view was that section 33 had effectively become dormant.[27]

B. Quebec's Historical Uses of Section 33

An important challenge to the notion of a political norm of rare use escapes much of the Anglo-Canadian scholarship on the notwithstanding clause—specifically Quebec's 14 uses, prior to 2017, of section 33.[28] Many such invocations were renewed by the National Assembly of Quebec at the prescribed five-year interval period, in accordance with subsection 33(3). François Côté and Guillaume Rousseau also note that the *non obstante*

25 Saskatchewan and Alberta each enacted an act that contained the notwithstanding clause in 1986 and 2000 respectively. However, these invocations of section 33 are characterized by Salvino as "ineffective", as Saskatchewan's invocation was declared unnecessary by the Supreme Court of Canada in 1987, and Alberta's use of section 33 concerned a bill that the Supreme Court of Canada held in 2004 to be *ultra vires* the province's jurisdiction (see *ibid* at 71–76).

26 Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49:4 Am J Comp L 707 at 726.

27 Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75 ("relatively unimportant because of the development of a political climate of resistance to its use" at 83). See also Jamie Cameron, "The Text and the Ballot Box: Section 3, Section 33, and the Right to Cast an Informed Vote" in Peter L Biro, ed, T*he Notwithstanding Clause and the Canadian Charter*: *Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 381 at 382 [Cameron, "The Text and the Ballot Box"]; François Côté & Guillaume Rousseau, "From *Ford v Québec to the Act Respecting the Laicity of the State*: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause" (2020) 94 SCLR (2d) 463 at 463; Manfredi describes section 33 as "something of a third rail of Canadian constitutional politics" (see Christopher Manfredi, "Courts, Legislatures, and the Politics of Judicial Decision-Making (or Perhaps the Notwithstanding Clause Isn't Such a Bad Thing after All)" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter*: *Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 184 at 194).

28 There is a slight discrepancy in numbers between Salvino and Rousseau & Côté. This disagreement can be explained by different assessments as to whether mere renewals of a prior invocation of section 33 count as a "use", or whether "uses" require introducing a new act, on a new topic, which invokes section 33. I adopt the latter approach here (see Salvino, "Last Resort", *supra* note 14 at 68–82; Guillaume Rousseau & François Côté, "A Distinctive Québec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights" (2017) 47:2 RGD 343 at 424–31 [Rousseau & Côté, "Distinctive Québec Theory"]) .

provision in Quebec's *Charter of Human Rights and Freedoms* has been invoked 32 times.[29]

The most prominent example of Quebec's use of section 33 is the omnibus application of the clause in the *Act respecting the Constitution Act, 1982*. This sweeping use, which brought the province's entire statute book under its protection, was primarily a protest to Quebec's regrettable—and still uncorrected—exclusion from the constitutional compromise of November 1981.[30] There still appears to have been a strong normative commitment to entrenched human rights documents at this time, as the statute book shielded from the federal *Charter* was nonetheless subject to the *Quebec Charter*. Indeed, future uses of the clause were narrow in scope and often went unrenewed.[31] The constitutionality of these statutes has also never been seriously challenged before the courts, suggesting that the clause's use was unnecessary or deployed only out of an abundance of caution. In fact, of the 14 provincial acts invoking the notwithstanding clause prior to 2017, many invocations were left to expire (though the acts continued on the statute books), and only four remain in effect today.[32]

Much of this paper reposes on the premise that a political norm of rare use has impacted, and ought to continue impacting, a government's decision-making when invoking section 33. While *non obstante* clauses have historically been invoked more frequently in Quebec, which dilutes the potency of the norm of rare use to some extent, this does not repudiate it. To preview the argument that follows, more important than the number of times section 33 has been used are the ends for which they are used, and whether those ends disclose any normative rejection of the human rights project. Quebec's pre-2017 uses of section 33 do not.[33]

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29 Côté & Rousseau, *supra* note 27 at 486; CQLR c C-12, s 52 [*Quebec Charter*].

30 Salvino, "Last Resort", *supra* note 14 at 18.

31 *Ibid* at 24–25.

32 *Ibid*.

33 To the contrary, if there really was no political norm of rare use, there would be little reason for Premier François Legault to be at pains to explain the notwithstanding clause is a "legitimate tool" or an "essential instrument", nor would the occasions of the clause's use provoke such academic and mediatic debate (see e.g. Tommy Chouinard, "Clause de dérogation renouvelée pour la loi sur laïcité: La CAQ et le PQ forment le «camp nationaliste», dit Legault", *La Presse* (2 May 2024) online: <lapresse.ca/actualites/politique/2024-05-02/clause-de-derogation-renouvelee-pour-la-loi-sur-laicite/la-caq-et-le-pq-forment-le-camp-nationaliste-dit-legault.php>; Alex Boissonneault & Hugo Lavallée, "Le Québec contre la Constitution", Société Radio-Canada (14 June 2021) online: <ici.radio-canada.ca/nouvelle/1801269/quebec-clause-derogatoire-legault-alex-boissonneault-hugo-lavallee>).

Instead, Quebec's historical uses of the clause are distinguishable from its post-2017 uses, insofar as the latter carry traces of populist justifications, that undermine—intentionally or not—the very notions of liberal human rights and of an entrenched human rights document. Indeed, Bill 21's shielding from the entirety of both the Canadian and Quebec Charters, "suspending…the near entirety of rights and freedoms in the province of Quebec" for the first time, confirms these differences in kind.[34] The novelty of these differences reveals an emerging, more frontal attack on the logic underpinning the norm of rare use.

C. Contemporary Uses

From 2017 to 2024, the notwithstanding clause was tabled eight times by provincial governments and brought into force on five occasions—specifically in Saskatchewan, Ontario, Quebec, and New Brunswick.[35] Additionally, for only the second and third times, a law entered the statute books with a pre-emptive *and* omnibus use of section 33.[36]

1. *Temporality of Use (Pre-Emptive vs. Responsive)*

The notwithstanding clause is used pre-emptively when applied to a law before, rather than in response to, a judicial ruling.[37] The related category of partially pre-emptive use covers instances in which governments enact

34 Bill 21, *supra* note 4, ss 32–33; *Hak c Procureur général du Québec*, 2021 QCCS 1466 at para 768 [*Hak*, QCCS].

35 In Saskatchewan: *The School Choice Protection Act,* SS 2018, c 39; *Parents' Bill of Rights*, *supra* note 5. In Ontario: Bill 31, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001, the Municipal Elections Act, 1996 and the Education Act and to revoke two regulations*, 1st Sess, 42nd Leg, Ontario, 2018 (referred to as the *Efficient Local Government Act*, 2018) [*Efficient Local Government Act*]; Bill 307, *Protecting Elections and Defending Democracy Act*, 1st Sess, 42nd Leg, Ontario, 2021, c 31; *Keeping Students in Class Act*, SO 2022, c 19, as repealed by *Keeping Students in Class Repeal Act*, SO 2022, c 20. In Quebec: *Respecting the Laicity*, *supra* note 4; *An Act respecting French, the official and common language of Québec*, SQ 2022, c 14 [*Act respecting French*]. In New Brunswick: Bill 11, *An Act Respecting Proof of Immunization*, 3rd Sess, 59th Leg, New Brunswick, 2019. For the purposes of this paper, we will describe these eight tablings of section 33 as "attempted uses", as this is what they have in common. Some, but not all, "attempted uses" of the clause were brought into force.

36 *Respecting the Laicity*, *supra* note 4; *Act respecting French*, supra note 35. The first such invocation was the Quebec government's use of section 33 to shield its entire statute book, in *An Act respecting the Constitution Act,* CQLR 1982 c L-4.2. Notably, the two most recent Quebec invocations are the first times that a law has been shielded from the entirety of both the Canadian *Charter* and the Quebec *Charter (*see *Hak*, QCCS, *supra* note 34 at para 768).

37 Axworthy, "Canadian Compromise", *supra* note 14 at 41.

the clause *after* a judicial ruling but *prior* to exhausting all appeal options.[38] Of the eight attempted uses of the clause from 2017 to 2024, four have been pre-emptive, and four have been partially pre-emptive. The four references that are fully pre-emptive are the *Act respecting the laicity of the State* (Quebec: Bill 21), *Act respecting French, the official and common language of Québec* (Quebec: Bill 96), *Keeping Students in Class Act* (Ontario), and *An Act Respecting Proof of Immunization* (New Brunswick). The four references that could be classified as partially pre-emptive include the *Parents' Bill of Rights* (Saskatchewan), the *School Choice Protection Act* (Saskatchewan), the *Efficient Local Government Act* (Ontario), and *An Act to Amend the Election Finances Act* (Ontario).

It should also be noted that there are varying degrees of partially pre-emptive use. For instance, the *Parents' Bill of Rights* invoked section 33 in response to a simple injunction order instead of awaiting the first-instance judge's final decision. This brings it closer to full pre-emptive use, as no court had issued a final decision about the statute's compatibility with *Charter* rights. On the other side of the spectrum is the *Efficient Local Government Act* or the *School Choice Protection Act*, which progressed through the legislative process all while the first-instance court's decision was appealed. In both instances, the bills were dropped once the first-instance decision was set aside.

Pre-emptive uses of section 33, especially fully pre-emptive uses that precede any judicial determination of rights, have attracted scrutiny, including from the clause's supporters. For example, Christopher Manfredi, like many political scientists, argues that the notwithstanding clause is "consistent with liberal constitutionalism" but suffers from the deficiency of being used pre-emptively.[39] Yet the most persuasive criticisms have come from participants in the constitutional compromise, for whom pre-emptive use was inconceivable, representing a "real abuse of the original intent of the 'framers'".[40] Jean Chrétien, Roy McMurtry, and Roy Romanow have stated that section 33 was not intended to let governments "circumvent proper process"[41] at their convenience, while Premiers Lougheed and

38 Manfredi, *supra* note 27 at 195. Note that Premier Lougheed's proposed amendments to section 33, referred to again later, include language prohibiting its use until "all rights of appeal are exhausted and a final judicial determination is rendered" (see Lougheed, *supra* note 20 at 18).

39 Manfredi, *supra* note 27 at 192.

40 Axworthy, "Canadian Compromise", *supra* note 14 at 41.

41 Paola Loriggio, "Chrétien, Romanow, McMurtry Condemn Ford's Use of Notwithstanding Clause", *The Canadian Press* (14 September 2018), online: <ctvnews.ca/politics/article/

Blakeney maintain section 33 was only meant to contest judicial review, not supplant it.[42] Nonetheless, the Supreme Court is understood as having ruled in *Ford* that pre-emptive use is permissible.[43]

2. *Scope of Use (Omnibus vs. Limited)*

Additionally, the notwithstanding clause permits a law to "operate notwithstanding" sections 2 and 7–15 of the *Charter*.[44] Legislatures invoking section 33 must therefore decide which *Charter* provisions the act will be shielded from.[45] Of the 18 bills that contained a reference to the notwithstanding clause prior to 2017, only three were "omnibus" uses, shielding the act from all of sections 2 and 7–15.[46] However, from 2017 to 2024, five of eight attempted uses have been omnibus.[47]

Omnibus uses are also heavily criticized. Notably, Justice Blanchard of the Superior Court of Quebec decried their use in the first-instance judgment on the Bill 21 case, claiming they banalize human rights and show "indifference" towards the override's scope.[48] The accusation is that using section 33 in an omnibus fashion evinces no principled reflection about which *Charter* rights might be breached, and when used with increasing frequency, may amount to a constructive rejection of the entrenched human rights instrument itself. Indeed, few acts would *actually require* protection from all of sections 2 and 7–15 to be operable. Though some of the provisions within the scope of section 33 are frequently litigated, such as sections 2, 7 or 15, it would be quite a peculiar statute indeed that required protection from, for instance, all of section 2(a) (freedom of conscience

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chretien-romanow-mcmurtry-condemn-fords-use-of-notwithstanding-clause>. Former Prime Minister Jean Chrétien was the federal Minister of Justice at the time of constitutional negotiations in 1981. Roy Romanow of Saskatchewan was then the Attorney General, later becoming Premier, while Roy McMurtry served as Attorney General of Ontario.

42 Lougheed, *supra* note 20 at 18; Maxime St-Hilaire, Xavier Foccroulle Ménard & Antoine Dutrisac, "Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-)Rejoinder" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 132 at 156; Axworthy, "Canadian Compromise", *supra* note 14 at 41.

43 *Ford*, supra note 7 at 741; Leckey, *supra* note 19 at 115.

44 *Charter*, *supra* note 6, s 33(1).

45 Leckey, *supra* note 19 at 111.

46 See e.g. Salvino, "Last Resort", *supra* note 14 at 25, 43.

47 These are the *Efficient Local Government Act*; *An Act to Amend the Election Finances Act*; *Act respecting the laicity of the State*; *Act respecting French, the official and common language of Québec*; and Bill 11, *An Act Respecting Proof of Immunization*.

48 *Hak*, QCCS, *supra* note 34 at paras 754, 768.

and religion), section 13 (self-incrimination), and section 14 (right to an interpreter in certain proceedings) to be operable. Omnibus uses thus intend to communicate something stronger than a mere protection of the statute in question. While this paper argues for declaratory relief in response to pre-emptive use, omnibus overrides are equally troubling, as the increased use of both reflects populist influences on our Constitution.

D. Contemporary Debates

This unprecedented shift towards pre-emptive or omnibus use of section 33 has led to renewed scholarly attention.[49] In particular, many have argued that though laws shielded by pre-emptive use cannot be made inoperable, the judiciary ought to nonetheless exercise "weak-form" judicial review. Proponents of expansive use disagree. This is the debate at this paper's core.

1. *Something to Declare?*

Writing in 2019, Grégoire Webber, Eric Mendelsohn, and Robert Leckey (now a judge of the Superior Court of Quebec) argue that pre-emptive use does not prevent a court from determining "whether an impugned law would otherwise survive Charter scrutiny" and issuing a declaration to that effect.[50] Webber offers a textual justification for this interpretation, while Leckey notably argues that a holistic reading of section 33 reveals that the legitimacy of its use "derives from democratic support".[51] Thus the courts, through judicial review, can inform the public about whether a law violates *Charter* rights, allowing all to contemplate the legislature's "trade-offs".[52] Further, as the clause's use must be renewed every five years, the public will find itself better-informed when passing democratic judgment on the clause's use at the next election.[53]

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49 *Ibid* at para 768.

50 Kristopher EG Kinsinger, "The Evolving Debate over Section 33 of the Charter" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 49 at 55; Webber, Mendelsohn & Leckey, *supra* note 9.

51 See generally Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510; Leckey, *supra* note 19 at 114.

52 Webber, Mendelsohn & Leckey, *supra* note 9; Leckey, *supra* note 19 at 113–14.

53 Webber, Mendelsohn & Leckey, *supra* note 9.

This interpretation reflects a modern liberal constitutionalist view. It accepts the need for "entrenched legal limitations on government",[54] expressed through negative liberty rights, and seeks to strike the right balance between "liberty, equality,...democracy and distributive justice".[55] It is also Rawlsian—if elected representatives wish to override "basic rights and liberties" embodied in the political constitution, they must justify their decision before the judiciary, who are empowered in turn to offer their interpretation for a "reasonable and rational" citizenry to consider.[56] Lastly, as will be discussed in Part V, a Dworkinian perspective also militates in favour of this conception, as it correctly locates judges in their role as moral agents who, through interpretive reasoning, issue persuasive determinations about a law's compatibility with principles of justice, fairness, and equality.[57]

Another way to understand the "Something to Declare" view is by characterizing the strength of the judicial review powers it imagines in the context of the *Charter*. This conception would ensure that, in all instances where there is a breach of a *Charter* right, a court's powers of judicial review cannot fall below the floor of "weak-form review".[58] While "strong-form" judicial review permits the judiciary to "issue declarations of invalidity" depriving acts of legal effect, weak-form systems only give courts the "power to make 'declarations of incompatibility'", without rendering an act inoperable.[59] Whether the inconsistent statute is amended or repealed by the political branches of government to eliminate the identified inconsistency depends on other factors, discussed in Parts IV and V.

54 Jonathan Montpetit, "The Rise and Fall of Liberal Constitutionalism in Quebec" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 271 at 273.

55 Harald Borgebund, *Liberal Constitutionalism: Re-thinking the Relationship between Justice and Democracy* (PhD Dissertation, University of York, 2010) [unpublished] at 13–14.

56 John Rawls, *Justice as Fairness: A Restatement* (Cambridge, US: Belknap Press, 2001) at 41–42.

57 Ronald Dworkin, *Law's Empire* (Cambridge, US: Belknap Press, 1986) at 87–88.

58 Rosalind Dixon & Adrienne Stone, "Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection" in David Dyzenhaus & Malcolm Thorburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 95 at 100–101.

59 *Ibid* at 101.

2. *"Nothing to Declare"*

While acknowledging serious arguments on the other side, Maxime St-Hilaire and Xavier Foccroulle-Ménard reply that shielding a law with section 33 removes acts from judicial debate by not even permitting weak-form review.[60] This view is grounded in, among other arguments, a purposive reading of the *Charter*, a common law reticence towards declaratory relief, and a view that *Ford* bars courts from doing anything beyond reviewing whether section 33 was invoked in its proper form.[61] Simply put, the notwithstanding clause creates unreviewable "exceptions" from rights.[62]

Yet, perhaps the most compelling argument for this view is its connection to the principle of parliamentary sovereignty, best expressed by A.V. Dicey: "[The legislature has] the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[63]

Proponents of the parliamentary sovereignty argument submit that prior to patriation, Canada largely had a regime of parliamentary sovereignty, similar to the British Constitution.[64] The introduction of an entrenched, judicially-enforceable bill of rights eliminated this regime on the condition that parliamentary sovereignty's "essential and core element"—the legislative ability to ultimately decide what becomes law—is preserved in section 33.[65] Parliamentary sovereignty is thus at section 33's metaphysical core, necessarily foreclosing the ability of judges to comment on laws it shields.[66]

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60 St-Hilaire, Ménard & Dutrisac, *supra* note 42 at 143; Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 Const Forum Const 38.

61 St-Hilaire, Ménard & Dutrisac, *supra* note 42 at 135–40.

62 St-Hilaire & Ménard, *supra* note 60 at 43.

63 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan, 1959) at 39–40.

64 Though Canada never exclusively had such a regime, as all laws had to be compatible with the *Constitution Act, 1867* and other British statutes.

65 Gardbaum, *supra* note 26 at 724; Newman, "Key Foundations", *supra* note 13 at 76; Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" (2004) 23 SCLR (2d) 135 at 137. This historical recounting is not without its detractors (see e.g. Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 Const Forum Const 9 at 13).

66 The "Something to Declare" camp, by contrast, emphasizes some form of democratic dialogue (between the judiciary and the legislature, and between both branches and the people) as part of the clause's *raison d'être*.

As discussed above, section 33 has been used more frequently (although by no means regularly) in Quebec. Rousseau and Côté explain this fact by infusing the parliamentary sovereignty justification with national-identitarian arguments.[67] They argue pre-emptive use is especially legitimate when promoting Quebec's linguistic and cultural difference.[68] They further contend that Parliamentary sovereignty gives full effect to the National Assembly's guardianship of this difference from external interference.[69] This theory, pejoratively characterized by Dia Dabby as "identitarian sovereignty",[70] rejects that an "Anglo-Canadian majority embodied by the Supreme Court"[71] could issue declaratory relief, as it would interfere with Quebec's attempt to "reconcile the expression of its national dimension and its special identity".[72]

Though there is a smaller school of thought that insists there are "internal limits" on whether section 33 can be used, these views are generally considered contrary to consensus.[73] Until such arguments enter the academic mainstream, those concerned with the increased, expansive (pre-emptive *and* omnibus) use of section 33 are therefore left arguing for "Something to

67 Rousseau & Côté, "Bill 21 and Bill 96", *supra* note 19 at 234–40.

68 *Ibid* at 232; Rousseau & Côté, "Distinctive Québec Theory", *supra* note 28; Benoît Pelletier, "La théorie du fédéralisme et son application au contexte multinational canadien" in Marc-André Turcotte & Julie Gagnon, eds, *La laïcité : le choix du Québec* (Québec: Secrétariat à l'accès à l'information et à la réforme des institutions démocratiques, 2021) 373 at 464.

69 Rousseau & Côté, "Bill 21 and Bill 96", *supra* note 19 at 243.

70 Dia Dabby, "Sustainable Laicité or Crises in Legitimacy? On the Renewal of the Notwithstanding Clause" (presentation delivered at the McGill Centre for Human Rights and Legal Pluralism, McGill University, 22 November 2024) [unpublished].

71 Rousseau & Côté, "Bill 21 and Bill 96", *supra* note 19 at 242.

72 Benoît Pelletier, "The Notwithstanding Powers and Provisions: An Asset for Quebec and for Canada" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter* (Montreal: McGill-Queen's University Press, 2024) 205 at 218. See also St-Hilaire & Ménard, *supra* note 56 ("the last thing the rule of law and judicial review of legislation need is judges who allow themselves to make statements about the relationship of legal provisions to constitutional rights from which they are expressly and validly excepted" at 47).

73 Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189 at 192–93. Perhaps the most radical of these arguments is advanced by Bordan, who suggests that section 33 must be read more closely with section 1 of the *Charter* (see Gregory B Bordan, "Are There Constitutional Limits on the Use of the Notwithstanding Clause?" in Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter* (Montreal: McGill-Queen's University Press, 2024) 321 at 322). Bordan's view is that section 1 forbids invoking section 33 to shield acts whose "very purpose or object is incompatible with a liberal, democratic society" (see *ibid*). Other approaches seek to give a broader scope to *Charter* provisions that section 33 cannot shield a statute from, namely section 28 (equality of women and men) and section 3 (democratic rights) (see Eberts, *supra* note 19; Cameron, "The Text and the Ballot Box", *supra* note 27).

Declare" as the most achievable best-case scenario. However, many of these legal debates occur alongside, whilst not directly engaging with, a significant contributor to this phenomenon: the rise of populist ideology. I turn to this next.

III. POPULISM AND CONTEMPORARY INVOCATIONS OF THE NOTWITHSTANDING CLAUSE

Populism is a fickle term, often criticized for its "buzzword" status and contested definitions.[74] Though some progressive scholars and lawyers have drawn an association between section 33 and populism, it does not appear that there has yet been a thorough, comprehensive discussion of the ways in which populist language and principles relate to, and legitimize, uses of the notwithstanding clause in Canada.[75] This part will begin by offering, in Sections A and B, a definition of populism and a description of the methodology used. In Section C, I assess to what extent provincial premiers use populist justifications for the clause's use. In Section D, I reflect on key takeaways, revealing that many, though not all, contemporary (post-2017) uses of section 33 are indeed related to populist ideology.

A. Definition

Populism as a descriptive concept of political ideology gained popularity around 2016, specifically correlated with the rise in support for Donald

74 See e.g. Andy Knott, "What is populism – and why is it so hard to define?", *The Conversation* (22 November 2018), online: <theconversation.com/what-is-populism-and-why-is-it-so-hard-to-define-107457>; David Molloy, "What is populism, and what does the term actually mean?", *BBC News* (6 March 2018), online: <bbc.com/news/world-43301423>; Yasmeen Serhan, "Populism is Meaningless", *The Atlantic* (14 March 2020), online: <theatlantic.com/international/archive/2020/03/what-is-populism/607600/>; Andreas Schedler, "Again, What Is Populism?", *The Review of Democracy* (1 February 2024), online: <revdem.ceu.edu/2024/02/01/again-what-is-populism/>.

75 See e.g. Mailey, *supra* note 65; Kerri A Froc, "Are You Serious? Litigating Section 28 to Defeat the Notwithstanding Clause" (2023) 114 SCLR (2d) 1 at 5; Emily Laxer, "Behind Provinces' Accelerated Use of the Notwithstanding Clause? Opportunism and a Populist Script" (8 December 2023), online (blog): <yorku.ca/research/robarts/observatory-populism/2023/12/08/behind-provinces-accelerated-use-of-the-notwithstanding-clause-opportunism-and-a-populist-script-by-emily-laxer>; Adam Goldenberg, "Notwithstanding the Judiciary" (2024 Cronkite Memorial Lecture delivered at the Faculty of Law, University of Saskatchewan, 16 September 2024) at 10, online: <linkedin.com/posts/adamgoldenberg_notwithstanding-the-judiciary-2024-cronkite-activity-7242872740477558784-jByE>.

Trump's first presidential campaign.[76] Despite long-standing definitional challenges, the "emergent conceptual consensus" aligns with the "ideational" definition first articulated by Cas Mudde in 2004.[77] It holds that populism is a "thin-centered ideology" that considers "society to be ultimately separated into two homogenous and antagonistic groups, 'the pure people' versus 'the corrupt elite'", and views politics as a "Manichean struggle" between them.[78] In this stark, dualistic vision of society, populists triumph when politics is used to fulfil the unified popular will—or the *volonté générale*—of the people.[79]

Of course, not all references to *the people* help identify populism. This would make populist discourse indistinguishable from that of other political ideologies. Instead, what is unique about populist rhetoric is the inference that only "a *part* of the people *is* the people".[80] The struggle between *the people* and elites must also be morally charged, opposing the "morally good or oppressed" people against the "corrupt" or morally-misguided elites.[81] This charge of corruption can be read expansively, including within

76 Cas Mudde & Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017) at 1; Google Trends, "Populism" (last visited 19 October 2025), online: <trends.google.com/trends/explore?date=all&q=populism&hl=en-IE>.

77 Schedler, *supra* note 74 at 1; Kirk A Hawkins & Cristobal Rovira Kaltwasser, "What the (Ideational) Study of Populism Can Teach Us, and What It Can't" (2017) 23:4 Swiss Political Science Rev 526 at 527; Cas Mudde, "The Populist Zeitgeist" (2004) 39:4 Government & Opposition 541.

78 Schedler, *supra* note 74 at 2; Hawkins & Rovira Kaltwasser, *supra* note 75 at 532; Mudde, *supra* note 75 at 543. A thin-centered ideology differs from a "thick" ideology as it has a "restricted ideological core" and is often attached to other ideologies who purport to offer a comprehensive or complete account of life, society, and the world (see Mudde & Rovira Kaltwasser, *supra* note 76 at 19).

79 Mudde & Rovira Kaltwasser incorporate Jean-Jacques Rousseau's conception of *volonté générale* into their definition of populism. Specifically, they argue that as populists conceive of society as a struggle between the "pure people" and the "corrupt elite", populists accept the Rousseauean idea that true political legitimacy stems from the collective will of the people, distinct from the mere sum of disparate private interests, and that the objective of politics is to discern the general will at a given moment and mobilize people and resources to realize it (see Mudde & Rovira Kaltwasser, *supra* note 76 at 16–18). But see Jan-Werner Müller, who argues that populist conceptions of the general will are not as Rousseauean as they seem, because formations of the will are not predicated on citizenship participation but appeals to nativism or identity (see Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Philadelphia Press, 2016) at 25, 29).

80 Müller, *supra* note 79 at 22, 69–70 [emphasis added]. This quote from Donald Trump sums it up: "the only important thing is the unification of the people—because the other people don't mean anything" (see *ibid* at 22).

81 Jane Mansbridge & Stephen Macedo, "Populism and Democratic Theory" (2019) 15 Annual Rev L & Soc Science 59 at 60.

its ambit perceptions of "out-of-touchedness" such as arrogance, economic wealth, or differing cultural values.[82]

Attitudes and rhetoric that align with this definition suggest the underlying influence of populist ideology. These may include references to the homogeneity of the people, support for greater direct rule unencumbered by constitutional or procedural constraints, and antagonism towards minorities or out-groups.[83] Lastly, as populist ideology is "thin-centered", other ideological elements often accompany it, including nationalism of many kinds.[84]

B. Methods

The rest of this Part reviews contemporary uses of section 33 by provincial governments and looks for traces of populist justifications.[85] This will help ascertain whether, and to what extent, populist logic, rhetoric, and ideology are deployed to legitimize the notwithstanding clause's increased use.

I began my review by identifying the eight attempted uses of the notwithstanding clause from 2017 to 2024. The starting point and core of the analysis were statements accompanying an introduction of the clause's use, whether in legislative debates, media releases, or press conferences. Statements by premiers or their offices were considered especially authoritative. Though political justifications for a given bill can evolve as policymakers receive feedback from opposition parties and the public, the initial reasoning provided by governments invoking the notwithstanding clause warrants particular attention given the political norm of rare use. Indeed, governments choosing to enact section 33 can be presumed to do so after some deliberation. So, a government's initial rationale gains importance when attempting to characterize the ideological influences shaping their thinking.

To confirm or refute these initial impressions, I additionally reviewed further references to the clause's use. For legislative debates, I searched for other references to the notwithstanding clause in each bill, including the period set aside in the legislative schedule for questions by opposition members to the government. For additional media releases, press conferences, or other public statements, I used relevant search terms in

82 *Ibid* at 60–62.

83 *Ibid* at 62–67.

84 Mudde & Rovira Kaltwasser, *supra* note 76 at 19.

85 I am indebted to Trevor Gulliver for his assistance with this section.

the Factiva media database. In both instances, I applied a temporal filter spanning from the date of invocation of the clause to the date of adoption of the bill by the provincial legislature. This necessarily excludes general commentary by provincial governments about section 33, untied to a specific invocation.

I then applied a critical discourse analysis to characterize the justifications identified in this universe of sources. Critical discourse analysis is an approach to researching and analyzing discourses that attends to how power is reproduced and naturalized in and through language.[86] Wodak contends that critical discourse analysis can reveal four main strategies of legitimation: authorization, moral evaluation, rationalization, and mythopoesis.[87] Authorization involves reference to personal or impersonal authorities, including customs, traditions, norms, and laws.[88] Rationalization appeals to both the utility of a certain action, the common-sensical nature of this behaviour, or the futility of resistance.[89] Moral evaluation specifies or implies the morality of actions or behaviours.[90] Mythopoesis involves the use of stories to justify or legitimize actions.[91] Here, I identify the words chosen (and occasionally, the symbols used) to justify an invocation of section 33 and look for populist signifiers deployed (by seeking out parallels to the definition of populism above) in advancement of these legitimation strategies. Supplementary literature about a provincial government's policy objectives and ideological influences helped contextualize the justifications offered. In short, the overarching objective of this exercise was to understand the relationships of power advanced, explicitly and implicitly, by the justifications provided for the notwithstanding clause's use, and if such relationships demonstrated hallmarks of populism's influence.

86 Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London, UK: Routledge, 2003); Ruth Wodak & Michael Meyer, eds, *Methods of Critical Discourse Analysis* (London, UK: SAGE Publications, 2001).

87 Ruth Wodak, *The Politics of Fear: What Right-Wing Populist Discourses Can Mean* (Los Angeles: SAGE Publications, 2015) at 6.

88 *Ibid*.

89 *Ibid*.

90 *Ibid*.

91 *Ibid*.

C. Analyzing Contemporary Uses of Section 33

Though this paper's analysis focuses on justification, many of section 33's inherent features also align with the populist signifiers identified above, especially when the notwithstanding clause is used in its most expansive form (pre-emptive *and* omnibus). For example, pre-emptive uses more quickly opt a law out of the *Charter*'s "constitutional constraints and minority rights".[92] Similarly, omnibus uses fully immunize the shielded act from these constraints. These features together suggest that invocations of the notwithstanding clause raise doubts *ipso facto* about "active engagement in the rights project".[93] However, to ascertain whether a use of section 33 can truly be characterized as *populist*, it is necessary to analyze the public justifications given for their use, as well as the context in which they arose.

1. *Ontario*

Premier Ford's government has attempted to use the notwithstanding clause on three occasions.[94] The first was on a 2018 bill halving the size of Toronto City Council.[95] Standing behind a placard labelled "A Government For The People", Ford accused the Council of being "the most dysfunctional political arena in the country", caused by its size and councillors' preference for lengthy, circular debates.[96] Following a Superior Court decision rendering the government's plan inoperable, Ford invoked the clause, stating:

> [W]e're prepared to use section 33 again in the future....If you want to make new laws in Ontario or in Canada, you first must seek a mandate from the people and you have to be elected. *Because it is the people who will decide what is in their best interests for this great province*....I was elected by 2.3 million people, [the judge] was appointed by one man.[97]

92 Mansbridge & Macedo, *supra* note 81 at 64.

93 Leckey, *supra* note 19 at 121.

94 See e.g. *Efficient Local Government Act*, *supra* note 35; *Protecting Elections and Defending Democracy Act*, *supra* note 35; *Keeping Students in Class Act*, *supra* note 35 as repealed by *Keeping Students in Class Repeal Act*, *supra* note 35.

95 *Efficient Local Government Act*, *supra* note 35.

96 David Shum, "Ontario to introduce legislation to cut Toronto city council seats by nearly half", *Global News*, (27 July 2018), online (video): <globalnews.ca/news/4356447/john-tory-toronto-city-council-seats/>.

97 CTV News, "Doug Ford to use notwithstanding clause to force Toronto city council cuts" (10 September 2018), online (video): <youtube.com/watch?v=apzahAUEcsQ> [emphasis added].

Ford used similar language to justify his second tabling of section 33 on a bill limiting third-party spending on election advertising, explaining that he would "work all day, all night to protect the people".[98] In defending his third attempted use, which enacted back-to-work legislation, Ford claimed that while opposition parties "stand up for the heads of the union", he refused "to feather the nest of the head of CUPE".[99]

A common denominator across Ford's statements is his emphasis on popular democratic rhetoric. The clause is not "the nuclear option", but "the people's option".[100] It is a tool to ensure that the (real) people's interests—efficient local government, fair elections, keeping children in school—prevail over the elites'.[101] Indeed, some political scientists characterize Ford's rhetoric as casting "well-connected insiders" and "radical special interests" against the precariously employed and overtaxed "real, hard-working Ontarians", who often work blue-collar jobs or live in suburban or rural areas.[102] This legitimizes pursuing whatever means necessary to cut the number of municipal politicians or limit unions' abilities to run pre-election advertising or strike.[103] Additionally, while not overtly targeting the judiciary in the rhetoric associated with these three bills, Ford nonetheless curiously accuses judges of "[making] new laws".[104] Though Ford's rhetoric lacks the inflammatory or overtly moral claims most typical of populism, his justifications nonetheless reveal a nexus between

98 The Canadian Press, "Ford government pushes through controversial election spending bill with notwithstanding clause", *CBC News* (14 June 2021), online: <cbc.ca/news/canada/toronto/notwithstanding-clause-vote-ontario-1.6064952> [emphasis added].

99 Back-to-work legislation alone is not an unusual phenomenon, nor is it unconstitutional per se. What was unusual—and controversial—was using the notwithstanding clause to achieve this aim (see Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No 23A (1 November 2022) at 1071, online: <ola.org/sites/default/files/node-files/hansard/document/pdf/2022/2022-11/01-NOV-2022_L023A.pdf>).

100 Global News, "Doug Ford explains why he's using notwithstanding clause to slash Toronto city council" (16 September 2018), online (video): <youtube.com/watch?v=msE0FbN4-jM>.

101 Laxer, *supra* note 75.

102 Peter Hillson & Mark Winfield, "Understanding the Political Durability of Doug Ford's Market Populism" (2024) 105:1 Studies in Political Economy 69 at 78, 79; Brian Budd, "The People's Champ: Doug Ford and Neoliberal Right-Wing Populism in the 2018 Ontario Provincial Election" (2020) 8:1 Politics & Governance 171 at 176; Laxer, *supra* note 75.

103 The use of the notwithstanding clause on the *Act to Amend the Election Finances Act* was perceived by many as a gambit to limit union spending prior to election campaigns. See e.g. The Canadian Press, "Union-backed group fights Ontario rules limiting spending on election advertising", *CBC News* (23 January 2018), online: <cbc.ca/news/canada/toronto/union-backed-group-fights-ontario-rules-on-election-advertising-1.4501104>.

104 CTV News, *supra* note 97.

populism and section 33 by using techniques of authorization, rationalization, and moral evaluation.[105]

2. *Quebec*

From 2017 to 2024, Premier Legault's government invoked section 33 on two occasions—an *Act respecting the laicity of the state* (Bill 21), and an *Act respecting French, the official and common language of Québec* (Bill 96). The clause's application to Bill 21 was renewed in 2024.[106] In all cases, section 33 was invoked for linguistic or nationalist ends, aligning with the prevailing view that Legault's populism is typically expressed on identity and cultural issues.[107] To that end, Legault justified the invocation of section 33 in Bill 21 "in the name of collective rights" and "Quebecers' values".[108] He insisted that opposition parties, by contrast, wished to impose "Canadian values on Quebec."[109] Additionally, a senior minister in the Legault government, Simon Jolin-Barrette, framed Bill 21 as a continuation of the intergenerational national struggle of separating religion and state.[110] By inscribing the clause's use in a romanticized version of common history, this explanation blends the authorization and mythopoetic techniques of justification. Also commonplace in Legault's assertions was his view that Quebeckers wanted the government to "deal with this file" and move on to other topics.[111] Bill 21 was characterized as a measured compromise that would do this.

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105 Kirk A Hawkins, "Is Chávez Populist?: Measuring Populist Discourse in Comparative Perspective" (2009) 42:8 Comp Political Studies 1040 at 1045, 1058.

106 Bill 52, *An Act to enable the Parliament of Québec to preserve the principle of parliamentary sovereignty with respect to the Act respecting the laicity of the State*, 1st Sess, 43rd Leg, Quebec, 2024 (assented to 7 May 2024), SQ 2024, c 12.

107 See e.g. Michel C Auger, "Le gouvernment Legault et les limites du populisme", *Radio-Canada* (8 November 2019), online: <ici.radio-canada.ca/nouvelle/1381039/gouvernement-legault-limites-populisme-auger>; Yasmine Abdelfadel, "Y a-t-il une limite au populisme de la CAQ?", *Le Journal de Montréal* (1 June 2022), online: <journaldemontreal.com/2022/06/01/y-a-t-il-une-limite-au-populisme-de-la-caq>; Frédéric Boily, *La Coalition Avenir Québec : Une idéologie à la recherche du pouvoir* (Québec City: Les Presses de l'Université Laval, 2018) at 100–101. See also Philippe Bernier Arcand, *La dérive populiste* (Montreal: Les Éditions Poètes de brousse, 2013) at 55–57, 78.

108 Quebec, National Assembly, *Journal des débats de l'assemblée*, 42-1, vol 45 No 27 (2 April 2019) at 1906 (Hon François Legault) [translation by author].

109 *Ibid*.

110 *Ibid* at 1907 (Simon Jolin-Barrette).

111 *Ibid* at 1905 (Hon François Legault); Quebec, National Assembly, *Journal des débats de l'assemblée*, 42-1, vol 45 No 27 (4 April 2019) at 2051 (Hon François Legault) [translation by author].

Meanwhile, when justifying section 33's application to Bill 96, Legault described the clause as a "legitimate tool" balancing "individual and collective rights", and giving effect to Quebec's distinct national character.[112] He continued: "Not only do we have the right to use the notwithstanding clause, we have the obligation to, *especially given that our mere foundation as a francophone people in the Americas is at risk*."[113]

Though Legault has rejected the label, these justifications for using the notwithstanding clause reflect traits of populist rhetoric.[114] Like Ford, Legault highlights that majoritarian values must prevail irrespective of the impact on minority groups. The clause is thus invoked on behalf of a homogenous and exclusive people (notably, here, along ethno-national lines) and their fundamental values.[115] Political opponents, meanwhile, support Quebeckers' surrender to morally corrupted or foreign value-systems ("Canadian values") imported by anglophone elites and immigrants (especially Muslims).[116] The connection with nationalism is a further indication of populism, as the two phenomena are often paired together.[117]

An important nuance, however, is that Legault also justifies the clause with non-populist language. Unlike Ford, Legault repeatedly claims that both acts balance *collective rights* with individual rights. Additionally, at least in legislative debates, he does not explicitly cast religious or linguistic minorities as an out-group.[118] The notion of preserving social peace through compromise also plays a prominent, though disputable, justificatory role.[119]

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112 CPAC, "Le PM du Québec François Legault présente un projet de loi pour réformer la Loi 101 – 13 mai 2021" (13 May 2021) at 00h03m:48s, online (video): <youtube.com/watch?v=RJvFaqtsBg4> [translation by author].

113 *Ibid* [emphasis added].

114 Ludovic Hirtzmann, "Québec: le populiste Legault dynamite le système politique", *Le Figaro* (2 October 2018), online : <lefigaro.fr/international/2018/10/02/01003-20181002ARTFIG00312-le-populiste-legault-dynamite-le-systeme-politique-quebecois.php>.

115 Mansbridge & Macedo, *supra* note 81 at 62–64.

116 Arcand, *supra* note 107 at 54, 78.

117 Mansbridge & Macedo, *supra* note 81 at 64.

118 For Bill 21, the out-group would be wearers of ostentatious religious symbols, especially Muslim women. The response to Bill 96, on the other hand, was noticeably marked among the anglophone and allophone communities. On the impact of Bill 21 on Muslim women, see especially Vrinda Narain, "How Does it Feel to be a Problem? Inclusion and Exclusion and Quebec's Bill 21" (2024) 32:4 Const Forum Const 21.

119 Indeed, the use of the term "social peace" (*paix sociale*) must be problematized. It is unclear to me whether Legault is characterizing the donning of ostentatious religious symbols as a violence that must be tamed, or that popular debate around the place of these symbols in the public square has become "violent". In any case, this is troubling.

3. *Saskatchewan & New Brunswick*

Lastly, the Saskatchewan government tabled the notwithstanding clause on two occasions from 2017 to 2024: the *School Choice Protection Act* and the *Parents' Bill of Rights*.[120] The New Brunswick government also tabled the clause in a later-withdrawn 2019 bill that would have mandated vaccinations for schoolchildren.[121] Notably, both the *School Choice Protection Act* and the New Brunswick bills do *not* exhibit traces of populist rhetoric. Saskatchewan's bill sought to correct a legally dubious (and later overturned) trial decision that would have eliminated state funding for non-Catholics attending Catholic schools.[122] In that vein, the press release accompanying the bill demonstrated a commitment to pluralism,[123] while legislative debates reveal no morally-charged language or Manichean worldview.[124] Similarly, in New Brunswick, Premier Higgs emphasized that the clause was not a "political football", and that the reference to the clause could be removed at committee stage on a free vote (which it was).[125]

By contrast, the clause's use in Saskatchewan's *Parent's Bill of Rights* evinces populist traits, albeit more subtly. This Bill shields the operation of

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120 *School Choice Protection Act*, *supra* note 35; *Parents' Bill of Rights*, *supra* note 5.

121 *An Act Respecting Proof of Immunization*, *supra* note 35; Jacques Poitras, "New Brunswick uses notwithstanding clause in 2nd bid to pass vaccination bill", *CBC News* (22 November 2019), online: <cbc.ca/news/canada/new-brunswick/cardy-notwithstanding-clause-mandatory-vaccination-bill-1.5369965>.

122 "Sask. government invokes notwithstanding clause over Catholic school ruling", *CBC News* (8 November 2017), online: <cbc.ca/news/canada/saskatchewan/sask-notwithstanding-schools-1.4392895>; "Court ruling bars Sask. gov't from funding non-Catholic students in Catholic schools", *CBC News* (20 April 2017), online: <cbc.ca/news/canada/saskatoon/saskatchewan-catholic-student-funding-1.4078955>; *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109, rev'd 2020 SKCA 34.

123 Government of Saskatchewan, "Government Will Use Notwithstanding Clause to Protect School Choice for Parents and Students" (1 May 2017), online: <saskatchewan.ca/government/news-and-media/2017/may/01/notwithstanding-clause> ("[w]e are protecting the rights of parents and students to choose the schools that work best for their families, regardless of their religious faith").

124 See e.g. Saskatchewan, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 28-2, vol 59 No 12A (15 November 2017) at 2927–28 (Honourable Bronwyn Eyre). Though opposition members criticized the use of the notwithstanding clause—arguing it should only be invoked following an appeal and questioning the timing of its invocation several months after the initial court ruling— the Bill was ultimately adopted unanimously (see Saskatchewan, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 28-2, vol 59 No 63A (23 May 2018) at 4363).

125 New Brunswick, Legislative Assembly, *Journal of Debates* (*Hansard*), 59-3, (11 December 2019) at 12 (Hon Blaine Higgs) online: <legnb.ca/content/house_business/59/3/hansard/10%202019-12-11b.pdf>

the "Use of Preferred First Name and Pronouns by Students Policy" from being struck down by the *Charter*, requiring teachers to obtain parental consent for pronoun and name changes for students under 16. It has been the subject of heavy criticism by 2SLGBTQ+ groups for its negative impact on gender-diverse children.[126] The language used by the Moe government in legislative debates does not, on its face, demonstrate overt signs of populist rhetoric. Instead, government members in the emergency session of the Legislative Assembly mostly argued in favour of a parent's "right" to know about circumstances affecting their child.[127] However, Premier Moe also described the mere granting of an injunction as "judicial overreach" that was "*blocking* implementation" of a policy that had the "strong support of a majority of…Saskatchewan parents".[128] To understand the relationship of power advanced by this statement, I read Moe's accusation in the context of the recent rise of the anti-gender movement ("AGM"), a global socially conservative movement that opposes "gender ideology" and casts "innocent, gender-conservative people" against "corrupt, immoral elites".[129] In that context, Moe's accusation of judicial overreach, which may not on its face be populist, takes on a new meaning. It is also revealing to contrast the measured words chosen in response to a judgment that would have closed many Catholic schools, with those chosen in response to a temporary suspension of a policy affecting a small minority of schoolchildren. The decision to recall the legislature—a measure usually reserved for emergencies—similarly reflects impatience with the constitutional structure and

126 Egale Canada, "Evidence shows that irreparable harm will be inflicted upon vulnerable children and youth due to the Government of Saskatchewan's move to invoke the notwithstanding clause to violate their rights" (12 October 2023), online (press release): <egale.ca/egale-in-action/sask-statement-oct12>.

127 See e.g. the Premier's responses during Question Period: Saskatchewan, Legislative Assembly, *Debates and Proceedings* (*Hansard*), 29-3, Vol 64 No 66A (10 October 2023) at 3975–76 (Hon Scott Moe).

128 Jason Warick, "Sask. premier to use notwithstanding clause to veto judge ruling on school pronoun policy", *CBC News* (28 September 2023), online: <cbc.ca/news/canada/saskatchewan/judge-grants-injunction-school-pronoun-policy-1.6981406>.

129 Agnieszka Graff & Elzbieta Korolczuk, *Anti-Gender Politics in the Populist Moment* (Abingdon, UK: Routledge, 2022) at 7; Haley MacEwen & Lata Narayanaswamy, "The International Anti-Gender Movement" (2023) United Nations Research Institute for Social Development, Working Paper No 2023-06, online (pdf): <cdn.unrisd.org/assets/library/papers/pdf-files/2023/wp-2023-4-anti-gender-movement.pdf> at 8. See also Vrinda Narain & Margot Young, "Notwithstanding Minority Rights: A Canadian Democratic Failure" (2023) 32:3 Const Forum Const 43 at 51.

with "parliamentary complexity, constraints, and paralysis", exercised on behalf of a 'silent majority' of concerned parents.[130]

D. Key Takeaways

In short, many, but not all, contemporary uses of section 33 exhibit populist traits. Of those that do, common rhetorical elements include fulfilling the will of the "true people" in the face of opposition from an elite or morally corrupted group, defined with varying clarity; indifference to or invisibilization of the targeted group; occasional criticisms of the judiciary; and inferences or statements about the other side's moral corruption. In Ontario, the clause is invoked to defend "ordinary people" against elites and special interests; in Quebec, to defend (the "true") Quebeckers against those importing Canadian values; and in Saskatchewan, as part of a global fight against liberal elites allegedly indoctrinating children in "gender ideology".

Not all justifications given for section 33, however, explicitly identify and target the constructed enemy, much less attack them in populism's most extreme form.[131] Reference is also made to alternative conceptions of rights in Quebec and in Saskatchewan, which does resemble Blakeney's justification for section 33's inclusion in the *Charter*.[132] Nonetheless, populism neither excludes the presence of other ideologies in a given polity, nor is it inherently antithetical to the concept of rights. Indeed, many populist movements, especially in countries where the rights-based approach enjoys strong normative support, attempt to repurpose the concept of rights for their own ends.[133] Even if the *Charter*, by virtue of the notwithstanding clause, does not constitute a closed list of nominate rights—such that the Constitution can accommodate the legislature's populist or non-populist interpretations, or inventions, of new "rights"—this possibility does not dispense with the question at hand. That question is whether statutes created in fulfillment of these new "rights" ought to wholly oust the judicial branch's well-established role of interpreting existing entrenched *Charter* rights.

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130 Mansbridge & Macedo, *supra* note 81 at 64.

131 Hawkins, *supra* note 105 at 1062–64.

132 Blakeney, *supra* note 19.

133 For a discussion about how populist leaders appropriate human rights discourse, including by using language of racial blindness, see also Frédéric Mégret, "Human Rights Populism" (2022) 13:2 Humanity 240 at 241, 245, 247–48.

Thus, though populism may not be solely responsible for eroding the "political norm of rare use", it appears to be a significant contributing factor. While the increased invocation of section 33 normalizes its use, this part has demonstrated that populist justifications are often deployed to legitimize them. The next part discusses the consequences that flow from this legal-political interplay. Briefly, the type of majoritarianism that populism espouses encourages section 33's use even further, all while weakening the liberal democratic safeguards that push against it. At stake is whether section 33 will become "a black box into which Charter rights and minorities vanish."[134]

IV. DECLARATORY RELIEF AS A NECESSARY AND FUNCTIONAL BULWARK

Populist uses of section 33 are not discrete acts with contained impact. Political leaders who invoke the clause in this manner do not merely unwind a political norm of rare use—making it more likely section 33 will be used in the future—but admit as legitimate a political ideology that undermines the liberal human rights project at large (A).[135] Part IV will advance arguments grounded in legal and political theory (B) and Canadian socio-legal norms (C) supporting the view that declaratory relief can act as a bulwark against some of these dangers.

A. Populism's Impact on Human Rights & Liberal Democratic Institutions and Culture

Though populist movements can, at times, appropriate the concept of rights for their own ends, populist ideology remains antithetical to the liberal human rights project. Core to the ideational conception of populism is anti-pluralism—"nothing should constrain" the pure people's will, not even minority rights.[136] Yet, pluralism is at the heart of the liberal human rights project, advancing its objectives of universalism (human rights

134 Leckey, *supra* note 19 at 115.

135 Gerald L Neuman, *Human Rights in a Time of Populism* (Cambridge, UK: Cambridge University Press, 2020) at 6–7.

136 Mudde & Rovira Kaltwasser, *supra* note 76 ("[p]opulism holds that nothing should constrain the will of the (pure) people, and fundamentally rejects the notions of pluralism" at 81); Neuman, *supra* note 135 at 2. But see Chantal Mouffe, *For a Left Populism* (London, UK: Verso, 2018) and Mansbridge & Macedo, *supra* note 81 at 63, who argue that left-populisms are still populisms without bearing this trait.

apply to everyone, without distinction) and social harmony (human rights help people live together across difference).[137] Therein lies the particular threat posed by populist uses of section 33, different in kind from uses that express measured disagreement with judicial opinions.[138] While the latter alters a right's scope, the former diminishes the liberal rights project.

Additionally, populism undermines public trust in the judiciary and other liberal democratic institutions. Indeed, its anti-elitism can lead to judicial interpretations of rights being cast as obstructing the will of the "true people".[139] Judges may even be cast as part of the elite class against whom a Manichean struggle must be waged.[140] While liberal democracies strive for "a harmonious equilibrium between majority rule and minority rights", independent (and often elite) institutions tasked with protecting that balance are criticized by populists for inhibiting a majoritarian conception of democratic life.[141] To that end, Richard Mailey aptly argues that populism rashly dismisses the "distinct benefits to allowing a politically independent and publicly unaccountable institution" take the lead on interpreting and enforcing rights.[142]

More broadly, populism can erode liberal democracy's "invisible glue"—a sense of civic comity—which holds its institutions together. Though some supporters of section 33 argue that "the challenges of citizenship" cannot be met by surrendering to "judicial guardianship", this

137 *Tolerance and pluralism as indivisible elements in the promotion and protection of human rights*, UNESC, 52nd Sess, UN Doc E/CN.4/RES/1996/L.26 (1996).

138 For instance, when Saskatchewan first invoked the notwithstanding clause in 1986, the then-Attorney General Sidney Dutchak stated: "[W]e are using section 33 in a *careful, limited, and responsible fashion*. The application of section 33 in the Bill *applies only to the extent necessary* to ensure the effective operation of this Act" (see Saskatchewan, Legislative Assembly, *Routine Proceedings* (*Hansard*), 20-4, (31 January 1986) at 4342 [emphasis added]). See also the discussion above on Bill 89, *An Act to amend The Education Act, 1995*, 2nd Sess, 28th Leg, Saskatchewan, 2017 and *An Act Respecting Proof of Immunization*, *supra* note 35.

139 Mudde & Kaltwasser, *supra* note 76 at 7. See also Goldenberg, *supra* note 75 at 10–11.

140 Goldenberg, *supra* note 75 at 10–11. See also Ryan Berg, "AMLO's Plan C and the North American Bloc, If We Can Keep It", *Center for Strategic and International Studies* (3 September 2024), online: <csis.org/analysis/amlos-plan-c-and-north-american-bloc-if-we-can-keep-it> ("AMLO has been…haranguing the judiciary throughout his presidency as an out-of-touch elite that no longer serves the public—an oligarchic class set against the people and many of his signature proposals. His remedy is to usher in an age of "penal populism": the popular election of judges at all levels between 2025 and 2027").

141 Mudde & Rovira Kaltwasser, *supra* note 76 at 80–82.

142 Mailey, *supra* note 65 at 14. See also Mansbridge & Macedo, *supra* note 81 ("[t]he rejection of elites can degenerate into a rejection of appropriately complex solutions to complex problems" at 73); Goldenberg, *supra* note 75 at 10–11.

view relies on the increasingly unreliable premise that political leaders will observe citizenly virtues of restraint and respect for the democratic process.[143] This view claims that even if politicians *could* use the notwithstanding clause at will, they choose to refrain in the spirit of "tolerance and inclusion, civility and moderation", hesitant to limit citizens' rights and deferring to the judiciary's rights-adjudication function.[144] For all its institutional safeguards, liberal democracy's soft underbelly is that the norms that enable its survival rest on the goodwill of its political leaders and its citizens.[145]

Altogether, these risks demand, from a liberal democratic point of view, a proportionate response. Courts around the world, including the Supreme Court of Canada, have expressed public concern about the threat that shifting global trends have posed to courts and constitutions, without, understandably, naming the populist ideological underpinning of these newfound challenges.[146] Nonetheless, in this context, it is necessary for

143 Newman, "Key Foundations", *supra* note 13 at 86. See also Newman, "NWC & Dialogue", *supra* note 20 ("[o]bviously, the use of the notwithstanding clause is not meant to be routine…it would [otherwise] amount to a rejection of those sections of the Charter as part of Canada's Constitution…it would not be appropriate to have legislators excessively involved in second-guessing judicial decisions on an everyday basis. Doing so would effectively subvert a proper institutional division" at 223–24).

144 Mansbridge & Macedo, *supra* note 81 at 73. See also *Hak*, QCCA *supra* note 8 at para 768.

145 See also Mailey, *supra* note 65 ("[i]s the lesson of the new populist moment, the moment that we're currently living through, that democratic institutions depend in the final instance on whether we collectively value them enough…that its structures and strictures mean nothing at all when they mean too little to too many of *us*?" at 14 [emphasis in original]).

146 On Chief Justice Wagner's concern that Canada's basic, fundamental, and moral values were under threat (from abroad), see Tonda MacCharles, "Canada's top judge says Supreme Court should provide leadership at a time when fundamental values are being undermined in the world", *Toronto Star* (22 June 2018), online: <thestar.com/news/canada/canada-s-top-judge-says-supreme-court-should-provide-leadership-at-a-time-when-fundamental/article_4b5c0f85-f4da-5c17-bb63-f06012bc0b73.html>. On his concern that judicial independence and democratic institutions have become more fragile, in part because of the proliferation of misinformation, see Daniel LeBlanc, "Chief justice warns against political attacks on judicial independence", *CBC News* (5 June 2022), online: <cbc.ca/news/politics/judicial-independence-supreme-court-richard-wagner-1.6473754>; Jim Bronskill, "Chief justice warns about the dangers of misinformation on democracy", *Canada's National Observer* (22 June 2023), online: <nationalobserver.com/2023/06/22/news/chief-justice-dangers-misinformation-democracy>. On social polarization, see Zena Olijnyk, "SCC Chief Justice Richard Wagner tells critics of court rulings to at least read the judgement first", *Canadian Lawyer Magazine* (4 June 2024), online: <canadianlawyermag.com/resources/legal-technology/scc-chief-justice-richard-wagner-tells-critics-of-court-rulings-to-at-least-read-the-judgement-first/386528>.

Canadian courts to opt for a plausible legal theory of section 33 that is assertive, not submissive—a bulwark against the erosion of entrenched rights, not a gateway to a populist appropriation of the *Charter*.

Before proceeding, however, it is worth noting that not all manifestations of populism necessarily bear these traits, nor is populism *exclusively* dangerous. At their best, populist movements channel legitimate grievances about elite institutions and their decisions—"democracy's way of saying, 'Listen harder.'"[147] In liberal democracy's balancing between universalism and difference, populists may argue that certain needs, whatever they may be, have not been sufficiently recognized, compromising their sense of self in relation to society.[148] The point is not that supporters of populism have no valid grievances. Instead, it is that overriding entrenched rights for populist motivations risks permanently damaging that delicate balancing, leading us down a path for which Canadian society is ill-prepared—a cure worse than the disease.

B. Declaratory Relief as a Bulwark: Theoretical Perspectives

Though the scholarship on populism has gradually converged around the ideational definition, academic debates rage on about how to respond to populism from a human rights perspective. On one hand, some argue that persuasion, or resolving the interests underlying populist stances is most prudent.[149] Confrontation would risk "playing into the hands of legislators" who want to delegitimize the rights project, especially if elite members of society lecture down at lay people about what human rights "really mean".[150] On the other hand, others argue that a restrained response would be an inappropriate form of "appeasement", recentring society on oppressive premises while not actually undermining populist support.[151] Human

147 Mansbridge & Macedo, *supra* note 81 at 70. See also Mudde & Rovira Kaltwasser, *supra* note 76 at 79–96. *Cf* Müller, *supra* note 79, who takes a more avowedly anti-populist stance.

148 On the importance of mutual recognition in society and the dangers arising from the absence of it, see Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, ed by Amy Gutmann (Princeton: Princeton University Press, 1994) at 25–73.

149 Müller, *supra* note 79 at 84, 89; Mansbridge & Macedo, *supra* note 81 at 73; Philip Alston, "The Populist Challenge to Human Rights" (2017) 9:1 J Human Rights Practice 1 at 11.

150 Geoffrey Sigalet, "Notwithstanding Judicial Review: Legal and Political Reasons Why Courts Cannot Review Laws Invoking Section 33" in Peter Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 168 at 180.

151 Helen Fenwick, "Enhanced Subsidiary and a Dialogic Approach—Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg

rights institutions, and institutions tasked with interpreting rights, must therefore "defend human rights principles" in a spirit of truth-telling, failing which populist narratives will triumph by default.[152] Come what may, they must be a "boat sailing against the wild current of populist rhetoric".[153]

These two approaches are not mutually exclusive. The appropriate approach depends on context, capacity, and the societal role played by the institutional actor in question. In this instance, on the narrow question of whether the judiciary ought to interpret section 33 as allowing for judicial review and declaratory relief, a more robust approach provides a better—and more familiar—conceptual framework. Indeed, as Dyzenhaus aptly observes in the context of judicial review of administrative action, courts can show appropriate regard for the expertise and jurisdiction of other branches of government without "submission"—without abdicating their unique institutional role.[154] Oftentimes, as here, courts are best-placed to foster public accountability concerning the exercise of public power—a function that must withstand the turbulence of shifting political trends. The theoretical justifications for this conclusion are threefold.

The first argument—and the primary argument of the leaders of the "Something to Declare" camp—is simply that declaratory relief in response to pre-emptive use promotes informed public debate, offering a different conception of rights imbued with special legitimacy for its judicial character.[155] Courts need not *solve* populism or *categorize* acts as populist, but can instead offer a competing account achieved primarily through reasoning rather than purely political considerations.[156] A tactfully written judicial recognition that the legislature has reached a different conclusion, while

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Against the UK?" in Katja S Ziegler, Elizabeth Wicks & Loveday Hodson, eds, *The UK and European Human Rights: A Strained Relationship?* (Oxford: Hart Publishing, 2015) 193 at 213. See also Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 168. Criticism of the European Council's margin of appreciation doctrine goes in this direction (see e.g. Marisa Iglesias Vila, "A Margin of Appreciation Doctrine for the European Convention on Human Rights: In Search of a Balance between Democracy and Rights in the International Sphere" (Paper delivered at the Yale SELA, 7 June 2013) Yale SELA Papers, online: <law.yale.edu/sites/default/files/documents/pdf/sela/SELA13_Iglesias_CV_Eng_20130508.pdf> at 7).

152 Neuman, *supra* note 135 at 269; Fenwick, *supra* note 151; Mégret, *supra* note 133 at 252–53.

153 *Biao v Denmark* [GC], No 38590/10 (24 May 2016) at para 35, Pinto de Albuquerque J, concurring.

154 See generally David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279.

155 Leckey & Mendelsohn, *supra* note 73.

156 Neuman, *supra* note 135 at 250, 256.

nonetheless asserting the court's own interpretation, need not condescend. It merely presents a separate but authoritative opinion which societal actors—political parties, civil society, and the media—can engage with. The legislature has taken the first shot through pre-emptive use; the judiciary takes the second. Though this might make the judiciary "a center of controversy", in fulfilling its constitutional role, it "educates citizens to the use of public reason" as they prepare to take the "final shot".[157] It promotes a familiar culture of justification for interference with legally protected interests.[158]

However, the impact of a decision to issue declaratory relief is, admittedly, not contained to a mere elevation of the quality of popular deliberation. The very decision to issue declaratory relief in a specific case would inevitably be perceived as casting the legislature's use of the clause in a negative light. In fact, this is the very point of declaratory relief—it is a discretionary and "exceptional remedy,"[159] serving a "corrective function" that seeks to compel a party to act based solely on the judiciary's soft power.[160] Its issuance, especially on a matter of controversy, would attract media attention and remind the public that the clause's use is abnormal. But far from being a bad thing, this is essential in combatting the notwithstanding clause's normalization.[161] Though it would be inappropriate—and impossible—for the Supreme Court to read the notwithstanding clause out of the *Charter* entirely, the Court can nonetheless resort to declaratory relief in an earnest attempt to secure the integrity of the existing nominate

157 John Rawls, "The Idea of Public Reason", in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, USA: MIT Press, 1997) 93 at 114.

158 David Dyzenhaus, "Proportionality and Deference in a Culture of Justification" in Grant Hushcroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 234 at 254; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48.

159 *Ewert v Canada*, 2018 SCC 30 at paras 7, 27, 81, 83–84 [*Ewert*]; *Shot Both Sides v Canada*, 2024 SCC 12 at paras 62–69 [*Shot Both Sides*].

160 *Shot Both Sides*, *supra* note 159 at para 74.

161 Hogg & Wright have written about how we may be entering "a new era in which the use of s. 33 is normalized" (see Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed, (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2023, release 1) at § 39:8). Leckey finds that there is "early, if inconclusive, evidence" of this (see Leckey, *supra* note 19 at 112). The content of the declaration matters, insofar as there is a meaningful difference between stating how and why an act shielded by section 33 would violate a claimant's *Charter* rights and making statements that excoriate the legislature or government. The judiciary should not be agnostic about breaches of rights, nor should it overplay its hand. What is being asked of the judiciary here is to do no more or less than what it does when issuing a judgment that might displease the government in the context of ordinary *Charter* litigation (see Leckey, *supra* note 19 at 112).

Charter rights, knowing that it pushes against the notwithstanding clause's repeated and frequent use.

Relatedly, declaratory relief can play a supportive role in resuscitating the public accountability that the drafters intended to be at section 33's core. Legislatures often give themselves the "only shot" because it is a worthwhile use of political capital. That there may be little political cost for populist invocations of section 33 is not an argument against declaratory relief, but an argument for it.[162] When citizens alone cannot guarantee the political accountability that section 33's framers intended, the judiciary can assist simply by issuing a declaration.[163] For example, political accountability for violations of minority rights cannot rest on minorities "voting harder"—indeed, this is the very reason for an entrenched *Charter* in the first place.[164] In the context of pre-emptive use and populist politics, it requires something more—a judicial call-to-order. This call-to-order would compel those not negatively affected by the shielded statute to question both means (the very use of the clause) and ends (the reason why it was used).

Of course, reading section 33 as permitting judicial review and declaratory relief is not a panacea. A pattern of judicial declarations of rights in the face of repeated expansive use could, in turn, be normalized. These declarations would therefore lose their shock factor, achieving neither de-normalization nor political accountability. The hope, however, is that so long as declaratory relief creates a shock factor, it will foster a civic space amidst a populist cloud wherein the populist appropriation of section 33 can be interrogated. That said, whether judicial declarations would actually have this effect turns on more practical considerations: the particularities of Canadian democratic and socio-legal culture.

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162 The public (union-led) response to the *Keeping Students in Class Act*, leading to its subsequent repeal by the Ford government, demonstrates that not all is lost. There are good reasons to believe that political accountability would follow many uses of section 33 even today. This paper is nonetheless concerned about instances where such accountability seems not to have materialized, for instance in Quebec. Whether Saskatchewan's government paid a political price at the last provincial election for its focus on gender-diverse children is debatable; of greater concern however, is the not-too-hypothetical world in which such accountability dissipates in the face of repeated use of section 33 and the normalization of populist rhetoric and ideology.

163 Cameron, "The Text and the Ballot Box", *supra* note 27 at 387. The next part will demonstrate that this is not judicial overreach but part of a court's constitutional role.

164 Salvino, "Minority Rights", *supra* note 18 at 406, 412.

C. Declaratory Relief as a Bulwark: Practical Perspectives

Little is known about how a judicial declaration of incompatibility in response to pre-emptive use of the notwithstanding clause would play out. There is some evidence, however, about what the alternate view—judicial silence in the face of potential populist violations of *Charter* rights—entails. An exploration of both follows.

1. *A Concession: Weak Democratic Landscape, Deferential Political Culture*

This discussion begins with a concession. The world is in a "democratic recession", leading to declines in political rights, civil liberties, and the rule of law.[165] Canada is not entirely immune. Conversations about the notwithstanding clause must consider the Canadian electorate's ability to participate in political discourse.[166] Trust in politicians and mainstream media is declining, and the ability to have nuanced conversations has been complicated by social polarization and the proliferation of misinformation.[167] In this context, is it possible to hold the kind of civic space needed for the dialogical exercise foreseen by the "Something to Declare" camp?

The vitality of our civic space is also hampered by some elements of Canada's sociocultural attitudes. Though civil society groups are critical in asserting human rights, Canadian civil society fulfills more of a service-provision function than an expressive one.[168] Additionally, the Canadian

165 Larry Diamond, "Facing Up to the Democratic Recession" (2015) 26:1 J Democracy 141.

166 Sabreena Delhon, "Detoxing Democracy: Exploring Motivation, Authority and Power" in Peter Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024) 419 at 419.

167 For instance, Statistics Canada data reveals that trust in Federal Parliament has declined from 38 percent in 2013 to 29.6 percent in 2024 (see Statistics Canada, *Public Confidence in Canadian Institutions*: *Table 2 Confidence in Institutions, by Socio-Demographic and Economic Characteristics* (Ottawa: Statistics Canada, 2013), online: <www150.statcan.gc.ca/n1/pub/89-652-x/2015007/t/tbl02-eng.htm>; Statistics Canada, *Confidence in Institutions, by Gender and Province* (Ottawa: Statistics Canada, 2025), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=4510007301> [Statistics Canada, *Confidence in Institutions by Gender*]). Additionally, the Reuters Institute for the Study of Journalism has found that trust towards news in Canada has declined from 55 percent in 2016 to 39 percent in 2024 (see Colette Brin & Sébastien Charlton, "Canada" in Nic Newman et al, eds, *Digital News Report 2024*, (Oxford: Reuters Institute for the Study of Journalism, 2024) 120 at 121 online: <reutersinstitute.politics.ox.ac.uk/digital-news-report/2024/canada>); Delhon, *supra* note 166 at 422.

168 See e.g. Laura Goodwin & Vivek Maru, "What Do We Know about Legal Empowerment? Mapping the Evidence" (2017) 9:1 Hague J Rule L 157. Leigha McCarroll, "Civil Society and Social Capital in Canada" in Regina A List, Helmut K Anheier & Stefan Toepler, eds,

polity has roots in "evolution", not, as in the United States, "revolution".[169] For this reason, Canadian political culture is often theorized as "gradual, incrementalist, and iterative".[170] Though Canadians share a strong commitment to freedom, equality, and community, this commitment does not always manifest through lively, ideologically-charged political participation.[171]

This paradox is reflected in the Canadian approach to human rights. Former Chief Justice Beverley McLachlin has noted that the *Charter* lays out more substantive equality rights than in the United States and expresses greater concern for "the general public welfare".[172] In short, when it comes to protecting rights, the judiciary does more of the heavy lifting. However, section 33's inclusion in the *Charter* means that, "in theory", the Canadian approach is "more…deferential to government".[173] In this populist era when theory is becoming practice, the less militant and more statist Canadian psyche—reflected in Canada's socio-institutional composition—struggles to condemn governmental use of the clause, even if support for the *Charter* is strong and trust in politicians weak.[174] Though this dynamic does cast

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International Encyclopedia of Civil Society (Switzerland: Springer Nature, 2024) 1 ("[t]he extent to which the sector can…facilitate collective action and ultimately build social capital is yet unclear…levels of social capital [are] in decline" at 8, 9). There are also warning signs as to Canadian civil society's vitality (see Dale Eisler, *Reviving Civil Society is Key to Good Government* (Saskatoon, SK: Johnson Shoyama Graduate School of Public Policy, 2024)).

169 The Right Honourable Beverley McLachlin PC, "Protecting Constitutional Rights: A Comparative View of the United States and Canada" (2nd Canadian Distinguished Annual Address, Center for the Study of Canada, delivered at Plattsburg State University, 5 April 2004) (Supreme Court of Canada, 2004) online: <scc-csc.ca/about-apropos/judges-juges/list-liste/beverley-mclachlin/sd-2004-04-05> [McLachlin, "A Comparative View"].

170 Nelson Wiseman, *In Search of Canadian Political Culture* (Vancouver: UBC Press, 2007) at 11.

171 Lea Caragata & Sammy Basu, "Civil Society and the Vibrancy of Canadian Citizens" in Mark Kasoff & Patrick James, eds, *Canadian Studies in the New Millenium*, 2nd ed (Toronto: University of Toronto Press, 2013) 304 at 306–307. See generally James Bickerton, Stephen Brooks & Alain-G Gagnon, *Freedom, Equality, Community: The Political Philosophy of Six Influential Canadians* (Montreal: McGill-Queen's University Press, 2006). David Zussman describes Canadian political culture as "spectator-participant", while also noting that Canadians "strongly support political authority" (see David Zussman, "Political Culture" (25 November 2007), online: <thecanadianencyclopedia.ca/en/article/political-culture>).

172 McLachlin, "A Comparative View", *supra* note 169.

173 *Ibid.*

174 This support for the *Charter* has been constant. In 2002, support for the *Charter* was 86–91 percent across all Canadian regions, with a strong majority also supporting courts having the final say on *Charter* interpretation (see Centre for Research and Information on Canada, *The Charter: Dividing or Uniting Canadians?* (Montreal: Centre for Research and Information on Canada, 2002) at 8, 30). See also Angus Reid Institute, *Canadians Have a More Favourable View of Their Supreme Court than Americans Have of Their Own* (Angus

doubt on the public's ability to fully engage in the nuanced participatory exercise envisioned by the "Something to Declare" conception, it is, as discussed below, a greater argument against "Nothing to Declare".

2. *Levelling the Playing Field for Minorities*

Although Canadian society may be less militant, Canadians nonetheless share a strong normative commitment to protecting minority rights, even amidst populist influences.[175] This should be cause for optimism as to declaratory relief's potential effectiveness. Indeed, polling suggests that Canadians are open to opposing the clause's use if presented with new information—or even a judicial declaration—about its effects on a minority group.[176] For instance, one poll found that support for the *Parents' Bill of Rights* plummeted when people believed it harmed children.[177] Another found that support for Bill 21 in Quebec declined from 60 percent to 40 percent if courts found a violation of the Quebec *Charter*.[178] This indicates declarations of incompatibility could carry weight even amidst preemptive use, perhaps because Canadians' trust in the judiciary is higher than for other public institutions.[179] Put simply, there is evidence to suggest that a judicial determinations of rights breaches—imbued with a sense of authority and legitimacy that politicians and pundits lack—will put into question popular support for rights-violating laws.

Reid Institute, 2015) at 2, 8. The *Charter* is ranked "above the flag, the national anthem and ice hockey" as Canadians' most important national symbol (see Lorne Neudorf, "Building National Identity Through the Constitution: The Canadian Charter Experience" in Alla Olijnyk & Alex Reilly, eds, *The Australian Constitution and National Identity* (Canberra: ANU Press, 2023) 59 at 60).

175 Bickerton, Brooks & Gagnon, *supra* note 171.

176 More Canadians would likely side with the Supreme Court than with the government if the Court found that a law violated the *Charter*—though it should be noted that this poll preceded the increased use of the notwithstanding clause and the rise of populist rhetoric in Canada (see Angus Reid Institute, *supra* note 174 at 12, 28).

177 Bruce Anderson, "Canadians are Divided on School Pronoun Mandates" (10 October 2023), online: <sparkadvocacy.ca/insights/2023/10/canadians-are-divided-on-school-pronoun-mandates>.

178 Vincent Brousseau-Pouliot, "Déroger aux droits fondamentaux n'est pas une valeur québécoise", *La Presse* (3 May 2024), online: <lapresse.ca/dialogue/chroniques/2024-05-03/casser-la-cassette/deroger-aux-droits-fondamentaux-n-est-pas-une-valeur-quebecoise.php>.

179 Statistics Canada, *Confidence in Institutions By Gender*, *supra* note 167; Angus Reid Institute, *supra* note 174 at 1, 13. Beyond its effects on majoritarian sentiment, declaring that a minority group's rights were violated has a positive affective impact, restoring to its members some of the recognition they had been denied. This is vital as people "suffer real damage" when society reflects back "a confining…picture of themselves" (see Taylor, *supra* note 148 at 25). See also Narain, *supra* note 118 at 27–29.

Indeed, the mere process of judicial review litigation can level the playing field for misunderstood minority groups struggling to be heard in the public square. Tsvi Kahana argues that section 33 is used inaccessibly when applied to complex policy issues not easily decipherable to the public.[180] The *Parents' Bill of Rights*, which deals with pronoun and gender identity issues, is one such example, affecting as it does a minority group with which few citizens have had first-hand contact.[181] Judicial review bridges this gap by ensuring that the interpretation of rights is governed by a rigorous, thoughtful process requiring expert evidence, testimony, and judicial reasoning, so that neither an issue's complexity nor a litigant's degree of marginalization is a barrier to society's understanding of a right. In this way, the judiciary can ensure that politicized portrayals of or misunderstandings about minority groups do not dictate Canadians' understanding of rights.

3. *Compatibility with Domestic and British Socio-Legal Norms*

Finally, "Something to Declare" ensures that when section 33 is preemptively used, courts still play a role on rights-adjudication matters, aligning with existing socio-legal norms. Unlike the United Kingdom, Canada has never had true Diceyan parliamentary sovereignty and, since patriation, has developed a reflex of strong-form judicial review on rights litigation.[182] In the Canadian public's understanding of law, it is judges, not politicians, who are seen as guardians of rights.[183] By contrast, British legislators, even

180 Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practices of Section 33 of the *Charter*" (2001) 44:3 Can Pub Admin 255 at 274–76.

181 Indeed, public polling demonstrates that opposition to the *Parents' Bill of Rights* increased among people who knew a trans person in their lives (see Anderson, *supra* note 177). While wary of the "condescension" I argue can and should be avoided, I am uncertain that the majority of the population is aware of the affirming benefits that the use of preferred pronouns can have for trans and gender-diverse children, or why the use of these pronouns in a school setting, unbeknownst to some parents, is beneficial. Debates on gender identity issues are also often shaped by social media ecosystems that polemicize them, which frustratingly inhibit the ability to communicate the merits of one approach over another in a reasoned manner to the majority of the population—who are not regularly tuned into socially conservative or socially liberal identity politics circles.

182 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan and Co, 1959) ("[n]o one can study the provisions of the *British North America Act, 1867*, without seeing that its authors had the American Constitution constantly before their eyes, and that if Canada were an independent country it would be a Confederacy governed under a Constitution very similar to that of the United States" at 166).

183 *Hunter v Southam Inc*, 1984 CanLII 33 (SCC), Dickson J [*Hunter*] ("[t]he judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind" at 155).

after gaining weak-form review powers on alleged violations of the *European Convention on Human Rights*, have continued to take seriously their long-standing constitutional role as supreme legal authority.[184] Even politically unpopular rulings by British courts on rights matters have been followed by remedial action, leading to the emergence of a norm—or even a constitutional convention—of parliamentary response.[185]

While the British model pairs weak-form review with a tradition of strong legislative responsiveness, the "Nothing to Declare" camp describes the Canadian model as a binary choice between strong-form review or no judicial review, subject to the legislature's unfettered discretion, eliding weak-form review altogether. This notion that entrenched rights can be rendered wholly non-justiciable has not survived the turn of the millennium in Canada or the United Kingdom.[186] Weak-form review would functionally align the Canadian rights adjudication process to that of the British tradition—insofar as both the judiciary and the legislature are involved in

184 With that said, the United Kingdom is not immune from global populist trends—indeed, some attribute the 2016 Brexit referendum as a key contributor to the rise of populism. Opposition to the *European Convention on Human Rights* is becoming more popular in some factions of the British Conservative Party (see Annabelle Dickson, "Brexit Wars Part II: Tories Plot British Exit From Europe's Human Rights Treaty", *Politico* (25 August 2023), online: <politico.eu/article/brexit-tories-rishi-sunak-european-convention-on-human-rights>). However, even in the recent political struggle over the Sunak government's Rwanda scheme, which the UK Supreme Court had declared unconstitutional in its first iteration, there was a huge emphasis on the legislature fulfilling its unique constitutional role (see Dominic Casciani & Sean Seddon, "Supreme Court Rules Rwanda Asylum Policy Unlawful", *BBC News* (15 November 2023), online: <bbc.com/news/uk-67423745>).

185 Jeff King, "Parliament's Role Following Declarations of Incompatibility Under the Human Rights Act" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015) 165 at 167, 183–87; Gardbaum, *supra* note 26 at 733–34.

186 And for good reason. Minority groups are "invariably" better off since the *Charter* than before (see Caragata & Basu, *supra* note 171 at 312–13, citing Hon Irwin Cotler, "Marriage in Canada – Evolution or Revolution" (2006) 44:1 Fam Ct Rev 60 at 61–62). For instance, the majority of *Canadian Bill of Rights* jurisprudence had the effect of conferring a veil of rights-compatibility on laws that can reasonably be said to be discriminatory. Examples include the denial of unemployment benefits to pregnant women (see *Bliss v Attorney General of Canada*, 1978 CanLII 25 (SCC)); the deprivation of Indigenous status to Indigenous women (but not men) who "married out" (see *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC)). Similarly, the invidious dissent in *Drybones* would have found that a criminal prohibition of intoxication by Indigenous peoples off-reserve—including in a territory where there are no such reserves—was compatible with the *Canadian Bill of Rights* (see *Drybones*, *supra* note 18 at 285–88, 300–307, Cartwright CJC, dissenting).

discerning rights—offering a balance more acceptable to both Canadian socio-legal norms and commonwealth comparators.[187]

One possible counterargument is that the existing law on declaratory relief does not—and ought not—serve this function, and even if it did, the absence of anything stronger than a declaratory remedy would deter governments from defending their action on appeal. Though much has been written about declaratory relief, there remain many open questions about its use in Canada.[188] Still, courts have a broad jurisdiction to grant declaratory relief,[189] which remains "available without a cause of action and whether or not any consequential relief is available".[190] However, declaratory remedies must "serve some utility to the parties",[191] have "practical utility" by settling a "live controversy",[192] and deal with disputes that are "real and not theoretical".[193]

This part has demonstrated that declaratory relief *would* provide clarity to the parties and have tangible consequences. It primarily does this by determining whether a law enacted under the cover of the notwithstanding clause is inoperable if the clause is not renewed.[194] But declaratory relief goes further—alerting the public and the political branches of government to a violation of rights, assisting the public in fulfilling its "constitutional role",[195] and potentially offering a "partial remedy", a form of "vindication" for unpopular minority groups.[196] Indeed, the majority of the Saskatchewan Court of Appeal in *UR Pride*, led by Chief Justice Leurer, categorically rejected the idea that so-called "hypothetical determinations" will always have "no practical effect".[197] To the extent that the majority's view stretches—or departs—from existing principles governing declaratory remedies, this is justified in the unique context of constitutional rights

187 See also Webber, *supra* note 51 at 528–33.

188 See generally Justice Malcolm Rowe, KC & Diane Shnier, "The Limits of the Declaratory Judgment" (2022) 67:3 McGill LJ 295.

189 *UR Pride* SKCA, *supra* note 9 at paras 125, 129–33, 139.

190 *Ewert*, *supra* note 159 at para 81.

191 Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed (Toronto: Thomson Reuters, 2016) at 46.

192 *Daniels v Canada* (*Indian Affairs and Northern Development*), 2016 SCC 12 at para 11.

193 *Ewert*, *supra* note 159 at para 81.

194 *UR Pride* SKCA, *supra* note 9 at para 138.

195 Leckey & Mendelsohn, *supra* note 73 at 200.

196 Bordan, *supra* note 73 at 317. Leonid Sirota, "Does the Charter's 'Notwithstanding Clause' Exclude Judicial Review of Legislation? Not quite!" (23 May 2019), online (blog): <doubleaspect.blog/2019/05/23/concurring-opinion>.

197 *Supra* note 189 at para 139.

and section 33. Given these consequences, it follows that governments would offer robust defences in court against such declarations. How else to explain why British governments, in their weak-form judicial review system, still vigorously defend themselves against declarations of inconsistency with the *Human Rights Act*? A government that forfeits the argument that it is infringing on the rights of its own citizens is difficult to reconcile with a liberal democratic society, but courts nonetheless retain the power to appoint *amici curiae* in such circumstances, as the Supreme Court of Canada did in the *Secession Reference* following the Quebec government's non-participation.[198]

In short, despite the broader danger implicated by populist invocations of section 33, especially in a climate of weakening democratic culture, declaratory relief can be an effective bulwark to populist threats to human rights in Canada. This is because a court's decision to issue declaratory relief can promote enlightened public discussion, assist in de-normalizing the clause's use, and create an opportunity for political accountability. There are good reasons to believe that Canadians will provide that accountability, because Canadians care about minority rights and will want to ensure the judiciary continues to play its habitual role in adjudicating rights matters.

V. GIVING EFFECT TO POPULIST USES OF SECTION 33 IN LEGAL INTERPRETATION

There has been one attempt to convince the judiciary to consider populism's rise in its interpretation of section 33. Counsel for the *Fédération autonome de l'enseignement* (FAE) argued before the Court of Appeal of Quebec in *Hak* that "Quebec society…is facing changes in the position adopted by the political branch towards the judicial branch", evidenced by the expansive use of section 33 "without nuance or justification".[199] In light of the "rise of populism in Quebec and elsewhere", the FAE argued that the Court of Appeal had a "*moral duty* to be *bold*" given the danger to human rights.[200] In their view, it was this moral duty that should embolden courts to overturn any precedent set in *Ford* and impose substantive limits on section 33. These arguments, which were unaccompanied with any evidence of populism or its effect on the constitutional order generally

198 I am indebted to Robert Boissonneault for these observations.

199 *Supra* note 8 at para 302.

200 *Ibid* at paras 302–303 [emphasis in original].

or the notwithstanding clause specifically, were not warmly received. The panel of the Court of Appeal replied acerbically that these arguments added "little, if anything, to the debate".[201] Adding that there was "no need to go on at length" in rejecting them, the Court ruled that inquiring why a government had invoked the clause, and whether it was part of the "rise in populism, *if any*", fell outside of its proper constitutional role.[202] Citing to the decision of Justice Major in *Imperial Tobacco*, the Court noted that it does not "apply only the law of which it approves", and that only voters should pass judgment on legislative decisions.[203]

Though the FAE's argument may have been laudable, it seems unsurprising that the Court of Appeal responded in this fashion. The case at bar was highly politicized, and a direct appeal to judges to reach a novel interpretation because populism falls outside of what judicial actors recognize as permissible "moves".[204] With respect, it perhaps tried to claim too much (overturning *Ford* altogether) while giving the Court little evidence to substantiate taking judicial notice of populism and its effects.

However, the underlying premise of the FAE's argument has merit. Judicial decision-making can, consciously or subconsciously, be a function of stated (legal) *and* unstated (public policy) norms.[205] Judges do, inevitably, consider extrinsic constraints on their decisions, such as the court's role in relation to other courts, to other branches of government, or to the broader public.[206] Additionally, the cases heard by appellate and apex courts are typically difficult and ambiguous ones, casting various plausible interpretations against each other. Reaching a decision in these contexts often requires some assessment of policy preferences, whether judges deliberately weigh them or not.[207] Such an assessment is more frequent and certainly inevitable in the context of open-textured constitutional questions implicating the separation of powers and the durability of the broader constitutional order. On this reading of judicial decision-making, it is therefore possible to call judges' attention to the rise of populism when deciding whether "Something to Declare" or "Nothing to Declare" ought to prevail. This can be done by highlighting populism's impact on unwritten

201 *Ibid at* para 304.

202 *Ibid* at paras 307–309 [emphasis added].

203 *Ibid* at para 309, citing *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 52.

204 See generally Lawrence Baum, *The Puzzle of Judicial Behaviour* (Ann Arbor: University of Michigan Press, 1997) at ch 3.

205 *Ibid* at 63–64.

206 Manfredi, *supra* note 27 at 185–86.

207 Baum, *supra* note 204 at 66; Manfredi, *supra* note 23 at 185.

constitutional principles and by illustrating that judges' historical moral role has been to defend rights.

For clarity, the argument here is not that populism alone supports a finding that section 33 ought to allow for judicial review. Whether a government or legislature acted in the way it did "because of populism" is irrelevant for the purposes of judicial inquiry, and the Court of Appeal of Quebec was right to state in *Hak* that exploring whether political parties, or the bills they introduce, are part of a "populist trend" surpasses a court's constitutional role.[208] Rather, the argument is that, in addition to the textually and contextually sound interpretations of section 33 offered by Leckey, Mendelsohn, and Webber, among others, populism's impact on unwritten constitutional principles and the broader moral context offer strong supplementary reasons why the Court ought to conclude accordingly.[209] By situating the justifications provided for the increased use of section 33 in their populist context, the immediate and eventual consequences of an interpretation that bars judicial review become ever clearer. The dangers posed by these consequences, which can be examined by courts, ground additional arguments as to why the judiciary *can* (A) *and ought* (B) to embrace "Something to Declare".[210]

A. The Judiciary "can": Unwritten Constitutional Principles

Leaders of the "Something to Declare" camp have already signalled how unwritten constitutional principles (UCPs) support their argument.[211] For example, Leckey and Mendelsohn note that the principles of democracy and the protection of minorities work together to protect the expression of "dissenting voices" and that majority rule alone cannot overwhelm *Charter* rights.[212] These principles remain highly relevant, even if the Supreme Court of Canada somewhat circumscribed the role of these principles in

208 *Hak* QCCA, *supra* note 8 at para 308.

209 Webber, *supra* note 51; Leckey & Mendelsohn, *supra* note 73.

210 I acknowledge here that the QCCA continued on in *Hak* by stating that imposing a political judgment "on the way in which the party in power exercises its legislative functions" is improper (see *supra* note 8 at para 308). As I seek to explain in this section, what is being asked of courts is not a political judgment on the machinations of the political branches of government, but a legal judgment that accurately weighs the consequences of the way in which section 33 is being used and justified against the constitutional framework and the historical role of the judiciary as the guardian of rights.

211 Leckey & Mendelsohn, *supra* note 73 at 203–204.

212 *Secession Reference*, *supra* note 11 at paras 67–68; Leckey & Mendelsohn, *supra* note 73 at 200–201.

Toronto (City) v Ontario (Attorney General).[213] Reports of their death seem greatly exaggerated.

Indeed, the majority in *Toronto (City)* confirmed that UCPs continue to assist in interpreting constitutional provisions.[214] They can also help develop structural doctrines that address questions which the Constitution's text does not resolve.[215] Read together with the *Secession Reference*, UCPs can help delineate the "role of our political institutions" and trace a line between competing "spheres of jurisdiction" while discerning the "scope of rights and obligations".[216] Moreover, these principles, consistent with the living-tree methodology of constitutional development, are necessarily context-responsive. The meaning of the democracy principle cannot be separated from the ways in which democracy is lived and experienced by citizens, nor can the protection of minorities principle be properly understood without considering the historical and contemporary pressures facing minority rights bearers. UCPs are therefore eminently useful here, as they help resolve a hotly contested question implicating the rights of citizens and the proper role of branches of government amidst a shifting societal landscape. Their use for this purpose remains firmly within the confines set in *Toronto (City)*, particularly as there is no claim that UCPs should be read as enabling courts to invalidate legislation.[217]

Populist invocations of section 33 illustrate the "Nothing to Declare" conception's incompatibility with these "underlying constitutional principles".[218] For instance, among the values inherent to the democracy principle are respect for human dignity, social justice and equality, tolerance for differing beliefs, cultural and group identities, and institutions that enhance civic participation.[219] Additionally, the protection of minorities has been described by the Supreme Court as a key function of judicial review.[220] This principle is informed by the context of subjugation and assimilation of minority religious groups in pre-Confederation Canada.[221] The dangers that the use of populist language to justify section 33 poses to these values—and the groups that rely on them—have been discussed

213 2021 SCC 34 [*Toronto (City)*].
214 *Ibid* at para 55.
215 *Ibid*. See also *Secession Reference*, *supra* note 11 at para 52.
216 *Supra* note 11 at para 52.
217 *Supra* note 213 at paras 57–63.
218 *Secession Reference*, *supra* note 11 at para 53.
219 *Ibid* at para 64; *R v Oakes*, 1986 CanLII 46 at para 64 (SCC).
220 *Secession Reference*, *supra* note 11 at para 81.
221 *Ibid* at paras 79–81.

extensively above. Populism's anti-plural, anti-institutional, and illiberal nature undermines the very social fabric in which these values are woven.[222] Foreclosing judicial review constitutes submission to these noxious effects. The proposed solution of simply "voting harder" misconstrues the democratic principle as having only a formal, process-specific content, not a rich, substantive one.[223] "Democracy is not simply concerned with the process of government", but more.[224]

By contrast, "Something to Declare" promotes differences of opinion, protects minority expression, and encourages rather than stifles citizen participation on questions of rights. It shows respect for the democratic process by acknowledging that the legislature may, through enacting section 33, shield the operability of a law from a *Charter* right. It shows respect for substantive democratic values by permitting concerned citizens to assert their point of view and seek declaratory relief, thereby promoting the participatory and deliberative culture implicit in the values underpinning these principles. At bottom, by alerting citizens and their governments to potential breaches of rights, courts help the people fulfill the democracy principle's overarching objective—the exercise of the right to self-government—in an informed and enlightened fashion.[225]

The constitutionalism and the rule of law principle, although not discussed by Leckey and Mendelsohn, is equally relevant. These principles act together to "[create] an orderly framework within which people may make political decisions", while safeguarding "fundamental human rights and individual freedoms" against the "assimilative pressures of the majority."[226] Repeated invocations of section 33 for morally charged, majoritarian purposes hinder the ability of the public, but especially minority groups, to rely on the *Charter*'s protections. Far from orderly, it renders constitutional guarantees unreliable, upending the stable protections intended to be enshrined in the *Charter* and destabilizing the existing constitutional arrangement. It does not promote the liberal version of constitutionalism

222 See e.g. Cas Mudde, "Populism in the Twenty-First Century: An Illiberal Democratic Response to Undemocratic Liberalism" (last accessed 7 December 2025) online: <amc.sas.upenn.edu/cas-mudde-populism-twenty-first-century>; Takis S Pappas, "Populism as Democratic Illiberalism" in Marlene Laruelle, ed, *The Oxford Handbook of Illiberalism*, (New York: Oxford University Press, 2023) 95.

223 *Secession Reference*, *supra* note 11 at para 64. See also Cameron, "The Text and the Ballot Box", *supra* note 27 at 387; Bordan, *supra* note 73 at 328.

224 *Secession Reference*, *supra* note 11 at para 64.

225 *Ibid*. See also Webber, Mendelsohn & Leckey, *supra* note 9.

226 *Secession Reference*, *supra* note 11 at paras 74, 78.

described by the Supreme Court, but a form of popular constitutionalism with little basis in Canada. Indeed, while the notwithstanding clause's presence in our Constitution necessarily implies that, on some laws, there is a "higher authority out there with power to overturn [a court's] decisions",[227] Canadian constitutionalism is not an amorphous product of shifting majoritarian whims legitimized by "brute forms of preference aggregation", but an ordered, internally coherent structure that is sensitive to the balancing of political power with minority and individual rights.[228] The "Something to Declare" camp is more loyal to the latter approach. By readily admitting that legislatures can interpret rights, this interpretation acknowledges that the "rule of law is not the rule of courts" and that all three branches of government contribute to its development.[229] But in rejecting the notion that the political branches of government have an unfettered discretion to immunize its interpretations from judicial scrutiny, it also rejects a reading of our constitution that reduces it to base majoritarianism—one which "Canadians have never accepted".[230]

How might litigators alert courts to the threat posed by these populist justifications, whilst avoiding the use of the term itself? The simplest answer lies in focusing on populism's effects in broad strokes—increased social polarization, declining trust in and attacks on democratic institutions, and diminishing tolerance for minority opinions, to name a few. Indeed, Chief Justice Wagner has already publicly expressed concern about many of these effects on the Canadian constitutional order. For instance, in his first press conference as Chief Justice, Wagner expressed concern that Canada's "basic values, fundamental values and moral values" are under threat from abroad.[231] These dangers must compel Canadian institutions to continue to uphold Canada's status as a "power in terms of the rule of law".[232] Chief Justice Wagner has also highlighted that democratic institutions have become more fragile, in part because of the proliferation of

227 Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004) at 253.

228 Robert Post & Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy" (2004) 92:4 Cal L Rev 1027 at 1036; *Secession Reference*, *supra* note 11 at paras 49–50, 76–77.

229 *Canada* (*Minister of Citizenship and Immigration*) *v Vavilov*, 2019 SCC 65 at para 241, Abella and Karakatsanis JJ.

230 *Secession Reference*, *supra* note 11 at para 76.

231 MacCharles, *supra* note 146.

232 *Ibid.*

misinformation.[233] This has occurred alongside a rise in social polarization, hampering the quality and accuracy of public debate.[234] In his view, these dangers demand that democracies go beyond complacency, adopting a more vigilant posture.[235]

B. The Judiciary "ought": Dworkin and Morality

Considering this paper's question through a Dworkinian lens promises strong theoretical moorings for the more vigilant approach envisaged by "Something to Declare". To be clear, this is not a plea for judges to "decide cases according to their own political or moral tastes" and provide legal rules as justification *ex post facto*.[236] Rather, it is a call for judges to decide hard cases by "interpreting the political structure of their community" in search of the "best *justification* they can find, in principles of political morality, for the structure as a whole".[237] Indeed, it may well be that both the "Nothing to Declare" and "Something to Declare" camps have legal arguments with strong backing in constitutional text and in unwritten constitutional principles. The disagreement between the Saskatchewan courts and the Court of Appeal of Quebec reveals as much.[238] The search then, per Dworkin, is for the interpretation that "better promotes the political ideals [that judges] think correct",[239] showing the law "in its best moral light".[240] Fundamentally, this is a question of role morality.[241] What external moral considerations can and should judges consider, as a function of their role and in relation to evolutions in social context?[242] When Chief Justice Wagner claimed that Canada was a "power in terms of the rule of law [and]

233 Leblanc, *supra* note 146; Bronskill, *supra* note 146.

234 Bronskill, *supra* note 146.

235 Olijnyk, *supra* note 146.

236 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 3 [Dworkin, *Taking Rights Seriously*]; Ronald A Dworkin, "'Natural' Law Revisited" (1982) 34:2 Fla L Rev 165 at 165 [Dworkin, "Natural Law Revisited"].

237 Dworkin, *Taking Rights Seriously*, *supra* note 236 at 3; Dworkin, "Natural Law Revisited", *supra* note 236 at 165 [emphasis in original].

238 *UR Pride* SKKB 2024, *supra* note 10; *UR Pride* SKCA, *supra* note 9; *Hak* QCCA, *supra* note 8.

239 Dworkin, "Natural Law Revisited", *supra* note 236 at 171.

240 David Dyzenhaus, "The Very Idea of a Judge" (2010) 60:1 UTLJ 61 at 65.

241 See generally David M Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28:2 Dal LJ 267. Judges can and ought to look beyond simply interpreting the statute book given the external morality implicated in adjudicating cases affecting climate change (see Hassan Ahmad, "Judicial Role Morality in Climate Change Litigation: An Embrace of Two Principled Lenses" (2024) 21:1 MJSDL 53).

242 Ahmad, *supra* note 241 at 59; Tanovich, *supra* note 241 at 302–303.

moral values", and that Canadian institutions ought to defend them, what precisely may have he been referring to?[243]

Canadian jurisprudence and the common law tradition provide a possible answer. Since patriation and the introduction of the *Charter*, Canadian judges have understood their role as being "guardians of the Constitution and of individuals' rights"[244], defenders of a document that is "the supreme guarantee of individual rights and freedoms."[245] The common law is also replete of examples where judges opted to inhabit a role of defending individual rights against overbearing state actors, even in more challenging political contexts than our own. For instance, the influential 18th century case of *Entick v Carrington*[246] held that representatives of the King could not breach privacy or property rights without statutory permission, while closer to home, the much-celebrated 1959 case of *Roncarelli v Duplessis*[247] protected an unpopular religious minority from political interference by the Premier. Even the Supreme Court of Canada's recent jurisprudence on the "honour of the Crown" demands more of government officials in their dealings with Indigenous communities, given the moral duties borne by Canada in the context of colonial harms.[248]

Crucially, an argument oft overlooked by the "Nothing to Declare" camp is that *the intention behind* the parliamentary sovereignty doctrine, confirmed by the *Bill of Rights 1689*,[249] was not to abrogate fundamental rights, but preserve liberties in the face of "arbitrary or despotic royal power."[250] The judicial response to parliamentary sovereignty in the 18th century—construing statutes passed by Parliament more narrowly—was similarly motivated by concern with the legislature's wide ability to limit rights.[251] By reimagining the judge's role as "protector of life, liberty and property", this century-long dynamic reveals a coherent moral reading of the common law that views

243 MacCharles, *supra* note 146.

244 *Hunter*, *supra* note 183 at 169.

245 Madame Justice BM McLachlin, "The Charter: A New Role for the Judiciary?" (1991) 29:3 Alta L Rev 540 at 541.

246 [1765] EWHC KB J98.

247 1959 CanLII 50 (SCC).

248 *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39; *Shot Both Sides*, *supra* note 159.

249 *Bill of Rights 1689* (UK), 1 Will & Mar, c 2.

250 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: Macmillan and Co, 1915) at 118–19; Mark Walters, "Human Rights in Canada Before (and Outside) the Canadian Charter of Rights and Freedoms in 1982" (nd) [unpublished].

251 Pierre-André Côté & Mathieu Devinat, *Interprétation des lois*, 5th ed (Montréal: Éditions Thémis, 2021) at para 126.

the judicial role as rebuffing the unchecked abrogation of rights.[252] At a time when the political branches of government teeter on granting themselves such a power, the judicial branch is morally bound to respond in kind.

A salient counter-argument common to all invocations of legal morality is that what is moral to one may be immoral to another.[253] While this debate cannot be resolved here, the "Something to Declare" conception shifts the public moral debate beyond a sole focus on the ends for which the clause was introduced, and towards the means of its invocation. In the end, though the FAE was not wrong to argue that courts have a "*moral duty*", what is being asked of judges is not so much boldness, but the adoption of a textually and contextually coherent interpretation of section 33 that best aligns with judges' moral role as guardians of rights amidst a challenging democratic landscape.[254]

VI. CONCLUSION

Even prior to the proliferation of contemporary invocations of the notwithstanding clause—increasingly pre-emptive, broad, and for populist purposes—much of the political class who reached this once-hailed compromise had been experiencing a grave case of buyers' remorse. Not more than a decade after patriation, Premier Lougheed called for new limits, including prohibiting the "undemocratic" practice of pre-emptive use.[255] Prime Minister Pierre Trudeau hated the clause, and blamed then-Minister of Justice Jean Chrétien for its inclusion until his passing.[256] Prime Minister Brian Mulroney famously declared that a *Charter* comprising the notwithstanding clause "was not worth the paper it is written on", arguing in favour of its abolition.[257] And yet, these concerns seemed largely academic when the clause was characterized as something resembling a third rail of Canadian politics.[258]

But history did not, in fact, end with liberal democracy.[259] As the North American political landscape illustrates, for all its dangers laid out above, populisms on the left and the right continue to enjoy strong global support,

252 *Ibid* [translated by author].
253 Manfredi, *supra* note 27 at 187.
254 *Hak* QCCA, *supra* note 8 at para 303 [emphasis in original].
255 Lougheed, *supra* note 20 at 17–18.
256 Jean Chrétien, *My Years as Prime Minister* (Toronto: Vintage Canada, 2008) at 392.
257 *House of Commons Debates*, 34-2, No 1 (6 April 1989) at 1210 (Rt Hon Brian Mulroney).
258 Manfredi, *supra* note 27 at 194.
259 *Cf* Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

reshaping constitutionalism and the judiciary a little more in their image.[260] Amidst this backdrop, the Supreme Court of Canada has heard the appeal from the Quebec Court of Appeal's decision in *Hak,* which adopted much of the "Nothing to Declare" camp's views. An application for leave to appeal from the Saskatchewan Court of Appeal's decision in *UR Pride*, which was far more favourable to the claims of "Something to Declare", has been granted by the apex court.[261] Both will, for the first time, require the Court to consider whether section 33 permits or forecloses judicial review. It will set a binding precedent, with important ramifications in the decades to come. This paper has sought to argue that there are compelling theoretical, pragmatic, and jurisprudential reasons for courts to reserve for themselves the ability to issue judicial declarations in light of this populist context. In short, courts may be the best-placed and the *only* safeguard against a gradual reading-out of *Charter* rights at the whims of politically motivated majorities.

Yet with no prospect of constitutional amendment on the horizon, the *Charter*'s hitherto overlooked contradiction—one that appears to have said in the same breath, "let us have a doctrine of supremacy of Parliament, let us have a supremacy of *Charter* regime"—may soon require resolution.[262] Though declaratory relief can be a partial bulwark and delay that moment, none should lose sight that, at bottom, the Constitution "is not what the Court says it is".[263] As Rawls reminds us, it is instead "what the people acting constitutionally through the other branches eventually allow the Court to say it is".[264] On this, populists and their opponents can agree: fundamental choices about what Canada is, and who Canadians are, loom in the distance.

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260 At the time of writing, the United States is governed by the second Trump administration, while Mexico's left-populist MORENA coalition, the architects of a controversial judicial reform bill that required constitutional amendment, continues to enjoy broad support following President Claudia Sheinbaum's landslide victory (see Thomas Graham, "Mexico President Lashes Out at Supreme Court Amid Looming Constitutional Crisis", *The Guardian* (4 November 2024), online: <theguardian.com/world/2024/nov/04/mexico-supreme-court-claudia-sheinbaum-judicial-reform>).

261 *Government of Saskatchewan as represented by the Minister of Education v UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74, leave to appeal to SCC granted, 41979 (6 November 2025).

262 Anne E Bayefsky, "The Judicial Function under the Canadian Charter of Rights and Freedoms" (1987) 32 McGill LJ 791 at 810–11, n 68.

263 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 237.

264 *Ibid.*