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THE SECTION 33 DEMOCRATIC ACCOUNTABILITY CONCEPT: PROPOSING A TWO-PRONGED APPROACH FOR JUDICIAL REVIEW

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INTRODUCTION

In 2021, Ontario successfully invoked the notwithstanding clause in the *Canadian Charter of Rights and Freedoms* ("*Charter*") for the first time in the province's history. The notwithstanding clause is a constitutional tool which permits federal, provincial, and territorial[1] legislatures to declare an act (or provision thereof) to temporarily[2] operate notwithstanding certain *Charter* rights.[3] By invoking the notwithstanding clause in *The*

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1 Although s 33 refers only to "Parliament or the legislature of a province", s 30 of the *Charter* extends the force of the *Charter* to the territories. Further, in 1982 the Yukon passed notwithstanding clause legislation that was ultimately never brought into force. See *Canadian Charter of Rights and Freedoms*, s 33(1), 30, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter of Rights and Freedoms*]; Bill 16, *The Land Planning and Development Act*, 2nd Sess, 42nd Leg, Yukon, 1982 (assented to 9 December 1982, never proclaimed into force) [*Bill 16*].

2 See *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 33(3).

3 The entrenched rights that can be temporarily set aside by the notwithstanding clause are ss 2 and 7 to 15 of the *Charter*. See *ibid*, s 33(1).

Protecting Elections and Defending Democracy Act,[4] Ontario immunized their previously declared[5] unconstitutional election spending regulations from further *Charter* scrutiny. The application of the notwithstanding clause to restrict political expression in the context of a provincial election raised fundamental questions about the intersection of the notwithstanding clause and democracy.

The notwithstanding clause is entrenched under section 33 of the *Charter*.[6] An act invoking the notwithstanding clause can declare itself or one of its provisions to temporarily operate notwithstanding sections 2 and 7 to 15 of the *Charter*. Recognized as a "uniquely Canadian development,"[7] there was no equivalent provisions in other liberal democratic constitutions or international treaties at the time of its passing.[8] Since the inclusion of the notwithstanding clause in Canada's Constitution, the notwithstanding clause has not developed into a model for constitutionalism globally.[9]

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4 The notwithstanding clause was invoked under s 4 of *The Protecting Elections and Defending Democracy Act*. See Bill 307, *Protecting Elections and Defending Democracy Act*, 1st Sess, 42nd Parl, Ontario, 2021 (assented to 14 June 2021), SO 2021, c 31.

5 The Ontario Superior Court ruled in *Working Families* ONSC that campaign finance regulation provisions of the *Elections Finances Act* unjustifiably infringed s 2(b) of the *Charter*. As a remedy, the impugned provisions were declared as having no force or effect, but the order was suspended for twelve months. See *Working Families Ontario v Ontario*, 2021 ONSC 4076 at paras 90–93 [*Working Families* ONSC].

6 *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 33.

7 Canada, Legal and Social Affairs Division, *The Notwithstanding Clause of the Charter Background Paper*, by Marc-André Roy & Laurence Brosseau, 2018-17-E (Ottawa: Library of Parliament, 2018) at 2.

8 See *ibid*.

9 Since its inception in 1982, the notwithstanding clause has not been broadly adopted as a model of constitutionalism globally. A version of the notwithstanding clause has only been added to constitutions in Israel and the Australian State of Victoria. However, both of these comparable notwithstanding clauses are more limited in geographic scope or in the rights that they can set aside. See *Basic Law: Freedom of Occupation*, 1994 (Israel); *Charter of Human Rights and Responsibilities Act 2006*, 2006 (Victoria), 2006/43, s 31 (Austl). More recently, in July 2023, Israel passed

At the time of its creation, the drafters of the *Charter*[10] recognized the notwithstanding clause's extensive rights–suspending potential and deliberately embedded limitations on its use within the text of section 33. Most notably, the notwithstanding clause cannot apply to democratic *Charter* rights (sections 3 to 5) and all notwithstanding clause acts require re-invocation after five years.[11] At the time of its inclusion in the *Charter*, the then federal minister of justice Jean Chrétien, among other political leaders,[12] stressed that the

judicial reforms to its Basic Laws that have been likened to the Canadian notwithstanding clause. For an analysis comparing Israel's 2023 legislative reforms and the notwithstanding clause see Irwin Cotler, "Israel Needs to Learn the Right Lessons from Canada's Legal Reforms", *The Globe and Mail* (23 February 2023), online: <theglobeandmail.com/opinion/article-israel-needs-to-learn-the-right-lessons-from-canadas-legal-reforms/>.

10 In referring to the "constitutional drafters" as the representatives that participated in the final 1981 November Accord, I do not dismiss the important role of the Canadian public and civil society organizations in shaping the *Charter* draft through the 1981 Special Joint Committee on the Constitution. See Adam M Dodek, *The Charter Debates: The Special Joint Committee on the Constitution and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018); Peter W Hogg & Annika Wang, "The Special Joint Committee on the Constitution of Canada, 1980–81" (2017) 81:2 SCLR (2d) 3.

11 The five-year sunset clause permits the notwithstanding clause to be perpetually renewed. See *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 33(1), 33(3).

12 For example, Prime Minister Pierre Elliott Trudeau expressed publicly that he "doesn't fear the notwithstanding clause very much" because of its low uptake in pre-existing federal and provincial human rights legislation. See Jack Webster, "Transcript of an Interview with then Prime Minister Trudeau", *CHAN-TV* (24 November 1981) at 5, cited in *The Notwithstanding Clause of the Charter Background Paper*, by Marc-André Roy & Laurence Brosseau, 2018-17-E (Ottawa: Library of Parliament, 2018) at 2. Provincial politicians similarly expressed an expectation of rare use of the notwithstanding clause. New Brunswick Premier Richard Hatfield stated: "I want to give an undertaking that I will do everything possible to urge the Legislature of New Brunswick not to use that [notwithstanding clause] opportunity, consistent with my firm view that if we are going to have rights, they must be shared by all Canadians, regardless of where they live." See "Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution", *Verbatim Transcript* (5

notwithstanding clause is a "safety valve" that should only be used "to correct absurd situations."[13]

In the post–*Charter* era, this political plea for limited notwithstanding clause use was largely adhered to in all Canadian regions outside of Quebec. In the forty years between 1982 and 2023, a total of 26 notwithstanding clause bills were tabled in a legislature.[14] Of those 26 notwithstanding clause bills, only 19 became fully promulgated and effective acts.[15] At the federal level, the notwithstanding clause has never been tabled in legislation.[16] At the provincial and territorial level, the notwithstanding clause has been introduced in legislation by the

November 1981) at 114. Ontario Minister of Justice Roy McMurtry also affirmed that he expected that the notwithstanding clause would only be used in the "unlikely event of a decision of the courts that is clearly contrary to the public interest." See Roy McMurtry, "The Search for a Constitutional Accord - A Personal Memoir" (1983) 8:1 Queen's LJ 28 at 65.

13 *House of Commons Debates*, 32-1 (20 November 1981) at 13042–43 [*Debates 20 November 1981*].

14 For an overview of notwithstanding clause uses, see Caitlin Salvino, "A Tool of Last Resort: A Comprehensive Account of the Notwithstanding Clause Political Uses 1982-2021" (2022) 16:1 JPPL 11 [Salvino, "A Tool of Last Resort"].

15 In previous writing, I have identified 16 promulgated and effective notwithstanding clause invocations between 1982 and 2021. Since the article's publication, there have been three additional notwithstanding clause bills passed. First, Quebec invoked the notwithstanding clause in the promulgated and effective *An Act respecting French, the official and common language of Québec.* Second, Ontario invoked the notwithstanding clause in the promulgated and effective *Keeping Students in Class Act.* This legislation was subsequently repealed within two weeks. Third, in 2023, Saskatchewan tabled notwithstanding clause legislation, titled: *The Education (Parents' Bill of Rights) Amendment Act*. This legislation was promulgated and proclaimed into force on 20 October 2023. See Salvino, "A Tool of Last Resort", *supra* note 14; *An Act respecting French, the official and common language of Québec*, SQ 2022, c 14; *Keeping Students in Class Act*, SO 2022, c 19; *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46.

16 Salvino, "A Tool of Last Resort", *supra* note 14.

Yukon,[17] Saskatchewan,[18] Alberta,[19] New Brunswick,[20] Ontario,[21] and Quebec.

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17 In the Yukon, the territorial legislature passed notwithstanding clause legislation that was never proclaimed into force. This use of the notwithstanding clause, passed at the outset of the *Charter* in 1982, responded to concerns that the statutory requirement that the Land Planning Board seats be filled by Yukon Inuit Peoples, would be interpreted as a s 15(1) violation. See Bill 16, *supra* note 1 at 363.

18 In Saskatchewan, the notwithstanding clause has been invoked three times. First, in 1986, the notwithstanding clause was invoked in back-to-work legislation that was later declared constitutional by the SCC. See Bill 144, *An Act to Provide for Settlement of a Certain Labour-Management Dispute Between the Government of Saskatchewan and the Saskatchewan Governments' Employees Union*, 4th Sess, 20th Leg, Saskatchewan, 1986 (assented to 1 January 1986), SS 1986, c 111; *RWDSU v Saskatchewan*, 1987 CanLII 90 (SCC) [*RWDSU*]. Second, in 2018, Saskatchewan tabled notwithstanding clause legislation in response to a court of first instance loss over denominational school funding. Ultimately, the notwithstanding clause bill that received royal assent was never proclaimed into force because the government was successful on appeal. See Bill 89, *The School Choice Protection Act*, 2nd Sess, 28th Leg, Saskatchewan, 2018, c 39 [Bill 89]; *Saskatchewan v Good Spirit School Division No 204*, 2020 SKCA 34. Third, in 2023, Saskatchewan tabled notwithstanding clause legislation in response to an injunction granted by the Saskatchewan Court of King's Bench against the Education's Minister's proposed pronoun policy. The "Use of Preferred First Name and Pronouns by Students" policy requires that students requesting "that their preferred name, gender identity, and/or gender expression be used" obtain "parental/guardian consent". This legislation was passed and proclaimed into force on October 20, 2023. See *The Education (Parents' Bill of Rights) Amendment Act*, *supra* note 15; Government of Saskatchewan, News Release, "Use of Preferred First Name and Pronouns by Students" (22 August 2023) at 4, online (pdf): <saskatchewan.ca/-/media/news-release-backgrounders/2023/aug/policy---use-of-preferred-first-name-and-pronouns-by-students.pdf>.

19 Alberta has tabled notwithstanding clause legislation twice. First, in 1998, Alberta tabled a notwithstanding clause bill to limit compensation available to individuals living with disabilities sterilized through a provincially run program. Following extensive public outcry, the notwithstanding clause bill was withdrawn the next day. See Bill 26, *The Institutional Confinement and Sexual Sterilization Act*, 2nd Sess, 24th Leg, Alberta, 1998; "Bill 26, The Institutional Confinement and Sexual Sterilization Act", 2nd reading, Legislative Assembly of Alberta, *Official Reports of Debates (Hansard)*, 24-2 (11 March 1998) at 812–13 [*Bill 26 Debates*]. Second, in 2000, Alberta

Unlike the other federal, provincial, and territorial legislatures, Quebec has expressly rejected the drafter's plea to only use section 33 as a tool of "last resort".[22] Instead, Quebec has used the notwithstanding clause to symbolically and substantively reject a perceived imposition of the 1982 constitutional reforms on the province without the consent of its political representatives.[23]

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passed the notwithstanding clause in legislation amending the existing *Marriage Act*, to explicitly define marriage as between "a man and a woman". This legislation was indirectly declared *ultra vires* by the SCC in 2004. See *Marriage Amendment Act*, RSA 2000, c 3, s 5; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 18.

20 In 2020, New Brunswick invoked the notwithstanding clause in a bill removing non-medical exemptions for mandatory public school immunization requirements. The notwithstanding clause was included to "avoid 'expensive court costs'" that could arise from the potential extensive litigation from the anti-vaccination lobby but was ultimately removed at the committee stage. See Bill 11, *An Act Respecting Proof of Immunization*, 3rd Sess, 59th Leg, New Brunswick, 2019 [Bill 11]; Jacques Poitras, "New Brunswick Uses Notwithstanding Clause in 2nd Bid to Pass Vaccination Bill", *CBC New Brunswick* (22 November 2019), online: <cbc.ca/news/canada/new-brunswick/cardy-notwithstanding-clause-mandatory-vaccination-bill-1.5369965>; Legislative Assembly of New Brunswick, Standing Committee on Economic Policy, *Minutes of Proceedings and Evidence*, 59-3 (16 June 2020) at 10–11 [*New Brunswick Committee 16 June 2020*].

21 I will discuss Ontario's uses in more detail throughout this article. Ontario has tabled a total of three notwithstanding clause bills since 2018, two of which were successfully promulgated and effective. However, the 2022 back-to-work legislation *Keeping Students in Class Act* was repealed less than a week after its passing. See 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 (first reading 12 September 2018) [*Efficient Local Government Act*]; *Protecting Ontario Elections Act*, SO 2021, c 5; *Keeping Students in Act*, *supra* note 15.

22 "Chretien, Romanow and McMurtry Attack Ford's Use of the Notwithstanding Clause", *MacLean's* (14 September 2018), online: <macleans.ca/politics/3ttawa/chretien-romanow-and-mcmurtry-attack-fords-use-of-the-notwithstanding-clause/>.

23 The Quebec practice of using the notwithstanding clause to expressly reject the imposition of the *Charter* on Quebec was much more prominent in the

Immediately, following the entrenchment of the *Charter*, Quebec passed the *Act Respecting the Constitution Act*.[24] This omnibus legislation applied the notwithstanding clause to every existing Quebec statute.[25] Following this omnibus application of the notwithstanding clause, Quebec then automatically included the notwithstanding clause in every promulgated statute until 1985.[26] After the end of this routine notwithstanding clause use, the Quebec government invoked the notwithstanding clause in a subsequent 15 promulgated and effective acts—bringing Quebec's total to 16 notwithstanding clause acts between 1982 and 2023. In addition to the omnibus *Act Respecting the Constitution Act*, these notwithstanding clause acts include five

first decade of the *Charter*. The origins of the practice stem from a perceived imposition of the *Charter* on the province on what former Quebec premier Réné Levesque referred to as the "night of the long knives" when Quebec was excluded from the final negotiations of the *Charter*. On the day of the coming into force of the 1982 Constitution, Quebec lowered all of its flags for a day of mourning. See "The Night of Long Knives: Political Intrigue Highlights Canada's Struggle to Bring Home Its Constitution", *CBC*, online: <cbc.ca/history/EPISCONTENTSE1EP17CH1PA3LE.html> ["Night of Long Knives"]. See also John English, *Just Watch Me: The Life of Pierre Elliot Trudeau: 1968–2000* (Toronto: Knopf Canada, 2009) at 462.

24 *Act Respecting the Constitution Act, 1982*, CQLR c L-4.2.

25 See *ibid*.

26 See Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) at 39:2.

pension–related acts,[27] six education–related acts,[28] one agriculture–related act,[29] and three miscellaneous acts.[30]

The three miscellaneous–themed acts were all purported to preserve a distinct Quebec culture. First, in 1988, Quebec successfully invoked the notwithstanding clause following a Supreme Court of Canada (SCC) decision declaring their unilingual signage language legislation unconstitutional.[31] Second, in 2019, Quebec invoked the notwithstanding clause to bar Quebec public servants[32] from wearing visible religious

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27 See *Act respecting the Civil Service Superannuation Plan*, CQLR c R-12; *Act respecting the Teachers Pension Plan*, CQLR c R-11; *Act respecting the Government and Public Employees Retirement Plan*, CQLR c R-10; *Act respecting the Pension Plan of Certain Teachers*, CQLR c R-9.1; *Act respecting the Pension Plan of Management Personnel*, CQLR c R-12.1.

28 See *Act respecting the Conseil Supérieur de l'Éducation*, CQLR c C-60; *The Education Act for Cree, Inuit and Naskapi Persons*, CQLR c I-14; *Act respecting the Ministère de l'Éducation*, CQLR c M-15; *Act respecting School Elections,* CQLR c E-2.3; *Act respecting Private Education*, CQLR c E-9.1; *Education Act,* RSQ c C-84.

29 See Bill 71, *An Act to Amend the Act to Promote the Development of Agriculture Operations*, 1st Sess, 33rd Leg, Quebec, 1986 (assented to 19 June 1986), SQ 1986, c 54.

30 See Bill 178, *An Act to amend the Charter of the French Language*, 2nd Sess, 33rd Sess, Quebec, 1988 (assented to 22 December 1988), SQ 1988, c 54; *Act respecting the laicity of the State*, CQLR 2019 c L-0.3; *An Act respecting French, the official and common language of Québec*, *supra* note 15.

31 *Charter of the French Language*, CQLR c C-11 was declared unconstitutional in *Ford.* See *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC) [*Ford*]. The Quebec government responded within a month of the 1988 *Ford* decision by invoking the notwithstanding clause in *An Act to Amend the Charter of the French Language*, *supra* note 30. This notwithstanding clause invocation was allowed to expire in 1993. See Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) at 145.

32 The religious symbols ban non-exhaustively applies to Quebec Crown prosecutors, judges, teachers, principals and public service employees who carry a firearm. The legislation incorporates a grandfather clause that exempts public servants who are already employed. However, these grandfathered public servants are unable to be transferred or promoted to another employment position without violating the statute. See *Act respecting the laicity of the State*, *supra* note 30 at Schedule II.

symbols while at work.[33] Finally, in 2022, Quebec passed legislation reforming various provincial institutions to safeguard the French language.[34] The legislation instituted French language requirements for the private sector, education sector, the judiciary, and municipal services, among others.[35]

The rare political use of the notwithstanding clause across Canada, has resulted in limited jurisprudence interpreting section 33's application. There has only been one SCC decision directly interpreting section 33 of the *Charter*. In *Ford v Quebec*, the SCC considered the constitutionality of Quebec's *Charter of the French Language*.[36] This legislation, which imposed a series of French language reforms, had two distinct but simultaneous

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33 The litigation challenging this legislation is ongoing and leave to appeal to the SCC has been requested. See *Act respecting the laicity of the State*, *supra* note 30. See also *Hak c Procureur général du Québec*, 2021 QCCS 1466 [*Hak*], aff'd in part *Organisation mondiale sikhe du Canada c Procureur général du Québec*, 2024 QCCA 254 [*Hak* QCCA], leave to appeal to SCC requested.

34 See *An Act respecting French, the official and common language of Québec*, *supra* note 15.

35 Since its promulgation, two provisions of *An Act respecting French, the official and common language of Québec* were temporarily suspended by way of interim injunction. On 12 August 2022, the Quebec Superior Court of Justice suspended provisions in the Act that required corporations produce French versions of legal documents via a self-paid certified translator. The provisions were suspended for their potential impact on access to justice. See *Mitchell c Procureur général du Québec*, 2022 QCCS 2983.

36 The *Charter of the French Language*, also known as Bill 101, imposed a range of strict measures across various sectors aimed at promoting the French language, including a requirement that all commercial signs in Québec be French-only. See *Charter of the French Language*, CQLR c C-11.

notwithstanding clause invocations applied to it in 1982[37] and 1984[38] respectively.

In the evaluation of the section 33 invocations, the SCC made several findings. First, the notwithstanding clause can be applied in an omnibus manner. This interpretation permits section 33 to be applied to multiple *Charter* rights and multiple acts through a single statute.[39] Second, the notwithstanding clause cannot be applied retroactively.[40] Third, and most notably, the SCC adopted the form–only approach[41] to notwithstanding clause interpretation. The form–only approach rejects any substantive evaluation of a notwithstanding clause invocation.[42] Instead, the SCC held that courts can only scrutinize the procedural requirements of a section 33 invocation. Accordingly, all that is procedurally required is "an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the *Charter.*"[43] The SCC further

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37 The first notwithstanding clause application to *An Act Respecting the Charter of the French Language* was applied through the omnibus *An Act Respecting the Constitution Act.* This first notwithstanding clause invocation added the notwithstanding clause to s 214 of the *Charter of the French Language* and applied the notwithstanding clause to the whole act. This first notwithstanding clause came into force on 17 April 1982 and was set to expire on 17 April 1987. See *Act Respecting the Constitution Act, 1982*, *supra* note 24; *Charter of the French Language*, *supra* note 36, s 214.

38 The second notwithstanding clause act invoked through *An Act to amend the Charter of the French Language* and applied only to s 58 of the *Charter of the French Language*. Section 58 required all public signs and posters to only use French. This second notwithstanding clause invocation came into force on 1 February 1984 and was set to expire 1 February 1989. See *An Act to amend the Charter of the French Language*, *supra* note 30.

39 *Ford*, *supra* note 31 at para 35.

40 The SCC's finding on retroactivity was based on a textual interpretation of s 33 and a reliance on rules of statutory interpretation. See *ibid* at paras 35–36.

41 *Ibid* at para 33.

42 The SCC concluded that the "requirement of an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms to be overridden seems to be a substantive ground of review" and was thus beyond the scope of judicial review of s 33: *ibid* at paras 33–35.

43 *Ibid* at para 33.

clarified that the notwithstanding clause act only needs to refer to the *Charter* section number to be overridden, rather than naming the right or freedom.[44]

Since *Ford*, the SCC has never again directly ruled on the interpretation of the notwithstanding clause. The SCC has in rare occasions relied on section 33 in its reasoning interpreting other constitutional provisions, such as in *Sauvé II*[45] and *City of Toronto*.[46] Beyond the SCC's limited interpretation of the notwithstanding clause, there is also minimal jurisprudence on section 33 at the

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44 *Ibid*.

45 In *Sauvé II*, the SCC recognized the exclusion of s 3 from the purview of s 33 in the purposive interpretation of the right to vote. The SCC stated: "the framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause." See *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11 [*Sauvé II*].

46 In *City of Toronto*, the SCC majority referred to the perceived potential negative impact on the notwithstanding clause to justify its narrowing of the application of unwritten constitutional principles. See *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 60 [*City of Toronto*] [emphasis in original]:

> Where, therefore, a court invalidates legislation using s 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s 33 and by meeting its stated conditions . . . Were, however, a court to rely *not* on s 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*.

provincial appellate[47] and lower court levels.[48] Currently, there are two major notwithstanding clause cases either under reserve[49] or

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47 There are two recent provincial appellate decisions on the notwithstanding clause. First, in 2023, the Court of Appeal for Ontario (ONCA) considered the notwithstanding clause invocation in *The Protecting Elections and Defending Democracy Act*. The ONCA in a split decision ruled that the legislation infringed s 3 of the *Charter* and by extension could not be immunized by the notwithstanding clause invocation. The ONCA unanimously found that s 33 was properly invoked. See *Working Families Coalition (Canada) Inc v Ontario (Attorney General)*, 2023 ONCA 139 [*Working Families* ONCA], leave to appeal to SCC granted, 40725 (9 November 2023). Second, in 2024, the QCCA considered the notwithstanding clause invoked in *An Act Respecting the Laicity on the State*, barring public service employees from wearing religious symbols. The QCCA unanimously upheld the validity of the law and its notwithstanding clause application, except for its application to elected representatives. The QCCA held that elected representatives cannot be barred from wearing religious symbols in the National Assembly because this act falls within the scope of s 3 of the *Charter*, which cannot be temporarily set aside by s 33. See *Hak* QCCA, *supra* note 33.

48 There are two recent lower court decisions directly engaging with the notwithstanding clause. First, the Quebec Superior Court in *Hak*, considered a challenge to the notwithstanding clause invocation barring public servants from wearing religious symbols. In *Hak*, Justice Blanchard applied the SCC's form-only approach from *Ford*, to rule that the notwithstanding clause was essentially "legally unassailable" through judicial review. Despite this finding, the QCCS relied on two other Charter sections to narrow the application of the notwithstanding clause. First, the minority language rights (s 23 of the Charter) were interpreted to bar the application of the religious symbols ban in English school boards. Second, s 3 of the *Charter* was interpreted broadly to permit individuals elected to the National Assembly to wear religious symbols in the legislature. The QCCS's decision in *Hak* was appealed in *Hak* QCCA, *supra* note 33. See *Hak*, *supra* note 33 at paras 796–800, 881–921, 939–1003. Second, in 2024, the Court of Kings Bench for Saskatchewan (SKKB) considered the constitutionality of the application of the notwithstanding clause to limit pronoun use for youth in educational settings. In a February 2024 decision, the SKKB rejected the government of Saskatchewan's motion to dismiss the challenge. This SKKB decision is currently being appealed by the Saskatchewan government. See *UR Pride Centre for Sexuality and Gender Diversity v Government of Saskatchewan*, 2024 SKKB 23; Pratyush Dayal, "Sask. government appealing judge's decision to allow amended court action in pronoun case" *CBC News* (6 March 2024), online: <cbc.ca/news/canada/saskatoon/sasktchewan-

that have requested leave to appeal to the SCC.[50] Until decisions in these two cases are rendered by the SCC, *Ford* remains the leading precedent on the interpretation of the notwithstanding clause.

Although not directly addressed in *Ford*, this article engages directly with the concept of democratic accountability and the notwithstanding clause. Section 33 has a unique relationship with democratic processes. The design of section 33 purposefully excluded the application of the notwithstanding clause to democratic processes, while simultaneously elevating democratic processes as a check on its unfettered application.

The intersection of democracy and the notwithstanding clause has increasingly become the focus of academic study by leading Canadian constitutional scholars.[51] Scholars such as Jamie Cameron and Cara Zwibel examine the concept of section 33 democratic accountability to inform a purposive

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49 *Working Families* ONCA, *supra* note 47.

50 *Hak* QCCA, *supra* note 33.

51 See Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71:4 UTLJ 510; Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189; 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, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal & Kingston: McGill-Queen's University Press, 2024) 381; Cara Faith Zwibel, "Section 33, the Right to Vote, and Democratic Accountability" in Biro, *supra* note 51, 364; Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44:3 Can Public Adm 255 [Kahana, "Ignored Practice"]; Tsvi Kahana, "The Notwithstanding Clause in Canada: The First Forty Years" (2023) 60:1 Osgoode Hall LJ 1 [Kahana, "Key Foundations"]; Dwight Newman, "Key Foundations for the Notwithstanding Clause in Institutional Capacities, Democratic Participatory Values, and Dimensions of Canadian Identities" in Biro, *supra* note 51, 69; Caitlin Salvino, "Notwithstanding Minority Rights: Re-Thinking Canada's Notwithstanding Clause" in Biro, *supra* note 51, 401 [Salvino, "Notwithstanding Minority Rights"]; Sabreena Delhon, "Detoxing Democracy: Exploring Motivation, Authority, and Power" in Biro, *supra* note 51, 419.

interpretation of democratic rights under section 3 of the *Charter*. Both scholars argue that the underpinning of democratic limits within section 33 permits an expanded interpretation of section 3 to bar applications of the notwithstanding clause to political expression.[52] Scholars Gregoire Webber,[53] Robert Leckey, and Eric Mendelsohn,[54] examine the design of section 33 to argue that the courts should be permitted to make findings on the constitutionality of notwithstanding clause acts, but for the invocation of section 33. Such an interpretation permits the electorate, as the institutional body with the final say on notwithstanding clause uses, to be fully informed on the court's interpretation of rights, in addition to the legislature's justification of notwithstanding clause use. Dwight Newman critically analyzes the role of the notwithstanding clause as a democratic participatory tool. He argues that the notwithstanding clause, as a tool of democratic expression, should not be limited through judicial review—even when it is applied to undermine democratic processes.[55] Tsvi Kahana puts forward two distinct approaches to the notwithstanding clause: one proposing an analytical tool to identify tyrannical notwithstanding clause uses and the other examining the role of public deliberation in notwithstanding clause democratic accountability.[56] Finally, Sabreena Delhon and myself (in earlier writing) are critical of the role that democratic accountability can play in holding notwithstanding clause uses accountable, including when minority groups are the target of its rights suspending authority.[57]

In this article, I seek to contribute to the further development of this existing scholarship by analysing and delineating the scope of the section 33 democratic accountability concept.

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52 See Cameron, *supra* note 51; Zwibel, *supra* note 51.

53 Webber, *supra* note 51.

54 Leckey & Mendelsohn, *supra* note 51.

55 See Newman, *supra* note 51.

56 See Kahana, "Ignored Practice", *supra* note 51; Kahana, "Key Foundations", *supra* note 51.

57 Salvino, "Notwithstanding Minority Rights", *supra* note 51; Delhon, *supra* note 51.

Building on the identified existing section 33 literature, I present a section 33 democratic accountability concept that has two prongs: (1) legislative, and (2) electoral. First, legislative accountability refers to the procedural legislative requirements constraining a notwithstanding clause invocation and encouraging public deliberation on its invocation. This legislative accountability prong requires a notwithstanding clause bill to proceed through all stages of the legislative process in a manner that encourages transparent and fulsome debate on its merits. Second, electoral accountability refers to the safeguards in election processes requiring notwithstanding clause invocations to be ultimately accountable to the electorate. This democratic accountability prong seeks to safeguard meaningful electoral processes where the electorate has the final say on legislative and executive actions.

Following an overview of my proposed section 33 democratic accountability concept, I then present an interpretive approach for the judiciary to apply it to promulgated notwithstanding clause acts. When faced with litigation challenging a notwithstanding clause use, I argue that section 33 itself contains internal limits on its application. The judiciary should interpret section 33 to bar its application in a way that undermines either legislative or electoral processes as mechanisms that uphold the concept of democratic accountability embedded within section 33.

The structure of the article is as follows. First, I introduce the two impetuses for this article: (1) the unprecedented notwithstanding clause applications to democratic processes and (2) the increasing academic literature focusing on the intersection of section 33 and democracy. Second, I present the section 33 democratic accountability concept. This proposed concept has two prongs of legislative and electoral accountability. In presenting the section 33 democratic accountability concept I engage with and build on the existing literature that examines the intersection of section 33 and democracy. Third, I address the implications of the section 33 democratic accountability concept for the courts. I propose an adjudicative approach for the courts to apply when faced with notwithstanding clause acts that undermine democratic

processes, albeit not in way that infringes the current recognized scope of section 3. Finally, I address potential shortcomings of the section 33 democratic accountability concept. I discuss both the limits of democracy as an accountability tool and conflicting interpretations of section 33 and democracy.

I. IMPETUS FOR DEMOCRATIC ACCOUNTABILITY EXAMINATION

The impetus for my examination of the section 33 democratic accountability concept is two-fold. First, there has been unprecedented notwithstanding clause applications to democratic processes. Second, there has been an evolution in the academic literature focusing on the intersection of the notwithstanding clause and democracy.

A. UNPRECEDENTED APPLICATION OF THE NOTWITHSTANDING CLAUSE TO DEMOCRATIC PROCESSES

Recently there has been a shift in notwithstanding clause use towards increased frequency and expanded geographic scope of invocations. Prior to 2018, only Alberta, Saskatchewan, the Yukon, and Quebec had tabled a notwithstanding clause bill. Since then, the notwithstanding clause has been introduced for the first time by Ontario and New Brunswick.[58] After an 18-year hibernation period between 2018 and 2023,[59] eight notwithstanding clause bills were tabled by Saskatchewan, Ontario, Quebec, and New Brunswick.[60] Five of the eight

[58] See Salvino, "Notwithstanding Minority Rights", *supra* note 51. See also Kahana, "Ignored Practice", *supra* note 51.

[59] No new notwithstanding clause bills were tabled in the legislature between 2001 and 2018. See Salvino, "Notwithstanding Minority Rights", *supra* note 51.

[60] See *Act respecting the laicity of the State*, *supra* note 30; *An Act Respecting French, the Official and Common Language of Québec*, *supra* note 30; *Protecting Ontario Elections Act*, *supra* note 21; *Keeping Students in Class Act*, *supra* note 15; Bill 89, *supra* note 18; *The Education (Parents' Bill of Rights) Amendment Act*, *supra* note 15; Bill 11, *supra* note 20; *Efficient Local Government Act*, *supra* note 21.

notwithstanding clause bills were fully promulgated and effective.[61]

This article not only responds to the increased general use of the notwithstanding clause, but also responds to the target of its invocation. In this post–2018 period, there has been an unprecedented application of the notwithstanding clause to undermine democratic processes.[62] Since 2018, I identify three tabled notwithstanding clause bills that directly or indirectly targeted democratic processes.

First, Ontario's 2018 *Efficient Local Government Act* sought to immunize legislation that intervened in an already commenced democratic election for Canada's largest municipality.[63] Ontario tabled this notwithstanding clause bill in response to a lower court decision declaring its abrupt legislative intervention in the already commenced Toronto City election unconstitutional.[64] The Ontario government passed legislation 105 days after the start of the Toronto City election slashing the municipal ward size from 47 to 25 wards.[65] Ultimately the responsive notwithstanding clause bill was not promulgated because the Ontario government successfully achieved a stay application and then won the case at the Court of Appeal for Ontario (ONCA) and the SCC.[66]

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61 See *Act respecting the laicity of the State*, *supra* note 30; *An Act respecting French, the official and common language of Québec*, *supra* note 15; *Protecting Ontario Elections Act*, *supra* note 21; *Keeping Students in Class Act*, *supra* note 15; *The Education (Parents' Bill of Rights) Amendment Act*, *supra* note 15.

62 By democratic processes, I refer to both electoral and legislative processes that impact the selection of electoral representatives and deliberation on bills under consideration by the legislature.

63 See *Efficient Local Government Act*, *supra* note 21.

64 Justice Belobaba of the Ontario Superior Court found that the legislation unjustifiably infringed the electoral candidates and votes s 2(b) freedom of expression. See *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151.

65 *Ibid* at paras 4–5.

66 First, the Ontario government was granted a stay of the Ontario Superior Court decision by the Ontario Court of Appeal. Subsequently, the Ontario government won on appeal at the Ontario Court of Appeal and the Supreme

Second, Ontario's 2021 *Protecting Ontario Elections Act*, successfully immunized legislation limiting political expression through third-party campaign finance spending.[67] Following a lower court decision declaring their original third-party campaign finance legislation unconstitutional,[68] the Ontario government passed its first promulgated and effective notwithstanding clause legislation.[69] The *Protecting Ontario Elections Act* immunized existing campaign finance provisions from *Charter* scrutiny. This legislation applied to the 2022 provincial election. In 2023, the ONCA ruled that the legislation unjustifiably infringed section 3 of the *Charter* and by extension could not be immunized by the notwithstanding clause invocation.[70] The ONCA unanimously found that section 33 was properly invoked.[71] This case was heard by the SCC in May 2024 and is currently under reserve.[72]

Finally, Quebec's 2019 *Act respecting the laicity of the State*, while generally targeting all public service workers who wear religious symbols, also banned individuals wearing religious symbols from being elected in the National Assembly.[73] The constitutionality of the provisions applying the religious ban to elected officials in the National Assembly was recently declared unconstitutional by the Quebec Superior Court.[74] The Quebec

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Court of Canada. See *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761; *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732; *City of Toronto*, *supra* note 46.

67 See *Protecting Ontario Elections Act*, *supra* note 21.

68 Justice Morgan of the Ontario Superior Court found that the amendments to the election finance legislation violated s 2(b) of the *Charter* by unjustifiably limiting speech during pre-election periods. See *Working Families* ONSC, *supra* note 5.

69 See *Protecting Ontario Elections Act*, *supra* note 21.

70 See *Working Families* ONCA, *supra* note 47 at paras 66–136.

71 See *ibid* at paras 48–59.

72 See *Working Families* ONCA, *supra* note 47.

73 See *Act respecting the laicity of the State*, *supra* note 30.

74 The Quebec Superior Court found that this provision of the legislation unjustifiably infringed the right to vote under s 3 of the *Charter*. See *Hak*, *supra* note 33 at paras 910–21.

Court of Appeal in February 2024 upheld this aspect of the lower court's ruling finding that the provisions limiting elected officials from wearing religious symbols in the legislature unjustifiably infringe section 3 and fall outside of the purview of section 33.[75]

This article seeks to respond to the unprecedented applications of the notwithstanding clause to undermine democratic processes. These identified applications raise novel questions on the notwithstanding clause and its relationship with democracy that necessitates further investigation.

B. The Academic Literature Shift Towards Substantive Limits on Section 33

There has also been a shift in the academic commentary on section 33. When the notwithstanding clause was first entrenched in the *Charter*, the academic literature focused primarily on its role as a uniquely Canadian dialogic tool.[76] Scholars embarked on suggesting a range of constitutional amendments to alter section 33 and increase its use across Canada.[77]

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75 *Hak* QCCA, *supra* note 33 at paras 654–85.

76 See Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1; Meghan Campbell, "Reigniting the Dialogue: the Latest Use of the Notwithstanding Clause in Canada" (2018) 1 Public Law 1; Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49:4 Am J Comp L 707; Stephen Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8:2 Intl J Constitutional L 167; Christopher P Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998–2003" (2004) 23 SCLR (2d) 105.

77 See Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (Oxford: Oxford University Press, 2001); Scott Reid, "Penumbras for the People: Placing Judicial Supremacy Under Popular Control" in Anthony A Peacock, ed, *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Don Mills, Ontario: Oxford University Press Canada, 1996); Kahana, "Ignored Practice", *supra* note 51; Peter H Russell, "Standing Up for Notwithstanding" (1991) 29:2 Alta L Rev 293.

More recently, however, the section 33 academic literature has largely shifted away from celebrating the notwithstanding clause as an "ingenious institutional arrangement"[78] towards engaging with the role of judicial review in evaluating section 33 applications. In part, this shift is correlative with the post–2018 shift in notwithstanding clause invocations and the novel section 33 applications to democratic processes.[79]

In presenting my section 33 democratic accountability concept, I directly build on and place myself in conversation with existing notwithstanding clause literature that considers section 33's intersection with democracy. There are currently wide-ranging complimentary and conflicting approaches to democracy and the notwithstanding clause.[80] I seek to contribute to the notwithstanding clause literature by developing a novel comprehensive account the section 33 democratic accountability concept.

Among the identified scholars who engage with the concept of notwithstanding clause democratic accountability, there are three overarching themes that can be identified. The first thematic group comprises of scholars who rely on an analysis of democratic accountability to argue for particular interpretive approaches to section 33. Both Jamie Cameron and Cara Zwibel fall within this category by arguing that the inclusion of democratic accountability mechanisms within section 33

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78 This term was coined by Mark Tushnet in the context of criticizing the existing literature that he argued over-estimated s 33 as a solution to the counter-majoritarian difficulty. See Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illustrations of the Countermajoritarian Difficulty" (1995) 94:2 Mich L Rev 245 at 250.

79 There are, of course, other non-democratic processes narrowing the scope of s 33. For example, scholars have argued that s 28 of the *Charter*, s 23 of the *Charter*, and unwritten constitutional principles can limit the scope of the notwithstanding clause. See e.g. Mary Eberts, "Notwithstanding v Notwithstanding: Sections 28 and 33 of the Canadian Charter of Rigths and Freedoms" in Biro, *supra* note 51, 338; Kerri A Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2020) 28:4 Const Forum Const 19.

80 See Webber, *supra* note 51; Leckey & Mendelsohn, *supra* note 51; Cameron, *supra* note 51; Zwibel, *supra* note 51; Newman, *supra* note 51; Salvino, "Notwithstanding Minority Rights", *supra* note 51; Delhon, *supra* note 51.

informs an expanded interpretation of democratic rights under section 3.[81]

Cameron, through a textual and purposive analysis, identifies a symbiotic relationship between sections 3 and 33, founded on a mutual embedding of the democratic accountability concept in each provision. She argues that this shared embedding of democratic accountability mechanisms in sections 3 and 33, necessitates a "vigorous enforcement of the right to vote".[82] Although section 2(b) can be set aside by the notwithstanding clause, her proposed expanded interpretation of section 3 "preserv[es] rights of meaningful participation and access to information about the electoral process".[83] Similarly, Zwibel argues that the interpretation of section 3 should be expanded based on a purposive interpretation of section 33.[84] She draws on the theory of democratic "structural rights" by Yasmin Dawood to argue that any section 33 use that "demonstrably and appreciably impact[s] our democratic structures" should be barred by section 3.[85]

Scholars Grégoire Webber, Robert Leckey, and Eric Mendelsohn, all argue that the courts can review notwithstanding clause acts to determine their constitutionality, but for the section 33 invocation. Although they arrive at the same conclusion for the role of judicial review, the scholars adopt diverging interpretative approaches. First, Webber bases his judicial review theory on a close textual reading of the term "operate notwithstanding" under section 33(2) and a comparative review of other weak-form judicial review jurisdictions. He proposes an interpretation of section 33 that permits courts to declare notwithstanding clause legislation inconsistent with targeted rights and freedoms but precludes them from imposing a remedy.[86] Second, Leckey and Mendelsohn

81 See Cameron, *supra* note 51; Zwibel, *supra* note 51.

82 Cameron, *supra* note 51 at 383.

83 *Ibid* at 392.

84 See Zwibel, *supra* note 51.

85 *Ibid* at 365.

86 See Webber, *supra* note 51 at 528.

adopt a distinct and broader interpretive approach to argue that courts can analyze the constitutionality of notwithstanding clause acts.[87] The authors rely on an interpretation of sections 33(1), 33(2), 33(3), combined with the unwritten constitutional principles of democracy and the protection of minority rights, to argue that section 33 permits courts to declare if an unjustified *Charter* violation occurred. The authors argue that section 33 only "precludes remedies to cure inconsistency with the Constitution, such as striking down."[88]

The final scholar that falls within this first category is Tsvi Kahana, who in a 2001 article focuses on the role of public deliberation as central to the democratic accountability mechanisms embedded in section 33. He identifies two factors of visibility[89] and accessibility[90] that bolster the ability of section 33 to be a tool that promotes democratic process accountability through extensive public discussions on its use.[91] Relying on this analysis, he proposes a requirement of notwithstanding clause uses only in response to SCC decisions, which naturally increases the visibility and accessibility of section 33 uses by elevating the issue to the national agenda.[92]

The second thematic category within the notwithstanding clause literature comprises of scholars who rely on an analysis of the intersection of the notwithstanding clause and democracy to

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87 The authors note that there are three ways their approach to role of judicial review and the notwithstanding clause differs from Webber's: (1) broader examination beyond s 33(2), (2) a different analysis of s 33(2), and (3) applying a more contextual approach, in contrast to Webber's "legal-technical" exercise. The authors argue that their proposed interpretation fits within the constitutional framework, whereas Webber's reconceptualizes the framework. See Leckey & Mendelsohn, *supra* note 51 at 191, 194.

88 *Ibid* at 190.

89 An invocation is invisible when the legislature applies the notwithstanding clause to an issue that is not on the public agenda. See Kahana, "Ignored Practice", *supra* note 51 at 257.

90 An invocation is inaccessible when it responds to complex policy questions that are not easily understood by the public. See *ibid*.

91 See *Ibid* at 276.

92 See *Ibid* at 278–79.

put forward a normative account of section 33. Dwight Newman falls within this category by theorizing that the notwithstanding clause is a democratic participatory tool in itself.[93] He interprets the structural design of the notwithstanding clause excluding democratic rights and requiring express legislation to signal central role of democratic participation in the notwithstanding clause vision.[94] He is critical of proposed interpretive limits on the notwithstanding clause because they undermine its role as a democratic participatory tool. This analysis leads him to conclude that even in cases where the notwithstanding clause is applied to undermine democratic processes, there should be no substantive judicial review limits placed on its use.[95]

Also within this category is Kahana's 2023 article where he creates a tool to evaluate notwithstanding clause uses and determine if they were tyrannical as a matter of policy.[96] Per Kahana, a use of the notwithstanding clause will be deemed tyrannical if: (1) "it is motivated by a desire to target minorities or to silence political opposition", or (2) "if its impact on rights is exceptionally severe such that it is unacceptable in a liberal democracy."[97] The dual primary factors of motivation and impact, are complimented by a third subsidiary factor that examines the legal effect of the legislation.[98]

The third and final thematic notwithstanding clause literature category comprises of scholars who are critical of democratic processes as an accountability tool on the notwithstanding clause. Falling within this category are Sabreena Delhon and

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93 See Newman, *supra* note 51.

94 See *ibid* at 79.

95 See *ibid* at 80–81.

96 See Kahana, "Key Foundations", *supra* note 51 at 7.

97 *Ibid* at 18–19.

98 The factors to evaluate the legal effects of notwithstanding clause acts are: (1) if the legislation is brought into force, (2) if the notwithstanding clause act is constitutional, and (3) if the legislation would be unconstitutional without the notwithstanding clause. Kahana presents that this third evaluation criteria is a secondary tool that either amplifies or softens a finding of tyranny on the two other factors of motivation and impact. See *ibid* at 16.

myself. In her notwithstanding clause analysis, Delhon asks "if the electorate is sufficiently enabled to play its role in holding governments accountable".[99] Through a review of its structural design and the context of its drafting, Delhon purports that "[s]ection 33 assumes . . . an active, informed, and empowered electorate".[100] She then critically analyzes current challenges facing Canadian democracy—such as democratic backsliding, distrust in public institutions, and online toxicity—to question the capacity of the electorate to play this safeguarding role when section 33 is invoked.

Similarly, in an earlier piece I argue that electoral and legislative democratic accountability mechanisms reinforce the unique vulnerability of minority groups to the notwithstanding clause.[101] By adopting a process-oriented approach to notwithstanding clause safeguards, the embedded democratic accountability mechanisms are not well-suited for minority groups who are underrepresented in the legislature and whose interests are largely ignored by the majoritarian electorate.[102]

Each of the scholars falling within the three thematic categories engage with the intersection of section 33 and democracy. As I present my section 33 democratic accountability concept in the following section, I will engage more deeply with each of these scholars as I seek to contribute to the further development of the notwithstanding clause literature.

II. THE SECTION 33 DEMOCRATIC ACCOUNTABILITY CONCEPT

I identify two prongs[103] of the section 33 democratic accountability concept: (1) electoral, and (2) legislative. First,

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99 Delhon, *supra* note 51 at 419.

100 *Ibid* at 421.

101 See Salvino, "Notwithstanding Minority Rights", *supra* note 51.

102 See *ibid* at 406–13.

103 My two-pronged approach is similar to that taken by Kahana in his 2001 article. As discussed, he identifies the factors of visibility and accessibility to inform his interpretation of s 33 that requires a facilitation of public deliberation on its use to ensure that the invoking government is accountable to the electorate. I similarly adopt a two-pronged approach,

electoral accountability encompasses safeguards in election processes to ensure all notwithstanding clause invocations are ultimately accountable to the electorate. Second, legislative accountability encompasses procedural requirements within the legislature to encourage public deliberation on its use. I argue that both prongs emanate from section 33 itself, resulting in an internally coherent interpretation of the notwithstanding clause.

A. Electoral Process Democratic Accountability

The first prong of my proposed section 33 democratic accountability concept is electoral accountability. The scope of this prong was developed through reference to the text, context, and other constitutional provisions and principles.

The textual elements of section 33 are clear that electoral processes are designed to be excluded from the notwithstanding clause. First, the notwithstanding clause cannot be applied to democratic rights. Section 33(1) specifies that a notwithstanding clause can only apply to sections 2, and 7 to 15 of the *Charter*. The *Charter* rights that fall within the notwithstanding clause's scope are fundamental freedoms under section 2;[104] legal rights under section 7 to 14;[105] and equality rights under section 15. Section 33 cannot be applied to democratic rights under sections 3 to 5; mobility rights under section 6; language rights under sections 16 to 22; and minority language education rights under section 23. Notably, the notwithstanding clause initially was drafted to apply to section 28 of the *Charter*, an interpretive clause

with public deliberation underpinning both prongs of electorate and legislative accountability. However, as is discussed in this section, my approach engages in a broader analysis of the democratic accountability concept that expands beyond public deliberation as an accountability tool. See Kahana, "Ignored Practice", *supra* note 51 at 270.

104 The fundamental freedoms that fall within s 2 are religion, expression, peaceful assembly, and association. See *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 2.

105 The rights that fall within ss 7 to 14 are life, liberty and security of person; search or seizure; detention or imprisonment; arrest or detention; criminal proceeding rights; cruel and unusual treatment or punishment; self-crimination; and interpretation. See *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 7–14.

guaranteeing gender equality.[106] However, the initial notwithstanding clause application to section 28 was removed before the *Charter* draft was finalised through a unanimous vote of the House of Commons.[107]

The drafters of the *Charter* explicitly excluded of democratic rights from the scope of section 33—section 3 encompasses the right of all citizens to vote in provincial and federal elections.[108] Section 4 limits all legislative terms to five-years, unless there is "war, invasion, or insurrection".[109] Finally, section 5 requires a sitting in Parliament and each legislature at least once a year.[110] The relevance of this purposeful exclusion of democratic rights from section 33 was recognized by the SCC in *Sauvé II*.[111]

Second, per section 33(3), notwithstanding clause invocations will expire within five years of its coming into force

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106 Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol 2 at 911–12.

107 *House of Commons Debates*, 31-2 (24 November 1981) at 13345 [*Debates 24 November 1981*]. See also Marilou Mcphedran, "Creating Trialogue: Women's Constitutional Activism in Canada" (2006) 25:3 Can Woman Stud 5; Marilou Mcphedran, Judith Erola & Loren Braul, "'28 – Helluva Lot to Lose in 27 Days': The Ad Hoc Committee and Women's Constitutional Activism in the Era of Patriation" in Steve Patten & Lois Harder, eds, *Patriation and Its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015); Kerri A Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment" (2014) 19:2 Rev Const Stud 237.

108 Section 3 of the *Charter* states: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein": *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 3, 33(1).

109 Section 4(1) of the *Charter* states: "No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members". Section 4(2) states: "in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be". See *ibid*, s 4.

110 Section 5 states: "there shall be a sitting of Parliament and of each legislature at least once every twelve months". See *ibid*, s 5.

111 *Sauvé II*, *supra* note 45 at para 11.

but it can be perpetually renewed.[112] Section 33(3), paired with section 4(1) of the *Charter*, establishes elections as a key accountability mechanism on the notwithstanding clause. Per section 4(1), elections must occur every five years and cannot be set aside by the notwithstanding clause.[113] Section 33(3) mandates expiry of the notwithstanding clause every five years, making its reconsideration cyclically align with elections.

Therefore, based on the text alone, section 33 is designed to elevate electoral processes as a form of accountability on its use. The notwithstanding clause cannot be applied to democratic rights. Parliament and legislatures cannot suspend the right to vote, and election periods cannot be deferred to delay elections. In five-year cycles that align with election periods, the notwithstanding clause expires, thus requiring deliberation on its renewal.

However, a textual analysis alone does not preclude the notwithstanding clause from being applied to undermine the ability of electoral processes to act as a democratic accountability tool. The primary vehicle to undermine elections is by way of targeting section 2(b) of the *Charter* through the notwithstanding clause. Although legislatures cannot suspend the right to vote, they can suspend freedom of expression, recognized by the SCC as a "linchpin" of political processes.[114]

For example, in 2021 the Ontario government invoked the notwithstanding clause in the *Protecting Elections and Defending Democracy Act*.[115] This notwithstanding clause invocation, responded to a loss at the Ontario Superior Court finding that the Ontario government's 2021 amendments to the *Election Finances Act* unjustifiably violated section 2(b) of the *Charter.* These 2021 amendments increased third-party spending limits in the 12 months preceding the issuance of the election writ.[116] The

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112 *Ibid*, s 33(3)–(4).

113 *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 4(1).

114 *R v Keegstra*, 1990 CanLII 24 (SCC).

115 *An Act to Amend the Election Finances Act*, SO 2021, c 31.

116 It should be noted the constitutional challenge initially sought judicial review of the 2017 amendments to the election finances legislation.

legislation also expanded the definition of political advertising beyond direct candidate or party advertising to also include issues-based advertising.[117] Less than a day after the Ontario Superior Court's declaration of invalidity, the Ontario government declared their intent to invoke the notwithstanding clause and immunize the impugned legislation from being struck down.[118] The notwithstanding clause was invoked six days later through the *Protecting Elections and Defending Democracy Act* and the election financing provisions, previously declared unconstitutional, applied to the provincial election on 2 June 2022.[119]

This 2021 Ontario notwithstanding clause use reveals the shortcomings of a text-only approach to democratic accountability in section 33. Although, the right to vote cannot be suspended, legislatures can directly interfere with political elections by targeting forms of speech that may be damaging to them. In this case, it was limiting political advertising by third-party organizations.[120] Recognising these shortcomings my section 33 democratic accountability concept extends beyond the textual formal protections of excluding democratic rights from section 33. A contextual examination of the purpose of section 33, and its intended design, fills the gaps left by the text of section 33 while simultaneously achieving the intended design of section 33 to be constrained by democratic processes, and ultimately be accountable to the electorate. I will now engage

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However, this challenge was updated following the 2021 amendments. The 2021 legislation imposed a third-party overall spending cap of $600,000 and a constituency spending cap of $24,000. See *Working Families* ONSC, *supra* note 5 at paras 2, 8.

117 *Ibid* at para 4.

118 "Ford government set to invoke notwithstanding clause after court rejects election finance changes", *CBC Toronto* (9 June 2021), online: <cbc.ca/news/canada/toronto/ontario-government-notwithstanding-clause-bill-wednesday-1.6059588>.

119 *Protecting Ontario Elections Act*, *supra* note 21.

120 A main target of this legislation was expression by unions. However, the legislation raises electoral accountability concerns not only because it targets speech by unions as political actors, but it targets speech by all third-party organizations in the context of an election.

with the elements of the historic, linguistic, and philosophic contexts[121] that are relevant to an analysis of the section 33 electoral accountability prong.

The historic context of the development of section 33 reveals the central role the notwithstanding clause played in the political compromise that achieved the entrenchment of the *Charter*.[122] The notwithstanding clause was the key compromise that led to the adoption of the *Charter* and the patriation of Canada's Constitution. Following *Re: Resolution to Amend the Constitution*,[123] the federal government was required to return to negotiations with the provinces to gain "'substantial' provincial agreement" necessary to amend the Constitution.[124] The "Gang of Eight" provinces were united against the Constitution's patriation, making the chances of successful negotiation unlikely.[125] It was only through the suggestion of the

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121 The historical, linguistic, and philosophic contexts of s 33 are related to a purposive interpretative approach. As set out in *R v Big M Drug Mart*, 1985 CanLII 69 at para 117 (SCC) [*Big M Drug Mart*], a purposive interpretation seeks to identify the purpose of the right with:

> [R]eference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

122 For reference look at the writing of Lorraine Weinrib for a comprehensive overview of the development of the *Charter* and its implications for Canada as a constitutional democracy. See Lorraine Eisenstat Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State" (1999) 33:1 Israel LR 13 at 26–37; Lorraine E Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80:1 Can Bar Rev 699 at 720–28; Lorraine E Weinrib, "Canada's Charter of Rights: Paradigm Lost" (2001) 6 Rev Const Stud 119 at 132–50; Lorraine Weinrib, "The Canadian Charter's Transformative Aspirations" (2003) 19:2 SCLR (2d) 17 at 18–33.

123 1981 CanLII 25 (SCC).

124 English, *supra* note 23 at 759–886.

125 Roy Romanow, John Whyte & Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Agincourt Ontario: Carswell/Methuen, 1984) at 189, 192. For use of the term "Gang of Eight" to refer to these eight provinces, see "Night of Long Knives", *supra* note 23.

notwithstanding clause by Alberta Premier Peter Lougheed that the Gang of Eight's united front began to splinter.[126] The successful constitutional patriation grew out of the famous "kitchen accord", where the notwithstanding clause political compromise was sketched out on a napkin between federal Minister of Justice Jean Chrétien, Premier of Saskatchewan Roy Romanow, and Attorney General of Ontario, Roy McMurtry.[127] Subsequent to that informal agreement, nine of the ten provinces shifted their support in favour of the *Charter* and ultimately signed the finalised patriation agreement the next day.[128] The historic context demonstrates that a key purpose of the notwithstanding clause is its role as a political compromise to gain requisite provincial consent for the Constitution. The provincial leaders at the time were concerned with the loss of parliamentary supremacy through an entrenched bill of rights. The notwithstanding clause was a direct response to this concern. Section 33 was thus designed as a political compromise to create a limited safety valve for parliamentary supremacy.

During its drafting, the scope of the notwithstanding clause as a parliamentary supremacy tool was significantly narrowed by embedded democratic accountability mechanisms. Section 33 of the *Charter* was designed to elevate electoral processes as an accountability mechanism on its use. This purpose is evident not only in the textual design of the *Charter* but also arises from the historic context. The key original drafter of the notwithstanding clause, Jean Chrétien,[129] stated this purpose clearly when he first

126 English, *supra* note 23 at 494.

127 *Ibid* at 506.

128 *Ibid* at 507.

129 Jean Chrétien was one of the key political actors in the negotiations of the notwithstanding clause. As the Minister of Justice, in 1980, Chrétien was tasked by former prime minister Pierre Elliott Trudeau with to negotiate the provinces an entrenched charter of rights. He acted as the representative of the federal government in discussions with the provinces and would often relay information to Prime Minister Pierre Elliott Trudeau who was not in attendance at the Ministers' conferences. See English, *supra* note 23 at 462–71. Chrétien represented the federal government at the Special Committee on the Constitution and indicated which amendments

introduced the notwithstanding clause to the Canadian public. Chrétien characterised the design of the notwithstanding clause as "provid[ing] the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy".[130] He explicitly referred to the limited scope and sunset clause of the notwithstanding clause to present that "it will be politically very difficult for a government to introduce without very good reason a measure".[131] The political difficulty stems from public deliberations on its use, by having the sunset clause provide "a degree of control on the use of an override clause in *allowing public debate on the desirability of continuing the deliberations further*".[132] According to Chrétien, quoting the writing of Canadian Civil Liberties Association's Allan Borovoy, the legislative process requirements and

would be agreeable to the federal government. See Dodek, *supra* note 10; Hogg & Wang, *supra* note 10. He, along with the then Premier of Saskatchewan Roy Romanow and the then Ontario Attorney General Roy McMurtry, negotiated the inclusion of the notwithstanding clause in what is known as the "Kitchen Accord", which they then got support from by Pierre Elliott Trudeau and the other provinces. Finally, he led the introduction of the final draft of the *Charter* to the House of Commons. Among the other political leaders who are considered key negotiators of the notwithstanding clause, such as Roy Romanow (Premier of Saskatchewan), Roy McMurtry (Ontario Attorney General), Peter Lougheed (Premier of Alberta), and Prime Minister Pierre Elliott Trudeau—he is the only one who commented in detail on the drafter's reasons for excluding democratic rights from the purview of the notwithstanding clause and including a five-year sunset clause. See for example other reflection pieces on the drafting of the notwithstanding clause that do not address these aspects of the notwithstanding clause's design: The Honourable Peter Lougheed, "Why a Notwithstanding Clause?" in David Schneiderman, ed, *Points of View/point de vue*, 6th ed (Calgary: Centre for Constitutional Studies, 1998) 1; McMurtry, *supra* note 12; Romanow, Whyte & Leeson, *supra* note 125; Thomas S Axworthy, "Colliding Visions: The Debate Over the Canadian Charter of Rights and Freedoms, 1980–81" (1986) 24:3 J Commonwealth & Comp Pol 239; Thomas S Axworthy, "An Historic Canadian Compromise: Forty Years after the Patriation of the Constitution Should We Cheer A Little?" in Biro, *supra* note 51, 25.

130 *Debates 20 November 1981*, *supra* note 13 at 13042.

131 *Ibid*.

132 *Ibid* at 13043 [emphasis added].

continuous review will act as a "red flag" to the public, resulting in "political difficulty" as a safeguard to the *Charter*.[133]

The intentional democratic design of the notwithstanding clause is even more apparent when one considers the pre-existing models of the notwithstanding clause in provincial and federal human rights codes.[134] Although the idea of a safety valve for legislatures from human rights legislation—entrenched or not—was not new, the Human Rights Code notwithstanding clauses did not include democratic accountability mechanisms. Instead, the Human Rights Code notwithstanding clauses could be applied to all rights and had no sunset clause. This historic context is also relevant because it shows a clear departure from the existing model in designing section 33 of the *Charter*. The *Charter*'s notwithstanding clause was designed to be a parliamentary supremacy "safety valve"[135] from entrenched rights, but only in narrow circumstances with democratic processes as an overarching source of accountability.

Taken all together, I identify two contextual factors relevant to the section 33 electoral accountability prong: (1) the political compromise of a parliamentary supremacy safety valve and (2) democratic accountability as a limit on the notwithstanding clause safety valve. Combined with the section 33 text, these two

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[133] See *Ibid*. Chrétien in his House of Commons speech introducing the notwithstanding clause quoted Allan Borovoy's statement to the Montreal Gazette:

> The process is a rather ingenious marriage of a bill of rights notion and a parliamentary democracy. The result is a strong charter with an escape valve for the legislatures. The "notwithstanding clause" will be a red flag for opposition parties and the press. That will make it politically difficult for a government to override the Charter. Political difficulty is a reasonable safeguard for the [C]harter.

[134] These human rights code notwithstanding clauses stated that every provincial statute was inoperative if it conflicted with the any part of the Human Rights Code unless the statute expressly declared that it was to operate notwithstanding the Human Rights Code. See *Alberta Bill of Rights*, RSA 2000, c A-14, s 2.; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 44.; *An Act to Amend the Charter of Human Rights and Freedoms and Other Legislative Provision*, RSQ 1996, c 10, s 52.; *Canadian Bill of Rights*, SC 1960, c 44, s 2.

[135] *Debates 20 November 1981*, *supra* note 13 at 13043.

contextual factors support a determination that there is an underlying democratic accountability concept within section 33 that extends beyond the textual protections for electoral processes. The section 33 democratic accountability concept fills the gaps left by the text to ensure that section 33 fulfils its purpose of being a parliamentary supremacy tool limited by democratic accountability mechanisms—including *meaningful electoral processes*.

Such an interpretation is also supported by the unwritten constitutional principle of democracy, which forms part of Canada's Constitution.[136] The SCC has identified a wide range of unwritten constitutional principles,[137] the most relevant to this analysis being democracy.[138] In *Reference Re Secession of Quebec*, the SCC referred to the principle of democracy as having "always informed the design of our constitutional structure" and that it "continues to act as an essential interpretive consideration".[139] The SCC expanded its understanding of democracy beyond a procedural "political system of majority rule", to recognize that "a functioning democracy requires a continuous process of

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136 Beverly McLachlin, "Unwritten Constitution Principles: What Is Going On" (2006) 4 NZJ Public Intl L 147.

137 Other judicially recognized unwritten constitutional principles include: constitutionalism (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) [*Reference re Secession*]); the doctrine of paramountcy (*Reference re Remuneration of Judges of the Prov Court of PEI*, 1997 CanLII 317 (SCC) [*Remuneration of Judges*]); federalism (*Reference re Secession*, *supra* note 137); judicial independence (*Remuneration of Judges*, *supra* note 137; *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13*; Rice v New Brunswick*, 2002 SCC 13; *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44 [*Provincial Court Judges' Assn of New Brunswick*]; parliamentary privilege (*New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC)); protection of minorities (*Reference re Secession*, *supra* note 137); the rule of law (*Reference re Secession*, *supra* note 137; *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC); *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco Canada*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9); and the separation of powers (*Babcock v Canada (Attorney General)*, 2002 SCC 57).

138 *Reference re Secession*, *supra* note 137.

139 *Ibid* at para 62.

discussion", whereby the executive is held accountable to the electorate through democratic legislatures and public interplay of ideas.[140]

Following *City of Toronto*, the unwritten constitutional principle jurisprudence has shifted from permitting their substantive application[141] to limiting their application to informing the interpretation of written constitutional text.[142] Even under this narrower interpretation, the textual and contextual elements of section 33 should be informed by the unwritten constitutional principle of democracy. Although the text of section 33 itself does not bar applications of the notwithstanding clause to political expression, the unwritten principle of democracy supports a contextual interpretation of section 33 that fills the gaps of the text. The unwritten constitutional principle of democracy recognizes that democratic accountability processes should encompass more than physical access to the ballot box, by requiring as stated by the SCC "a continuous process of discussion" that extends beyond formal electoral periods.[143] This expansive understanding of democracy, that includes political expression and debate, informs the textual and contextual analysis of section 33. The unwritten constitutional principle of democracy supports a restriction of section 33 to bar its application in ways that undermine democratic processes, including the exchange of ideas necessary for a functioning democracy.[144]

Based on a combination of the text, the context, and the unwritten constitutional principle of democracy, my electoral prong of the section 33 democratic accountability concept safeguards *meaningful electoral processes*. I propose that the electoral accountability prong of the democratic accountability concept bars notwithstanding clause application to any process,

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140 *Ibid* at para 68.

141 *Ibid*; *Remuneration of Judges*, *supra* note 137; *Provincial Court Judges' Assn of New Brunswick*, *supra* note 137; *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ONCA).

142 *City of Toronto*, *supra* note 46.

143 *Reference re Secession*, *supra* note 137 at para 68.

144 *Ibid*.

mechanism, and expression necessary to a citizen casting a vote in a provincial or federal election.

There are several elements of the electoral accountability prong. First, the prong is limited to any expression necessary to a citizen casting a vote in a provincial or federal election. The scope of the protection does not extend to municipal elections because the democratic *Charter* rights excluded from the notwithstanding clause under section 33(1) relate only to provincial or federal elections.[145]

Second, the scope of any process, mechanism, and expression necessary to a citizen casting a vote will be interpreted broadly to achieve the safeguarding of meaningful electoral processes. Per Chrétien, elections were designed as an accountability mechanism to achieve "a degree of control on the use of an override clause in *allowing public debate on the desirability of continuing the deliberations further.*"[146] A textual approach alone to section 33 cannot achieve this intended purpose because public debate and deliberation can be limited by setting aside section 2(b) of the *Charter*.

The scope of the electoral prong of democratic accountability is broadly defined to bar notwithstanding clause application to any process, mechanism, and expression necessary to a citizen casting a vote. Under the electoral accountability prong, any processes or mechanisms necessary to citizen voting likely fall within the scope of sections 3 to 5 of the *Charter* and thus cannot be set aside by section 33.[147] Thus, I will focus on further outlining the scope of necessary expression to citizen voting.

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145 *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 3–5; *City of Toronto*, *supra* note 46 at para 2.

146 *Debates 20 November 1981*, *supra* note 13 at 13042–43 [emphasis added].

147 Take for example a legislature using the notwithstanding clause to temporarily set aside s 15 of the *Charter* and deny disability accommodations for citizens to vote at polling stations. Such an application, while likely an infringement of equality right under s 15, is also likely protected under s 3 outside the scope of s 33. The purpose of s 3 is broadly interpreted to ensure the right of each citizen to participate meaningfully in the electoral process. The broad interpretation of s 3 would likely regard disability accommodations as necessary for citizens to participate

Public deliberation and consideration of government action is an inherent risk embedded within the structure of section 33 and forms the basis of the electoral accountability prong. The electoral accountability prong, by way of barring any notwithstanding clause application that limits expression necessary to a citizen casting a vote, ensures that elections remain a meaningful limit on the use of section 33.

Expression necessary to a citizen casting a vote is defined broadly to include any speech, communications, or expressive acts responding to government action or inaction. There are no temporal or thematic limitations on this expression. The protected expression under the electoral accountability prong is not limited to a time period because public deliberation is a continuous ongoing process that is not restricted to a certain period before an election. Similarly, the protected expression is also not limited to critiques of notwithstanding clause use. Such an interpretation would be too narrow and difficult to implement. Instead, the category of necessary expression is expansive applying to all expression that can be categorized as responding to government action or inaction. A non-exhaustive list of this category of protected expression includes campaign spending, political protest, freedom of the press, relevant information for electoral choice, and information on voting locations and methods.[148] Examples of speech that fall outside of this category are commercial expression,[149] advertising,[150]

meaningfully in elections and thus represent a group to strike any legislation interfering with electoral processes or mechanisms. See *Frank v Canada (Attorney General)*, 2019 SCC 1; *Harvey v New Brunswick (Attorney General)*, 1996 CanLII 163 (SCC); *Sauvé v Canada (Attorney General)*, 1993 CanLII 92 (SCC) [*Sauvé I*].

148 I note that this is an expansive category that captures broad categories of expression. However, the scope of this category is tempered by the application of s 1 of the *Charter*. As will be discussed later in this article, any expression that falls within my proposed democratic accountability concept is still subject to s 1 and can have justified reasonable limits placed on it.

149 For example, business signs as were at issue in *Ford*, *supra* note 31.

150 For example, advertising to children at issue in *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 86 (SCC) or enforcing health warnings on tobacco products in *Imperial Tobacco Canada*, *supra* note 137.

anti-abortion expression outside of medical clinics,[151] and some forms of hate speech.[152]

Expression necessary to a citizen casting a vote is also not limited to actions by rights-holders. It can include expression by State actors—including the judiciary. Judicial decisions form part of expression necessary to a citizen casting a vote because it responds to State action. Constituents' democratic decision making benefits from judicial interpretation of the scope of *Charter* rights and impugned notwithstanding clause legislation. Dialogic constitutionalism necessitates constituent exposure to both the legislature's and the judiciary's interpretation of *Charter* rights when making electoral decisions.

My electoral prong of democratic accountability builds on the existing literature on the intersection of the notwithstanding clause and democracy. The electoral accountability prong aligns most closely with the notwithstanding clause interpretations by Jamie Cameron and Cara Zwibel. As reviewed earlier, both Cameron and Zwibel argue that an analysis of section 33 leads to an expanded interpretation of the scope of democratic rights under section 3.[153] Cameron identifies a symbiotic relationship between sections 3 and 33, founded on a mutual embedding of the democratic accountability concept in each provision. She argues that this shared democratic accountability embedding in sections 3 and 33 necessitates an expanded interpretation of section 3 that "preserv[es] rights of meaningful participation and access to information about the electoral process".[154] Alternatively, Zwibel presupposes a "broad consensus that

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151 Although anti-abortion expression is expression necessary to a citizen casting a vote, its geographic location at a medical clinic is not. As such, existing legislation bars abortion protests within a safe zone outside of medical clinics. See e.g. *Safe Access to Abortion Services Act*, 2017, SO 2017, c 19, Schedule 1.

152 Some forms of hate speech will fall outside of expression necessary to a citizen casting a vote—particularly hate speech targeting specific individuals or groups. Each evaluation will be contextual. Hate speech that falls within the s 33 democratic accountability concept remains subject to limitations under s 1 of the *Charter*.

153 Cameron, *supra* note 51; Zweibel, *supra* note 51.

154 Cameron, *supra* note 51 at 392.

section 33 is a tool of democratic accountability"[155] to argue that the interpretation of section 3 should be expanded to include what Yasmin Dawood refers to as "structural rights".[156] Zwibel argues that any notwithstanding use that "demonstrably and appreciably impact[s] our democratic structures" should be "beyond the reach of section 33" through an expanded purposive section 3 interpretation.[157]

The proposed expanded interpretations of section 3 by Cameron and Zwibel both engage with electoral accountability mechanisms, albeit to different depths. Zwibel presupposes the existence of an underlying principle of democratic accountability that creates a "special relationship" between sections 3 and 33 but accepts that the "full scope and import of that relationship remain[s] unclear".[158] Alternatively, Cameron engages in a fulsome analysis of an underlying concept of democratic accountability through a focus on the constitutional text.[159] She argues that democratic accountability is a "fundamental condition" of section 33 because it provides legitimacy for uses of section 33.[160] Her analysis of democratic accountability is distinct because it examines how the concept creates a symbiotic relationship between sections 3 and 33, rather than focusing only on the notwithstanding clause.[161]

Ultimately, my analysis of the section 33 democratic accountability concept fundamentally seeks to respond to the same issue raised by Cameron and Zwibel. We all seek to grapple with how the courts should respond when faced with a

155 Zwibel, *supra* note 51 at 365.

156 Structural rights refer to an interpretation of democratic rights that expands beyond a formal right to vote towards a right to participate meaningfully in electoral processes. *Ibid* at 365 citing Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review" (2012) 62:4 UTLJ 499 at 504.

157 Zwibel, *supra* note 51 at 365.

158 *Ibid* at 374.

159 Her focus is on the exclusion of democratic rights and the sunset clause. See Cameron, *supra* note 51 at 385–87.

160 *Ibid* at 385.

161 *Ibid*.

notwithstanding clause invocation that undermines democratic processes, albeit not in a way that infringes the current judicial interpretation of sections 3 to 5 of the *Charter*. The notwithstanding clause was uniquely designed to elevate democratic processes as a safeguard to limit the use of the notwithstanding clause. We all determine that a text only analysis of section 33 leaves significant loopholes for the notwithstanding clause to be applied to undermine the democratic processes that were intended to act as a safeguard to limit its use.

Building on the novel arguments on the intersection of section 3 and 33 proposed by Cameron and Zwibel, I too seek to respond to the jurisprudential gap left by the form-only approach when the notwithstanding clause is applied to undermine democratic processes. The approach I adopt also differs from Cameron and Zwibel's. Most notably, I base my analysis of the democratic accountability concept (including the electoral accountability prong) in section 33 alone. Instead of interpreting section 33 to expand the scope of other *Charter* rights, I identify internal limits within section 33 that bars its application to democratic processes. My approach adopts an internally coherent account of section 33, that is informed by other *Charter* provisions or principles, but does not have implications for their interpretation. My approach also differs from Cameron and Zwibel's by adopting a second prong focused on legislative accountability. Cameron and Zwibel focus primarily on electoral processes to expand the purposive analysis of the right to vote under section 3 of the *Charter*. Finally, my proposed application of the electoral accountability prong through judicial review is more prescriptive. Both proposed interpretive approaches by Cameron and Zwibel are more open-ended barring notwithstanding clause uses that "demonstrably and appreciably impact[s] our democratic structures" (Zwibel)[162] or that undermines "rights of meaningful participation and access to information about the electoral process" (Cameron).[163]

[162] Zwibel, *supra* note 51 at 365.

[163] Cameron, *supra* note 51 at 392.

My electoral prong of the section 33 democratic accountability concept also does not go as far as Kahana's public deliberation approach.[164] In his 2001 article, Kahana argues that notwithstanding clause uses should be limited to SCC decision responses. I do not purport to claim that the electoral accountability prong limits notwithstanding clause uses to SCC decision responses. Such a limitation, I argue, overshoots the scope of the democratic accountability concept that seeks to ensure that electoral processes can meaningfully act as a notwithstanding clause accountability mechanism. The text and context of section 33 are clear that the notwithstanding clause can be invoked pre-emptively. Despite this distinguishment, I would not discount the value of Kahana's proposed approach as a potential avenue for political reform of section 33 through constitutional amendment.[165]

I would, however, recognize that the electoral accountability prong aligns with the interpretation of the notwithstanding clause's operation proposed by Webber,[166] Leckey, and Mendelsohn.[167] As discussed, these scholars adopt differing interpretive approaches to argue that section 33 permits courts to review the constitutionality of notwithstanding clause acts. Whereas Webber adopts a technical textual and comparative interpretation of section 33,[168] Leckey and Mendelsohn rely on a textual and purposive interpretation of section 33, alongside an examination of the unwritten constitutional principles of democracy and protection of minority rights.[169]

Leckey and Mendelsohn directly engage with the concept of democratic accountability to support their proposed interpretation of section 33. They interpret section 33(2), in conjunction with other written and unwritten constitutional

164 Kahana, "Ignored Practice", *supra* note 51.

165 Notably, Kahana does not purport to claim that his theory is justified by constitutional interpretive methods.

166 Webber, *supra* note 51.

167 Leckey & Mendelsohn, *supra* note 51.

168 Webber, *supra* note 51 at 528.

169 Leckey & Mendelsohn, *supra* note 51 at 212.

aspects, to assign an "important role" to the electorate in assessing notwithstanding clause invocations and infer that the judiciary has a role in "support[ing] this democratic accountability".[170] Based on an analysis of section 33(3), they conceptualize the notwithstanding clause as instilling legislative accountability and democratic responsibility to the public.[171] The notwithstanding clause through sections 33(1), 33(2), and 33(3) "makes space for the voters to assess the legislature's use of the notwithstanding clause".[172] The spaces for voters to assess and ultimately be "responsible" for the use and impacts of the notwithstanding clause is through democratic processes. Under Leckey and Mendelsohn's theory, the judiciary plays a supportive role in enabling the "electorate to play its constitutional role" by providing relevant information to the electorate on judiciary's conception of the impact of the impugned law on the targeted rights.[173]

Webber, Leckey, and Mendelsohn, although taking diverging justificatory approaches, all argue that section 33 should be interpreted to allow the judiciary to make a finding on whether a notwithstanding clause act (or the act/provision it applies to) unjustifiably infringes the *Charter.* Their interpretation purports that the notwithstanding clause only precludes the judiciary from employing a remedy by operating notwithstanding the finding of an unjustifiable *Charter* infringement.[174] Leckey and Mendelsohn directly link their proposed approach to a notion of electoral accountability, where it is the electorate not the legislature who has the final say on rights interpretation.

While the merits of the diverging justifications are outside the scope of this article, my proposed electoral prong of the section 33 democratic accountability concept encompasses the electorate having access to a court's interpretation of the

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170 *Ibid* at 190.

171 *Ibid* at 199.

172 *Ibid* at 200.

173 *Ibid* at 200–01.

174 Webber, *supra* note 51; Leckey & Mendelsohn, *supra* note 51. See also *Constitution Act, 1982*, s 52, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 24(1).

constitutionality of a notwithstanding clause act. As argued by Webber, Leckey, and Mendelsohn, (albeit through different approaches) the text, context, and unwritten constitutional principles support such an interpretation.

Within the context of my proposed approach, the electoral accountability prong bars the notwithstanding clause from being applied in a way that undermines any process, mechanism, and expression necessary to a citizen casting a vote in a provincial or federal election. I define expression under the electoral accountability prong broadly. As outlined above, necessary expression is not limited to individual rights-holders. It includes expressive acts by State actors, such as the judiciary. Citizens require access to differing interpretations of constitutional rights in casting their ballot. When the notwithstanding clause is invoked, citizens are exposed to the legislature's interpretation of constitutional rights and the justifications to suspend them. Access to information on a court's interpretation of a notwithstanding clause act only further enriches the public deliberation that forms an integral part of the electoral accountability safeguard. The electoral prong of the democratic accountability concept is better fulfilled by an interpretation which recognizes judicial interpretation of notwithstanding clause acts as expression necessary to a citizen casting a vote. Therefore, the electoral accountability prong aligns with the theories of Webber, Leckey, and Mendelsohn to permit the judiciary to make a finding on the constitutionality of a notwithstanding clause act, but for the use of section 33. In sum, the electoral accountability prong under the section 33 democratic accountability concept bars notwithstanding clause applications that undermine electoral processes. Electoral processes include any process, mechanism, and expression necessary to a citizen casting a vote in a provincial or federal election. The electoral accountability prong also supports the approach to notwithstanding clause judicial review proposed by Webber, Leckey, and Mendelsohn. An interpretation of the notwithstanding clause that allows the electorate to be informed of the competing interpretations of *Charter* rights is necessary to fulfilling the electoral prong of the democratic accountability concept.

B. Legislative Process Democratic Accountability

The second prong of the notwithstanding clause democratic accountability concept is legislative process accountability. Although many notwithstanding clause scholars focus only on the electoral safeguards embedded in section 33, I argue that the notwithstanding clause legislative safeguards are equally important and fall within the section 33 democratic accountability concept.

Multiple elements of the section 33 text point to legislative processes as a limitation on notwithstanding clause use. First, section 33(1) requires any notwithstanding clause invocation to be passed via "an Act of Parliament or of the legislature" through simple majority vote.[175] This legislative process requirement bars the executive from invoking the notwithstanding clause unilaterally, as can be done with the federal *Emergencies Act*.[176] Second, section 33(1) also requires that the notwithstanding clause be "expressly declar[ed]" or in French "expressément déclaré".[177] The SCC in *Ford* determined that "[a] section 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden."[178]

The textual support for a legislative accountability prong is bolstered by the already reviewed context of section 33. The drafters of the notwithstanding clause explicitly sought to elevate democratic processes as a limit on notwithstanding clause use. In reference to legislative processes as an accountability mechanism, Chrétien explicitly recognized the tabling of

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175 *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 33(1).

176 The executive can unilaterally declare a national emergency and use the additional powers under the *Emergencies Act*. However, the executive must pass a motion for confirmation of the declaration of an emergency in the House of Commons and Senate of Canada within seven sitting days. See *The Emergencies Act*, SC 1988, c C-29, s 60. See also Library of Parliament (HillNotes), "The Emergencies Act: Parliament's Role During a National Emergency" (23 February 2022), online: <hillnotes.ca/2022/02/22/the-emergencies-act-parliaments-role-during-a-national-emergency/>.

177 *Canadian Charter of Rights and Freedoms*, *supra* note 1, s 33(1).

178 *Ford*, *supra* note 31 at para 33.

proposed notwithstanding clause legislation as acting as a "red flag".[179] This red flag, initiated through the tabling of an express notwithstanding clause bill in the legislature, alerts other elected representatives, the press, and the public to respond through deliberation on its use and imposing potential electoral consequences.[180]

Based on this textual and contextual analysis of section 33, I propose that there is a legislative accountability prong within the section 33 democratic accountability concept that requires notwithstanding clause bills to proceed through all stages of the legislative process in a manner that encourages transparent and fulsome debate on its merits. I do not identify any additional limitations on notwithstanding clause applications beyond the textual limitations within section 33. My account of the concept of democratic accountability aligns with *Ford* on the express declaration requirements. All that is required by a notwithstanding clause express declaration is a reference to the sections to be set aside by the notwithstanding clause.[181]

The section 33 legislative process requirements have already successfully limited the application of the notwithstanding clause. For example, in 1998, Alberta immediately withdrew its tabled notwithstanding clause bill following significant public outcry against its targeting of disabled individuals sterilized through a government program.[182] In this instance, the tabling of the notwithstanding clause notified the public of the government's intended use of the rights-suspending instrument. The requirement of a full legislative process, rather than an executive declaration, permitted time for public deliberation to signal to the bill that there was a significant political risk if the legislation were to be fully promulgated.

Another example of the practical application of the legislative process accountability mechanism is evident in the role of committees. In both Saskatchewan's 2018 and New Brunswick's

179 *Debates 20 November 1981*, *supra* note 13 at 13042–43.

180 *Ibid*.

181 *Ford*, *supra* note 31.

182 Salvino, "A Tool of Last Resort", *supra* note 14 at 40–41. See also *Bill 26 Debates*, *supra* note 19 at 812–13.

2021 attempted notwithstanding clause invocations, legislative committees passed amendments related to the notwithstanding clause. In New Brunswick, the notwithstanding clause was removed fully at the committee stage.[183] In Saskatchewan, the notwithstanding clause bill was amended to only come into force via proclamation, which the Minister of Education commented would not occur if they achieved a stay pending appeal of the decision that the notwithstanding clause was intended to respond to.[184]

There are also examples of notwithstanding clause uses where legislative processes have been largely ineffective in encouraging legislative and public deliberation. For example, in 1988 Quebec invoked the notwithstanding clause in response to the SCC's decision in *Ford* in less than a week and without any debate in the legislature from any party.[185] Further, in 1986, Saskatchewan passed its notwithstanding clause act in a special accelerated two-day sitting that greatly limited any opportunity for legislative and public deliberation before it was passed.[186] Despite these examples of limited effectiveness of the notwithstanding clause legislative requirements, I argue legislative accountability remains a necessary foundation of the democratic accountability concept and thus constitutes the second prong.

III. IMPLICATIONS OF DEMOCRATIC ACCOUNTABILITY WITHIN SECTION 33: PROPOSING AN ADJUDICATIVE APPROACH FOR THE COURTS

My proposed notwithstanding clause democratic accountability concept has significant implications for judicial review of section 33. I will now delineate an approach for the judiciary to apply the section 33 democratic accountability concept prongs of electoral and legislative accountability. As I will argue, in applying the

183 *New Brunswick Committee 16 June 2020*, *supra* note 20 at 10–11.

184 Saskatchewan, Legislative Assembly, Standing Committee on Human Services, *Hansard Verbatim Report*, No 24 (23 May 2018) at 733.

185 *An Act to amend the Charter of the French Language*, *supra* note 30.

186 Salvino, "A Tool of Last Resort", *supra* note 14 at 35.

democratic accountability concept, both prongs should be interpreted as arising from section 33 alone, rather than an expansion of other constitutional rights or principles.

At the outset I note that my proposed democratic accountability concept does not usurp the separation of powers between the legislature and judiciary. The notwithstanding clause is not a carte blanche for legislatures and has numerous limits embedded within it. It was carefully designed to elevate democratic processes as an accountability tool. This design arose out of democratic deliberation by elected representatives across Canada and was passed through a unanimous vote in the House of Commons.[187] The proposed democratic accountability concept reinforces the separation of powers. The judiciary's role within this concept is not to enforce rare use of the notwithstanding clause, rather its role is to ensure that the deliberate democratic accountability design of section 33 is implemented. Ultimately, under the democratic accountability concept the judiciary takes on a process-oriented approach to ensure that the notwithstanding clause is not employed by the legislature to avoid accountability to their electorate.

The remainder of this section provides guidance on the proposed judicial application of the section 33 democratic accountability concept. First, I address whether *Ford* is determinative and precludes any further judicial interpretation of section 33. I argue that in cases where the notwithstanding clause is used to undermine democratic processes, *Ford* can either be distinguished or there are compelling reasons to depart from the precedent. Second, I argue that my proposed democratic accountability concept and its application to limit the scope of section 33 is supported by the dominant *Charter* interpretation approaches. I engage with a textual, purposive, and progressive interpretation of section 33 to demonstrate that the two prongs of democratic accountability are consistent with judicial interpretation of section 33. Third, I argue that the two

187 The initial application of the notwithstanding clause to s 28 was removed before the *Charter* draft was finalized through a unanimous vote of the House of Commons. See House of Commons, *Debates*, 32nd Parl, 1st Sess, 24 November 1981, at 13151–52.

prongs of democratic accountability are embedded within section 33 alone. Thus, in applying the legislative and electoral prongs of democratic accountability, section 33 itself contains internal limits on its application. This interpretation differs from other section 33 literature that seeks to limit its application by expanding the scope of other constitutional provisions and principles. Fourth, I outline the stages a court should follow in assessing a notwithstanding clause act. Finally, I address the scope of the of both the electoral and the legislative accountability prongs. I discuss the interpretive approach for addressing conflicts between the two branches.

A. FORD IS NOT DETERMINATIVE ON DEMOCRATIC ACCOUNTABILITY WITHIN SECTION 33

The SCC in *Ford* conducted a text-only analysis, determining that the Court should adopt a form-only approach to section 33, that section 33 can be applied in an omnibus manner, and section 33 should not be applied retroactively.[188] I argue that *Ford* is not determinative where section 33 is applied to undermine democratic processes. This argument is two-fold. First, *Ford* can be distinguished in cases where the notwithstanding clause targets democratic processes. Second, in the instance that *stare decisis* applies, I argue that there are compelling reasons to depart from the form-only approach in *Ford*.

1. DISTINGUISHING FORD

If the SCC considers a notwithstanding clause act that potentially undermines democratic processes, I argue that *Ford* can be distinguished. The form-only approach adopted by the SCC in *Ford* responded to the claimant's argument that there should be substantive requirements on notwithstanding clause invocations. The substantive limits claimed were a requirement that the notwithstanding clause act should explicitly refer to the rights being set aside, as opposed to listing the *Charter* section.

[188] *Ford*, *supra* note 31 at para 35.

The SCC, through a textual analysis, found that there was no justification for placing such claimed substantive limits.[189]

I argue that *Ford* can be distinguished from a future notwithstanding clause case where the section 33 use potentially undermines democratic processes. The notwithstanding clause application at issue in *Ford* did not in any way undermine electoral or legislative processes. The application of the notwithstanding clause in *Ford* concerned commercial expression, whereby Québec mandated unilingual French business signs.[190] The court's form-only approach solely responded to the argued claim that there is a substantive requirement that a notwithstanding clause act name the rights being set aside. The factual matrix and issues raised in *Ford* can be distinguished from future notwithstanding clause applications to democratic processes.

2. Compelling Reasons to Depart from the Precedent in Ford

In the instance that *stare decisis* applies, there are compelling reasons to depart from the precedent in *Ford*. The doctrine of *stare decisis* holds that the SCC, as the "apex court",[191] should not depart from its precedents "unless there are compelling reasons to do so".[192] The SCC engages in a balancing exercise between the *stare decisis* principles of certainty and correctness, ultimately determining if "it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error".[193] The horizontal *stare decisis* compelling reasons jurisprudence

189 *Ibid* at para 33.

190 See *Charter of the French Language*, *supra* note 31; *Ford*, *supra* note 31.

191 The Honourable Justice Malcolm Rowe & Leanna Katz, "A Practical Guide to Stare Decisis" (2020) 41 Windsor Rev Leg Soc Issues 1 at 17.

192 *R v Henry*, 2005 SCC 76 at para 44 [*Henry*]. See also *R v Chaulk*, [1990] 3 SCR 1303 at 1353, 1990 CanLII 34 (SCC) [*Chaulk*]; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 139, Rothstein J, concurring with result [*Fraser*].

193 *Canada v Craig*, 2012 SCC 43 at para 27. See also *R v Sullivan*, 2022 SCC 19 at para 66.

identifies a non-exhaustive list of factors where the SCC may exercise its discretion to depart from an existing precedent.[194]

A situation where the notwithstanding clause is applied to undermine democratic processes would represent a "rare"[195] instance where a departure from the existing precedent is warranted. In the case of *Ford*, I argue that the already judicially recognized compelling reason of unworkability[196] warrants a departure from the precedent.[197] *Ford* is unworkable because a form-only approach allows the notwithstanding clause to be applied to undermine the democratic processes designed to act as a safeguard on its use. Such an interpretation of section 33 is antithetical to its purpose that includes democratic accountability mechanisms.

B. The Democratic Accountability Concept Prongs of Electoral and Legislative Accountability Align with Dominant Constitutional Interpretation Approaches

My proposed section 33 democratic accountability concept is also relevant to judicial interpretation of the notwithstanding clause. I argue that the two prongs of legislative and electoral accountability both emanate from section 33 itself and can be applied by the judiciary to restrict applications of the notwithstanding clause. This application of the section 33 democratic accountability concept by the judiciary is permissible because it aligns with dominant approaches to *Charter* interpretation.

The electoral and legislative prongs of the democratic accountability concept were developed by reference to the bilingual text of section 33. I identified five textual elements of section 33 that inform the two prongs of democratic

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194 See *Chaulk*, *supra* note 192 at 1353*; Fraser*, *supra* note 192 at para 139, Rothstein J, concurring in the result.

195 *Henry*, *supra* note 192 at para 44.

196 See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Henry*, *supra* note 192; *R v Jordan*, 2016 SCC 27 [*Jordan*].

197 See *Vavilov*, *supra* note 196; *Henry*, *supra* note 192; *Jordan*, *supra* note 196.

accountability.[198] In my analysis, I argued that the textual elements of section 33 are inadequate in their ability to ensure the notwithstanding clause is limited by meaningful electoral and legislative processes.

The electoral and legislative accountability prongs are also informed by a purposive contextual analysis and the unwritten constitutional principle of democracy. I relied on the historical, linguistic, and philosophic context[199] in developing the scope of the prongs. I identified contextual factors relevant to the purposive analysis of section 33: (1) political compromise of a safety valve and (2) the democratic accountability as a limit on the notwithstanding clause safety valve. These two contextual factors supported the identification of the scope of the electoral and legislative prongs of the section 33 democratic accountability concept.

The unwritten principle of democracy further supports the application of the electoral and legislative prongs of section 33 democratic accountability. Per *City of Toronto*, unwritten constitutional principles can inform the written text of section 33.[200] The unwritten principle of democracy supplements the written text of section 33 to recognize that democratic accountability mechanisms require more than physical access to the ballot box. The unwritten principle of democracy recognizes that "functioning democracy requires a continuous process of

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198 First, s 33(1) requires that the notwithstanding clause act be passed by a simple legislative majority. Second, s 33(1) also requires the notwithstanding clause be invoked by of an express declaration referencing the *Charter* provision to be set aside. Third, per s 33(1) the notwithstanding clause cannot operate notwithstanding democratic rights (ss 3 to 5). Fourth, the notwithstanding clause must be renewed every five years, cyclically aligning with constitutionally required elections. Finally, the textual reference to the "operation" of the notwithstanding clause is (bilingually) ambiguous because it does not expressly bar courts from ruling on the constitutionality of an Act while being precluded from applying a remedy. See *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 33(1), 33(2), 33(3).

199 See also *Big M Drug Mart*, *supra* note 121 at para 117.

200 *City of Toronto*, *supra* note 46.

discussion".[201] This expansive understanding of democracy as an unwritten principle further supports the electoral and legislative prongs of democratic accountability. For democratic processes to be a meaningful constraint on notwithstanding clause use, there must be accountability mechanisms that extend beyond the formal textual requirements of section 33. The electoral and legislative accountability prongs are informed by the unwritten constitutional principle of democracy by acting as meaningful safeguards within the democratic accountability concept.

Finally, although not engaged with while developing the democratic accountability concept, the electoral and legislative accountability prongs also align with a progressive interpretation of section 33. The progressive interpretative approach is a "dominant"[202] approach to *Charter* interpretation.[203] Progressive interpretation rejects a frozen approach to *Charter* interpretation by ensuring provisions can grow to meet "changing societal needs".[204] As already discussed, the notwithstanding clause is undergoing an unprecedented rise in use. The rise in use alone, however, does not represent a changing societal need that warrants a progressive interpretation to section 33. Instead, the context of the notwithstanding uses are key. I identified three instances since 2018 where the notwithstanding clause has been invoked[205] to undermine democratic processes.[206] This unprecedented shift in notwithstanding clause thematic application represents a contemporary need for further judicial interpretation of

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201 *Reference re Secession*, *supra* note 137 at para 68.

202 Peter Hogg, "Canada: From Privy Council to Supreme Court" in Jeffrey Goldsworthy, ed, *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2007) 55 at 87.

203 See *Hunter et al v Southam Inc*, 1984 CanLII 33 at 155 (SCC); *Law Society of Upper Canada v Skapinker*, 1984 CanLII 3 at para 35 (SCC); *Re BC Motor Vehicle Act*, 1985 CanLII 81 at para 53 (SCC).

204 *Re BC Motor Vehicle Act*, *supra* note 203 at para 53.

205 By invoked I am referring to both successful promulgated and effective notwithstanding acts, as well as acts that were tabled but never promulgated.

206 See *Efficient Local Government Act*, *supra* note 21; *Act respecting the laicity of the State*, *supra* note 30; *Protecting Ontario Elections Act*, *supra* note 21.

notwithstanding clause applications that undermine the very democratic processes that were designed to act as a safeguard on its use. The section 33 democratic accountability concept responds to this contemporary need and thus aligns with a progressive interpretive approach.

In sum, the section 33 democratic accountability concept aligns with the dominant approaches of *Charter* interpretation. The two prongs of electoral and legislative accountability were developed in reference to a textual and contextual analysis. The development of the prongs also considered the unwritten constitutional principle of democracy. Finally, although the democratic accountability concept was not developed with reference to the progressive interpretation, it still aligns with such an interpretation. There is a contemporary need for the jurisprudence on section 33 to evolve and respond to the unprecedented threat to democratic processes by the notwithstanding clause. An application of the democratic accountability concept meets responds to such a need and thus aligns with the progressive interpretation to section 33.

C. An Internally Coherent Interpretation of Section 33

In applying the democratic accountability concept, the courts should interpret the two prongs to be embedded in section 33 alone. The concept does not emanate from outside of the notwithstanding clause. Thus, an interpretation of the section 33 democratic accountability concept arises out of section 33 itself, rather than from an extension of other *Charter* rights or unwritten constitutional principles.

Such judicial interpretation arises out of textual and purposive contextual analyses of section 33. Section 33 alone bars an application of section 33 that undermines democratic processes. I argue that this interpretation allows section 33 to be interpreted in a manner that is internally coherent. This internally coherent approach avoids any stretching of other constitutional provisions or principles beyond their purpose.

One advantage of my internally coherent approach is that it responds to critiques of approaches that seek to chip away at the constitutional compromise in section 33 by expanding the

interpretation of other constitutional aspects.[207] For example, a challenge to the claim that section 3 should be expanded through an interpretation of section 33 is that the SCC has already explicitly relied on an analysis of section 33 to develop an expansive interpretation of section 3.[208] Despite the reliance on section 33 to recognize the "special importance"[209] of the section 3 right, the SCC has yet to expand the section 3 interpretation to safeguard political expression and permit cross-pollination of sections 2(b) and 3.[210] Further, the exclusion of section 3 from the notwithstanding clause is only one of many democratic accountability mechanisms embedded within section 33. An interpretation of notwithstanding clause democratic accountability that only expands the interpretation of section 3 ignores the need for a holistic interpretation that acknowledges and implements the concept as a whole.

Additionally, the recent SCC decision in *City of Toronto* undermines a claim that the unwritten constitutional principle of democracy alone can limit the application of the notwithstanding clause. In *City of Toronto*, the SCC majority held that unwritten constitutional principles can only inform the interpretation of written constitutional text, rather than "serve as bases for invalidating legislation."[211] In making this finding on unwritten constitutional principles, the majority opinion directly engaged with the notwithstanding clause, finding that an interpretation of independently applicable unwritten constitutional principles would be a "judicial error of particular significance" to sections 33 and 1 of the *Charter*.[212] The majority expressed a concern that such an unwritten constitutional principle interpretation risked undoing an "undeniable aspect of the [section 33] constitutional

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207 See e.g. Newman, *supra* note 51; Geoff Sigalet, "Notwithstanding Judicial Review: Legal and Political Reasons Why Courts Cannot Review Laws Invoking Section 33" in Biro, *supra* note 51, 168.

208 See *Sauvé II*, *supra* note 45 at para 11.

209 *Ibid*.

210 See generally *Harvey*, *supra* note 147; *Figueroa v Canada (Attorney General)*, 2003 SCC 37; *Sauvé I*, *supra* note 147; *Sauvé II*, *supra* note 45.

211 *City of Toronto*, *supra* note 46 at para 63.

212 *Ibid* at para 60.

bargain".[213] An internally coherent interpretation of the section 33 democratic accountability concept addresses the recent unwritten constitutional principle jurisprudence from *City of Toronto* by emanating from the text of section 33 itself which is informed by the unwritten constitutional principle of democracy.

D. Steps in Analysing the Notwithstanding Clause Application

As already discussed, the electoral accountability prong of the section 33 democratic accountability concept aligns with the interpretation of notwithstanding clause judicial review proposed by Webber,[214] Leckey, and Mendelsohn.[215] This section will briefly address how to conduct the analysis of a valid notwithstanding clause invocation and the act or provision to which it applies.

1. Judicial Review of Notwithstanding Clause Acts

I suggest that the process for evaluating a notwithstanding clause application should begin with the act or provision to which it applies. The court should first determine if the act or provision is a prima facie *Charter* infringement, but for the notwithstanding clause application. If the act or provision is interpreted to be a *Charter* infringement, the court should then proceed to a section 1 analysis under the *Oakes* test framework.[216] If the court finds that there is no *Charter* infringement or that the identified infringement is justified under section 1, the analysis should stop. There is no need to further examine the notwithstanding clause application because it has been rendered unnecessary.

However, if the court finds that the act or provision to which the notwithstanding clause applies both infringes the *Charter* and is not justified under section 1, they should then analyze whether the notwithstanding clause was validly enacted. I argue that this analysis not only considers whether the

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213 *Ibid*.

214 See Webber, *supra* note 51.

215 See Leckey & Mendelsohn, *supra* note 51.

216 *R v Oakes*, 1986 CanLII 46 at paras 62–79 (SCC).

notwithstanding clause was applied retroactively,[217] but also if it was applied in a way that undermines the section 33 democratic accountability concept. I argue that the democratic accountability concept prongs of electoral accountability and legislative accountability represent a red-line rule that can invalidate notwithstanding clause applications. If a notwithstanding clause act undermines any identified mechanisms within electoral accountability or legislative accountability (or both), that part of the notwithstanding clause application will be struck as invalid.

2. Applying the Prongs of Electoral and Legislative Accountability

The section 33 democratic accountability concept should be interpreted as having two applicable prongs that cannot be undermined through a notwithstanding clause application. The electoral and legislative accountability prongs should be interpreted generously to ensure that the application of section 33 reflects its purpose and is informed by the unwritten principle of democracy.

If there is a notwithstanding clause application that undermines either democratic accountability prong, the notwithstanding clause invocation (or a part thereof) will be declared invalid and struck or read down from the act. The application of the democratic accountability concept in judicial review represents a red-line rule that cannot be crossed. The two red-line rule prongs are electoral and legislative accountability.

Earlier I defined both prongs of electoral and legislative accountability. First, electoral accountability is aimed at ensuring the notwithstanding clause is limited by *meaningful electoral processes*. I identified the scope of the electoral accountability prong as safeguarding any process, mechanism, or expression necessary to a citizen casting a vote in a provincial or federal election. Expression includes any communication, speech, or other form of expression responding to government action or inaction. Examples of such expression include campaign

[217] As prohibited by *Ford*, *supra* note 31 at para 35.

spending, political protest, freedom of the press, relevant information for electoral choice, and information on voting locations and methods.

Second, legislative accountability requires notwithstanding clause bills to proceed through all stages of the legislative process in a manner that encourages transparent and fulsome debate on its merits. I do not identify any additional limitations on a notwithstanding clause application beyond the textual limitations within section 33 and set out in *Ford*.[218] Any application of the clause that undermines either branch of the democratic accountability concept, regardless of the extent of the impact, will be declared void.

Admittedly, democratic accountability can be seen as a malleable concept that could be expansively interpreted without limits. My development of only two prongs that can be applied to limit the notwithstanding clause narrows the overapplication of the democratic accountability concept. The prongs of electoral and legislative accountability continue to ensure that the notwithstanding clause can act as a parliamentary supremacy tool, while barring its ability to undermine the very democratic processes designed to hold any use of it accountable to the electorate.

The democratic accountability concept narrowly targets notwithstanding clause acts that undermine legislative or electoral processes, most notably expression necessary for meaningful democratic processes to hold governments accountable. For example, the democratic accountability concept would not have barred Quebec's past use of the notwithstanding clause to immunize differential pension schemes from gender equality under section 15 of the *Charter*.[219] Nor would it have barred Alberta's attempted uses in the contexts of marriage

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218 See *Ford*, *supra* note 31.

219 See *Act respecting the Civil Service Superannuation Plan*, *supra* note 27; *Act Respecting the Teachers Pension Plan*, *supra* note 27; *Act Respecting the Government and Public Employees Retirement Plan*, *supra* note 27; *Act respecting the Pension Plan of Certain Teachers*, *supra* note 27; *An Act Respecting the Pension Plan of Management Personnel*, *supra* note 27.

equality[220] and compensation for sterilization.[221] The concept also would not have had any implications on New Brunswick's attempted invocation of the clause to remove religious and other exemptions from mandatory vaccination policies.[222] All these past attempted and successful notwithstanding clause invocations would have been permitted because they do not undermine legislative processes nor do they restrict expression necessary to a citizen voting under the electoral accountability prong.

The area where the democratic accountability concept is arguably most malleable is in the context of expression that is necessary to a citizen voting. Although broader than the other aspects of the democratic accountability prongs, I argue that the protected expression in this context is also a limited category that is restricted to communication, speech, or other acts of expression responding to government action or inaction. Government in this context refers to provincial and federal governments. An examination of the impugned legislation in *Ford* and the 2018 and 2021 Ontario notwithstanding clause invocations further illustrates the scope of this category.

First, in *Ford*, Quebec's legislation barred multilingual commercial signs and usage of the English company's name on signs. Although disruptive, this application of the notwithstanding clause does not undermine the electoral accountability branch. Commercial signs are not necessary speech, communications, or other acts of expression relevant to citizen voting. If, however, the legislation barred individuals from campaign leafleting using bilingual or anglophone text, such an application would likely undermine the electoral accountability branch and be void.

Second, the context of Ontario's recent notwithstanding clause attempted and actual notwithstanding clause invocations also illustrate of the scope of expression under the electoral prong of democratic accountability. To begin, Ontario's 2018

220 See *Marriage Amendment Act*, *supra* note 19.

221 See *Bill 26 Debates*, *supra* note 19.

222 See Bill 11, *supra* note 20.

application of the notwithstanding clause would not undermine electoral accountability because the concept, which emanates from section 33 itself, applies only to federal, territorial, and provincial elections.[223] Alternatively, Ontario's 2021 notwithstanding clause application to the campaign finance regulations is a direct undermining of the electoral accountability prong and would be declared void under my proposed approach. Provincial election campaign finance regulations are directly linked to speech and communications necessary for citizen voting. Such an application of the notwithstanding clause undermines electoral accountability processes designed to limit notwithstanding clause use through political risk from public deliberation and electoral evaluation.[224]

Before concluding, I will make one final point regarding potential conflict between the two notwithstanding clause democratic accountability prongs. The electoral and legislative accountability prongs were designed as complementary safeguards that work in tandem to ensure all attempted and actual notwithstanding clause invocations are ultimately accountable to the electorate. As they are currently conceptualized, it is difficult to foresee any potential conflicts between electoral and legislative accountability processes. In the instance that there is a conflict, the court should deal with the conflict in a contextual manner and weigh the competing democratic accountability interests. This is a highly contextual analysis that requires the judge to determine which democratic accountability mechanism best aligns with the overarching textual, purposive, and progressive interpretation of section 33.

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223 Section 33 applies only to provincial and federal legislatures, and by extension their electoral processes. Section 30 of the *Charter* extends all *Charter* rights to the territories, including electoral rights. See *Canadian Charter of Rights and Freedoms*, *supra* note 1, ss 3–5, 30; *City of Toronto*, *supra* note 46 at para 2.

224 My proposed democratic accountability concept does not bar legislatures from enacting legislation that impacts expression during the electoral writ. Rather, legislatures retain the ability to pass such legislation, so long as it is justified under s 1 of the *Charter*.

IV. DEMOCRATIC ACCOUNTABILITY CONCEPT SHORTCOMINGS

The section 33 democratic accountability concept is not without its shortcomings. I will address two directly: (1) the limitations of democracy as an accountability tool and (2) conflicting interpretations of section 33 and democracy.

A. LIMITATIONS OF DEMOCRACY AS AN ACCOUNTABILITY TOOL

The drafters of section 33 specifically designed democratic processes to act as a notwithstanding clause accountability mechanism. This designation of democracy as an accountability tool has significant shortcomings both in its ability to be an accountability mechanism and its failure to safeguard the needs of minority groups.

Legislative and electoral processes have inherent limits as a section 33 democratic accountability mechanism. The shortcomings inherent in the section 33 democratic accountability concept are twofold. First, democratic accountability overestimates the ability of the electorate in holding governments accountable. The electorate may not be sufficiently informed to hold the executive and legislatures accountable for uses of the notwithstanding clause. This critique is made by Sabreena Delhon who analyzes the role of the electorate as a notwithstanding clause democratic accountability mechanism. Through her analysis, she questions whether "the electorate is sufficiently enabled to play its role in holding governments accountable".[225] Delhon examines the structural design and the context of section 33's drafting to identify the elevation of electoral processes as an accountability mechanism on notwithstanding clause uses. She argues that the design-concept for use of section 33 to incur political risk "assumes . . . an active, informed, and empowered electorate".[226] Through an analysis of current challenges facing Canadian democracy—such as democratic backsliding, distrust in public institutions, and online toxicity—she questions the capacity of

[225] Delhon, *supra* note 51 at 419.

[226] *Ibid* at 421.

the electorate to play this safeguarding role when section 33 is invoked.

Second, democratic accountability mechanisms reinforce the unique vulnerability of minority groups to the notwithstanding clause. In other writing, I criticize the democratic safeguards embedded in the notwithstanding clause for their process-oriented approach that fails to protect the interests of minority groups.[227] Although legislative processes add "an element of transparency" to alert the public of intended notwithstanding clause invocations, minority groups are, by definition, underrepresented in the legislature to have their interests raised.[228] Additionally, the elevation of democratic elections as an accountability tool on notwithstanding clause use, is poorly suited for minority groups. The majority electorate is often indifferent or in some cases actively supports the application of the notwithstanding clause to target minority groups.[229]

These two identified shortcomings of democracy as an accountability tool are also relevant to my proposed section 33 democratic accountability concept. For the purposes of this article, I acknowledge the normative and practical shortcomings within the notwithstanding clause democratic accountability concept. I have chosen to narrow my approach to identifying the

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227 See Salvino, "Notwithstanding Minority Rights", *supra* note 51.

228 *Ibid* at 407.

229 See e.g. the targeting of minority religious groups in Quebec through the *Act respecting the laicity of the State* that was part of the Coalition Avénir Quebec's election campaign where they won a majority. "Results of October 1st, 2018 general election", *élections Québec* (1 October 2018), online: <electionsquebec.qc.ca/en/results-and-statistics/general-election-results/2018-10-01/>; Maura Forrest, "Francois Legault's CAQ wins majority in Quebec election, ends nearly 50 years of two-party rule", *National Post* (2 October 2018), online: <nationalpost.com/news/politics/francois-legaults-caq-wins-quebec-election-ends-nearly-50-years-of-two-party-rule-in-province>; Andy Riga, "Judges, teachers wearing religious symbols risk losing jobs, CAQ says", *Montreal Gazette* (3 October 2018), online: <montrealgazette.com/news/"uebec/caq-will-fundamentally-change-quebec-legault-says>. See also Salvino, "Notwithstanding Minority Rights", *supra* note 51 at 406–13.

scope and implications of the democratic accountability concept. However, I recognize that there remain serious challenges within this concept that require further reflection even if my proposed approach is adopted.

B. Conflicting Interpretations of Section 33 and Democracy

I will also address the argument that there should be no substantive limits on a notwithstanding clause application (even in the context of democratic processes) because a notwithstanding clause invocation is in itself a democratic practice. Some may argue that the process of tabling, deliberating on, and passing the notwithstanding clause is democratic processes at work and they should not be limited in any way by an unelected judiciary. Such an interpretation rejects any limit (even if democratic in nature) on the legislature's ability to pass notwithstanding clause acts as a representative of the electorate.

This approach is reflected by the already discussed Dwight Newman who examines the role of the notwithstanding clause as a democratic participation tool.[230] He argues that the structural design of the notwithstanding clause excluding democratic rights and requiring express legislation, signals that the foundation of the notwithstanding clause vision is democratic participation.[231] He is critical of scholars who seek to narrow the application of the notwithstanding clause through judicial review, including the suggestion that the judiciary can make declarations on notwithstanding clause acts while the remedy is precluded.[232] Although he admits "serious concern" raised by notwithstanding clause use that threatens democratic participation, he rejects that the solution is increased judicial supervision of its use.[233] Instead he suggests "real efforts at rebuilding civil society and recovering long-standing institutions of responsible government and redeveloping educational systems for strong citizenship".[234]

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230 See Newman, *supra* note 51.

231 *Ibid* at 79.

232 *Ibid* at 73–74.

233 *Ibid* at 80–81.

234 *Ibid* at 80.

My response to such conflicting interpretations of democracy is twofold. First, the drafters of the notwithstanding clause embedded democratic accountability in section 33 through democratic processes. Thus, similar to the application of other provisions of the *Charter*, the judiciary interpreting the Constitution that was developed through democratic processes does not usurp democracy.[235] Instead, Canada as a constitutional democracy is enriched by the judiciary interpreting the democratically-developed Constitution.

Second, many critics of the strong-form judicial review who are concerned with activist courts overinterpreting constitutional text beyond their role within the separation of powers, support process-oriented judicial review.[236] Process-oriented judicial review limits the role of the judiciary in constitutional democracy to safeguarding access to democratic processes. This limited role for the judiciary recognizes that political leaders may seek to undermine (particularly civil and political) constitutional rights to gain an advantage in upcoming elections. As such, the judiciary's intervention in safeguarding democratic processes is necessary to maintain a fair and neutral electoral process.

Although process-oriented judicial review has been rejected in Canada since the adoption of the *Charter*,[237] it is relevant to the democratic accountability concept. The two prongs of electoral and legislative accountability reflect a process-oriented approach where they seek to ensure that the notwithstanding clause cannot be applied to undermine democratic processes intended to act as a safeguard on its use. The process-oriented approach recognizes that even though legislation may be passed through democratic processes, if it undermines these democratic processes the judiciary is permitted to intervene to safeguard a fair and neutral political process. Drawing on the

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235 See generally *Re BC Motor Vehicle Act*, *supra* note 203 at paras 19–20.

236 See e.g. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346; Patrick J Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21:1 UBC L Rev 87 at 131–32.

237 See *Re BC Motor Vehicle Act*, *supra* note 203 at paras 18–22.

process-oriented approach, the democratic accountability concept is narrow and seeks only to uphold the very democratic processes that lend legitimacy to the legislature as an elected institutional body.

These conflicting interpretations of section 33 and democracy can be harmonized if one recognizes the notwithstanding clause can be both a democratic participatory tool and be barred from undermining of the very processes that form the foundation of democracy. Although Newman suggests a range of efforts to rebuild democratic civil society, even narrow process-oriented approaches support the judiciary playing a central role in safeguarding democratic processes from being undermined by the notwithstanding clause.

V. CONCLUSION

I engaged with the intersection of democracy and the notwithstanding clause. Building on and placing myself in conversation with the existing notwithstanding clause literature, I presented my own section 33 democratic accountability concept encompassing the two prongs of electoral and legislative accountability.

The post–2018 notwithstanding clause uses represent an unprecedented shift towards section 33 application undermining democratic processes. In the coming years, the judiciary and likely the SCC will consider new litigation challenging such uses. This article develops a section 33 democratic accountability concept and provides guidance for future courts faced with such notwithstanding clause acts. An internally coherent section 33 analysis bars notwithstanding clause applications that undermine the very democratic processes designed to limit its application. This interpretation reflects an internally coherent interpretation of section 33 and has implications for Canada's constitutional democratic system as a whole.