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RESEARCH NOTE / NOTES DE RECHERCHE

A Paper Tiger No More? The Media Portrayal of the Notwithstanding Clause in Saskatchewan and Ontario

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Abstract

Since 2017, four provincial legislatures have introduced bills invoking the controversial notwithstanding clause. We present an original dataset of news articles from 10 different outlets that discussed the clause while these bills were being debated in Saskatchewan and Ontario. Empirically, although the clause is typically portrayed accurately, we find over one-fifth of articles about the clause did not indicate that it must be included in legislation. Normatively, the clause was twice as likely to be portrayed negatively as it was positively, and the type of portrayal was strongly associated with the ideological orientation of the news outlet. The rate of negative portrayals was similar across the two provinces, which suggests that attitudes toward the clause may endure beyond the policy issue itself or the level of media visibility.

Resumé

Depuis 2017, quatre législatures provinciales ont présenté des projets de loi invoquant la clause dérogatoire controversée. Nous présentons un ensemble original d'articles de presse provenant de dix points de vente différents qui ont discuté de la clause pendant que ces projets de loi étaient débattus au Saskatchewan et en Ontario. De manière empirique, bien que la clause soit généralement présentée de manière précise, nous constatons que plus d'un cinquième des articles sur la clause n'indiquaient pas qu'elle devait être incluse dans la législation. De manière générale, la clause était deux fois plus susceptible d'être présentée de manière négative que positive, et le type de présentation était fortement associé à l'orientation idéologique du média. Le taux de représentation négative était similaire dans les deux provinces, ce qui suggère que les attitudes à l'égard de la clause peuvent perdurer au-delà de la question politique elle-même ou du niveau de visibilité médiatique.

Keywords: notwithstanding clause; media; Charter of rights; provincial politics; courts

Mots-clés : clause dérogatoire; médias; Charte canadienne des droits et libertés; politique provinciale; tribunaux

Introduction

Canada's notwithstanding clause is making a comeback. The controversial clause permits a provincial legislature or the federal Parliament to declare that a law shall operate notwithstanding certain provisions in the 1982 Canadian Charter of Rights and Freedoms. Until recently, it had been used so infrequently that some wondered whether it was on "a path towards illegitimacy as a result of its non-use and political repudiation" (Albert, 2018: 147). However, four provincial legislatures have introduced bills invoking the notwithstanding clause since 2017, two of which have passed into law. After decades of scholarship attempting to answer why the clause was used so infrequently (Kahana, 2001; Leeson, 2000), concerns now abound about the clause's normalization (Leckey, 2019; Sirota, 2017).

The renewed political saliency of the notwithstanding clause provides an opportunity to explore how it is portrayed by Canadian media. This research note provides an opportunity to answer the following questions: How, during periods of increased scrutiny, is the notwithstanding clause described in the media? Empirically, is the clause depicted accurately or inaccurately? Normatively, is it depicted positively or negatively? Does its depiction depend on the ideological orientation of the news outlet?

To answer these questions, we compiled an original dataset of 329 articles from 10 Canadian news outlets referencing the notwithstanding clause in Ontario and Saskatchewan between 2017 and 2018. We then undertook a qualitative content analysis to assess how the notwithstanding clause was described in these outlets. We find that there was considerable media attention paid to the notwithstanding clause, particularly in Ontario. Empirically, there were few outright errors, and misreporting was rare across news outlets, but over one-fifth of articles in our dataset whose main topic was the notwithstanding clause did not indicate that the clause must be contained in legislation, and very few referenced past uses of the clause or the reasons for its existence.

Normatively, the notwithstanding clause was approximately twice as likely to be portrayed negatively as it was positively, and its characterization as an "override" of Charter rights was ubiquitous. An author's tone toward the notwithstanding clause was strongly associated with the news outlet's ideological orientation, with authors in the conservative *National Post* and *Toronto Sun* far more likely to portray the clause positively. More surprisingly, there was minimal variation between the two provinces, with a roughly 2:1 ratio of negative to positive portrayals in articles about both Saskatchewan and Ontario. The results demonstrate that while the notwithstanding clause is subject to far more negative than positive portrayals, it has its defenders in conservative Canadian news outlets.

The Notwithstanding Clause: History and Scholarship

Section 33 of the 1982 Canadian Charter of Rights and Freedoms authorizes legislatures to "expressly declare" that "an Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15" of the Charter, which include "fundamental freedoms," legal rights and equality rights. The notwithstanding clause is a legislative, not executive, instrument: sections 33(1) and

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33(4) explicitly reference "Parliament or the legislature of a province." Legislation invoking the clause ceases to have effect five years after coming into force, though it can be re-enacted. At the time of the Charter's entrenchment in 1982, it was the first instrument of its kind in any national or international constitutional rights document (Grover, 2005: 488).

The academic literature on the notwithstanding clause has been primarily normative (for exceptions, see Hiebert, 2019; Kahana, 2001). Critics see the clause as a threat to minority rights and argue that the judiciary should have the ultimate say on rights issues (Sirota, 2017; Whyte, 1990). Proponents see the clause as a mechanism to foster inter-institutional dialogue, correct judicial error and maintain Canada's tradition of parliamentary rights protection (Russell, 2007; Newman, 2019). Rousseau and Côté (2017: 400) show that Quebec's francophone scholars have been much more favourable toward the notwithstanding clause than anglophone Canadian scholars, reflecting a "different moral conception of parliamentary sovereignty in matters of collective interest, especially when considering Quebec cultural vulnerability." This different moral conception is palpable in the Quebec National Assembly's history of invoking the clause. In 1982, the National Assembly repealed and replaced every existing piece of Quebec legislation with identical legislation invoking the notwithstanding clause. Quebec's omnibus use continued until December 1985, when the Quebec Liberals replaced the Parti Québécois in government (Kahana, 2001: 281).

The first major empirical study of the notwithstanding clause was done by Tsvi Kahana (2001). If we count Quebec's omnibus use as a single use, exclude bills that did not pass and exclude re-enactments, Kahana's data show that the notwithstanding clause had been used 17 times: 14 times by Quebec and once each by Yukon, Alberta and Saskatchewan. Kahana found only four bills containing the clause had received significant media attention: Saskatchewan's 1986 back-to-work law, Quebec's 1988 sign law in response to *Ford v. Quebec* (1988), the 2000 Alberta Marriage Act and Alberta's 1998 bill to limit compensation for forced sterilization—the only bill (to that point) containing the notwithstanding clause that did not pass (Kahana, 2001: 256–58, 269–72).

To update Kahana's (2001) data, we searched the legal databases Quicklaw and CanLII and found that the notwithstanding clause has been used three times in new laws that have passed since 2001, bringing the total number of uses of the notwithstanding clause to 20 (like Kahana, we exclude re-enactments and count Quebec's omnibus use as a single use). The first recent use was Quebec's 2005 Act to Amend Various Legislative Provisions of a Confessional Nature in the Education Field, part of the Quebec's elimination of religious instruction in public schools. In addition to re-enacting existing uses of the notwithstanding clause from 2000 that were expiring, section 14 permitted schools to continue to offer religious programs to their students until June 2008, after which it was no longer necessary.

The second and third recent laws containing the notwithstanding clause were Saskatchewan's 2018 School Choice Protection Act and Quebec's 2019 Act to Respect the Laicity of the State. However, two other bills containing the clause were introduced but did not pass: Ontario's 2018 Efficient Local Government Act, which was ultimately removed from the order paper, and New Brunswick's 2019 Act Respecting Proof of Immunization, which was defeated in a free vote.

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We discuss the Saskatchewan and Ontario bills, the first to be introduced during this period, below.

Saskatchewan's School Choice Protection Act (2018)

Saskatchewan's use of the notwithstanding clause was in response to a decision from the Saskatchewan Court of Queen's Bench in *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212* (2017). Although section 93 of Canada's Constitution Act, 1867 permits Saskatchewan to fund separate Catholic and Protestant schools, the Good Spirit School Division (GSSD) challenged the constitutionality of government funding for non-Catholic students to attend the St. Theodore Roman Catholic School. The GSSD argued that the government decision violated the section 2(a) right to freedom of religion and section 15 equality rights in the Canadian Charter of Rights and Freedoms (2017: paras. 1–4). In the decision, Justice Layh held that Saskatchewan's funding of non-minority faith students infringed these sections of the Charter and was not a reasonable limit. Therefore, the impugned provisions were of no force or effect (2017: para. 475).

On May 1, 2017, Saskatchewan premier Brad Wall announced his government's intention to use the notwithstanding clause in response to the decision, which "if allowed to stand, would force about 10,000 non-Catholic students out of Catholic schools" (Saskatchewan, 2017). The School Choice Protection Act was introduced at first reading on November 8, 2017, and received royal assent on May 30, 2018. The law amends The Education Act, 1995 to continue providing government funding to boards of education regardless of the religious affiliation of pupils or their parents/guardians and invokes the notwithstanding clause to insulate the bill from sections 2 and 15 of the Charter. Because the government also appealed the judicial decision, the law's coming into force has been delayed. In March 2020, Saskatchewan's Court of Appeal overturned the Court of Queen's Bench decision, finding the Good Spirit School Division's rights were not affected. As of writing, the public-school boards have announced they will seek leave to appeal to the Supreme Court of Canada.

Ontario's Efficient Local Government Act (2018)

On September 10, 2018, Justice Belobaba of the Ontario Superior Court of Justice ruled in *City of Toronto et al. v. Ontario (Attorney General)* (2018) concerning the constitutionality of Ontario's Better Local Government Act. That legislation, which was introduced on July 30 and received royal assent on August 14, had reduced the size of Toronto's city council from 47 to 25 wards. However, because the 47-ward municipal election campaign period had begun in May and the election was scheduled for October, the City of Toronto challenged that the law violated the right to vote and candidates' rights to freedom of expression (sections 3 and 2(b) of the Charter). Justice Belobaba ruled that the law infringed the right to freedom of expression and was not a reasonable limit. He struck down the impugned provisions and ordered that the election proceed with 47 wards as originally planned (paras. 1–11).

Later that day, Ontario premier Doug Ford announced that his government would appeal the ruling but, in the meantime, would re-enact the legislation

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with the notwithstanding clause. On September 12, the government introduced the Efficient Local Government Act, the first-ever piece of Ontario legislation to invoke the notwithstanding clause. To re-enact the ward changes, the bill applied the notwithstanding clause to all of the sections of the Charter to which it can apply (sections 2 and 7–15). One week later, with the Efficient Local Government Act still making its way through the Ontario legislature, the Court of Appeal for Ontario ruled in *Toronto (City) v. Ontario (Attorney General)* (2018). The three-judge panel unanimously held that it was very likely that Justice Belobaba erred in his application of the law and therefore granted a stay of the lower court ruling, allowing the election to go forward with 25 wards (para. 11). The Ford government withdrew the Efficient Local Government Act from the order paper, as the notwithstanding clause was no longer necessary. On October 22, 2018, Toronto held its 25-ward election. Although the case was moot, the Ontario Court of Appeal officially overturned Justice Belobaba's decision a year later in *Toronto (City) v. Ontario (Attorney General)* (2019), a 3–2 decision in which the majority found the Better Local Government Act constitutional. The Supreme Court of Canada granted leave to appeal in March 2020.

Data and Methods

Macfarlane (2008) examined news articles in the *Globe and Mail* and *National Post* that discussed seven Supreme Court of Canada Charter decisions between 2002 and 2007. He found 26 articles discussed the notwithstanding clause, and nearly two-thirds (17/26) of these articles described it as "'overriding' or 'overturning' rights, or 'rejecting,' 'overruling' or 'opting out' of the Charter" (312). Moreover, rights were represented in a "remarkably consistent" way by the two newspapers, although the *Globe* mentioned the notwithstanding clause at nearly twice the rate of the *Post* (322).

Our study builds on Macfarlane's research by exploring how the clause is depicted during times of heightened scrutiny due to its actual inclusion in a bill. Our cases were limited to Saskatchewan and Ontario because at the time we constructed our dataset, Quebec and New Brunswick had not yet introduced their legislation. We constructed a dataset of news articles about Ontario and Saskatchewan's legislation using searches from a total of 10 online news sources: the *Globe and Mail*, the *National Post*, CBC News, CTV News, Global News, *Maclean's*, the *Toronto Star*, the *Toronto Sun*, the *Saskatoon StarPhoenix* and the *Regina Leader-Post*. These sources were chosen because they included the two highest-circulating newspapers with a national scope (*Globe and Mail* and *National Post*), four major national news websites (CBC, CTV, Global and *Maclean's*) and the two highest-circulating English-speaking newspapers in Saskatchewan (*StarPhoenix* and *Leader-Post*) and Ontario (*Star* and *Sun*). It also allowed us to incorporate newspapers with ideological diversity, including outlets that have progressive (*Toronto Star*) and conservative (*National Post* and *Toronto Sun*) editorial leanings (see Thibault et al., 2020: 2, 10).

To construct the dataset, searches were done separately on the 10 online news outlets using variations of "Toronto and notwithstanding clause," "Saskatchewan and notwithstanding clause," and "notwithstanding clause." We limited searches

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to articles published between the date of the *Good Spirit* decision (April 20, 2017) and one week after the passage of Saskatchewan's law (June 6, 2018), and between *City of Toronto et al. v. Ontario* (September 10, 2018) and one week after the Court of Appeal's stay decision (September 26, 2018). We excluded letters to the editor, articles that did not mention the clause, and videos accompanied by a brief blurb. Articles published by more than one news source were only counted once. The final dataset included 329 articles: 49 about Saskatchewan and 280 about Ontario. Two coders then coded these articles using qualitative content analysis, a method used to create results that are rigorous, reliable, replicable and valid (Sampert and Trimble, 2010: 326). Our codebook drew from Canadian political science scholarship on media coverage of the Supreme Court of Canada (Sauvageau et al., 2006), federal elections (Soroka et al., 2006) and Canadian politics generally (Sampert and Trimble, 2010). The Appendix contains the codebook and a description of the coding process. SPSS software was used for all calculations and statistical analyses.

We began with four hypotheses. First, we hypothesized that portrayals of the notwithstanding clause would be more negative than positive. Second, because the strongest critics of Charter-based judicial review have tended to be conservative political parties and conservative scholars (Morton and Knopff, 2000; Brodie, 2002) and because the Saskatchewan and Ontario governments were led by conservative parties, we predicted that conservative news outlets (the *National Post* and *Toronto Sun*) would be more likely to portray the notwithstanding clause positively. Third, and relatedly, we predicted that conservative news outlets would be more likely to critique the judicial decision to which the clause was used as a response. Fourth, we predicted the notwithstanding clause would be portrayed more negatively in opinion articles about Ontario than in opinion articles about Saskatchewan, as the policy issue was much more visible and contested in Ontario.

Results

Of the 329 articles in the dataset, 49 were written about Saskatchewan and 280 were written about Ontario. The Ontario legislation containing the clause had extraordinarily high visibility, with an average of 16.5 unique articles per day during the 17-day period. By contrast, the busiest period of reporting on the clause in Saskatchewan (27 articles between May 1 and May 17, 2017) amounted to 1.6 articles per day. In terms of genre, 61.1 per cent of articles were "hard news" and 38.9 per cent were opinion articles (op-eds and editorials). In 69.6 per cent of articles, the first author was a person employed by the outlet; in 13.4 per cent, there was an unnamed author (usually "CBC News" or "Canadian Press"); in 12.5 per cent, the author was a guest columnist; and in 4.6 per cent, the article was an unsigned editorial.

The articles in the dataset came from 10 different news sources: 29.8 per cent were from national newspapers (the *Globe and Mail* and *National Post*), 26.7 per cent from national online news sources (CBC News, CTV News, Global News and *Maclean's*) and 43.5 per cent from regional newspapers (*Toronto Star*, *Toronto Sun*, *Regina Leader-Post* and *Saskatoon StarPhoenix*). The *Toronto Star* ($n = 77$, 23.4%) had the most articles in the dataset while Global News ($n = 7$,

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Table 1 Main Topic

	Ontario	Saskatchewan	All articles
Notwithstanding clause	48.6%	42.9%	47.7%
Policy issue	23.9%	24.5%	24.0%
Court case(s)	12.9%	14.3%	13.1%
Other	14.6%	18.4%	15.2%
	$n = 280$	$n = 49$	$n = 329$

2.1%) had the fewest. The two regional Ontario outlets did not contain any articles on the Saskatchewan legislation, whereas the Saskatchewan outlets contained five articles on the Ontario legislation.

Each article was coded for its main topic, which Table 1 breaks down into four categories: the notwithstanding clause (both its specific use and in the abstract), the policy issue in the relevant jurisdiction (the size of Toronto's city council and the funding of Catholic schools), the court cases in the relevant jurisdiction (including the Court of Appeal's decision to stay Justice Belobaba's ruling in Toronto) and any other topic. Nearly half (47.7%, $n = 157$) of the articles in the dataset were on the topic of the notwithstanding clause.

We measured whether the articles described the historical reasons for the notwithstanding clause's inclusion in Charter. An article only needed some mention of the reasons for its inclusion; for example, one article that included the sentence "The notwithstanding clause was part of the original political compromise that created the Charter" was coded as "yes" (Fine, 2017). Historical reasons were mentioned by only 13.4 per cent (44/329) of all articles and 24.2 per cent (38/157) of articles whose main topic was the notwithstanding clause (see Table 2). Articles about Ontario were less likely to mention the historical reasons (22.1% in Ontario, 38.1% in Saskatchewan). Table 2 also includes data on whether articles discussed any of the five most prominent uses of the clause: Quebec's omnibus use from 1982 to 1985, Saskatchewan's 1986 back-to-work legislation, Quebec's 1988 sign law, Alberta's 2000 marriage law and (for Ontario only) Saskatchewan's 2018 school choice law. Mention of previous uses was rare. Even in articles on the topic of the notwithstanding clause, only one-quarter (24.8%) mentioned any previous use of the clause. However, Saskatchewan's one previous use (its 1986 back-to-work legislation) was mentioned in 47.6 per cent of all articles about Saskatchewan whose main topic was the clause, where it was mentioned in just 5.1 per cent of articles about Ontario on the topic. Surprisingly, Saskatchewan's more recent use—legislation that had passed only four months earlier—was only mentioned in 7.4 per cent of Ontario articles on the topic of the notwithstanding clause.

To assess accuracy, we measured whether authors made clear and obvious errors about the notwithstanding clause. Factual errors were made in 12 articles (3.6%), and 9 of those articles were on the topic of the notwithstanding clause (5.7% of articles on that topic). Half of the errors occurred in hard news articles and half in opinion articles (six each). Of the 12 errors, 4 misstated the number of total previous uses of the clause, each claiming it had been used five or fewer times (the correct number was 18 or 19, depending on when the article was written). Four other articles failed to mention Quebec's 2005 religious education law when describing

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Table 2 Historical Reasons and Past Uses

	Historical reasons	Quebec omnibus (1980s)	Saskatchewan back-to-work (1986)	Quebec signs (1988)	Alberta marriage (2000)	Saskatchewan school choice (2018) (Ontario only)	Any past use
All articles	13.4% (44/329)	1.8% (6/329)	5.5% (18/329)	4.6% (15/329)	3.6% (12/329)	3.9% (11/280)	14.3% (47/329)
Main topic: NWS clause	24.2% (38/157)	3.8% (6/157)	10.8% (17/157)	8.9% (14/157)	7.0% (11/157)	7.4% (10/136)	24.8% (39/157)

the most recent use of the notwithstanding clause. Four additional errors were made: one article misstated the sections to which the clause can apply; one erroneously claimed the prime minister had "powers within the Charter to overrule" provincial use of the clause; one article incorrectly stated that the Saskatchewan government only intended to introduce legislation containing the clause once the Supreme Court of Canada had ruled; and one article contained several errors in a single sentence, most notably regarding the Supreme Court's ability to "strike down" legislation invoking the clause (Postmedia Network, 2017).

Overall, explicit errors were rare, and many were relatively minor, such as failing to mention Quebec's 2005 use of the clause. However, beyond errors of commission, there were also errors of omission—namely, whether the author made clear that the notwithstanding clause must be contained in legislation. Although we coded *any* reference to a law, bill, legislation, legislatures or legislators as "yes," 29.8 per cent of all articles did not contain any indication that the notwithstanding clause needed to be contained in legislation, including 21 per cent of articles whose main topic was the notwithstanding clause.

Assessing the judicial decision

We also measured whether the authors of the articles assessed the judicial decisions to which the clause was used as a response and whether the assessment was positive, neutral or negative. To be coded as an assessment, the author needed to make some independent determination about the judgment, which excluded articles whose author merely mentioned the case or quoted a third-party assessment. Examples of negative assessment include legal scholar Dwight Newman calling the decision in *Good Spirit* "quite frankly, a mess" (Newman, 2017) and political scientist Emmett Macfarlane's assessment that the judge in *Toronto v. Ontario* "appears to have arrived at his ruling using incoherent legal arguments" (Macfarlane, 2018). Examples of positive assessments included the *Toronto Star* editorial board's description of Belobaba's decision as "a pithy, persuasive ruling" (Star Editorial Board, 2018) or *Toronto Sun* columnist Jim Warren's assertion that the ruling "reflects what everyone with common sense agrees" (Warren, 2018).

In total, 13.7 per cent of articles in the dataset ($n = 45$) assessed one of the decisions, and those assessments were largely negative: 15.6 per cent ($n = 7$) were positive, 4.4 per cent ($n = 2$) were neutral and 80 per cent ($n = 36$) were negative. Because only nine articles assessed the Saskatchewan decision (three positive and six negative), Table 3 only describes assessments of the Ontario Superior Court of Justice (OSCJ) decision, 83.5 per cent (30/36) of which were negative. We then organized the 10 news outlets into three categories based on ideological orientation: progressive (*Toronto Star*), conservative (*Toronto Sun* and *National Post*) and centrist (the other seven sources). The *Toronto Star* accounted for three-quarters of all positive assessments of the OSJC decision, and 60 per cent (3/5) of its assessments were positive. By contrast, in all other venues combined, there was only one positive assessment, with 91.7 per cent (22/24) of negative assessments coming from the conservative outlets. The conservative outlets were the most likely to focus on Belobaba's decision in the first place, as 77.8 per cent (28/36) of all

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Table 3 Assessment of Ontario Superior Court of Justice (OSCJ) Decision

	Progressive (*Toronto Star*)	Centrist (7 outlets)	Conservative (*National Post* and *Toronto Sun*)	All outlets
Positive	60%	0%	4.2%	11.1%
Neutral	0%	14.3%	4.2%	5.6%
Negative	40%	85.7%	91.7%	83.3%
	n = 5	*n* = 7	*n* = 24	*n* = 36

assessments of Belobaba's decision came from those papers, which contained only 32.1 per cent of all articles in the dataset.

Measuring tone

Coders also assessed the *author's* tone—positive, neutral or negative—toward the notwithstanding clause itself. Coders erred on the side of neutrality; the author needed to be primarily and clearly positive or negative to be coded accordingly (see Soroka et al., 2006: 2). Likewise, if an article quoted sources primarily critical about the notwithstanding clause but the author was neutral toward the clause, that tone was coded as neutral. An example of a positive portrayal is political scientist Ted Morton's assertion that the clause "represents a creative middle ground between parliamentary supremacy and judicial supremacy" (Morton, 2018); an example of a negative portrayal comes from columnist Andrew Coyne in the *National Post*: "It is, to be sure, part of the charter, as much as the rights whose override it permits . . . but that does not oblige us to accept that it should be" (Coyne, 2018). Titles were not considered as part of the tone.

Assessing the author's tone enabled us to situate our project in the larger theoretical and practical debates about the proper role of courts and legislatures in constitutional rights protection. Those with a negative tone toward the clause tend to support a judicial "final say" over rights interpretation, suggesting that the judiciary best protects minorities from rights-infringing governments (see Sirota, 2017; Whyte, 1990). Those with a positive tone toward the clause, by contrast, argue that it enables legislatures to offer different interpretations of rights when unelected judges misinterpret the constitutional provisions or otherwise get the decision wrong (Baker, 2010; Newman, 2019; Russell, 2007). Insofar as media coverage can be an important driver of public opinion, and given limited public knowledge of the notwithstanding clause (Macfarlane, 2008), a tone analysis can determine the extent to which views on the judiciary's "final say" are present in media analysis—and can potentially influence public opinion—in an era where Canadian courts adjudicate policy issues of considerable importance.

Unsurprisingly, the articles coded as "hard news" were overwhelmingly neutral toward the notwithstanding clause (199/201, 99%), with only two portraying the clause negatively. As such, our analysis of tone below focusses solely on the 128 opinion articles. In contrast to hard news articles, the tone varied considerably in opinion articles: 42.2 per cent portrayed the clause negatively, 39.1 per cent neutrally and 18.9 per cent positively. Of opinion articles whose main topic was the

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Table 4 Tone towards Notwithstanding Clause by News Outlet

	Opinion articles*			
	Progressive	Centrist	Conservative	All outlets
Positive	9.7%	6.8%	34.0%	18.8%
Neutral	22.6%	38.6%	49.1%	39.1%
Negative	67.7%	54.5%	17.0%	42.2%
	n = 31	*n* = 44	*n* = 53	*n* = 128
	Opinion articles, main topic = Notwithstanding clause**			
	Progressive	Centrist	Conservative	All outlets
Positive	17.6%	11.8%	50.0%	28.6%
Neutral	11.8%	23.5%	27.3%	21.4%
Negative	70.6%	64.7%	22.7%	50.0%
	n = 17	*n* = 17	*n* = 22	*n* = 56

*tau-b = −0.406; $p < .001$
**tau-b = −0.379; $p < .001$

notwithstanding clause ($n = 56$), 50 per cent were negative, 21.4 per cent were neutral and 28.6 per cent were positive (see Table 4). Contrary to our hypothesis, provincial variation in tone for opinion articles was minor (41.8% negative in Ontario, 44.4% negative in Saskatchewan) and not statistically significant.

We did find, however, that a newspaper's ideological orientation had a strong effect on the author's tone toward the notwithstanding clause in opinion articles. This was especially true for the two conservative outlets, which accounted for 75 per cent (18/24) of opinion articles that portrayed the clause positively, though they accounted for only 41.4 per cent (53/128) of all opinion articles. The positive-to-negative ratio in the conservative outlets was 2:1, compared with a 1:7 ratio in the progressive *Toronto Star* and a 1:8 ratio in centrist outlets (though centrist outlets had a higher percentage of neutral articles than the *Star*). Notably, authors from the *Globe and Mail* were 7.5 times more likely to be negative about the clause ($n = 15$) than positive ($n = 2$).

Finally, drawing from Macfarlane (2008), we measured whether the notwithstanding clause was described as an "override" of Charter rights. "Override" was ubiquitous: it was used approvingly either as a verb, noun or both in 55.9 per cent of all articles in the dataset and in 72 per cent of articles whose main topic was the notwithstanding clause. Interestingly, "override" was used more in hard news (67.7%, 136/201) than in opinion articles (37.5%, 48/128). However, within opinion articles, the author's tone toward the notwithstanding clause was associated with the use of "override": the term was used in 33 per cent of opinion articles that were positive toward the notwithstanding clause, compared with 51.9 per cent of articles that were negative ($V = 0.262$, $p < .05$).

Analysis

Empirically, our analysis demonstrates that there are important gaps in the way the notwithstanding clause is described in Canadian media. While explicit factual errors were rare, there were a troubling number of what we would call "errors of

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omission." Of the articles whose main topic was the notwithstanding clause, less than one-quarter made any reference to the historical reasons for its inclusion (24.2%) or any previous use (24.8%). More importantly, more than one-fifth of articles on the topic of the notwithstanding clause (21%) omitted any reference to the fact that it must be contained in legislation, which could potentially leave readers with the mistaken impression that the clause can be invoked by executive order. Recognizing that the notwithstanding clause is a legislative instrument is crucial to understanding inter-institutional interactions and the way in which rights are debated, protected and violated. We hope future media articles on the clause will make clearer its legislative dimension.

Our first hypothesis, that the notwithstanding clause would be portrayed more negatively than positively, was confirmed. While hard news articles were overwhelmingly neutral, 42.2 per cent of opinion articles portrayed the clause negatively, compared with 18.9 per cent positively; when the main topic was the notwithstanding clause, 50 per cent were negative and 28.6 per cent were positive. Moreover, the characterization of the clause as a mechanism to "override" rights was pervasive. The term was contained in 72 per cent of all articles whose main topic was the clause and, surprisingly, in 33.3 per cent of opinion articles that portrayed the notwithstanding clause positively. As Knopff et al. (2017: 624–25) have argued, labelling the clause as an "override" reinforces a simplistic and "court-centric" view of rights adjudication, whereby legislatures infringe rights and courts protect them. The alternative view put forward by proponents—that the notwithstanding clause enables legislatures to engage in dialogue with courts over the proper interpretation of Charter rights—remains a minority view in Canadian news outlets. The idea that judges should have the "final say" on rights issues seems to have permeated dominant media commentary on the clause.

Our second hypothesis, that conservative news outlets would be more likely to support the notwithstanding clause, was also strongly confirmed. The divergence between the *Globe and Mail* (2 positive, 15 negative) and the *National Post* (13 positive, 8 negative), in particular, is in stark contrast to Macfarlane's (2008) findings, in which he found the two papers were "remarkably consistent in their presentation of rights issues" (322). Yet it is very much in keeping with broader trends in twenty-first century Canadian politics and political science, where the strongest proponents of the notwithstanding clause have been conservative parties and commentators (as discussed in Macfarlane, 2017). Our third hypothesis was also confirmed for articles about Ontario: conservative outlets were the most likely to have a negative assessment of the judicial decision in Ontario, with the progressive *Toronto Star* the only outlier in terms of having more positive than negative assessments of that decision. Our final hypothesis was that the notwithstanding clause would be portrayed more negatively in opinion articles about Ontario than about Saskatchewan, due to the urgency and heightened visibility of the issue in Ontario. This hypothesis was not confirmed. While the number of opinion articles about Saskatchewan was small ($n = 18$), provincial differences in evaluations of the notwithstanding clause were minor and not statistically significant.

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Conclusion

This study uses an original dataset of news articles in Saskatchewan and Ontario to provide the first systematic analysis of the portrayal of the notwithstanding clause during a period in which governments were introducing legislation invoking it. Our data show that Canadian news outlets paid considerable attention to the notwithstanding clause, particularly in Ontario. Empirically, we find that legislative dimension of the clause is often absent in media analyses, with over one-fifth of the articles on the topic of the notwithstanding clause omitting any reference to the fact that it must be contained in legislation. Normatively, the notwithstanding clause was twice as likely to be portrayed negatively as it was positively, with surprisingly little variation between Saskatchewan and Ontario. The ideological orientation of the news outlets was strongly associated with the way in which the clause was portrayed, with few positive portrayals outside the *Toronto Sun* or *National Post*. Assessments of the lower court decisions that provoked governments to respond with legislation containing the notwithstanding clause were also overwhelmingly negative from news outlets, with the exception of the progressive *Toronto Star*. The collective media narrative, albeit one that varies by news outlet, seems to be that the judges in Saskatchewan and Ontario got their decisions wrong but that the provincial legislatures should not use the notwithstanding clause to correct them. In essence, the media narrative largely supports a view that judges should have the "final say" on rights issues, even when those decisions are open to criticism.

In addition to its empirical findings, this research note also provides directions for scholarship. First and foremost, scholars should also explore how the clause was portrayed when it was included in the two most recent bills in Quebec and New Brunswick. These bills provide examples of the clause being invoked for policy issues that are likely subject to far more ideological and moral disagreement (wearing religious symbols and mandatory vaccination) than the funding of non-Catholic students in Saskatchewan or the size of Toronto's city council. Moreover, the Quebec case provides an opportunity to test whether Rousseau and Côté's (2017) finding—that Quebec's francophone scholars had more positive views of the notwithstanding clause than did anglophone Canadian scholars—is also true of Quebec's francophone media.

Second, scholars should delve more deeply into understanding why the notwithstanding clause has suddenly become so popular among provincial governments, relative to the preceding 30 years. Did Saskatchewan's legislation on a relatively noncontroversial topic pierce a consensus that the notwithstanding clause could never again be used outside of Quebec? Does it reflect the questionable jurisprudence used in the Saskatchewan and Ontario lower court decisions? Or has the clause been driven by something else entirely, such as ideology or anti-elite sentiment? Analyses of policy documents, legislative debates and interviews with government officials can provide a fruitful explanation for why the clause once seen as a "paper tiger" (Leeson, 2000) has been revived. One thing is clear: provincial governments have been increasingly emboldened to introduce legislation containing the notwithstanding clause, even as media commentary remains largely skeptical about its benefits.

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References

Albert, Richard. 2018. "The Desuetude of the Notwithstanding Clause." In *Policy Change, Courts, and the Canadian Constitution*, ed. Emmett Macfarlane. Toronto: University of Toronto Press.

Baker, Dennis. 2010. *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*. Montreal and Kingston: McGill-Queen's University Press.

Brodie, Ian. 2002. *Friends of the Court: The Privileging of Interest Group Litigants in Canada*. Albany: SUNY Press.

City of Toronto et al. v. Ontario (Attorney General), [2018] ONSC 5151.

Coyne, Andrew. 2018. "The Notwithstanding Clause Has Always Been like an Unexploded Bomb." *National Post*, September 11. https://nationalpost.com/opinion/andrew-coyne-the-notwithstanding-clause-has-always-been-like-an-unexploded-bomb-in-ontario-it-just-went-off.

Fine, Sean. 2017. "Saskatchewan to Invoke Charter Clause over Catholic School Funding." Globe and Mail, May 1. https://www.theglobeandmail.com/news/national/saskatchewan-to-invoke-charters-notwithstanding-clause-over-catholic-school-funding/article34866278/.

Ford v. Quebec, [1988] 2 S.C.R. 712.

Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212, [2017] SKQB 109.

Grover, Sonja. 2005. "Democracy and the Canadian Charter Notwithstanding Clause: Are They Compatible?" *International Journal of Human Rights* **9** (4): 479–90.

Hiebert, Janet. 2019. "Notwithstanding the Charter: Does Section 33 Accommodate Federalism?" In *Canada at 150: Federalism and Democratic Renewal*, ed. Elizabeth Goodyear Grant and Kyle Hanniman. Montreal and Kingston: McGill-Queen's University Press.

Kahana, Tsvi. 2001. "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter." *Canadian Public Administration* **44** (3): 255–91.

Knopff, Rainer, Rhonda Evans, Dennis Baker and Dave Snow. 2017. "Dialogue: Clarified and Reconsidered." *Osgoode Hall Law Journal* **54** (2): 605–40.

Leckey, Robert. 2019. "Advocacy Notwithstanding the Notwithstanding Clause." *Constitutional Forum* **28** (4): 1–8.

Leeson, Howard. 2000. "Section 33, The Notwithstanding Clause: A Paper Tiger?" *IRPP Choices* **6** (4): 1–24.

Macfarlane, Emmett. 2008. "Terms of Entitlement: Is There a Distinctly Canadian 'Rights Talk'?" *Canadian Journal of Political Science* **41** (2): 303–28.

Macfarlane, Emmett. 2017. "Conservative with the Constitution? Moderation, Strategy, and Institutional Distrust." In *The Blueprint: Conservative Parties and Their Impact on Canadian Politics*, ed. Joanna Everitt and J. P. Lewis. Toronto: University of Toronto Press.

Macfarlane, Emmett. 2018. "Doug Ford's Law to Slash Toronto Council Is Unfair—but the Court Shouldn't Have Spiked It." *Maclean's*, September 10. https://www.macleans.ca/opinion/doug-fords-law-to-slash-toronto-council-is-unfair-but-it-should-not-be-struck-down/.

Morton, F. L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.

Morton, Ted. 2018. "Provinces Demanded 'Notwithstanding' Powers for Good Reason. They Should Use Them." *National Post*, September 14. https://nationalpost.com/opinion/ted-morton-provinces-demanded-notwithstanding-powers-for-good-reason-they-should-use-them.

Newman, Dwight. 2017. "Premier Wall's Decision to Override a Messy Court Ruling Is Completely Proper." *National Post*, May 7. https://nationalpost.com/opinion/dwight-newman-premier-walls-decision-to-override-a-messy-court-ruling-is-completely-proper.

Newman, Dwight. 2019. "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities." In *Constitutional Dialogue: Rights, Democracy, Institutions*, ed. Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon. Cambridge: Cambridge University Press.

Postmedia Network. 2017. "Saskatchewan Will Use the Charter to Keep Non-Catholic Students in Catholic Schools Despite Court Ruling." *National Post*, May 1. https://nationalpost.com/news/canada/saskatchewan-to-block-judges-catholic-school-funding-decision-with-notwithstanding-clause.

Rousseau, Guillaume and François Côté. 2017. "A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights." *Revue générale de droit* **47** (2): 343–431.

Russell, Peter H. 2007. "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy." *Policy Options* (February). http://irpp.org/wp-content/uploads/assets/po/the-charter-25/russell.pdf.

Sampert, Shannon and Linda Trimble. 2010. *Mediating Canadian Politics*. Toronto: Pearson.

Saskatchewan. 2017. "Government Will Use Notwithstanding Clause to Protect School Choice for Parents and Students." Government of Saskatchewan (website), May 1. https://www.saskatchewan.ca/government/news-and-media/2017/may/01/notwithstanding-clause.

Sauvageau, Florian, David Schneiderman and David Taras. 2006. *The Last Word: Media Coverage of the Supreme Court of Canada*. Vancouver: UBC Press.

Sirota, Leonid. 2017. "The Notwithstanding Clause's Toxic Legacy." *Policy Options*, May 11. https://policyoptions.irpp.org/magazines/may-2017/the-notwithstanding-clauses-toxic-legacy/.

Soroka, Stuart N., Antonia Maioni and Blake Andrew. 2006. *2006 Federal Election Newspaper Content Analysis*. Montreal: Observatory on Media and Public Policy, McGill University.

Star Editorial Board. 2018. "Doug Ford Is Trampling on the Rights of All Ontarians." *Toronto Star*, September 10. https://www.thestar.com/opinion/editorials/2018/09/10/doug-ford-is-trampling-on-the-rights-of-all-ontarians.html.

Thibault, Simon, Frédérick Bastien, Tania Gosselin, Colette Brin and Colin Scott. 2020. "Is There a Distinct Quebec Media Subsystem in Canada? Evidence of Ideological and Political Orientations among Canadian News Media Organizations." *Canadian Journal of Political Science*. Advance online publication. doi:10.1017/S0008423920000189.

Toronto (City) v. Ontario (Attorney General), [2018] ONCA 761.

Toronto (City) v. Ontario (Attorney General), [2019] ONCA 732.

Warren, Jim. 2018. "Doug Ford Is Wasting His Energy on This Council Fight." *Toronto Sun*, September 15. https://torontosun.com/opinion/columnists/warren-doug-ford-is-wasting-his-energy-on-this-council-fight.

Whyte, John D. 1990. "On Not Standing for Notwithstanding." *Alberta Law Review* **28** (2): 347–57.

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