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Original Gender: Mobilizing *Charter* Section 28 to Defend Trans Rights in Saskatchewan

By: Charlotte Dalwood

Matter Considered: [Use of Preferred First Name and Pronouns by Students](#), Government of Saskatchewan

On October 10, 2023, Saskatchewan Premier Scott Moe [wants his government](#) to invoke the notwithstanding clause in the [Canadian Charter of Rights and Freedoms](#) to shield his [anti-trans name and pronoun policy](#) from *Charter* scrutiny.

The policy in question, announced in August, requires Saskatchewan students under the age of 16 to obtain parental permission before changing their names and pronouns at school. Regina-based organization UR Pride is [challenging that policy](#) as contrary to sections 7 and 15(1) of the *Charter*. That case will be argued in November. Last week, the Court of King's Bench of Saskatchewan [granted an injunction](#) to prevent the policy from going into effect until the *Charter* challenge is heard.

Moe's planned use of the notwithstanding clause in section 33 of the *Charter* is in response to that injunction. [Section 33](#) is an override provision that allows a provincial or federal government to violate the rights enumerated in *Charter* section 2 or sections 7 to 15 without supplying proof of legal justification; it is enough for the government in question to simply invoke the section in legislation for the override to have force and effect.

The main check on the override, to date, has been the sunset clause built into section 33: invocations of the notwithstanding clause automatically expire after five years. Courts have not subjected uses of the notwithstanding clause to a reasonableness review or analyzed their interaction with other *Charter* provisions.

But if Moe follows through with his stated intention to invoke the notwithstanding clause, courts may have an opportunity to undertake just such an analysis, in particular, with reference to [Charter section 28](#).

That provision reads: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." This is effectively a second notwithstanding clause within the *Charter*, and it is one that may [trump the application of section 33](#). This is because section 28 operates "notwithstanding anything in this *Charter*"—including section 33, which itself only allows governments to override the rights contained in *Charter* sections 2 and 7 to 15 (i.e., not those referenced in section 28).

What is the ostensible problem with mobilizing section 28 to defeat Moe’s use of section 33? The former only speaks of “male and female persons.” It would seem, then, that if a law applies equally to men and to women, but deprives those outside the gender binary of their *Charter* rights, section 28 is not engaged.

That would be a mistaken conclusion, however. The reference in section 28 to “male and female persons” is arguably a reference to “gender.” Thus, a law that invokes section 33 to infringe people’s rights on the basis of gender may still be subject to *Charter* scrutiny.

Constitutional originalism tells us why this may be the case.

What’s Originalism Got to Do with It?

Originalism is a family of interpretive theories that divides along generational lines. So-called “old” or “first-generation” originalists locate the meaning of constitutional provisions in the subjective intentions of the framers. In contrast, “new” or “second-generation” originalists locate the meaning of the constitution in the “original public meaning” of its words and phrases, that is, [“the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written.”](#)

Originalists insist that the Constitution’s original meaning—whether located in the minds of the drafters or the first readers of the constitutional canon—is binding on the judiciary. Courts are not to legislate from the bench, amending the Constitution as they see fit. Rather, they are to give effect to the actual words and phrases of the constitutional text, which mean the same things now as they did when the constitution was first ratified.

If this seems at odds with the “[purposive](#)” approach to *Charter* interpretation endorsed by the Supreme Court of Canada, Canadian scholars from different social locations have argued that it is not ([see e.g. here and here](#)).

The Supreme Court has long felt “[the gravitational force of originalism](#).” In *R v Big M Drug Mart Ltd*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 SCR 295, Justice Brian Dickson characterized the purposive approach as one undertaken “by reference 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*” (at para 117). This is a sort of hybridization of first- and second-generation originalist methodologies. Courts, in interpreting *Charter* rights, are not to give effect to *any* purposes; rather, they are to give effect to those specific purposes set in motion in 1982. To that end, courts are to look at a range of textual and contextual information—but always with an eye to distilling the *Charter*’s original meaning.

There are normative reasons for bringing originalist thinking to bear on our reading of *Charter* section 28: it is democratic; it is consistent with how we read any other text; and it furthers progressive interpretive goals, as we will shortly see.

But for the present purposes, it is sufficient to adopt originalist reasoning simply because such reasoning best resonates with Supreme Court jurisprudence.

The Hendiadys at the Heart of Section 28

For the purposes of this short post, I will focus on the original public meaning of section 28. What would it have meant, in 1982, for the *Charter*'s guarantees to apply "equally to male and female persons?" It would have meant that they apply equally irrespective of gender.

This argument requires a brief review of English rhetoric.

A [hendiadys](#) is a linguistic construction in which two words, connected by a conjunction (e.g., "and"), are used to express a single, complex idea for emphasis. Examples abound in everyday speech. I am "sick and tired" of having my rights as a trans woman debated by cisgender politicians. Fortunately, my coffee is "nice and hot," ensuring I am sufficiently caffeinated to write this post.

There is a two-part test for hendiadys. First, are the words in question the same part of speech (i.e., are they both nouns, verbs, or adjectives)? And if so, do the two combined express an idea that would not be fully captured by either word on its own?

The phrase "male and female" passes this test. It comprises two adjectives connected with a conjunction, "and." The two adjectives together express an idea that includes but exceeds the meaning of each term on its own, in this case, the gendered human experience at large. The point is not that male and female are the only subject positions one can occupy within that experience; rather, it is that they are two parts of a larger whole. By pairing them, the *Charter* emphasizes its point: that everyone—male and female, or, in other words, gendered persons—benefits equally from the *Charter*'s protections. Not just men. Not just women. But everyone who experiences gender.

How can we be sure that this was the original public meaning of section 28? Because it was [what was intended](#) by the feminist citizen-actors who pressed for the inclusion of section 28 in the *Charter* in the first place. Among the most powerful feminist lobbyists—the so-called "Ad Hockers"—there was "an understanding of section 28 as an overarching fundamental principle of gender equality for the entire Charter," Kerri Froc argues in [a recent article \(at 249\)](#). Froc continues: "It was meant to ensure rights were viewed through a gendered lens and to be used as a means to conduct a gender-based analysis of constitutional provisions" (at 249-250).

Whether we look for original meaning in the subjective intent of section 28's framers or in the rhetoric actually used in that section, we arrive at the same result: "male and female persons" refers to "gendered persons."

The conclusion to be drawn from this analysis is a straightforward one. The section 28 notwithstanding clause protects trans and nonbinary people from discrimination on the basis of gender with respect to their other *Charter* rights.

This last point is key. Section 28 is not a standalone guarantee of gender equality; rather, it guarantees the equal application of other *Charter* protections regardless of gender. Were it not the case that Moe was planning to use the section 33 notwithstanding clause, section 28 arguments could still complement those grounded in other *Charter* rights and freedoms, in particular, that his government's name and pronoun policy violates the rights enumerated in sections [7](#) and [15\(1\)](#) (as argued by [UR Pride](#) in [their ongoing Charter challenge of the policy](#)). The policy applies to cisgender students, too, but has a particular negative effect on trans and nonbinary youth because it is they who are most likely to use preferred names and pronouns at school. As a result, the policy deprives them of their rights under sections 7 and 15(1) in a gender-discriminatory manner.

In the present political moment, however, the argument has a somewhat different valence: namely, that the government of Saskatchewan cannot use section 33 to violate those rights in a manner inconsistent with section 28.

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