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Original Powers: Reviving the Federal Disallowance Power to Combat Anti-Trans Legislation

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Matters Commented On: Government of New Brunswick, *Policy 713 Sexual Orientation and Gender Identity*, (Fredricton: Government of New Brunswick, 2023); Government of Saskatchewan, *Use of Preferred First Name and Pronouns by Students*, (Regina: Government of Saskatchewan, 2023); Government of Alberta, News Release, "Preserving choice for children and youth" (1 February 2024).

A specter haunts Canada: the specter of legislated transphobia.

It began in New Brunswick. In Summer 2023, the province's Minister of Education and Early Childhood Education changed Policy 713—the provincial education policy pertaining to sexual orientation and gender—to limit gender diverse students' ability to use their chosen names and pronouns at school (see New Brunswick, Department of Education and Early Childhood Education, *Policy 713 Sexual Orientation and Gender Identity* (Fredericton: Government of New Brunswick, 2023)).

Then, in Fall 2023, Saskatchewan invoked the Notwithstanding Clause to legislate its policy requiring schools to obtain parental consent before permitting students sixteen (16) years of age and younger to choose their names and pronouns (Bill 137, *An Act to Amend* The Education Act, 1995 *respecting Parental Rights*, 3rd Sess, 29th Leg, Saskatchewan, 2023).

Now Alberta's United Conservative government has announced its intentions to legislate a spate of anti-trans policy items come fall 2024: prohibiting gender-affirming healthcare like puberty blockers for Albertans fifteen (15) years old and younger; requiring schools to obtain parental permission before permitting students fifteen (15) years old and younger to choose their names and pronouns; and prohibiting trans women and girls from participating in women's sports (see Government of Alberta, News Release, "Preserving choice for children and youth" (1 February 2024)). And in a press conference about the impending implementation of these anti-trans policies, Alberta Premier Danielle Smith refused to rule out a potential use of the Notwithstanding Clause to shield them from judicial scrutiny (see Janet French, "Alberta premier says legislation on gender policies for children, youth coming this fall," *CBC News* (February 1, 2024)).

Since Alberta's announcement, especially, there has an ongoing public debate over what, if anything, Canada's federal government might be able to do to protect the rights of trans and gender-diverse Canadians under the Constitution (see, e.g., Dale Smith, "Can the Federal Government Stop Danielle Smith's Anti-Trans Policies," *Xtra Magazine* (February 15, 2024)). This blog post intervenes in that debate by answering that the federal government can exercise its

constitutional powers to nullify provincial legislation that violates the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24)) [the *Charter*].

The Federal Disallowance Power affords the Governor General in Council the ability to veto (disallow) a provincial statute. This power is outlined in section 56 of the *Constitution Act, 1867*, and its application was extended to include provincial legislation in section 90 of the same (*The Constitution Act, 1867*, 30 & 31 Vict, c 3).

The Federal Disallowance Power

The procedure for disallowing a provincial statute is straightforward. Once the Lieutenant Governor of a province has granted royal assent to one of that province's statutes, they are constitutionally mandated to submit a copy of the statute to the Governor General. The Governor General, in turn, may within one (1) year of receiving their copy of the statute disallow it via an Order in Council (see Gerard V La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Department of Justice Canada, 1955), at 14 citing the *Reference re The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province*, 1938 CanLII 34 (SCC), [1938] SCR 71 at 85 and 89 ["*Disallowance Reference*"]).

This much was clear to the Supreme Court in its 1938 *Disallowance Reference*. There, the Court was asked, among other questions, whether the Federal Disallowance Power was "still a subsisting power" and, if so, whether "the exercise of said power of disallowance by the Governor General in Council [is] subject to any limitations or restrictions" (*Disallowance Reference* at 72). The Court found that the procedure for vetoing a provincial statute was as follows:

> Where the Lieutenant-Governor of the Province assents to a Bill in the Governor General's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the Governor General, and if the Governor General in Council within One Year after Receipt thereof by the Governor General thinks it fit to disallow the Act, such Disallowance (with a Certificate of the Governor General of the Day on which the Act was received by him) being signified by the Lieutenant-Governor by Speech or Message to the House or if more than one to each of the Houses of the Legislature or by Proclamation shall annul the Act from and after the Day of such Signification (*Disallowance Reference* at 81).

The Federal Disallowance Power has seen significant historical application, having been exercised 121 times in Canada's history (see "Can the Federal Government Disallow Québec's 'Anti-Religious Symbols' Act?"). Most of these uses were during the leadership of Canada's first Prime Minister, Sir John A. Macdonald. Between 1867 and 1896, the federal government disallowed 65 provincial laws; between 1896 and 1920, it disallowed 31; and between 1920 and 1943, it disallowed sixteen (see Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62:3 American J of Comparative L 641 at 661). Indeed, the federal government has not disallowed a piece of provincial legislation since 1943, when it vetoed an Alberta statute prohibiting the leasing of land "to any enemy alien or Hutterite" (see *An Act to amend The Land*

Sales Prohibition Act, SA 1943, c 30 at sec 1). Since then, the broad scholarly consensus is that the Federal Disallowance Power has been rendered obsolete through constitutional convention.

This article disputes that conclusion.

Powers of Revision

As noted above, the general consensus amongst scholars of the Canadian Constitution is that the Federal Disallowance Power is obsolete to the point that it could not now be used. Peter Hogg puts it succinctly:

> If the federal objection to a provincial statute is that it is unwise, then the province may fairly reply that its voters should be left to determine the wisdom of the policies of the government which they have elected. In my view, the provincial case is unimpeachable: the modern development of ideas of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance (Peter W Hogg, "Constitutional Law of Canada, 5th Edition" (11 August 2023) at 5.13, online: (WL Can) Thomson Reuters Canada).

In other words, the Federal Disallowance Power is incompatible with Canadian democratic federalism. But how is this view compatible with the subsistence of the Federal Disallowance Power in the written text of the Constitution – in short, with the fact that the power has never been formally repealed?

To answer that, we must turn to the work of Richard Albert, who has provided the most careful argument for the legal obsolescence of the Federal Disallowance Power. It is, he contends, a victim of "constitutional desuetude." That is to say, the Power has lost "its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by preceding and present political actors" (Albert at 644). This modality of informal constitutional amendment "leaves the text [of the Constitution] entrenched and unchanged but renders it politically invalid" (Albert at 645).

On Albert's theorization of the phenomenon, constitutional desuetude has three elements: "significant time, conscious nonuse, and repudiation. All three elements—the (1) sustained (2) conscious nonuse of a rule that has been (3) publicly repudiated by political actors—are necessary to render a rule desuetudinal" (Albert at 651). The temporal element is key, as Albert explains: the sustained nonuse of a constitutional provision in the past creates political expectations about that provision's continued nonuse in the present and future (Albert at 654). These expectations establish a constitutional convention that is binding on political actors insofar as they structure those actors' actions and sense of what is and is not possible under the existing politico-legal regime (Albert at 655-656). But so, too, is explicit repudiation essential, on Albert's analysis, for a constitutional provision to succumb to desuetude. As he puts it, "there can be no constitutional desuetude without the repudiation of an entrenched provision" (Albert at 674).

The Federal Disallowance Power has fallen victim to constitutional desuetude, Albert contends, because its sustained nonuse over the past 80 or so years evidences the emergence of a binding

convention against its present or future use (Albert at 662). This is so even though the Federal Disallowance Power "remain[s] entrenched in the constitutional text and theoretically useable by the Canadian government" (Albert at 662). In other words, the political cost of utilizing the Disallowance Power has become intolerably high (Albert at 668). Thus, instead of disallowing provincial legislation, the federal government now exercises its authority to challenge the constitutionality of a provincial statute or refer the statute to the courts for constitutional review (Albert at 667). In short, "the Canadian judiciary has filled the void left by the obsolescence of the disallowance…powers" (Albert at 667).

Objections to Constitutional Desuetude

I have two objections to Albert's analysis. The first is normative. The second is historical.

My normative objection is that, at the end of the day, Albert misapprehends the purpose of enacting a written constitution. Written constitutions are aspirational documents that define the scope of political and legal debate in the years following their creation (see, e.g., Jack M. Balkin, *Living Originalism* (Cambridge: Belknap Press, 2011) at 59). To be a constitutional actor—that is to say, someone who sees themselves as enacting the constitutional project in some way, big or small—is to identify *with* the Constitution, and to work to reform constitutional practice with reference to the constitutional text. This is a faith-based project, as Jack Balkin recognizes with reference to the United States Constitution, which demands "faith in the possibilities contained in the [constitutional] document, faith in the institutions that grow up around the document, and finally, faith in the American people, who will ultimately determine the interpretation and direction of the document and its associated institutions" (Balkin at 79).

Thus, where constitutional desuetude refers to the apparent powers of political actors to informally revise the constitution-as-written through the constitution-as-practiced, I prefer to emphasize those actors' powers of constitutional persuasion. At different points in time, different actors will place the interpretive accent on different aspects of the constitutional canon. But it is the fact that, at any time, other actors can rest their case on neglected aspects of the same canon when combating constitutional practices with which they disagree that allows the Constitution to evolve and change, in response to new circumstances and demands, *through fidelity to the original text*. As Balkin puts it, "[t]he ability of people to criticize the Constitution-in-practice in the name of the Constitution and to work to push it toward their desired vision is what helps make an ancient document newly legitimate to each generation" (Balkin at 70).

What I am arguing is this: A constitutional provision never dies; rather, its continued availability in the pages of the Constitution-as-written, even if only as a discursive potentiality, is what keeps the constitutional project alive. If we accept the possibility of constitutional desuetude, we deny to the people governed by the Constitution the power to use the Constitution-as-written to reform the Constitution-as-practiced. In short, we eliminate the persuasive power of the constitutional text.

My second objection to Albert is historical. While scholars largely concur about the obsolescence of the Federal Disallowance Power, there has not been the sort of sustained, explicit repudiation of its use by political actors that Albert's framework requires. To the contrary and as further

explained below, the constitutional negotiations that gave rise to the *Charter* preserved the Federal Disallowance Power as a check on provincial uses of the notwithstanding clause.

Original Negotiations

The *Charter* is the product of significant give-and-take between the provinces and the federal government. The fact of those negotiations is well known and can be summarized briefly with reference to one of the most significant outcomes thereof, to wit, the inclusion of the Notwithstanding Clause as section 33 of the *Charter*.

Early drafts of the *Charter* did not include the Notwithstanding Clause (see Hogg, "Constitutional Law of Canada," at 39.2). Its origins lie in a summer 1980 compromise proposal by the Government of Saskatchewan at the Federal-Provincial Continuing Committee of Ministers Responsible for Constitutional Affairs (see David Johansen & Philip Rosen, "The Notwithstanding Clause of the Charter" (September 1997)). Saskatchewan's proposal was insufficient to bridge the divide between those for and against a codified *Charter of Rights*; nonetheless, a Notwithstanding Clause was again proposed in September 1980, this time by the Government of Québec. The latter proposal failed to command the support of the provinces, however.

In November 1981, a Federal-Provincial Conference of First Ministers occurred in Ottawa. The Governments of Alberta, British Columbia, and Saskatchewan variously floated the idea of a Notwithstanding Clause, but the Conference reached an impasse on the afternoon of November 4th. In what has come to be known as the "Night of the Long Knives" in Québec (see, e.g., "A Fragile Unity: 'The Night of the Long Knives'"), an agreement was reached later that night between the federal government and all the provinces save Québec to codify a Charter of rights and freedoms that included a legislative override of fundamental freedoms, legal rights, and equality rights (see Johansen & Rosen, "The Notwithstanding Clause of the Charter"). That agreement effectively ensured what we now know as the *Charter* would become constitutional law.

At the time, federal and provincial leaders had much to say about the Notwithstanding Clause's place in the constitutional canon. Manitoba Attorney General GWJ Mercier, for example, stated that,

> under our agreement, the rights of Canadians will be protected, not only by the constitution but more importantly by a continuation of the basic political right our people have always enjoyed, — the right to use the authority of Parliament and the elected Legislatures to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy. (see Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, at 115)

While in a later debate in the House of Commons, then federal Minister of Justice Jean Chrétien said that,

> What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override

> certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy. (Canada, House of Commons, Debates, 20 November 1981, at 13042-13043, cited in Johansen & Rosen, "The Notwithstanding Clause of the Charter")

In short, the Notwithstanding Clause itself is the price the federal government paid for provincial acceptance of the *Charter* as a whole. And its purpose is to ensure a kind of balancing between the legislative and judicial branches of power.

But so, too, is the continued existence of the Federal Disallowance Power in the Canadian Constitution the price the provinces paid for the Notwithstanding Clause.

A decade before the 1981 First Ministers' Conference, in 1971, a Constitutional Conference took place in Victoria. The end result of that conference was an expansive package of proposed constitutional amendments that, crucially, included a package of constitutional rights and the repeal of the federal powers of disallowance and reservation (see "Constitutional Conference – Victoria (1971)" (June 14-16, 1971)). In the end, the Government of Québec rejected the Victoria Charter, killing it and forcing federal-provincial negotiations to continue.

But, importantly for my purposes, those subsequent negotiations saw the federal government go back on its willingness, evidenced at Victoria, to give up its veto power over provincial legislation. Political scientist Peter Russell sums up the back-and-forth that took place in the decade-or-so that separated the debates over the Victoria Charter and the promulgation of the *Canadian Charter of Rights and Freedoms*:

> The Victoria Charter contained a short pledge on the part of both levels of government to promote "equality of opportunity and well-being for all individuals in Canada" and to reduce regional disparities. Hidden away in small print in an attached schedule was abolition of the federal powers of reservation and disallowance. Trudeau was willing to give up this power of federal surveillance over the provinces in exchange for their being bound by a charter of rights. A decade later when they insisted on inserting a legislative override in the charter, he would withdraw this offer (Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004) at 89).

The takeaway from the foregoing is that, as long as the Notwithstanding Clause has constitutional force, so, too, does the Federal Disallowance Power. And the reason is simple. Canada's provincial governments could have insisted on a repeal of the Federal Disallowance Power, and the federal government could have continued to offer it, in the package of constitutional reforms that was ultimately accepted in 1981. But neither occurred, despite both sets of parties knowing from their experience of the Victoria Charter that repeal was potentially on the table.

The fact is, the Federal Disallowance Power was discussed and ultimately left in the Constitution-as-written. Thus, even if we accept Albert's argument that constitutional provisions may be subject to desuetude, the historical record indicates that the *Charter* generation of political actors

consciously retained, and thereby gave continuing life and force to, the Federal Disallowance Power.

Whither Federalism?

The foregoing brings us, at long last, to the case study with which this article began: the cresting wave of anti-trans legislation sweeping the country at present.

Could Canada's federal government exercise its powers under the *Constitution Act, 1867* to disallow provincial acts that invokes the notwithstanding clause to legislate transphobia?

It could.

What the Supreme Court found in the *Disallowance Reference* remains true today: The Federal Disallowance Power is a subsisting power subject to no formal limitations save that it be exercised according to the procedures outlined in the text of the Constitution itself (see *The Disallowance Reference*). There has been no formal amendment to erase the Federal Disallowance Power from the constitutional canon; quite the contrary, in fact, as what amendments have been made to the Constitution have consciously retained the Power as a persisting one.

But the foregoing raises a threshold question: Under what circumstances can the federal government exercise its constitutional power to disallow provincial legislation with democratic legitimacy? And to that question I would answer: In any circumstance in which a provincial government has invoked the Notwithstanding Clause to void Canadians' *Charter* rights. That is the upshot of the historical analysis undertaken above.

Should Canada's federal government exercise its powers under the *Constitution Act, 1867* to disallow provincial acts that invokes the notwithstanding clause to legislate transphobia?

It should.

One of the principal arguments for the obsolescence of the Federal Disallowance Power is that it has been supplanted by the courts' powers of constitutional review. And that is, in many respects, true. I do not think it would be democratically legitimate for the federal government to disallow a duly enacted piece of provincial legislation when either the federal government or citizen-actors could take the relevant provincial government to court to challenge that legislation's constitutionality. But therein lies the rub: In cases where the provincial legislation invokes the Notwithstanding Clause to foreclose the possibility of judicial override, that option becomes unavailable and the Federal Disallowance Power a legitimate check on provincial authority.

I have argued already that providing such a check was the historical purpose of preserving the Federal Disallowance Power in an amended constitutional canon that included voidable protections of fundamental rights and freedoms.

But it will nonetheless be objected, recalling Hogg's argument against the Federal Disallowance Power, that the appropriate means of checking provincial invocations of the Notwithstanding

Clause is through the ballot box. It is for Albertans to decide, through their choice of elected officials, what legislation they want their government to pass; so long as said legislation is within one of the provincial heads of power, it is not for the federal government to say one way or the other whether that legislation is just.

I have two objections to this argument. The first is that the *Charter*, in particular amongst the documents of Canada's constitutional canon, upholds minority rights; and those rights do not necessarily command majority support. The Supreme Court held as much in its *Reference re Secession of Quebec* (1998 CanLII 793 (SCC), [1998] 2 SCR 217, at paras 79-82), wherein it found that respect for minorities was a guiding constitutional principle underlying the constitutional order as a whole.

The second is that the argument for a democratic check on the Notwithstanding Clause is politically naïve.

Minority rights, as the name denotes, are the rights of *minorities*. By definition, these are not the same as the rights of majorities, most notably, of majorities of the electorate. In a democratic state like Canada, majorities do not need a charter of rights and freedoms to protect their interests; they can do so quite ably at the ballot box. It is those who cannot exert their will democratically who need constitutional protection.

The Notwithstanding Clause is a tool of the legislative government, an entity whose members necessarily command the support of a majority (or, at least, of a plurality) of the electorate. It is a tool for overriding the constitutional rights of those who do not command that same level of support—because, if they did, they would legislate a contrary policy agenda (see, e.g., Charlotte Dalwood, "How Canada's Constitution Makes it Possible for Saskatchewan to 'Trample' on LGBTQ2S+ Rights," *Xtra Magazine* (September 29, 2023)). In short, there exists no democratic check on uses of the Notwithstanding Clause because those uses definitionally have majority support.

At least, they do within the provincial sphere in which they are enacted. They do not necessarily command the widespread support of the Canadian electorate as a whole. And that is the key: The Federal Disallowance Power, as a tool of *Canada's* duly elected government rather than of any individual province's, gives the rest of Canada a democratically legitimate (being a device of a democratically elected federal government) avenue for countering provincial infringements of minority rights. And all of Canada, including the provincial majority or plurality that voted in the government whose legislation is being disallowed, has, at least once every five years, the opportunity to vote for or against the federal government that employs the Disallowance Power. In other words, the argument from democracy is at least as much an argument for using the Federal Disallowance Power as it is an argument against using the Notwithstanding Clause.

Conclusion

Reports of the Federal Disallowance Power's demise have been greatly exaggerated. It is alive and well thanks to the acceptance of the *Charter* by the provinces and the Canadian people.

With recent invocations, and threatened invocations, of the Notwithstanding Clause to infringe upon the *Charter* rights of transgender and gender-diverse Canadians, the time has come for the federal government to play its role within the constitutional order and prevent those infringements from becoming lasting law. The time has come for the federal government to use its powers of disallowance again.

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