Winnipeg Free Press (Manitoba, CA)
January 11, 2006 A11
Section: Focus

The safety valve
The nothwithstanding clause ensures a proper balance of power

Bryan Schwartz

SHOULD the notwithstanding clause be abolished?

My view is no.

Let me begin by addressing myself to the strongest enthusiasts of the Charter.
Prime Minister Paul Martin has apparently proposed to eliminate the ability of only Parliament, not the provinces, to invoke the clause. Many provinces, including Quebec, would likely oppose abolition at the provincial level. Even to abolish the clause at the federal-only level, however, would take a formal constitutional amendment. That requires the consent of seven provinces with half the population of Canada.

The nationwide process might not stop with looking at the notwithstanding clause. Some federal parties or provincial leaders would likely say: "If you are going to abolish the 'safety valve' for all time, first let's change the Charter to make sure that certain options remain open. For example, we have to make it clear that we can have mandatory minimum sentences for violent crimes." We might end up with a Charter whose simplicity, flexibility or strength has been undermined.

Opening the Charter for amendment would risk opening up the larger constitutional debate.
The Supreme Court of Canada has said that if any province proposes an amendment, there is a correlative duty of the federal government and other provinces to discuss it. The prospect of achieving constitutional consensus on a wider agenda is small. In the meantime, other issues of public importance would be neglected.

The existence of the notwithstanding clause means that legislatures effectively consent to Charter decisions. Elected politicians might not fully agree with court rulings, but by forbearing from using the notwithstanding clause, they implicitly find those decisions to be tolerable. Abolish the notwithstanding clause, and it is easier for politicians to completely distance themselves from unpopular rulings and fuel public resentment against them. Furthermore, courts might feel free to make difficult decisions in favour of individual or minority rights if they know that their decrees are not absolutely final and unalterable.

Many Canadians, however, might not be unqualified "Charter enthusiasts." I believe there is much to be said for applying the "check and balance" approach to all branches of government, including the courts. We cannot always trust that elected officials will be just or prudent. We have a tremendous amount of power concentrated in the office of the prime minister. Majority government and party discipline means that the House of Commons is often a minimal restraint.

The Senate has no real moral authority and rarely stands in the way of the prime minister, and court decisions and the federal spending power have largely eroded provincial authority. It is welcome that the Supreme Court of Canada is at least one active check on the concentration of power in a few hands. Judges, however, can get things wrong too. In some cases, they may through no fault of their own be inadequately informed about the state of things in the real world. They may not have the some practical experience and information as elected politicians. The view of the world that judges receive is to some extent limited by the formal rules of evidence and the data that the parties themselves choose to muster.

It is also possible for judges to place too much emphasis on one contested value at the expense of another. Abraham Lincoln was unimpressed by the Supreme Court of his day's emphasis on states rights and property rights at the expense of national security and racial equality. Rights do collide, and what the courts impose in the name of one right may grievously offend another.

Martin himself said in a year-end interview in 2003 that he would invoke the notwithstanding clause in a hypothetical case where the courts effectively required churches to perform gay marriages.
In the debate, Martin framed the issue in terms of "politicians" versus "courts." One alternative and equally loaded framing would be "elected representatives of the people" versus "unaccountable judges." The choice of rhetoric should not determine how people view the matter. In the end, there is balance to be struck between the roles of different branches of government. Reasonable people might place more emphasis on the role of the courts, but the claims of representative democracy should not be summarily dismissed.

If the "notwithstanding clause" was a safety valve to be contemplated by Paul Martin in 2003, is it prudent to foreclose its use for all future times? Pierre Trudeau, who brought us the Charter, was opposed to the notwithstanding clause. Yet he had invoked the War Measures Act in 1970. How could he now be sure that some future national security crisis might not require swift and decisive action that required an override of the Charter?

Faced with the potential for terrorists to acquire weapons of mass destruction, and the willingness to use them, there might be future circumstances in which the use of stringent measures is far more warranted than during the FLQ crisis. There might not be time in such an emergency for the Supreme Court of Canada to decide, let alone assess properly, whether such measures are sustainable under the "reasonable limits" clause.

The Liberal government has been in office for 13 years, and did not consider it necessary or appropriate to move previously to abolish the notwithstanding clause. Martin himself considered using it as a thinkable proposition as recently as 2003. A genuine respect for constitutionalism suggests that proposals to reform the Charter should be presented in a studied and considered manner, not suddenly sprung in the middle of a televised campaign debate.

Whether doing so was good or bad campaign politics remains to be seen. It was not, in my view, an exercise in sound statecraft.

Bryan Schwartz teaches constitutional law at the University of Manitoba.