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## Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review

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## Abstract

This article argues that the Charter's notwithstanding clause makes exception to judicial review. In the counter-factual world where laws "shall operate" as they "would have but for" Charter provisions, courts may not question the consistency of laws with selected Charter rights. Courts must legally treat such laws as though selected Charter provisions do not exist to be applied to them; but of course, they continue to exist. Because the provisions do exist, judgements about their consistency with statutes invoking section 33 are left to the political process. This reading is grounded in the subjunctive mood (*conditionnel passé*) of the text. It aligns with Alan Blakeney's and Peter Loughheed's historical purpose for the clause in 1982: to allow legislated rights as trumps against judicial review. This is justifiable as a matter of political morality because it offers a standard for holding legislators accountable for using the clause to protect rather than trump rights.

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# Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review<sup>1</sup>

GEOFFREY SIGALET<sup>2</sup>

This article argues that the Charter's notwithstanding clause makes exception to judicial review. In the counter-factual world where laws "shall operate" as they "would have but for" Charter provisions, courts may not question the consistency of laws with selected Charter rights. Courts must legally treat such laws *as though* selected Charter provisions do not exist to be applied to them; but of course, they continue to exist. Because the provisions *do exist*, judgements about their consistency with statutes invoking section 33 are left to the political process. This reading is grounded in the subjunctive mood (*conditionnel passé*) of the text. It aligns with Alan Blakeney's and Peter Loughheed's historical purpose for the clause in 1982: to allow legislated rights as trumps against judicial review. This is justifiable as a matter of political morality because it offers a standard for holding legislators accountable for using the clause to protect rather than trump rights.

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1. My title pays homage to the multi-authored book *Legislated Rights*. This essay is heavily indebted to the insightful argument of this landmark work in the theory of rights: Grégoire Webber et al, *Legislated Rights* (Cambridge University Press, 2018), DOI: <<https://doi.org/10.1017/9781108551069>>.
  2. Assistant Professor of Political Science, UBC Okanagan; Director, UBC Centre for Constitutional Law and Legal Studies. Many thanks to my RA Neelesh Thakur for excellent research support. I am also indebted to Bradley Miller, Grant Huscroft, Dwight Newman, Gerard Kennedy, Asher Honickman, Maxime St-Hilaire, Xavier Focroulle Ménard, Jacob Levy, Hoi Kong, Christopher Manfredi, Michael Da Silva, Ben Woodfinden, David Jo, Emmanuelle Richez, Mark Harding, Dave Snow, Erin Crandall, Emmett Macfarlane, Robert Leckey, and others for comments and conversations about this article. A special note of thanks to Grégoire Webber for his patience and wisdom in helping me to develop my argument in opposition to his own.

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**WHAT DOES IT MEAN TO ENACT LAWS** “notwithstanding” provisions of the *Canadian Charter of Rights and Freedoms*? Section 33 of the *Charter* allows the federal and provincial legislatures to enact laws that operate “notwithstanding” certain sections of Canada’s constitutional bill of rights.<sup>3</sup> Does this mean that such laws are enacted notwithstanding the *Charter* rights enumerated in these sections? Or notwithstanding the judicial remedies of holding laws unconstitutional or inoperative? Or notwithstanding judicial review?

There has not been much jurisprudence on the meaning of section 33 since the Supreme Court of Canada held, in *Ford v Québec (AG)*, that it “lays

3. *Canadian Charter of Rights and Freedoms*, s 33(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. Given the importance of the wording of the English and French versions of subsections 33(1) and (2) of the notwithstanding clause for my argument, I here set them out in full:

- |   |  |
|---|--|
| (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. | (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte. |
| (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration ( <i>ibid</i> ).                                       | (2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte ( <i>ibid</i> ).  |

down requirements of form only, and there is no *warrant* for importing into it grounds for substantive review of legislative policy.”<sup>4</sup> One exception to this is the recent case of *Hak c Québec*, where plaintiffs challenged Québec’s use of the notwithstanding clause in the *Loi 21*<sup>5</sup> litigation.<sup>6</sup> The legislature invoked the clause with a view to preventing courts from striking down the law’s ban on some civil servants wearing religious symbols and prohibiting the exercise of most official functions with covered faces. The Québec Superior Court held that the *Ford* precedent rendered *Loi 21*’s recourse to the notwithstanding clause “judicially unassailable” (*juridiquement inattaquable*) and that courts should refuse to offer formal declarations about whether *Charter* rights are violated.<sup>7</sup>

Even prior to *Hak*, Québec’s *Loi 21* sparked conflicting readings of section 33. Grégoire Webber, Eric Mendelsohn, and Robert Leckey offered an intriguing textually focussed argument for the judicial power to declare laws to be inconsistent with *Charter* rights in cases where legislatures invoke section 33.<sup>8</sup> They concentrated their claims on the text of section 33(2) and its focus on the “operation” of legislation. Since their initial joint publication, these authors now offer different arguments. Leckey and Mendelsohn argue that the notwithstanding clause allows judicial declarations about *Charter* violations despite protecting the *constitutional validity* of statutes.<sup>9</sup> Webber maintains that because the notwithstanding clause protects only the “operation” of laws, courts may have the power to declare statutes invoking it invalid and *unconstitutional*,

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4. [1988] 2 SCR 712 at para 33 [*Ford*].

5. *Act Respecting the Laicity of the State*, CQLR c L-0.3 [*Loi 21*] (see section 6 of the Act for the ban on some civil servants wearing religious symbols and section 8 for the prohibition on most officials exercising their functions with covered faces).

6. See QCCS 1466 [*Hak*]. Another exception (released after the submission of this article for peer review) is the recent Supreme Court of Canada case of *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, where Wagner CJ and Brown J discussed how section 33 enables a legislature to “give continued effect to *its* understanding of what the Constitution requires” (at para 60).

7. *Hak*, *supra* note 6 at para 4. The court also held that the section 28’s equal guarantee of all rights to both sexes is an interpretive clause that cannot be used to trump section 33 (*ibid* at paras 869, 874-75).

8. See Grégoire Webber, Eric Mendelsohn & Robert Leckey, “The faulty wisdom around the notwithstanding clause” (10 May 2019), online: *Policy Options* <policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause> [perma.cc/7DUH-98MF]. Léonid Sirota quickly posted his agreement with this early version of the argument. See Léonid Sirota “Concurring Opinion” (23 May 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/05/23/concurring-opinion> [perma.cc/Q94E-SCP5].

9. See Robert Leckey & Eric Mendelsohn, “The Notwithstanding Clause: Legislatures, Courts, and the Electorate” (2022) 72 UTLJ 189, DOI: <https://doi.org/10.3138/utlj-2020-0135>.

but not inoperable.<sup>10</sup> The Québec Superior Court effectively rejected these arguments by holding that making use of such declarations would disrespect the separation of powers by engaging in “a purely theoretical question” (*une question purement théorique*).<sup>11</sup>

In the wake of *Loi 21*, Maxime St-Hilaire and Xavier F Ménard argued against Webber, Mendelsohn, and Leckey’s thesis on the grounds that section 33 suspends *Charter* rights themselves and so legislation invoking the notwithstanding clause cannot be reviewed by courts for any inconsistency with those very rights.<sup>12</sup> *Hak* at times appears to side with St-Hilaire and Ménard’s view, as when the court refers to the “suspension of rights” (*la suspension du droit*)<sup>13</sup> and “suspending fundamental liberties” (*que l’on suspend des libertés fondamentales*).<sup>14</sup> Despite these expressions, the court also said that it declined to make a declaration of unconstitutionality as a matter of “its judicial discretion” (*sa discrétion judiciaire*) to respect the separation of powers by avoiding theoretical questions.<sup>15</sup> Although the court recognized constraints on its discretion, its statement could imply that courts have discretion to declare laws invoking section 33 to violate *Charter* rights in line with the arguments of Webber, Mendelsohn, and Leckey. What is more, this potential affirmation of judicial discretion clashes with the idea that the notwithstanding clause suspends rights. If rights are suspended, then there is “nothing to declare.”<sup>16</sup> If rights are not suspended, then Webber, Mendelsohn,

10. Grégoire Webber, “Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation” (2021) 71 UTLJ 510, DOI: <<https://doi.org/10.3138/utlj-2020-0066>> [Webber, “Notwithstanding Rights, Review, or Remedy?”].

11. *Hak*, *supra* note 6 at para 795.

12. See “Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause” (2020) 29 Const Forum Const 38, DOI: <<https://doi.org/10.21991/cf29401>>. I should note that Ménard has recently joined two other co-authors to revise his view of section 33 as a means of specifying rights in relation to the common-good. This view is very much compatible with the reading of the text offered in this article. See Kerry Sun, Stéphane Séraphin & Xavier F Ménard, “Notwithstanding the Courts? Directing the Canadian Charter toward the Common Good” (1 July 2021), online: *Ius & Iustitium* <[iusetiustitium.com/notwithstanding-the-courts-directing-the-canadian-charter-toward-the-common-good](https://iusetiustitium.com/notwithstanding-the-courts-directing-the-canadian-charter-toward-the-common-good)> [perma.cc/LVP6-TSQJ]. Even more recently (well after this article was first submitted for peer review), Séraphin, Sun & Ménard have done an admirable job of expanding their view that section 33 stands for the coordinate ability of legislatures to specify *Charter* rights in “Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order” 110 SCLR 135, DOI: <<https://doi.org/10.2139/ssrn.4123003>>.

13. *Hak*, *supra* note 6 at para 761.

14. *Ibid* at para 771.

15. *Ibid* at paras 795-96.

16. St-Hilaire & Ménard, *supra* note 12 at 40-41.

and Leckey may be right to argue that courts have discretion to declare that laws violate rights.

This lively debate has so far failed to adequately grapple with the text of section 33, despite the debate's focus on the text. Although some Canadian scholars may find it novel to prioritize the constitutional text, the case for the judicial review of laws invoking the notwithstanding clause primarily rests on how the text legally restricts adjudicative discretion. This article argues that section 33(1) indirectly renders judicial review moot, whereas the meaning of section 33(2) directly prohibits courts from reviewing the consistency of laws with selected *Charter* rights. The meaning of the phrase "shall operate notwithstanding" in section 33(1) prevents courts from using provisions of the *Charter* to hold laws unconstitutional (Part I(A)). That renders most *adjudicative* questions about the *Charter* consistency of laws moot and beyond the judicial mandate, which indirectly immunizes statutes from judicial review. On this reading, section 33(1) does not make laws consistent with *Charter* rights and freedoms.

However, section 33(2)'s guarantee that laws "shall have such operation" as they "would have but for the provision of the *Charter*" directly prevents courts from reviewing the consistency of laws with selected *Charter* provisions (Part I(B)). This is because laws with the subjunctive "operation" they "would have but for" certain *Charter* provisions presume the counterfactual world where such provisions do not exist. The counterfactual world where laws operate as they would have but for the existence of certain provisions of the *Charter* is a world where courts could not question the consistency of laws with selected *Charter* rights and freedoms as a first step towards declaring them "of no force or effect" under the Constitution's supremacy clause. But the subtlety of the subjunctive mood is that the provisions of the *Charter* selected by laws invoking section 33 *do* continue to exist, and so judgements about their consistency are left to the political process. Legislation properly invoking the notwithstanding clause thereby remains open to the judgement of citizens and legislators as to whether it complies with selected rights, but it prohibits courts from making such judgements.

This reasoning supports the Québec Superior Court's refusal in *Hak* to invalidate *Loi 21* or to declare the law unconstitutional for violating the *Charter* rights to religious freedom and equality. It also undermines St-Hilaire and Ménard's argument that the notwithstanding clause suspends *Charter* rights (Part II(A)), although it supports their conclusion that laws invoking section 33 are not subject to judicial review. The argument also vitiates Webber, Mendelsohn,

and Leckey's shared view that section 33(2) allows for the judicial review of laws for *Charter* violations (Part II(B)).

For those unconvinced that the subjunctive mood of the text prohibits judicial review, this reading of the text is further supported by looking to the historical purpose that section 33 was drafted to realize. To understand this, the article reviews the evidence offered by the fears of the federalist framers who opposed the notwithstanding clause, and the hopes of the prairie premiers who negotiated for it. The federalists' fears may support reading the historical purpose of the clause as suspending rights, but they are better characterized as expectations for the clause's potential abuse. The reflections of the prairie premiers, Allan Blakeney and Peter Lougheed, offer strong evidence that section 33 was drafted to enable legislatures to contest judicial misinterpretations of *Charter* rights. This historical purpose fits harmoniously with reading the text of section 33 as prohibiting judicial review without suspending rights. The text and history of the clause suggest that it enables legislatures to enact laws concerning the scope of certain *Charter* rights, while trumping courts' ability to subject these laws to judicial review.

It is important not to lose sight of why the legal effect of the notwithstanding clause matters in terms of political morality. The article concludes by arguing that reading the notwithstanding clause to allow for legislated rights as trumps may not guarantee responsible uses of section 33, but it does promise to better orient legislatures towards democratic responsibility for the protection and construction of *Charter* rights (Conclusion). By allowing legislatures to enact propositions of laws that express disagreements with courts about *Charter* rights, the notwithstanding clause enables citizens to hold legislators and judges accountable for respecting such rights. It allows for political arguments about the legal scope and nature of *Charter* rights outside of courtrooms. With this standard in hand, it may be possible to have more reasonable disagreements about whether laws like *Loi 21* are *politically* legitimate.

## I. NOTWITHSTANDING JUDICIAL REVIEW?

There are at least three different answers concerning the legal effect of the *Charter*'s "notwithstanding clause."<sup>17</sup> The three general answers are that the clause allows legislatures to enact laws notwithstanding *Charter* rights; notwithstanding the judicial remedies of holding laws unconstitutional or inoperable;

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17. See Webber, "Notwithstanding Rights, Review, or Remedy?" *supra* note 10 at 510-11.

or notwithstanding judicial review. To the question “notwithstanding what?”<sup>18</sup> this section shows that the notwithstanding clause applies notwithstanding judicial review.

#### A. “SHALL OPERATE NOTWITHSTANDING A PROVISION...”

In a sense, it is premature to formulate the question as “notwithstanding what?” because each interpretation of the legal effect of section 33 may presume different meanings for the term “notwithstanding.” Before asking “notwithstanding what?” let us ask: “what does ‘notwithstanding’ mean in this context?” The answer is that the term “notwithstanding” in section 33(1) instructs courts to treat laws as constitutional, even if they are inconsistent with *Charter* rights. If we make the reasonable assumption that laws the Constitution authorizes to “operate” are constitutional, then section 33(1) secures the constitutional consistency of laws that might otherwise have been found to be unconstitutional because of their inconsistency with certain rights and freedoms. This alone renders judicial review moot and beyond the appropriate mandate of courts.

Section 33(1) reads:

33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

On one reading of the meaning of 33(1), the legal effect of the term “notwithstanding” is to “suspend rights determinations,”<sup>19</sup> to “override rights,”<sup>20</sup> to “validly make exception to a right,”<sup>21</sup> to trump rights,<sup>22</sup> or for “suspending that

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18. *Ibid.*

19. John Whyte, “Sometimes Constitutions are Made in the Streets: The Future of the *Charter’s* Notwithstanding Clause” (2007) 16 Const Forum Const 79 at 83, DOI: <<https://doi.org/10.21991/C9ZQ18>>.

20. Peter W Hogg, “Override of Rights” in *Constitutional Law of Canada*, Student Edition (Thomson Reuters Canada, 2020) 39-1.

21. St-Hilaire & Ménard, *supra* note 12 at 43.

22. Tsvi Kahana, “What Makes for a Good Use of the Notwithstanding Mechanism” (2004) 23 SCLR 191 at para 10. For the description of the clause as a legislative “trump of judicial decisions,” see Tsvi Kahana, “Understanding the Notwithstanding Mechanism” (2002) 52 UTLJ 221 at 252, DOI: <<https://doi.org/10.2307/825966>>; 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 Can Bar Rev 699 at 724-25.

part of the constitution to which it applies.”<sup>23</sup> This ordinary meaning reading would support the suspended rights thesis advocated by St.-Hilaire and Ménard. For example, Jeremy Waldron has worried that “to legislate notwithstanding the Charter rights is a way of communicating to the polity that you (the legislature) do not think that Charter rights matter, at least so far as the legislation in question is concerned.”<sup>24</sup> Although Waldron is primarily concerned with the popular impression of the term “notwithstanding” in section 33, his interpretation illustrates how the ordinary linguistic meaning of “notwithstanding” section 33(1) is used to support the suspended rights thesis. Waldron interprets section 33 as forcing legislatures to present their disagreements with courts about the proper interpretation of rights as “rights-misgivings,” taking certain rights “to an extreme or applying [them] in cases where other important interests (for example, survival and security) are much more urgently engaged.”<sup>25</sup>

But this reading is mistaken. Read with less guesswork about ordinary linguistic meaning, the term “notwithstanding” simply indicates that statutory conflicts with selected *Charter* provisions cannot be used to hold laws unconstitutional. This leaves open the question of whether the statutes invoking section 33 are inconsistent with *Charter* rights, or perhaps “reasonable limits” on rights under section 1—but it closes the door on courts holding such laws to be unconstitutional. To understand why the term “notwithstanding” should not be read in the ordinary language sense of suspending rights, it is worth consulting its history.

## 1. HISTORY

The historical meaning of the term “notwithstanding” guarantees the priority of one legal provision against another in the interest of avoiding conflicts of laws. In the Westminster tradition, the terms “notwithstanding” or “*non-obstante*” once had the legal effect of suspending, trumping, or overriding laws, but this changed with the Glorious Revolution. Until the 1689 English Bill of Rights, the term *non-obstante* was originally linked to the Crown prerogative power to “suspend”

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23. Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) at 50, DOI: <<https://doi.org/10.1017/CBO9780511691867>>.  
Professor Webber has changed his view since his impressive and convincing early work.

24. “Some Models of Dialogue Between Judges and Legislators” (2004) 23 SCLR 7 at para 60.

25. *Ibid.*

or “dispense” with laws.<sup>26</sup> If the Westminster constitution had not been altered by the Glorious Revolution, then constitutional “*non obstante*” or “notwithstanding” powers could be analogized to King James II’s suspensions of laws. But Articles I and II of the Bill of Rights cut the suspension and dispensing powers away from the Crown and transformed them into the ordinary legislative power to enact changes in the law, so that statutory enactments could not be overridden by royal or judicial orders.<sup>27</sup> In William Blackstone’s words, the King’s power of *non obstante* was “effectually demolished by the bill of rights at the revolution.”<sup>28</sup>

The original English statutory notwithstanding (“*non obstante*”) clause was Article II of the Bill of Rights, holding “that from and after this present session of Parliament no dispensation by *non obstante* of or to any statute or any part thereof shall be allowed...except a dispensation be allowed of in such statute.”<sup>29</sup> This changed the prerogative power to suspend or dispense with the law into the statutory power to make alterations to the scope of laws using the statutory terms “non obstante” and “notwithstanding,” which thereafter took on the meaning of ensuring the *primacy* or *paramountcy* of a statutory provision, implying the repeal of any other conflicting past or present provisions, but not the existence of any such conflicts.<sup>30</sup> The post-Glorious Revolution meaning of the term “notwithstanding” is tied to how the English Bill of Rights prohibited the King and his judges from suspending, dispensing, or overriding laws. As a matter of Westminster history, the statutory term “notwithstanding” means the opposite of suspending the law. It means that a law *cannot be suspended* by the laws to which it applies, except by explicit statutory authority.

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26. See Paul D Halliday & G Edward White, “The Suspension Clause: English Text, Imperial Contexts, and American Implications” (2008) 94 Va L Rev 575 at 615-16. The King’s suspending power “erased the action of the law altogether,” while the dispensing power “excepted named persons from the action of law in specific cases” (*ibid* at 615).

27. See “English Bill of Rights 1689,” online: *The Avalon Project at Yale Law School* <avalon.law.yale.edu/17th\_century/england.asp> [perma.cc/6UXD-22MU].

28. *Commentaries on the Laws of England* (Clarendon Press, 1765) reprinted in William Blackstone, *Commentaries on the Laws of England* (William S. Hein & Co, 1992) at 331.

29. *Supra* note 27. This meaning was echoed in the constitutional theory of the age. For example, in Thomas Hobbes’ *Leviathan* the “laws of nature” specifically apply to the state of nature, yet he says “notwithstanding the laws of nature (which every one hath then kept, when he has will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will, and may lawfully rely on his own strength and art, for caution against all other men” (*Leviathan* (Hackett, 1994) at 106). Hobbes does not mean that the laws of nature are “suspended” by the lack of a sovereign power, but rather that the laws of nature can minimize but not guarantee the right of men to self-preservation in the state of nature.

30. See Ruth Sullivan, *Statutory Interpretation*, 2nd (Irwin Law, 2007) at 304-05.

## 2. NOTWITHSTANDING PROVISIONS

With this history in mind, it becomes easier to understand the contextual meaning of “notwithstanding a provision” in section 33(1). Statutes that “shall operate notwithstanding a provision” of the *Charter* may be paramount over such provisions in the case of conflicts, but they are not necessarily in conflict with rights, nor do they suspend rights. They simply cannot be constitutionally suspended by the provisions they contravene. Considered on its own, section 33(1) preserves the constitutionality of statutes that may or may not be inconsistent with rights enumerated in the *Charter*. This is partly a matter of the meaning of “notwithstanding” as a paramountcy clause, and partly a result of how the word “operate” relates to the section 52(1) supremacy clause. It also makes sense to avoid reading “notwithstanding” as suspending rights because the clause speaks of “provisions” rather than “rights.”

Canadian courts understand statutory notwithstanding clauses as the legislature’s instruction to interpret part of the law as a “paramount provision” when seeking to avoid conflicts between provisions, in order “to produce coherent, internally consistent legislation.”<sup>31</sup> In statutory interpretation, “notwithstanding” or “non obstante” clauses function not to create conflicts but to state which provision has priority in the case of conflicts.<sup>32</sup> As noted above, this reflects their post-Glorious Revolution history as guarantees of parliamentary sovereignty against the Crown in its executive and judicial capacities. Notwithstanding clauses ensure the paramountcy of statutes by reading them as consistent with or as having priority over inconsistent provisions of other laws. Analogously, it seems plausible to say that the paramountcy of laws invoking section 33(1) does not rule out their consistency with rights, but it does guarantee their constitutional validity “notwithstanding” any potential inconsistencies. This means that laws properly invoking the notwithstanding clause are constitutional. This could be because they are consistent with enumerated rights, they constitute “reasonable limits” on rights under section 1, or they have priority over conflicting rights in some other sense that is nevertheless constitutionally authorized by section 33’s status as part of the *Charter* itself.

Beyond analogies, the way that section 33(1) ensures that laws “shall operate” implies that laws invoking the clause are constitutional, “notwithstanding” any inconsistencies with the “provisions” they select. The term “operate” implies that

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31. *Ibid* at 305.

32. See Asher Honickman, “Deconstructing Section 28” (29 June 2019), online: *Advocates for the Rule of Law* < [www.ruleoflaw.ca/deconstructing-section-28](http://www.ruleoflaw.ca/deconstructing-section-28) > [perma.cc/6W32-KVDG].

such laws have constitutional priority, in the sense that they are to be interpreted as constitutionally consistent despite any inconsistencies with specified provisions. Section 52(1) of the *Constitution Act, 1982* guarantees “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” This does not prevent laws that are consistent with the Constitution yet inoperative due to a conflict with some other provision of fundamental law.<sup>33</sup> For example, in Canadian federalism jurisprudence, constitutionally valid provincial laws can be inoperative due to their inconsistency with valid but paramount federal laws.<sup>34</sup> But section 52(1) does prevent the operation of any law if it is inconsistent with the Constitution. Presuming that all operable laws are constitutionally consistent, section 33(1) protects the paramount consistency of laws with the Constitution, “notwithstanding” any inconsistencies with selected *Charter* provisions.

Another reason section 33(1) does not suspend *Charter* rights is that the term “notwithstanding” applies to certain “provisions” and “sections” of the *Charter*, rather than to *Charter* rights themselves. Of course, this could reasonably be taken to imply that laws suspend enumerated rights because such rights and freedoms are the *content* of the *Charter*’s provisions. Even so, the fact that the language of section 33(1) requires legislatures to “expressly declare” that laws “shall operate notwithstanding a *provision*” supports interpreting “notwithstanding” as guaranteeing the constitutionality of laws without suspending rights.

Laws invoking section 33 do not gain priority over *specified rights*, but rather over specified “provisions” and “sections” of the *Charter*. This protects the constitutionality of enactments notwithstanding any inconsistencies discovered by the courts, without implying that such inconsistencies amount to violations of *rights*. That may even leave room for federal or provincial laws to invoke section 33 by simply stating “notwithstanding the *judicial interpretation* of section X of the *Charter*,” and to complement such statements with alternative legislative interpretations of *Charter* rights (*e.g.*, in preambles).

This suggests there is no need for a constitutional amendment to section 33, as some scholars have suggested, as a means of clarifying that notwithstanding

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33. See Malcolm Lavoie, “R. v. Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union” (2017) 40 Dal LJ 189 at 216-17.

34. See *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327; *Bank of Montreal v Marcotte*, 2014 SCC 55 at para 72.

enactments do not suspend *Charter* rights.<sup>35</sup> The wording of section 33(1) may already authorize statutes that facially interpret the scope and nature of *Charter* rights by targeting judicial decisions about rights. Legislators themselves should perhaps take note of this. Keeping in mind the paramountcy meaning of “notwithstanding,” the text “notwithstanding a provision” does not create conflicts with *Charter* provisions, nor the rights they contain.

### 3. MOOTNESS

Given the reasonable assumption that operable laws are constitutional, laws properly invoking section 33(1) are to be treated as constitutional, however inconsistent they may be with selected provisions of the *Charter*.<sup>36</sup> This does not settle the question of the consistency of statutes with selected *Charter* rights, but it arguably does render this question moot and beyond the judicial function. This mootness releases legislatures from the onus of demonstrating to courts that legislation is consistent or sets “reasonable limits” on the *Charter* rights they engage. It does nothing to reduce the onus of demonstrating to citizens that laws are consistent with rights or reasonable limits on rights.

Could courts declare laws invoking section 33(1) to be unconstitutional violations of *Charter* rights *if not for their invocation* of the notwithstanding clause? Or could they in some way limit themselves to noting that such laws are inconsistent with *Charter* rights without impugning their constitutionality? Part I(B) of this article will show that section 33(2) directly prohibits judicial review; but even on its own, section 33(1) indirectly prevents, or at the very least discourages, such declarations.

Considering section 33(1) alone, the answer to the first question is that courts could not hold laws invoking the clause to be unconstitutional violations of rights. The Supreme Court of Canada’s logic holds that unconstitutional laws are inoperable and that operable laws are constitutionally consistent per section 52(1),<sup>37</sup> with the admitted grey area of cases wherein courts “suspend” declarations

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35. For examples of scholars advocating such amendments, see Richard Albert, “The Desuetude of the Notwithstanding Clause – and How to Revive It” in Emmett Macfarlane, ed, *Policy Change, Courts, and the Canadian Constitution* (University of Toronto Press, 2018) 146; Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd (Oxford University Press, 2001) at 193 [Manfredi, *Judicial Power*].

36. This is true even if we follow the distinction between “internal” scope limits and “external” section 1 limits on *Charter* rights. See Stephen Gardbaum, “Limiting Constitutional Rights” (2007) 54 UCLA L Rev 789 at 801, 806.

37. See *Nova Scotia (Workers’ Compensation Board) v Martin*, 2003 SCC 54 at para 28.

that laws are constitutionally invalid to avoid lawlessness.<sup>38</sup> If operable laws are presumed constitutional, per section 52(1), then it follows that laws invoking section 33(1) cannot be declared unconstitutional violations of rights. This suggests that there is no “live controversy” with respect to the constitutional consistency of laws invoking section 33(1) that will have any practical effect.<sup>39</sup> These cases will be moot. This should lead courts to refuse to hear cases about how laws *would* be unconstitutionally inconsistent with rights if not for their invocation of section 33(1).

Could courts declare laws invoking section 33(1) inconsistent with *Charter* rights without holding them unconstitutional? There is nothing in section 33(1) that ensures that laws will be consistent with *Charter* rights. Even so, the clause does appear to indirectly insulate laws from *Charter* review on account of separation of powers and vagueness concerns. The Supreme Court of Canada has held that it may consider moot questions in rare circumstances where this will not threaten scarce judicial resources, or where it will serve the public interest, or where it will not “be viewed as intruding into the role of the legislative branch.”<sup>40</sup> However, adjudicating constitutional laws that appear inconsistent with the *Charter* would intrude on the legislative function as a kind of politicized reference question for private litigants. It would be akin to the kind of “private reference question” that the Court refused to settle in *Borowski v Canada*.<sup>41</sup> Entertaining such questions would also run against the Court’s own reasoning in the *Reference Re Secession of*

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38. See *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 746-53. The only examples of operable but constitutionally inconsistent laws are “judicially created” cases where courts suspend the formal impact of their conclusion that laws are unconstitutional to prevent the breakdown of the rule of law. *Ontario (AG) v G*, 2020 SCC 38 at para 239. See also Webber, “Notwithstanding Rights, Review, or Remedy?” *supra* note 10 at 519-23. Note Webber’s reading of section 33 underlines the “all-important” shift in the Supreme Court’s early practice of characterizing suspended declarations of invalidity in the language of “deem[ing]...temporarily validity and force and effect” for inconsistent legislation (*Re Manitoba Language Rights*, *supra* note 38 at 780) to “suspend[ing] the declaration of invalidity” (*Carter v Canada (AG)*, 2015 SCC 5 at para 128). The Court’s current language of suspending the declaration of invalidity adheres to the notion that the court cannot formally hold that the law is invalid but operable. That is why the declaration is “suspended” to a specific future time. Webber’s view that normally the operation, consistency, and validity of laws in relation to the supreme Constitution offer courts no discretion aligns with the premise of the argument offered here. Webber’s view that section 33(2) severs this connection is at odds with the argument and his view is addressed in Part II(B) below.

39. *Borowski v Canada (AG)*, [1989] 1 SCR 342 at 344.

40. *Ibid* at 362.

41. *Ibid* at 365.

*Québec* that courts should decline reference questions that are too legally vague,<sup>42</sup> including vague questions that would “usurp any democratic decision.”<sup>43</sup>

The proper invocation of section 33 is a democratic decision, and it is not clear how courts would justify the constitutionality of laws deemed inconsistent with *Charter* rights. Would they constitute “unjustifiable” limitations on rights under section 1 that are nevertheless consistent with the Constitution? Or would they sever the normal link between the operation and constitutionality of laws under section 52(1)? The former view is how Leckey and Mendelsohn understand the possibility of judicial review of laws invoking section 33; the latter is how Webber sees the matter. While these arguments are directly considered and countered in Part II(B) below, it is safe to say that their mutual disagreements raise questions about the clarity of any jurisdiction for courts in reviewing the substance of laws invoking section 33(1). This vagueness is just one more reason why courts should avoid reviewing the *Charter* consistency of laws that properly invoke section 33, even where such laws appear to be *prima facie* inconsistent with *Charter* rights.

If we assume that operational laws are constitutional, then the meaning of “shall operate notwithstanding” in section 33(1) settles the consistency of legislation with the Constitution. This does not settle the consistency of laws with *Charter* rights, but it does indirectly prevent, or at the very least discourage, judicial review. On this interpretation, the *Québec* trial court in *Hak* was quite correct to decline to issue a declaration that *Loi 21* is a violation of *Charter* rights, but the court should have been even more explicit about why the question was not only hypothetical (*des considérations hypothétiques*), but also beyond judicial review.<sup>44</sup> Section 33(2) directly ensures that the court in *Hak* did not have discretion (*discretion judiciaire*) to make such declarations about such moot questions.<sup>45</sup> The following part of this article will help clarify why section 33(2) denies any such discretionary reasoning or remedies.

## B. “SHALL HAVE SUCH OPERATION BUT FOR...”

Whatever can be gleaned about the legal effect of the notwithstanding clause from the meaning of section 33(1) must be qualified by and related to section 33(2). Section 33(2) directly addresses how courts should treat the legal effect of laws that use the notwithstanding clause. The English text reads:

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42. *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

43. *Ibid* at para 217.

44. See *Hak*, *supra* note 6 at para 795.

45. *Ibid* at para 796.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

This part of the article argues that the textual mood of section 33(2) prohibits the substantive judicial review of laws invoking the notwithstanding clause. This allows legislatures to have a substantive say about the interpretation of *Charter* rights without sacrificing the Blackstonian connection between consistency, validity, and operation of fundamental law.

#### 4. BLACKSTONE'S OPERATION

To clarify how the term “operation” in section 33(2) relates to the legal effect of statutes, it is first necessary to review the Blackstonian linkage between the consistency, validity, and operation of laws. This linkage supports reading section 33(1)’s protection for the operation of laws as a guarantee of their constitutional consistency. Like “notwithstanding,” the term “operation” is a term of art in common law systems. The Blackstonian view of this term of art (a view that Canadian courts have said is inspired by William Blackstone’s aphorism claiming that judges discover rather than make law) maintains that invalid laws are invalid from the outset (*ab initio*), and that all government activity carried out in relation to the invalid law is consequently invalid too.<sup>46</sup>

This understanding of judicial power has deep roots in common law systems.<sup>47</sup> Even before the *British North America Act, 1867*, the *Colonial Laws Validity Act 1865* made the “Repugnancy” of colonial laws to “the Provisions of any Act of Parliament extending to the Colony” result in such laws being “absolutely void and inoperative.”<sup>48</sup> Later, the *Statute of Westminster 1931* ensured that no colonial statute would be “void or inoperative on the ground that it is repugnant to the Law of England.”<sup>49</sup> The Supreme Court of Canada drew on this history to interpret the supremacy clause in section 52(1) of the *Constitution Act, 1982*, which, as discussed above, states that laws are “of no force or effect” to the extent that they are inconsistent with the Constitution. In *Re Manitoba Language Rights*, the Court reasoned that the words “‘of no force or effect’ mean

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46. See *Canada (AG) v Hislop*, 2007 SCC 10 at para 84, citing William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) at 69-70.

47. See generally Robert Leckey, *Bills of Rights in the Common Law* (Cambridge University Press, 2015) at 57-63, DOI: < <https://doi.org/10.1017/CBO9781139833912>>.

48. (UK), 28 & 29 Vic, c 63, s 2.

49. (UK), 22 Geo V, c 4, s 2(2).

that a law thus inconsistent with the Constitution has no force or effect because it is invalid.”<sup>50</sup>

While the Court has made various exceptions to the remedies available in relation to the retroactive invalidity of laws,<sup>51</sup> section 52(1) remains subject to the Blackstonian interpretation that invalid laws are “inoperative” insofar as they are inconsistent with constitutional law. Courts have no discretion to make declarations that legislation is inconsistent with the Constitution without also holding that “the law has failed by operation of s. 52.”<sup>52</sup> Where the Blackstonian view involves the invalidity of statutory law that is inconsistent with supreme constitutional law, a statute’s invalidity “does not arise from the fact of its being declared unconstitutional by a court, but from the operation of s. 52(1).”<sup>53</sup> This means that “[c]ourts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state.”<sup>54</sup>

The Blackstonian view moves from the inconsistency of laws with a superior order of law, to the invalidity, and finally to the inoperability of laws. It holds that there can be no law inconsistent with the Constitution that is valid and operable. But not all inconsistencies between laws of the same order imply invalidity, and not all valid laws are operable.

What does the Blackstonian link between the consistency, validity, and operation of laws have to do with understanding the legal effect of section 33? One result of this linkage is that because the “operations” of law presumes their constitutional consistency and validity, section 33(2) reinforces the requirement that laws properly invoking the notwithstanding clause be treated as presumptively constitutional. But the full impact of section 33(2) can only be understood by paying attention to the mood of the English and French texts.

## 5. SUBJUNCTIVE OPERATION

The subjunctive mood of the English text of section 33(2) ensures that courts cannot subject laws invoking the notwithstanding clause to substantive judicial review. When section 33(2) says that the law “shall have such operation as it would have but for” selected provisions of the *Charter*, it asks courts to act *as*

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50. *Supra* note 38 at 746.

51. See e.g. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 at 18.

52. *R v Ferguson*, 2008 SCC 6 at para 27.

53. *Nova Scotia (Workers’ Compensation Board) v Martin*, *supra* note 37 at para 28.

54. *Ibid.*

*though* the relevant *Charter* rights have no bearing on the operation of the law at all. The clause specifically protects the operability of laws in the counterfactual state-of-affairs where the selected *Charter* provisions do not exist, and there is *no question* of their inconsistency with statutes. This protects the full Blackstonian package of laws' constitutional consistency, validity, and operation. The subtlety of the subjunctive mood is that statutes operate *as though* they exist in a world where relevant *Charter* provisions do not exist, while of course, the provisions do continue to exist. And this leaves it open to citizens and politicians to politically assess their consistency with laws invoking section 33.

It will be helpful, at this point, to review the subjunctive and indicative moods. In English, the indicative mood signals actual state-of-affairs.<sup>55</sup> The subjunctive mood signals counterfactual or hypothetical states of affairs.<sup>56</sup> Imagine ordering a meal from a waiter in a restaurant. An example of an indicative order is, "I'll have the rainbow trout without any sauce." The waiter is directed to bring one thing (rainbow trout) without another thing (sauce). A subjunctive order is a stranger thing because it will involve asking someone to do something as though a counter-factual or hypothetical state of affairs is obtained.

An example of a subjunctive order is: "I'll eat whatever is *vegetarian*, but for my sake consider *fish* a *vegetable*." The waiter is instructed to bring a set of things (vegetables), including one type of thing that lies outside of that set (fish), by pretending that the outlying thing belongs naturally to the ordered set (trout *qua* veggie). If the waiter brought the customer a rainbow trout with the pronouncement "here is your non-vegetarian meal, madame," he would be disobedient. If the waiter set down a plate of rainbow trout in front of the customer while saying "here is your *vegetarian* meal, madame," he would be more obedient for his drole emphasis.

Section 33(2)'s text communicates a subjunctive order for courts to treat the "operation" of laws "as [they] would have but for" their selected provisions of the *Charter*. The world where the law operates as if the selected provisions did not exist is a counterfactual world. Absent these provisions, laws could not be interpreted as inconsistent with their enumerated rights. Courts must reason as though laws have the same operation they would have in the state of affairs where

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55. See Wayne A. Davis "Indicative and Subjunctive Conditionals" (1979) 88 *The Philosophical Review* 544, DOI: < <https://doi.org/10.2307/2184844>>. "Conditionals appear in either the indicative or the subjunctive mood. 'If I release the glass, it *will* fall' is an indicative conditional, for its consequent is in the indicative mood. 'If I released the glass, it *would* fall' is a subjunctive conditional, its consequent being in the subjunctive" (*ibid* at 545). See also Bas Aarts, "Mood" in *Oxford Modern English Grammar* (Oxford University Press, 2011) 275.

56. See Aarts, *supra* note 55.

inconsistency with the relevant *Charter* provision(s) *did not exist* as grounds for assessing the operability of the law. Laws cannot be held inoperable because they cannot be interpreted as inconsistent and invalid in relation to the selected part of the *Charter*. Like the waiter who is instructed to treat fish as a vegetable, the court must uphold the law without blurting out what it might otherwise say about its inconsistency with rights enumerated in the *Charter*.

The subjunctive mood of section 33(2) in no way undermines how section 33(1) allows laws to be consistent with *Charter* rights (or perhaps reasonable limits on rights under section 1). This is the subtlety of the subjunctive: courts are not told to interpret laws as suspensions, overrides, or trumps over *Charter* rights; they are instead asked to act *as if* the provisions of the *Charter* in question *do not exist* as grounds for assessing the constitutional consistency, validity, and operation of laws. The laws operate as they would have in a world where the selected provisions of the *Charter* do not exist in relation to them, and *Charter* provisions cannot be used to question the rights-consistency of laws in a world where they do not exist.

The terms “suspending,” “overriding,” “trumping,” or “applying” could all inaccurately be used to express this unique relationship between a statute and a *Charter* provision, but they do not quite capture how the subjunctive language of “shall have such operation as it would have but for” entails treating the statute *as though* the *Charter* provision is not there, even though *it is there*. It does not “suspend” the *Charter* from “applying” to statutes, because the subjunctive implies that statutes invoking section 33(2) operate *as though* selected *Charter* provisions do not exist as grounds for assessing their constitutionality. But the *Charter* provisions continue to exist and apply to laws invoking section 33; they are not temporarily amended out of the Constitution. Rather, they are to be treated as though they did not exist for purposes of assessing the constitutionality of the law.

As a result, section 33(2) imposes institutional blinders prohibiting courts from reviewing the consistency, validity, and operability of laws in relation to the *Charter* provisions they select. Courts cannot hold in their reasons (*rationes*) that laws are inconsistent, invalid, or inoperative, and they also seem to be barred from considering the hypothetical inconsistency of laws with rights in *obiter dicta*.<sup>57</sup> Because section 33(2)’s subjunctive mood instructs courts to reason about laws invoking the notwithstanding clause *as though* selected provisions of the *Charter* do not exist in relation to such statutes, this appears to bar even *hypothetical* reasoning. Perhaps the most that litigants hoping for declarations of

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57. For the Supreme Court’s landmark precedent concerning the *ratio decidendi* and *obiter dicta* distinction, see *R v Henry*, 2005 SCC 76 at paras 57-58.

inconsistency should expect is for courts to note that section 33(2) prevents them from reasoning about the constitutional consistency of laws that are alleged to conflict with selected *Charter* provisions.<sup>58</sup>

If section 33(2) were indicative, it might have read “shall have such operation but for the provisions of the *Charter* referred to in the declaration.” Such a construction could indicate that courts have discretion to consider the consistency and validity of laws in relationship to *Charter* provisions, while being barred from holding laws inoperative as a result of any inconsistencies. This might prohibit only the *last* step in the chain of adjudicative reasoning from invalid to inoperative laws. But the subjunctive mood of section 33(2) prohibits courts from reasoning about the inconsistency and invalidity of laws by requiring them to respect the operation of the law *as it would exist without* the *Charter* provisions in question. This prohibits the *whole chain* of reasoning from inconsistent to invalid to inoperative laws. As such, the court in *Hak* was quite mistaken if it truly meant to imply that it had the “discretion” (*discretion*) to review the *Charter* consistency of laws invoking the notwithstanding clause.<sup>59</sup> The subjunctive mood of section 33(2) directly removes such reasoning from the discretion of courts. As discussed in Part II(B) below, Webber mistakenly reads section 33(2) as if were written in the indicative mood.

Interestingly, the subjunctive mood of section 33(2) supports the court’s decision in *Hak* to refuse to consider remedies under sections 24 or 28 against *Loi 21*. Section 33(1) does not textually apply to section 24’s guarantee of remedies for violations of *Charter* rights,<sup>60</sup> nor to section 28’s guarantee of the equal guarantee of rights to both sexes “notwithstanding anything in this *Charter*.”<sup>61</sup> But section 33(2)’s subjunctive mood ensures that courts are prohibited from considering whether laws are inconsistent with the sections of the *Charter* they select.

When courts act *as though* the law operates as it would without any relationship to the *Charter* provision(s) it selects, there is no way for them to assess whether rights have been “infringed or denied” as required for a remedy under section 24.<sup>62</sup> The world where laws operate as they would but for select

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58. The Court may note alleged inconsistencies between law and selected *Charter* provisions when holding that section 33(2) does not allow them to reason about whether they constitute constitutional inconsistencies, that is, violations or reasonable limits on rights. But that is all.

59. *Hak*, *supra* note 6 at para 796.

60. See *Charter*, *supra* note 3, s 24.

61. *Ibid*, s 28.

62. Leckey & Mendelsohn, *supra* note 2; Sirota, *supra* note 8.

*Charter* provisions is a world where laws cannot be said to infringe or deny the rights and freedoms contained in such provisions.

Similarly, because section 28 protects the sex-based equality of all rights “referred to” in the *Charter*, section 33(2) requires courts to treat the law as though it operated without any relation to the rights “referred to” by selected provisions. That bars courts from considering whether or not laws are consistent with the provisions of the *Charter* in a way that protects the equal guarantee of rights to both sexes.<sup>63</sup> This legal effect of the mood of section 33(2) backs up the trial court’s decision in *Hak* to refuse to offer the respondents a remedy using sections 24 or 28, in light of *Loi 21*’s invocation of the notwithstanding clause.<sup>64</sup>

## 6. A L’EFFET QU’ELLE AURAIT

The French text of section 33(2) takes on the past conditional (*le conditionnel passé*) rather than the subjunctive mood,<sup>65</sup> but it has the same legal effect of prohibiting substantive judicial review.<sup>66</sup> That is because in French the *conditionnel passé* mood is used to express hypothetical or counter-factual statements in much the same fashion as the English subjunctive mood.<sup>67</sup> For example, the phrase “Elle m’a dit qu’elle aurait voulu venir nous voir” translates to “She told me that she would have liked to come to see us.” The past conditional “qu’elle aurait” refers to a counterfactual state of affairs, a world where the subject of the sentence “she” did not in fact want to “come see us,” but “would have” had she known about the visit, or not been distracted, et cetera. In this light, the French text of section 33(2) requires courts to treat laws properly invoking the notwithstanding clause as having the “effet” (operation) “qu’elle aurait” (that they would have), “sauf la disposition en cause de la chartre” (but for the *Charter* provision in question).

As such, like the English text, the French version of section 33(2) requires courts to consider the law as constitutionally consistent, valid, and operational.

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63. Pace Kerri Froc, “Shouting into the Constitutional Void: Section 28 and Bill 21” (2019) 28:4 Const Forum Const 19 at 19-22, DOI: <<https://doi.org/10.21991/cf29391>>.

64. See *Hak*, *supra* note 6 at paras 785-880.

65. This is partly because the French *subjonctif* does not signal non-factual modality but is primarily used to express doubts or uncertainty. See Maurice Grevisse & André Goosse, *Le Bon Usage*, 16th ed (De Boeck Supérieur, 2016).

66. See Office québécois de la langue française, “Conditionnel dans les phrases hypothétiques” (last updated March 2021), online: *Banque de dépannage linguistique (BDL)* <[vitrinelinguistique.oqlf.gouv.qc.ca/24140/la-grammaire/le-verbe/temps-grammaticaux/conditionnel/conditionnel-dans-les-phrases-hypothetiques](http://vitrinelinguistique.oqlf.gouv.qc.ca/24140/la-grammaire/le-verbe/temps-grammaticaux/conditionnel/conditionnel-dans-les-phrases-hypothetiques)> [perma.cc/JE5A-BSGF].

67. See University of Texas “Tex’s French Grammar: Past Conditional” (accessed 4 January 2024), online: <[www.laits.utexas.edu/tex/gr/tac2.html](http://www.laits.utexas.edu/tex/gr/tac2.html)> [perma.cc/7HH4-S5KT].

They must assume the full Blackstonian package as it exists in the counter-factual state of affairs where the relevant *Charter* provision did not exist. The French text's *conditionnel passé* puts the same counter-factual blinders on courts as does the English subjunctive.

## II. NOTWITHSTANDING RIGHTS OR REMEDIES?

In answer to the question “notwithstanding what?”, it should now be clear that section 33 does not apply “notwithstanding rights,” nor “notwithstanding remedy,” that is, against the remedy of courts holding laws unconstitutional or inoperative. The true answer is “notwithstanding substantive judicial review.” Instead of suspending, overriding, trumping, et cetera *Charter* rights or the remedy of disoperation, section 33 prohibits substantive judicial review. That is, it blocks courts from considering the *whole chain* of Blackstonian reasoning about the consistency, validity, and operation of laws in relation to selected *Charter* provisions. Practically speaking, this means that courts may not hold laws properly invoking the notwithstanding clause to be inconsistent with selected *Charter* provisions, nor can they declare laws to violate *Charter* rights (at least not until the invocation reaches the five-year expiration without renewal).

This interpretation backs up the Supreme Court of Canada's holding in *Ford* that section 33 “lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy.”<sup>68</sup> But unlike St-Hilaire and Ménard's suspended rights thesis, it prevents substantive judicial review without suspending *Charter* rights. It also supports the trial court's refusals in *Hak* to declare *Loi 21* an unconstitutional violation of rights, or to offer remedies for alleged inconsistencies between the law and *Charter* rights using sections 24 and 28. This also undermines Webber's and Leckey and Mendelsohn's respective arguments for “notwithstanding remedy.”

### A. NOTWITHSTANDING RIGHTS?

Section 33 does not authorize laws “notwithstanding rights,” at least not in the sense of suspending the application of *Charter* rights to laws invoking section 33. This is because the meaning of the term “notwithstanding” in section 33(1) involves an anti-suspension rather than suspension effect; it protects the constitutionality of laws and renders questions of their consistency with

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68. *Ford*, *supra* note 4 at para 33. Note that this reading of s 33 does not prohibit the *procedural* review of whether invocations of s 33 are *intra vires*.

*Charter* provisions moot. If courts could review the substantive consistency of laws invoking the notwithstanding clause, then section 33(1) would ensure that such laws would be read as constitutional because they are consistent with rights or “reasonable limits” under section 1 or constitutionally paramount in some other sense.

The meaning of “shall operate notwithstanding a provision” does not support the suspended rights thesis offered by St-Hilaire and Ménard.<sup>69</sup> Whereas St-Hilaire and Ménard argued (with Ménard later recanting) that the notwithstanding clause prohibits judicial review by suspending rights, the reading offered here clarifies that the clause prohibits judicial review without suspending rights. Even so, section 33(2)’s prohibition against substantive judicial review vindicates St-Hilaire and Ménard’s claim that, where laws invoke section 33, there is “nothing to declare” in the sense that courts must act *as though* selected *Charter* provisions do not exist to apply to laws invoking the notwithstanding clause.<sup>70</sup> The courts have nothing to declare because the Constitution leaves the assessment of the *Charter* consistency of laws invoking the notwithstanding clause up to Canadian citizens and their representatives.

## B. NOTWITHSTANDING REMEDIES?

This article’s reading of section 33(2) also undermines claims that the notwithstanding clause prohibits *only* remedies holding laws unconstitutional or inoperative. If section 33(2) prohibited only these remedies, courts could review the substantive consistency of laws in relationship to the *Charter* rights without holding inconsistent laws unconstitutional or inoperative. The Blackstonian meaning of section 33(2)’s protection for the “operation” of laws, combined with the subjunctive mood of the English text, and the French *conditionnel passé*, together ensure that courts may not review the constitutional consistency of laws with selected provisions of the *Charter*. Rather, they must treat proper uses of the notwithstanding clause *as though* they have the same constitutional operation, consistency, and validity they would have if the *Charter* provisions in question did not exist.

As noted above, there are two different accounts of what it means for section 33(2) to apply “notwithstanding remedy.” Leckey and Mendelsohn argue that because the clause protects only the “operation” of laws and does not apply to

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69. See St-Hilaire & Ménard, *supra* note 12 at 40. Recall that Ménard has recanted the suspended rights thesis in his more recent work co-authored with Sérafin and Sun (*supra* note 12).

70. *Ibid* at 41.

section 24, laws invoking it remain subject to “judicial scrutiny” and remedies for violations of rights.<sup>71</sup> They claim that section 33(2) does “save” the *constitutional validity* of laws, even if they are held to be unreasonable limits on rights under section 1.<sup>72</sup> Webber also focuses on the “operation” of laws, but he argues that this indicates a textual exception to only the last step of the Blackstonian movement from finding laws inconsistent, invalid, and inoperative.<sup>73</sup> As a result, Webber’s reading leaves room for courts to find laws properly invoking the notwithstanding clause to be inconsistent with *Charter* rights, and *constitutionally invalid*, yet nevertheless operational. Both interpretations are used to support the thesis that courts can declare laws invoking the notwithstanding clause to be inconsistent with *Charter* rights, and both interpretations are mistaken because of their failure to acknowledge the subjunctive mood of section 33(2).

Leckey and Mendelsohn’s interpretation is implausible because it jars with *both* the subjunctive and indicative readings of section 33(2). Leckey and Mendelsohn argue that “s 33(2) makes space within the Charter, and thus within the Constitution of Canada, for laws that infringe rights by temporarily ensuring their operation without regard to their impact on specified rights and freedom.”<sup>74</sup> They further claim that whereas section 1 “saves” the constitutionality of laws that are inconsistent with rights because courts find them to be “justified in a free and democratic society,” section 33(2) preserves the “operation” of even unreasonable and unjustifiable laws.<sup>75</sup> This implies that laws invoking the notwithstanding clause can override even the “reasonable limits” authorized by section 1.<sup>76</sup>

The subjunctive mood of section 33(2) contradicts the idea that it preserves the “operation” of constitutional laws while allowing courts to review their

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71. Leckey & Mendelsohn, *supra* note 9 at 1-3.

72. *Ibid* at 8-10.

73. Webber, “Notwithstanding Rights, Review, or Remedy?” *supra* note 10 at 519-23.

74. Leckey & Mendelsohn, *supra* note 9 at 9.

75. *Ibid* at 10-11.

76. There has been some scholarly debate about the application of s 1 of the *Charter* to s 33. For example, Brian Slattery has argued that section’s “guarantee” that the *Charter* as a *whole* ensures that rights are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” means that rights are not subject to *unreasonable* limits imposed using the s 33 notwithstanding clause. See Brian Slattery, “Legislation” (1983) 61 Can Bar Rev 391. It seems unlikely that s 1 applies to s 33, because s 1 guarantees rights and freedoms, and s 33 grants neither rights nor freedoms. However, if s 1 applies to s 33 because it applies to the *Charter* as a *whole*, then Leckey and Mendelsohn’s view implies that the notwithstanding clause can override even the “reasonable limits” authorized by s 1. That would unacceptably imply that s 33 authorizes *unreasonable* limits on rights in the face of s 1’s explicit guarantee of rights and freedoms subject to only to “reasonable limits” (*supra* note 9).

consistency and validity in relation to *Charter* rights. Because section 33(2) requires courts to treat laws with the same operation, validity, and consistency they would have in a counter-factual world without the *Charter* provision in question, courts are prohibited from looking to the inconsistency of laws with *Charter* provisions. Section 33(2) thereby directly bars the kind of review Leckey and Mendelsohn think it authorizes. Finally, even if section 33(2) were indicative, it would be plausible to read it as making an *exception* to what normally follows from the inconsistency and invalidity of laws with the Constitution. This would not “save” the constitutionality of laws but only their operation in the face of their unconstitutionality (as Webber argues).

Webber’s interpretation would be more plausible if the text of section 33(2) were written in the indicative mood, or if the French text were not written in the past conditional. Webber reads the English text’s subjunctive language of “as it would have but for the provision,” as though it read “but for the provision” or “if not for” or “except for” or “in spite of,” indicating an exception to the ordinary inquiry into the consistency, validity, and operability of statutes as they relate to the *Charter*. He treats the application of the *Charter* to the operability of laws the way a customer treats tuna when she orders “one salade niçoise, but hold the fish.” And it is true that if section 33(2) read “shall have such operation but for,” then it could be more plausible for courts to exempt consideration of the operation of laws from their inquiry into the consistency and validity of statutes. But the subjunctive use of “would” in section 33(2) instructs judges to treat the operation of laws *as though* they operated without any relation to selected provisions of the *Charter*. That prohibits courts from assessing any inconsistencies with the rights and freedoms enumerated in those provisions.

### III. LEGISLATED RIGHTS AS TRUMPS

Why enact laws notwithstanding judicial review? Reading the notwithstanding clause as immunizing laws against substantive judicial review, as opposed to suspending rights or specific remedies, aligns well with the framers’ primary purpose for section 33: preventing or remedying the undemocratic mischief of judicial misinterpretations of *Charter* rights.<sup>77</sup> In other words, it secures the possibility of legislated rights as trumps<sup>78</sup> against judicial review.

77. See Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) at 256-61, DOI: < <https://doi.org/10.1093/acprof:oso/9780199646999.001.0001> > (on the relationship of laws to the mischief they are drafted to address).

78. As many readers will recognize, this article’s eponymous phrase “legislated rights as trumps” intentionally subverts a well-known phrase from Ronald Dworkin. See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2013) at 329.

Although the historical purpose of the notwithstanding clause is but one guiding source for interpreting its constitutional meaning,<sup>79</sup> it would be a mistake to understand the clause by looking only to the framers who voted for (or against) including the clause in the Constitution.<sup>80</sup> Indeed, it is risky business to look to historical intentions at all, except where actual evidence of the historical purposes of constitutional drafters in “direct[ing] and constrain[ing] future action” support interpretations of the semantic meaning of the text.<sup>81</sup> However, both the fears of the framers who opposed the notwithstanding clause and the hopes of the framers who crafted and supported it are relevant to understanding the meaning of the text in relation to its historical purpose. And as Dwight Newman has aptly shown, the reflections of the prairie premiers, Allan Blakeney of Saskatchewan and Peter Lougheed of Alberta, have special relevance for understanding the historical purpose and meaning of section 33 because they were its primary champions and drafters.<sup>82</sup> Taken together, the evidence from the framers supports reading the clause’s primary historical purpose as enabling legislatures to resist wayward judicial interpretations of rights, rather than to override or suspend rights themselves. This historical purpose lines up best with reading the terms “shall have such operation but for” in section 33(2) as prohibiting substantive judicial review without suspending rights.

There may be some evidence that the notwithstanding clause was expected to be used to suspend and override *Charter* rights. For example, Trudeau went so far as to link his opposition to section 33 to the rights suspension thesis in his memoirs, where he noted that including section 33 in the *Charter* “violated

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79. See *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, Lamer CJC (“The flexibility of the principles [the *Charter*] expresses does not give us authority to distort their true meaning and purpose, nor to manufacture a constitutional law that goes beyond the manifest intention of its framers” at 337). As Oliphant and Sirota note, this passage is particularly remarkable because Lamer CJC also authored the anti-originalist *dicta* in *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486. See Benjamin Oliphant & Léonid Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 Queen’s LJ 107 at 155, DOI: <<https://doi.org/10.2139/ssrn.2749212>>.

80. See Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at 144–45, DOI: <<https://doi.org/10.1093/acprof:oso/9780198262138.001.0001>>.

81. Michael W McConnell, “Time, Institutions, and Interpretation” (2015) 95 BU L Rev 1745 at 1758 (“But when the function of a text is to direct and constrain future action, the meaning of the text *is* what the authors of the text ‘intend’ to direct or constrain, rendering the distinction purely abstract” at 1758).

82. See Dwight Newman, “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities” in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019) 209 at 224, DOI: <<https://doi.org/10.1017/9781108277938>>.

my sense of justice: it seemed wrong that any province could decide to suspend any part of the Charter, even if the suspension was only temporary.”<sup>83</sup> And in 1981, then Minister of Justice Jean Chrétien introduced the penultimate draft of the *Charter* to Parliament while describing the notwithstanding clause as a “safety valve” that was “unlikely ever to be used except in non-controversial circumstances...to override certain sections of the [*Charter*].”<sup>84</sup>

These comments could be used to make the case that the purpose of the notwithstanding clause was to suspend and override rights. However, it is important to remember that this evidence is primarily found in the reflections and statements of the federalist framers who *opposed* including the notwithstanding clause in the *Charter*, due to their fears that it would undermine rights.<sup>85</sup> Whatever Chrétien and Trudeau had to say, or Chrétien continues to say,<sup>86</sup> about the purpose of section 33 should be understood with careful consideration for their opposition to the notwithstanding clause. Evidence from the reflections of the prairie premiers who supported the clause, surveyed below, directly contradicts Chrétien’s claim that the law was meant to suspend rights on rare and uncontroversial occasions. As such, Trudeau’s fears are best understood not as evidence of the historical purpose that the notwithstanding clause was crafted to fulfill, but rather as expectations about the *abuse* of that purpose. Chrétien’s claim that a clause would be used sparingly to suspend rights in uncontroversial emergencies expresses his hope that the clause he opposed would be understood in ways that minimized its use.

In contrast, there is evidence that Allan Blakeney and Peter Lougheed drafted and gained provincial support for the notwithstanding clause as a means of contesting judicial review. Both Blakeney and Lougheed supported a patriation deal without a *Charter* in 1981, but they each came to accept the *Charter* as part of the patriation package once Chrétien and Trudeau agreed to the notwithstanding

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83. Pierre Elliott Trudeau, *Memoirs* (McClelland & Stewart, 1995) at 193.

84. “Resolution Respecting Constitution Act, 1981,” *House of Commons Debates*, 32-1, No 12 (20 November 1981) at 13042 (Hon Jean Chrétien).

85. See Janet L Hiebert, “Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding” in James Kelly & Christopher Manfredi *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (University of British Columbia Press, 2009) at 110.

86. See “Chrétien, Romanow and McMurtry attack Ford’s use of the notwithstanding clause” (14 September 2018), online: *Maclean’s* <[macleans.ca/politics/ottawa/chretien-romanow-and-mcmurtry-attack-fords-use-of-the-notwithstanding-clause](http://macleans.ca/politics/ottawa/chretien-romanow-and-mcmurtry-attack-fords-use-of-the-notwithstanding-clause)> [perma.cc/6AX8-N22X].

clause.<sup>87</sup> Blakeney, Lougheed, and Manitoba's premier Sterling Lyon made the notwithstanding clause a condition of their agreement to patriation at the November 1981 First Ministers' meeting.<sup>88</sup> Blakeney, Lougheed, Lyon and the premiers of the other provinces, with the exception of Québec, accepted Trudeau's proposed five-year expiration on laws, including notwithstanding provisions and limits on its application to democratic, mobility, and language rights.<sup>89</sup>

Lougheed emphasized how section 33 ensures that *Charter* rights remain subject "to a final political judgment in certain instances, rather than a final judicial determination as to the extent of all rights."<sup>90</sup> Blakeney's view overlapped with Lougheed's but also extended to envisioning section 33 as a means of protecting unenumerated rights that might be threatened by judicial decisions.<sup>91</sup> Blakeney publicly contradicted the account of one of his constitutional advisors during the *Charter* negotiations, John Whyte, who had previously offered a misleading historical argument for the suspended rights thesis by claiming:

The premiers' interest was probably not simply to acquire the power to correct mistaken and dangerous rights decisions of the courts, but rather to gain the ability to suspend rights determinations so that, in some instances, public interests could be pursued.<sup>92</sup>

Whyte's historical claim reflects the entanglement of the rights suspension thesis with the more general and widespread assumption that a legislature is a "forum of policy" in which political decision-making is justified as a matter of whether

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87. The idea for a non-obstante or notwithstanding clause was first suggested by the Premier of Alberta Peter Lougheed at the February 1979 meeting of First Ministers. See Barry Strayer, "The Evolution of the Charter" in L Harder & S Patten, eds, *Patriation and Its Consequences: Constitution Making in Canada* (University of British Columbia Press, 2015) 72 at 90, DOI: <<https://doi.org/10.59962/9780774828635>>.

88. *Ibid.*

89. See Howard A Leeson, *The Patriation Minutes* (Centre for Constitutional Studies, Faculty of Law, University of Alberta, 2011) at 70. Blakeney and Lougheed were undoubtedly the critical figures in making the notwithstanding clause a condition of patriation, as they, particularly Lougheed, helped bring Premier Lyon (who was even more skeptical of a *Charter* than the other Western premiers and intentionally antagonized Trudeau) to accept the *Charter* (*ibid* at 29, 31, 42, 64). They also resisted Ontario Premier Davis' attempt to limit the notwithstanding clause so that it would not apply to s 2 fundamental freedoms (*ibid* at 66, 69).

90. The Honourable Peter Lougheed, "Why A Notwithstanding Clause?" (1998) 6 Points of View (Edmonton: Centre for Constitutional Studies, University of Alberta) 1 at 6.

91. See The Honourable Allan Blakeney, "The Notwithstanding Clause, the *Charter*, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1 Const Forum Const 1 at 6, DOI: <<https://doi.org/10.21991/C9KD4W>> [Blakeney].

92. Whyte, *supra* note 19 at 83.

it “advances or protects some collective goal of the community as a whole.”<sup>93</sup> The courtroom is characterized as a “forum of principle” concerned with the rights of individuals as trumps against the preferences and interests of the majority.<sup>94</sup> For Whyte, section 33 was meant to prevent the rights of individuals, under the guardianship of the courts, from trumping the legislature’s concern for the policy interests of the majority.

Blakeney argued that Whyte’s claim was historically mistaken in creating a “false dichotomy” between *Charter* rights and government policy, and that section 33 really enabled “the use of all three arms of government in protecting rights and freedoms.”<sup>95</sup> He took pains to stress that rights were enumerated in the *Charter* based off of the capacity of courts to protect them, not their importance, and that section 33 can be used in some cases “to protect a fundamental right that is not included in the *Charter*.”<sup>96</sup> Lougheed emphasized responding to particular judicial decisions about specific enumerated rights, whereas Blakeney underlined the need to legislatively correct misinterpretations of how enumerated rights relate to unenumerated rights. Neither premier suggested that the clause would be used only in rare and uncontroversial circumstances, thereby contradicting Chrétien’s claims. Both premiers clarified that the primary focus of the notwithstanding provision was to remedy abuses of judicial review, not the *Charter* itself.

Considering this evidence, it is not quite accurate to say that section 33 was historically drafted to preserve parliamentary sovereignty.<sup>97</sup> Instead, Blakeney and Lougheed’s reflections suggest that it was meant to allow the legislature to contest judicial review and to share in *constitutional* sovereignty<sup>98</sup> over a subset of rights. This purpose sits uneasily with reading the legal effect of the notwithstanding clause as suspending rights or certain remedies. If the clause simply *suspends* rights, then how could it allow legislatures to prevent or correct judicial misinterpretations of rights? If the clause operates as an *exception* to what normally follows from inconsistency with constitutional rights (as Webber, Leckey, and Mendelsohn argue along different lines) and laws invoking it remain open to judicial review, does this not jar with the purpose of allowing legislatures to stop or rectify abuses of the judicial review?

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93. Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) at 68.

94. *Ibid* at 69.

95. Blakeney, *supra* note 91 at 1, 5.

96. *Ibid* at 6.

97. See Lorraine Eisenstat Weinrib, “Learning to Live With the Override” (1990) 35 McGill LJ 541 at 567-71.

98. See Manfredi, *Judicial Power*, *supra* note 35 at 188-95.

On the other hand, the historical purpose of the notwithstanding clause fits nicely with interpreting the legal effect of section 33 as prohibiting judicial review without suspending *Charter* rights. Consider how this purpose and legal effect line up to help explain Saskatchewan's recent invocation of the clause in *The School Choice Protection Act, 2018*.<sup>99</sup> In the case that provoked the law invoking section 33, a trial judge controversially read section 2(a) of the *Charter*'s protection for religious freedom to conflict with section 93 of the *Constitution Act, 1867*'s protection for denominational schools, and then concluded that funding for non-Catholics at Catholic schools could not be justified by any legitimate reason for infringing the state's duty of neutrality.<sup>100</sup> In response to the trial court's decision, the legislature invoked the notwithstanding clause to protect its statutory requirement for grants to boards of education to be made "without regard to the religious affiliation" of registered parents, guardians, or students: "Pursuant to subsection 33(1) of the *Canadian Charter of Rights and Freedoms*, section 2.1 is declared to operate notwithstanding sections 2 and 15 of the *Canadian Charter of Rights and Freedoms*."<sup>101</sup>

The law's preamble offers constructions of *Charter* rights.<sup>102</sup> It reads:

Whereas it is desirable and in the public interest that education funding should not be based on any religious affiliation of parents, guardians or pupils;

Whereas it is desirable and in the public interest that boards of education may, subject to this Act and *The Education Act, 1995*, determine their own policies respecting admitting pupils, and that education funding to boards of education not be limited due to religious affiliation of parents, guardians or pupils[.]

The first clause demonstrates a commitment to religious neutrality, by offering a historically privileged denominational right on equal terms to denominational and non-denominational students alike. The second clause shows a concern with the autonomy of religious institutions that echoes the Supreme Court of Canada's own jurisprudence on the right to religious freedom. Since the text of section 33(1) does not suspend rights, it allows Saskatchewan's statute to construct the scope of how the duty of state neutrality, drawn from

99. *The School Choice Protection Act*, SS 2018, c 39 [*School Choice Protection Act*].

100. *Good Spirit School Division No 204 v Christ the Teacher Roman Catholic Separate School Division No 212*, 2017 SKQB 109 at paras 451-55 [*Good Spirit School Division, 2017*].

101. *School Choice Protection Act*, *supra* note 99 at s 3.

102. See Mark Mancini & Geoffrey Sigalet, "What Constitutes the Legitimate Use of the Notwithstanding Clause?" (20 January 2020), online: *Policy Options Politiques* <[policyoptions.irpp.org/magazines/annee-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause](http://policyoptions.irpp.org/magazines/annee-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause)> [perma.cc/6DEZ-9839].

the *Charter* right to freedom of religion, relates to constitutional protections for historically vulnerable religious institutions. Because the text of section 33(2) prohibits judicial review, courts were barred from reviewing and contradicting the legislature's judgement about these *Charter* rights in its response to the trial court's decision.<sup>103</sup>

In this example, Saskatchewan used the notwithstanding clause for the very purpose Blakeney and Loughheed designed it to achieve. *The School Choice Protection Act, 2018* is a good example of how section 33 was crafted to anticipate or correct abuses of judicial review and why this purpose was realized by enabling legislated rights as trumps against judicial review. Even if one shares Léonid Sirota's skepticism about the rights sensitivity of the legislative debate leading up to *The School Choice Protection Act, 2019*, the preamble of the law offers clear concern for *Charter* rights.<sup>104</sup> And the preamble is arguably easier to link to legislative intent, to the extent that such institutional intent is discoverable, than the statements of any one legislator. The law accordingly uses section 33 not to trump *Charter* rights but to trump judicial review. The alignment of historical purpose with the legal effect assigned to certain texts does not guarantee the truth of any constitutional interpretation, but the harmony of history and text can only make such arguments more convincing.

#### IV. CONCLUSION

What is the legal effect of the notwithstanding clause? The answer offered in this article is that the clause's text and historical purpose suggest that it trumps judicial review without trumping rights. This is a primarily interpretive argument, but it is also buttressed by considerations of political morality. By contrast, reading the purpose and legal effect of trumping rights into section 33 is not only textually and historically misguided but also harder to justify in a free and democratic society.

Reading section 33 as notwithstanding substantive judicial review is more justifiable than its rivals because it orients legislatures towards responsibly

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103. See *Saskatchewan v Good Spirit School Division No 204*, 2020 SKCA 34. The Saskatchewan Court of Appeal recently reversed the trial court decision, thereby upholding the *Charter* consistency of the earlier law. It did this at the invitation of the government's decision to appeal the trial case, and without implying that s 33 violates *Charter* rights.

104. See Léonid Sirota "Not as advertised" (3 January 2022), online: <doubleaspect.blog/2022/01/03/not-as-advertised> [perma.cc/GF7W-SUPW]. See also, Léonid Sirota, "Do legislators debate rights when they make laws notwithstanding the *Charter*?" (article presented to the Canadian Political Science Association's annual conference) [unpublished, on file with the author].

settling “which among the near countless possible meanings contemplated by the two-term declarations of rights found in bills of rights is to be *the* meaning for *this* community.”<sup>105</sup> It does this by explaining the legal effect of the notwithstanding clause as displacing judicial decisions concerning the just duties and obligations that rights require between persons. Implicit in this ability to enact laws notwithstanding judicial review is the capacity to trump judicial mistakes concerning the just meaning of rights as they relate to different persons and states of affairs.

The ability to enact legislative interpretations of rights using the notwithstanding clause does not guarantee justice but provides Canadians with an extra-judicial moral standard for evaluating whether such enactments reasonably protect *Charter* rights or unjustly violate them. The suspended rights thesis turns the evaluation of every use of the notwithstanding clause into a kind of two-term analysis of whether legislatures are justified in using section 33 to override rights. Webber, Leckey, and Mendelsohn’s arguments need not commit courts to declaring that statutes violate rights. It is possible for courts to adopt either version of the “notwithstanding remedies” argument, and yet exercise the “passive virtues” by refraining from exercising their power to review and declare laws to operate as violations of rights.<sup>106</sup> Nevertheless, these arguments render any evaluation of statutes invoking section 33 to be a matter of determining whether the law is constitutional or operational *despite* its violation of rights.

Once again, reading section 33 as notwithstanding judicial review explains Saskatchewan’s school choice statute. Although many *Charter* rights are drafted as two-term relations such as the section 2(a) guarantee of the rights of “everyone” to “freedom of conscience and religion,” the two-term declaration requires laws to specify how these rights relate to specific states of affairs and other rights and duties. Judicial decisions about the meaning of religious freedom have specified how it entails a duty on the part of the state to treat religions neutrally by not enacting laws promoting the exercise of particular faiths.<sup>107</sup> But section 93 of the *Constitution Act, 1867* also specifies the right to religious freedom in relation to public education by offering explicit protections against provincial interference with the rights of the “Protestant or Roman Catholic Minority of the Queen’s

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105. Webber et al, *supra* note 1 at 54. I note here that the interpretation of s 33 offered here also fits nicely with the Supreme Court’s dicta about the clause in *Toronto (City) v Ontario*, *supra* note 6 at para 60.

106. Webber, “Notwithstanding Rights, Review, or Remedy?” *supra* note 10 at 538.

107. See *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336; *Mouvement laïque québécois v Saguenay*, 2015 SCC 16 at para 72 [*Mouvement laïque québécois*]; *Adler v Ontario*, [1996] 3 SCR 609, McLachlin J, dissenting in part.

Subjects.”<sup>108</sup> These are both sources of law that open up the question of whether the duty of neutrality found in the section 2(a) right to religious freedom implies that it would be discriminatory or neutral to extend the *Constitution Act, 1867* section 93 protected funding for historical Protestant or Catholic religious minorities to persons of other religions or of no religion. It is up to courts *and* legislatures to establish the valid scope of the right to religiously neutral state action as it relates to the right of historically protected denominations to public funds.

When the Saskatchewan trial court struck down expanded funding for non-Catholics at protected Catholic schools as an “axiomatic” violation of the right to religious neutrality that was not a “justified infringement” under section 1, the legislature responded by appealing the decision, while also re-enacting the law expanding funding for non-Catholic students, with a preamble emphasizing the importance of religious neutrality and invoking the notwithstanding clause.<sup>109</sup> Reading “notwithstanding” as an anti-suspension term allows the Saskatchewan law to protect the section 2(a) right to religious neutrality by expanding the historical right to public funding for denominational education on equal terms to students outside of that denomination.<sup>110</sup> It also allows us to take the opposite substantive view *without* mischaracterizing the law’s stated concern for religious neutrality as an attempt to justify violating the right to religious freedom. That is, it allows some to read the legislation as enacting a mistaken attempt to specify how the section 2(a) right relates to public funding for non-Catholics at constitutionally protected Catholic schools.

This offers legislators and citizens the chance to ask whether the reasoned choice of the legislature was a just specification of the right to religious freedom, or a mistaken understanding of the right. Of course, this reading also makes it possible, albeit implausible, to read the Saskatchewan law as seeking to justifiably override the right to religious freedom itself. It remains possible to read laws invoking section 33 as unreasonable limits on rights that should be remedied by amendment or by allowing the invocation of the notwithstanding clause to expire. This encourages space for reasonable disagreements about the just specification of *Charter* rights. Because section 33(2) prohibits substantive judicial review, it allows legislatures, and by extension voters, to disagree with

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108. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 93(3), reprinted in RSC 1985, Appendix II, No 5.

109. *Good Spirit School Division*, 2017, *supra* note 100 at paras 451-55.

110. See Joanna Baron & Geoffrey Sigalet, “Saskatchewan’s Brad Wall and the Rehabilitation of the Charter” (19 May 2017), online: *Policy Options Politiques* <policyoptions.irpp.org/fr/magazines/mai-2017/saskatchewan-brad-wall-rehabilitation-charter> [perma.cc/4EQ7-ZGBS].

courts about the just scope of rights as they relate to certain policy matters. This provides higher expectations for responsible uses of the notwithstanding clause. The more surgical the legal effect of the notwithstanding clause can be, the more we can develop normative standards for determining whether legislatures have justly used section 33 to protect rights.

Conversely, the blunter the legal effect of the notwithstanding clause is, the less surprised and disappointed we should be when section 33 is invoked to smash rights. Interpreting section 33 as notwithstanding rights or remedies blunts the legal effect of the notwithstanding clause and risks lowering our expectations for how it should be used. Reading the legal effect of section 33 as suspending or authorizing the violation of *Charter* rights recreates what Blakeney criticized as John Whyte's "false dichotomy" between *Charter* rights and government policy. The suspended rights thesis guides us to implausibly read *The School Choice Protection Act, 2018* as directly suspending the *Charter* right to religious neutrality that the statute's own preamble professes concern for.

Webber, Leckey, and Mendelsohn may not require courts to exercise their alleged power of judicial review over laws invoking section 33; yet their arguments imply that legislatures invoke the notwithstanding clause to protect the operation of laws that violate rights. In an earlier article, Leckey went so far as to say that "section 33 is plainly an exception to the *Charter's* protection of rights and freedoms," which suggests that he takes the point of the notwithstanding clause to be trumping rights.<sup>111</sup> This would direct us to interpret Saskatchewan as using the notwithstanding clause to protect the operation of public education funding policy that violates the section 2(a) right to religious freedom. The Saskatchewan legislature's admirable concern for religious neutrality would be mischaracterized as a policy interest justifying the violation of rights.

As noted above, Webber, Leckey, and Mendelsohn began to make their arguments in the face of Québec's *Loi 21*, a law prohibiting some civil servants from wearing religious symbols and most officials from covering their faces while exercising state functions. Their arguments about the legal effect of the notwithstanding clause would potentially allow courts to make declarations about how *Loi 21* violates the *Charter* right to religious freedom. Ironically, reading the legal effect of section 33 as notwithstanding rights may constitutionally legitimize

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111. Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause" (2019) 28:4 Const Forum Const 1 at 3.

the very kinds of rights violations that these authors justly oppose.<sup>112</sup> If using the notwithstanding clause necessarily creates opposition between *Charter* rights and legislation, then it is difficult to see why we should expect it to be used in ways that engage in reasonable disagreements with courts about rights. This robs us of a robust standard for distinguishing between Saskatchewan's use of the notwithstanding clause from use of the clause in Québec's *Loi 21*: Both uses will be read as trumping rights with the Constitution's blessing.

This offers legislators a constitutional excuse to legally suspend and override rights in pursuit of policy interests. Instead of forcing proponents of *Loi 21* to publicly justify the law's section 2(4) claim to protect "religious freedom," they can simply equate their legal power to violate rights with the morality of doing so.<sup>113</sup> The government and legislators could dismiss questions about how the law's restrictions on civil servants wearing religious symbols protects the *free exercise* of religion as raising the very kinds of rights concerns that section 33 allows them to trump. The price of allowing courts to scrutinize invocations of the notwithstanding clause may, therefore, be to absolve legislatures of the responsibility for using it to protect rights. It may also become less probable that legislatures will use the notwithstanding clause to correct abuses of judicial review that threaten to undemocratically replace reasonable legislative constructions of rights.

The choice between interpreting section 33 as notwithstanding rights, remedies, or judicial review is at once a matter of lawyerly *technê*, and also a matter of what Aristotle called the legislative art, or *nomothetikê*, in political morality. There is a compelling legal-technical case to be made for reading the

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112. *Contra* Leckey & Mendelsohn, *supra* note 9. I want to emphasize that it remains open to Québec and Québécois to argue that *Loi 21* actually comports with a *Charter* based concern for religious neutrality. Indeed, s 2 of the law mentions concern for religious freedom and freedom of conscience, s 3 uses words "en fait et en apparence" (seemingly lifted right from para 137 the Supreme Court's decision in *Mouvement laïque québécois*, *supra* note 107), and s 4(2) employs language about the right to secular public services. My view is that none of these rights claims can adequately address the free exercise claim that should be part and parcel of any true conception of religious liberty (*Loi 21*, *supra* note 5, s 2-4). Interestingly, Léonid Sirota, in his CPSA article (*supra* note 104), has claimed to find a fairly robust rights discussion leading up to the enactment of *Loi 21*.

113. *Loi 21*, *supra* note 5, s 2. For a helpful overview of the recent uses of s 33 in Saskatchewan, Ontario and Québec, including the media's portrayal of these events, see Eleni Nicolaides & Dave Snow "A Paper Tiger No More? The Media Portrayal of the Notwithstanding Clause in Saskatchewan and Ontario" (2021) 54 *Can J Pol Sci* 60; see also, Nicolaides & Snow "Notwithstanding the Media" in Kate Puddister & Emmett Macfarlane, eds, *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (UBC Press, 2022) 120-139, DOI: <<https://doi.org/10.59962/9780774867931>>.

legal effect of laws invoking section 33 as notwithstanding substantive judicial review for consistency with the sections of the *Charter* they select. This case, if sound, settles the legal effect of the notwithstanding clause.

But the technical dimension of this argument should not be wholly separated from political morality.<sup>114</sup> Aristotle claimed that the art of wise legislation (*nomothetikē*) was not a type of making (*poiēsis*), where the end is separate from the activity, but rather a branch of practical wisdom (*phrónēsis*) concerning “action and deliberation” (*praktikē kai bouleutikē*),<sup>115</sup> where the activity of legislating is part of its end of citizens becoming good.<sup>116</sup> He argued that no private art of law-making could be separated from the legislative art of crafting political rules that human beings require to pursue virtuous lives together—lest citizens make laws in isolated households akin to the cannibalistic cyclopes.<sup>117</sup>

To be sure, the interpretive choice between reading enactments as notwithstanding rights, remedies, or judicial review will not itself produce virtuous legislatures that protect just rights, nor legislatures that unjustly violate them by authorizing cannibalism, et cetera. Even so, there is reason to think that interpreting laws invoking section 33 as notwithstanding judicial review will encourage more precise legislative care for *Charter* rights. And there is reason to doubt that allowing legislatures to enact laws notwithstanding rights or remedial invalidation will increase legislative responsibility for rights as relations of justice. That does not shed light on the legal meaning of the notwithstanding clause, but it does offer reason to welcome the legislative art of the framers in providing for legislated rights as trumps against judicial review.

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114. On this point I agree with Sérafin, Sun, and Ménard, although I dissent from their view that Grégoire Webber's account of s 33 shares positivist-cum-juristocratic assumptions with “orthodox legal constitutionalist” accounts (*supra* note 12 at 6-7). On the contrary, Webber's argument leaves room for s 33 to be used to legislate about the scope of *Charter* rights (although he certainly underplays this implication of his argument) and his view that declaratory judicial review remains available is tied primarily to his mistakenly indicative reading of the phrase “shall operate as it would but for” in s 33(2). The proper point of disagreement with Webber is not on the legitimacy of legislated rights, nor the proper relationship between positive law and justice, but whether the positive law of s 33(2) distributes legislative responsibility over rights as trumps against judicial review.

115. Aristotle, *Nicomachean Ethics*, Bk 6, c 8 1141b25-30, trans by David Ross (Oxford University Press, 2009) at 109.

116. *Ibid.*, Bk 10, c 9, 1180b20-25, at 201.

117. *Ibid.*, Bk 10, c 9, 1180a26-29, at 200.

