The Structure of Invalid but Operative Legislation

Why the Notwithstanding Clause Does Not Preclude Judicial Review

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Abstract

A fundamental question concerning the legal effects of the notwithstanding clause is whether courts could conduct judicial review of legislation invoking the clause. The received wisdom on this question has been that the notwithstanding clause precludes judicial review. But in recent years, scholars have argued in different ways that the notwithstanding clause permits judicial review. This thesis critically builds on the arguments that the notwithstanding clause permits judicial review of protected legislation. It points out internal problems with those arguments and proposes a revised theory of the notwithstanding clause which addresses the difficulties with those arguments. Along the way, it proposes a novel interpretation of the supremacy clause of the Constitution of Canada, introduces the Canadian doctrine of separation of powers into the legal debates on section 33 after developing that doctrine, and responds to key recent developments in the debate over the notwithstanding clause.

Résumé

Une question fondamentale concernant les effets juridiques de la clause dérogatoire est de savoir si les tribunaux peuvent procéder à un contrôle juridictionnel de la législation invoquant la clause. L'idée reçue sur cette question est que la clause dérogatoire exclut le contrôle juridictionnel. Cependant, ces dernières années, les universitaires ont soutenu de différentes manières que la clause dérogatoire permettait le contrôle judiciaire. Cette thèse s'appuie de manière critique sur les arguments selon lesquels la clause dérogatoire permet le contrôle judiciaire de la législation protégée. Elle souligne les problèmes que posent ces arguments et propose une théorie révisée de la clause dérogatoire qui aborde les difficultés que posent ces arguments. En cours de route, elle propose une nouvelle interprétation de la clause de suprématie de la Constitution du Canada, introduit la doctrine canadienne de la séparation des pouvoirs dans les débats juridiques sur l'article 33 après avoir développé cette doctrine, et répond aux développements récents clés dans les débats sur la clause dérogatoire.

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I. Introduction

Section 33 of the Canadian Charter of Rights and Freedoms—commonly known as the "notwithstanding clause"—allows a statute to operate notwithstanding sections 2 or 7-15 of the Charter.[1] The central question over what the clause achieves legally (what its legal effects are) is whether it precludes judicial review of legislation invoking it and, if so, on what grounds. The orthodox answer has been that clause precludes judicial review as the rights guaranteed in sections 2 or 7-15 are "overridden" by its invocation.[2] According to the received wisdom that has dominated much of early scholarship, the notwithstanding clause has been understood as a provision that allows legislatures to "override" or derogate from the rights guaranteed in sections

[1] *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, Constitution Act, 1982*].

(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.	(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.
(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.	(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.
(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).	(4) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.
(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).	(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 33 [*Constitution Act, 1982*].

[2] *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712 at 738-741 [*Ford*]; Lorraine E. Weinrib, "Learning to Live with the Override" (1990) 35:3 McGill LJ 541 [Weinrib, "Learning to Live"]; Brian Slattery, "A Theory of the Charter" (1987) 25:4 Osgoode Hall LJ 701 [Slattery, "A Theory of the Charter"]; In summary, Weinrib has argued that the invocation of section 33 amounts to a concession of rights-infringement. Slattery has argued that the legislature may invoke section 33 pre-emptively if it is confident about the constitutionality of a given statute. In both cases, as Tsvi Kahana has reviewed, both views conclude that legislation protected by the clause precludes judicial review. See Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ at 223-226 [Kahana, "Understanding the Notwithstanding Mechanism"].

2 or 7-15 of the Charter. In recent years, however, several legal scholars—Grégoire Webber, Robert Leckey, and Eric Mendelsohn—have jointly argued that the notwithstanding clause permits judicial review of legislation protected by the clause.[3] As they observe, the notwithstanding clause makes no mention of judicial review or the idea of override.[4]

Yet there are crucial disagreements over *how* the notwithstanding clause legally achieves this. According to Webber, section 33(2) of the notwithstanding clause is key to discerning the clause's legal effects.[5] That section secures the 'operation' of protected legislation that is found constitutionally inconsistent and therefore invalid. In so doing, section 33(2) makes exception to the legal effects of section 52(1) of the Constitution Act, 1982, commonly known as the supremacy clause, which renders any law that is inconsistent with any part of the Constitution of Canada "to the extent of inconsistency, of no force or effect."[6] In short, the notwithstanding clause saves the operation of an unconstitutional law that would have been inoperative (of no force or effect) pursuant to the supremacy clause. But because the notwithstanding clause only saves the impugned law's operation—not its constitutional inconsistency or invalidity—it is open for the court to

[3] Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The Faulty Received Wisdom Around the Notwithstanding Clause," *Policy Options* (10 May 2019): online (blog) https://policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause/ [Webber, Mendelsohn & Leckey, "The Faulty Received Wisdom"].

[4] Webber, Mendelsohn & Leckey, "The Faulty Received Wisdom", *supra* note 3; Kahana has also made this observation in Kahana, "Understanding the Notwithstanding Mechanism", supra note 2 at 231.

[5] Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2020) 71:4 UTLJ 510 [Webber, "Notwithstanding Rights, Review ,or Remedy?"]; Grégoire Webber, "The Notwithstanding Clause, The Operation of Legislation, and Judicial Review" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* (forthcoming in McGill-Queen's University Press in 2024) [Webber, "The Notwithstanding Clause"]. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4214650.

[6] *Constitution Act, 1982*, s 52.

(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of inconsistency, of no force or effect.

(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

scrutinize the protected law and find it unconstitutional. The notwithstanding clause's legal effects, therefore, are found in section 33(2) and its relationship to the supremacy clause.

However, Leckey and Mendelsohn jointly dispute the proposition that the notwithstanding clause exempts the supremacy clause.[7] Exempting the supremacy clause's legal effects, they argue, "misconstrues the supremacy clause and misunderstands the significance of the overarching principle of constitutional supremacy in the Canadian legal order."[8] This is because the supremacy clause implies that an operative law is consistent with the Constitution. On their view, section 33(2) temporarily renders the impugned law *overall consistent* with the Constitution of Canada, even if it is found unconstitutional. The textual source of judicial scrutiny of legislation invoking the notwithstanding clause lies not in section 33(2), but in section 33(3). This subsection provides that a law protected by the notwithstanding clause "shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration." For Leckey and Mendelsohn, this subsection importantly recognizes that voters are entitled to know whether the notwithstanding clause is used to violate their rights. That, in turn, binds courts under the duty to inform the voters by declaring the protected law's unconstitutionality.

Does the notwithstanding clause exempt the supremacy clause that enshrines the Constitution as the supreme law? Or does it constitutionalize an unconstitutional law by rendering it consistent with the supremacy clause? There is a fundamental tension in the idea that a law could be unconstitutional but operative. A convincing doctrinal explanation of how the notwithstanding clause permits judicial review must resolve this tension. And this task depends on convincingly

[7] Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 UTLJ 189 [Leckey and Mendelsohn, "The Notwithstanding Clause"]; Leckey, "Legislative Choices in Using Section 33 and Judicial Scrutiny" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* (forthcoming in McGill-Queen's University Press in 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4473378 [Leckey, "Legislative Choices"].
[8] Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 193.

characterizing the doctrinal relationship between the notwithstanding clause and the supremacy clause.

This paper develops a philosophically informed doctrinal theory of the notwithstanding clause: it clarifies the doctrinal relationship between the notwithstanding clause and the supremacy clause, and explains why judicial review of legislation invoking section 33 is legally permitted. I argue, with Leckey and Mendelsohn, that a law protected by the notwithstanding clause is consistent with the Constitution of Canada; the notwithstanding clause need not make exception to the supremacy clause's legal effects. But I provide a subtly but importantly different account of how section 33 achieves this: it does not change the constitutional status of an unconstitutional law; rather it renders the legislative constitutional evaluation about the impugned law constitutionally consistent in the sense of the supremacy clause. Consequently, the notwithstanding clause *complicates* the ordinary application of the supremacy clause. Ordinarily, section 52 complies with the *judicial* constitutional evaluation of legislation. But it is silent on *who* should decide what constitutional consistency means. With the invocation of the notwithstanding clause, it will be argued, the supremacy clause complies with the competing *legislative* constitutional evaluation. In either case, the rule of the supremacy clause continues to apply.

This reading of the supremacy clause implies that legislation invoking the notwithstanding clause is constitutionally consistent with the supreme law of the land. But if the protected law is consistent with the Constitution, how could courts declare it unconstitutional? I argue, as does Webber, that section 33(2) allows for judicial review of legislation protected under section 33. But I develop Webber's account by arguing that the judicial function of administering declaratory relief is juridically 'immune' from legislative interference under the Canadian doctrine of separation of powers. This will further illuminate how section 33(2) saves coherently an invalid law from losing

its operation. This also explains why, contrary to the orthodox reading of section 33, the notwithstanding clause cannot be read as suspending the court's jurisdiction to review legislation's constitutionality. On the whole, this paper seeks to critically build on the arguments put forward by Webber, Leckey, and Mendelsohn, with a view to articulating a more robust theory of the notwithstanding clause.

The orientation of the arguments developed here will mainly be doctrinal: it seeks to discern the legal meanings of the notwithstanding clause, supremacy clause, and the coherence of judicial review by analyzing the texts of section 33 and section 52 and relevant case law on the judicial declaration of invalidity and the separation of powers. But this doctrinal theory will be philosophically and historically informed. It will take philosophical theories about notwithstanding [*non obstante*] clauses from early Canadian constitutional thought to early modern English constitutional thought as starting points in reflecting on how the notwithstanding clause in the Canadian Charter should be interpreted.[9] Insofar as the argument of this paper is ultimately doctrinal, its merits will depend on correct legal-technical evaluations aimed at identifying what the law is. In this regard, the orientation of this paper shares that of Webber's theory. But by situating the notwithstanding clause's legal effects based on section 33(2) within other constitutional features, such as the supremacy clause, legal history of notwithstanding powers, and the separation of powers doctrine, this paper shares Leckey and Mendelsohn's aim of situating section 33 normatively within the Constitution of Canada more broadly.

This paper begins by reviewing Webber, Leckey, and Mendelsohn's arguments in detail (Section II). It then points out internal objections to their arguments (Section III). It will be argued

[9] An alternative method is to take the law—legal doctrines, principles, or concepts—as a starting point for philosophical reflections. See Jeremy Waldron, "Lecture 1: Dignity and Rank" in Jeremy Waldron et al, eds, *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012) 13 at 13-14.

that Webber's position is not fully convincing as it mistakenly analogizes section 33's exemption of the supremacy clause to the doctrine of paramountcy in federalism. Leckey and Mendelsohn's position is implausible as it analogizes the section 33 to the section 1 limitations clause of the Charter. These internal criticisms should motivate a third, revised account of the relationship between the notwithstanding clause and the supremacy clause (Section IV). Here, I canvass and build on the legal history of the notwithstanding clause in Canada. This will reveal that the notwithstanding clause's institutional purpose is to ensure that legislative rights-protecting determination of sections 2 or 7-15 of the Charter is supreme over competing judicial determination. Doctrinally, this means that the supremacy clause—which renders operative law consistent with the Constitution—applies to the law invoking the notwithstanding clause. This doctrinal relationship also explains the legal effects of the notwithstanding clause, and its normative significance that some scholars have neglected. But importantly, this does not preclude judicial review of legislation (Section V). The reason is because the judiciary's authority to declare legislation unconstitutional is 'immune' from legislative interference under the separation of powers doctrine. To that end, Section V will canvass Canadian separation of powers case law, pair the doctrines of invalidity and separation of powers, and explain why the notwithstanding clause must be interpreted so as to respect the principle of separation of powers. This section will also addresses an important and perennial challenge to the judicial review of legislation protected under section 33. Section VI concludes.

II. Arguments for Judicial Review of Legislation Invoking the Notwithstanding Clause

Let us begin by reviewing Webber's theory of the notwithstanding clause. Webber argues that judicial review of legislation protected by the clause is justified chiefly by section 33(2)'s reference

to the 'operation' of legislation. This subsection provides that "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."[10] To understand what it means to protect legislation's 'operation', Webber argues, we need to first appreciate a doctrinal analytical sequence that proceeds from constitutional *(in)consistency* to *(in)validity* to *(in)operability*. According to this analytical sequence, a statute that is constitutionally consistent (consistent with the Constitution of Canada) is consequently constitutionally valid and therefore operative ('of force or effect'). [11] Conversely, a statute that is constitutionally inconsistent ('repugnant') is invalid ('void') and therefore inoperative ('of no force or effect'). The idea of 'operation' of legislation is synonymous with the notion that legislation is of 'force or effect'. The latter is found in the section 52 supremacy clause of the Constitution, which provides that the "Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of inconsistency, of *no force or effect* [*inopérantes*]." [12] The supremacy clause also discloses a sequence from constitutional inconsistency to inoperability. But where is the idea of invalidity found? The idea of invalidity is found in the supremacy clause's legally contiguous predecessor: the Colonial Laws Validity Act, 1865.[13] That imperial legislation regulated Canada's laws with the legally superior English law prior to the patriation of the Canadian Constitution in 1982. Importantly, it stated that a colonial law will be '*void* or inoperative' on account of its 'repugnancy' to (inconsistent with) the law of

[10] *Constitution Act, 1982, s 33(2).*
[11] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 520-522.
[12] *Constitution Act, 1982, s 52*; emphasis added.
[13] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 520-521; *Colonial Laws Validity Act, 1865* (UK), 28 & 29 Vict, c 63, https://caid.ca/ColLawValAct1865.pdf [*Colonial Laws Validity Act, 1865*]. For a recent argument for the continuity of the *Colonial Laws Validity Act*, 1865 and the *Constitution Act, 1982*, see Brian Bird, "The Unbroken Supremacy of the Canadian Constitution" (2018) 55:3 Alta L Rev 755.

England.[14] And, in an early case on dealing with the section 52 supremacy clause, the Supreme Court of Canada has clarified that a law that is 'inconsistent' with the Constitution and so 'of no force or effect' is so inoperative *because* it is *invalid* ('void'): the operation of legislation is a function of its validity.[15] This doctrine of invalidity developed under the section 52 supremacy clause jurisprudence establishes a series of steps from constitutional inconsistency to invalidity to inoperability. Crucially, the notwithstanding clause targets only the last step in this sequence, and saves only the operation of legislation. It is silent on the protected law's constitutional consistency and validity, leaving it open for courts to determine such law's constitutionality.[16] In so doing, section 33 makes exception to the supremacy clause's legal effect of rendering invalid laws inoperable.

Leckey and Mendelsohn's theory of the notwithstanding clause departs from Webber's in at least two crucial ways. First, Leckey and Mendelsohn deny Webber's proposition that section 33(2) exempts the supremacy clause. On their view, Webber's position is problematic as it commits a "conceptual error" that "misunderstands the significance of the overarching principle of constitutional supremacy."[17] This argument is worth quoting directly in full:

> "[Webber's] analysis is unconvincing. Substantively, it misconstrues the supremacy clause and misunderstands the significance of the overarching principle of constitutional supremacy in the Canadian legal order. It requires understanding section 33 as *overriding* or *fundamentally modifying* the supremacy clause. Properly understood, the supremacy clause enshrines the principle that, as between the Constitution and any law repugnant to it, the Constitution prevails and the other law yields. That a law is inconsistent with the Constitution within the sense of the supremacy clause means that the Constitution objects to the law's continued operation, in whole or in part. It is a *conceptual error* to characterize

[14] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 520; see also section 4 of the *Colonial Laws Validity Act, 1865*, https://caid.ca/ColLawValAct1865.pdf.
[15] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 520.
[16] Another important implication is that subsection 33(2) becomes legally effective only after there is a finding of constitutional invalidity that triggers inoperability. If the operation of legislation is already secured because it is found to be constitutional, then subsection 33(2) is not legally triggered whether it is invoked in the legislation or not.
[17] Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 193.

> as 'invalid' or 'inconsistent' with the Constitution a law expressly allowed by it to operate."[18]

Alternatively, they read section 33(2) as making space within the Charter—and thus within the Constitution of Canada—for laws that violate sections 2 or 7-15 of the Charter to temporarily operate without regard to their impact on specified rights and freedoms.[19] That is, the notwithstanding clause "prevents a protected law's breach of Charter rights from amounting to 'inconsistency' with the Constitution of Canada for the purposes of the supremacy clause."[20] In securing the protected law's 'operation', section 33(2) engages the supremacy clause's logic that operative legislation is consistent with the Constitution of Canada. In this regard, section 33 is analogous to the section 1 limitations clause of the Charter, which guarantees that a rights-infringing law may be constitutionally consistent overall if it is "reasonably justified in a free and democratic society."[21] The notwithstanding clause and the supremacy clause are compatible, argue Leckey and Mendelsohn, and one need not exempt the other.

Second, unlike Webber, Leckey and Mendelsohn rely on section 33(3) as a normative foundation for judicial review of legislation invoking the clause.[22] This subsection provides that

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[18] Leckey & Mendelsohn, "The Notwithstanding Clause", supra note 7 at 193; emphases added.
[19] *Ibid* at 196-197.
[20] *Ibid* at 196.
[21] *Constitution Act, 1982*, s 1, https://canlii.ca/t/8q7l#sec1. See also *R. v. Oakes*, [1986] 1 SCR 103 [*R v Oakes*].

(1) The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	(1) La *Charte Canadienne des droits et libertés* garantit les droits et libertés qui y sont éconcés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[22] Several commentators have also argued along similar lines recently, highlighting a deeper connection between section 33(3) and section 3 of the Charter, which protects voting rights. See Jamie Cameron, "The Text and the Ballot Box: S. 3, S. 33, and the Right to Cast an Informed Vote" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* (forthcoming in McGill-Queen's University Press in 2024); Cara Faith Zwibel, "Section 33, the Right to Vote, and Democratic Accountability" in *The Notwithstanding Clause and the Charter: Rights, Reforms, and Controversies,* ed. Peter L. Biro (forthcoming in McGill-Queen's University Press in 2024).

"a declaration [to invoke the notwithstanding clause] shall cease to have effect *five years* after it comes into force or on such earlier dates as may be specified in the declaration."[23] They suggest that the reference to five years establishes a link to general elections, since five years mark the maximum term limit of legislative bodies.[24] For this reason, this subsection "makes space for the voters to assess the legislature's use of the notwithstanding clause."[25] The decision to either revoke or reinvoke the notwithstanding clause must be subject to the democratic support from the electorate. That means voters must be informed about how the legislature's use of section 33 impacts their rights—whether it is constitutional or not—in order for the clause to be invoked legitimately. It is here that courts are duty-bound to inform the electorate about "the consequences of a legislature's use of the notwithstanding clause," for instance by declaring the relevant law unconstitutional.[26] On Leckey and Mendelsohn's reading, then, it is not the textual legal meaning of section 33(2) that explains why courts may review a protected law, but section 33(3)'s normative role of the courts that facilitates legislative accountability that justifies judicial review.

III. Objections to the Existing Arguments for Judicial Review of Protected Legislation

The theories put forward by Webber, Leckey, and Mendelsohn capture important truths about the notwithstanding clause and the supremacy clause. Respectfully, however, their arguments are not without internal objections. This section develops objections to their accounts in order to motivate an alternative theory of the notwithstanding clause.

A. Difficulty with Leckey and Mendelohn's theory

[23] *Constitution Act, 1982*, s 33(3).
[24] Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 198.
[25] *Ibid* at 197.
[26] *Ibid* at 199.

Consider first Leckey and Mendelsohn's argument. The key challenge that Leckey and Mendelsohn face is akin to the challenge that has been put to the proportionality analysis of the Charter's limitations clause.[27] The section 1 'limitation clause' of the Charter provides that all Charter rights and freedoms are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[28] The legal test to determine reasonable limits developed under *R v Oakes* proceeds in broadly two steps.[29] First, the claimant must show that the government infringed or violated Charter right(s) in question. Second, only if a rights-infringement is found, the onus falls on the government to justify the infringement as 'reasonable limits' justifiable in a free and democratic society. The Oakes Test prescribes four further steps to show that a rights-infringement is reasonably justified: the rights-infringing legislation must (1) have a pressing and substantial objective; the legislative means must be (2) rationally connected to the legislative objective in question, (3) minimally impairing, and (4) there must be a proportionality between the salutary and deleterious effects of the infringement.[30]

The section 1 proportionality analysis has been criticized for mischaracterizing the nature of rights both conceptually and normatively. This critique relies on the distinction between 'violation' and 'limitation' of a right. The idea of 'limitation' is synonymous with that of 'boundary', 'definition', 'specification', or 'delimitation'—all of which constitute the *proper scope* of a right that corresponds to a duty that others owe to the right-holder.[31] By contrast, the idea of 'violation' or 'infringement' of a right does not refer to the scope of a right. Instead, it

[27] Recently, Webber has articulated the gist of this challenge. This section is an attempt to develop that challenge. See Webber, "The Notwithstanding Clause", *supra* note 5 at 8-9.
[28] *Charter, Constitution Act, 1982,* s 1, https://canlii.ca/t/8q7l#sec1.
[29] *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].
[30] *Oakes* at 106.
[31] Grégoire Webber, "On the Loss of Rights" in Grant Huscroft, Bradley W. Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, and Reasoning* (New York: Cambridge University Press, 2014) 123 at 149 [Webber, "On the Loss of Rights"].

points to a person's failure to respect the proper scope, limits, or boundaries of another's right.[32] So the idea of 'violation', unlike 'limitation', captures the idea of *wronging* another: while limiting a person A's right to x does *not* thereby wrong her, violating A's right to x does. Under the Oakes Test, the government may *violate* a person's right to x, but that infringement may be justified as a reasonable limit under the proportionality analysis. That suggests that a person's right to *x* is never conclusive but merely presumptive. But the very idea of a 'right' should be understood as a *conclusive* claim to *x* that directs what kind of action the right-holder is legally entitled to, *after* its internal limits or boundaries have been delineated. Properly understood, the structure of the Oakes Test signals that a person has a conclusive claim to *x,* but at the same time, that claim is merely defeasible.[33]

How is Leckey and Mendelsohn's theory subject to this criticism? Recall that, on their view, legislation invoking section 33 may be found unconstitutional by a reviewing court, but that law will be constitutionally consistent in the sense of the supremacy clause: even if it is found to violate rights, the law is overall constituent with the Constitution and therefore constitutionally "permissible."[34] As Webber has recently put, this understanding of the supremacy clause effectively reads the Constitution as "authorizing the violation of its very provisions."[35] To be sure, Leckey and Mendelsohn maintain that sections 1 and 33 are dissimilar in an important way. While the law 'saved' under the section 1 limitations clause "avoids inconsistency with the Constitution and continues to operate because it has been found by a court, after a trial with evidence, to be justified in a free and democratic society… the fact that a law avoids inconsistency with the

[32] Bradley W. Miller, "Justification and Rights Limitation" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 93 at 94-100 [Miller, "Justification and Rights Limitation"]; Webber, "On the Loss of Rights", *supra* note 31 at 135-136.
[33] Miller, "Justification and Rights Limitation", *supra* note 32 at 95-96.
[34] Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 196; emphasis added.
[35] Webber, "The Notwithstanding Clause", *supra* note 5 at 8.

Constitution and operates because of section 33 says nothing about the law's *reasonableness* or the *justifiability* of its impact on rights."[36] In other words, while rights-infringing law that survives the section 1 scrutiny is deemed 'reasonable' in a free and democratic society, this is not necessarily so with a law protected by section 33. This may be so. But it remains the case that sections 1 and 33 both find rights-violating laws constitutional overall, and they therefore distort the nature of rights. On the whole, then, Leckey and Mendelsohn face a dilemma. On the one hand, the protected law may be found unconstitutional. That unconstitutionality must be *genuine* insofar as the reviewing court is signalling to voters about the impact of that unconstitutional law on their rights. On the other hand, the same law is overall constitutionally consistent with the Constitution owing to the notwithstanding clause. The genuinely unconstitutional legislation is now genuinely constitutional all things considered. These considerations call for a reconsideration of Leckey and Mendelsohn's understanding of the relationship between the notwithstanding clause and the supremacy clause.

B. Difficulty with Webber's theory

What about Webber's theory of the notwithstanding clause? The main difficulty with Webber's theory concerns his account of how invalid law can nevertheless be operative, or how section 33 *severs* the protected law's analytic progression from constitutional invalidity to inoperability. To explain this severance, Webber draws an analogy between the notwithstanding clause (which severs an *invalid* law from becoming inoperative) and the doctrine of paramountcy in federalism jurisprudence (which severs a *valid* law from becoming operative).[37] In the federalism paramountcy analysis, when validly enacted provincial and federal laws are inconsistent (dual compliance is impossible), the valid provincial law will be inoperative to the

[36] Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 196; emphasis added.
[37] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 525-528.

extent of its inconsistency.[38] Although the paramountcy doctrine and the notwithstanding clause are not "strictly analogous,"[39] Webber maintains, the former serves as a precedent that an analytical sequence may be interrupted by the Constitution.[40]

In my view, respectfully, this analogy is not wholly convincing. Although it will later be argued that the notwithstanding clause *is* functionally akin to the paramountcy doctrine, the notwithstanding clause and the paramountcy doctrine are disanalogous in *how* they sever the analytic progression: severing a valid law from operating is meaningfully different from severing an invalid law from losing legal operation, so the latter cannot be relied on to support the former. In the paramountcy doctrine, the interrupted provincial law is constitutional *in the first place*. Its progression from validity to operability is severed not because of its constitutional status, but owing to its conflict with some federal law. In other words, the provincial law's sequence is interrupted because of the need to hierarchically organize conflicting laws. However, when it comes to an invalid law protected under section 33, the analytical sequence is severed *not* as a result of hierarchically organizing conflicting laws. Rather, the invalid legislation is unconstitutional *to begin with*—it is void *ab initio* or empty of legally meaning—unlike a valid provincial law. The protected unconstitutional law becomes inoperative *before* it reaches the stage of being hierarchically organized with some conflicting law. In short, severing a positive analytical progression from validity to operability is *relevantly* disanalogous to severing a negative analytical progression from invalidity to inoperability: appealing to the paramountcy doctrine shows that a *positive* analytical sequence from constitutional validity to operability can be severed; but this does not *ipso facto* show that a *negative* analytical sequence from constitutional invalidity to

[38] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed supplemented (Toronto: Thomson Reuters, 2020) at ch 16.1 [Hogg, *Constitutional Law of Canada*].
[39] Webber, "Notwithstanding Rights, Review or Remedy?", *supra* note 5 at 528.
[40] *Ibid* at 525.

inoperability can be severed. This difference counsels challenges the legal-technical merit of Webber's theory, and it is uncertain how plausible it is to maintain that the notwithstanding clause saves the operation of invalid law.

Together, these objections to Webber, Leckey, and Mendelsohn's pairing of section 33 and section 52(1) motivate an alternative explanation of how the notwithstanding clause and the supremacy clause should relate. The following section proposes that answer with a view to addressing the weaknesses of Webber, Leckey, and Mendelsohn's arguments.

IV. Reconceptualization of the Notwithstanding Clause and the Supremacy Clause

Does the notwithstanding exempt the supremacy clause or are they compatible (the supremacy clause secures the constitutional consistency of the law protected under section 33)? This section argues with Leckey and Mendelsohn that a law invoking section 33 is constitutionally consistent in the sense of the supremacy clause by virtue of its operation; the two sections are consistent. But this section builds on Leckey and Mendelsohn's account in two principal ways. First, it provides an alternative explanation of *how* the supremacy clause achieves this: it will be argued that the notwithstanding clause complicates the ordinary application of the supremacy clause. Second, I develop a historical argument that supports this doctrinal interpretation of the supremacy and notwithstanding clauses. To do so, I canvass a history of notwithstanding [*non obstante*] powers not only in Canada, but also in the history of early modern English common law, from which the Canadian Constitution inherits its legal tradition. The constitutional history of *non obstante* powers reveals that the purpose of *non obstante* clauses was to secure the primacy of rights-protecting legislation. A plausible doctrinal account of the section 33 notwithstanding clause should be informed by that history, and the proposed doctrinal relationship of the supremacy and

notwithstanding clauses is congruent with that history. The texts of sections 33 and 52(1) do not conclusively reveal how the supremacy clause should be interpreted. But the historical nature of *non obstante* powers could and should inform our interpretation.

A. Ordinary application of the section 52(1) supremacy clause

Recall Leckey and Mendelsohn's account of the notwithstanding clause and the supremacy clause. On their view, section 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 freedoms. In other words, the effect clause prevents a protected law's breach of Charter rights from amounting to 'inconsistency' with the Constitution of Canada for the purposes of the supremacy clause."[41] The key explanation for this is that the notwithstanding clause *complicates* the ordinary application of the supremacy clause.[42] As a legal rule, the supremacy clause applies ordinarily to the judicial finding of unconstitutionality; it is the court's constitutional evaluation of legislation that engages the supremacy clause. Since its inclusion in the *Constitution Act, 1982,* the section 52(1) supremacy clause has been understood as the foundation of judicial review of legislation along with the section 24 remedies clause within our Constitution.[43] So even without a formal constitutional provision that mandates such judicial authority, the Supreme Court of Canada has relied on section 52(1) since the Constitution Act,

[41] Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 195-196.

[42] *Constitution Act, 1982,* s 52.

(2) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of inconsistency, of no force or effect.	(2) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

[43] *Reference re Manitoba Language Rights,* [1985] 1 SCR 212 at 746 [*Manitoba Language Right Reference*]. Section 24(1) of the Charter provides that, "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competence jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". See *Charter, Constitution Act, 1982,* s 24(1).

1982 to strike down unconstitutional legislation.[44] In our ordinary constitutional jurisprudence and practice under the Constitution Act, 1982, the judiciary is responsible for deciding whether the impugned law is constitutional or not as the "guardians of the Constitution."[45] If the reviewing court finds that legislation is constitutionally inconsistent, that triggers the antecedent of the clause that renders the legislation inoperative to the extent of constitutional inconsistency. If legislation survives judicial scrutiny and operates, that implies that the legislation is consistent with the Constitution in the sense of the section 52(1) supremacy clause. Strictly speaking, however, section 52 is silent on the question of judicial review; it guarantees *that* the laws which are 'inconsistent' with the Constitution will be inoperative, but without prescribing *whose* constitutional evaluation should comply with the supremacy clause.[46] In short, the supremacy clause is silent on *who* should decide what counts as 'constitutional' pursuant to section 52(1).

The notwithstanding clause complicates this ordinary application of the supremacy clause: the supremacy clause applies to the operative legislation protected under 33 and thereby renders it constitutionally consistent. Consider that a legislature enacts a law invoking section 33, that law is challenged in court and found unconstitutional, but its unconstitutional provisions continue to operate pursuant to subsection 33(2). The judicial declaration of unconstitutionality and the invocation of section 33 creates two competing legal norms (competing views on the impugned law's constitutionality), of which only the legislative norm operates. Significantly, given that the legal operation that section 33 protects *flows from* legislative constitutional determination of rights and freedoms (holding that the protected law is constitutionally consistent and valid), the

[44] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (New York: Cambridge University Press, 2013) at 100 [Gardbaum, *New Commonwealth Model*]; see also *Vriend v Alberta* [1998] 1 SCR 493 at 563 [*Vriend*], where Justices Cory and Iacobucci wrote in their concurring opinion that "it was the deliberative choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid."
[45] *Reference re Supreme Court Act* [2014] 2 SCR 433 at para 89.
[46] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 527.

supremacy clause applies *not* to the judicial finding of unconstitutionality, but rather to the *legislative* evaluation of constitutionality. In short, the notwithstanding clause generates two competing sets of constitutional evaluation to which the supremacy clause. But because the supremacy clause implies that operative law is constitutionally consistent, and section 33 protects the legal operation of *legislative* evaluation of constitutionality, the supremacy clause *applies to* the legislature's constitutional evaluation. In short, once the notwithstanding clause is invoked, it is the legislative constitutional evaluation that engages the supremacy clause. The notwithstanding clause should therefore be read as a rule that determines *which* of the two legal positions is constitutionally consistent in the sense of the supremacy clause—to which of the two legal positions that supremacy clause applies.

While this account shares Leckey and Mendelsohn's view that the supremacy clause is consistent with the notwithstanding clause, it overcomes the aforementioned difficulty with Leckey and Mendelsohn's account. The difficulty with Leckey and Mendelsohn's view is the notwithstanding clause positions courts to hold conflicting determinations about a protected law's constitutionality (it is unconstitutional insofar as rights are violated but also overall constitutional). But when the section 52(1) supremacy clause applies to—and constitutionalizes—the legislative constitutional evaluation, it allows the *reviewing court* to maintain that the protected law is unconstitutional without also upholding that it is consistent with the Constitution. Importantly, the proposition that the notwithstanding clause complicates the supremacy clause's ordinary application is consistent with Leckey and Mendelsohn's account; and it should be understood as a fuller articulation of the relationship between sections 33 and 52(1) that they presumably intended to articulate.

B. Constitutional purposes of non obstante *powers*

Crucially, this understanding of sections 33 and 52(1) is congruent with the historical nature of *non obstante* powers as found in the common law of England and Canada.[47] In Canada, the historical purposes of notwithstanding clauses have been to empower the legislature to have a "final say" over rights-disputes in at least two distinct ways. This historical scholarship relies importantly on the constitutional thought of the former social democratic premier of Saskatchewan Allan Blakeney, and the former conservative premier of Alberta Peter Lougheed.[48] Although the two premiers belonged to different political parties, they were seen as "primary champions and drafters" of the notwithstanding clause, who labored together to ensure that the clause was included in the Charter.[49] What was the significance of the clause that united them for its support despite their political differences?

Both Blakeney and Lougheed thought that the notwithstanding clause would protect rights in important ways. Blakeney thought it could protect certain moral rights that were not enumerated

[47] It should be noted that while scholars have underscored *institutional dimensions* of section 33's purpose with reference to parliamentary supremacy and federalism, they have relatively underemphasized the nature of notwithstanding [*non obstante*] powers themselves until recently. Even so, the discussions about the nature of *non obstante* powers remain brief. For these discussions, which will be discussed further below, see Geoffrey Sigalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review" (2023) 61:1 Osgoode Hall LJ [Sigalet, "Legislated Rights as Trumps"] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254342; Eric Adams & Erin RJ Bower, "Notwithstanding History: The Rights-Protecting Purposes of Section 33 of the *Charter"* (2022) 26:2 Rev of Constitutional Studies 121 at 6 [Adams & Bower, "Notwithstanding History"]. For references to federalism, see Janet Hiebert, "Notwithstanding the Charter: Does Section 33 Accommodate Federalism?" in Elizabeth Goodyear Grant & Kyle Hanniman, eds, *Canada at 150: Federalism and Democratic Renewal,* (Montréal: McGill-Queen's University Press, 2019) [Hiebert, "Notwithstanding the Charter"]; Janet Hiebert, "The Notwithstanding Clause: Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms" in Peter Oliver, Patrick Macklem & Natalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) [Hiebert, "Why Non-Use Does Not Necessarily Equate with Abiding by Judicial Norms"]; Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in *Constitutional Dialogue: Rights, Democracy, Institutions,* eds. Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon (New York: Cambridge University Press, 2019) [Newman, "Canada's Notwithstanding Clause"].

[48] Hon. Allan E. Blakeney, "The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) 19:1 *Constitutional Forum constitutionel* 1. [Blakeney, "The Notwithstanding Clause"]; Peter Lougheed, "Why a Notwithstanding Clause?" in *Points of View/Points de vue, No. 6* (Edmonton: University of Alberta Centre for Constitutional Studies, 1998), https://www.constitutionalstudies.ca/wp-content/uploads/2020/08/Lougheed.pdf, [Lougheed, "Why a Notwithstanding Clause?"]; Newman, "Canada's Notwithstanding Clause at 216-217; Sigalet, "Legislated Rights"; Adams and Bower, "Notwithstanding History".

[49] Sigalet, "Legislated Rights as Trumps", *supra* note 47 at 22.

in the Charter—such as certain social and economic rights—which are best realized by the legislatures and not the courts through democratic processes, social solidarity, and political activism.[50] Blakeney stressed that Charter-enumerated rights are *not more important* than those that are excluded from the Charter; the Charter does not create a hierarchy of rights.[51] Some rights were included in the Charter because were typically threatened by governments, which meant that courts were better positioned to protect them. By contrast, the moral rights not included in the Charter were typically threatened by citizens. That meant lawmakers were better positioned to protect such rights.[52] In sum, legislatures needed a way to prioritize certain moral rights over some Charter-enumerated rights.[53]

Peter Lougheed had a different reason for supporting the inclusion of the notwithstanding clause in the Charter. Lougheed knew that the scope and content of Charter rights needed to be specified by courts. But he insisted that the clause was needed for lawmakers to contest judicial specification of certain Charter rights that was be politically contested, unpopular, and ultimately subject to democratic disagreement.[54] Lougheed thought that section 33 should "provide an

[50] Section 26 of the Canadian Charter of Rights and Freedoms seems to expressly affirm this point. Section 26 provides that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada." *The Constitution Act, 1982*, s 26, https://canlii.ca/t/8q7l#sec26. It is worth also mentioning that, along this line, Ryan Alford has recently argued that we should pay more attention to rights that are not included in the Charter, particularly those that predate the Charter. See Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montréal: McGill-Queen's University Press, 2020) at 36-38 [Alford, *Seven Absolute Rights*].

[51] Blakeney, "The Notwithstanding Clause", *supra* note 48.

[51] Newman, "Canada's Notwithstanding Clause", *supra* note 47 at 216-217.

[52] Newman, "Canada's Notwithstanding Clause", *supra* note 47 at 216-217; Newman, "Key Foundations for the Notwithstanding Clause in Institutional Capacities, Democratic Participatory Values, and Dimensions of Canadian Identities" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* (forthcoming in McGill-Queen's University Press in 2024) at 97 [Newman, "Key Foundations"]; see also Blakeney, "The Notwithstanding Clause", *supra* note 48

[53] Newman, "Canada's Notwithstanding Clause", *supra* note 47 at 216-217.

[54] Newman, "Canada's Notwithstanding Clause", *supra* note 47 at 218, with Newman citing Lougheed as claiming that "what we have, in fact, chosen as a nation is a constitutionalization of rights, subject to a final political judgment in certain instances, rather than a final judicial determination as to the extent of all rights."

opportunity for responsible and accountable public discussion of rights issues…"[55] As Lougheed wrote at the time:

> "[t]he drafters of the Canadian Charter foresaw the problem created by the judicial supremacy in the United States, and opted to form a system of checks and balances between the judiciary and legislators before judicial supremacy could assert itself. Thus, at least one premise supporting the existence of s. 33 is that it allows effective political action on the part of legislators to curb an errant court."[56]

So historical records reveal that the two premiers had quite different reasons for advocating for the entrenchment of the notwithstanding clause.

Blakeney and Lougheed shared the view that the notwithstanding clause served *rights-protecting* purposes, albeit *in different ways.* Indeed, this understanding of section 33 is also revealed in larger constitutional history of notwithstanding clauses. First, the rights-protecting purposes of notwithstanding powers were evident in section 2 of the Canadian Bill of Rights (1960),[57] which is "the most direct [antecedent]" of the section 33.[58] Section 2 of the Canadian Bill of Rights section provided:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.[59]

But because the 1960 Bill of Rights was an ordinary statute, it was liable to repeal by future legislation. This was precisely what troubled FR Scott and Bora Laskin, who were leading constitutional scholars at the time. According to Adams and Bower, Scott "specifically worried

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[55] Lougheed, "Why a Notwithstanding Clause?", *supra* note 48 at 35.
[56] Lougheed, "Why a Notwithstanding Clause?", *supra* note 48 at 35.
[57] The *Bill of Rights, 1960* was ordinary law and so did not grant courts the power to declare acts of Parliament *ultra vires.* It only provided a judicial check on federal legislation subject only to express declaration of notwithstanding clause.
[58] Adams & Bower, "Notwithstanding History", *supra* note 47 at 6; Newman, "Canada's Notwithstanding Clause", *supra* note 47 at 214-215.
[59] *Canadian Bill of Rights,* SC 1960, c 44, s 2.

that the rights protections of the *Bill of Rights* would be easily diminished by subsequent legislation enacted by Parliament."[60] For this reason, Laskin predicted that, although the Bill of Rights "might serve an important symbolic political function, it would have little legal impact in protecting human rights and freedoms."[61] Herein lies the constitutional significance of the section 2 notwithstanding clause from the Bill of Rights. That notwithstanding clause was added by then-Justice Minister Davie Fulton to the proposed *Bill of Rights.* By requiring future lawmakers to expressly declare any derogation from the rights and freedoms contained in the Bill of Rights, Fulton expected that the section 2 notwithstanding clause would raise the political costs for legislatures to derogate from the Bill of Rights.[62] As Adams and Bower write,

> "any future derogations from the rights and freedoms would need to be explicit, deliberate, transparent, and subject to the exposure, debate, and criticism of the democratic process, rather than proceeding by implication, inadvertence, or subterfuge. Several pre-Confederation provincial legislatures followed course: they included notwithstanding clauses for similar purposes in their provincial human rights legislation, including the *Saskatchewan Human Rights Code,* the *Alberta Bill of Rights,* and Québec's *Charter of Human Rights and Freedoms*."[63]

The element of express declaration, then, now highlighted a third way in which a notwithstanding clause served rights-protecting purposes.

Perhaps more significantly, the rights-protecting purposes of Canadian notwithstanding clauses are congruent with their *origins* in English common law (from which Canada inherits its constitutional tradition). From medieval to early modern English constitutional thought, notwithstanding [*non obstante*] powers described the royal prerogative powers to suspend or dispense with the general application of ordinary statutes, when their strict application would produce unjust results. On that account, *non obstante* prerogatives existed to promote equity and

[60] Adams & Bower, "Notwithstanding History", *supra* note 47 at 7.
[61] *Ibid*.
[62] *Ibid* at 7-8.
[63] *Ibid* at 8.

justice.[64] According to William Blackstone, *non obstante* prerogatives were integral to discharging the monarch's unique responsibility as the "fountain of justice" and the "general conservator of the peace of the kingdom" to execute the laws in the manner, time, and circumstances as deemed appropriate.[65] This was why, as Blackstone reports, dispensing and *non obstante* powers more generally were binding only to the extent that they executed "what the legislature has first ordained"; their purpose was not to "contradict the old laws, or establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary."[66] *Non obstante* prerogatives, like other royal prerogatives in the middle ages, existed in large part for the benefit of the monarch's subjects.[67]

However, the Glorious Revolution of 1688 fundamentally changed the nature of *non obstante* prerogatives. With the adoption of the English Bill of Rights in 1689, *non obstante* prerogatives ceased to function as royal prerogatives.[68] The English Bill of Rights declared that James II had "endeavour[ed] to subvert the… laws and liberties of this kingdom… by assuming

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[64] *Ibid* at 4; Sigalet, "Legislated Rights as Trumps", *supra* note 47 at 7-8.

[65] William Blackstone, *Commentaries on the Laws of England, Book 1: Of the Rights of Persons,* edited by David Lemmings (New York: Oxford University Press, 2016) at 171-174 [Blackstone, *Commentaries*]; Sir Edward Coke described them as "sole and inseparable" to the office of monarchy (or the king's political person). That is, they legally constituted the crown, without which the crown could not exist. See Sir Edward Coke, "The Case of Non Obstante" in Steve Sheppard, ed, *The Selected Writings and Speeches of Sir Edward Coke, Volume 1* (Indianapolis: Liberty Fund, 2003) at 423-425 [Coke, *Selected Writings*]; see also Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven, CT: Yale University Press, 1996) at 147-164 [Burgess, *Absolute Monarchy*].

[66] Blackstone, *Commentaries, supra* note 65 at 174.

[67] Blackstone, *Commentaries, supra* note 65 at 159. Blackstone's categorization of royal prerogatives in his *Commentaries* helpfully situates *non obstante* prerogatives. *Non obstante* prerogatives were part of royal prerogatives over *domestic* affairs (other royal prerogatives regulating domestic affairs included the monarch's prerogative powers over commerce and the Church of England). Monarchs also held prerogative powers over *foreign* affairs, including but not limited to the rights to appoint ambassadors, make treaties with other states, and to declare war and make peace. Together, the royal prerogatives over domestic and foreign affairs constitute *royal authority* ("regal power"). Royal authority is one of three *kinds* of prerogatives belonging to the monarch *qua* his or her capacity as a *political* person (i.e. the *office* of monarchy). The other two kinds of royal prerogatives concern the king's character ("royal dignity") and the king's income ("royal revenue"). Blackstone asserts that there are royal prerogatives belonging to the monarch *qua* his or her capacity as a *private* person. These include privileges according to which the king's debt should be prioritized over that of subjects, or that no cost should be recovered against the king. As Blackstone says, these "indirect" prerogatives are only *exceptions* to the general rules laid down for the political community, in favor of the Crown. See generally, Blackstone, *Commentaries* at ch 7.

[68] Alford, *Seven Absolute Rights, supra* note 50 at 116-117.

and exercising a power of dispensing with and suspending of laws and the executing of the laws without the consent of Parliament… [and that] the pretended Power of Dispensing Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late illegall."[69] Effectively, the English Bill of Rights severed *non obstante* prerogatives from the office of monarchy. Now, they referred to the legislative powers to ensure the primacy of ordinary statutes against their suspension or dispensation by the monarch or the monarch's judges.[70]

The adoption of the English Bill of Rights, 1688 reveals deeper purposes of *non obstante* powers. This becomes evident when we reflect on *why* UK Parliament severed *non obstante* prerogatives from the monarch. The answer is that *non obstante* prerogatives were repeatedly abused by King James II in the months leading up to the revolution.[71] Owing to his firm Gallican Catholic convictions, James II was deeply committed to modernizing and centralizing Protestant England into a Catholic nation.[72] But his efforts to do so were viewed widely as undermining fundamental ancient liberties in England. First, *non obstante* prerogatives were invoked to undermine the independence of the judiciary. As part of his efforts to catholicize England, James II sought to appoint judges who were sympathetic to Gallican Catholicism. To do so, the king

[69] *Bill of Rights* (1689), I Will & Mary, session 2, c. 2. https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction#:~:text=X1The%20Bill%20of%20Rights,Assent%20on%2016th%20December%201689.

[70] Sigalet, "Legislated Rights", *supra* note 47 at 7-8.

[71] What the drafters of the English Bill of Rights referred to as "the pretended Power of Dispensing Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late."

[72] As a version of Catholic thought, Gallicanism (in brief) held that monarchical authority is independent of papal authority over temporal matters. In practice, Gallicanism has effectively justified such absolute monarchy as that exercised by Louis XIV of France. During the seventeenth century Continental Europe, there were heated debates within the Catholic Church over the proper authority of the monarch, especially between Louis XIV (who defended Gallicanism) and Pope Innocent XI. Most recently, Steve Pincus has argued that James II surrounded himself with advisers with Gallican advisers who emphasized the unquestionable absolute authority of the monarch, that the monarch could not be resisted even passively, and that the monarch's policies could not be questioned or petitioned. Pincus's historiography highlights that James II's policies were influenced by these larger debates within Continental Europe, and challenges the received wisdom that narrowly English contexts. For a review of historiography on the Glorious Revolution and its causes, see Steve Pincus, *1688: The First Modern Revolution* (New Haven, CT: Yale University Press, 2009) at 3-10, 119-120 [Pincus, *1688*].

nullified the Test Act of 1673 and the Penal Laws, which were intended to insulate England from Continental European Catholic practices: the Test Acts required all political and military office holders to take the sacrament according to the rites of the Church of England; and the Penal Laws punished those who officiated at or attended non-Church of England services.[73] However, the king had failed to repeal these statutes through parliamentary processes (the House of Commons or the House of Lords). This was when he began to resort to *non obstante* prerogatives to nullify the statutes, most notably in the case called *Arthur Godden v Sir Edward Hales* in 1686. This case concerned whether the king could dispense with the religious penal laws for Sir Edward Hales, who was a member of the House of Commons and a close associate of the king. In November 1685, Hales was formally received into the Catholic Church. Subsequently, he was commissioned colonel of a regiment of foot from the king. That position required him to take the oaths of the Supremacy of Allegiance, receive holy communion from the Church of England, and renounce the Catholic doctrine of transubstantiation. Of course, these were forbidden as a Catholic, and Hales did not take the requisite oaths. It was then that his employee, Arthur Godden, brought a legal action against Hales for failing to comply with the Test Act. Hales appealed to the Court of King's Bench, and argued that his obligations to take the oaths were dispensed with. Eleven out of twelve judges ruled in favor of Hales. But this was anticipated, as the king had been replacing judges that denied that the king could govern with *non obstante* prerogatives without parliamentary consent with those who thought it permissible.[74] This case was widely followed, and viewed as expanding the scope of royal prerogatives.[75]

[73] Pincus, *1688*, *supra* note 72 at 4.
[74] Pincus reports that the removal of judges for political reasons was greatly accelerated under James II compared to his predecessor King Charles. See Pincus, *1688*, *supra* note 72 at 154.
[75] Even King Louis XIV's French ambassador at the time (who shared the Gallican Catholic view of royal power) thought James II had expanded royal prerogatives strikingly. The French ambassador was reported to have said that "the prerogative attributed to the King of England has overturned the laws entirely" and therefore has put King James

Second, King James II issued the Declarations of Indulgence by royal fiat in 1687 and 1688. The 1687 Declaration fortunately promised the right to religious free exercise to Catholics. But the second Declaration issued in May 1688 severely restricted religious assemblies from speaking against Roman Catholicism or the monarch. What is more, Church of England clergymen were compelled to read aloud the Declaration of Indulgence from their pulpit. These led seven bishops to petition against reading the declaration principally objecting to the uses of dispensing prerogatives to compel expression, which led to the so-called Seven Bishops Trial. Questions over the nature and scope of *non obstante* prerogatives increasingly became a matter of public concerns, especially as the king took the bishops to trial for their resistance.[76] Indeed, the case of *Godden v Hales* and the Seven Bishops Trial were seen as part of the king's abuses of royal power more generally.[77]

These events illuminate the nature of legislative *non obstante* or notwithstanding clauses adopted in the English Bill of Rights and in the Canadian Charter. Fundamentally, English parliamentarians assumed notwithstanding powers to *correct* what they viewed as abuses of royal prerogatives. The purposes of legislative notwithstanding powers were to secure due process of law, non-arbitrariness, and ultimately to protect fundamental ancient English rights and liberties. The Coronation Oath Act of 1689, which William III swore to in succeeding James II, reflected

"in a position to do many things that he could not otherwise have done without Parliament." See Pincus, *1688, supra* note 72 at 155.

[76] It was telling that the bishops were found not guilty, even by judges who were politically sympathetic to Gallican Catholicism. This significantly indicated that even those judges found the king's exercise of royal edict problematic.

[77] Notably, the king was thought to be undermining the jurisdictional authority of ancient English universities when he forcefully appointed Catholic college masters at the Universities of Oxford and Cambridge against the universities' objections. The king also launched comprehensive surveillance programs over the press, effectively silencing political dissents to his policies. The king's invocations of *non obstante* prerogatives should be situated within this larger socio-political context, and should be understood as part of his broader exertion of royal authority. See Pincus, *1688, supra* note 72 at 150-178.

these constitutional commitments.[78] Under that previous oath, monarchs promised to rein "by the Law and Ancient Usage of this Realm."[79] But under section 3 of the Coronation Oath Act of 1689, the monarchs were to "Promise and Sweare to Govern the People of this Kingdome and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customes of the same."[80] The oath affirmed unequivocally that the monarch was constrained by acts of Parliament, consonant with the English Bill of Rights. This was significant as Stuart monarchs, including James II, argued that "the Laws and Ancient Usage of this Realm" included *absolute* royal prerogatives (including *non obstante* prerogatives) by which monarchs were above the law and could govern without Parliament.[81] Together, the Coronation Act and the English Bill of Rights, 1688 therefore exhibit constitutional commitments to protect rights as do Canadian notwithstanding clauses in the Canadian Bill of Rights and the Canadian Charter.

With this historical account of *non obstante* powers in view, let us return to asking how the notwithstanding clause and the supremacy clause should be paired doctrinally. The preceding historical survey suggests invariably that the legal nature of *non obstante* is fundamentally to protect rights, and to do so conclusively even if temporarily: to administer justice by executing legislation equitably; to change laws through parliamentary consent and procedural fairness; to enact non-enumerated moral rights; and to contest controversial judicial rights-specification. The central aims of notwithstanding powers are constitutionally oriented in a fundamental sense. In light of these considerations, it is appropriate to say that the section 33 notwithstanding clause

[78] In effect, the Coronation Act and the English Bill of Rights upended Stuart theories of kingship and Parliament, which James II accepted and according to which, the king cannot be legally constrained by Parliament. See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) at ch 5; for the influence of Roman law and the civilian legal tradition in shaping Stuart theories of kingship and Parliament, see Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (New York: Oxford University Press, 2016) at ch 9.
[79] Alford, *Seven Absolute Rights, supra* note 50 at 118.
[80] *Coronation Oath Act [1689]* c 6, s 3. https://www.legislation.gov.uk/aep/WillandMar/1/6/data.pdf.
[81] Alford, *Seven Absolute Rights*, supra note 50 at 118.

renders the protected law as constitutionally consistent with the Constitution of Canada—and so with the supremacy clause—in virtue of rendering that law operative. Construing their relationship this way provides a fitting doctrinal expression of the constitutional purposes of *non obstante* powers.

C. Subjunctive legal operation of section 33(2): necessary legal effects

The idea that section 33 reorients the supremacy clause's ordinary application conceptually explains and justifies the notwithstanding clause's necessary legal effects outlined in section 33(2): it precludes all forms of constitutional remedy under the section 52 of the supremacy clause, but without precluding judicial review. However, in order to discern these legal effects, *and* to fully appreciate their normative significance, we need to first appreciate the *subjunctive* grammatical mood that frames the formulation of section 33(2). Read closely, the key idea of the 'operation' of legislation protected under section 33(2) is framed in a 'subjunctive' linguistic mood:

> 33(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 (emphasis added).

Philosophically speaking, the linguistic mood of 'would have but for' is subjunctive: it describes some possible world that is different from our actual world.[82] The reference to some possible world *specifies* or *qualifies* the nature of legislation's operation that must obtain in our world ('An Act or a provision of an Act… shall have *such operation* as it would have but for… '). Read naturally, the subjunctive clause provides that the relevant law *operates as though* sections 2 and 7-15 of the Charter are absent; it does not merely prescribe *that* the operation of legislation should be secured,

[82] W. Starr, "Counterfactuals", *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = https://plato.stanford.edu/archives/win2022/entries/counterfactuals/; see especially s 1.1. "What are Counterfactuals?".

but also *how* the law invoking the notwithstanding clause must operate.[83] In short, the subjunctive mood of section 33(2) instructs judges how the legislation should operate in our world.

Although scholars agree that the subjunctive clause informs the legal operation pursuant to section 33(2), there are disagreements over *how expansively* the subjunctive clause should be read. On the one hand, Webber, Leckey, and Mendelsohn construe the clause narrowly and maintain that it protects *only* the operation of legislation without saving that law's constitutionality. For Webber, the linguistic mood of section 33(2) protects an invalid law that violates sections 2 or 7-15 that *would have been inoperative* without the notwithstanding clause; this is the sense in which the protected law operates as though sections 2 or 7-15 do not exist. Similarly for Leckey and Mendelsohn, to have 'such operation as it would have but for' sections 2 or 7-15 means that the legislation invoking section 33(2) is immune from being modified by any form of constitutional remedy. For, a law that is "struck down does not have the operation as it would have but for being struck down; it ceases to operate... The same logic applies to the 'tailored remedies' of reading in, reading down, and severance, each of which modifies the 'operation' that a statute would otherwise have."[84]

On the other hand, Geoffrey Sigalet reads the subjunctive clause more expansively, and reads it as the chief textual warrant against judicial review of legislation invoking section 33. On Sigalet's view, in a hypothetical world in which sections 2 or 7-15 of the Charter do not exist, courts would be unable to declare legislation for infringing upon sections 2 or 7-15

[83] Importantly, the French text of section 33(2) is also functionally subjunctive: "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." As Geoffrey Sigalet has recently argued, "a l'effet qu'elle aurait" also expresses hypothetical or counterfactual statements. See Sigalet, "Legislated Rights as Trumps", *supra* note 47 at 18. But, as I argue below, while Sigalet concludes that the subjunctive mood of section 33(2) precludes judicial review of legislation protected by section 33, I argue otherwise.

[84] Leckey & Mendelsohn, "Notwithstanding Clause", *supra* note 7 at 192. For a leading case on constitutional remedies that discusses these remedies, see *Schachter v Canada* [1996] 2 SCR 679.

unconstitutional because the law could not become inoperative for violating the rights in those Charter sections to begin with. So too in our actual world, therefore, court must put on "institutional blinders" from "reviewing the consistency, validity, and operability of laws" in relation to sections 2 or 7-15 of the Charter.[85] Legally, therefore, section 33(2) prohibits courts from declaring the relevant legislation unconstitutional for violating sections 2 or 7-15 of the Charter.

Respectfully, although Sigalet's account captures important truths about the legal effects of section 33(2), it is not the case that that section's subjunctive mood precludes judicial review. A more plausible position is that the subjunctive clause protects legislature's legal position by denying all forms of constitutional remedies, as Leckey and Mendelsohn argue. But what Leckey and Mendelsohn *underemphasize* is that there is particular normative significance in denying "interpretive" or "tailored" remedies, such as the reading in or reading down remedies. As the Supreme Court of Canada has held in *Vriend v Alberta,* interpretive remedies are thought to be *less intrusive* than striking down the law either entirely (remedy of nullification) or partially (remedy of severance).[86] They aim to *realize legislative intent* without severing or nullifying unconstitutional provision(s) of legislation and, accordingly, attempt to assist lawmakers to fulfill their constitutional responsibilities. In short, interpretive remedies seek to avoid the need to strike down or sever an unconstitutional law as originally written. So, denying interpretive remedies is normatively more significant than denying courts from striking down a law to remedy its constitutional defect. It communicates a correspondingly greater degree of deference to legislative intent and the original legislative design. This is what subjunctive legal operation of section 33(2) guarantees, and what is significant about its particular linguistic mood.

[85] Sigalet, "Legislated Rights as Trumps", *supra* note 47 at 16.
[86] *Vriend, supra* note 44 at 573.

Highlighting the normative significance of the subjunctive legal operation of section 33(2) could sharpen the views of Webber, Leckey, and Mendelsohn. Webber maintains only that the notwithstanding clause saves "the *loss* of legislation's operation ('force or effect')."[87] But in principle, the loss of legislation's operation may be saved by interpretive remedies. Leckey and Mendelsohn's account is not vulnerable to this possibility. But they *underemphasize* the normative significance of interpretive remedies just mentioned. However, focusing on what is particularly significant about precluding interpretive remedies suggests a meaningful answer to Sigalet's challenge that subjunctive legal operation denies judicial review. The subjunctive legal operation *further restricts* the judicial administrations of remedies by protecting the lawmakers' original design of the impugned law. In so doing, section 33(2) does mandate courts to treat *as though* sections 2 or 7-15 of the Charter do not exist in a *meaningful* way, but without denying judicial review altogether.

To sum up, taking seriously the constitutional purpose of the notwithstanding clause must counsel us to reconsider the ordinary application of the supremacy clause. If section 52(1) is doctrinally interpreted so as to apply to legislative constitutional evaluations about the law, then that could explain why the subjunctive legal operation demands heightened degree of deference to original legislative design. Yet the idea that the notwithstanding clause renders the protected legislation constitutionally supreme raises an important question: does it then prohibit courts from reviewing such legislation and possibly declaring it unconstitutional? The answer to this question is 'no'. The following sections explains why by developing a philosophical argument that section 33 permits doctrinally the judicial declaration of invalidity.

[87] Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 524; emphasis added.

V. The Separation of Powers Doctrine: A Foundation of the Doctrine of Invalidity

This section explains why legislation protected by section 33 does not preclude courts from nevertheless assessing its constitutionality even if it complies with the supremacy clause of the Constitution. A plausible answer must explain how it is that a reviewing court can find a protected law unconstitutional, even when it is consistent with the Constitution overall. I argue that the doctrine of invalidity—the judicial function of declare legislation invalid pursuant to section 52(1)—is grounded in the deeper principle of the separation of powers between the legislative and judicial branches. The separation of powers doctrine protects the courts' jurisdiction to find legislation's invalidity, even if section 33(2) of the notwithstanding clause saves the protected law from inoperability. Correlatively, the separation of doctrine explains why the invocation of section 33 cannot suspend the judicial function of finding legislation's invalidity. In short, the separation of powers doctrine further clarifies how the notwithstanding clause saves *only* the operation of legislation, but not its constitutional consistency or validity.

A. The separation of powers doctrine in Canada

To begin, recall that the doctrine of invalidity, which develops the legal effects of the supremacy clause, is integral to understanding why the legislation protected by section 33 may be reviewed. The doctrine of validity outlines the constitutional structure of judicial reasoning about rights. It holds that if a given law is constitutionally consistent, then it is valid, and therefore operative; if the same law is constitutionally inconsistent, then it is invalid, and therefore inoperative.[88] In order for the notwithstanding clause to become take effect and secure legislation's operation, therefore, the protected law must first be found constitutionally inconsistent and invalid. It is because the notwithstanding clause does not save the validity of the scrutinized law that the

[88] Webber, "Notwithstanding Rights, Review, or Remedy?" *supra* note 5 at 519-528.

court can find it invalidity. The doctrine of separation of powers provides a legal foundation to this doctrine of validity in that it informs *to what extent* judicial reasoning about legislation's constitutionality is constitutionally protected from being suspended by legislative reasoning about the same law.

Indeed, several scholars have identified a line of case law that affirms the *functional* separation of powers in Canada as a structural constitutional principle in Canada.[89] The separation of powers was first recognized by name in *Fraser v. Public Service Staff Relations Board* (1985) in Canada. This case concerned whether and how far a public servant can criticize the government's policies in his capacity as a private citizen. Before explaining the significance of acting neutrally and impartially in the eyes of the public, Chief Justice Brian Dickson pointed out

[89] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 13-14 [Sossin, *Boundaries of Judicial Review*]; Warren Newman, "The Rule of Law, the Separation of Powers and Judicial Independence in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) at 1039-1044 [Newman, "The Separation of Powers"]; Guy Régimbald & Dwight Newman, *The Law of the Constitution of Canada*, 2nd ed (Toronto: LexisNexis, 2017) at 106-108 [Régimbald & Newman, *The Law of the Constitution of Canada*]; Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 89-92 [Russell, *The Judiciary in Canada*]; Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016) at 47-48 [Waldron, *Political Political Theory*]. It should also be noted that William Blackstone also recognizes the functional separation of powers as an integral feature of the Westminster model of parliamentary government. In Blackstone, *Commentaries, supra* note 65 at 173, he argues: "In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car,. I. c.10. which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state"; see also Howard L. Lubert, "Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England'" (2010) 72:2 The Rev of Politics at 289-291, 294-295 [Lubert, "Sovereignty and Liberty"]. As Lubert argues, "Ultimately, then, Blackstone's argument regarding constitutional sovereign is more complex than a simple, pure doctrine of legislative sovereignty. His nuanced use of sovereignty reflects his commitment to a balanced constitution, to maintaining "the equilibrium of power between one branch of the legislature and the rest" (*Comm.* I. 51) that he associates with the preservation of liberty. Parliamentary sovereignty remains a leading principle of the constitution, but it is tempered by other co-equal principles (in particular, natural rights and equity) and by an institutional structure that preserves separation of powers and ensures the cooperation of the three social orders in making law (at 291).

in the decision that "[t]here is a separation of powers among the three branches of government—the legislature, the executive, and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy."[90]

About a decade later, the Court further recognized the separation of powers in a series of cases. In the 1993 case called *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly),* the Supreme Court considered whether section 2(b) of the Charter guaranteeing the freedom of expression protected the media from filming the Nova Scotia House of Assembly's proceedings which exercised its parliamentary privileges. The Court held that the Charter did not apply to parliamentary privileges, which were necessary for the proper functioning of the legislative branch. Although the case did not directly concern the separation of powers, Justice Beverley McLachlin (as she was then) affirmed that it is "fundamental to the working of government as a whole that [the legislative body, the executive including the Crown, and the courts] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other."[91] For this reason, courts may determine if a particular parliamentary privilege in question is necessary to the proper functioning of the legislature, but have "no power to review the rightness or wrongness of a particular decision made pursuant to that the privilege."[92] One year later, the separation of powers figured centrally in the Court's refusal to interfere with the Crown's prosecutorial discretion in the case called *R v. Power.*[93] Relying on *Fraser*, the majority held that courts cannot review

[90] *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 at 469-470 [*Fraser*].
[91] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 389 [*New Brunswick Broadcasting Co*].
[92] *New Brunswick Broadcasting Co, supra* note 91 at 323. In 2005, the Supreme Court echoed this understanding of parliamentary privilege in *Canada (House of Commons) v. Vaid* [2005] 1 SCR 667, 2005 SCC 30 at 21, maintaining that parliamentary privilege is "one of the ways that the fundamental constitutional separation of powers is respected."
[93] [1994] 1 SCR 601 at 620-621 [*Power*].

prosecutorial discretion "as a matter of principle based on the doctrine of separation of powers"; courts "do not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them" because it is the responsibility and expertise of the executive branch to administer criminal law (not the court's).[94] Together, *New Brunswick* and *Power* strongly affirmed that the judiciary's functional separation from both the legislative and executive branches, which entailed the duty *not* to interfere with the proper function assigned to each branch.

In the years following *Power,* the Supreme Court continued to recognize the separation of powers doctrine's constitutional status on firmer grounds. In the 1996 case called *Cooper v Canada (Human Rights Commission),* the Court considered whether an administrative agency (Canadian Human Rights Commission) can find of a provision of legislation (section 15(c) of the *Canadian Human Rights Act, 1985)* invalid. The majority denied that the agency has the authority to do so, because only the judicial branch has the "exclusive" jurisdiction to declare legislation invalid. In a concurring opinion, Chief Justice Antonio Lamer explicitly grounded this exclusive judicial function to the separation of powers doctrine.[95] Perhaps more significantly, he characterized the separation of powers as "the *backbone* of our constitutional system," "[o]ne of the *defining* features of the Canadian Constitution," and that, at a minimum, it "requires that certain functions be exclusively exercised by judicial bodies."[96] The following year, the Supreme Court further affirmed the constitutional status of separation of powers congruently with these propositions. This was held in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* in which the Supreme Court clarified what the provincial courts' judicial independence consists of,

[94] *Ibid* at 621, 623, 628.
[95] Although the majority does not explicitly appeal to the separation of powers, insofar as the majority opinion affirms the court's exclusive jurisdiction to declare legislation invalid that is not shared with the legislative and executive branches, it is consistent with Lamer CJ's opinion that emphasizes the separation of powers doctrine.
[96] *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR at 867, 871, 873 [*Cooper*]; emphasis added.

including its "inextricably bound" relationship between judicial independence and the separation of powers.[97] More specifically, it was found that judicial independence "inheres in" and "flows from" the separation of powers doctrine, which is a "*fundamental* principle of the Canadian Constitution."[98]

Quite recently, in *Mikisew Cree Nation v Canada (Governor General in Council),* the Court echoed this line of case law and held that "the separation of powers is 'an essential' feature of our constitution." In *Mikisew Cree Nation,* the federal Minister of Finance introduced two omnibus bills—without consulting with the Mikisew in the legislative process—that could adversely affect Canada's environmental protection regime and Mikisew Cree Nation's treaty rights to hunt, trap, and fish.[99] The key issue was whether the Crown had the duty to consult the Mikisew during the legislative process.[100] On this question, the Supreme Court answered negatively, because although the omnibus bills were developed and introduced by the Crown (federal Minister of Finance), the executive branch was performing its *legislative* function: although the legislature should be encouraged to consult affected Indigenous groups, the duty to consult strictly speaking applies only to the executive branch owing to the Crown's treaty with Indigenous peoples.[101] The separation of powers figured centrally in this case, alongside the doctrine of parliamentary sovereignty. The Court affirmed that the development of legislation is part of the lawmaking process (parliamentary sovereignty), which is "generally protected from judicial review" owing to

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[97] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 SCR 3 at 90 [*Provincial Judges Reference*].
[98] *Provincial Judges Reference* at 90; emphasis added.
[99] *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765 at paras 6-7 [*Mikisew Cree First Nation*]. The omnibus bills were Bill C-38, *Jobs, Growth and Long-term Prosperity Act,* SC 2012, c 19, and Bill C-45, *Jobs and Growth Act, 2012,* SC 2012, c 31. Both bills received royal assent in December 2012.
[100] The legislation may be challenged and found invalid for violating Aboriginal rights under section 35 of the *Constitution Act, 1982.* But this scenario would occur *after* the omnibus bills are enacted, not *during* the legislative process. This point is emphasized by the *Mikisew* court.
[101] *Mikisew Cree First Nation, supra* note 99 at paras 16-18 and 33.

the longstanding constitutional principle of the separation of powers.[102] Were courts to supervise the legislative process, each branch of government "will be unable to fulfill its role if it is unduly interfered with by the others."[103] This survey of case law on the separation of powers suggests that the doctrine is founded on a coherent line of doctrinal development. As a matter of law, the separation of powers doctrine is arguably as fundamental to the structure of the Constitution of Canada as the unwritten principles of democracy, federalism, and minority rights.[104]

To be sure, the principle of the separation of powers is not formally entrenched in the Canadian Constitution.[105] But as the Supreme Court has said in the *Secession Reference,* the fundamental, unwritten constitutional principles are "not explicitly made part of the Constitution by any written provision… but it would be impossible to conceive of our constitutional structure without them."[106] Similarly, Waldron argues that not everything that a constitutionalist political theory commits us to is found in our constitution.[107] First, consider the principle of democracy. Although the Constitution recognizes certain democratic rights and principles under the Canadian

[102] *Ibid* at para 34-35.
[103] *Ibid* at 768.
[104] *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 32[*Secession Reference*].
[105] Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 2 at 261-262. Indeed, Kahana maintains here that the notwithstanding clause "should not be examined from the American perspective of checks and balances, as the latter is based on a fundamental mistrust of both courts and legislatures." Reading section 33 as such would be at odds with an "underlying assumption in Canadian constitutionalism [which emphasizes] trust and respect between branches, not suspicion and confrontation" (at 262). A full response to this normative argument is beyond the scope of this section's argument, which is focused on reporting and synthesizing doctrinally the separation of powers as developed by the Supreme Court of Canada. For the purposes of this paper, it suffices to note that the Canadian Constitution may affirm that branches of government should trust and respect each other while also guarding against possible jurisdictional intrusions.
[106] *Secession Reference*, *supra* note 104 at para 50; see also *Provincial Judges Reference*, *supra* note 97 at 85, which acknowledges that although provincial (and federal courts, by extension) are "creatures of statutes, and that their existence is not required by the Constitution…there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution." It is important to recognize that the *Secession Reference* did not treat the principles of democracy, federalism, rule of law, and minority rights as an exhaustive list of unwritten principles. The Court held explicitly that "there are four fundamental and organizing principles of the Constitution *which are relevant to addressing the question before us* [concerning Québec's secession] (although this enumeration is *by no means exhaustive):* federalism; democracy; constitutionalism and the rule of law; and respect for minorities…" (para 32). This leaves open for finding the separation of powers as another unwritten principle of the Canadian Constitution.
[107] Waldron, *Political Political Theory, supra* note 89 at 47.

Constitution, for example in sections 1 and 3 of the Charter, the principle of democracy as such is not entrenched in the Canadian Constitution.[108] And the Supreme Court has recognized the principle of democracy as "an essential interpretive consideration" as an idea richer than a mere majority rule.[109] What is more, the idea of the rule of law is only mentioned in the preamble of the Constitution Act, 1982 (which is not formally a binding law) and it is not part of the Constitution Act, 1867.[110] Yet rule of law is also recognized by the Supreme Court of Canada and it would be implausible to deny its place in the Constitution.[111] It is also true that the principle of the separation of powers is in tension with the principles of responsible government (which fuses the legislative and executive branches) and the advisory functions of the Canadian courts (which fuses the executive and judicial branches).[112] Perhaps this is why the Canadian doctrine of separation of powers may not be "strict."[113] But all of this is consistent with the idea that there remains *some* functional separation especially between the judicial and the other two branches, and that the separation of powers in Canada is *narrower* than as found in the United States, for example. The proposition that *some* judicial functions are meaningfully separated from legislative and executive functions (and ought to remain so) under the Canadian doctrine of separation of powers is therefore plausible.

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[108] So too is this the case with the US Constitution. As Waldron observes, the US Constitution does not legally entrench the principle of democracy, strictly speaking. However, it does contain important democratic considerations in Article I, 2.1, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. See Waldron, *Political Political Theory, supra* note 89 at 47.

[109] *Secession Reference*, *supra* note 104 at para 62. See also Leckey & Mendelsohn, "The Notwithstanding Clause", *supra* note 7 at 200.

[110] But note that the Constitution Act, 1867 does import principles similar to the unwritten English Constitution, and there may be a way of reading Dicey that suggests that the English Constitution does treat the rule of law as a legal principle. See footnote 9 in Waldron, *Political Political Theory, supra* note 89 at 319.

[111] It is intrinsic to the section 7 fundamental justice clause of the Charter, the section 15 equality rights clause of the Charter, and the section 52(1) supremacy clause of the Constitution. The principle of the rule of law is also key to important cases such as *Roncarelli v Duplessis*, [1959] SCR 121, the *Manitoba Language Rights Reference*, and the *Secession Reference.* See Newman, "The Separation of Powers", *supra* note 89 at 1031-1032.

[112] See Hogg, *Constitutional Law of Canada, supra* note 38 at chs 7.3(a) and 14.2(a).

[113] *Cooper, supra* note 97 at 871.

B. The pairing of the doctrines of invalidity and the separation of powers

The doctrine of invalidity is importantly related to the separation of powers doctrine in that the separation of powers provides a deeper doctrinal basis for the judicial declaration of invalidity under the section 52(1) supremacy clause. To see this relationship between the two doctrines, consider more closely the discussion on the separation of powers in the case called *Cooper* mentioned earlier. In writing for the majority, Chief Justice Lamar writes:

> "the constitutional status of the judiciary, flowing as it does from the separation of powers, requires that *certain functions be exclusively exercised* by judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, must nevertheless have exclusive jurisdiction over *challenges to the validity of legislation* under the Constitution of Canada, and particularly the *Charter*. Only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to *declare invalid* an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members usually serve at the pleasure of the government of the day and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task. Security of tenure, financial security, and independence with respect to matters of administration bearing directly on the exercise of the courts' judicial function define judicial independence. In the context of the *Charter* adjudication, these features help to insulate the courts from interference, *inter alia*, by elected legislatures, and thus ensure that courts can safeguard the supremacy of *Charter* rights *through the vehicle of s. 52*."[114]

This passage reveals an integral legal relationship between the doctrines of invalidity and separation of powers. First, it situates the doctrines of invalidity under the section 52(1) supremacy clause jurisprudence. The judicial declaration of invalidity, according to the *Cooper* court, is authorized pursuant to section 52(1) of the Constitution Act, 1982 (to declare legislation invalid is to safeguard the supremacy of Charter rights "through the vehicle of s. 52"). Under the supremacy clause jurisprudence, then, the doctrines of invalidity and separation of powers are intricately bound together. Second, the Constitution assigns exclusively to the courts the right to find

[114] *Cooper, supra* note 97 at 873; emphasis added.

legislation invalid: the doctrine of invalidity falls within the exclusive judicial function.[115] Third, the exclusive judicial function of finding legislation invalid is grounded in the deeper doctrinal foundation of the separation of powers: the doctrine of invalidity "flows from" the separation of powers doctrine, and the constitutional status of the judicial declaratory relief is informed by the separation of powers. The structure of the supremacy clause jurisprudence is thus marked not only by the analytical sequence of the doctrine of invalidity, but also by the separation of powers that deepens the nature of declaratory relief. On the whole, then, that the judiciary can declare legislation invalid is "fundamental to the working of the government as a whole"[116] and realizes "[o]ne of the defining features of the Canadian Constitution."[117] It is therefore "equally fundamental that no branch of government oversteps" the judicial declaration of invalidity, but that "each show proper deference for the legitimate sphere of activity of the other"[118] such as the judicial declaration of invalidity.

The pairing of the doctrines of invalidity and separation of powers has crucial implications on how the notwithstanding clause should be interpreted. As the Supreme Court of Canada has repeatedly held, interpretation of constitutional provisions must be informed by "foundational principles of the Constitution" and by reference to the "structure of the Constitution as a whole."[119]

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[115] But this does not show that the right to declare legislation invalid is the *only* exclusive judicial function; there may be other judicial functions that are uniquely judicial that other branches of government do not share. To be sure, a fuller Canadian separation of powers doctrine will need to articulate what they are. For the purposes of this paper, however, it suffices to note that the declaration of invalidity falls under the court's jurisdiction as its exclusive function. For a critique that the Canadian separation of powers jurisprudence lacks a thorough analysis of the meaning and content of the idea, see Newman, "The Separation of Powers" at 1040.

[116] *New Brunswick Broadcasting Co, supra* note 91 at 389.

[117] *Cooper, supra* note 97 at 871.

[118] *New Brunswick Broadcasting Co, supra* note 91 at 389.

[119] *Reference re Senate Reform* [2014] 1 SCR 704 at 706; *Secession Reference, supra* note 104 at 240. Such principles include federalism, democracy, minority rights, constitutionalism and the rule of law. To be sure, this list does not mention the separation of powers. Still, there are reasons to include the separation of powers in the list. First, there is no reason to read the list in the *Senate Reform Reference* and the *Secession Reference* as exhaustive. And second, as reviewed, the Court has characterized the separation of powers as a fundamental principle of the Canadian Constitution on several occasions—on par with the principles just mentioned.

As the foregoing review of relevant case law reveals, the Canadian Constitution arguably confers the separation of powers the constitutional status and weight of a foundational principle. Insofar as the judicial declaration of invalidity flows from the separation of powers, it too should be read as being of similar constitutional weight. Accordingly, the court's jurisdiction to reason about rights and assess legislation's constitutionality pursuant to the section 52(1) supremacy clause cannot be suspended or overstepped by legislative reasoning about the same law. It is constitutionally 'immune' in the Hohfeldian sense from legislative interference, including the use and interpretation of the section 33 notwithstanding clause.[120] Since this immunity is grounded in a constitutional doctrine, it is commanded by the Constitution itself. Correlatively, this also entails that the separation of powers 'disables' the legislature's use and interpretation of the section 33 notwithstanding clause so as to alter the judicial function. In Hohfeldian terms, that is, the legislature's constitutional jurisdiction lacks the 'power' to alter the court's jurisdiction to over the doctrine of invalidity.[121] In short, the separation of powers clarifies that courts may review constitutional consistency and validity of legislation protected by section 33, since those analytical steps fall within the core judicial function under section 52(1). In short, the separation of powers clarifies the legislature and court's constitutional limits and scope for reasoning about rights. In so doing, it provides a deeper doctrinal justification for *how* the notwithstanding clause coherently severs invalid legislation from losing operation.[122]

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[120] For a distinction between 'immunity' and 'power' in the Hohfeldian jural relations, see Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions I" in Walter Wheeler Cook, ed, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, 2010) at 60-64 [Hohfeld, *Fundamental Legal Conceptions*]. See also Leif Wenar, "Rights", *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), especially s 2.1.4, https://plato.stanford.edu/archives/spr2023/entries/rights/ [Wenar, "Rights"].

[121] Hohfeld, *Fundamental Legal Conceptions*, *supra* note 120 at 60-64; see also Leif Wenar, "Rights", *supra* note 120 at s 2.1.5, https://plato.stanford.edu/archives/spr2023/entries/rights/.

[122] This argument, to my mind, coherently unifies judicial review and legislative finality so as to resolve the tension between the two; it should justify judicial review without justifying judicial finality. As Kahana says, a plausible

To briefly summarize, the notwithstanding clause does not suspend the supremacy clause's legal effects, but renders protected legislation compliant with the supremacy clause by reorienting the latter's application. This implies that the protected legislation is constitutionally supreme in the sense of the supremacy clause. However, the protected law remains liable to constitutional scrutiny by courts. The separation of powers doctrine, paired with the doctrine of invalidity, importantly explains why this must be so. The final section will refine this account of the notwithstanding clause by addressing an important objection to the theories developed by Webber, Leckey, and Mendelsohn.

C. Why the notwithstanding clause cannot suspend the court's jurisdiction to review legislation

Taking the separation of powers doctrine seriously counsels why recent articulations of the orthodox interpretation of section 33 are incorrect. The orthodox interpretation holds that the notwithstanding clause suspends the court's jurisdiction to review legislation. In recent years, a number of commentators have argued that section 33 must preclude judicial review because it rendering legislative reasoning about the scope and content of certain rights constitutional.[123] Relying on the history of Premiers Lougheed and Blakeney's support for the notwithstanding clause reported earlier, Maxime St-Hilaire and Xavier Foccroulle Ménard argue that the proper

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justification of the notwithstanding clause should achieve this task. See Kahana, "Understanding the Notwithstanding Mechanism", *supra* note 2 at 247.

[123] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order" (2023) 110 *Supreme Court Law Review (2d)* 135 (forthcoming in 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123003 [Sérafin, Sun & Ménard, "Notwithstanding judicial Specification]; Maxime St-Hilaire & Xavier Foccroulle Ménard, "Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause" (2020) 29:1 *Constitutional Forum constitutionelle* 38 [St-Hilaire & Ménard, "Nothing to Declare"]*;* Maxime St-Hilaire, Xavier Foccroulle Ménard & Antoine Dutrisac, "Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-)Rejoinder" in Peter L. Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms and Controversies* (forthcoming in McGill-Queen's University Press in 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4295034 [St-Hilaire, Ménard & Dutrisac, "A Response to a (Non-)Rejoinder"]; Sigalet, "Legislated Rights", *supra* note 47. Sigalet's argument has already been addressed in the last section, so this section will focus on the other arguments listed here.

purpose of the clause is to render legislative determination of sections 2 or 7-15 of the Charter constitutionally consistent. The clause achieves this by temporarily suspending the application of the Charter provisions protected by section 33 and removing them from the judicial debate.[124] By removing the court's jurisdiction to find unconstitutional the legislation that invokes the clause, the clause shields the relevant legislation from becoming constitutionally inconsistent. This conclusion, they add, is buttressed by the heading of the notwithstanding clause, which makes exception to the "application of Charter rights." In effect, the reviewing court that reviews a protected law has "nothing to declare" because the clause removes their jurisdiction to review legislation in the first place.[125] St-Hilaire and Ménard have defended this conclusion also from the classical legal tradition with Kerry Sun. On this parallel argument, judicial and legislative reasonings about rights specify the scope and content of 'rights' (*ius*) in different ways. The question of who should decisively settle the scope and content of relevant Charter rights is a "prudential question not foreclosed by the concept of right itself."[126] The role of section 33 is to ensure that legislative determination of certain Charter rights prevail over that of judicial determination, they argue, as has been affirmed by the Supreme Court recently in *Toronto v Ontario (AG)*.[127]

Both arguments infer that the notwithstanding clause precludes judicial review from the key premise (expressed in different ways) that the clause protects legislative determination of

[124] St-Hilaire, Ménard & Dutrisac, "A Response to a (Non-)Rejoinder", *supra* note 123 at 7.
[125] *Ibid* at 4-7.
[126] Sérafin, Sun & Ménard, "Notwithstanding Judicial Specification", *supra* note 123 at 158.
[127] [2021], 1 SCC 34 at para 60, emphasis added: "First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter,* the legislature may give *continued effect to its nderstanding of what the Constitution requires* by invoking s. 33…" These arguments are informed by a deeper theory about the relationship between courts and legislatures, according to which the two branches are responsible for "coordinate" interpretation of Charter rights and freedoms. For a fuller account of coordinate constitutional interpretation in Canada, see Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montréal: McGill-Queen's University Press, 2010).

rights. However, they do not establish that the purpose of the notwithstanding clause denies judicial review for two reasons. First, they rest on a faulty assumption that suspending judicial determination of rights is the only (or main) way to achieve the constitutional consistency of legislative determination of those rights. But that assumption need not hold given that legislation's constitutional consistency could be secured by reorienting the supremacy clause's application, and without precluding judicial review. Second, the answer developed in this paper offers a doctrinally more *circumscribed* and *precise* expression of how the notwithstanding clause renders legislative determination of rights constitutionally consistent than those developed by St-Hilaire, Sérafin, Ménard, Sun, and Dutrisac—*while* sharing the major premise that the purpose of section 33 is to render legislative determination of Charter rights constitutionally consistent. Third and finally, insofar as this answer references the separation of powers and the doctrine of invalidity, it relies on a more holistic reading of the Constitution. Together, therefore, there are reasons—both internal and external—to resist the orthodox understanding of the notwithstanding clause.

D. On the significance of constitutional impasse and the operation of legislation

Fundamentally, the notwithstanding clause is best understood as a constitutional provision that establishes a paramountcy or hierarchy relationship between conflicting laws, and more specifically, between conflicting legislative and judicial determinations of constitutional rights and freedoms. In this sense, the notwithstanding clause is indeed analogous to the doctrine of paramountcy in federalism jurisprudence or the doctrine of implied repeal in statutory interpretation.[128] But reflecting on this conception of section 33 reveals what is particularly significant about the fact that the clause targets only the operation of legislation. The idea of conflicting laws necessarily introduces the cognate idea of *constitutional impasse*: a scenario

[128] This idea has been already articulated by Sigalet and Webber. See Sigalet, "Legislated Rights as Trumps", *supra* note 47 at 8; Webber, "Notwithstanding Rights, Review, or Remedy?", *supra* note 5 at 519-528.

which demands some higher order constitutional rule, mechanism, or body to decisively break such impasse.[129] As Peter Hogg says, "[every] legal system has to have a rule to reconcile conflicts between inconsistent laws." [130] In short, fundamental jurisdictional conflicts over rights-determination highlights the necessity of legal operation in the event of legal conflict. Once we recognize the need to resolve a constitutional impasse in constitutional disputes, it becomes significant why the notwithstanding clause protects only the *operation* of legislation. A close review of the paramountcy doctrine and the supremacy clause—both of which regulate conflicting laws to ensure legal operation—buttresses this idea. Consider the formulation of the paramountcy doctrine. The paramountcy doctrine renders validly enacted provincial law that is inconsistent with a federal law inoperative *only to the extent of* its inconsistency *and* does not render the inoperative provisions of the provincial law invalid or inapplicable.[131] Understood in reverse, the paramountcy doctrine secures the operation of federal law *only insofar as* it is necessary to break a constitutional impasse, all without denying the valid jurisdiction of the provincial legislature. So too is the case with the doctrine of implied repeal, which "operates most often as a rule of paramountcy rather than a method of repeal."[132] Consequently, the doctrine of implied repeal renders subsequently enacted legislative provisions "inoperative *to the extent of any conflict"* with relevant prior

[129] On constitutional impasse, see generally Jacob T. Levy, "Departmentalism and Dialogue" in *Constitutional Dialogue: Rights, Democracy, Institutions,* eds. Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon (New York: Cambridge University Press, 2019) [Levy, "Departmentalism and Dialogue"]; Victor Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (New York: Oxford University Press, 2014) at ch 1 [Muñiz-Fraticelli, *The Structure of Pluralism*].
[130] Hogg, *Constitutional Law of Canada, supra* note 38 at ch 16.1; see also Muñiz-Fraticelli, *The Structure of Pluralism, supra* note 129 at 13-30; and NW Barber, *The Constitutional State* (New York: Oxford University Press, 2010) at 145-146 [Barber, *The Constitutional State*].
[131] Hogg, *Constitutional Law of Canada, supra* note 38 at ch 16.6.
[132] Ruth Sullivan, *Statutory Interpretation,* 3rd ed (Toronto: Irwin Law 2016) at 328 [Sullivan, *Statutory Interpretation*].

provisions.[133] Importantly, the "inoperative provisions remain *valid law* and will become *applicable again* if for any reason the conflict disappears."[134]

All these examples are narrowly concerned with securing legal operation by establishing paramountcy relations between conflicting laws. They are not concerned with suspending general jurisdictional authority. It is not the case that they render the relevantly inferior law invalid or inapplicable altogether. They merely resolve the practical impasse that arises from inconsistent laws between federal and provincial governments (paramountcy) and the same enacting legislative body (implied repeal). The analogy extends to the inconsistent judicial and legislative determinations of rights, and informs how the notwithstanding clause and the supremacy clause should relate. The notwithstanding clause renders a legislative determination of rights paramount (in the sense of the supremacy clause). But it does so only to break a constitutional impasse between inconsistent legislative and judicial determinations of constitutional rights, and does not render an inferior legal position (judicial determination) inapplicable (the judicial constitutional evaluation is of equal constitutional status insofar as the separation of powers doctrine warrants its articulation). The fundamental character of the notwithstanding clause is, therefore, analogous to the doctrines of paramountcy and implied repeal: it only claims to rank inconsistent laws without assessing the constitutionality of the conflicting laws; it presumes that they are constitutional. All of this underscores the significance of section 33(2)'s targeted subjunctive operation of legislation.

VI. Conclusion

This paper has sought to resolve an inherent tension in the idea that law can be constitutionally invalid but operative under the invocation of the notwithstanding clause. Resolving this tension

[133] *Ibid* at 328; emphasis added.
[134] *Ibid.*

hinges on plausibly capturing the legal relationship between section 33 and the section 52(1) supremacy clause. The existing theories offered by Webber, Leckey, and Mendelsohn face difficulties in how they capture this relationship. Webber argues that section 33 exempts section 52(1); Leckey and Mendelsohn argue that the latter constitutionalizes the law protected by section 33 but found unconstitutional. I have argued that the doctrinally correct relationship between the notwithstanding and supremacy clauses must be guided by the constitutional purposes of notwithstanding clauses more generally. Because the notwithstanding clause exists to secure rights-protecting legislation supreme, this should inform how the clause interacts with the supremacy clause of the Constitution. I have also argued that the doctrine of invalidity is grounded in the deeper legal doctrine of separation of powers, and why the latter is relevant to the legal debates on the notwithstanding clause. This explains why courts may find unconstitutional those laws protected by section 33, even if such laws comply with the supremacy clause. It also explains why it would be incorrect, as a matter of law, to interpret the notwithstanding clause as suspending the court's jurisdiction to review legislation. On the whole, then, there are many truths to what Webber, Leckey, Mendelsohn, and their critics have argued. This paper has sought to critically build those truths to explain why the notwithstanding clause affirms the legislature's constitutional role in specifying the scope and content of rights while also upholding does the court's jurisdiction to review that role afforded to the legislature.

As the Supreme Court of Canada has said in the *Secession Reference,* the Constitution "has an internal architecture" and that the "individual elements of the Constitution are linked to others, and must be interpreted by reference to the structure of the Constitution as a whole."[135] The constitutional theory of the notwithstanding clause developed here follows this instruction from

[135] *Secession Reference, supra* note 104 at para 50.

the Court: the clause's place within the Constitution is rendered intelligible as it fits coherently with the doctrine of invalidity, section 52(1) supremacy clause, and the doctrine of separation of powers—all of which constitute some of the most important elements of the Constitution of Canada.

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