Constitutional forum constitutionnel

What is Most Bothersome About Section 33: Or What Hasn't Yet Been Said

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I. Introduction

We are in the midst of a resurgence of interest in section 33 of Canada's *Charter of Rights and Freedoms*, resulting in a burst of new literature.[1] What is remarkable, however, is how little of what is written about section 33 today is genuinely new. Exploring the seminal contributions to the debate about the override as far back as the early 1980s, one sees that all of the basic positions were mapped out within a few years of the *Charter*'s adoption in 1982.[2]

What is new are the circumstances that have brought section 33 to the fore of our concerns about the Constitution. After lying dormant as a matter of interest for decades — outside of Quebec, that is — the notwithstanding clause, which Barbara Billingsly once called the *Charter*'s "sleeping giant," has now been stirred awake.[3] Since 2018, section 33 has gradually become politically palatable in English Canada after decades in which we assumed it was not.[4]

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1 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]. Section 33 permits Parliament or a provincial legislature to pass a law that will operate "notwithstanding a provision included in section 2 or sections 7 to 15" of the *Charter*, effectively suspending the operation of one or more of those rights in relation to the law passed. An override under section 33 lasts up to five years but can be renewed: s 33(3) and (4).

2 I corroborate this assertion below.

3 Barbara Billingsley, "Section 33: The Charter's Sleeping Giant" (2002) 21 Windsor YB Access to Justice 331 at 332.

4 For an overview of uses the override since 2018 by Saskatchewan, Ontario, and Quebec, see Tsvi Kahana, "The Notwithstanding Clause in Canada: The First Forty Years" (2023) 60:1 Osgoode Hall LJ 1.

The reasons are complex and related to processes that are transforming politics and culture in ways we have not begun to fully understand. They go far beyond what is called populism, though they do reflect this in part.[5] They likely have something to do with increasing polarization in politics and the collapse of the political centre, which in turn probably relates to developments in media and technology, and the ever-lower levels of civic literacy in Canada. But whatever the causes, the giant is wide awake and ready for its time in the sun.

The notwithstanding clause has always been bothersome to a large portion of *Charter*-philes. Politicians and political theorists have tended to defend it; lawyers and rights advocates have opposed it.[6] The recent debate involves two conversations. One concerns whether courts still have a role to play once section 33 is invoked (whether it precludes any form of judicial review), a discussion mostly taking place among law scholars — and some of the arguments here are new.[7] The other debate reprises basic positions on the legitimacy question: whether section 33 is consistent with the *Charter*'s purpose of protecting rights, and if so, how a government might use the power responsibly. Again, almost none of the arguments advanced in this broader theoretical debate are new.

What stands out to this reader of the copious literature on section 33 is that what is most concerning about the override — what is most bothersome about it, from a certain perspective — remains elusive. In what follows, I offer an account that attempts to pinpoint, at a high level of abstraction, the crux of what unsettles me and I suspect many others. The account is not new in the sense that it reframes countless versions of the "section 33 as aberration" argument.[8] But it may be new in offering different reasons for this position, ones that try to avoid an impasse in the legitimacy debate we have never moved beyond.

I will argue that section 33 does not belong in the *Charter* not because impartial judges rather than unfettered legislatures ought to be ruling on the limits of *Charter* rights, but because it is inconsistent with the idea of a charter, a constitutionally entrenched bill of rights (not itself a new idea). My contribution is this: The *Charter* without section 33 closely embodies Ronald Dworkin's theory of "rights as trumps," a theory based on preventing the state from violating individual dignity and equality in a fundamental sense.[9] The *Charter*

5 See e.g. Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 23:4 Const Forum 9, noting at 15: "if the notwithstanding clause keeps its current form, and *if* Müller-style populism were to become prominent or even normalized nationally or provincially, then Canada's constitutional future could well be bleak."

6 Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard point this out in "Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order" (2023) 110(2d) SCLR 135 at 135.

7 For an overview, see Geoffrey Sigalet, "Legislated Rights as Trumps: Why the Notwithstanding Clause Overrides Judicial Review" (2024) 61:1 Osgoode Hall LJ 63, which outlines a debate about courts providing declarative relief in the wake of section 33 being invoked — a debate that began with Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The faulty received wisdom around the notwithstanding clause" (10 May 2019), *Policy Options Politiques*. See also contributions to Part 3 of Peter L Biro, ed, *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies* (Montreal: McGill-Queen's University Press, 2024).

8 For the seminal version of this argument, see John D Whyte, "On Not Standing for Notwithstanding" (1990) 28:2 Alta L Rev 347.

9 Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

with section 33 gives rise on its face (i.e. with no substantive conditions for invoking it) to the possibility of reverting to majority rule; it subordinates rights to the whim of the majority or even a mere plurality. Which is to say that the debate over who should decide limits on rights — unelected and unaccountable but impartial judges or democratically elected, potentially abusive but often earnest and reasonable legislatures — is a red herring.

Contrary to conventional wisdom, I argue that the *Charter*'s main characters are not the court and the legislature, but the individuals and groups who bear the rights it guarantees. If we approach the *Charter* as laypersons and simply read the text without any concern about how it works in practice — who enforces the rights, where and when — the guarantee of rights comes across first and foremost as a moral statement. The *Charter* tells a story about how we are a rights-bearing people. Like other bills of rights, it is a declaration of the values at the heart of our political order. But here's the point: up until section 33, those values are Kantian, which is to say, the *Charter* reflects a concept of the person as intrinsically valuable, equal, autonomous, and, in a certain sense, inviolable. The whole point of telling a story in which the state promises not to infringe basic rights beyond reasonable limits is to affirm the primacy of individual freedom and equality as ends in themselves.[10] With section 33, however, the story takes a sudden utilitarian turn. The provision might be used well (by a cautious, reasonable legislature), but on its face — on a plain reading — it instantly unravels the Kantian picture of the intrinsic value of the individual and the political primacy of their basic rights. The story ends with the individual and their rights being made subordinate to the happiness, if not the whim, of the greatest number.

II. Why the Debate over Courts and Legislatures is a Red Herring

The literature on the override frames the question of its merits as being about who should decide on the limits of rights: judges or legislatures. Figures from John Whyte to Jamie Cameron, Leonid Sirota, Vrinda Narain, and Margot Young have cast doubt on section 33 — without denying that courts often make poor decisions that are out of step with the electorate or costly and damaging to society.[11] But judges, the opponents of the override suggest, are better equipped to venture the challenge of sorting out complex moral issues with which cases involving fundamental rights present us. Courts are also a forum for methodical presentation of the evidence and careful deliberation by judges who, for the most part, strive to be impartial. They will sometimes get it wrong, but the vast majority of the time, they get it right. Section 33 may involve more democratic voices, but the provision itself contains no conditions or qualifications for invoking it to override core rights and is thus open to abuse by populist gov-

10 Justice Dickson, as he then was, in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 94 [*Big M*]: "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms … Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person."

11 Whyte, *supra* note 8; Jamie Cameron, "The *Charter*'s Legislative Override: Feat or Figment of the Constitutional Imagination?" (2004) 23:2d SCLR 135 (noting at 140: "[s]ection 33 grants legislatures a power that cannot legitimately be exercised against the Charter's entitlements or the judiciary's power of review"); Leonid Sirota, "Not Withstanding Scrutiny" (May 4, 2017), online (blog): *Double Aspect* <https://doubleaspect.blog/2017/05/04/not-withstanding-scrutiny/> [https://perma.cc/LQ6U-PLTW]; and Vrinda Narain & Margot Young, "Notwithstanding Minority Rights: A Canadian Democratic Failure" (2024) 32:3 Const Forum Const 43.

ernments.[12] Even one of the section's original proponents, Peter Lougheed, Premier of Alberta in 1981, came to the view in the late 1990s that section 33 should be amended to require a 60 percent majority of the legislature before invoking it.[13]

Supporters of section 33 emphasize two flaws with American-style "strong-form" judicial review, systems where courts strike down legislation or have the last word on the nature of rights. It is hard to undo a bad decision on basic rights: we have to amend the Constitution (nearly impossible under the Canadian system) or stack the court. Neither is quick or convenient.[14] A long line, from Paul Weiler, FL Morton, and Brian Slattery to Lorraine Weinrib, Peter Russell, and Christopher Manfredi, from Kent Roach to Dwight Newman and Geoffrey Sigalet,[15] lauds section 33 for serving as an ingenious made-in-Canada solution to these problems with judicial review by allowing us to have our cake and eat it too: a constitutional protection of rights with a quick democratic corrective mechanism. The override gives legislatures a veto over courts, and if they seek to renew the veto after five years, tough questions about rights can even be put to electors directly. Yes, this group concedes, the override can involve abuse by populist majorities or pluralities, but as Jeremy Waldron has noted, ample evidence shows that legislatures can also engage in robust and reasoned debate about moral questions at the heart of rights disputes and come to reasonable conclusions.[16] In this sense, the clause is not inherently bad, even if every defender of section 33 has, from the outset, distinguished good and bad uses of the clause.[17] They have built their case on the assumption of the override being used well, minimizing the fact that, as drafted, it leaves open the basic

12 As Sirota, *ibid*, puts it: "[R]eal-life governments are largely uninterested in thinking about constitutional rights. If they are allowed to disregard judicial decisions, they will not engage in serious deliberation themselves. They will press ahead with their political objectives, sloganeering and lying along the way." Narain & Young, *ibid*, assert at 48: "[T]he message behind section 33 is that the majority can whip the minority into submission whenever it pleases. At a social level, a society cannot assimilate this message without assimilating the underlying theme, that is, that the minority serves as a threat." See also Whyte, *ibid*; Mailey, *supra* note 5.

13 Peter Lougheed, "Why a Notwithstanding Clause?" (1998) 6 Points of View (published by the Centre for Constitutional Studies) at 17. He also suggested, at 18, that section 33 should be amended to preclude the use of the override to preempt judicial review, citing as an example Saskatchewan's use of it 1986 in relation to labour legislation.

14 See e.g. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346.

15 See Paul C Weiler, "Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?" (1980) 60:2 Dalhousie Rev 205; Paul C Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18:1 U Mich JL Ref 51; F L Morton, "The Political Impact of the *Canadian Charter of Rights and Freedoms*" (1987) 20:1 Can J Political Science 31; Brian Slattery, "A Theory of the *Charter*" (1987) 25 Osgoode Hall LJ 701; Lorraine Eisenstat Weinrib, "Learning to Live With The Override" (1990) 35:3 McGill LJ 541; Peter H Russell, "Standing Up for Notwithstanding" (1991) 29:2 Alta L Rev 293; Christopher Manfredi, *Judicial Power and the Charter* (Toronto: McLelland and Steward, 1993); Kent Roach, *The Supreme Court on Trial: Judicial Activism Or Democratic Dialogue* (Toronto: Irwin Law, 2001); Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge, UK: Cambridge University Press, 2019) 209; Sigalet, *supra* note 7.

16 Waldron, *supra* note 14 at 1384, commending the British Parliamentary debates in 1966 on the Medical Termination of Pregnancy Bill: "it is striking how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review."

17 See e.g. Mark Mancini & Geoffrey Sigalet, "What Constitutes the Legitimate Use of the Notwithstanding Clause?" (20 January 2020) *Policy Options*, suggesting the question is "whether [a government invoking 33]

possibility of being grossly misused or proposing reforms that might curb this (e.g. Lougheed's suggested 60 percent threshold for invocation).[18]

Lost in this debate is the role of the *Charter* as a moral statement, or what the *Charter* says before we get to the question of how it works in practice. The debate is premised — as it should be — on concerns about practical application. This assumes that without section 33, the court is the central actor on the constitutional stage. We the individual citizens who are bearers of *Charter* rights are there too. But we are not *actors*. The drama turns on section 1 and decisions about reasonable limits.[19] For this reason, throughout much of the debate, the *Charter*'s guarantee of rights is reduced to, or blurred together with, the question of the *extent* to which we possess rights. However, this diverts us from the more fundamental and striking proposition (in the first 32 sections of the *Charter*) that we are a people who define ourselves as possessing a host of individual and group rights that assume a primacy in our political order by being subject only to reasonable limits. The debate shifts the focus from the *Charter*'s assertion of the moral priority of these rights to a theoretical dispute over who has the moral authority to decide on their limits: judges or elected officials?

Reading the *Charter* as a civilian, we are not sure who will decide on the limits to our rights — police, courts, government — but we admire the idea that rights will or at least *should* be protected. We appreciate that Canada defines itself, in its highest law, as committed to the *values* of individual freedom and equality. Then section 33 appears abruptly and says: "But as it happens, many of the most important rights will not be protected necessarily. Maybe. But maybe not."

III. The *Charter*'s Two Theories

The idea of adding a bill of rights to Canada's Constitution had germinated over the decades prior to its adoption in 1982. This was a period when human and civil rights had come to the fore of political discourse in the United States and around the world. In the 1950s and 60s, the Warren Court had recognized a host of important legal and civil protections,[20] and Congress passed (and President Johnson signed) the *Civil Rights Act*.[21] President Carter made human rights a central pillar of his foreign policy, Amnesty International won the Nobel Prize in 1977, and Eastern European dissidents helped bring about the end of Soviet rule. In a broader sense, human rights had become, as Samuel Moyn has argued, a "last utopia" after the demise or discrediting of various other large-scale political programs, from communism to post-colo-

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sets out a reasonable legislative definition of what rights mean, or whether it simply seeks to override rights in the name of majoritarian preferences."

18 As Jamie Cameron, *supra* note 11, aptly put it at 136: "[T]he override is an article of faith, and keeping the faith is a central theme in the literature on section 33." See also Lougheed, *supra* note 13; Mandredi, *supra* note 15, at 208-9, suggesting a requirement for a three-fifths majority of the Parliament or legislature enacting an override.

19 *Charter*, *supra* note 1, s 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."

20 *Brown v Board of Education of Topeka, Kansas*, 347 US 483 (1954); *New York Times Co v Sullivan*, 376 US 254 (1964); *Griswold v Connecticut*, 381 US 479 (1965); *Katz v United States*, 389 US 347 (1967).

21 *Civil Rights Act of 1964*, Pub L No 88-352, 78 Stat 241.

nialism.[22] Pierre Trudeau's desire to include a charter in constitutional reform efforts reflected the spirit of the times. The just society was committed, above all else, to protecting the dignity and worth of every human life.[23]

This was also a period of upheaval, due in large part to the fallout from judicial activism around rights. Many Americans found decisions of the Supreme Court protecting or expanding the rights of Blacks, women, the accused, or convicts to be unsettling and confounding. Judges often seemed to be out of step with majority sentiment, placing undue weight on individual rights in a manner seen to be immoral or illegitimate. Judicial review and constitutional rights were hotly contested. Just as rights were emerging as a last utopia, in the US and around the world, political theorists and jurists debated whether the very idea of judicial review was justifiable or good for democracy, and if so, how.[24]

It was here that American jurist Ronald Dworkin offered a theory of rights that remains one of the clearest and most helpful ways of understanding the two basic approaches to rights that we all tend to operate within. First published in 1969 in *The New York Review of Books* and later included in his book *Taking Rights Seriously*, Dworkin's essay "Rights as Trumps" distinguishes a Kantian from a utilitarian approach to rights that maps onto the *Charter* with and without section 33, or a framework where judges have the last word on the reasonable limits to rights and one where legislature do.[25] Dworkin's purpose in the essay was to try to explain to Americans the moral framework within which the Warren Court's activism could be justified. Although it serves as an argument for judicial review, for courts protecting constitutional rights against the majority, it is primarily a theory of the place of individual rights in a liberal democracy.[26]

In many cases, we exercise freedoms without affecting other people. It is when rights impose serious burdens on others, including the majority's interests, that the scope and limits of rights become contentious. How do we decide how much freedom the individual should enjoy at the majority's expense, and vice versa? One theory holds that jurists and politicians should aim to strike a balance between individual and collective interests. They should aim to avoid restricting a right unduly by defining its limits too narrowly or inflating a right too much by defining its limits too broadly.[27] Excess in one direction harms the individual; excess in the other harms the majority. Dworkin argues that the assumption of an equivalence of interests overlooks something important. The balance metaphor, in his view, fails to grasp what it means to *take rights seriously*.

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22 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010).

23 Pierre Elliott Trudeau, "The Values of a Just Society" in Thomas S Axworthy & Pierre Elliott Trudeau, eds, *Towards a Just Society*, translated by Patricia Claxon (Toronto: Penguin Books, 1990) at 402: "In my thinking, the value with the highest priority in the pursuit of a Just Society had become equality."

24 Alexander M Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill Company, 1962); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

25 Dworkin, *supra* note 9. The chapter in which Dworkin set out the theory first appeared as the essay "A Special Supplement: Taking Rights Seriously" (17 December 1970), *New York Review of Books*. Citations here are to *Taking Rights Seriously*, *supra* note 9.

26 Although Dworkin clearly favours one theory over the other, neither is necessarily correct. Each is a distinct vision of justice. The point of the exercise is to appreciate their distinctness.

27 Dworkin, *supra* note 9 at 197-98.

Dworkin contrasts the balance theory with a second model: rights as trumps. In cases involving fundamental rights, governments and courts do not aim to strike a balance between individual and collective interests; they impose a burden on the majority so as to protect a fundamental interest on the part of the individual. The reasoning reflects a commitment to the "vague but powerful idea of human dignity."[28] This is premised on the idea that "there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust."[29] Violating a core right is more serious than curtailing the majority's interest because it involves "treating a man as less than a man, or as less worthy of concern than other men." We protect rights out of a conviction that unequal or undignified treatment does a "grave injustice," and we believe it is worthwhile to pay an "incremental cost in social policy or efficiency" to avoid this injustice.[30]

If we uphold rights to protect underlying values of dignity and equality, then it is more serious to violate a fundamental right than it is to inflate it. We may need to strike a balance when competing rights come into conflict, but not when defining a right against the collective. As Dworkin noted, in the one area where "the stakes for the individual are the highest," the criminal law, "[w]e say that it is better that a great many guilty men go free than that one innocent man be punished, and that homily rests on the choice of the second model for government."[31]

If rights should function as trumps, as they often do in criminal law, when can they be justifiably limited or infringed? Dworkin posits three instances. One is where the state shows that values underlying a right (fundamentally: dignity, equality) are not significantly engaged in a given case. The second is where the government shows that if a right is defined in a certain way, it will entail a conflict with an equally important individual right, calling for a balancing of those rights. The third is where the government shows that defining a right would involve a "cost to society [that] would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right involved, a degree great enough to justify whatever assault on dignity or equality might be involved."[32]

The key for Dworkin with respect to the third ground was that if the cost to society of granting a right is alleged to be great enough to justify an assault on dignity or equality, the cost had to be clear. An argument about cost could not be based on a vague or speculative concern. His example was curtailing speech at the 1968 Democratic Convention in Chicago. Could the state justifiably criminalize Abbie Hoffman and others for crossing state lines to incite a riot? They came to the convention to give "emotional speeches which argue that violence is justified in order to secure political equality."[33] On the balance theory of rights, Dworkin believed the law at issue could be a justified infringement on free speech. There was a possibility that Hoffman and his fellow protestors could incite a riot and their freedom had to be balanced against the right of the majority of Chicago's citizens to be secure against that risk.

28 *Ibid* at 198.
29 *Ibid*.
30 *Ibid*.
31 *Ibid* at 200.
32 *Ibid*.
33 *Ibid* at 197.

However, Dworkin thought the law hindering Hoffman from speaking could not be justified on the second theory because it did not fall within any of the three exceptions. More specifically, the cost that Hoffman's speech imposed upon society was not clearly so great as to warrant a serious infringement of his dignity (which curtailing his speech would entail), because the possibility that his speech would cause a riot was speculative at best. We justifiably curtail rights when the cost is both "clear and substantial," as it is, in Dworkin's example, in the case of falsely shouting fire in a crowded theatre.[34] We hinder the freedom to speak in this way because we know it will likely cause significant harm and "no other means of preventing this are at hand."[35]

There is a temptation to read section 1 of the *Charter*, which guarantees the rights set out in the document subject to such "reasonable limits … as can be demonstrably justified in a free and democratic society," as either an example of the first (balancing) theory of rights or, at best, as an agnostic framing, a statement that could work with either of the two theories.

The Supreme Court of Canada in *R v Oakes* set out a "proportionality test" to decide when a right is justifiably limited from the perspective of section 1.[36] Dworkin was himself critical of limitation clauses,[37] and proponents of proportionality tests have assumed them to be contrary to Dworkin's preferred theory of rights, suggesting that our framework for section 1 reflects the balancing theory.[38] But Jacob Weinrib has offered a persuasive argument that despite a perceived difference between proportionality theory and rights as trumps, the latter is a notable instance of the former.[39] Section 1 of the *Charter*, as fleshed out in *Oakes*, is, on this view, an embodiment of rights as trumps.

Briefly, on the *Oakes* test: a right is justifiably limited when the state's interest is pressing, the violation of a right bears a rational connection to the state's interest, it minimally impairs the right (no less impairing means are available), and the benefit to society significantly outweighs the impact of the infringement on the individual.[40] The last two segments are crucial. They do not involve a balancing, but are tantamount to asking: does the infringement impair dignity or equality in a fundamental sense, and is the cost of avoiding this simply too great? Put otherwise, rights violations can only be justified under *Oakes* if the impairment is not significant or the cost to society of avoiding the breach is excessive.

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34 *Ibid* at 204.

35 *Ibid*.

36 *R v Oakes*, [1986] 1 SCR 103 at paras 69-71 [*Oakes*].

37 Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, NJ: Princeton University Press, 2006) at 49, cited in Jacob Weinrib, "When Trumps Clash: Dworkin and the Doctrine of Proportionality" (2017) 30:3 Ratio Juris 341 at 347.

38 Weinrib, *ibid* at 342: "those who are sympathetic to proportionality reject the rights as trumps model for failing to acknowledge the conditions under which a right may be justifiably infringed."

39 Weinrib, *supra* note 37 at 342.

40 As Dickson CJ put it in *Oakes*, *supra* note 36, at para 71: "Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

Weinrib encapsulates both the theory of rights as trumps and the *Oakes* test in the assertion that, for Dworkin, "[a] right might be violated by a collective goal, but it cannot be outweighed by one."[41] Courts do not balance rights with collective goals under section 1 by favouring one of the "ordinary routine goals of political administration" over a given right. Rather, the state must establish a "special urgency" for limiting a right.[42]

As Weinrib argues, showing a special urgency involves meeting three conditions common to both Dworkin's theory and *Oakes*. The state must first establish that its goal in limiting the right is "consistent with the suppositions on which the original right must be based."[43] For Dworkin, these suppositions will ultimately involve the "vague but powerful idea of human dignity" or "the more familiar idea of political equality."[44] Along similar lines, Dickson CJ held that the state's objective under section 1 must be consistent with values embodied in the *Charter*, including "public safety, order, health, or morals or the fundamental rights and freedoms of others."[45] Secondly, for both Dworkin and under *Oakes*, a law limiting a right must curtail the right as minimally as possible, or there must be no way of advancing the state's objective that is less impairing. And, finally, a limit will be justified only if curtailing the right in this way is necessary to avoid a clear and present danger or harm to other rights-holders (yelling fire in a crowded theatre). *Oakes* can thus be read as a close reflection of Dworkin's requirements for limiting rights in accordance with his preferred the theory of rights as trumps.[46] The point is that the rigour imposed by stipulating these conditions makes limiting rights in favour of collective interests something different from, and more onerous than, a mere balancing.

But *Oakes* is not part of the *Charter*'s text, and my argument is about what the *Charter* says — up to and excluding section 33. Without *Oakes*, I suggest that section 1 is *not* ambivalent as to Dworkin's two theories. If rights are guaranteed to "reasonable limits," this might call for a balancing of state and individual interests. But section 1 says that the *Charter* "guarantees the rights and freedoms set out in it *subject only* to such reasonable limits … as can be demonstrably justified" (emphasis added). The use of the words "subject only" makes clear that section 1 affirms the primacy of rights and regards limits as justifiable in reasonable but *exceptional* cases. It frames the rights guaranteed in the *Charter* not as things to be balanced with collective interests or administrative convenience. It frames rights as a moral priority, as things that come first in Canada's general political agenda, *subject only* to reasonable limits.

The Charter as a Moral Statement, with and without Section 33

Obvious objections to this reading arise: what is the point of approaching the *Charter* as a moral statement if what matters for rights protection is its practical application? And how do we make sense of how the *Charter* works as a legal instrument without talking about the politics of judicial review? Put another way: how does one even read the *Charter* as a moral statement without tacitly *assuming* judicial review as the means by which rights are in fact

41 Weinrib, *supra* note 37 at 343.
42 Dworkin, *supra* note 9 at 192, cited in Weinrib, *supra* note 37 at 343.
43 Dworkin, *supra* note 9 at 200, cited in Weinrib, *supra* note 37 at 343.
44 Dworkin, *supra* note 9 at 198, cited in Weinrib, *supra* note 37 at 343
45 *Big M*, *supra* note 10 at para 95, cited in Weinrib, *supra* note 37 at 344.
46 For a more complete mapping of *Oakes* onto Dworkin's theory, see the chart in Weinrib, *ibid*, at 348.

protected? How can one feel good about the assertion of the moral priority of rights in Canada without assuming on some level their real enforcement by one entity or another (which, by logical deduction, would have to be the courts, since government and police are the entities to be reined in)? Is it not simply bad faith to attempt to read the *Charter* without the idea of judicial review hovering somewhere in the background? And if so, does the reading advanced here not end up in the same impasse we have been stuck at for forty years, arguing over judicial review versus democratic deliberation as the best way to decide reasonable limits?

Reading the *Charter* as a moral statement may indeed tacitly assume the idea of judicial review. And if we assume that the *Charter* without section 33 is premised on a form of judicial review (courts deciding on reasonable limits), this would not rule out a reading of the document — or a practical approach to it — in a manner consistent with the balancing theory of rights. The argument here is different, however. With or without judicial review in mind, the *Charter* without section 33 is *better explained* by the theory of rights as trumps. The idea of declaring the priority of rights in a constitutional instrument makes better sense on the theory of rights as trumps precisely because the balancing theory can take effect just as easily with ordinary legislation. The balancing theory fails to account for the idea of individual rights being *placed above* ordinary law, being "subject only" to reasonable limits.

The inclusion of section 33 in the *Charter* breaks the continuity of this argument — and this, I suggest, is the crux of what is most bothersome about it. The theory of rights as trumps closely encapsulates what the *Charter* was meant to be, until section 33 was added: a moral statement along the broadly Kantian lines suggested above. The override disrupts this reading because *however it happens to be used* — for good or bad — its plain meaning is to allow a government to suspend the operation of core rights without qualification, which necessarily entails the subordination of core rights to the will of the majority or even a mere plurality of voters. This amends the general moral statement that the *Charter* makes, amounting at best to a balancing theory of rights but also, possibly, their outright suppression in a fit of populist nativism.[47]

Is a Moral Reading Irrelevant?

I want to end on the broader point that when it comes to the *Charter* we are all normative theorists. Framing the *Charter* as a moral statement is not anomalous or idiosyncratic. All the defences of section 33 take place on the plain of normativity, and are premised on a distinction between good and bad uses, including Slattery's "coordinate model," Waldron's faith in legislatures acting responsibly, and Newman's theory of "coordinate interpretation."[48] Practical suggestions for redeeming the override — Lougheed's 60 percent threshold, citizen juries that would decide on limits,[49] and so on — all of these are moral visions. Pictures of right and

47 Barbara Billingsly articulated the ambiguity this way: "the presence of the notwithstanding clause in the *Charter* begs a fundamental question: is Canada's predominant democratic philosophy that the majority rules or that majority rule is constrained by some protection for minority rights?" Barbara Billingsley, "Canada's Triangle of Democracy" (2001) 25:6 Law Now Magazine 15.

48 Slattery, *supra* note 15; Waldron, *supra* note 14; Newman, *supra* note 15.

49 Lougheed, *supra* note 13; Ian Peach & Richard Mailey, "Weaving Section 33 into the *Charter* Project: Citizen-Led Oversight as a Potential Way Out of the Legitimacy Conundrum" (2023) 32:3 Const Forum Const 53.

wrong. Ideas about how rights *should* be protected, in what way, to what extent, and in whose favour. We read the *Charter* first through a normative lens, then we apply it.

For some of us, the various defences of section 33 — or attempts to redeem it through practical suggestions for reform — have never been completely satisfying or convincing. I suggest the reason for this is that the notwithstanding clause runs contrary to a deeper and distinct normative conception of constitutional rights, one approximating Dworkin's theory of rights as trumps. So long as the override remains a part of the *Charter*, it will seem out of place for this reason.