Learning to Live With The Override

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In *Ford* v. *A.G. Quebec*, the Supreme Court of Canada had its first occasion to interpret the override clause found in section 33 of the *Charter*. The author argues that by focusing on purely formal requirements the Court incorrectly treated the override clause as an ordinary exercise of legislative power.
Although the override clause has been thought of as repugnant to a rights protecting document, the author submits that it does not necessarily involve a choice between rights entrenchment and legislative sovereignty. Rather, the interaction of section 33 with section 1 of the *Charter* results in the creation and entrenchment of an institutional dialogue between the courts and the legislature. Without that dialogue we may experience a progressive weakening of the judicial commitment to rights protection.

Dans *Ford* c. *P.G. Québec*, la Cour suprême du Canada a, pour la première fois, interprété l'article 33 de la *Charte* et la clause nonobstant que l'on y retrouve. La Cour n'a, toutefois, que tenu compte des conditions explicites de son application. Ceci, d'après l'auteur, caractérise incorrectement l'application de la clause nonobstant comme n'étant qu'un simple exercice de pouvoir législatif.
Bien que la clause nonobstant ait été perçue comme étant contraire à l'esprit d'un document visant la protection de droits fondamentaux, l'auteur soutient qu'elle n'implique pas nécessairement un choix entre l'enchâssement de droits et la souveraineté du pouvoir législatif. Au contraire, l'analyse de l'article 33, sous réserve de l'article 1 de la *Charte*, permet au législateur de dialoguer avec le pouvoir judiciaire et ce, à l'intérieur du contexte institutionnel.

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> A contingent and limited power bestowed on any organ of government to shift the orientation of authority ought to be exercised consciously, deliberately, and visibly. The greater the consequences of the shift, the greater the need for observance of the principle. Making the agent spell out the nature of what is done focuses his (or its) attention and at the same time assists critical assessment by others. Both facets of responsible action — careful reflection and the need to respond — are implicated.
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> —Albert S. Abel (1976)

> The Liberals ... have learned the hard way, through last year's debate about linguistic rights, that arguing for the notwithstanding clause is much more painful on a case-by-case basis, while the Péquistes got away with their general opting out of the Charter of Rights.
>
> —Lise Bissonnette (February 1990)

I. Introduction

The momentous decision of the Supreme Court of Canada in *Ford* v. *A.G. Quebec*[1] is the first case in which the Court had occasion to interpret the override clause.[2] The case is well-known for the invalidation of Quebec's legislation mandating French only in commercial signs, holding that the freedom to use the language of one's choice in the commercial marketplace was constitutionally protected as freedom of expression.[3] Premier Robert Bourassa responded to the decision by invoking the notwithstanding clause to shield his revised language policy from *Charter* review. He thereby precipitated a public outcry on the incongruity of a legislative override in a rights-protecting instrument. Ironically, the Court's discussion of the override power has elicited little comment. Nonetheless, this part of the *Ford* judgment can provide the indispensable back-

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[1]*Ford* v. *A.G. Quebec*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford* cited to S.C.R.].

[2]The text of s. 33 reads as follows:

> (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.
>
> (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.
>
> (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.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

[3]The Court found freedom of expression to be infringed under both the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12 [hereinafter *Quebec Charter*] and the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. It also found that the impugned legislation could not be justified as a limitation on protected rights under either instrument.

ground for our national re-consideration of s. 33, by illuminating the unseen pull of historical presuppositions on our understanding of legal constructs and the extent to which imported political and legal controversies plague our vision of the *Charter*. Perhaps, in studying this aspect of the *Ford* judgment, we can begin to appreciate the unique and distinctively Canadian qualities of the *Charter*'s particular mode of rights protection.

II. Background

A. *Quebec's Use of the Override*

The story begins with the exclusion of René Levesque's Parti Québecois government from the discussions culminating decades of effort to reach an agreement on patriation of the Constitution and adoption of a bill of rights. The representatives of the other ten governments in November of 1981 forged the consensus that precipitated the most extensive changes ever made to the Canadian Constitution, a key element of which was to insert the notwithstanding clause into the *Charter* system of rights protection.[4]

In its resentment at both the accord and its product, the Quebec government seized on the key component of the compromise, the override power, to shield the province — to the greatest extent possible — from the Charter's entrenchment. It embarked on a policy of blanket override of constitutional rights, using the override clause much like an opt-out clause.

The override clause proved to be a cumbersome instrument to this end, because it required not only an express declaration of override in each overriding enactment, but specification of the rights overridden as well. To meet the specificity requirement, Quebec used what came to be called the "standard override clause," making reference to all the rights subject to the override.[5] To meet the express declaration requirement a variety of strategies were devised. By an omnibus amendment enactment,[6] the National Assembly repealed and re-enacted, with the addition of this standard clause, all pre-*Charter* legislation. It then inserted this clause into all post-*Charter* enactments.[7]

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[4]The story is told, from 1976 on, in R.J. Romanow, J. Whyte & H. Leeson, *Canada...Notwithstanding: The Making of the Constitution, 1976-1982* (Toronto: Carswell, 1984). See also K. Banting & R. Simeon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983). See *infra* note 58.

[5]The text of the "standard override" stated:

> This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Act of Parliament of the United Kingdom).

An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21. Assented to June 23, 1982. (First reading on May 5, 1982; second reading June 2, 1982, and third reading on June 23, 1982.)

[6]*Ibid.*

[7]Quebec's override policy therefore had three features. The first was the standard form override clause making reference to all the *Charter* sections subject to the override. The second was the

The omnibus enactment came into force on June 23, 1982, three months after the *Charter* came into effect. To prevent assertion of any of the *Charter* rights in question with respect to that period, the National Assembly purported to give the override clauses retroactive operation to April 17, 1982, the day that the *Charter* came into force.[8]

B. *The Quebec Court of Appeal Ruling*

The Quebec Court of Appeal invalidated the standard override, not in the *Ford* judgment, but in *Alliance des Professeurs de Montréal* v. *A.G. Quebec*.[9] In three separate sets of reasons, for a four member panel, the Court unanimously determined that the standard override failed to satisfy the specificity requirement set out in section 33.[10] The reasoning is a pioneering attempt to interpret an important component of the *Charter*'s institutional structure with almost no previous judicial guidance. The Supreme Court of Canada's failure to consider this attempt seriously is one of the unexplained features of its later treatment of the same issues.

In the most lengthy analysis, Jacques J.A. treats the question of interpreting the features of s. 33 as a question of first impression, building his interpretation of its text on a theoretical foundation. He begins by invoking the special constitutional role of the courts, in particular the special mode of interpretation which the Constitution demands. Referring to the writings of theorists of constitutional democracy, such as John Rawls, Friedrich Hayek and Ronald

omnibus legislation by which all existing Quebec legislation was repealed and re-enacted with a standard override clause. The third feature was the routine addition of the standard override clause in all new pieces of legislation and all new amendments to existing legislation. I refer to this policy of override as "comprehensive". See *infra* note 58.

[8]More precisely, the National Assembly repealed and re-enacted each statute originally enacted before April 17, 1982 to insert a standard override clause. This amending legislation came into force on June 23, 1982; the amendment came into force on April 17, 1982. Similarly, each statute adopted in the period between April 17, 1982 and June 23, 1982 acquired, by the same amending legislation, a standard override clause. These amendments took effect on the date that the enactment in question came into effect. See sections 1 to 7 of an *Act Respecting the Constitution Act, 1982*, *supra*, note 5, reproduced in *Ford*, *supra*, note 1 at 727-28.

[9][1985] C.A. 376, (1985) 21 D.L.R. (4th) 354 [hereinafter *Alliance*]. This was a decision of the Quebec Court of Appeal, from which the Attorney General of Quebec had secured leave to appeal to the Supreme Court of Canada (Chouinard, Lamer & La Forest JJ.) 30 September 1985. The appeal was never perfected. Justice Lamer was critical, during oral argument, of Quebec's failure to bring this case to the Supreme Court. When counsel for the Attorney General of Quebec noted that the same issues as to the comprehensive override policy were before the court in the cases at bar, Justice Lamer pointed out that while the issues were contained in the other cases, the failure to appeal that particular case meant that the parties to it were not before the Court. The Supreme Court judgment refers to this background in *Ford*, *supra*, note 1 at 736-37.

[10]Chief Justice Crête presided at the hearing of argument but did not take part in the judgment. Kaufman J.A. concurred with the judgment of the court. The separate reasons of Justices Jacques, Mayrand and Vallerand are the subject of the discussion that follows.

Dworkin, he concludes that a judge must read the Constitution of Canada, the source of all state law-making power, as protecting fundamental freedoms in the exercise of law-making. Law, in other words, is understood not merely as the product of majoritarian decision-making, but as a system constraining legislative preferences to certain values. So understood, legislative supremacy is not the rule, but the exception to the rule; the Constitution, as per s. 52 of the *Constitution Act 1982*, reigns supreme.[11]

Regarding the text of section 33 as an exception to the Constitution's fundamental values in this way, Jacques J.A. reads into the specificity requirement of s. 33 a stipulation going beyond simple reference to the section numbers of the *Charter* sections overridden. He highlights the textual basis for this view contrasting the reference to the overriding provision with the reference to the overridden provision:[12]

textes dérogatoires	*textes auxquels on déroge*
une loi...celle-ci ou une de ses dispositions.	une disposition donnée de l'article 2 ou des articles 7 à 15. [*sic*]

He also notes that the French, "indépendamment d'une disposition donnée", marks the same kind of specificity for the overridden provisions as does the English. While a legislature is free to specify more than one of the rights or freedoms subject to the override, mere reference to section numbers of the *Charter* does not satisfy the requirement of specificity. Indeed, reference to section numbers undermines the very purpose of the stipulated form of specification, namely, "afin de confronter bien clairement la loi de dérogation et les droits dont les justiciables sont privés."[13] To support this interpretive conclusion, Jacques J.A. again makes reference to the matrix of foundational values in which one finds s. 33, namely a constitutional document that stipulates in s. 1 that the character of our society is to be free and democratic.[14] Referring again

[11] *Ibid.*, C.A. at 378, D.L.R. at 358. Section 52 states:

(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 the inconsistency, of no force or effect.

[12] *Ibid.*, C.A. at 380, D.L.R. at 361. The translation reads:

overriding provisions	*provisions overridden*
... an Act ... the Act or a provision ... thereof.... [*sic*]	... a provision included in section 2 or sections 7 to 15 of this Charter. [*sic*]

[13] *Ibid.* The English translation reads: "bring into sharp focus the effect of the overriding provisions and the rights deprived." C.A. at 380, D.L.R. at 361.

[14] For a similar understanding of the closing words of s. 1 of the *Charter*, see Dickson C.J.C. in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200 at 225 [hereinafter *Oakes* cited to S.C.R.]:

to the work of John Rawls, he observes that democracy as a constitutional value is not simply majority rule, but a system premised on freedom of speech and assembly, thought and conscience, so that political decisions are reached through rational discussion rather than at the insistence of special interests.[15]

Jacques J.A. refers to *Re Alberta Legislation* for Canadian judicial evocation of the centrality of reasoned debate as the foundation of our democratic functioning.[16] He also points out that the override cannot reach the exercise of democratic rights guaranteed under s. 3 of the *Charter*.

Reading the constitutional text in light of these fundamental considerations, Jacques J.A. states,

> Ce libre débat du citoyen sur l'action législative et gouvernementale ne peut s'exercer que si l'information nécessaire a été clairement fournie. Dans l'espèce, il s'agit, d'une part, d'indiquer le droit précis opposable à la législature dont on veut priver le citoyen dans le cas d'une législation particulière; et, d'autre part, de démontrer un rapport entre l'un et l'autre.[17]

He concludes that the omnibus and standard clause exercise of the override power by the National Assembly must fall because "les critères d'information

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> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society....

[15]At this crucial stage in Jacques J.A.'s analysis, a quotation from J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971) at 225, setting out the need for rational discourse in political determinations, is incomplete, as it was in the originally released reasons for judgment. See C.A. at 380, D.L.R. at 362. The full quotation, with the omitted words italicized, reads as follows:

> We may take for granted that a democratic regime presupposes freedom of speech and assembly, and liberty of thought and conscience. These institutions are not only required by the first principle of justice but, as Mill argued, they are necessary if political affairs are to be conducted in a rational fashion. While rationality is not guaranteed by these arrangements, in their absence the more reasonable course seems sure to be *rejected in favour of policies sought by special interests. If the public forum is to be free and open to all, and in continuous session, everyone should be able to make use of it. All citizens should have the means to be* informed about political issues. They should be in a position to assess how proposals affect their well-being and which policies advance their conception of the public good. Moreover, they should have a fair chance to add alternative proposals to the agenda for political discussion.

[16][1938] S.C.R. 100 at 133, 146, 2 D.L.R. 81 at 107, 119 in *Alliance, supra*, note 9, C.A. at 381, D.L.R. at 363.

[17]*Alliance, ibid.*, C.A. at 382. The D.L.R. translation at 364 reads as follows:

> Citizens can only exercise their right to discuss legislative and government action freely if the necessary information has been clearly provided. This case concerns the issue, on the one hand, of indicating which specific right, disputed by the Legislature, the citizen is being deprived of in a given piece of legislation and, on the other hand, of demonstrating the link between the legislation and the right.

et de rapport" stipulated by s. 33 are lacking.[18] Since reliance upon s. 33 transforms the legal guarantee of the rights in issue, justiciable under s. 24 of the *Charter*, into mere interests at risk to political determinations, courts must monitor the formal strictures set down by the constitutional text strictly.

Mayrand J.A., who concurs with Jacques J.A., begins his short judgment by commending the National Assembly for its simplification of the task of applying the override to the entire body of Quebec statute law. But praise soon dissolves as he moves to align himself with the views of Jacques J.A., condemning the exercise for failing to conform both "à la lettre et à l'esprit" of s. 33.[19] The *Charter*'s override, he points out, is to be contrasted with global override powers, such as those in the *Canadian Bill of Rights*[20] and the *Quebec Charter*[21] In its novel specificity requirement, s. 33 is designed to illuminate the rights and freedoms withdrawn from *Charter* protection in order to encourage "un examen éclairé et sérieux de la dérogation proposée".[22]

While s. 33 has this informational function in order to promote informed debate, Mayrand J.A. makes it clear that the stricture is a matter of form, not of substance. This formal quality does not, however, invite judicial deference.

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[18]*Ibid.*, C.A. at 382, D.L.R. at 365 "criteria of information and of relationship". He offers two examples that illustrate the absence of "linkage". In the first, Jacques J.A. states that "il n'y a aucun rapport apparent et aucun n'a été démontré" ("there is no apparent link, and none has been demonstrated") between the *Loi sur la raffinerie de sucre du Québec, 1982*, S.Q. 1982, c. 28 and the right of freedom of conscience and of religion set out in s. 2(a) of the *Charter. Ibid.*, C.A. at 382, D.L.R. at 364. His point appears to be that reference to section numbers, perhaps particularly by the standard clause format, gives no information about the actual operation of the override declaration in its derogation from enjoyment of rights guarantees. The link is not obvious and it is not provided.

The second example is somewhat different: Jacques J.A. concedes that there may be a link between the freedom contained in s. 2(a) and the *Loi concernant le recensement des électeurs pour l'année 1982*, S.Q. 1982, c. 34 but he states that "none has been demonstrated", *ibid.* Here again, it is not entirely clear whether it is the standard clause format or the reference to section numbers *per se* that infringes the specificity requirement. The underlying point, however, is clear. One must read the specificity requirement in light of its purpose, and that purpose in light of the larger ideas of constitutionalism invoked. The comprehensive application of the override, including the standard clause declaration and the omnibus and routine application, is inconsistent with both the text and purpose of s. 33.

[19]*Alliance, ibid.*, C.A. at 383, D.L.R. at 355: to the "letter and spirit".

[20]R.S.C. 1970, App. III, s. 2 empowers Parliament to declare that a statute "shall operate notwithstanding the *Canadian Bill of Rights*". It is interesting to note that it is not only the subordinated enactment that is referred to in its entirety in this formula. The overriding enactment itself is to override *in toto* because there is no provision for invoking the *non obstante* clause for only part.

[21]*Supra*, note 3. Section 52 states: Sections 9 to 38 prevail over any provision of any subsequent act which may be inconsistent therewith unless such act expressly states that it applies despite the *Charter*.

[22]*Alliance, supra*, note 9, C.A. at 383, D.L.R. at 356: "an enlightened and serious examination of the proposed derogation".

On the contrary, the specificity requirement precipitates judicial verification of adherence to the form stipulated because, whether there is an informed and rigorous debate on the override declaration or not, a valid exercise of the override withdraws legislation from judicial review for *Charter* conformity.[23]

Vallerand J.A., in a short set of reasons, joins his colleagues in their view of the primacy of rights protection under the *Charter*. He notes the precision with which the text delineates the method for departing from those rights, especially the specification of the right in question, which, in his view, is designed to facilitate an informed democratic discussion because citizens have the opportunity to understand, consider and discuss the deprivation contemplated. The override declarations under review, because of their omnibus and standard clause features, fail to come within the power granted because they do not identify clearly those rights subject to the derogation. The failing, however, is not one of democratic function, which lies outside judicial review, but consists in the non-compliance with the *Charter*'s mandatory requirement of particularized procedure.

The reasoning of all three judgments shares a commitment to the primacy of the Constitution, including the *Charter*, as a framework for the exercise of political power. Within this framework, the override is understood not as a remnant or preservation of unchecked parliamentary sovereignty; it is rather a mechanism that can work against values having pre-eminent standing in our society. While it is triggered by the majority, it does not derive legitimacy for that reason. Instead, the override offers a carefully formulated exception to the primacy of rights protection, checked by judicial review as to form, with the understanding that the form stipulated is conducive to informed and reasoned debate. It is this possibility of rich democratic debate that gives legitimacy to s. 33 despite the fact that by its exercise particular rights are removed from the legal realm of constitutional protection and left to the give and take of the political forum.

This reasoning is within the stream of *Charter* jurisprudence described as "purposive" by the Supreme Court of Canada. It resonates with that Court's descriptions of the interpretive task of judges in its invocation of the Constitution as the highest order of law, constraining every exercise of power by the state and enlisting judges as its guardians.[24] The sensitivity to the text of

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[23]In failing to meet the formal requirements of specificity set down by the terms of s. 33, the override clauses are rendered *ultra vires* and void. *Ibid.*

[24]For example, see *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 156, 11 D.L.R. (4th) 641 at 650, *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321 at 359-60 [hereinafter *Big M Drug Mart* cited to S.C.R.], *Oakes*, *supra*, note 14 at 119, for *Charter* cases and *Reference Re Language Rights under the Manitoba Act, 1870*, [1985] 1 S.C.R. 721 at 744-45, 751, 19 D.L.R. (4th) 1 at 19, 24 [hereinafter *Manitoba Language Reference* cited to S.C.R.]. Some of the arguments are relatively weak, or rather, underwritten. One is hard pressed to accept, as presented, the

s. 33 lies within this interpretive stream, although reference to other features of s. 33, such as the sunset provision that coincides with election frequency and the requirement of "express" declaration, might have bolstered the interpretation offered.

This contextual vision of Canadian constitutionalism invokes the ultimate values of our society and the judiciary as their guardian, such that the constitutional text forwards the idea of free and democratic nationhood. These features of the Quebec Court of Appeal's approach carry forward the Supreme Court of Canada's stated vision of the *Charter* and the judicial role predicated by it. As we shall see, the Supreme Court of Canada's treatment of the National Assembly's omnibus, routine and standard clause use of the override does not.

III. Quebec's Argument iu the Supreme Court of Canada:[25] Section 33 as tbe Preservation of Legislative Supremacy

In *Ford*, the province of Quebec took issue with the interpretation of s. 33 put forward by the Quebec Court of Appeal in *Alliance des Professeurs de Montréal*, arguing that the notwithstanding clause preserves full legislative sovereignty with respect to those rights subject to it. Counsel for the Attorney General of Quebec took comfort in both the pre-*Charter* history of legislative supremacy in Canada and the crucial role the override played in the final compromise leading to adoption of the *Charter*. So understood, the exercise of the notwithstanding clause was to be constrained only by political considerations, free from judicial scrutiny.

Legal support for this view was offered. A parallel to such unreviewable power was suggested, namely s. 92(10)(c) of the *Constitution Act, 1867*, under which Parliament is empowered to declare a work or undertaking to be for the general advantage of Canada and thus bring it within exclusive federal legislative jurisdiction.[26] The Court's differentiation between legal and political sanc-

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argument that the democratic system ensconced by the right to vote in s. 3 of the *Charter* (which is beyond the reach of s. 33) subsumes full exercise of the right to freedom of expression, when the override itself can nullify the protection of freedom of expression itself. I am indebted to Rod MacDonald for pointing out that the Quebec Court of Appeal's approach may derive from a civilian sensitivity to the text of the *Charter*.

[25]For the sake of clarity I combine written and oral submissions.

[26]Section 91(29) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 includes in the catalogue of Parliament's exclusive powers:

> Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Section 92(10)(c) excepts from the provincial catalogue of exclusive powers:

> Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

See P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 484 for discussion of these provisions.

tions, in the *Reference Re Resolution to Amend the Constitution*,[27] also demonstrated the importance of discerning the appropriate forum for reviewing an exercise of constitutional powers.[28]

Quebec argued that the formal requirements prescribed in section 33 demonstrated the unreviewable character of the legislative prerogative in s. 33 by requiring traditional legislative form without expressly excluding standard form or omnibus usage. More particularly, the various elements prescribed in the text of s. 33 imposed merely formal strictures on the exercise of the override, the only relevant one being the stipulation of those *Charter* sections which were to yield. This stipulation did not assure a more informed democratic debate, as the Quebec Court of Appeal had stated, because the difference between reference to the *Charter* text by section number or by recapitulation of the text was a purely formal distinction. Since the text allowed subordination of sections 2 and 7 through 15 of the *Charter*, reference to any or all of those section numbers would suffice. Counsel for the Attorney General of Quebec pointed out that the very values upon which the Court of Appeal based its holding, namely the rights instrumental to democratic participation, as set out in s. 2(b) of the *Charter*, were subject to the override. Moreover, requiring the override declaration to specify the right or freedom actually subordinated would place too high a burden on legislatures while empowering courts with a forbidden review power.

IV. The Supreme Court of Canada's Ruling

A. *Reasons for Judgment*

The Supreme Court of Canada upheld Quebec's omnibus, routine and standard clause override, but invalidated the early retrospective application from April 17 to June 23, 1982.[29] The judgment offers little reasoning for these conclusions and has attracted minimal public attention or scholarly interest.[30]

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[27] *A.G. Man.* v. *A.G. Can.*; *A.G. Can.* v. *A.G. Nfld*; *A.G. Que.* v. *A.G. Can.*; *A.G. Can.* v. *A.G. Que.*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 (*sub nom. Ref. re Amendment of the Constitution of Canada*) [hereinafter *Patriation Reference* cited to S.C.R.].

[28] This was an odd argument, but did not attract any attention. In that case the Supreme Court of Canada deliberated not only on the legal sanctions to "unilateral" patriation — *i.e.*, a request for patriation legislation to the Westminster Parliament without consent of a broad segment of Canadian political constituencies, but also upon the political propriety of the contemplated course of action by the federal government. Its ruling that the undertaking did not conform to constitutional convention exemplified an exercise of judicial review of political powers that would seem to cut against Quebec's position. While one could argue the absence of a power to invalidate the product of an act of political impropriety, judicial power to declare the impropriety was inconsistent with the attempt to foreclose judicial review altogether.

[29] The retrospectivity argument was raised only in the factum of the Attorney General for Ontario, Intervenor. My notes indicate that counsel for the Attorney General for Quebec did not make reference to the retrospectivity point in his oral argument.

[30] See G. Marshall, "Taking Speech Rights for an Override: Free Speech and Commercial Expression" (1989) Public Law 4.

Nevertheless, this ruling has far-reaching consequences for the institutional framework of rights protection in Canada and, more particularly, the current claims as to the impropriety of an override clause in a rights-protecting constitution. The Court's determination — that section 33 contains only formal prerequisites to the subordination of *Charter* rights and, for that reason, tolerates no judicial review whatsoever — adopts, without argument, the distinct view that s. 33 is inimical to the *Charter*'s guarantees. Later in this paper, I suggest a different approach, namely that the legislative role under the notwithstanding clause coheres with Canada's innovative constitutional system of rights protection. Before developing that idea, I set out the Supreme Court's treatment of Quebec's use of the override between 1982 and 1985.

At the outset, the Court emphasized that it took no position as to the "constitutional perspective" from which to interpret s. 33. It was not "particularly relevant or helpful" for purposes of interpretation, we are told, to consider whether s. 33 continued pre-*Charter* legislative supremacy, on the one hand, or marked the culmination of a "fully informed democratic process", on the other.[31] Instead, the Court emphasized the formal quality of the requirements for exercise of the override and deduced from that formality severe limits upon the judiciary's ability to review exercise of the override.

Turning first to the question of specification, the Court determined that the legislature need not relate the subordinating enactment to the particularized subordinated right or freedom. Such a reading would require "a *prima facie* justification of the decision to exercise the override authority rather than merely a certain formal expression of it".[32] The judicial role precipitated by a requirement of justification did not follow from the terms of s. 33. Such a requirement was also unacceptable because it would exact an impossible burden on legislatures, which might not be able to determine with any certainty the rights affected.

The "essential" form required by s. 33, the Court determines, is express declaration. Should a legislature intend to override only part of a provision, the specification of that part would of course suffice. Reference by section, subsection or paragraph number is sufficiently express, however, given that it is the standard form of statutory reference used in legislative drafting for purposes of amendment and repeal. There is "no reason why more should be required" because this kind of reference would provide "sufficient indication to those concerned of the relative seriousness of what is proposed".[33] The Court goes on to say that "express" declaration could not have been "intended" to include a

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[31]*Ford*, *supra*, note 1 at 740.

[32]*Ibid.*

[33]*Ibid.* at 741. This idea that the function of s. 33 is to signal a serious political act is repeated twice but remains unclear. How can the seriousness of the action be conveyed when the legislature's view of the effect and implications are not?

restatement *in words* of the *Charter* rights overridden because, in the case of the standard override clause used by Quebec, such a restatement would encumber the declaration with "a very long recital indeed".[34]

The Court affirms the omnibus use of the override on similar grounds. The insertion of standard clause override declarations into a large body of statutes by a single enactment is valid, the Court reasons, because any other conclusion would lead the judiciary into review of the permissibility of legislative policy as to exercise of the override.[35] Accordingly, no review of the "routine" use of the override is permissible.

After accepting the standard form declaration and its omnibus and routine enactment, the Court turns to retroactive application. After noting that s. 33(1) was "not without ambiguity" as to prospective or retrospective application, the Court invokes the principle of statutory construction that where a provision can be read prospectively or retrospectively a judge is to read it prospectively.[36] It is on this basis that the Court strikes down the retroactive application of the override. While the opinion includes a quotation from a text on statutory interpretation, which notes the law's aversion to interference with vested rights and obligations, the judgment gives no account of the principle in the constitutional context.[37]

B. *The Judgment's Critical Perspective*

1. The Specificity Issue

The most remarkable feature of the Court's discussion is the sparseness of its interpretive technique. Two pages in a lengthy opinion dispose of a major question of constitutional structure. Aside from briefly noting that the phrases "shall operate notwithstanding" and "a effet indépendamment" in s. 33(1) allow for retroactive or prospective operation, there is no examination of the wording or design of s. 33. There is no reference to other *Charter* sections. There is no consideration of the institutional roles implicit in the *Charter*'s structure. There are no references to the modes of interpretation established in other *Charter*

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[34] *Ibid.*

[35] *Ibid.* at 743.

[36] *Ibid.* at 744-45.

[37] *Ibid.* The passage quoted is from P.-A. Côté, *The Interpretation of Legislation in Canada* (Cowansville: Yvon Blais, 1984) at 96 which includes the following passage from Wright J.'s dictum in *Re Athlumney*, [1898] 2 Q.B. 547 at 551-52 (Q.B.):

> Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter [sic] of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

cases. There is no mention of the academic literature on s. 33.[38] The often conclusory analysis reads like routine statutory interpretation.[39] One has no sense that it is a Constitution under interpretation or that the Court sees itself as its guardian.[40] The Court also ignores the opportunity to build upon the distinction it had earlier expressed between limitations upon rights, justifiable under s. 1, and exceptions to those rights, available only through political action, either under s. 33 or by constitutional amendment.[41]

Especially perplexing is the lack of reference to the *Charter* text under examination. The *Charter* differs from the *Canadian Bill of Rights* and the *Quebec Charter*, for example, in that the entire instrument is not open to override.[42] In contrast to these instruments, s. 33 provides that the override operate "notwithstanding a provision included in section 2 or sections 7 to 15". And it so states twice.[43] Moreover, the text also states that the declaration must be made "expressly" and ceases to have effect after a maximum five year period, subject to renewal by re-enactment. These terms, individually and collectively, are restrictive. The Court nonetheless sees no significance in these features and finds in s. 33 an easily exercised formality.[44]

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[38]Commentators, for example, have suggested that substantive values are attached to exercise of the override by arguing that the strictures of s. 1 justification apply. See B. Slattery, "Canadian Charter of Rights and Freedoms — Override Clause Under Section 33 — Whether Subject to Judicial Review Under Section 1" (1983) 61 Can. Bar Rev. 391, and D.J. Arbess, "Limitations on Legislative Override Under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values" (1983) 21 Osgoode Hall L.J. 113. This view has not received wide support. It is rejected, for example, by Hogg, *supra*, note 26 at 690-91, and D. Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 130-31. For general discussion of the political dimension of s. 33, see "The Charter and s. 33: Holding Politicians Accountable" (1987) 3 Admin. L.J. 21 and D. Greschner & K. Norman, "The Courts and s. 33" (1987) 12 Queen's L.J. 153. For the view that the United States Supreme Court's current retreat from the activism of the Warren Court demonstrates the utility of s. 33 as a rights-protecting mechanism, see A. Petter, *Policy Options*, April 1990 at 33.

[39]Three times the Court states there is "no warrant" for a particular interpretation. See *Ford*, *supra*, note 1 at 740-44. We are told that stating the provision to be overridden in the words of the *Charter* "cannot have been intended by the use of the word 'expressly'..." in the text of s. 33.

[40]Compare, for example, the detailed discussion leading up to the consideration of a heading in the *Charter's* text in *Skapinker* v. *Law Society of Upper Canada*, [1984] 1 S.C.R. 357 at 370-79, 9 D.L.R. (4th) 161 at 171-78 [hereinafter *Skapinker*] or the consideration of text and theory informing the articulation of the role of the courts under section 1, in *Oakes*, *supra*, note 14 at 135-40.

[41]*A.G. Quebec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 at 86, 10 D.L.R. (4th) 321 at 327. This case was, however, referred to elsewhere in the reasons for judgment: see *Ford*, *supra*, note 1 at 771.

[42]This point is made by Mayrand J.A., in the Quebec Court of Appeal, see *Alliance*, *supra*, note 9, C.A. at 383, D.L.R. at 356. See text, *supra*, at notes 20 and 21.

[43]Ss. 33(1), (2). See text, *supra*, note 2.

[44]The specificity feature of s. 33 can be traced to its announcement at the First Minister's Conference on 5 November, 1981. The "Fact Sheet" distributed at that time, repeatedly describes the overridden provision of the *Charter* as a "specific provision" and appears to contrast this specific override technique with that found in other instruments, including the *Canadian Bill of Rights*.

The Court's key analytic tool is its characterization of the override as "formal". This quality is nowhere defined or elucidated, but one thing is clear: because the override is "formal" it admits no "substantive review of the legislative policy in exercising the override authority in a particular case."[45]

The spectre of impermissible judicial review pervades the Court's treatment of the standard clause and omnibus character of Quebec's use of the override. The Court appears to assume that a requirement of specificity, *i.e.*, reference to the actual right or freedom infringed by the enactment in which the override declaration appears, would necessarily engage the judiciary in substantive review of these declarations. This assumption is unsubstantiated, however. Specificity in exercising the override can be, indeed must be, a formal matter entirely divorced from the merits or demerits of using the override in a particular case. The judicial role in determining whether the specificity requirement has been satisfied implies no judgment concerning the justification of the legislative policy of override. Judicial review would merely ensure that the override complies with the stipulated elements of its form. The Court's failure to see this distinction is odd not only because it is evident but because it is fundamental to the appellate court ruling.

It is true that by requiring specificity the Court might eventually find itself called upon to enunciate the requisite standard of specificity. Would reference to a specific right be enough? Would there be an evidentiary requirement (*e.g.*, an opinion, a court decision, a legislative debate) demonstrating that the legislature had considered the *Charter* impact of the policy? Even this more active review could escape the badge of "substance" by looking for some evidence rather than requiring that the legislature do it right. Moreover, the determination of the degree of specificity required for overriding rights would depend on the significance the Court attaches to rights generally, rather than on the merits of particular legislative policies.

At any rate, wherever one might draw the line on specificity, the comprehensive override policy would clearly fall on the impermissible side. Quebec's use of the override manifested a broad policy of negating all *Charter* sections subject to the override rather than a specific policy in regard to particularized *Charter* rights. As the Court had no apparent compunction in pointing out elsewhere in the same judgment, the override in issue "appears to have been enacted

See A. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill, 1989) at 904-05. Previous discussions had contained a draft of opt-in provisions (for the provincial legislatures) and proposals for an override. Roger Tassé, the Deputy Minister of Justice of Canada during the formulation of the *Charter*, appears to take the view that s. 33 contemplates specific reference to the particular right overridden. See R. Tassé, "Application of the Canadian Charter of Rights and Freedoms" in G.A. Beaudoin & E. Ratushny, eds, *Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 65 at 104-06.

[45]*Ford*, *supra*, note 1 at 740-41.

as part of the well-established legislative policy and practice at the time of including the standard override provision in every Quebec statute."[46] That characterization, which the Court apparently did not regard as an impermissibly "substantive" determination, would have sufficed to invalidate the comprehensive policy of override, without any need to anticipate where to draw the line in the future.[47]

In the Court's view, a substantive specificity requirement would impose not only an impermissible task on the courts, but an excessively onerous burden on legislatures as well. Accordingly, the judgment adduces the difficulty of accurately specifying the rights affected as an additional reason for rejecting specificity.[48] This argument, however, is simply one of cost, the cost of action and the cost of error. Governments can discover in various ways which rights are implicated. They can seek legal opinions, precipitate court references or await determinations in litigation. The Court assumes that s. 33 permits a legislature to subordinate potential rights claims of which it is unaware or uncertain. Moreover, the Court assumes that the state should not bear the risk of error, even though the invalidation of an erroneous override or the failure to specify rights affected would mean not merely that the state loses, but that rightholders win. This cost-benefit analysis is truncated. It lets costs win the day, with no consideration of the benefits (to the functioning of legislatures and governments) which informed deliberation might purchase.

The Court overruled the Quebec Court of Appeal's holding that s. 33 requires that the overriding declaration reproduce the *Charter*'s formulation of the overridden rights. On analogy to amendment or repeal of statutes, the Court decided that reference to the numbers of sections and their component parts suf-

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[46]*Ibid.* at 736.

[47]In questioning during oral argument, Justice Lamer expressed concern for the problem of omnibus legislation, *e.g.*, a long statute amending a wide variety of statutes or a very long statute, such as the *Criminal Code*. How would a court, on review, be able to ascertain when the override declaration was sufficiently specific? The Court opted to defer to the legislature's fulfilment of "form" requirements in all cases, rather than find unacceptable a policy of clearly non-specific override.

[48]In oral argument, several justices expressed concern at the extent of the resources that would be necessary to effectuate frequent or large-scale overrides. The Court has had no difficulty with arguments of administrative expediency in other contexts: see *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 and *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R 486, 24 D.L.R. (4th) 536. The Court, perhaps because it did not recognize the parallel between the arguments, did not respond in the override context in the same way that it did in the rights context, *i.e.*, to conclude that rights cannot be hostage to legislative expediency. The override makes rights vulnerable to a particular design of legislative action, one that exacts a higher cost witb increased use. It is to this type of legislative effort that rights bend, not to a version simplified by concern for cost minimization. I am indebted to Rod MacDonald for pointing out that the "subtle cautionary vehicles built into s. 33" are analogous to common law doctrines, *e.g.*, natural justice.

fices. In declaring that "[t]here is no reason why more should be required under s. 33",[49] the Court ignores the cornerstone of its *Charter* jurisprudence, the differences between the statutory and constitutional contexts. The *Charter*'s guaranteed rights and freedoms express the highest values in our legal system, as s. 52 of the *Constitution Act, 1982* attests. Marking departure from these rights and freedoms in the words in which the Constitution expresses them is a way of acknowledging their normative status. The override is more than a mechanism of legal change. As the judgments in the Quebec Court of Appeal so eloquently point out, an override declaration transforms a constitutionally protected right, justiciable under s. 24 of the *Charter*, into an interest at risk in the political arena. To equate exercise of the override power to the modification of statutes, which are by definition alterable at the hand of the legislature, is to assume what is in issue. The question is whether legislative supremacy has been bridled; an analogy to an illustration of legislative supremacy at work cannot provide the answer.[50]

The difference between word reference and number reference may appear to be merely symbolic. Once raised, however, the question cannot be resolved by invoking considerations of legislative form, because neither kind of reference is more formal or less substantive than the other. Symbolism, however, is hardly irrelevant to the interpretation of the *Charter*, which is now the preeminent constitutive symbol of the Canadian legal order. In fact, the difference between numbers and words is considerable. The words of a legal instrument are the bearers of discursive meaning.[51] Section numbers, on the other hand, are

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[49]*Ford*, *supra*, note 1 at 741.

[50]The question is begged on a different level as well. The issue is the degree of specificity required. For *Charter* sections that contain only one right, reference to the section number is, to those who are familiar with the text, arguably as informative as reference to the text. But the large majority of the sections subject to the override contain many rights, so that reference to the section number, while clear, embraces a number of protected interests. Some of those sections, like 10 and 11, contain subsections; the others do not. Therefore, for a declaration under s. 33 to specify the particular right in issue, something more than section (or subsection) number reference is required. An analogy to statutory amendment cannot shake this conclusion because statutory amendment must by its very nature be as specific as necessary to identify the provisions to be amended. An appropriate analogy would be amendment of the constitutional text itself: one would not amend section 11 by reference to section 11 *unless* one meant to include *all* of section 11. That type of specificity is what s. 33, and indeed all statutory amendment, appears to require. Thus the Court's analogy works against its conclusion.

[51]The Court, in the context of the issue of freedom of expression, states: "Language is ... intimately related to the form and content of expression." See *Ford*, *supra*, note 1 at 748. In the *Manitoba Language Reference*, *supra*, note 24 at 744, the Court stated:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

the most abstract of abstractions. Numerical reference to overridden rights is a representational divide that distances the reader from the concrete significance of the legislative act. The use of numbers neutralizes the enactment process by insulating legislators from direct appreciation of the specific impingements of the legislation.[52]

2. Omnibus Application

The Court's judgment validated the omnibus override mechanism as well as the standard form of declaration referable to the widest available range of *Charter* rights. A legislature could not only deny all *Charter* rights subject to the override for any particular enactment; it could also, by one statute, enact override clauses into all statutes on the books.[53] Because s. 33 sets out merely formal requirements, distinctions of part or whole, or between comprehensive and particular enactments, had no significance. The Quebec legislature thus was not seen to enact overrides against the background of residually subsisting rights. Rather, its policy, as the Court understood it, was to eliminate all the *Charter* rights subject to s. 33. Nonetheless, the Court denied the difference between overriding *Charter rights* and overriding, to the extent possible, by a combination of standard and omnibus declarations, the *Charter sections* themselves.[54]

The Court dismissed arguments against routine override as "essentially submissions concerning permissible legislative policy."[55] This comment is

[52]In the course of argument, Justice Estey asked why a broader use of the override, *e.g.*, the standard clause used by Quebec referring to all the rights and freedoms subject to the override and not merely the specified right actually jeopardized, would not be a "clarion call to a higher danger". This question, as well as the Court's ruling, underestimates the normative force of a legislature enacting — and debating — not a formulation of numbers and not a standard form clause, but its decision to enact law inconsistent with: freedom of religion and conscience, the right to free expression and political participation or the right to life, liberty and security of the person assured by adherence by the state to the principles of fundamental justice. Justice Estey also asked whether, in the age of xerox legislation, it was not appropriate for legislatures to automate their override to the extent possible.

[53]The omnibus enactment did not even mention the names of the statutes into which the standard override clause was being inserted. See *Alliance, supra*, note 9, C.A. at 379, D.L.R. at 360, Jacques J.A.

[54]During oral argument, the Court expressed concern at the task of drawing the line between routine and non-routine use. Would 15 times a year, 20 times a year, 25 times a year be too much? A similar type of concern had arisen in the *Patriation Reference, supra*, note 27 on the question of the requisite degree of provincial content for patriation where the Court determined that the degree of support for the federal government's initiative was insufficient. The issue before the Court in *Ford* was whether the override in regard to every piece of extant legislation and on an ongoing basis in regard to every new enactment complied with s. 33. It would have been sufficient for the Court to indicate that comprehensive application of the override was invalid and to outline its reasoning.

[55]*Ford, supra*, note 1 at 743.

revealing, because the category of "policy" that it invokes is elusive. The issue here was certainly not "policy" in the usual sense: the arguments in question were not directed against the legislature's evaluation of social benefits. Rather, the National Assembly's comprehensive use of the override was alleged to be inconsistent with the formal requirements of explicitness and specificity. To be sure, the legislation impugned was an expression of political will. The Court was not being asked, however, to review the social benefits of the Quebec policy on the override but to determine the proper form of override of *Charter* rights in view of the *Charter*'s language, structnre, and purpose. There was no question of policy independent of form. By characterizing the submissions as concerned with policy, the Court collapsed the very distinction between form and substantive review upon which it relied in sustaining Quebec's blanket and comprehensive override.

3. The Retrospectivity Issue

The Court's aversion to substantive review, where form alone was to reign supreme, did not carry into the discussion of retroactive override. Here, at least in the material it quoted, the Court went beyond this understanding of form to consider the propriety of honouring reliance on existing rights or obligations. Albeit somewhat cryptically, the normative attributes of law — if not of rights protection and constitutionalism — broke the surface of the argument.

The Court might have said more than it did. As I shall explain presently, it might have made reference to the rule of law,[56] to the variety of unusual fetters on law-making power in s. 33, and to other sections of the *Charter*, as well as of our Constitution generally. The core consideration underlying such an approach is that an individual is entitled to know the law applicable to any contemplated action.[57] Changes to the law after the fact are unfair to those who act in reliance upon existing legal arrangements. Retrospective overriding of constitutional rights undermines not only that basic understanding of legal fairness but does so in an area where the stakes are particularly high.

A retrospective override power would empower governments to dissolve crystallized legal relations having constitntional significance. Such a course of action might be attractive for several reasons: to shield government against potential litigation, to escape from a court ruling as to infringement or remedy, or to alleviate the need to appeal a court order. Or a government might choose,

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[56]The Supreme Court has stated, in a different context, that the rule of law is not merely set out as a foundational principle in the text of the *Charter*'s preamble but is "clearly implicit" in the very nature of constitutionalism. See *Manitoba Language Reference*, *supra*, note 24 at 750.

[57]See also *Patriation Reference*, *supra*, note 27 at 805-06 where it is stated:

> The "rule of law" is a highly textured expression ... conveying, for example, a *sense of orderliness, of subjection to known legal rules* and of executive accountability to legal authority.

like Quebec had done on the facts before the Court, to use the override to make a political statement.[58]

Retrospective overriding of constitutional rights, for whatever reason, forecloses reliable assessment of the extent of one's constitutional rights — the most important and the most fragile interests in our collective lives. A single use of the retrospective override would shake confidence in those guarantees subject to s. 33. Repeated use could undermine reliance on the currency of rights protection altogether, but at a lower political cost than prospective declarations of override. Indeed, a government would not have to go so far; credible threats of invocation of the override retrospectively would suffice.[59] Retrospective nullification of rights therefore effects a much greater erosion of rights than does prospective action. The question is: does the *Charter*'s text permit it?

The *Charter*'s text reflects these basic principles of the rule of law. Indeed, in the *Manitoba Language Reference*, the Supreme Court interpreted the specific reference to the rule of law in the *Charter*'s preamble to include the idea that one is to be subjected only to known legal rules.[60] In addition, other elements contained in s. 33 itself, such as the requirements that the declaration be an express part of an enacted law, not exceed five years, and go through the legislature for renewal, do not seem compatible with a retrospective capability.

Section 33 stipulates that the express statement of override take the form of legislative enactment.[61] The Court might have regarded this requirement as a matter of form only, as it did the specificity requirement, and therefore compatible with the substantive defects of retroactive operation of statute law. Yet,

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[58]Quebec did not seem to have difficulty with the values protected by the *Charter* or the judicial roles generated by entrenchment of rights. The policy of omnibus and standard form override coincided with increased protection of rights under the *Quebec Charter*. Indeed, the language policy in issue in *Ford* was held by the Supreme Court to be inimical to the *Quebec Charter* as well as the Canadian *Charter*. The controversy was whether the source of the guarantee of the rights would be constitutional, *i.e.*, applicable to the whole country at both the federal and provincial levels, or local to and designed for Quebec at the provincial level. See G. Rémillard, "Rebuilding the Relationship: Quebec and its Confederation Partners" (speech at Mont Gabriel, Quebec, 9 May 1986) in Bayefsky, *supra*, note 44, 944 at 945.

[59]The possibility of retrospective override would thus render the rights subject to s. 33 less reliable, even when the override had not been used. This result would run counter to the supremacy of the Constitution set down in s. 52 of the *Constitution Act, 1982*, *supra*, note 11.

[60]*Supra*, note 24. See L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) at 51-63 for a discussion of retroactive law-making.

[61]The override in s. 33 is to be contrasted in this respect with the emergency derogation powers allowed by, for example, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 21 September 1970 Eur. T.S. No. 5; Council Eur. Doc. H(79) 4(1979) and the *International Covenant on Civil and Political Rights* 1966, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). These derogation powers, which apply to a restricted list of rights and freedoms, when certain grounds obtain, are exercisable on a temporary basis by the executive.

it preferred to read s. 33 so as to honour reliance in the currency of constitutional rights. Its reason for seeing substance implicit in form here, but not in the other part of the argument, is unarticulated.

The requirement of an express declaration of override, which is in addition to the requirement of enactment, emphasizes the public nature of the declaration, so that all rightholders can learn both that the legislature is considering use of the override and when and if it has put it in place. Retrospective declarations would still be public, in the sense of being accessible and intelligible, but would not inform people of the status of their constitutional rights at any particular moment.[62]

The form of legislation stipulated by s. 33 for an override declaration offers assurances of process that are not compatible with retroactive operation. For example, the subordination of rights pursuant to s. 33 cannot be effected by delegated or executive action.[63] Accordingly, rights are not hostage to executive discretion or to administrative action. Conditioning the override on a legislative process assures an opportunity for debate in the legislatures and, in our media-saturated society, news coverage as well. Publicity is important because rights protect against legislative ignorance or indifference, as well as against intentional oppression.[64] If those affected take the opportunity to press their claims to their representatives, legislators cannot act without knowing the full effect of

[62]One might argue that many, if not most, individuals exercise their rights and freedoms without knowing that is what they are doing. Indeed, much *Charter* adjudication arises in the criminal context where one would not expect reasoned consideration of rights protection to be uppermost in the mind of the actor. But this criticism misses the point. The *Charter* establishes the ground rules of the interaction between the state and the individual and encapsulates, in its grid of rights and freedoms and institutional roles, the values which we deem essential to the kind of society in which we wish to live. While the exercise of rights may be unwitting or intuitive, indeed even though the content of many rights may in the first years of the *Charter*'s implementation be unknown, we still adhere to the principle of the rule of law that the courts, by means of legal reasoning, declare ongoing principles of legal ordering. While it may be the rare case where a person consults the law books before taking a course of action, the legal culture in which we live provides an intuitive ambience, which is informed by our ideas of what is fundamental to human dignity in our political community.

[63]Legislation embodying an override could, likely, authorize delegated action and rule-making, for example in emergency situations. By the terms of s. 33, there would be debate before the Act was passed and re-enactment would be required. The protection afforded can be appreciated by momentary reflection on the government's reaction to the F.L.Q. crisis in 1970. Without an override in place, *Charter* arguments might have been made against the curtailing of civil liberties and legal rights. Presumably the government's action would have been sustained or rejected on the basis of argument under section 1 of reasonable limits justifiable in a free and democratic society. With an override in place, there would have been no opportunity for challenge to the rights subordinated by it. But any dissatisfaction as to the use of state powers would have a forum when the time came for renewing the override.

[64]*Big M Drug Mart*, *supra*, note 24 at 334, and *Morgentaler* v. *R.*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

their policy on rightholders. If the cause is lost at this point, the rightholders have at least had the opportunity that democracy offers for participation and the building of political experience and alliances for another try if only when the five year duration of the enactment expires. Retrospective use of the override undercuts these features of our political life.

Furthermore, the five year maximum duration of the declaration, an unusual fetter on legislative prerogative, gives additional opportunity to those who oppose use of the override, in general or in particular, to press their case.[65] The five year stipulation coincides with election frequency, so that each new administration must take responsibility for departures from *Charter* norms, both its own and those of its predecessors. Retrospective operation might muffle the public debate apparently envisaged in s. 33. Rights notionally apply to everyone so that the prospect of a period of time in the future without guaranteed enjoyment of rights casts a general shadow. In contrast, using s. 33 to nullify that guarantee of rights after the fact may not engage the constituency interested in rightsholding generally, but only those who stand to lose by the changes in their own established legal relationships with the state.

Moreover, the retroactive operation of the override is incompatible with the judicial remedies available under s. 24 of the *Charter*, a section not subject to the override. An override declaration *pro tanto* removes the specified right or freedom from the catalogue of guaranteed interests. Someone who has litigated or begun to litigate an alleged infringement however has invoked not only the right or freedom guaranteed but also the access to the courts afforded by s. 24. Retrospective nullification of rights or freedoms that have entered the judicial system would amount to a legislative usurpation of the judiciary's constitutional role and drain s. 24 of any substance, despite the fact that s. 24 is not subject to the override.

The Court's treatment of retrospectivity has a curious relationship to its treatment of specificity: the two approaches are inconsistent with respect to the relevance of substantive values. Although the Court insists in its discussion of specificity that s. 33 "lays down requirements of form only,"[66] it nonetheless precludes the retroactive impairment of existing rights. At the level of constitutional analysis, however, the Court's treatment of the two issues is thoroughly consistent in its refusal to attach significance to the fact that the override derogates from constitutionally protected rights. The values inherent in the structure, provisions, and purposes of the *Charter* as the supreme law of the land have no bearing on the validity of omnibus and standard clause denials of rights. Although it applies a substantive rights-protecting consideration in the preclusion of retroactivity, the Court ascribes that consideration to a rule of statutory

[65]See Rawls, *supra*, note 15.
[66]*Ford*, *supra*, note 1 at 740.

construction. The Court fails to note the values expressed in the rule and, more to the point, ignores the possibility that the same value that animates the rule of statutory construction may be present in the *Charter* and even in the mechanisms of s. 33.

V. Section 33 as an Integrated Instrnment of Rights Protection

A. *History Revisited: From Debate to Text*

In upholding Quebec's comprehensive use of the override, but for its retrospective application, the Supreme Court of Canada drew no connection between its reading of s. 33 and the institutional roles set down in other sections of the *Charter*. Nevertheless, the ruling has far-reaching consequences for our understanding of the institutional framework of rights protection in Canada and also for our assessment of the currently controversial notwithstanding clause. In my view, the ruling cuts against the major premises of the Court's *Charter* jurisprudence. Before turning to these broader considerations, we must review some overly familiar history in order to make salient the Court's unstated assumptions. The Court's almost complete validation of Quebec's use of the override manifests the generally accepted view that s. 33 is inimical to the *Charter*'s guarantees. I would like to suggest a different approach, one that accords the notwithstanding clause an integrated and positive role in our innovative constitutional system of rights protection.

It is common knowledge that section 33 broke the impasse on entrenchment by tempering judicial review of rights claims with a legislative escape. The landmark decision of the Supreme Court of Canada in the *Patriation Reference*[67] had sent the first ministers back to the bargaining table one last time, in November of 1981. The Court, on appeal from litigation initiated by the hold-out gang of eight in the appellate courts of three provinces, declared the legal validity of the federal government's contention that it could secure constitutional amendments from the U.K. Parliament at Westminster to effect patriation and entrenchment of the *Charter* without provincial consent. However, in an extraordinary foray beyond the legal issues raised, the Court also stated that such action would depart from established constitutional convention.[68] The first ministers, sensing a constitutional crisis of unprecedented gravity, made the most of this judicial reprieve, and agreed to what they could: adoption of judicially monitored rights protection tempered by a legislative override.

We associate this last-minute grafting of the override onto the *Charter* with those who objected to rights protection altogether, and therefore understand the change as repugnant to the rights-protecting project. Those who supported

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[67]*Supra*, note 27.

[68]The Court had perhaps recognized that entrenching rights without wider support would vest judges with the legal power to review rights infringements, but no real legitimacy.

entrenchment as well as those who opposed it, those who acceded to the terms of s. 33 for the sake of the deal and those who saw in it a refuge from rights protection, all viewed the notwithstanding clause as inimical to rights protection.

In this view, to which the Supreme Court subscribed despite its early disclaimer, s. 33 keeps alive the legislative sovereignty that pre-dated the *Charter*. The override thus offers the country's eleven legislatures a safe-haven from the rule of non-elected and non-representative judges. The only requirement is that the legislature follow the "form" prescribed.

Despite the superficial clarity of the historical record and the popular understanding of these events, the *idea* that the override undermines rights protection may be wrong.[69] The debate preceding entrenchment appeared at the time to demand a choice between two mutually exclusive alternatives, rights entrenchment supervised by courts and legislative sovereignty.[70] But perhaps we are too close to that prolonged controversy to understand its real contribution to the *Charter*'s mode of rights-protection: instead of delineating alternatives, the controversy may have laid the conceptual foundation for a new institutional hybrid, a complex arrangement that would harness the strengths of both courts and legislatures to the project of rights protection.

The notwithstanding clause, I suggest, did not mark a triumph for either side of the entrenchment debate. It embodies neither a failure to entrench rights absolutely nor a trap door out of rights protection. Instead, it marks a dialectic. But it is a special sort of compromise for it does not merely juxtapose contradictory elements of opposing positions. Instead, it melds the best of the contending views into something new and better. Accordingly, by looking deeper than the conventional understanding, one can see in the adoption of the notwithstanding clause the characteristic Canadian process of building alliances, here creating a coherent structure of rights protection out of the extremes of legislative sovereignty and unmitigated judicial review. So read, s. 33 would reflect something positive about Canada's commitment to rights protection: not rule by supercourts at the expense of legislatures, but a complex partnership through

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[69]It is beyond the scope of this paper to delve into the historical evolution of section 33, but I take the view that this position had deep roots in the growth of Canada's commitment to rights protection culminating in the Charter's final text. I elaborate the historical development of the mode of rights protection which I here ascribe to the *Charter*, as a unique and distinctively Canadian structure, in the context of the international development of models of rights-protection at the national and international level, in a work in progress entitled "The Structure of Charter Rights".

[70]Courts, those who were pro-entrenchment argued, were the appropriate bodies to articulate the content of rights and determine their infringement in the context of individual claims and developed fact situations, but not competent to weigh rights in all circumstances against the hurly burly of other interests. Legislatures, the opposite camp argued, holding the political mandate, the resources and the ties to the people, could rank all interests asserted in that marketplace of interests, including rights claims.

institutional dialogue between supercourts and superlegislatures. And once we become accustomed to its interesting transformation of our law and politics, we might learn to live with — and indeed grow attached to — this new institutional arrangement.

B. The Institutional Framework of the Charter: Sections 1 and 33

What would such a heretical view of the notwithstanding clause entail? To approach section 33 as a coherent element in a coherent structure of rights protection is to integrate it into the other institutional arrangements set down by the *Charter*.[71] Sections 1, 24, and 32 of the *Charter*, under the umbrella of s. 52 of the *Constitution Act, 1982*, provide that institutional context by stipulating that rights are to be subject only to reasonable limits, demonstrably justifiable in a free and democratic society; that judicial review of infringement and remedial relief is available in the courts of law; that the strictures of rights guarantees apply to all government action; and that the *Charter*, as well as the rest of the Constitution, form the supreme law of the land. By examining s. 33 within this institutional mesh, instead of presupposing its repugnancy to it, one can begin to see the flawed presuppositions informing the judgment that the Court made, as well as the contours of the legal argument it did not make.

Section 52 of the *Constitution Act, 1982* states that the Constitution of Canada is the supreme law of Canada, that any inconsistent law is *pro tanto* of "no force or effect", and lists the instruments included within the Constitution. This supremacy of the written Constitution is not new.[72] The statement of its stature and content, at the time of the adoption of the *Charter*, however, does serve a particular purpose: it emphasizes that the Constitution frames law-making power in Canada and, therefore, that the institution of legislative supremacy functions under law. While the legislatures are "supreme" in their

[71]In this paper I briefly outline the institutional coherence of the *Charter*. In a work in progress entitled, "The Structure of *Charter* Rights", I make full argument for this position. I contend, for example, that the *Charter*'s unique institutional framework of rights protection reflects the history and structure of Canadian constitutionalism and thus, while it includes elements of other systems of rights protection at the national and international level — both past and present — can only be understood as remarkably different from them.

[72]The *British North America Act, 1867* — now the *Constitution Act, 1867*, *supra*, note 26 was for the most part supreme over any law created by a Canadian institution by virtue of the *Colonial Laws Validity Act, 1865*, (U.K.), 28 & 29 Vict. c. 63 which provided that statutes of the Parliament at Westminster extending to a colony were to prevail over any repugnant colonial laws. The *British North America Act*, in s. 129, also precluded change to any such imperial statute. The *Statute of Westminster, 1931*, (U.K.), 1931, 22 Geo. 5, c. 4 preserved this arrangement in regard to the *British North America Act* although it did repeal the effect of the *Colonial Laws Validity Act* generally. See P. Hogg, *Constitutional Law of Canada*, *supra*, note 26 at 37-42, B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2d ed. (Toronto: Butterworths, 1983) at 1-34 and W. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 805.

sphere, *i.e.*, have plenary authority to make laws in exercise of the powers and within the strictures set down by the Constitution, they do not enjoy sovereignty in Canada. We live under a system of constitutional supremacy, not under a system of legislative supremacy.

The roles of the legislatures and other institutions of government, under the *Charter*, are delineated by s. 32.[73] While the precise application of this provision to the myriad of activities carried out by and under governmental authority awaits judicial elucidation, it is clear that legislatures must honour the legal strictures upon their powers set down by the *Charter*. These strictures, in the form of rights and freedoms, shape legislative power in a number of ways. Some rights and freedoms negate power; other mandate government action. Still others exact a respect for certain values when and if government chooses to act.

The guardianship of the Constitution is vested in the courts. Under s. 24 of the *Charter*, those who enjoy the guarantees of rights and freedoms have recourse to the courts for determination of infringements and remedial relief.[74] The institutional structure of the *Charter* therefore contemplates the judicial review of rights infringements by the institutions bound to honour the stipulated guarantees. It is thus not open to the legislatures to definitively evaluate their own adherence to the *Charter*. In addition, it is not for the courts to weigh the advantages or disadvantages, in political terms, of judicial participation in the enforcement function. The categories of activism or deference are thus displaced, globally as well as in the context of analysis of particular claims of infringement, by the Constitution's clear prescription of judicial role.

That role is infused with content by the mode in which the rights and freedoms are guaranteed. While the rights and freedoms are "set out" in a variety of sections of the *Charter*, they are guaranteed under s. 1, which is, after section 33, the least understood of the *Charter*'s provisions. The text of s. 1 states:

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[73]Section 32(1) states:

> This Charter applies
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[74]S. 24(1) states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(2) vests in the courts the discretion to exclude evidence obtained in contravention of guaranteed rights or freedoms where to do otherwise would bring the administration of justice into "disrepute".

> 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.

The guarantee function thus has two levels, one dealing with the rights and the other with the permissible limits upon the rights.

The main characteristic of the judicial function under s. 1, following from this two level guarantee, is the integration of the values of right-holding into each of the two levels. Both rights and their limits express the values underlying rights, first, because of the nature of rights and, second, because limits on rights are the subject of justification according to the values inherent in a society that is both free and democratic.

This two level feature of the guarantee maximizes the judicial quality of the courts' monitoring of adherence to rights guarantees by organizing the analysis of the alleged infringement into separate, sequential stages. By distinguishing the right from the permissible limits, and by articulating the type of analysis applicable to the consideration of limits (demonstrable justification) as well as the criterion of justification (the combined values of freedom and democracy), the courts are empowered to engage in rigorous review of the state's adherence to rights protection while constrained to legal categories. The courts are nowhere empowered to go beyond the traditional bounds of the judicial function into the legislative waters of balancing or maximizing utility — that function is left to the legislatures, under s. 33.[75]

While under s. 1 the courts exercise these two related and judicially appropriate functions — to articulate the content of the rights and to determine their permissible limitation, all on legally cognizable grounds — the structure of rights protection under the *Charter* includes a third possibility. To the categories of rights and limits, s. 33 adds the category of denials of the guaranteed rights and freedoms by exercise of the override.[76] For this category, the designation of

[75]This view of section 1 is elaborated in the context of a discussion of the Supreme Court's understanding of the limitation clause in L.E. Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Sup. Ct. L. Rev. 469.

[76]The distinction between limitation and denial of rights is a distinction of long standing in the formulation of Canadian rights protection. For example, while Article 1 of the Canadian Constitutional Charter, 1971 (The Victoria Charter) provides for limitations on the fundamental freedoms protected ("as justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others..."), Article 2 states:

> No law of the Parliament of Canada or the Legislatures of the Provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared.

Similarly, in the Constitutional Amendment Bill (Bill C-60), s. 25 (1978) provides for limitations on a more selective range of grounds than the Victoria Charter and then, in s. 23 sets out this caveat:

institutional power also follows along traditional functional lines. Appropriately, it is the legislatures that the *Charter* permits to nullify rights and freedoms in the name of majoritarian or representational values.

This exception to the guarantees afforded under s. 1 — of the rights or their justified limits as monitored by courts of law — is constrained by requirements of scope, duration, and manner in order to intensify the legislative nature of the function. The override thus applies only to some rights and freedoms;[77] must be renewed by legislative enactment, as desired, after a maximum duration of five years; and requires certain attributes of form: an express declaration of override and specification of the rights overridden. The exceptional quality of the instrument of departure from the norms embodied in the rights and freedoms is indicated both by the heading in the text of the *Charter*, "Exception where express declaration", and by the extraordinary fetter placed on the legal effect and content of the legislative declaration of override.[78]

The design of the *Charter* is thus not to give legislative powers to courts or to combine constitutionalization of rights with an inimical power of legislative supremacy over some of those rights. Indeed, the reciprocity of sections 1 and 33 avoids that very institutional anomaly by providing a structure of rights protection in which courts can be courts and legislatures, legislatures. This design cannot be appreciated if one approaches *Charter* interpretation by distinguishing between activism and deference, or their proxies form and substance, and chooses one or the other alternative as appropriate without legal analysis. Instead, one must recognize that, here as elsewhere in our legal system, form and function reflect substantive values, and in a properly designed and interpreted instrument, coherence as well.

Accordingly, form and substance find expression in both the judicial role under s. 1 and the legislative power under s. 33. Section 1 authorizes judicial review of the content of legislation, and the exercise of power thereunder, for adherence to the values crystallized as rights and freedoms. It also authorizes the judiciary, if the state assumes the onus of persuasion, to examine the justifiability of a policy that infringes guarantees. The judiciary cannot enter upon this second stage of consideration of the permissibility of limits on rights unless

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> To the end that full effect may be given to the individual rights and freedoms declared by this Charter, it is hereby further proclaimed that, in Canada, no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom.

See A. Bayefsky, *supra*, note 44 at 214, 354-55.

[77]Namely, ss. 2, 7-15, the rights that do not reflect the structural components of our federalism and separation of powers.

[78]In *Skapinker*, *supra*, note 40 at 370-77, the Supreme Court of Canada deliberated upon the use of marginal notes in aid of interpretation of the *Charter* text and concluded that such notes can be helpful.

the state has prescribed its policy as law.[79] It is here, as a precondition to justification of limits on rights, rather than in the exercise of the override power under s. 33 as determined by the Supreme Court of Canada in the cases at bar, that the simple form of law-making has operative significance. That very minimal form of law is set by the *Charter* text as a precondition to the task of justification in a court of law of limits on interests otherwise protected from legislative incursion. In this context, this form is to be sustained as law only as justified on the criteria essential to a society committed to both freedom and democracy. It is not evidence of fulfilment of the manner and form stipulated for exercise of the exceptional departure from those values permitted by the override.

Form also plays an important role in s. 33. The exceptional quality of the override suggests a narrow reading.[80] The terms of s. 33 are conducive to such a reading because they set down extraordinary conditions for the exercise of legislative power. The legislature must consider not only the policy to be transformed into law, but also the terms of the override and the specific rights and freedoms in issue. These conditions do not engage the policy determination that underlies exercise of the override; they work to intensify the democratic function that legitimates the legislative process by ensuring that debate, *i.e.*, the democratic process of law-making, focuses on the subordination of the rights or freedoms in question. The courts are not to review the merits of that policy. Nor do they investigate whether the debate took place. Their role, as for other constitutional powers, is to monitor adherence to the power granted and any strictures upon it.

Accordingly, the *Charter* does not envisage the transformation of our courts into super-legislatures to oversee the determination by a legislature to override rights or freedoms. On the contrary, it envisages the transformation of legislatures into super-legislatures, in the exercise of their powers to make law consistent with rights protection and, when prescribed conditions are met, to make law that overrides rights. The transformation of the courts is not into super- legislatures, therefore, but into super-courts, articulating the content of rights, justifying their limitation on grounds conducive to freedom and democracy, as well as monitoring strict adherence to the form of legislative override.

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[79]The view that compliance with the term "prescribed by law" in s. 1 requires accessibility and intelligibility of the legal instrument, as required by the principles of the rule of law, is not inconsistent with the position taken in the text. See, *R.* v. *Therens*, [1985] 1 S.C.R. 613 at 645, 18 D.L.R. (4th) 655 at 680-81, Le Dain J., for this view. These stipulations are still matters of form and not of substance because they can be determined without engaging in an evaluation of the social welfare embodied by the policy.

[80]This rule of statutory interpretation is absent from the Court's canvass of applicable interpretive guides to the text of s. 33. In contrast, it is the cornerstone of the Quebec Court of Appeal's judgment on the same issues in *Alliance*, *supra*, note 9. See *supra*, notes 9-24 and accompanying text.

VI. Conclusion

The *Charter* lays down an intricate set of institutional arrangements. It intertwines a limited legislative override with the judicial oversight of the guarantee and limitation of rights. These elements form an integrated regime of rights protection in a democratic society. By so easily reading s. 33 as empowering the National Assembly of Quebec to negate constitutional rights wholesale, the Supreme Court ignored the implications of its decision for the wider framework of Canadian constitutionalism.

To avoid reviewing the merits of the Assembly's action, the Court postulated a choice between a formal and substantive reading of s. 33. This dichotomy fails to touch the issue at stake. No one claimed that s. 33 calls for the judicial evaluation either of the social good promoted by the legislature or of the democratic nature of the legislative process at a particular moment. Rather, s. 33 engages values of constitutional process. Such values are within the judicial competence no less than the process values of criminal or administrative law.

The Court's handling of the blanket override is rich in ironies. There is, first of all, an irony about judicial activism. On the one hand, the Court deferred to the repudiated policy of a defeated government that used the *Charter* to reject the *Charter*. On the other hand, the Court exercised its special mandate as guardian of the Constitution to vindicate *Charter* values in respect to language rights. It thus boldly struck down duly enacted legislation of extraordinary political sensitivity, while simultaneously refusing — on grounds of deference — to explore the values of constitutional process that must govern legislative action.

Second, there is an irony about language rights. In dealing with s. 33, the Court tells us that the language used in a declaration of override is without significance. Nonetheless, in striking down the specific legislation, it holds that language expresses our individual human dignity and is for that reason protected under the *Charter* as a fundamental freedom.

Third, there is an irony about democracy. In purported deference to the democratic function, the Court eliminates all "substantive" costs to the override's exercise. It regards the use of the override simply as the exercise of majoritarian power. The Court thereby defers to a legislative process devoid of its legitimating qualities of reasoned and focused debate by the people's representatives.[81]

Fourth, there is an irony about the future of the override itself. The *Ford* decision and Quebec's subsequent use of the override in its new language legislation catapulted s. 33 back onto the constitutional agenda. The Court's treat-

[81]The best proof against this view is the heated reaction across the country to Quebec's use of the override after *Ford*.

ment of the override, however, denies us a satisfactory appraisal by our highest court of the place of s. 33 in the *Charter*'s institutional arrangements. Without insight into the symbiotic relationship between rights and justified limits articulated by courts of law, on the one hand, and the temporary, express and specific override enacted by legislative fiat, on the other, it is difficult to appreciate the way in which the *Charter* insulates the courts from the political repercussions of the rights-honouring function. Consequently, we may not realize that s. 33 frees Canada from the crisis of judicial legitimacy that mars other rights-protecting systems. If the ultimate result of the Court's judgment is the repeal of s. 33, our Constitution will lose the very mechanism that allows the judiciary to make judgments of the kind the Supreme Court of Canada itself made and presumably deems appropriate, in regard to the language of expression in the *Ford* case.

Our constitutionalism is a seamless web, made up of constitutional text, convention and judicial pronouncement. The override can be understood as intensifying and strengthening its patterns of respect for democracy, difference and individual dignity. The Supreme Court's interpretation of the override's purpose, function and strictures purports to strengthen our commitment to democracy. However, its reasoning cuts the connection between democracy and the other fundamental values for the sake of which we hold democracy dear.