

Democracy and the Legislative Override of Constitutional Rights

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In Canadian law, constitutional rights are not trumps. The 1982 Constitution permits limitation of those rights “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” (s.1) It also permits Parliament or the provincial legislatures to override certain rights for a limited period:

s. 33:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (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
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

This override power has been used very rarely by provincial legislatures, and never by federal government. In the 2004 elections, the refusal by the leader of the federal Conservatives to say *whether* he would use s. 33 to override a likely Supreme Court decision requiring same-sex marriage was one of the reasons for the defeat of his party.

The presence of s. 33 in the *Charter* is, nonetheless, controversial among Canadian commentators. Some see it as threatening rights review and favour its repeal. Others, along with some American writers, see it as establishing a role for legislative or even popular *interpretation* of the *Charter*, and thus as a way of taking the Constitution away from the courts.

Both views are incorrect. First, s. 33 applies to some rights only, and the exceptions are of importance in understanding the limited function of the override. Second, like every other provision of the Constitution, s.33 is itself supervised by the courts, who are recognized as having the final authority to determine whether a purported derogation under s.33 is valid—that they exercise this power deferentially does not show otherwise. Third, there is no evidence to suggest that an exercise of s.33 in any way effects later interpretation of the overridden rights by the courts or by any other institution. As the Constitution itself states, the provision creates an “exception” to the *Charter’s* application, not a determination of how it is to be applied.

Nonetheless, s.33, (like the limitation clause of s.1) does have an important role in supporting democratic values. By confining the override to a special procedure, it leaves relatively uncontaminated the analysis of rights themselves. The sunset provisions of

section mean that an election will intervene before the derogation can be re-enacted. Both features make it likely that a legislature will have to face, and debate, conflicts of values. Doing so overtly, rather than folding these considerations into some judicial theory of what the Constitution requires, supports the political equality on which democratic processes depend.