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A Canadian Proposal

CAROLINE S. EARLE*

Values such as justice and equality are the products of politics, not its antecedents. They take root in a public that engages in debate and argument and is given the opportunity to nurture notions of reasonableness and commonality.¹

INTRODUCTION

Canada has been defined and shaped by its neighbor to the south.² Canadian citizens debate their identity with a wary eye toward the overwhelming commercial and cultural influence of the United States.³ In return, Americans enjoy the luxury of knowing that their unprotected northern border is safely insulated by a benign presence. Indeed, Canada's trustworthiness inspires complacency—with the result that many Americans know little of Canada beyond its most popular sport, ice hockey.⁴ This inattentiveness often extends to the political arena. Consequently, a new and uniquely Canadian resolution to the ongoing debate over judicial finality⁵ has been overlooked by all but a few American commentators.⁶

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2. The American Civil War is one example of how U.S. actions have shaped Canadian history. Animosity between Britain and the Lincoln Administration made Canada, a British colony, vulnerable to American aggression. Even after the war, Canada was subjected to raids and threatened invasions from "the Fenians, a group of Irish-Americans, organized in 1857, who hoped to strike a blow for Irish independence by attacking the British colony of Canada." GORDON STEWART, HISTORY OF CANADA BEFORE 1867, at 32 (1989). These threats accelerated the confederation of Canada. Similarly, the unfolding American experiment influenced the form of government that the Fathers of Confederation chose for Canada. They purposely fashioned a strong central government, in part because of the problems that the United States had encountered by reserving to each separate state "all sovereign rights, save the small portion delegated." DONALD CREIGHTON, CANADA'S FIRST CENTURY: 1867-1967, at 10-11 (1970).

3. See, e.g., GEORGE GRANT, LAMENT FOR A NATION: THE DEFEAT OF CANADIAN NATIONALISM (1965). Grant laments the passing of Canadian sovereignty with respect to the United States. The work made a profound impact at the time and sparked renewed Canadian nationalism and a debate over national identity—a debate that has not abated in the years since its publication.

4. Many would be surprised, however, to learn that Canada's national sport is soccer.

5. The term "judicial review," a term broader in scope than "judicial finality," refers to the power of American courts to assess the constitutionality of legislative acts. The term "judicial finality," as used in this Note, refers to the U.S. Supreme Court's final adjudicatory power in interpreting the constitutionality of legislative acts. While in theory this power is subject to certain legislative checks, see infra notes 35-36 and accompanying text, the Supreme Court, for the most part, has the final say in interpreting the Constitution.

For decades, commentators and constitutional scholars have debated the limits of the United States Supreme Court's final adjudicatory power in interpreting the constitutionality of legislative acts. When Canada enacted a Charter of Rights and Freedoms in 1982, the provincial governments, aware of the judicial finality debate in the United States, were reluctant to grant the courts an unchecked power of review. The new constitution explicitly granted the courts such power in sections 24(1) and 52(1). To garner provincial support for the constitution, the federal government agreed to include a legislative override provision in the Charter. Known as the “Notwithstanding Clause,” section 33 provides that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature that... [certain Abortion Decision]; Daniel O. Conkle, Nonoriginalist Constitutional Rights and the Problem of Judicial Finality, 13 HASTINGS CONST. L.Q. 9 (1985) [hereinafter Nonoriginalist Constitutional Rights]; Calvin R. Massey, The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States, 1990 DUKE L.J. 1229; Robert A. Sedler, Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms, 59 NOTRE DAME L. REV. 1191 (1984); Paul C. Weiler, Rights and Judges in a Democracy: A New Canadian Version, 18 U. MICH. J.L. REF. 51 (1984).

8. 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.” Id. pt. VII. Together, commentators have interpreted these clauses as establishing the supremacy of the constitution and the power of the courts to uphold certain rights embodied within that document. Christopher P. Manfredi, Adjudication, Policy-Making and the Supreme Court of Canada: Lessons From the Experience of the United States, 22 CAN. J. POL. SCI. 313, 319 (1989).
11. This Note does not detail the political adventure of Chartermaking. An oft-cited summary of the drafting and ratification of the Charter is ROY J. ROMANOW ET AL., CANADA... NOTWITHSTANDING (1984).
Section 33 represents an appealing solution to the American debate over judicial finality.

This Note proposes the enactment of an American legislative override similar to the Canadian provision. It is a radical proposal. Indeed, it goes to the heart of the American political-constitutional order. It suggests amending the Constitution to provide for a legislative override of U.S. Supreme Court interpretations of certain constitutional provisions. The amendment would allow Congress, and hence the American people, to engage in a dialogue with the Supreme Court over the scope and content of specific constitutional rights. This dialogue would be most beneficial in the case of those constitutional provisions that have proven difficult to define.

The continuing debate over the pros and cons of judicial finality has reached a stalemate. That debate has been dominated by three theoretical positions: judicial review activists, who argue for an unrestricted use of judicial review; strict constructionists, who argue that judicial review is an illegitimate usurpation of the policymaking power of the legislature; and moderates, who argue for a circumscribed form of judicial review. This Note suggests that a legislative override, similar to the Canadian provision, would provide the key to moving beyond this deadlock. The override would allow the Supreme Court to exercise freely and legitimately its reviewing powers.

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12. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. Legislative override provisions are not new to Canada. They have been used throughout Canadian history in both provincial and federal bills of rights. These bills of rights, however, do not have constitutional status. They are merely legislative acts that, according to the judicial doctrine of parliamentary sovereignty, may be set aside by subsequent legislation. (Since adoption of the Charter, the Supreme Court of Canada has granted the federal Bill of Rights quasi-constitutional status.) Since a new legislature could not be bound by its predecessor under the doctrine of parliamentary sovereignty, a bill of rights override provision proved redundant.

13. Massey argues that the United States has a de facto version of the Canadian override. He asserts that with respect to privacy rights, the Eighth Amendment, First Amendment free speech and exercise of religion, and procedural due process, the Supreme Court has given Congress and state legislatures an override of sorts by allowing them to define the parameters of those constitutional safeguards. Massey, supra note 6, at 1272-98. Massey is correct in pointing out that the effect of some of the Supreme Court's adjudication is that Congress and state legislatures have some role in defining constitutional rights. The override is not only concerned with legislative control, however, but also the source of that control. At any point, the Supreme Court may reassume any power that it has delegated to Congress and the states. Conversely, the Canadian override does not rely on judicial magnanimity for its invocation.


15. See infra text accompanying notes 32-33.

16. See infra text accompanying notes 33-37.
power by supplying a democratic check on judicial constitutional interpretations.

The purpose of this proposal is as old as democracy itself: to maximize citizen participation in the processes of government. In essence, this proposal should be understood as a renewed vote for democracy. It suggests that the task of interpreting the Constitution is as fundamental a citizenship duty as voting; constitutional analysis is too important to leave in the hands of a select few. Inviting the American people, through their representatives, to try their hand at constitutional interpretation could strengthen and further legitimate the U.S. constitutional-democratic regime. Given a voice in constitutional interpretation, the American people would assume that task with dedication and compassion.

The proposal is imperfect. Its most obvious problem is the need to overcome the status quo: why is such an override necessary at all? Americans learn early on in their political education that American government is composed of three branches—the Executive, the Legislature, and the Judiciary—each with separate domains. Reverance for this structure may make it difficult for Americans to entertain a new approach to interaction between the branches. Even if accepted, implementation of the override would require a constitutional amendment—never an easy task. Despite these weaknesses, the proposal’s strengths merit a closer look.17

This Note attempts to circumvent the stalemated debate over judicial finality by proposing a legislative device to override Supreme Court interpretations of certain Constitutional provisions. Part I explores briefly the present deadlock in the American judicial review debate.18 Part II examines how section 33 has operated within the Canadian context. Part III proposes adapting section 33 to the American political structure. This Note concludes that a legislative override would reinvigorate American democracy. Canada’s section 33 represents a practical resolution to the quagmire of the judicial finality debate. American constitutional commentators should seize the opportunity to revisit the judicial review debate in this country.19

17. One further weakness of the proposal may be the decidedly Canadian perspective of this Note. This perspective may cast suspicion on the validity of the observations and the proposal itself.
18. This Note does not address the issue of the legitimacy of judicial review. I recognize the entrenched nature of that institution and proceed from the assumption that it will remain a fixture of American jurisprudence.
19. The conservative character of the present Supreme Court suggests that commentators who have traditionally supported judicial review may find themselves increasingly uncomfortable with its use by the Rehnquist Court. If so, they may be put in the novel position of searching for a way around Supreme Court decisions. A legislative override could provide a solution to this quandary while at the same time preserving the institution of judicial review.
I. THE JUDICIAL REVIEW DEBATE: IDEOLOGY AND INACTION

The judicial review debate in the United States has been captured by as powerful a faction as the Federalists could have ever imagined. Eminent legal scholars, jurists, political scientists, and philosophers have all tackled the prickly question of judicial finality. Many have set forth compelling treatises advocating unabashed judicial finality. Others reject the whole institution as incompatible with the Framers' vision. And still others fence-sit between the two extremes. While this Note does not intend to disparage the intellectual and theoretical contributions these scholars and commentators have made regarding the proper role of judicial activism, theoretical debate can become a substitute for action. In the instance of judicial review, where court decisions have a direct impact on the daily lives of real people, this irony may become a tragedy.

This Note proposes a dramatic innovation in the American constitutional framework. Such action is necessary for two reasons, both of which focus on the Supreme Court's reviewing power as the ultimate arbiter of the Constitution. First, the Supreme Court's decisions are pervasive in their effect. For example, modern cases resolving issues of abortion and school busing.

20. "By faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The Federalist No. 10, at 123 (James Madison) (Penguin ed. 1987). While each player in the judicial review debate is approaching the question from a different perspective, they collectively may be deemed a faction because they are actuated by a common impulse—their concern with the Constitution. Similarly, each is motivated by a political vision that has as its end result a just, or potentially just, community. They have unwittingly sabotaged themselves, however, by combining to stall any real advance toward a solution to the problem of judicial finality. In this sense, they work in common against the interests of everyone in the history and future of this country who has been, or will be, affected by an unelected Court's final reviewing power.

21. E.g., Dworkin, supra note 9; Tribe, supra note 9.


23. Ely, supra note 9; Perry, supra note 9; Nonoriginalist Constitutional Rights, supra note 6.


25. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (setting guidelines for the implementation of court-ordered desegregation plans, which included the busing of public schoolchildren); Keyes v. Sch. Dist., 413 U.S. 189 (1973) (furnishing guidelines permitting district-wide desegregation when intentional discrimination in one part of school district found); Board of Educ. of
have spread their tentacles throughout the nation. These holdings change people's lives in a direct and dramatic way, affecting crucial choices, such as whether one may terminate a pregnancy and where one's children may go to public school. While commentators debate theoretical positions, the decisions of unelected justices impact the daily lives of citizens. It is in the interests of these Americans that the debate surrounding judicial finality should be resolved.

Second, and interrelatedly, the Supreme Court has become in the eyes of many Americans merely another political branch of government. In the recent past, for example, Senate confirmation hearings of Supreme Court nominees have become intense political battles. This politicization of the Supreme Court contradicts its traditionally perceived role as a neutral guardian of constitutional rights. Interest groups, sensing this change, now try to influence the Supreme Court for favorable rulings on constitutional cases. These developments signal to Americans that the highest court increasingly is a part of the political process. Unlike the other governmental branches, however, the American voter has no direct power to restrain the nine political actors on the Court. This is a dangerous development for the Court. Having been reduced to a political branch, its legitimacy may suffer in the eyes of a public uneasy with the finality of its power. Since the strength of the highest court derives from its legitimacy, the judicial review debate must be resolved before that strength decays any further.26

A. JudicialActivists

One of the theoretical perspectives dominating the stalemated judicial finality debate is judicial activism. Nonetheless, proponents of unchecked

26. John Hart Ely notes that commentators have been ominously portending the "destruction" of the activist Supreme Court for years. He notes that the Court has thrived despite these predictions, and suggests that it will continue to do so. ELY, supra note 9, at 46-48. Ely's attention, however, is directed toward executive and/or legislative reaction to Supreme Court activism. In contrast, my point is that the Supreme Court is sowing the seeds of its own "destruction." Judicial activism has served to undermine the Supreme Court's legitimacy with the people. Minorities, who in the past have looked to the Court for protection of their rights, may feel that the Court is increasingly susceptible to majority impulse. Similarly, those in the majority may fear the influence of special interest groups on the Court and also may view the politicization of the Court as inconsistent with its unelected and effectively unchecked status.

27. "Unchecked," that is, by the legislature (barring the extraordinary measures of constitutional amendment, impeachment, or restriction of the Court's jurisdiction) or by the conscious self-restraint of judges. The judge's own understanding of the principles underlying her decisions, however, and the
judicial activism might question their role in the deadlock. In the United States, judicial review has been a thoroughly entrenched institution for well over a century. It seems unlikely that judicial review as a means to make or shape legislative, constitutional, and social policy will be repudiated in the near future. Judicial activists might argue, therefore, that their participation in the debate—focused on promoting the acceptance of activist judicial review and its proper use by principled judges—facilitates the well-established judicial task of interpreting and applying the Constitution.

Proponents of judicial activism should not be absolved so easily. If judicial review is indeed a healthy development and the courts are the best protectors of constitutional rights, then judicial review can only work properly, that is, can only evenly distribute its benefits to all or most Americans, if it is embraced by a majority of courts. Tentative acceptance throttles the judicial role because it unjustifiably limits the protective role of the courts. Only robustly activist judges will engage in the philosophical feats that Ronald Dworkin and Laurence Tribe, for example, would have them perform. Moreover, even assuming such acceptance, one can never assume uniform vision or ability. The fact remains that on issues of constitutional interpretation, intelligent and principled judges may reach different conclusions. Inconsistent visions will translate into inconsistent law.

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28. Judge Posner argues that "activism" is a shibboleth, because the judicial role inherently requires action. The real issue, he suggests, is whether a judge's activism derives from improper sources or from "firm moorings in constitutional text, or structure, or history, or consensus, or other legitimate sources of constitutional law." Richard Posner, What am I? A Potted Plant?, NEW REPUBLIC, Sept. 1987, at 23, 25. I have no quarrel with this argument but, as indicated supra note 18, this Note does not enter into the doctrinal debate over the appropriate limits of judicial decision making. This Note focuses on what is, rather than what should be. I use the term "activism," therefore, to denote a theoretical position that embraces a creative and robust judicial approach to constitutional interpretation.
29. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), started the United States down the judicial review path. It was some 50 years before the Court used its reviewing power again in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). After Dred Scott, the Court grew increasingly comfortable with its reviewing power.
In recent times, activist courts have used judicial power to benefit certain disadvantaged groups. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that race may be considered by university in making admissions decisions); Roe v. Wade, 410 U.S. 113 (1973) (protecting a woman's qualified right to terminate her pregnancy); Brown v. Board of Educ., 347 U.S. 483 (1954) (holding racial segregation in public education to be unconstitutional). In the past, this was not always the case. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Adkins v. Children’s Hosp., 261 U.S. 525 (1923); Plessy v. Ferguson, 163 U.S. 537 (1896); The Civil Rights Cases, 109 U.S. 3 (1883); Dred Scott, 60 U.S. (19 How.) at 393.
30. Small wonder that Ronald Dworkin calls his fictitious judge "Hercules." His rigorous analysis of the principled approach to judicial review would be no small feat to duplicate on an individual basis. DWORKIN, supra note 9, at 105.
Equally problematic is the close link between judicial review as a device and the ideology that it serves. Activists' support of judicial review is often tied to a certain ideological agenda. Activists frequently legitimize the use of judicial review by pointing to decisions that have protected the rights of individuals. The possibility that a conservative court may elect to experiment with this reviewing power has received increasing attention. Present debate indicates that some conservatives are pressing for a form of limited judicial activism—if only to “correct” past liberal intrusions or to protect certain economic rights. Should this occur, it presents a dilemma for activists. To concede that judicial review is only selectively permissible would tend to undermine their thesis. The alternative, however, might be to accept decisions that are diametrically opposed to their values and beliefs, beliefs that are inexorably linked to an activist role for the courts. Given such a scenario, activists may begin to look in vain for some kind of a “check” on certain exercises of the court’s reviewing power in order to repair “inappropriate” (i.e., conservative) applications of judicial review.

B. Strict Constructionists

Strict constructionists are in an equally difficult position. They advocate a strict adherence to the text of the Constitution and the Framers’ intent. While these “interpretivists” do not eschew all judicial activity in applying the Constitution, they do require that such activity be limited to searching the historical record for the intent of the drafters of the constitutional provision in question. Robert Bork argues that “[t]he structure of government the Founders of this nation intended most certainly did not give courts a political role.” Based on this reasoning, strict constructionists perceive judicial policymaking to be fundamentally inconsistent with the structure of American democracy and, hence, illegitimate.

In order to prevail, strict constructionism depends on a majority of the judiciary accepting its constitutional theory. Barring a sudden warm embrace of their minority position, interpretivists advocate judicial restraint. In a society of competing ideologies and motivations, neither of these options seems viable. Strict constructionists contribute to the impasse, therefore, by.


32. Bork, supra note 22, at 154; see also Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971). Judge Bork is one of the leading proponents of the original intent theory.
offering impractical solutions. While one may commend their intellectual intractability, their obstinance prolongs the judicial review deadlock.

C. Judicial Review Moderates

What, then, of the moderates—those who draw a strict perimeter around the judiciary’s reviewing power? These scholars view the core dilemma of judicial review as the “tricky task . . . of devising a way . . . of protecting minorities from majority tyranny” while at the same time limiting the anti-majoritarian thrust of judicial scrutiny. John Hart Ely suggests resolving this conundrum by allowing the courts to exercise their reviewing power solely to protect “participational” or “process” rights. While his argument is compelling, Ely stumbles on the question of how to limit the Court’s activist tendencies to process rights. He concedes that formal checks on the Supreme Court’s power have not proven to be satisfactory. These checks include amending the Constitution, impeaching an uncooperative Justice, changing the Court’s jurisdiction, and “packing” the Court. As Ely acknowledges, each of these alternatives has either fallen into disuse or represents a burdensome and awkward device for combating an errant judicial decision. None represents a practical means of compelling the judiciary to limit its review to process rights.

The tentative steps of moderates like Ely are a welcome effort to resolve the judicial review debate by bridging the gap between activists and strict constructionists. These moderates attempt to reconcile the institution of judicial review with the majoritarian structure of American democracy.

33. ELY, supra note 9, at 7-8.
34. Id. Thus, the Court’s “activism” would be limited to ensuring that minorities have access to the political process. Ely suggests that voting rights, First Amendment expression (with narrow restrictions), and Fourth and Eighth Amendment protections, for example, must be subject to judicial scrutiny in order to protect minority participation in the political forum.
35. Id. at 46.
36. Id.; see also Daniel O. Conkle, The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry’s Constitutional Theory and Beyond, 69 MINN. L. REV. 587 (1985). Conkle asserts that Congress’s Article III power to restrict the Supreme Court’s jurisdiction may be reconciled with the principle of majority consent. He argues that Congress’s decision not to exercise that power legitimizes the Supreme Court’s constitutional policymaking. Id. at 653-58. He does concede, however, that inferring consent to Supreme Court constitutional doctrine by congressional inaction is more difficult than a positive congressional affirmation. Id. at 658. A legislative override would resolve this dilemma in two ways. First, the legislative override creates a tool by which Congress and the American people can participate more fully in constitutional dialogue. It is an inclusive device, concerned with increasing participation, not an exclusive device concerned with limiting or restricting the Supreme Court’s role. Second, the override, as a quick and direct response to Supreme Court constitutional policymaking, would allow the other “checks” on the Supreme Court to be used for particularly egregious cases of judicial abuse, rather than for a discrepancy in constitutional interpretation.
Nonetheless, such proposals remain largely theoretical and are dependent for success on a wholesale conversion of the judiciary. As with both activist and strict constructionist proposals, unless the Court willingly chooses to limit its review to process rights, the arguments of moderates perpetuate the debate, and hence the inaction, surrounding judicial review.

This Note asserts that intellectual debate, while never wasted, at some point must come to a close. Far too many lives have been irrevocably changed by judicial finality to support further intransigence. Section 33 of the Canadian Charter of Rights and Freedoms provides an intriguing method for overcoming the present stalemate.

II. SECTION 33 IN PRACTICE

In its entirety, section 33 of the Canadian Charter of Rights and Freedoms states:

(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).

Section 33 contains a number of key features. First, it operates only with respect to certain rights and freedoms. Only the legal freedoms of section 2, the legal rights of sections 7 to 14, and the equality rights of section 15 are vulnerable to legislative override. Charter provisions protecting

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37. See supra notes 24-26 and accompanying text.
39. These include freedom of religion, freedom of the press, freedom of expression, freedom of peaceful assembly, and freedom of association. Id. § 2.
40. These include the right to life, liberty, and security of the person; the right to be secure against unreasonable search or seizure; the right not to be retained or imprisoned arbitrarily; the right to be informed, upon arrest, of the reasons for the arrest; the right to retain counsel; the right to a habeas corpus proceeding; the right to certain proceedings in criminal and penal matters; the right not to be subjected to cruel or unusual punishment; the right not to incriminate oneself; and the right to have an interpreter, if necessary. Id. §§ 7-14.
41. These protect one's right to be considered equal before and under the law regardless of race, national or ethnic origin, color, religion, sex, age, or mental or physical handicap. Section 15 precludes
mobility rights and the democratic right to an election at least every five years (and a sitting legislature at least once a year) are outside of the amending process, and hence are beyond legislative purview. Second, any act or provision invoking section 33 automatically expires after five years, if not earlier. Since the Charter requires that elections be held at least once every five years, the electorate can use the polls to censure egregious use of the legislative override. Third, the use of section 33 itself is subject to judicial review. The Supreme Court of Canada, as the court of last resort, may determine what section 33 requires from the legislature invoking it. Each of these features has important consequences for the legitimacy and effectiveness of a legislative override in a federalist system.

Section 33 has been invoked three times since its enactment in 1982. In each case, its use has generated public controversy, political debate, and judicial action. The following discussion of each invocation will clarify the nature of the legislative override device and expose its weaknesses and strengths.
A. First Use of the Override: Québec 1982

The separatist government of the province of Québec was the first to invoke section 33. Discontent with the new constitution, the Québécois government refused to ratify the new document, which it felt did not protect the province's unique French character. Out of defiance, the Québec National Assembly enacted legislation declaring "that all Québec statutes operated notwithstanding any of the Charter sections which could be overridden." A legal challenge to the blanket use of section 33 was immediately launched, and met with mixed results in the lower courts. The case was appealed to the Canadian Supreme Court, but the override provision had lapsed by the time the case came before the bench. Nonetheless, the Justices chose to comment on this use of section 33 in the context of another Charter decision, Ford v. Québec.

In Ford, the Canadian Supreme Court rejected the argument that "in order to be valid, a declaration pursuant to section 33 must specify the particular provision within a section of the Charter which Parliament or the legislature of a province intends to override." Requiring "an apparent link or relationship between the overriding Act and the guaranteed rights or freedoms" would necessitate substantive review by the courts. The Justices held that "[s]ection 33 lays down requirements of form only." If these procedural requirements are met, the override's "validity . . . is not affected

45. Donna Greschner & Ken Norman, The Courts and Section 33, 12 QUEEN'S L.J. 155, 161-62 (1987) (emphasis omitted). While Québec's resolution was protected as to the federal Charter of Rights and Freedoms, it contravened the province's own Charter of Human Rights and Freedoms. See infra note 62. After the Charter's enactment, many provinces adopted their own provincial Charters of Rights and Freedoms. Unlike state constitutions, which require more than a simple majority for amendment, these provincial charters are ordinary pieces of legislation that the government may amend at will. Although some of these provincial documents also contain a legislative override clause, as with provincial bills of rights, see supra note 12, the Override Clause is redundant.

46. The case was Alliance des Professeurs de Montreal v. Attorney-General of Que., 21 D.L.R.4th 354 (Que. C.A. 1985). The Québec Superior Court upheld the blanket use of § 33, but the Québec Court of Appeal reversed this decision, ruling that the National Assembly had not followed the requirements of § 33 and thus the wholesale override was void. This highlighted for the first time the role of the courts in interpreting the procedural requirements of the Notwithstanding Clause.

47. Québec's use of § 33 in 1982 raised three issues. First, did § 33 require that a legislature specify, using the language of the Charter itself, the right or freedom that it was intending to override? Second, could § 33 be used in an omnibus fashion to protect a number of laws collectively from Charter scrutiny? Third, could § 33 be applied retroactively?

48. 54 D.L.R.4th 577 (1988) (Can.). This case resulted from the third use of § 33. See infra text accompanying notes 60-70.

49. Ford, 54 D.L.R.4th at 596.

50. Id. at 598.

51. Id.
by the fact that it was introduced into all Québec statutes . . . by a single enactment." 52 Thus, the Court held that it is sufficient for Parliament or a legislature to recite Charter provisions by section number where it is uncertain which rights or freedoms it is infringing.

Québec's use of section 33 was important for several reasons. First, it demonstrated that section 33 was useful as a political weapon. Québec’s invocation of the Notwithstanding Clause was a symbolic gesture—it sent a resounding signal that the province did not accept the new constitution as legitimate. Second, such an immediate and drastic use of section 33 aroused the ire of many commentators. It crystallized opposition against the provision because many saw Québec’s ploy as their worst fear realized. 53 Finally, the courts were given an immediate opportunity to begin their task of interpreting the new Charter and its legislative override provision.

B. Second Use of the Override: Saskatchewan 1984

In 1984, the government of Saskatchewan legislated an end to a provincial workers strike. 54 The Province invoked the Notwithstanding Clause to preempt a constitutional challenge to its back-to-work legislation. 55 The workers returned to their jobs, but not before challenging the government’s use of §33 in the courts. 56 In contrast to Québec, in this case a “government which ha[d] accepted the Charter us[ed] §33 to protect a specific law from a constitutional challenge based on one of the Charter rights or freedoms.” 57 Saskatchewan used §33 as the drafters had intended. The public, nonetheless,

52. Id. at 600. The Court also concluded that §33 may not operate retrospectively from the date of its enactment. Id. at 601.
53. For an excellent example of the more extreme reaction to Québec’s invocation of §33, see Stephen A. Scott, Entrenchment by Executive Action: A Partial Solution to “Legislative Override,” 4 SUP. CT. L. REV. 303 (1982).
55. The government was in the midst of a court battle over its use of similar back-to-work legislation, which was enacted in response to a dairy union strike in 1983. At issue in that case was whether the legislation infringed on freedom of association as protected by §2(d) of the Charter. The case was on appeal to the Supreme Court when the provincial worker legislation was enacted. The government used §33 to protect the new legislation against an unfavorable ruling by the Supreme Court in the dairy case. It was the first government to use §33 as intended; that is, to protect certain legislation from Charter (judicial) scrutiny.
56. It seems that this legal challenge was not pursued. Professor Christopher Manfredi of McGill University, Montreal, an expert on the Charter, confirmed this for me. Telephone interview with Christopher P. Manfredi, Associate Professor of Political Science, McGill University (Sept. 14, 1992).
57. Greschner & Norman, supra note 45, at 162 (emphasis omitted).
was outraged. To many, Québec’s use of the Notwithstanding Clause had seemed less threatening because of its unique constitutional position. Saskatchewan, on the other hand, had participated fully in the constitutional dialogue, and therefore presumably knew the gravity of exercising the override. Consequently, the controversy surrounding section 33’s role in a democratic system became more acute.

**C. Third Use of the Override: Québec 1984/1988**

In 1984, as the legal challenge to its first use of section 33 was winding through the courts, Québec used the override a second time. On this occasion, it attached the Notwithstanding Clause to a French-only sign law. The Province was concerned with preserving its linguistic heritage. The Parti Québécois (P.Q.) government felt that the banishment of bilingual signs would further this policy goal and reaffirm the eminence of the French language in Québec. A number of individuals felt differently, resulting in the case of *Ford v. Québec*, which was decided by the Supreme Court in 1988.

Under *Ford*, the Notwithstanding Clause provided effective protection against judicial review of the French-only sign legislation. As noted earlier, the *Ford* decision addressed the omnibus use of section 33. In addition, it established an approach to the Notwithstanding Clause that encompassed procedural, but not substantive, review. The Court determined that section 33

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59. *Id.* at 46.
60. The Greschner and Norman article, *supra* note 45, is an example of this heightened awareness. Saskatchewan’s use of § 33 motivated the analysis. The authors explore three possible judicial approaches to § 33. Each approach is related intimately to § 33’s place in a democratic parliamentary system of government.
61. Ch. 56, § 12, 1983 S.Q. (Can.). The sign provision was part of a larger act. Bill 101 was the Charter of The French Language. R.S.Q. ch. C-11, § 58 (1977), *amended by* ch. 56, § 12 1983 S.Q. (Can.). It was introduced by the Parti Québécois separatist government in 1977. This Charter restricted the use of languages other than French in many areas of daily life; such as in firm names, commercial signs, and in the provincial legislature and courts. The Supreme Court had ruled earlier that making French the official language of the province’s legislature and courts was unconstitutional. Attorney General of Que. v. Blaikie, 101 D.L.R.3d 394 (1979) (Can.).
62. 54 D.L.R.4th 577 (1988) (Can.).
63. The provision was vulnerable, however, to § 3 of Québec’s own provincial Charter of Human Rights and Freedoms. R.S.Q. ch. C-12, § 3 (1977) (Can.). Section 3 provides that “[e]very person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.” *Id.* The Court held that “freedom of expression” in both the Québec and federal Charters included “the freedom to express oneself in the language of one’s choice.” *Ford*, 54 D.L.R.4th at 604. It thus found the sign law unconstitutional under Québec law as an infringement on freedom of expression. *Id.* at 619.
merely required the provincial legislature or Federal Parliament invoking it to include "an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the Charter." Thus, section 33 did not require the legislature to establish a link between the Act and the guaranteed right or freedom. The Supreme Court established that the democratic process did not mandate substantive review.

In support of their position, the appellants in Ford advanced a theory of section 33 and its role in a democratic society. They contended that a legislature or Parliament, in invoking section 33, must cite the specific provision of the Charter that it intends to override. In this way, "the nature of the guaranteed right or freedom [would be] . . . sufficiently drawn to the attention of the members of the legislature and of the public so that the relative seriousness of what is proposed may be perceived and reacted to through the democratic process." In other words, "there must be a 'political cost' for overriding a guaranteed right or freedom." While the Court rejected this argument for substantive review, it remains a compelling attempt to render the override consistent with the democratic principle of governmental accountability.

With the Ford case before the Supreme Court, the P.Q. government was vulnerable to political attack on the sign issue. Liberal Party candidate Robert Bourassa's campaign platform included the repeal of the French-only sign law. This volatile issue, and the promise of repeal, helped propel Bourassa to power. Once elected, however, the new Premier chose to await the Ford decision before taking action. He clearly hoped that the Court would relieve him of this political hot potato.

Bourassa's hopes were in vain. The Court found that the sign law violated both the federal Charter and Québec's own charter of rights. While the Notwithstanding Clause protected the law from repeal under the federal constitution, it succumbed to attack under the provincial charter. Forced into action, Bourassa attempted to appease both French and English by introducing Bill 178. The new Bill, protected by section 33, required French-only exterior signs on commercial structures, but permitted bilingual signs on the inside. This solution provoked the wrath of both the French, who felt compromised, and the English, who felt betrayed. More importantly, the negative impacts of

64. *Ford*, 54 D.L.R.4th at 598.
65. Id. at 596.
66. Id.
Bourassa's decision extended to the constitutional negotiations of the then-pending Meech Lake Accord. The Accord was designed to bring Québec back into the constitutional fold.\(^68\) It required unanimous assent from all of the ten provinces, as well as the federal government. When Manitoba Premier Gary Filmon heard that Bourassa had used section 33 to protect the sign law, he withdrew the Accord from discussion in the Manitoba legislature.\(^69\) This created a domino effect of doubt among the other provinces. The hostile climate that ensued made negotiation difficult, and the whole project ended in failure in the summer of 1990. Québec is now once again considering separation from the rest of Canada.\(^70\)

It would be inaccurate to suggest that Québec’s use of section 33, by itself, precipitated its present constitutional crisis. Québec’s difficulties transcend the Charter. Nonetheless, the province’s reliance on the legislative override generated hostility both within and outside of Québec\(^71\) and exacerbated their constitutional dilemma. Québec’s experience indicates that the use of section 33 can be costly.

**D. Overview of Canadian Use of Section 33**

Canadian use of section 33 reveals many of the device’s benefits and flaws. Initial fears that the override would be used to stamp out minority rights have not materialized. Québec’s use of section 33 to promote French rights, and conversely to limit Anglophone rights, had a profound impact on both Québec’s external and internal politics. The other provinces are presumably aware that invocation of the override to limit minority rights will generate severe repercussions. As Saskatchewan’s experiment with section 33 demonstrates, any invocation of the override will likely trigger national scrutiny and hostility. The political liabilities associated with using the override constitute a check against casual or routine legislative use. This is evidenced by the fact that the Federal Parliament has yet to invoke the Notwithstanding Clause.\(^72\)

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70. Québec held a referendum on forming a “sovereignty-association” with Canada in 1976 under the P.Q. government. At that time, the people of Québec voted to remain within the Union.
71. Many provinces, particularly those in the West, saw Québec’s use of § 33 for what it was—a political ploy made at the expense of the English minority in Québec.
72. *See Massey, supra* note 6, at 1272.
The *Ford* decision provided an important starting point toward reconciling the override with democratic government. The Canadian experience suggests that a legislative override may be most consistent with democratic principles when used reactively because it opens up debate. Used preemptively, the override constitutes a check on substantive judicial scrutiny of government legislation—resolving the problem of judicial finality. While such use encourages positive public debate and political dialogue over the constitution, it prevents a direct exchange between the two branches. Reactive use of section 33 has the positive effect of encouraging such communication.

Reactive use of section 33 may create a judicial-legislative exchange in two ways. First, the legislature may invoke section 33 after the court has ruled on an issue. Having opened up the channel of communication, the legislature receives the benefit of the court's opinion on the matter. Second, Canadian government, unlike the U.S. legislative or executive branches, may refer questions to the courts. This reference procedure "avoids confrontation and allows the government to obtain a prospective judicial declaration of the constitutionality of a proposed law or course of action."73 The reference procedure requires dialogue between the two branches. If the court's reaction places the legislation in constitutional doubt, the government may nonetheless use section 33 to pursue its policy goals. The voting public checks misuse or abuse of the legislative override.

Used reactively, section 33 creates a direct judicial-legislative exchange. The benefits of such an exchange are both theoretical and practical. First, reactive use of the override allows both the Court and Parliament an opportunity to fashion separate interpretations of the constitutional provision in question. The Court, anticipating a potential legislative challenge, will strive to present a rigorously argued and compelling constitutional analysis. Thus, the override would stimulate increasingly thoughtful doctrinal arguments from the Court. Second, if Parliament disagreed with the Court's interpretation, it would need to not only formulate its own doctrine, but to respond to the Court's interpretation. This would have the practical effect of allowing the legislature, and hence the electorate, some say in constitutional interpretation, and the theoretical benefit of encouraging finely tuned constitutional decision making. Ideally, the override would produce a negotiation between the Court and the Canadian electorate about the content and scope of certain constitutional rights and freedoms.

The preceding examination of section 33 also highlights, if only by implication, the necessary boundaries of section 33. Democratic accountability

73. Sedler, *supra* note 6, at 1241.
might suffer if those constitutional provisions ensuring political participation were also susceptible to legislative override. If the legislature were free to limit access to the political process, then the democratic nature of the override would be defeated. The legislature invoking it could not pretend to represent the will of the people. Similarly, the electorate’s ability to censor egregious use of the override would be jeopardized. It is clear that both the theory and practice of the override requires open access to the political process.

Section 33 has been successfully used as intended to shield provincial law from charter scrutiny. The Canadian courts have nonetheless left their imprint on section 33 by limiting their review to a procedural inquiry. Section 33 could have been interpreted to require substantive review and/or to allow for prospective application.\(^7\) It is both ironic and troubling that a provision intended to limit judicial review is itself at the mercy of the Supreme Court’s interpretational choices.

The Canadian override is not perfect. Among its benefits, however, are the potential for increasingly rigorous and inclusive interpretations of constitutional provisions. These attributes render it an attractive solution to the theoretical impasse of the judicial finality debate in the United States.

III. SECTION 33: ADAPTATION AND ACTION

The Canadian legislative override provides a unique model for the United States to apply in resolving its judicial finality debate. Some modifications are necessary, not only to shape the override to the American political landscape, but also to offer a palatable solution to judicial review commentators. This proposal will not satisfy everyone. Nonetheless, perhaps those weary of the interminable debate over the legitimacy and scope of judicial finality will rejoice in this first tentative step toward resolution and action.\(^7\)\(^5\)

A. Application of Override in the American Context

Which levels of American government should have access to a legislative override? Canadian governments at both the provincial and the federal level can invoke section 33. Canada, however, has only ten provinces while the United States has fifty states. This difference alone indicates that, in the interests of efficiency, only Congress should possess the override power.

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\(^7\) See Greschner & Norman, supra note 45.

\(^7\) I recognize the almost insurmountable political obstacles that stand in the way of an American constitutional amendment resembling § 33. This proposal has value, nonetheless, for what it suggests—that a practical resolution to the judicial review debate is necessary and possible.
Congress, as representative of all the American people, is best suited to negotiate with the Supreme Court over constitutional interpretations. If the states were added to the negotiating process, the din of voices would likely drown out any profitable dialogue. In addition, while lower courts engage in judicial review, the concern of this Note, and of most commentators, lies with the reviewing power exercised by the U.S. Supreme Court.

A legislative override would require a constitutional amendment. The form of the override would have to be considered carefully. In order to create a true exchange between Congress and the Supreme Court, neither check can become rote; that is, frivolous use of the override and irresponsible or unprincipled use of judicial review must not be encouraged. To deter abuse or matter-of-fact applications, an American override should require more than a mere majority for invocation. The Constitution’s amending formula is attractive in this regard. Requiring a two-thirds vote of Congress to invoke a constitutionally created legislative override would necessitate a solid consensus on the subject of the override and deter misuse or abuse of the override.

The demanding two-thirds formula for override would not diminish the significance of judicial review. Although the possibility of a legislative veto may factor into its decision making, this should not curtail the Court’s deliberation since judicial review as advocated by its proponents already requires some consideration of the prevailing political climate. Indeed, liberated from the legitimacy debate, the Court may feel freer to exercise its reviewing power. For example, the override would release the Court from

76. Weiler suggests “that this arrangement [§ 33] would not be unthinkable in the United States... if it were translated into a congressional override of the Supreme Court,” but concedes that “almost all American scholars would have grave qualms about conferring any such power on the state legislatures.” Weiler, supra note 6, at 84.

77. Manfredi suggests just such a change to § 33: “Among the possible structural changes to s.33 might be a requirement that more than a simple legislative majority be necessary to invoke it.” Christopher P. Manfredi, Comment, Fundamental Justice in the Supreme Court of Canada: Decisions Under Section 7 of the Charter of Rights and Freedoms, 1984-1988, 38 AM. J. COMP. L. 653, 682 n.127 (1990).

78. Article V of the Constitution requires a two-thirds vote from both houses of Congress in order to propose a constitutional amendment. The amendment must be ratified by three-fourths of the states for adoption. As explained supra text accompanying note 76, state ratification would neither be necessary nor desirable in the case of a legislative override.

79. See, e.g., Conkle, supra note 36, at 629-630. Conkle proposes that, in determining developing moral patterns, the Supreme Court should “examine factors such as constitutional and statutory enactments (and failures to enact), societal customs and practices, and public opinion.” Id. at 630.

80. Some Canadian scholars argue that § 33 “not only removes any lingering doubts about the legitimacy of judicial review, it also promotes full enforcement of rights and freedoms by the courts.” Greschner & Norman, supra note 45, at 181. Thus, the “courts can go about their... business in an active way, knowing that a democratically-elected legislature has the option of overcoming their decisions.” Id.
an overly cautious activism and, better yet, from the need to deny the activist implications of its decisions. It would also increase the chance for a rich and provocative dialogue with Congress.\textsuperscript{81}

In addition, the two-thirds requirement would protect the interests of minority groups in a representative majoritarian democracy. Proponents of judicial activism view the Supreme Court as a guardian of minority interests. The two-thirds consensus in Congress (difficult to obtain in the best of circumstances) required for override would not unduly threaten those minority interests. A minority group in Congress could foil the efforts of the majority to enact legislation under the protective umbrella of the override.

The Canadian experience indicates that the point at which the override is used in the political process affects the quality of exchange between the legislature and the courts. "Prospective application of the override power,\textsuperscript{82} which shields a law from judicial interpretation, eliminates the dialogue between court and legislature. For example, while Qu\'ebec's 1982 omnibus use of section 33 was primarily a political ploy,\textsuperscript{83} it nonetheless preempted a beneficial dialogue between legislature and court. Prospective use alerted the public that its rights were in jeopardy, but the judiciary did not have an opportunity to offer its understanding of the constitutional scope of the legislation in question.

The Canadian legislative override could be modified to require such a dialogue, limiting its invocation to overturning judicial decisions.\textsuperscript{84} Congress would then be in a position to benefit from the Court's constitutional interpretation. In addition, it would give the public an opportunity to register its voice in the debate by contacting their representatives in Congress. This would give citizens direct input into constitutional adjudication. Through either communication with their representatives in Congress, or by voting their approval or displeasure with Congress's interpretation, an override would place substantive constitutional choices in the people's hands. As one commentator has noted, "when citizens are deprived of control over their own lives, public values and civic energy are corroded."\textsuperscript{85} A legislative override

\textsuperscript{81} As one commentator notes, "beyond whatever legal obligations are incumbent upon the courts to decide cases before them, there is an almost intuitive notion in us that the Judiciary has something to contribute to the healthy governance of the nation, and that 'judicial self-restraint,' rigorously applied, seriously minimizes the possibility of that contribution." John Agresto, \textit{The Limits of Judicial Supremacy: A Proposal for "Checked Activism,"} 14 GA. L. REV. 471, 476 (1980).
\textsuperscript{82} Greschner & Norman, supra note 45, at 187.
\textsuperscript{83} See supra text accompanying note 45.
\textsuperscript{84} At least one Canadian source has suggested that § 33 be modified in this way. Greschner & Norman, supra note 45, at 187.
\textsuperscript{85} \textit{Monahan}, supra note 1, at 138.
would give constitutional control back to the people and allow them to reclaim a place in constitutional deliberations.

**B. Scope of an American Override**

The benefits of a legislative override are clear: increased congressional participation in constitutional adjudication, increased public dialogue and citizens' input into the shaping of their Constitution, and a new legitimacy for judicial review derived from the knowledge that Congress and the people pose a greater check on errant Court decisions. More difficult is the question of the scope of a legislative override. This question has two parts: first, to which Supreme Court decisions would the override apply; and, second, which constitutional provisions would be subject to the override provision?

1. **Supreme Court Decisions to Which Override Would Apply**

This Note suggests that the override should be limited to congressional use. Such a limitation would encourage Congress to assume an active role in constitutional dialogue and would provide for a debate between two powerful branches of the federal government, the Congress and the Supreme Court. The override should apply, however, to Supreme Court invalidations, as contrary to the Constitution, of both state and federal laws. The override strives to create a dialogue between Court and Congress. The controversy that arises from Supreme Court decisions invalidating state laws concerning abortion, anti-sodomy, and affirmative action requires a negotiation over the meaning of the applicable constitutional provisions. The override would provide the most benefit where malleable constitutional provisions are at issue.

A legislative override should also be limited in scope to those Supreme Court decisions in which constitutional issues have been decided on the merits. Since the primary purpose of the override is to establish a dialogue between the Congress and the Court, the override should only be available when a real dialogue is possible. Thus, written opinions and summary affirmances of lower court decisions, as decisions on the merits, would be cause for invoking the override. Conversely, the denial of certiorari, by which

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86. See supra note 76 and accompanying text.
87. Cynics may suggest that the Supreme Court will then curtail use of the override by refusing to grant certiorari to cases involving volatile constitutional questions. While this possibility must be acknowledged, I would counter that Supreme Court Justices, like most of us, prefer to be heard on an important issue.
the Court essentially declines to deal with the merits of the case, would not be grounds for invoking the override. In addition, the override should be applicable only to the holding of the case. Congress's primary concern would be with the invalidation of a law under the Supreme Court's constitutional analysis, and the use of the override to protect a subsequently re-enacted law from the same treatment. The Court's analysis would nonetheless be important to the extent that it formed a persuasive argument for its position. Congress, to justify its invocation of the override, would then have to recognize and refute the Court's argument to the satisfaction of the electorate.

2. Constitutional Provisions to Which Override Would Apply

The legislative override is best applied to those constitutional provisions that have proven troublesome to define. Such provisions encourage creative adjudication and have generated the Supreme Court's most imaginative efforts. Moreover, these provisions are susceptible to changing meanings as society itself changes and evolves. The constitutional dialogue created by an override would be most fruitful when society and the Supreme Court diverge in their interpretations.

Application of the legislative override to substantive provisions of the Constitution will not unduly violate the vision of proponents of an unchecked judicial review because it will not curtail the Court's review. Indeed, it will free the Court to use its reviewing power with even more vigor than in the past. At the same time, it invites a rich and continuing discourse between Congress, the Court, and the American people over the meaning of these provisions. The Canadian override applies to rights and freedoms that, in many instances, mirror the American Bill of Rights. While Canadian use of the override has not yet explored these rights in a judicial-legislative dialogue, the override has expanded the debate into the public forum. An American override allowing a legislative check on substantive Bill of Rights provisions, as well as the Fourteenth Amendment, could provoke a similar discussion in the United States.

89. See supra notes 79-80 and accompanying text.
90. These include freedom of religion; freedom of speech; freedom of association; the right to life, liberty, and security of the person; freedom against unreasonable search or seizure; the right to a speedy trial; and the right not to be subjected to cruel and unusual punishment.
91. See supra text accompanying note 71.
92. The Takings Clause of the Fifth Amendment would be subject to legislative check—an outcome that may cause conservative judicial activists like Richard Epstein some concern. See Epstein, supra
The Canadian override does not apply to sections 3, 4, and 5 of the Charter. Those sections guarantee "democratic rights," ensuring the government's accountability to the electorate through required elections and annual sittings. Section 33 thus satisfies, in part, those proponents who would limit judicial review to "representation-reinforcing" rights. There is little reason to disturb this aspect of the Canadian override model. In the American context, this would concern certain provisions of the original Constitution, and the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments. As Ely notes, "our elected representatives, . . . have an obvious vested interest in the status quo," and therefore judicial finality in this area may be desirable.

Ely includes freedom of speech and equal protection in his list of process rights. By contrast, this proposal embraces only those constitutional provisions that directly provide for the right to vote. Substantive rights such as freedom of expression and equal protection are too nebulous to limit the debate to one branch of government. Rather, it is precisely these types of vague constitutional provisions that would benefit from invocation of the override and the ensuing dialogue.

Canada's section 33 is itself subject to judicial review. While the Supreme Court of Canada has limited itself to procedural review, the line between procedural and substantive review is a fine one. Accordingly, judicial review of an American override should be subject to legislative check. There is every reason to hope that a clear and concisely drafted provision would allow little room for judicial interpretation, and possible distortion, of the purpose and procedure of the override. The entire experiment, however, would be jeopardized were the Court to misconstrue the provision. A legislative check on the override itself would preclude such a disaster.

C. Use of an American Override

The preceding paragraphs have proposed the adoption of an American legislative override modeled upon Canada's section 33, but with important

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note 31. While it may provide little comfort to such conservative theorists, at the very least the stringent two-thirds requirement for invocation of the override would curtail rash legislative action.

93. Ely, supra note 9, at 179.
94. These provisions include Article I, Section 2, Clauses 1, 3, and 4; Article I, Section 3, Clauses 1, 2, 3, and 4; Article I, Section 5, Clauses 1, 3, and 4; and Article II, Sections 1 and 4.
95. Ely, supra note 9, at 117.
96. A legislative override with respect to the Court's interpretation of the override may result in a ping-pong effect as both the Court and the Congress struggle to leave their imprint on the provision. This is not an entirely undesirable effect. The whole point of the override is to encourage dialogue between these two institutions. Both branches should be involved in shaping the provision into a workable form.
differences. First, the override would be retrospective in initial application. It could only initially be triggered in reaction to a Supreme Court decision. Second, Congress would have exclusive use of the override. Third, use of the override would be limited to those substantive constitutional provisions that have stirred the most debate in interpretation and application. Fourth, the override would not apply to those “process” rights that safeguard citizen participation in the democratic electoral system. Finally, the override itself would be subject to legislative review in order to ensure that the Court does not attempt to pre-empt the override’s usefulness by narrowly restricting its applicability. These are the general contours of an American legislative override.

Application of an American override may be illustrated in the context of the following hypothetical. Assume that state X enacts a law, law A, that restricts the purchase and possession of AK-47s. This is not a far-fetched hypothetical: debate over the wisdom of allowing citizens to possess combat weapons is current and volatile. Assume further that the National Rifle Association, recognizing a threat to its understanding of the Second Amendment, decides to challenge the constitutionality of law A. It initiates suit against the government of state X, claiming that law A unconstitutionally infringes the Second Amendment right “to keep and bear arms.” The case winds its way through the state court system, and is eventually appealed to the U.S. Supreme Court. The Court grants certiorari to resolve the constitutionality of law A.

In deciding whether law A violates the Second Amendment, the Supreme Court is faced with the task of interpreting the scope of the provision “to keep and bear arms.” Precedent permitting (or maybe not, if it decides to reconsider prior doctrine), the Court may interpret this provision in any one of a number of ways. It could decide, for example, that the Second Amendment protects the right of any American citizen to keep and bear arms of any type at any time. Conversely, it could decide that the right to keep and bear arms falls short of such an absolute right. In the latter case, the Court could interpret the Second Amendment as drawing a line at some point, based on any number of distinctions (e.g., type of weapon, age of owner, intended use of weapon). In either case, such a decision would involve the interpretation of a substantive and nebulous provision of the Bill of Rights, and hence would be subject to legislative review using an American override.

Let us assume that the Court, in the hypothetical case of National Rifle Association v. State X, decides that the Second Amendment unconditionally protects the rights of citizens to keep and bear arms of any type at any time, and it strikes down law A as unconstitutional. The Court would justify its holding in a written opinion outlining its doctrinal reasoning, and rebutting any arguments to the contrary. The opinion would carefully support its result.
because of the potential for legislative review. The Court would, in effect, advocate its interpretation of the Second Amendment to the people of the United States.

Congress could respond in one of two ways. It could either let the ruling stand, or it could attempt to override the Court's interpretation of the Second Amendment. Its chosen path would depend in large part upon the concerns of the individual members of Congress, derived from their view of the Constitution, and their constituents' views of the Constitution.

Should Congress, via its Judiciary Committee, choose to review the Court's interpretation of the Second Amendment, it would likely hold public hearings in which organized groups and individual citizens could make constitutional arguments for or against the Supreme Court's vision of the Second Amendment. In addition, citizens could articulate their own interpretation of this provision. After canvassing the national feeling on this issue, the House and Senate could then hold separate hearings and focus the constitutional debate to determine whether review of the Court's interpretation is desirable, if the override should be used, and how it should be used.

The Judiciary Committee could propose that Congress challenge the Court's interpretation. In doing so, the Committee would present its findings, derived from the public hearings, to Congress as a whole. The Committee would also suggest the form that this challenge should take. Any use of the override would have to be sensitive to states' rights. The override should not be used to create a national body of law. Rather, its purpose should be to force Congress and the American people to face the many diverse and opposing interpretations of their Constitution, and to forge a common meaning out of the Constitution's malleable language. The override's purpose is to allow the American people a hands-on opportunity for constitutional decision making.

Bearing in mind the purposes and potential pitfalls of the override, the Judiciary Committee could suggest legislation as simple as the following:

The language of the Second Amendment of the Constitution of the United States of America, specifically the phrase "to keep and bear arms," does not encompass the right of individual citizens to bear combat weapons, unless those citizens are members of a branch of the United States Armed Services and have been authorized by such branch to possess and use those weapons. This legislation shall be upheld notwithstanding the Supreme Court's interpretation of the Second Amendment to the contrary in the case of National Rifle Association v. State X.

A vote would then be taken in the House and Senate. Congress could decide by a two-thirds vote to enact this legislation under the guise of the American legislative override. Conversely, the legislation could fail to pass the stringent two-thirds requirement. In either case, public debate over the involved issues,
gun control and the meaning of the Second Amendment, is not wasted. It is, however, a demanding enough process both in regard to time and support for passage, to protect against haphazard use of the override and majority passion.

As a means of placing a check on judicial interpretations, this override process is more desirable than the amending process for two reasons. First, the Constitution's text is something to preserve. Frequent amendment of the Constitution could impair its legitimacy. Second, proposed amendments to the Constitution require state ratification, while the override does not. Under both processes, the people are being asked to interpret their Federal Constitution. Consequently, eliminating state ratification for invoking the override, as both unnecessary and unwieldy, would focus the debate on the national interest and allow Congress a realistic chance at engaging in a constitutional dialogue with the Court. The option for congressional invocation of the override would sharpen the constitutional dialogue, both in Court and Congress.

The above hypothetical use of the override illustrates some of its benefits. First, Congress, as possessor of the override power, would be urged by its constituents to consider the Court's holding. These same constituents would harness their own constitutional arguments and present them to Congress. Next, Congress would engage in a constitutional dialogue of its own and decide the issue at the national level. This process would take time, but this is not a negative. Interpretation of the Constitution should require careful thought and debate. This is precisely the type of dialogue that the override is designed to inspire.

In both form and content, the Canadian override provision must be modified to the American Constitution and system of government. This is not, however, an insurmountable task. The United States has the enviable position of being able to learn from another country's mistakes. Particularly with respect to the prospective use of section 33 and its susceptibility to judicial review, the American override can be drafted to avoid Canadian pitfalls. Careful drafting should also serve to placate the various factions within the constitutional finality debate who have been unwilling to move beyond their deadlock.

**CONCLUSION**

This Note proposes a legislative override to resolve the problem of judicial finality. "Legislative review of Judicial review" is perhaps the most apt description of this device. Its significance, however, goes far beyond resolving the immediate theoretical impasse. This proposal represents a renewed vote

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for democracy—“a basic trust in the political process itself.”98 Given constitutional responsibility, the American people would assume their task with enthusiasm and compassion. Congress, which in modern times has often reneged on its duty to reflect and lead the moral evolution of American society, would be encouraged by an override to put its own stamp on constitutional debate.

A legislative check does not guarantee that a Korematsu99 could never happen again; a “choice for democracy means that the community has a right to be wrong.”100 But then again, even the most avid proponents of judicial finality cannot claim that the Court is foolproof. An override, as proposed, does guarantee a thorough and ongoing debate about the nature and place of constitutional rights in American society. Canadians have been shaped by the American presence and, as one commentator has sagaciously noted, “it would be a mistake to conclude that we have nothing to learn in return.”101

98. MONAHAN, supra note 1, at 119.
100. MONAHAN, supra note 1, at 87.
101. Canadian Abortion Decision, supra note 6, at 317.