The author sets out the judicial role that is appropriate in the analysis of rights claims under the Canadian Charter of Rights and Freedoms. This judicial role is appropriate, she argues, because it fulfills the specific remedial purposes of the Charter, offers the best reading of the Charter's text against the background of its drafting history, and reflects the particular model of rights-protection that the Charter was designed to incorporate, i.e., the model embedded in post-Second World War constitutions and international rights-protecting instruments. While the Supreme Court of Canada initially adopted this judicial role (by applying purposive interpretation of the rights guarantees and only principled and normative application of the limitation clause), some judges later departed from it, preferring a more deferential approach for rights claims embedded in a socio-economic context. The author argues that this deferential approach is inappropriate for the Charter for a number of reasons. As a matter of constitutional interpretation, it lacks any foundation in the Charter's political history, text or chosen model of rights-protection. As a matter of constitutional history and theory, it imports as generic an outdated, misconceived, and parochial American constitutional paradigm.

L'auteur donne les grandes lignes du rôle judiciaire qui convient à l'analyse des revendications de droits en vertu de la Charte canadienne des droits et libertés. Elle estime que ce rôle judiciaire est indiqué parce qu'il répond au besoin de recours spécifique de la Charte, qu'il constitue la meilleure lecture du texte de la Charte par rapport au contexte de sa préparation et qu'il traduit un modèle particulier de protection des droits que la Charte, de par sa conception, doit incorporer, c'est-à-dire le modèle ancré dans les constitutions et les instruments internationaux de protection des droits de l'après-guerre. Bien que la Cour suprême du Canada ait d'abord adopté ce modèle judiciaire (en appliquant une interprétation fonctionnelle aux garanties des droits et en adoptant uniquement une application de principe et normative de la clause limitative), certains juges s'en sont écartés, préférant une démarche plus différencielle pour les revendications de droits ancrés dans le contexte socio-économique. L'auteur estime que cette démarche différencielle ne convient pas à la Charte et ce, pour un nombre de raisons. En tant qu'interprétation constitutionnelle, il lui manque les fondements de l'histoire politique de la Charte, qu'il s'agisse du texte ou du modèle choisi de protection des droits. En tant qu'histoire ou théorie constitutionnelle, elle est importante en tant que paradigme constitutionnel générique du genre paroissien américain, démodé et peu judicieux.
The intention of a *Charter* is to limit the scope of the legislature and Parliament in relation to the fundamental rights of Canadian citizens.\(^1\)

...the very denomination of certain interests as ... rights means that any interference should be kept to a minimum. In this sense proportionality is a natural and necessary adjunct to the recognition of such rights.\(^2\)

I. **INTRODUCTION**

With the adoption of the *Canadian Charter of Rights and Freedoms*,\(^3\) Canada joined the family of nations operating under a post-Second World War regime of rights-protection. This step marked the culmination of decades of discussion about the nature of rights and, as the debate matured, the institutional structure necessary to protect rights effectively in Canada. The challenge was to transform Canada’s federal, parliamentary democracy into a modern, rights-protecting polity. Unlike other states making this transition, Canada did not create a special constitutional court or reconstruct its political institutions. It vested the new judicial review function in the existing courts and, in addition, marked out an innovative constitutional role for the established legislatures. This institutional continuity reflected two factors. First, the adoption of Canada’s *Charter of Rights and Freedoms* occurred without the precipitating events that have pushed other nations to this step, such as revolution, defeat in war, or reconstruction of government at the end of a regime, for example apartheid or communism. Second, the new arrangements were negotiated by those who held power under the old arrangements. Nonetheless, the *Charter* effected a revolutionary transformation of the Canadian polity involving every public institution. The Supreme Court became the subject as well as the major agent of this transformation, mandated to bring the entire legal system into conformity with a complex new structure of rights-protection.

The centrepiece of the new arrangements lies in the *Charter’s* first section:\(^4\)

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1. Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada 1980–81, 38 *Proceedings* (Justice Minister Jean Chrétien) [hereinafter *Proceedings*].
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.

This guarantee-and-limitation clause, despite its distinctive features, brings the Canadian Charter within the pattern of rights-protecting instruments adopted since the Second World War. The prototype for these instruments, the two century old United States Bill of Rights, has no parallel provision. It set down a list of constitutional guarantees primarily as negations of legislative authority, and made no specific provision for judicial review. The modern documents, in contrast, envisage the positive role of the state assuring the rule of law, the essentials of liberal democracy, and the foundations for general welfare in a multicultural, pluralist society. This extended dimension is given effect in part by a wider range of rights and freedoms guaranteed against the legislature and the executive. It is further secured by specification of the exclusive grounds on which the state is permitted to limit the operation of those guarantees. Judicial review is an integral and indispensable part of this model having as its purpose the imposition of the new rights-based values on every exercise of public power.

Constitutional rights embody the bedrock principles of post-Second World War liberal democracy. Experience in the operation of rights-protecting instruments has demonstrated that it is these principles, not their crystallization as rights, which must be regarded as absolute. To this end, the constitutional arrangements do not permit the state to abrogate these rights altogether but allow limits on restricted grounds. Limitation differs from abrogation in the way that an exception to a rule differs from the absence of the rule. A limitation attests to the primacy of that which it limits and maintains some conceptual continuity with it, coming into play only upon demonstration of stringent justifying conditions. In contrast, abrogation nullifies that which it abrogates. It is the traditional role of courts to sustain this distinction wherever it arises in our legal system.

Limitation provisions in rights-protecting instruments thus give legal expression to the common body of principles underlying the guarantees and the permitted basis for their limitation. They do not mark a boundary beyond which the exercise of plenary legislative authority reasserts itself, excluding the normative force of these principles. In operation, limitation provisions require demonstration by the state that any measure diminishing the enjoyment of the rights conforms to the principles, encapsulated in the formula for permitted
limitation, that underlie the rights themselves. On this basis, the normative force of the guarantee of the rights continues into the limitation analysis because:

... the ultimate objective of the limitation clauses is not to increase the power of a state or government but to ensure the effective enforcement of the rights and freedoms of its inhabitants.

The express statement of the exclusive grounds of limitation in modern instruments creates the opportunity for a reasoned and coherent judicial elaboration of the terms of limitation consistent with the principles informing the document as a whole. The judges’ responsibility is to interpret and apply these terms, not to defer to the legitimacy of the policy-making function of the representative, accountable legislature or to roam at large among considerations of their own choosing. When a bill of rights is silent as to the permissibility or basis of limitation on rights, it leaves the scope and limitation of rights to judicial development. Proponents of plenary legislative power can allege that the judges, even when asserting the core values of liberal democracy, usurp the political role or impose their own personal values. Lacking a sufficient response to this charge, judges may find themselves strongly tempted to treat the rights guarantees as encroachments on the working of democratic institutions, and to defer. These patterns are evident in many rights-protecting systems from time to time and, some might say, sharply demonstrated by trends under the United States Bill of Rights in the aftermath of the Warren Court’s attempts to bring that instrument into conformity with the postwar model of rights protection.

In its initial judgments under the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada respected the postwar structure of rights protection embedded in its first provision and began to work out the requisite rules of interpretation, legal presumptions, and conceptions of institutional roles. Central to this legal analysis was the Court’s understanding that its responsibility was to secure the rights guarantees as supreme law and to ensure that the limitation function enjoyed normative continuity with the rights. It began to apply tests that derive from the postwar systems of rights protection, most notably those that

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come under the rubric of “legality” and “proportionality.” These tests require the state to justify any encroachment on guaranteed rights as prescribed by law, suitable, necessary and lacking excess. Some members of the Court, however, opposed these developments. They saw in the postwar model an unwarranted expansion of judicial power at the expense of legislatures and the executive, and introduced a more relaxed and deferential mode of Charter review. The Charter was not to fetter the legislature when it worked as mediator, resolving competing claims asserted primarily by groups, often including the claims of vulnerable people, for limited resources in a complex and ultimately unknowable world. Rigorous constitutional scrutiny to preserve traditional ideas of justice was acceptable only in those instances where an individual asserted rights against the state, the paradigm situation being the criminal process. But even in this context, deference often seemed appropriate. This deferential approach, in which rights enjoy no distinctive, protected status, now vies for dominance with the Court’s original, postwar approach.

In this paper, I develop a critique of the deferential approach to judicial review under the Charter. First, it disregards the prolonged, well-informed and remarkably participatory debate that led to the Charter’s adoption. Particularly it disregards its fully and publicly articulated remedial purpose: to withdraw certain interests, denominated as constitutional rights and freedoms, from the give and take of the ordinary political process. Second, it fails to take seriously the written product of that debate. The deferential approach in effect creates a hierarchy of rights lacking any discernible basis in the text and ignores the differentiation between rights that the text does make. It also disregards the carefully chosen terms of the limitation formulation, drafted in publicly televised, parliamentary proceedings. That text was expressly designed to include the technical legal language of the postwar instruments in order to deliver the effective regime of rights-protection desired by Canadians generally and, in particular, sought by those to whom the previous lack of rights-protection mattered most.

Disregard of remedial purposes and text leads to the third failing: insensitivity to the Charter’s reconstruction of institutional roles. The advocates of deference cede the primacy of guaranteed rights and freedoms to ordinary politics on the ground that the representative, accountable legislatures must take responsibility for the political choices required. In effect, the polity reverts to the legislative policy-making role that the Charter was designed to redesign. This response to the standard critiques against judicial review ignores the fact that the distinctive features of the Charter, notably the postwar limitation clause and the made-in-Canada legislative override or notwithstanding clause, restructure
institutional responsibilities. Judicial deference to the legislature may be the conclusion of analysis of a Charter claim. It is not a pre-emptive strike.

The most interesting features of the Charter are the roles cast for the existing Canadian courts, executive and legislatures. These new roles do not merely continue the pre-Charter functions of Canadian legislatures. Nor do they recapitulate the institutional features of older rights-protecting instruments, which attracted the charge of undermining and debilitating the democratic function. The Charter’s institutional structure is designed to respond to that critique. First, the Charter provides a much clearer normative foundation to the rights, including the statement that Canada is to be a “free and democratic society,” as well as interpretive directives on gender equality and the preservation and promotion of multiculturalism. Second, it withdraws those rights from the reach of ordinary politics. Third, the Charter does not merely contract state power or denigrate the political process. It expands and enhances political power by establishing a new form of extraordinary constitutional politics, situated in between court determinations of rights violations and constitutional amendment: the temporary, legislative suppression of named guarantees by ordinary legislative majority. The Charter thus does not precipitate a simplistic confrontation between judicially enforced rights guarantees and legislative supremacy. Fourth, in place of that confrontation the Charter establishes a complex, normative partnership model, in which courts, the executive and legislatures, each working to its institutional strengths, carry interlocking constitutional mandates to sustain and develop the basic elements of a modern, liberal democracy.

The desire to refashion the most basic structure and traditional working of our inherited constitutional arrangements is not unique to Canada. It is part of a postwar global phenomenon that is reworking our received ideas of national and legislative sovereignty. Commenting on developments in public law in England, in the absence of a bill of rights, Sedley J. has described judicial transformation of the organic British constitution in similar terms:

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... we have today both in this country and in those with which it shares aspects of its political and judicial culture a new and still emerging constitutional paradigm, no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable — politically to Parliament, legally to the courts. That the government of the day has no separate sovereignty in this paradigm is both axiomatic and a reminder of the sharpest of all the lessons of eastern Europe: that it is when state is collapsed into party that democracy founders.

This essay argues that the calls for pre-emptive judicial deference to the ordinary political process severs the Charter from its political genesis, its text, its chosen models, its institutional structure, and its early interpretation in fidelity to a fixed constitutional theory that no longer animates the Canadian constitutional order. Part II of the essay outlines the features of the postwar model and notes the congruence of section 1, the Charter's guarantee-and-limitation clause, with those features. Part III examines the development of the limitation formulation in the proceedings of the 1980–81 Joint Committee of Parliament, following the model of postwar rights-protecting instruments, and the subsequent creation of the legislative override or notwithstanding clause.

In Part IV, the paper contrasts the full integration of the postwar model for limitation, in the Court's early interpretation of its role under the Charter, with the deferential counter-revolution. In conclusion, in Part V, I suggest that the Court could best fulfil the values of democracy championed in the revisionist approach by retracing its steps and returning to the Charter's text, remedial purposes and adopted model of rights-protection.

II. THE POSTWAR MODEL

The postwar model of rights-protection, expressly incorporated into Canada's Charter, developed in the aftermath of the Holocaust, as a reaction against a fascist legal system that imposed law without rights. Designed to protect the most basic elements of human freedom and dignity against state encroachment, in the shadow of their utter denial, the postwar rights-protecting instruments,

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7 Supra note 3 at s. 33.

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both national and international, constrain governments to respect equal citizenship in the pluralist and multicultural nation state.9

The central feature of the postwar system is the guarantee of named rights and freedoms against the state, interests deemed essential to equal human dignity in modern society.10 The guarantees take effect as higher law, either as constitutional protections or as international norms to which nation states subscribe. The postwar, rights-protecting instruments do not regard the individual as disembodied or abstracted from human community, nor do they regard the state as intrinsically hostile to human flourishing. These instruments regard the right-holder as a unique individual whose personal identity is embedded in a given or chosen community, including the family, within a democratic and rights-respecting society. This system of rights protection works to maximize the conditions under which human beings flourish by both commanding and restricting the exercise of state power.11

These higher law guarantees, whether national or international, are not absolute. To accommodate the functioning of the modern active state that provides the context in which we live our lives, and to afford the fullest realization of the principles of liberal democracy, the postwar system makes room for permitted limits upon, but not abrogation of, the rights and freedoms.12 These limits on rights stand as exceptions to the most basic and fundamental entitlements enjoyed by members of a liberal democracy. To legitimate such exceptions, the postwar model requires the state to bear a strict burden. It must utilize its deliberative, accountable and representative machinery. It must engage in an exercise of justification, adjudicated by independent judges on a case-by-case basis. Judicial independence means that the government cannot decide in its own cause, as would follow in a system of legislative supremacy. Adjudication means that the government must be prepared to justify, not simply

11 Marcic, supra, note 9 at 61ff.
explain or offer excuses for, any infringement of rights, in a court of law, on the basis of evidence and argument.\textsuperscript{13} Adjudication by an independent judiciary allows for limitation in a way that preserves the normative primacy of the right.

Limitation analysis precipitates two sequenced inquiries.\textsuperscript{14} First, the principle of legality, as a formal matter, requires the state to embody any limitation on the guaranteed rights in general laws, the product of the recognized law-making institutions. In most instances this requirement offers the subject the protection derived from the working of the public, published, representative, accountable legislative process and from the general application of the laws produced. In common law jurisdictions, it also provides the possibility of judge-made rules predicated upon the principled evolution of the common law. Unconstrained executive discretion or undisclosed rulemaking fail to meet the standard. The basic idea emanates from the rule of law: the authority, accessibility, intelligibility and predictability of a system of legal rules as they impact on the individual.\textsuperscript{15}

Second, the principle of legitimacy takes the analysis beyond the more formal aspirations of law creation to include principles of justice.\textsuperscript{16} Rights are not absolute. Encroachments are permitted, but only as justified exceptions, that is as encroachments on the right but not on the underlying value-structure of the rights-protecting polity.\textsuperscript{17} This result follows from the understanding that limits


\textsuperscript{14} E.-I.A. Daes, "Restrictions and Limitations on Human Rights" (1971) 3 René Cassin Amicorum Discipulorumque Liber 79 at 84–85.


\textsuperscript{16} "The criterion which determines the boundaries of human rights is not law (especially written law) but justice." O.M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality" (1976) 17 Harv. Int'l L.J. 503 at 517.

\textsuperscript{17} "...[T]he basic liberties constitute a family, the members of which have to be adjusted to one another to guarantee the central range of these liberties ... [T]he mutual adjustment of the basic liberties is justified on grounds allowed by the priority of these liberties as a family, no one of which is in itself absolute. This kind of adjustment is markedly different from a general balancing of interests which permits considerations of all kinds — political, economic, and social — to restrict these liberties, even
share the same normative foundation as the rights themselves. Limits operate to "provide equivalent protection to the rights and freedoms of others, or for the protection of other legal interests which are essential if man is to continue to enjoy his rights and freedoms." Because they constitute the foundation of the liberal democratic state, the rights and their justified limits do not undermine the legislative prerogative of governments holding a temporary electoral mandate.

Limitation clauses express these features of the postwar model in a variety of ways. Reference may be made to specific, permitted grounds of limitation, such as morality, public order, the general welfare or democracy — the traditional "police powers" of the sovereign state — or to more general or abstract formulations. Some limitation clauses apply to all the guarantees in the instrument; others attach to specific guarantees. The common thread is the stipulation of an exclusive, objective basis for limiting rights. These variations offer different expressions of the basic commitment to a legal system in which laws operate within the "framework of individual rights" — and not the other way around.

Limitations, as normative exceptions to the rights, present questions separate from the scope of the right itself. Inasmuch as they are exceptions, the independent courts deal with each assertion of limitation individually, reading the exclusive grounds of limitation narrowly and restrictively, against the state. To successfully justify limitations on the rights guaranteed, the state carries the burden of demonstrating that the impugned measure forwards the purposes of a society committed to equal human dignity. It is not enough to demonstrate that the impugned measure enjoys the support of the majority or confers the blessings of utility.

regarding their content, when the advantages gained or injuries avoided are thought to be great enough." J. Rawls, Political Liberalism (New York: Columbia University Press, 1993) at 358–59.

18 Marcic, supra note 9 at 67, with reference to both the German Constitution and the Universal Declaration of Human Rights. Kiss, supra note 5 at 290.

19 Jacobs & White, supra note 15 at 301–302.

20 "At the beginning, individual rights were applied only within the framework of law. In our time laws are only applied within the framework of individual rights." Daes, supra note 14 at 84.

21 Kiss, supra note 5 at 290; Jacobs & White, supra note 15 at 302; Marcic, supra note 9 at 65.
The postwar instruments stipulate that the limitation must be “necessary in a democratic society,” the standard that provided the model for the Charter’s requirement that the state demonstrably justify limits on rights “in a free and democratic society.” The key point here is that the reference to “democracy” in this context does not denote the expansiveness of unrestrained majority rule. It has normative, substantive, rather than procedural content, connoting a polity that constrains every exercise of power to the rule of law, to the principles of liberal democracy, and to the idea of equal human dignity. Express provision for limited limitations on rights does not therefore subordinate the guarantee of rights to simple majority rule or to the satisfaction of the most preferences, or the most intense preferences, of the elected members of the legislature or the electorate. Instead, the “democratic society” standard refers back to the principles of rights-protection.

In the international system, “democratic society” clauses have a standard interpretation. As John Humphrey observed, the addition of such a clause to the Universal Declaration of Human Rights reflected the desire to put “some real limits on limitations of the exercise of freedom.” These real limits are understood to incorporate the principles of the Charter of the United Nations, the Universal Declaration of Human Rights, and the Covenants on Human Rights. Under the European Convention on Human Rights, for example, “democracy,” as a ground of limitation, connotes the common heritage of European countries in respect to the rule of law, the values of pluralism, tolerance and broad-mindedness, equality, and liberty. This concept promotes self-fulfilment and the commitment to political freedom and individual rights as a moderating force on the state. Noting that it may appear circular to protect rights in a democracy subject to a standard of democracy, Professor Humphrey describes the “vicious circle” as “more apparent than real.” The product of the

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Marcic, supra note 9 at 70: “the words ‘in a democratic society’ ... introduce a further normative element.”


26 June 1945, Can T.S. 1945 no. 7.

6 I.L.M. 360. Kiss, supra note 5 at 306–7, Strossen, supra note 13 at 850.


Kiss, supra note 5 at 306, Sieghart, supra note 12 at 93.

Humphrey, supra note 24 at 147.

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democratic process is checked in order to realize a substantive understanding of democracy.\textsuperscript{30}

The "necessary" qualification of the democracy standard is clarified by distinguishing it from both a more rigid and a less demanding standard. It does not require the state to prove that its policy is "indispensable" or "absolutely necessary," but it does require something more than merely showing that the measure is "reasonable," "desirable," "ordinary" or "useful."\textsuperscript{31} Language found helpful to convey the requisite standard stipulates the need for "pressing social need" in the circumstances and "justification."\textsuperscript{32} Further elaboration emphasizes the objective quality of the analysis, the burden of justification on the state, the proportionality of the impugned measure to its legitimate objective and its minimal restriction on the right in servicing that objective.\textsuperscript{33} The central point is that the ordinary political process, and the values of tradition, expediency, efficiency and cost containment will not satisfy the test. Nor will a result prevail if some members of society are treated as having less than equal human dignity. It is not permissible to treat some individuals as less worthy by sacrificing their rights in order to benefit others.

The international postwar instruments also employ a margin of appreciation, which broadens the basis for encroachments on rights guarantees. This consideration marks respect for the separate national sovereignties of the participating states as well as their different cultures and traditions, while stipulating development towards the values that inform the rights guarantees.\textsuperscript{34}

\textsuperscript{31} Kiss, supra note 5 at 308; Sieghart, supra note 12 at 93, Jacobs & White, supra note 15 at 307.
\textsuperscript{34} Strossen, supra note 13 at 857, n. 252: "Courts within a single country should not feel it necessary to exercise self-restraint ... since rulings by domestic courts do not entail any threat to national sovereignty."
The doctrine provides flexibility in situations of emergency best appreciated by persons most familiar with and close to the particular circumstances, for questions deeply rooted in the particular national life of a nation state, and for special situations where an issue has prompted a wide range of different national approaches. Its purpose is pragmatic. A uniform, pan-European system of human rights must develop incrementally, upon "the fragile foundations of the consent of the Contracting Parties." Commitment to the guarantees has to be secured without abandoning the principles of narrowly construing limitations or perpetuating the "ideas and conditions prevailing at the time when the [rights-protecting] treaties were drafted."

The postwar model does not simply negate state power. It delineates the institutional mechanisms that transform a system of legislative sovereignty into a system of constitutional supremacy. Once this transformation is effected, the fact that a measure is the duly enacted product of the legislative process satisfies at most only the initial inquiry as to legality. The mere exercise of legislative authority, therefore, only moves the limitation inquiry to the next stage, where the courts engage in substantive examination of constitutional legitimacy. At that point the state must prove its preferred policy to be a justified exception to the guaranteed right, by demonstrating its compatibility with the basic requirements of rights-protection. These requirements encompass both the equal human dignity of all members of society as holders of rights and the wider exigencies of an effective rights-protecting system. Although the inquiry goes beyond questions of procedure, fairness, or jurisdiction, it does not enter into the actual merits of the impugned measure.

The text of section 1 of the Canadian Charter of Rights and Freedoms fully exemplifies these features of the postwar model. The initial prerequisite for valid limitation requires that the state prove "prescription by law." If this stipulation is met, the second, substantive requirement arises: proving that the impugned measure is "reasonable" and "demonstrably justified in a free and democratic society." The exceptional nature of a measure limiting rights is reflected in the stringent requirement of justification, i.e., reasonable limits and demonstrable justification. The forum for justification, as other sections of the Charter make clear, is a court, which adjudicates infringements on a case-by-case basis, invalidating measures that do not conform to the requirements of section 1. The

36 Jacobs & White, supra note 15 at 38.
ultimate standard is that of a “free and democratic society,” a phrase that refers not to the majoritarian institutions of the state, but to the polity as the repository of the entire ensemble of rights and the preconditions for their effective exercise.

The congruence of the limitation formula in section 1 of the *Charter* and the postwar model is not mere coincidence. At the final stage of the drafting of the section, the postwar model was deemed essential to the achievement of the new *Charter*’s remedial purposes — to create an effective and legitimate system for judicial review of rights violations in lieu of legislative supremacy. The limitation formula was recast to conform to the postwar model, replacing a weaker version that would have ceded rights guarantees to majoritarian preferences of any kind. These developments are the subject of the next section of this essay.

III. THE EVOLUTION OF CANADA’S LIMITATION CLAUSE: FROM POLITICS TO LAW

Canada’s *Charter* grafted a constitutional rights-protecting system onto a constitutional framework that was partly unwritten, in the tradition of British constitutionalism, and partly written, to establish the institutional structure of a new parliamentary, federal system of government in 1867. While the *Charter* project had a number of stimuli, the widely perceived inability of the existing legal system to protect the fundamental values of liberal democracy provided significant momentum. The public debate that preceded the adoption of the *Charter* revealed widespread dissatisfaction with a constitution largely silent as to these values. Other parts of the legal system — the common law, statutory rights codes (provincial and federal), administrative law as well as the federal-provincial division of powers — had showed promise from time to time but ultimately proved inadequate. Proposals to add a system of rights protection, to stand supreme over the routine exercise of public authority, precipitated discussions as to the comparative competence of courts and legislatures to serve the desired end with extensive reference to the experience of other countries as well as to Canada’s international obligations.

In the final stages of the debate, the draft text delineating these functions attracted a remarkable degree of attention precipitating what was, in effect, an intensive national seminar on the substantive content and institutional structure of the modern constitutional state. Politicians wary of any reduction in their powers found themselves pitted against individuals and groups intent on securing precisely such restrictions. The question of institutional legitimacy figured so prominently that the final text of the Charter includes a complex array of institutional directives. These directives mark one of the distinctive features of the Charter. They set it apart from older texts such as the United States Bill of Rights, which does not refer to judicial review, as well as from modern rights-protecting instruments, which do formally establish judicial review but set down less institutional detail. Other countries, deliberating later on the same questions in their own national contexts, have considered the Canadian Charter as a distinctive model. Some have followed Canada's example, notably Israel and South Africa, where the combination of novel and traditional elements in the Canadian Charter have found new homes.

Since the Charter created no new institutions, such as a constitutional court or new legislatures, these directives take on particular importance. They indicate that the Charter project, as finally conceived and captured in text, contemplated both the expansion and restriction of the functions of existing institutions. To understand these changes one must keep several facts in mind. The Canadian courts, since 1867, had exercised the authority to strike down laws that transgressed the federal-provincial division of powers, which had the status of higher law. Canada was thus no stranger to judicial review. In addition, the discussions were well informed, not merely on the particular challenges that Canadian society posed for the design of a bill of rights. There were also many references, both approving and disapproving, to the operation of well-established, rights-protecting systems. Moreover, the recent disappointment at the limited reach of the statutory Canadian Bill of Rights, 38 on the one hand, and the overarching directives of the international rights-protecting obligations under the auspices of the United Nations, on the other, provided a framework that brought the discussions into sharp focus. Canada's debate, therefore, stands apart from that which preceded the adoption of the United States Bill of Rights in the late eighteenth century or the formulation of rights-protecting systems in the immediate aftermath of the Second World War. Canadians had the opportunity to address the institutional questions in great detail in the context of the mature, stable, democracy of a modern welfare state. Indeed, it was the understanding of

the full ramifications of the institutional transformation proposed that fueled the strong opposition mounted by eight provincial premiers to the project.\footnote{W.S. Tarnopolsky, \textit{The Canadian Bill of Rights}, 2d ed. (Toronto: McClelland \& Stewart, 1975).}

The decades-long debate produced a fascinating series of proposals as to institutional role, some expansive and others restrictive. These rejected alternatives shed light on the final design. They demonstrate that in following a postwar trend, the \textit{Charter} project did not ignore or dismiss concerns raised as to the legitimacy of judicial review of legislation in a democracy.\footnote{C.R. Epp, \textit{The Rights Revolution} (Chicago: University of Chicago Press, 1998); C.N. Tate \& T. Vallinder, \textit{The Global Expansion of Judicial Power} (New York: New York University Press, 1995).} On the contrary, those involved in the \textit{Charter}'s genesis took that controversy very seriously and responded to it. First, the \textit{Charter} delineates a narrow judicial role that does not go beyond established legal modes of analysis. Second, it imposes restrictions on policy choices according to foundational constitutional values, the same values that legitimate democratic government and federalism. Third, it gives governments the permission to depart from these restrictions upon demonstration in a court of law that the breach has the form of law and is justified according to constitutional principles. Fourth, it creates an override power that permits a legislative majority to suppress selected guarantees expressly, for the term of its electoral mandate, without establishing justification. The procedural requirements imposed are more demanding than mere prescription by law, in respect for the fundamental nature of the guarantees suppressed, but less demanding than the extraordinary degree of political consensus required for permanent constitutional amendment. These features do not usurp the legislative role or debilitate political institutions. Each moves responsibility to the elected branch of government and ties the democratic function to the values and principles that give it legitimacy. At a minimum, the standard critiques against judicial review must be reformulated in light of these features.

The \textit{Charter}'s elaborate institutional structure builds on the core idea that the Constitution, including the rights guarantees, is supreme law. The \textit{Charter} makes explicit many of the institutional implications of this higher law status, clarifying elements that have attracted controversy in other systems of rights protection. Section 52 of the \textit{Constitution Act, 1982} expressly stipulates that laws inconsistent with the Constitution are “of no force or effect.” Other provisions apply the supremacy directive to the legislatures and to the executive, as well as
to the courts, whose task it is to determine the conformity of those laws to the Charter’s guarantees. Section 32 imposes the obligation to comply with the Charter’s guarantees on governments and legislatures. Section 24 provides for judicial review of rights claims, including a grant of wide remedial power. Sections 25 to 29 supply interpretive directives, both preserving pre-Charter entitlements and specifying the supervening values of multiculturalism and gender equality.\footnote{Supra note 3.}

The most important elements of the institutional structure are to be found in two companion clauses: section 1, the guarantee-and-limitation clause, and section 33, the notwithstanding or override clause. To fully appreciate the judicial role, one must understand both the relationship between these two clauses and the considerations that informed the drafting of the limitation formula within section 1, for which we have a rich parliamentary record.

The historical material illuminates the ideas and models that informed the Charter’s distinctive institutional features. First, the limitation formula, following the postwar model’s legality stricture, requires the state to formulate, as law, any exercise of power that limits guaranteed rights. The second is that the remedial aspirations for Canada’s Charter adopt the postwar model of rights-protection, in which the normativity of the guaranteed rights offers only one level of constitutional guarantee. The other level is provided by the strict terms of the limitation formula, which carry the normative content of the guarantees into the strictures for permissible limitation. The third is that the legislative override or notwithstanding clause, which applies only to certain rights, precludes the need for judicial deference, or any margin of appreciation, in applying the limitation formula. For rights not subject to that clause, the Charter, by implication, gives courts the last word unless the constitutional context is transformed or the extraordinary consensus necessary for constitutional amendment is satisfied. For the remaining rights, judges should not defer to the legislature because that body itself has the power, by simple majority, to in effect opt out of the guarantee for the term of its electoral mandate.

The limitation and notwithstanding clauses are the products of a political debate that informs their nature and design. The Charter marks the culmination of contentious federal-provincial negotiations seeking agreement on a constitutional text for inclusion by amendment into Canada’s written constitution. The Charter project reflected Prime Minister Trudeau’s dual commitment to liberal democracy under the rule of law and a national citizenship
based on rights, including minority language rights designed to counter Quebec nationalism.\(^42\) Only New Brunswick and Ontario supported this initiative. Combined in opposition, but not in motivation, were the remaining eight provinces, including Quebec. The so-called “gang of 8” joined forces to resist Trudeau’s Charter, melding a provincial rights agenda, including the Quebec nationalist movement, to the desire to preserve legislative supremacy on the British model.\(^43\) Hoping that a consensus would emerge, Trudeau set in motion a deliberative process in which committees of federal and provincial officials worked toward a “best efforts” draft, pending agreement on the project itself. The eight provincial premiers remained recalcitrant, although opinion polls indicated strong popular support for the Charter across the country, including Quebec.\(^44\)

The drafting process became a natural battleground between the pro-Charter and anti-Charter camps. When objection to the project gained strength, opponents of the Charter secured agreement to remove rights, to diminish the force of their guarantee, and to negate their content through wide limitation clauses and provincial opt-out and/or opt-in clauses. When the political balance shifted to those supporting rights protection, the rights proliferated and


broadened, limitation clauses narrowed and the opt-in and opt-out conditions disappeared.\textsuperscript{45}

One element remained constant however. Every draft of the \textit{Charter} included express limitation formulations, reflecting the fact that the legitimacy of the judicial role remained a strong concern. Sustained provincial opposition to the \textit{Charter} initiative eventually produced a compromise draft that subordinated a range of rights to a single, expansive limitation clause.\textsuperscript{46}

The \textit{Canadian Charter of Rights and Freedoms} guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

This version afforded marginal force to the rights guarantees. It did not even require that limits on rights have the form of law, which would have offered assurance that a measure restricting rights had passed through the legislative process or worked through the principled reasoning of the common law. Its vague language did not indicate any specific degree of “acceptance” beyond the vague word “general.” What would this mean: passage by a legislature? long-standing application? presence in many of Canada’s legal systems? presence in other legal systems? presence in systems that honoured rights? On any reading, this formulation failed to remedy the defects in the existing arrangements. Canadian experience offered numerous examples of the general acceptance of egregious rights infringements in their time and place. Indeed, it was precisely the past acceptance of these now wholly discredited policies — based on ignorance, prejudice, and tradition — that prompted widespread support for an entrenched \textit{Charter}. In the Joint Committee hearings on the \textit{Charter} described below, presenters dubbed this attempt at compromise the “Mack Truck clause,” connoting the expansiveness of permissible limitation on rights with the image of a huge truck that could be driven at will through the \textit{Charter}’s guarantees.\textsuperscript{47}


\textsuperscript{46} Bayefsky, \textit{supra} note 42 at 766.

\textsuperscript{47} \textit{Proceedings, supra} note 1, (12 December 1980) at 22:53. The image was struck by Ms. Monique Charlebois, who appeared before the Committee on behalf of the National Association of Women and the Law, and was picked up by other presenters. The clause was also condemned as a “bathtub section,” enabling politicians to pull the plug on citizens’ rights. \textit{Ibid.}, (9 December 1980) at 22:32.
This draft text reflected the extent to which the governments supporting the *Charter* were willing to compromise in order to achieve wider support. But the opposing eight provinces sought more than a drafting victory; their objective was to defeat the *Charter* project altogether.\textsuperscript{48}

The Conservative Party, the official opposition in the national Parliament, hoping to give time for provincial efforts against the *Charter* project to consolidate, secured the Liberal government’s reluctant agreement to put the *Charter* into a parliamentary committee for public hearings. This move, animated by coldness to the *Charter* project, proved to be the major turning point in its favour. For the first time, the “ordinary Canadians” most affected by the presence or absence of effective rights protection in the Constitution had the opportunity to do more than simply register their strong support for the *Charter* to the pollsters. They had the opportunity to delineate, en masse and in significant detail, the *Charter* they wanted.

This was not the first public forum on the Constitution. The Molgat-MacGuigan Committee, a Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, which reported in 1972 just after the failure of the *Victoria Charter*\textsuperscript{49} proposal, had engaged a very interested public in the issue of constitutional reform, including rights protection.\textsuperscript{50} This and other public airings of the issues had constituted a prolonged national seminar on constitutional reform. The numerous initiatives created momentum for constitutional change as the circle of those involved widened beyond the usual cast of federal and provincial politicians and their bureaucrats.

The Joint Committee of the Senate and House of Commons of 1980–81 created the opportunity for experts, representative groups and public interest associations to voice the strong public support for the *Charter* project that

\textsuperscript{48} The “gang of 8” did support an amending formula for Canada’s constitution but not a *Charter*. For the terms of their amending formula, see Bayefsky, *supra* note 42 at 806. It is interesting to note that Premier René Lévesque, the leader of the separatist party in Quebec, agreed to this formula even though it did not give Quebec a veto over constitutional change as did Trudeau’s version.


\textsuperscript{50} Bayefsky, *supra* note 42 at 224–308. In just over two years the committee held 145 public meetings, 72 of which took place in 47 cities and towns and produced eight thousand pages of transcript. While the public engagement was exceptional at that stage of the constitutional wars, the committee regretted that it had not been able to tap the views of disadvantaged Canadians.
Trudeau’s Liberals had been nurturing through intensive promotion of their “people’s package” of reforms. The nationally televised sessions went on for months, galvanizing further support for a government withstanding the friendly fire of Charter supporters. Local, regional, national and umbrella groups, organized on the common bonds of race, religion, national origin, ethnicity, gender, aboriginal status and disability, voiced their desire for effective rights-protection. Their message was that the Charter should preclude repetition of the many past failings of Canadian legislatures and courts to offer equal concern and respect to all members of Canadian society. Experts as well as public interest associations dedicated to promoting equality and civil liberties submitted detailed critiques of the draft text. They proposed amendments, citing other rights-protecting systems as positive models and past failures to protect rights in the Canadian system as tests for the new Charter to meet.

This process resulted in dramatic changes to the guarantee-and-limitation clause. There was strong consensus among presenters that the “Mack Truck” formula would offer no effective protection of rights. As drafted, it would preserve legislative sovereignty at judicial prerogative. The record of the courts on the basic liberties and equality did not instill any more confidence than that of the legislatures. Revision of the limitation formula thus became a high priority, given that there would be no constitutional court to administer the Charter and no alteration of the existing political institutions. The limitation

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51 Presenters included the Canadian Advisory Council on the Status of Women, the National Action Committee on the Status of Women, the Canadian Association for the Mentally Retarded, The Association of Franco-Manitobans, the Coalition of Provincial Organizations for the Handicapped, the National Association of Japanese Canadians, the Ukrainian Canadian Committee, the Inuit Committee on National Issues, the Native Women’s Association of Canada, the Native Council of Canada, the Canadian Federation of Civil Liberties and Human Rights Associations, the National Association of Women and the Law, the Council of National Ethnocultural Organizations of Canada, the B.C. Civil Liberties Association, the Canadian Association for Prevention of Crime, the Canadian National Council for the Blind, the Nishga Tribal Council, the Nuu-Chah-Nulth Tribal Council, the Indian Association of Alberta, the Vancouver People’s Law School Society, the Union of N.B. Indians, the Anglican Church of Canada, and the Canadian Jewish Congress.

52 The presenters made reference to the widely perceived failures of the legal system to adequately protect liberty, autonomy and equality through the common law, the division of powers between the federal and provincial governments, the “implied bill of rights” (based on the preamble to the British North America Act, 1867, which stated that the Canadian constitution was to be similar in principle to the British Constitution) and the statutory, federal Bill of Rights.

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formula would therefore have to carry the burden of the transformation by providing a clear statement of the mode of institutional protection that the Charter would afford. The stakes were high. Creating an inadequate institutional framework for the new constitutional guarantees would not merely perpetuate the status quo. Given the difficulty of securing constitutional rights guarantees against governments that controlled the amendment process, it might well leave the country without further viable reform options.

Experts in the comparison of human and civil rights systems agreed and offered constructive suggestions. Of particular importance were the contributions of R. Gordon L. Fairweather, Chief Commissioner of the Canadian Human Rights Commission, and Professor Walter Tarnopolsky, a distinguished scholar of human rights appearing as President of the Canadian Civil Liberties Association. Justice Minister Chrétien later acknowledged that he had relied upon these submissions in making the final revisions to the limitation formula in section 1 of the Charter. Both Mr. Fairweather and Mr. Tarnopolsky proposed drafting the limitation formula on the postwar model of rights protection, giving institutional structure and drafting suggestions that reflected the content of the submissions that had preceded them.

Gordon Fairweather opened his submissions to the Joint Committee by situating the process in its postwar agenda. The formulation of Canada’s Charter was not “an isolated act of domestic draftmanship.” It was an exercise originating in Canada’s international undertakings and commitments under the U.N. “Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights that flowed from the Universal Declaration and [that has] now become the International Bill of Rights.”

53 In reference to the provincial opposition to the Charter project, he pointed out that all the provinces had supported Canadian ratification of the Covenants in 1976. Moreover, he noted that the opposing premiers’ allegiance to the British heritage of parliamentary supremacy should be considered in the light of the fact that the United Kingdom had been a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms since 1951.

53 Proceedings, supra note 1 (11 November 1980) at 5:7. Later, in response to a question, Mr. Fairweather expressed the view that the “Mack Truck” limitation formula would put Canada in violation of her international obligations. See ibid., (14 November 1980) at 5:14.
With Canada’s international commitments in mind, he rejected the “Mack Truck” clause as “seriously flawed,” “dangerously broad” and “unacceptable.” In departing from the formula used in modern state constitutions as well as international rights-protecting instruments, the draft suggested a reluctance to depend upon language that had stood the test of adjudication in its service to rights protection. In his view, the compromise limitation clause stood at “the heart of a very regressive document,” which would permit discrimination on the basis of age, racial restrictions on political and economic rights, and gender discrimination. He suggested that the Charter should be as “comprehensive as, and close to the language and spirit of, the International Covenants.” On this basis, he recommended the following text for the guarantee-and-limitation clause:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

Professor Tarnopolsky’s presentation to the Joint Committee on behalf of the Canadian Civil Liberties Association went further and carried exceptional weight. He represented Canada’s leading civil rights association and was, in his own right, an acknowledged expert in international and national systems of rights protection. In addition, he spoke as Canada’s leading expert on the Canadian Bill of Rights of 1960, a statutory instrument so ineffective as to have become the negative benchmark for those seeking effective rights-protection. Since his academic work had meticulously exposed the inadequacies of the statutory Bill of Rights, Professor Tarnopolsky’s declared preference for that

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54 Ibid. at 5:8 and 5A:2.
55 Ibid. at 5:12. Earlier drafts had followed this model more closely. But the political goal of bridging the gap between those who supported and those who opposed the project had moved the wording away.
56 Ibid. at 5:18.
57 Ibid. at 5:12,14–16.
58 Ibid. at 5A:3. This was the second of two proposals he put forward for section 1. It differs from the final version in only two respects: (i) the final version contains the adjective “reasonable” modifying the word “limits,” and the phrase “as can be demonstrably justified” replaces the phrase “as are reasonably justifiable.” His first proposal contained two additional subsections, one precluding limitation on legal and non-discrimination rights and the other guaranteeing Charter rights and freedoms equally to men and women. The gender rights provision later found its way into section 28 of the Charter but the limitation clause was made applicable to all rights and freedoms.
59 Tarnopolsky, supra note 39.

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discredited instrument over the proposed Charter draft was striking. This preference took on added significance when he widened the basis of comparison to include the postwar model:

[The “Mack Truck” limitation formulation] permits Parliament to take away everything that Parliament gives by the rest of the charter ... Limitations clauses have come to be inserted in international instruments and in Commonwealth bills of right by United Kingdom lawyers since 1950 with the signing of the European Convention on Human Rights. However, none of the limitations clauses, in the international arena, nor, of course in Europe, nor in the Commonwealth, has a limitation clause as wide as this one ...

Professor Tarnopolsky went on to describe the main features of the postwar model — the requirements of both legality and legitimacy for permissible limitation on rights. The established pattern was to save laws that infringed rights if both “prescribed by law” and “necessary for the purposes of a free and democratic (and, in our case, plural and democratic) society.” In operation such stipulations shifted the onus to the party supporting the infringement to prove that it had been specified as law and was justified on a standard of necessity.

The “Mack Truck” text preserved parliamentary supremacy rather than instituting an effective measure of rights protection on the postwar model. The phrase “democratic society with a parliamentary system of government” implied parliamentary supremacy and was therefore incompatible with an entrenched bill of rights. The words “generally accepted” shared the same flaw because it was “very difficult to argue that whatever Parliament enacts is not generally acceptable in that society.” How could one argue in a court of law that members of Parliament do not “represent what is generally accepted in

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60 Proceedings, supra note 1 (18 November 1980) at 7:9. Professor Tarnopolsky took the view that the limitation clause, as drafted could be “more dangerous from a civil libertarian point of view” in that there would be less opportunity “to argue [against] the limitations” under the Charter as proposed than under the Canadian Bill of Rights. Proceedings at 7:16.

61 Proceedings, supra note 1 (18 November 1980) at 7:10.

62 Ibid. at 7:16

63 Alan Borovoy, then General Counsel of the Canadian Civil Liberties Association (and now President), was also critical of the “generally accepted” formula. In his opinion: If you are talking about that which is generally accepted in a free and democratic society with a parliamentary form of government, you may well be talking about everything that Parliament or the legislatures have said is acceptable and to the extent that you are doing that, then it renders the entire Charter a verbal illusion. Proceedings, supra note 1, (18 November 1980) 7:26.

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Professor Tarnopolsky was asked whether the word “reasonable” describing “limits” would constrain governments to respect rights. His opinion was that these words, if standing alone, might require objective assessment and some onus on the government to prove the necessity of the limitation, in the postwar model. However, the draft’s further stipulation of “generally accepted” limits undermined this reading.

In effect, the “Mack Truck” formula would impose no limit on the exercise of power. Professor Tarnopolsky illustrated the dangers posed by the absence of such restraint, citing notorious examples of past failures to protect rights in Canada. These were the same examples that many other presenters had noted as test-cases for the effectiveness of a new constitutional bill of rights. The judiciary had upheld the internment of Canadian Japanese during the Second World War, discrimination against aboriginal women under federal legislative authority, and incursions on the freedom of religion and expression of Jehovah’s Witnesses in Quebec in the 1940s and 1950s.

These two submissions, by Professor Tarnopolsky and Mr. Fairweather, clarified what was at stake in the formulation of the limitation formula and resulted in decisive changes to the Charter text. Canada’s international obligations combined with the remedial purposes of the Charter required the postwar model. Professor Tarnopolsky proposed new wording to bring the limitation formula within this model: section 1 should require governments to bear an onus to establish that limits on rights were “prescribed by law and ... necessary for the purposes of a free and democratic ... society” and “demonstrably justifiable ... or demonstrably necessary.”

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64 Ibid. at 7:9.
65 Ibid. at 7:20. For further commentary, see W.S. Tarnopolsky, “A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights” (1982–83) 8–9 Queen’s L.J. 211. In this article, Justice Tarnopolsky notes that the Charter, in contrast to the International Covenant on Civil and Political Rights, does not provide expressly against limitation of the legal rights under normal circumstances or against certain other rights even in times of emergency. But, he notes, the Charter did not preclude arguments to this effect.
67 Supra note 1 (18 November 1980) 7:10.
The final changes to section 1 marked acceptance of these submissions. Justice Minister Chrétien quickly conceded the weaknesses of the “Mack Truck” limitation clause:

... many witnesses and most members of the Committee have expressed concerns about Section 1 of the Charter of Rights and Freedoms. These concerns basically have to do with the argument that the clause as drafted leaves open the possibility that a great number of limits could be placed upon rights and freedoms in the Charter by the actions of Parliament or a legislature.

... I am prepared on behalf of the government to accept an amendment similar to that suggested by Mr. Gordon Fairweather, Chief Commissioner of the Canadian Human Rights Commission and by Professor Walter Tarnopolsky, President of the Canadian Civil Liberties Association. The wording I am proposing is designed to make the limitation clause even more stringent than that recommended by Mr. Fairweather and Professor Tarnopolsky. I am proposing that Section 1 read as follows:

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.

This will ensure that any limit on a right must be **not only** reasonable and prescribed by law, but must also be shown to be demonstrably justified.

Chrétien defended this wording against the allegation that nothing much had changed.\(^{68}\)

I think we have moved quite far; and, in the case of those who were the main proponents of the change, Professor Tarnopolsky and Mr. Fairweather, it is the text which they have more or less suggested, and they have approved it and commended me on it. ...  

*So this limited clause narrows the limits of the courts.* The first one — and you heard the testimony given here, where there was argument to the effect that it was so limiting in scope as to be almost useless, and we would be caught in the same position as we were in the case of the Bill of Rights of Mr. Diefenbaker ...

The intention of a **Charter** is to limit the scope of the legislature and Parliament in relation to the fundamental rights of Canadian citizens.

Asked to comment on the extent of the judicial review power, Mr. Chrétien indicated that it is the role of the courts to interpret the law when citizens raise

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\(^{68}\) *Proceedings, supra* note 1 (15 December 1981) at 38:42 [emphasis added].
rights claims, as a check on what is otherwise the absolute and arbitrary power of legislatures.\textsuperscript{69}

Mr. Chrétien's comments make clear that the final draft of section 1 was designed to bring the \textit{Charter} into the postwar model of rights protection. The \textit{Charter} would secure its guarantees against the ordinary political process by setting down the exclusive ("only") basis on which encroachments on rights were to be justified by the state. This justification burden was to be stringent, so that the enjoyment of fundamental rights would be the norm, and the limitation the exception. In result, the legislatures' prerogatives would be restricted. Canadian society would not only be democratic, but free and democratic. This transformation did not effect the transfer of the political power previously enjoyed by the political arms of the state to the courts. On the contrary, the judicial review function would itself be restricted by the terms of the limitation formula. These features would provide protection for rights unavailable under the statutory \textit{Canadian Bill of Rights}. This unprecedented degree of protection was achieved by incorporating the features of the postwar model of rights-protection, that is, prescription by law, reasonableness and demonstrable justification in a free and democratic society.

Those who guided the final drafting of the \textit{Charter}'s limitation formulation had as their goal the creation of an effective rights-protecting system on the postwar model, one that would elevate the most fundamental interests of members of a postwar democracy above the ordinary workings of elected governments. The pre-\textit{Charter} legal system had failed to offer this protection. Federal-provincial negotiations had produced a draft text for constitutional amendment that augured no better. The desire to provide effective, but not absolute, protection for rights had necessitated going beyond the existing framework. The process had ultimately adapted the language and institutional framework of the postwar model for rights protection to the Canadian context.

The difference between the "Mack Truck" version and the postwar model incorporated into the final text of section 1 is striking. Recall that the limitation provisions in postwar instruments impose the burden on the state in respect to two inquiries, an initial consideration of legality, which, if satisfied, leads to a

\textsuperscript{69} \textit{Proceedings}, \textit{supra} note 1 (1 December 1981) at 49:29 [emphasis added]. Mr. Chrétien's description of the changes as imposing limits on the permissible limits echoes the statement by John Humphrey that the parallel clause in the International Declaration of Human Rights "put some real limits on limitations of the exercise of freedom," \textit{supra} note 24 at 147.
second inquiry into legitimacy. A measure could pass the "Mack Truck" version of limitation but fail both of these tests. It would fail the first test to the extent that it lacked the required form of law or the qualities of accessibility, intelligibility and predictability encompassed in the rule of law. And it would fail the substantive test to the extent that the state demonstrated nothing beyond the fact that members of a legislature, executive or the general public at some time and place had signaled, perhaps by inaction, their acceptance. The remedial objective of the final drafting of the Charter was to preclude the repetition of past rights infringements on this basis. To this end, the final drafting of the Charter's limitation clause incorporated the features of the postwar model to replace the "Mack Truck" version's subordination of rights to "reasonable limits," "generally acceptable" in a parliamentary democracy, that is, the ordinary majoritarian function of elected legislatures. As the drafting history demonstrated, "generally acceptable" limits on rights were the problem, not the solution.

The penultimate and final texts of the limitation formula thus posed starkly contrasting alternatives for Canada's constitutional future. The "Mack Truck" clause offered the continuation of legislative supremacy, with the fundamental interests of Canadians resting on the good judgment and self-restraint of elected politicians and political parties. The alternative materialized in the final formulation for section 1, based on the reasoning and draft text offered by Professor Tarnopolsky and Mr. Fairweather: the adoption of the features of the postwar framework of rights and their legally prescribed, justified limits. The alternatives were clear and the choice made between them was decisive. The judicial role dictated by the final text embodied what experts considered the best framework for effective rights-protection, one which enjoyed widespread public support across the country and formed the basis of Canada's international obligations. The battle for and against the Charter produced a limitation formula that made rights stand prior to all but justified limitation (i) having the form and quality of law and (ii) demonstrated as justified in a rights-protecting polity.

As we shall see, however, victory in the battle for the text proved insufficient to effect the desired transformation. The aspiration was to replace a system in which rights fit into a framework of law with a system in which law functions within the framework of rights-protection. Remarkably, the "Mack Truck" approach, which is an example of the former rather than the latter, has its champions in the Supreme Court of Canada. Before turning to that development,

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70 Daes, supra note 14.
it is necessary to consider the final adjustments to the Charter made in response to the final version of the limitation clause.

The Charter, momentarily removed from the crucible of federal-provincial politics by the public deliberations in the Joint Committee, reverted to negotiation among the first ministers. The politicians who opposed the Charter did not take up their old game of scaling down the rights and expanding the limitation formula. Instead, they left in place the guarantee-and-limitation clause as transformed in the Joint Committee. Perhaps they recognized that the revised text enjoyed profound legitimation by virtue of the unprecedented public participation in drafting its terms, its popular support, and the national television coverage of the Joint Committee proceedings. As the price for acceptance of the Charter as redrafted in the Joint Committee, seven premiers exacted agreement to a fall-back mechanism in respect to the rights they considered most controversial, just in case the courts ventured too far beyond the politicians’ tolerance for rights-protection. The first ministers created the legislative override or “notwithstanding” mechanism and made it applicable to the rights

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71 The work of the Joint Committee transformed more than the guarantee-and-limitation clause. It also strengthened the protection against search and seizure and against discrimination on the basis of mental or physical disability, increased entitlements to minority language education, and strengthened the enforcement clause. See Romanow et al., supra note 43 at 250–57.

72 Quebec, which had mounted the strongest battle against the Charter, found itself isolated. Its partners in the “gang of 8” group had ultimately found a palatable deal, which included the notwithstanding clause as well as their preferred amending formula (without Quebec’s desired opt-out with compensation). This trade-off was totally unacceptable to the Quebec government. For commentary on Quebec’s exclusion, see C. Morin, Lendemains Piegés: du référendum à la “nuit des longs couteaux” (Montréal: Boréal, 1988) and S. Clarkson & C. McCall, Trudeau & Our Times (Toronto: McClelland & Stewart, 1990) at 368ff. Quebec’s opposition to the Charter did not reflect opposition to rights protection, to a formal bill of rights or to the type of institutional arrangements created. Quebec’s Charter of Human Rights and Freedoms (Charte des droits et libertés de la personne), R.S.Q., c. C-12 (originally enacted in 1975 and amended in 1982 after the entrenchment by constitutional amendment of the Canadian Charter of Rights and Freedoms) has features and institutional arrangements similar to the Canadian Charter, although, as a provincial statute, it has different subject matter and application. Its array of protected rights is broader, including, for example, a right to rescue, rights to property, privacy, cultural rights, and economic and social rights. Its limitation clause, section 9.1, applicable to the fundamental freedoms and rights, added in 1982, is similar to section 1 of the Canadian Charter and shares the international human rights instruments as its model. Section 52 enables the National Assembly to expressly state that a later enacted law applies “despite the Charter.”

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they believed should not rest for final determination in the courts: fundamental freedoms, legal rights, and equality rights. This mechanism enabled a legislature, within its legislative jurisdiction, to suppress guarantees it specified for up to five years, the maximum length of electoral office, by explicit enactment. Re-enactment of a lapsed overriding provision was permitted. Left to final judicial determination under the limitation provision, without recourse to the notwithstanding clause, were the democratic rights, the mobility rights, and the language rights. The politicians left these interests to the expertise of the independent judiciary, marking continuity with long established constitutional commitments to parliamentary democracy and federalism.

This new clause offered, in general form, the type of political flexibility that the opposing premiers had inserted in earlier drafts of the Charter as opt-in and opt-out mechanisms for specific rights. The model for these clauses resided in various statutory rights-protecting instruments. They were considered safety valves for exceptional circumstances. And in fact the prototypes had all but never been used.

The “notwithstanding clause” materialized as a response to the Charter text that emerged from the Special Joint Committee proceedings. The new limitation provision made limits on rights the exception, rather than the rule. Without the “notwithstanding clause,” the Charter created three possible outcomes to a successful Charter challenge: (i) the enjoyment of the rights as guaranteed, (ii) legally prescribed limits upon those rights as justified by governments in courts of law according to the postwar model or (iii) constitutional amendment. The notwithstanding clause added a fourth possibility: Parliament or a legislature could re-assert its primacy over specified Charter rights, for the duration of its electoral mandate, for whatever reason, by expressly indicating this desired result in legislation. Judicial affirmation of generally acceptable or merely reasonable limits on rights was not part of the final package.

In the Charter’s early days, Canadians seemed to regard the rights-limits-override arrangements in the Charter as somewhat unseemly — a compromise of justice, rather than a just compromise. But the notwithstanding clause is better understood as a political innovation that in its own way responds to the countermajoritarian difficulty posed by judicial review of rights guarantees in a

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democracy. The legislature’s capacity to have the last word, by invoking its political authority to expressly suppress rights for the duration of its mandate, shelters the courts from the political considerations or repercussions of the issue at hand. The courts need only attend to specification by law, objective reasonableness, and justification on a standard of necessity in a free and democratic society. If the government were to reject a ruling informed by such considerations, the legislature in question would be free to override the court’s determination. But it would do so at the political cost of expressly legislating contrary to the Charter’s guarantees. In addition, the political cost secures only a temporary reprieve because of the sunset provision, which re-instates the Charter’s primacy after five years.74

What is the place of ordinary majoritarian politics in this framework? In terms of judicial determination of justified limitation, the product of the legislative process per se might not even meet the “prescribed by law” standard. A measure that would meet the promulgation standard, for example, would not necessarily meet the standards of intelligibility and prediction as to impact on the subject, key components of the rule of law strictures in the postwar model. Moreover, something other than the often chaotic and unfocused political process is necessary to satisfy the justification standard. The legislative override also stands apart from the ordinary political process. The suppression of Charter guarantees made possible under this provision requires an enactment that invokes the override power and specifies the Charter rights superceded. There can be considerable political cost attached to these features, especially when one adds the need to contend with the political implications of the sunset provision. Thus the Charter’s limitation and override provisions put the guaranteed rights and freedoms beyond the operation of ordinary politics and onto the constitutional stage. This is the real force of the guarantee.

The notwithstanding clause, as outrageous as it may appear, has some merit. It legitimates the new judicial role under the Charter. To infringe guaranteed rights, governments must either establish sufficient justification in terms set down by the section 1 limitation formula or satisfy the strictures, and pay the political costs, set down in section 33. Courts need not, indeed they must not, subordinate rights to ordinary politics because that would undermine the roles that the Charter stipulates for both courts and legislatures. Institutional propriety

74 The override mechanism does not require a court ruling as a precondition. It appears that a convention is developing to wait for a definitive ruling by the Supreme Court of Canada before serious consideration of using the override. This dynamic may have an effect on the Supreme Court’s deliberation.

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is preserved: courts adjudicate on the basis of legal reasoning, precedent and coherence, and legislatures legislate according to their representative and deliberative functions.

The Charter thus creates a new system of interlocking institutional roles under the Constitution, combining the postwar model of rights protection in the courts with a temporary, renewable legislative suppression of some guarantees. Both institutions have full roles as constitutional actors. Each role reflects institutional strengths and traditional functions. There is no need for one institution to encroach upon, anticipate, forestall or defer to the other institution’s authority, interests or preferences. By so affirming the separation of powers, the Charter’s institutional structure should dispel, and must at least transform, concerns as to the countermajoritarian quality of the judicial protection of rights in Canada.

IV. THE CHARTER IN THE SUPREME COURT OF CANADA: RIGHTS TRAPPED IN THE BALANCE

A. Early interpretation: the postwar model

The Charter’s legal purpose was to insulate certain extraordinarily important interests from the ordinary political process. History, theory and comparative study combined to demonstrate that these interests stood at risk if protected only by the self-restraint of legislatures and their executive officers. The Charter redesigned the institutional roles in respect to these interests by giving them special status as guaranteed rights and freedoms under the supreme law of Canada. It fell to the courts of law, as guardians of the Constitution, to extrapolate the full implications of the transformation. The Charter text left no doubt as to the judicial review function: the rights required the application of legal expertise and the exercise of political independence for their fulfilment. Judges, at all levels of the judicial system, would adjudicate claims of infringement of the guarantees in cases that came forward in no particular order as to importance, subject matter or institutional question. The challenge was to decide these cases, one by one, and, at the same time, to integrate the new arrangements into the Constitution so as to establish a revitalized, coherent legal order.

75 Weinrib, supra note 73.
The early Charter judgments demonstrate that the Supreme Court of Canada approached this challenge methodically. It recognized that its role was to act as the guardian for guaranteed rights and freedoms that constituted fundamental features of a free and democratic society. Interpretation was therefore to be purposive, to realize the purposes of the instrument as a whole as well as each guarantee. Rights were the norm and limitations the exception. It followed that justification for any encroachment on the rights stood as an isolated issue distinct from the scope of the right and the fact of its breach. For the same reason, any encroachment upon the guarantees demanded justification by the state on a stringent basis. Justification was not the mere rehearsal of the political calculus, on the merits; nor was it review for jurisdiction, or reasonableness, or fairness as in administrative law. The distinctiveness of justification rested on the idea of continuity between the limitation formula and the specification of the guaranteed rights. Justified limits were thus merely limits, not negations, of the rights and freedoms. The ultimate standard for justifying limits on rights was located in the final words of section 1, "free and democratic society" — words read as referring to a rights-protecting polity, not simply to majoritarian institutions, process or product.

This approach emerged incrementally, as members of the Court worked out the many implications of the Charter text, the institutional structure it put in place, and the arrangements required for adjudication of rights claims. A number of early cases gave strong indication that the Court read the limitation clause restrictively and normatively, in the postwar mode, even before Oakes, the case that offered the fullest articulation of the legal framework for limitation on rights.

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77 For a full analysis of this initial rights-forwarding approach to limitation on rights, see L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L. R. 469.

The Court’s treatment of the “prescribed by law” stipulation illustrated this pattern. These words had been added to section 1 at the behest of Gordon Fairweather and Professor Tamopolsky during the Joint Committee hearings, described earlier, to bring the limitation analysis in line with the postwar model. The Court, drawing on the application of the parallel stipulation in the European Convention, determined that this proviso operated as a precondition to more substantive claims. This precondition precluded substantive state justification if the impugned measure lacked basic legal foundation. It was unacceptable for courts of law to consider the state’s claim of substantive legitimacy of an encroachment on a right or freedom that lacked the legal form that only the state’s law-making process could provide. Examples of prescription by law included statute or regulation, authority arising by necessary implication from statute or regulation, or the application of a common law rule. Lacking the political legitimacy emanating from such form, the state’s reasons for encroachment were of no constitutional relevance.\(^7\) The proviso supported the project of rights protection by, in effect, offering an implicit guarantee that the policy-making arm of the state would comply with the rule of law. In the Charter era, government policy affecting rights and freedoms would be the work of the accountable and representative legislative process, including more fully articulated executive action, or the product of the incremental growth and application of common law principles. The “free and democratic society” that the Charter promised was thus not freedom in tension with or at the expense of democracy. It was freedom increased by virtue of the added accountability, under the rule of law, of those who exercise power in the name of the state.

The Court’s initial treatment of substantive justification also fell into these patterns. In *Quebec v. Quebec Association of Protestant School Boards*, for example, the Court distinguished justified limits on rights from measures that denied the guaranteed rights by directly conflicting with them.\(^8\) Such denials would fail the test of section 1 justification in a court of law. They were not beyond the reach of political action altogether, just beyond the reach of ordinary political action. Temporary denial was available (with the possibility of renewal) by invoking the legislative override power under section 33 and permanent denial was available by constitutional amendment.\(^9\) Accordingly, the state could not justify an ordinary law that stood diametrically opposed to a Charter guarantee. In *Singh*, the members of the Court who decided the case on the basis of the Charter, rejected arguments appealing to reasonableness, expense and

administrative convenience, suggesting that only a demonstration of prohibitive cost might supersede Charter guarantees. To do otherwise would render the Charter's guarantees "illusory." Similarly, in Big M, the Court unanimously rejected arguments invoking administrative convenience, expediency and tradition as sufficient justification for limiting rights. Such considerations were the basis on which statutory provisions or executive action breached rights; they could not also constitute the basis for justifying such breaches. And in the Motor Vehicle Reference, the Court entertained the possibility that the state might justify limitation on "the principles of fundamental justice," but only in emergency circumstances.

The thread tying these cases together was the understanding that the judicial duty under the Charter was to subordinate ordinary political considerations to Charter guarantees. When it elevated fundamental rights to constitutional status, the Charter restricted political priorities and imposed costs on the state for deviation. These results were the point of the exercise. The distinctions made in these cases reflect similar distinctions as between the characterization of permitted and non-permitted limitation in the postwar systems of rights-protection. The patterns are similar because the aspiration is the same: to put the denominated rights and freedoms beyond the reach of the ordinary political process and its routine calculations of majoritarian preferences, tradition, cost and benefit.

In Oakes, the Supreme Court presented the full conceptual and doctrinal framework for the justification of limits on Charter rights. Because limits constituted exceptions to Charter guarantees, the state would bear the burden of justification. The challenge was to narrow these exceptions to preclude full negations of the guarantees. The dual function of section 1, which combines both the guarantee and the exclusive basis for limitation of all Charter rights, provided the key concept. It signified the unity of values that informed both the rights and their permissible limitation. This unity of values mandated that the courts inquire into limits on rights "in light of a commitment to uphold the rights

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83 Ibid. at 218–19. Alan Borovoy had used the same term to criticize the "Mack Truck" clause, supra note 63.
84 Big M, supra note 76.
85 Ibid. at 352.
and freedoms set out in the other sections of the Charter.” The final words, “in a free and democratic society,” provided the conceptual underpinning:

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....

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Here we have the clearest statement by the Court of the Charter’s purpose and effect as well as the postwar structure of rights-protection. Where the principles “essential” to both freedom and democracy are implicated, ordinary political preferences are held in check. Rights and their justified limits enjoy higher constitutional status than these ordinary preferences. The limitation clause is the vehicle of restraint in precluding full denial of the guarantees and imposing on the state the burden of justification, i.e., the burden of establishing that its impugned policy stood above these ordinary preferences.

The Court then went on to formulate the doctrinal components of the “Oakes test.” Each component worked to put this conceptual framework into operation. As a precondition to making arguments as to justification, the state was required to satisfy the legality principle, by demonstrating the impugned measure was “prescribed by law.” As noted previously, the Court read this term as a separate basis for assessing the permissibility of a limit on a Charter guarantee, precluding limits derived from the arbitrary, informal exercise of executive power and unintelligible or inaccessible exercises of legislative power. Next, the state had to justify the legitimacy of the infringement on the rights in a process of reasoning that included three sequenced stages.

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87 Oakes, supra note 78 at 135–36.
88 Ibid. at 136.
89 Ibid.
First, justification required scrutiny of the relationship between the impugned measure and its objective. In terms of content, the objective had to have elevated importance, as indicated by the Court's stipulation that admissible objectives were to be "pressing and substantial in a free and democratic society," i.e., "of sufficient importance to warrant overriding a constitutionally protected right or freedom." The state was precluded from justifying measures whose objectives were "trivial or discordant with the principles integral to a free and democratic society" as a rights-forwarding polity.

Having examined the objective in terms of its policy genesis and consistency with core constitutional values, the next step scrutinized the correlation between the objective and the means chosen for its attainment. This step made clear that a constitutionally adequate purpose was in itself insufficient. This examination for "proportionality" had several components. It started with state demonstration of a "rational connection" between the objective and the means employed, thus eliminating "arbitrary, unfair or irrational" measures. It then moved to a more demanding analysis. The state would have to demonstrate, given the objective and its rationally connected means, that the impugned measure encroached on the right as little as possible in the light of other possible measures that might meet the previous tests. Lastly, encroachments of a more severe nature had to serve correspondingly more important objectives.

Ibid. The characterization of the objective was not simply a matter of assertion or courtroom strategy. It was not to have a "shifting purpose," i.e., a purpose lacking the political legitimacy deriving from demonstrable connection to the enacting purpose and the deliberative legislative process. Big M, supra note 76. This idea also operates in administrative review: "It is only possible to assess the soundness of agency decisions if we know the reasons for them at the time they were made. Bland statements set at a high level of generality, or justifications which were clearly rationalized ex post facto, do not ensure proper accountability..." P.P. Craig, Administrative Law, 4th ed., (London: Sweet & Maxwell, 1999) at 607. See Baker v. Canada, [1999] 2 S.C.R. 847, para. 37-44.

Oakes, supra note 78 at 138-39
Oakes, supra note 78 at 139.

Oakes, supra note 78 at 139.

In applying the newly formulated Oakes test to the claim asserted, the Court ruled that a Criminal Code provision failed the "rational connection" component of the test in imposing a reverse onus on those proved to be in possession of a small quantity of narcotics to disprove trafficking. The Court reasoned that it was rational to presume that these people were not engaged in trafficking, i.e., that they possessed the prohibited substance for personal use. The proportionality analysis was modified in Dagenais v. C.B.C., [1994] 3 S.C.R. 835 at 889, to include consideration that the
The Court set down the doctrinal tests for judicial review under the Charter methodically, articulating its understanding of the new constitutional structure, describing the institutional roles dictated, including its own, and extrapolating the appropriate doctrinal formula. Despite the detail and clarity of this exposition, the analysis remained incomplete. The Court did not set out the full range of considerations that supported its analysis. The Court made no reference to the prolonged deliberations that had ultimately turned to the postwar model to immunize rights from the routine activity of temporarily elected governments. By reaching back to the Joint Committee proceedings in 1980–81, the Court could have demonstrated the close link between the remedial objectives of the Charter, its text, and the interpretive approach adopted. Having made reference to the Charter’s genesis, the Court might then have made more extensive reference to the models for the institutional roles under the Charter as well as to the extensive literature on limits on rights within the postwar systems of rights protection. It had turned to this material when it set down the purposive deleterious effects not outweigh the salutory effects.

One might object that reference back to the Charter’s political genesis would lead the Court into considerations akin to the discredited original intent doctrine in the United States. The parallel is not as strong as it might seem. First, the weakness of the historical intent approach in the United States does not taint all historical foundation for legal analysis, only that which is not guided by history so much as by the instrumental search for conservative social values that a sufficiently distanced history can provide. Given this ideological foundation, the history that is done is often defective as well as selective. Second, the subject matter here is the conceptual structure of a Constitution, the institutional roles dictated by that structure and the doctrinal tests that serve to put remedial objectives, concept and institutions into operation. It is not these elements that make the security of historical material attractive to those who subscribe to the doctrine of original intent. Third, original intent in its more objectionable modes uses history to supplement or supply text. In the Canadian context, the text is more forthcoming, especially when read in light of the models that animated its drafting. Fourth, the Canadian example rests on recent history. The very full and well-informed documentary trail includes a long series of drafts and transcripts of proceedings produced by established institutions within a mature system of government. This is not a search through personal diaries, letters, and speeches to find the subjective understandings of certain people involved, in one way or another, in the formulation of a text two hundred years ago when the enterprise of protecting constitutional rights was in its infancy, social ordering was based on religious precept, and political institutions were newly established in the aftermath of revolution. Fifth, the Charter benefitted by the fact that the idea of protecting rights was much more developed. There was a shared language and conceptual structure, as well as operative systems, available to inform the discussion of the alternative models of rights protection and institutional roles. There were also the examples of past Canadian failures on which to forge remedial initiatives.
approach to Charter interpretation and in its application of the “prescribed by law” stipulation but failed to do so for the justification analysis. Such reference material was not lacking. It could readily have made reference to the Siracusa Principles on the Limitation Provisions in the International Covenant on Civil and Political Rights. Here there is set out what Canadians would recognize as the precise terms of the Court’s limitation analysis in Oakes, first in a list of general principles and then more specifically in respect to the terms “prescribed by law” and “in a democratic society.” Or it might have drawn explicitly from the case-law or academic commentary on the proportionality analysis in other rights-protecting systems. Lastly, the Court might have referred back to the reasoning of Canadian judges who had, before the Charter’s adoption, attempted to infuse judicial analysis with a commitment to a rights-protecting paradigm strikingly similar, mutatis mutandis, to the postwar model.

Had the Court provided this broader basis for its initial interpretation of the Charter’s structure of rights-protection, institutional roles and doctrinal arrangements, the approach set out in Oakes might have proved more resilient. The similarity of the Oakes test, and the reasoning that supported its adoption, to the postwar model is so striking that one must acknowledge its strong influence on the Court. In failing to attribute the primary features of the Charter to this model, in terms of its political genesis as well as its conceptual underpinnings, the Court left its work unnecessarily vulnerable. The challenge materialized in the form of a competing vision of constitutional structure, institutional role and doctrinal strictures. This competing vision, far from enjoying roots in the Charter’s political genesis, its text or its chosen models, follows a different paradigm and resurrects the very possibilities that the final changes to the Charter text were put in place to supplant.

B. The Deferential Approach: Reassembling the Mack Truck

The Supreme Court of Canada’s initial approach to the Charter was soon challenged by an alternative understanding of the structure of constitutional rights-protection, which included a decidedly deferential judicial role. This approach is informed by the idea that the constitutional order is secured by the

96 Siracusa Principles, supra note 15.
97 As noted earlier, these judgments had attracted considerable criticism. They had come to stand for the undesirable state of the law for which entrenchment of rights-protection was the remedy. See L.E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada’s Constitution” (2001) 80 Can. Bar Rev. 699.
sovereignty of the legislature. The ordinary, political process reigns supreme. In elevating process in this way, this approach might appear to be lacking in substantive commitments. But that is not the case. The traditional values espoused need no special protection here because they enjoy adequate security in the workings of popularly elected, majoritarian institutions that control policy-making and thus the agenda for change. Constitutional amendment transforming the relative responsibilities of courts and legislatures is deeply unsettling to this world-view, all the more so if the changes involve substantive commitments, protected by judicial review, that are inconsistent with generally accepted mores. The role of the courts is restricted to interpretation and application, in service to the paramount, legislative, law-making function.

The fullest account of the primacy of majoritarian process is provided in Justice La Forest’s dissenting reasons for judgment in *RJR-MacDonald Inc. v. Canada*, although there are many examples of its application in other cases. In this case, the Supreme Court, by a majority of five to four, struck down most of the federal prohibitions against tobacco advertising.\(^8\) In this dissent, La Forest J., the architect of the deferential approach, sets out here the most explicit account of his views on the limitation clause, views that have had considerable influence on the Court’s treatment of the limitation clause.

Justice La Forest begins by pointedly rejecting any prescribed test for limitation, preferring to see the *Oakes* paradigm as setting at most a “set of principles or guidelines” that should not act as a substitute for section 1 itself.\(^9\) This reference is not, as one might expect, to the limitation formula expressly set down in section 1, but to the idea “implicit in its wording” that the courts must “strike a delicate balance between individual rights and community needs.”\(^10\)

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10. *RJR*, ibid. In an extra-judicial discussion of the Charter’s limitation clause, La Forest J. makes clear that he regards section 1, which makes no reference to balancing, as an “express provision for the balancing of interests.” See “The Balancing of Interests under...”
This balancing exercise requires analysis that is non-abstract, non-formal, contextual and flexible. The exercise remains normative, nonetheless, it is claimed, because it includes consideration both of the nature of the right and the values invoked by the state to justify the limit. The dual function embodied in section 1 has the effect of “activating Charter rights and permitting such reasonable limits as a free and democratic society may have occasion to place upon them.”

Quoting from one of his earlier judgements, La Forest J. described this balancing function in these words:

In the performance of the balancing task under s.1 ... [w]hile the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

Justice La Forest’s particular concern is with onus and burden of proof under the Oakes test as originally formulated. Legislated social policy initiatives might fail the stringent section 1 limitation requirements due to the difficulty, if not the impossibility, of producing “definitive social science evidence respecting the

the Charter” (1992) 2 N.J.C.L. 133 at 134 [hereinafter “The Balancing of Interests”]. The distinction between what is express and what is implicit makes sense in terms of his reference, at the beginning of the article, to Roscoe Pound who understood law as a balancing of interests between competing groups in the political marketplace. La Forest J. writes, at 135:

In balancing interests, whether on a constitutional or sub-constitutional level, one must put the interests on the same plane. Balancing individual interests against social interests is not really possible. One must translate one into the other, and in most cases, since we are engaged in social engineering, it is best to deal with them as social interests. But in the Charter we have adopted a rights approach, which clearly focuses our thinking on the individual’s (or group’s) interest.

Pound advocated “a pragmatic, ... sociological legal science,” i.e., “adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.” (1908) Col. L. Rev. 605 at 609–10. Writing during the Lochner era, he stressed results rather than abstract legal content, law as an instrument of social reform, and legal precepts used as “guides to results that are socially just,” rather than as “inflexible molds.” N.E.H. Hull, “Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism” (1989) Duke L.J. 1302 at 1310.

101 RJR, supra note 98 at 47.
root causes of a pressing area of social concern."\textsuperscript{103} Requiring governments to meet a standard of "scientific accuracy" would paralyze government policy-making in the socio-economic sphere, amounting to "an unjustifiable limit on legislative power" that was not "consonant with reality."\textsuperscript{104} Rights guarantees, therefore, encroach on the legislature's authority to act in the real world where the relationship between cause and effect is murky or at least beyond demonstration.

Problems of proof pale beside the larger question of institutional role, however. The centrality of the legitimacy question is evident in a long passage that La Forest J. quotes from an early Charter commercial speech case. This extract describes the legislative process as primarily an exercise in mediation between vying political claimants and for that reason not amenable to judicial review based on the proportionality paradigm set out in Oakes: \textsuperscript{105}

\begin{quote}
... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how the balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. ... When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter [the legal rights], the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for
\end{quote}

\begin{footnotes}
\footnotetext{103}{Ibid. at 50.}
\footnotetext{104}{Ibid.}
\footnotetext{105}{Irwin Toy v. Quebec (A.G.) (1989), 58 D.L.R. (4th) 577 at 625–26, as quoted in RJR, \textit{supra} note 98 at 51. This passage occurs in the reasons for judgment of Dickson C.J.C., Lamer and Wilson JJ. La Forest J. did not sit on this case. It is difficult to account for the endorsement of this approach by the judges who did, given their (more or less) consistent adherence to the classic \textit{Oakes} test.}
\end{footnotes}
achieving the purpose have been chosen, especially given their accumulated experience in
dealing with such questions.

This passage makes clear that stringent judicial review of legislation is
appropriate (if at all) only in the criminal context, based on established judicial
expertise in protecting liberty and in the interpretation of legislation in the
context of a criminal prosecution. Such review power is acceptable because the
legislature acts here on behalf of the whole community. Since everyone benefits
from the protections of the criminal law and stands equally exposed to the
interference with liberty authorized, “both the benefits and the burdens (the
rights and duties flowing from the criminal law) are pervasive.”106 Courts can act
for the common or shared good.

Beyond the criminal context, however, or at least where there are no
“competing claims,” La Forest J. rejects a strong judicial review function
because the legislature confers benefits on some and burdens on others. The
function of legislators in their representative capacity is to assess the social
science evidence relevant to different policy choices and to mediate between
competing social interests.107 Here the legislature is not engaged in an analysis

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106 The quoted passage, illuminates La Forest J.’s basic distinction. It is from his public
lecture on section 1 of the Charter, delivered as the Goodman Lecture of 1992 at the
University of Toronto Faculty of Law. See “The Balancing of Interests” supra note 100
at 138.

107 La Forest J.’s resistance to judicial review of Charter rights in the socio-economic
context may derive from reluctance to acknowledge the public interest model of
litigation wherein adjudication legitimately enforces basic constitutional norms. Support
for this conjecture lies in La Forest J.’s contrast between cases that are “polycentric”
and for that reason candidates for deference (the word used to describe cases such as
Irwin Toy, supra note 105 and McKinney v. University of Guelph, [1990] 3 S.C.R. 229,
76 D.L.R. (4th) 545. See La Forest J., “Balancing of Interests,” supra note 100 at 147
and the class of cases appropriate for strict review under the original Oakes framework,
those in which the accused raises liberty issues as the “singular antagonist” against the
state.) See D. Gibson & S. Gibson, “Enforcement of the Canadian Charter of Rights
and Freedoms (Section 24)” in G.-A. Beaudoin & E. Ratushny, The Canadian Charter
of Rights and Freedoms, 2d ed. (Toronto: Carswell, 1989) at 783–94 for the contrast
between the private and public models of adjudication and the reason for an expansion
Laskin C.J.C.: “It is not the alleged waste of public funds alone that will support
standing but rather the right of the citizenry to constitutional behaviour by Parliament.”
For the classic American discussion, see A. Chayes, “The Role of the Judge in Public
Law Litigation” (1975–6) 89 Harv. L. Rev. 1281; D. Feldman, “Public Interest
Litigation and Constitutional Theory in Comparative Perspective” (1992) 55 M.L.R.

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of the discernible and pervasive rights and wrongs of traditional criminal justice. It is balancing between and among a myriad of claims for action and inaction. The task is to award selective benefits out of scarce resources and to protect the less fortunate in a multitude of contexts. The legislature performs this function in its representative capacity, making policy without any clear guidelines in terms of social science data or expertise. When claims come to the courts challenging legislative policy forged in this socio-economic context, the problems are polycentric. The courts have no established expertise to resolve such disputes. Governments cannot meet the onus in terms of evidence, social science data or argument for the means-end or minimal impairment tests as set out in Oakes.\(^{108}\)

Justice La Forest thus sees the Charter as a bad fit for the reality of Canadian society, in which many “groups” vie for government largesse, including those who are in special need. He does not offer a definition of vulnerability. Nor does he investigate whether claims emanate from rights-holders asserting Charter guarantees. In his description of the political activity of the vying “groups,” Charter entitlements have no distinctive status. Similarly, the word “group” makes no allowance for the way in which some Charter guarantees protect interests of an organic community. For example, the entitlements to freedom of religion and non-discrimination based on religion have regard for people whose religious beliefs and practices bring them together to share a distinctive, shared way of life. The language rights protect individuals who also share a culture and tradition. In addition, the Charter offers protection to persons who possess particular characteristics, often unchosen and unchangeable, but who may or may not function in or depend upon an actual communal structure at all, or at least outside of the political arena. These protections work against the tendency of legislatures to ignore or impose disadvantage upon persons who are merely different from the mainstream or, worse still, undervalued by it for one reason

44 at 55, sheds light on the distinction: “interest group litigation in general is not synonymous with public interest litigation. Interest group litigation is typically a medium for arbitrating between competing claims in a pluralist system, a legal extension of the politics of faction. Public interest litigators, by contrast, try to give effect to an alleged common interest of the whole community. The emphasis is communitarian rather than pluralist. If the public interest were but an aggregation of individual interests, public interest litigation could be seen as a form of maxi-private-interest litigation. However, the range of interests which are encompassed... may be very wide, including those of foreigners, future generations and fetuses...”

\(^{108}\) La Forest J. considers the Court “unable to engage in assessing finicky details” or devising or approving the “single choice open to the Legislature.” See “The Balancing of Interests,” \(supra\) note 100 at 146.
or another. Where the Charter would give priority to particular claims, some individual and some shared, and to particular groups, La Forest J. sees fungible winners and losers in the political marketplace.

Justice La Forest wants to ensure that the Charter does not undermine legislative efforts to protect the disadvantaged. For this reason, he drains the rights claims of their constitutional distinctiveness. But concern to preserve efforts at social reform or economic redistribution does not compel this retreat from the Charter. It is possible to preserve the primacy of the Charter without imposing or exacerbating disadvantage. To this end, the adjudicator has to take the onus and burdens seriously. It would be necessary to inquire carefully into the record to ascertain the nature of the disadvantage implicated. The next step would be to consider the specific disadvantage claimed and the legislative intervention in its name. Then one would have to unwind the complex intersectionality between disadvantage and denial of constitutional rights. Sometimes they are mutually independent; at other times the long-term infringement of the interests that the Charter now protects has created or contributed to some degree, perhaps even to a pervasive degree, to disadvantage. In the rare case, protection of one Charter right may impact negatively on another. In that situation, the analysis would work to preserve to the extent possible the core entitlements engaged. Finally, the analysis of the right, the limit and the remedy should work together to preserve both the benefit of the legislative initiative and the Charter entitlement.108 The Charter provides flexible remedial tools in section 24 to this end.110 Justice La Forest seems to prefer wholesale, preemptive, judicial deference.

For La Forest J., Charter rights outside the criminal context possess no distinctive normative character. He affirms that "the rights guaranteed by the Charter must be given priority in the equation," a metaphor that does more to obscure than to clarify his ideas. Yet he can offer no such priority because the

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109 For an example of the approach that treats constitutional rights and rights-groups as fungible with the beneficiaries of legislative support and socio-economic interests, see Edwards Books, supra note 98. The dissent by Wilson J. retains the primacy of the rights even in limitation: respect for the communal aspect of rights guarantees, the distinctiveness of rights, and the need to preserve legislative protections for the economically disadvantaged.


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benefits and burdens that attend these rights, in his view, do not accrue to all, but advantage some and disadvantage others. Legislators must therefore simply decide which interests have a superior claim to the state’s limited resources. Only the elected representatives of the people have the competence to consider the social science evidence supporting the competing claims and to mediate between the competing social interests. Thus, from the legislative standpoint, rights refer only to fungible interests that compete for the legislature’s favour at the moment; and from the adjudicative standpoint, courts ought to recognize that the choice between interests properly belongs to the legislature. Rights enjoy no special normative status in this meshing of La Forest J.’s conception of politics with his conception of institutional competence.

Far from granting rights a priority in the equation, La Forest J.’s argument assimilates rights to other values in the legislative calculus and, having denied their distinctiveness, dismisses any special role for the courts in their protection. His scales accord no special weight to the guaranteed rights. The unsurprising consequence is that courts, in deciding whether to allow an infringement of a guaranteed right in the non-criminal context accord the legislation “a high degree of deference.”

Outside the criminal context, where there is a community of common interests, La Forest J.’s theory opts for the pre-Charter arrangements. As under the statutory Canadian Bill of Rights, the guaranteed rights stand subject to the vagaries of the political process. His approach abandons the primary purpose that animated the drafting of the Charter’s guarantee-and-limitation clause: to secure rights guaranteed under the Charter a place beyond the reach of ordinary politics.

Justice La Forest’s approach rests neither on text nor on purposive interpretation. The rights and freedoms that section 1 expressly guarantees dissolve into the mix of competing interests from which the legislature sets priorities and preferences. The Charter text permits only those limits as are “prescribed by law” and can be “demonstrably justified in a free and democratic society.” Justice La Forest characterizes the limits as those that “a free and democratic society may have occasion to place” on the rights. This dilution of the actual language of section 1 is based on an idea “implicit in the wording” which turns out to be as inconsistent with the section’s text as with its remedial purpose. Justice La Forest’s approach to the section 1 limitation coincides with the deferential “Mack Truck” version of section 1 (“limits ... acceptable in a free
and democratic society with a parliamentary system of government”), a formula decisively repudiated at the end of the process that created the Charter text. By equating the final words of section 1, “free and democratic society,” with what legislatures promote in their routine function, he rejects — or ignores — the core idea of the postwar model that expressly triumphed during the drafting period. That idea is that both rights and their limits provide the foundation of the rights-protecting polity, supplanting the supremacy of the legislature as mediator between vying constituencies.

Nor does the deferential approach to section 1 make sense of other constitutional provisions. The application to the Charter of the supremacy clause, section 52 of the Constitution Act, 1982, presupposes at least the legal possibility that rights as guaranteed by the Charter have the status of higher law. Justice La Forest’s insistence on deference to the legislature effectively undercuts this status. Nor does his insistence on deference illuminate the relationship between section 1 limitation and the legislative override in section 33. Why would Canadian legislatures have to satisfy the special conditions laid down in section 33 to override some Charter rights and freedoms for the length of their mandate, if the mere passing of a socio-economic measure through the legislative process suffices for courts to subordinate rights to legislative limits? Moreover, if the primary divide lies between criminal and non-criminal contexts, one would expect some suggestion of that distinction within the differentiation between the rights for which the override is available and those for which it is not. Here again the text contradicts La Forest J.’s allocation of institutional competencies. In his view, judicial expertise and experience justify assigning to courts the oversight of rights in the criminal context, but the text of section 33, by allowing the override to apply to the legal rights, leaves the last word on such questions to the Parliament.

Justice La Forest postulates a clean distinction between rights questions that require consideration of competing socio-economic interests and those that protect the individual against the state in the criminal process. This division is neither authorized by the Charter text nor feasible in practice. As the record of Charter litigation shows, cases implicating the liberty of the accused and the nature of criminal liability readily impinge on other Charter rights, for example, religious freedom, freedom of expression, security of the person, gender equality and disability equality. And perhaps the most deferential reformulation of the

Oakes test occurred in the context of a garden variety criminal case. It makes little sense to have the vigour of the judicial review of limits on such rights depend on the context in which they are litigated.

The distinction also does not fit well with the Charter's genesis. The Charter was supposed to remedy the inadequacies of the judicial role on rights questions that arose in the common law, as a federalism question, or under the statutory Canadian Bill of Rights. Justice La Forest's deferential model of Charter
analysis reverts to the pattern of those discredited cases. In any event, successive Liberal governments during the 1970s could have put a criminal law Charter into effect through the exclusive and paramount federal jurisdiction over the criminal law. If that was all that adoption of the Charter signifies, then Canada’s eleven governments spent over a decade coming to an agreement on pervasive constitutional change when agreement was unnecessary. Provincial opposition to the Charter, and the final insistence upon the override clause, was misguided. Despite appearances and general understanding, the Charter had minimal impact on provincial jurisdiction.

Justice La Forest’s approach dispenses with the most salient aspects of the postwar model of rights protection. He does not recognize purposive interpretation, the special normative status of rights, the reference to democracy as a rights-protecting polity rather than to majoritarian mechanisms, and the idea that justification preserves the normative values of the rights within the limitation analysis. In his alternate Charter universe, there is no call to test government policy against substantive constitutional norms. Groups and individuals vie for state action or inaction free of the burden or advantage of Charter guarantees to their policy goals. Courts possess no expertise in respect to the value of individual dignity and equality that informs all rights. The allocation of resources is untied to constitutional priorities. The legislative process, not Charter conformity, vindicates state policy.

The Supreme Court had determined, under the Canadian Bill of Rights, that the judiciary could legitimately review discrimination in the criminal law but not in the context of regulation or social benefits. Thus it ruled, in R. v. Drybones, [1970] S.C.R. 282, that criminal sanctions could not vary on the basis of racial characteristics. Accordingly, an Aboriginal person could not be made liable to a criminal sanction for conduct where a non-Aboriginal person would not. But when the state imposed racially-based disadvantage in the non-criminal regulatory context, the Court found no infringement of equality before the law: Canada v. Lavell, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 and Canada (A. G.) v. Canard, [1976] 1 S.C.R. 170, 30 D.L.R. (3d) 9. Similarly, when the state withheld benefits based on pregnancy and childbirth, in Bliss v. Canada, [1979] 1 S.C.R. 183, the Court also rejected the claim to breach of equality as impermissibly egalitarian.

This conclusion is inconsistent with the positions put forward by the “gang of 8” in the Patriation Reference, much of which the S.C.C. accepted. See Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753. See also Re Objection to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793.

La Forest J.’s understanding of s. 1 limitation inverts the Charter’s structure. Section 1 establishes the guarantees as the presumptive norm, subject only to the type of limits prescribed and justified. For La Forest J., the norm is plenary legislative authority over
One feature of the postwar instruments finds favour, however. While ignoring the features of the international rights-protecting arrangements that were specifically identified as models for the Charter in its final formulation, La Forest J. takes up a feature that played no part in those deliberations: the margin of appreciation. As noted earlier, that doctrine operates within the international rights-protecting systems to preserve respect for member states having different histories and cultures. The doctrine, however, is not a carte blanche; it operates within the confines of judicial review and the primacy of the rights guarantees. Moreover, the flexibility introduced by the margin of appreciation does not go so far as to perpetuate resistance to the transition into the rights-protecting regime.

The applicability of margin of appreciation analysis to Canada's Charter is somewhat strained. The doctrine is based on the political and cultural diversification of sovereign nation states that enter into an international rights-protecting system on a voluntary basis with full exit rights. Canada, in contrast, issues labelled socio-economic, a label that displaces the right claim by virtue of the context in which it arises. Accordingly, the Court's original approach, when carried through to its exacting empirical conclusions, imposes "unjustified limits on legislative power." He negates the whole project of creating a Charter for Canada in which rights would stand prior to ordinary legislative process: "Interpreted literally, mechanically, without nuance, the Oakes test and the burden of proof which it imposes on the state would most often negate its ability to legislate." (para. 67) To reach this conclusion he exaggerates the level of scientific accuracy demanded by the Oakes test, in effect reading it literally, mechanically and without nuance. For a similar inversion of the Charter's structure of rights and limitation, see Sopinka J., in Egan, supra note 98, at 576: "I am not prepared to say that by its inaction to date the government has disentitled itself to rely on section 1 of the Charter." Here the idea seems to be that the government has an entitlement to judicial validation of its legislation, despite the proven infringement on the guaranteed right because it might act to remove that infringement in the future, in whole or in part. This approach has more common ground with pre-Charter, plenary legislative authority than constitutional rights-protection. It marks the nadir of s. 1 analysis.

In RJR, supra note 98 at 56–57, La Forest J. refers with approval to the margin of appreciation, citing Irwin Toy v. Quebec, [1989] 1 S.C.R. 927 at 990 for the proposition that the courts should not impose strict burdens on legislative policy-making when social science evidence is not determinative. See also R. v. Lyons, [1987] 2 S.C.R. 309 at 349.

Jacobs & White, supra note 15 at 37–38. For the view that the margin of appreciation can introduce an excessively subjective, reasonableness-based test that undermines protection of rights and freedoms, see O. Gross, "Once More unto the Breach" (1998) 23 Yale J. Int'l L. 437 at 496–98.
has always had a national criminal code, a widely shared system of common law with the exception of Quebec's *Civil Code*, and a unified court system with the Supreme Court of Canada at its apex for questions of provincial and federal law alike. In addition, as noted earlier, one objective of the *Charter* project was the creation of a pan-Canadian system of rights protection to inculcate an idea of shared citizenship. All these factors militate against adoption of a margin of appreciation into *Charter* adjudication. In any event, the function that the margin of appreciation doctrine plays in the international systems of rights-protection is provided for expressly in the *Charter* by the legislative override capacity under section 33. If the self-standing political units cannot subscribe to the rights guarantee and narrowly drawn limits, then the legislative capacity to suppress certain rights for the duration of an electoral mandate shifts the responsibility to the legislature to effect an express suppression of stipulated rights.  

Justice La Forest is of the view that it is permissible to limit rights in deference to the legislature because he regards representative government as the only way to mediate among competing social interests. This diminishing of *Charter* rights for the sake of legislative sovereignty is problematic for several reasons.

First, the *Charter* was designed to discipline the exercise of all state power to the framework of rights. As finally formulated and initially interpreted, it committed those who exercise public power in Canada to the values essential to liberal democracy in a pluralist, diverse, and often divided, state. The postwar model embodied in the text and its early interpretation translated that commitment into an institutional framework in which courts carry out a legal function, overseeing conformity to constitutional guarantees.

Second, La Forest J. fails to apply his own argument about the function of legislation to the creation of the *Charter*. That document was itself the product of a prolonged and intense political process, which manifested clear intention to commit the legal system to its terms. Even on La Forest J.'s own account, the *Charter* itself is a mediation between competing social interests in which the final result supports those who have been vulnerable to political neglect and prejudice in the past, and is therefore entitled to judicial deference. Justice La  

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120 The override is also the correct mechanism for the “step by step” approach to limits on rights favoured by the Court in *McKinney*, *supra* note 107 and *Egan*, *supra* note 98. If the *Charter* strictures are deemed intolerable for a political community, then its recourse is not in the courts but to its legislature, where the political responsibility for divergence from those strictures is triggered by invocation of the override.

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Forest's argument leads to the paradox that the product of ordinary politics is entitled to judicial deference but the product of decades of constitutional politics is not.

Third, his approach fails to recognize the remarkably participatory nature of the politics that produced the features of the *Charter* that he diminishes. By any standard of representational politics, the process of constitutional reform that produced the *Charter* was exemplary.\(^1\) Repeated public debate by the first ministers and others on the respective merits of judicial review and legislative sovereignty was followed by televised parliamentary hearings in which those traditionally least valued by the political system had the opportunity to influence the terms of their constitutional entitlements. Ignoring the remarkably participatory genesis of the *Charter*, La Forest J. fails to acknowledge even the political merits of the exercise that crystallized the remedial purposes of Canada's constitutional revolution.

Fourth, his resistance to the *Charter* in the name of allegiance to the representative responsibility of ordinary politics ignores the fact that one of the purposes of a rights-protecting instrument is to reconfigure the political process to improve representation and accountability. Elected and representative lawmakers must deliberate upon the priority of our common rights and freedoms — the guarantees prerequisite to a free and democratic society — when they exercise, or authorize the exercise of, the power we repose in them to regulate our lives. In other words, the *Charter* requires that elected officials take not only our votes, but also our rights, into their deliberations. Moreover, in the postwar model, departures from the guarantees require reasoned, normative justification by governments on a case-by-case basis in courts of law. Government lawyers must prepare to defend the exercise of state power when asked the following

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1. One might object on the grounds that the provincial government and National Assembly of Quebec objected to the entrenchment to the *Charter* and that this reflects a lack of participation or consent that should precipitate deference. The argument would not be very strong, even if it rested on the historical record. But it does not. The separatist government of Quebec fully participated in the *Charter* process up to the last minute, many participants believed with the purpose of undermining it. It secured most of the features of its preferred amending provisions, which did not contain a Quebec veto, in the trade-off for the *Charter*. Its political allies secured the override as well. The separatist government worked for rejection of a *Charter of Rights*, while committed to rights in its own governance. It played a dangerous game, which it lost. This background does not register a mark against the *Charter*. Moreover, the newly re-elected federal Liberals who had carried the *Charter* project for over a decade enjoyed an overwhelming mandate from Quebec voters.
questions: did the exercise of power have a foundation in law? was the legal rule intelligible, accessible and predictable to those to whom it applied? what was the actual purpose of the impugned exercise of power, i.e., the purpose for which the impugned act or action passed through the law-making process? was that purpose of sufficient urgency and public importance to warrant an encroachment on constitutional rights? was it rational to pursue the purpose in the chosen way? was there a way to achieve the purpose without encroaching, or by encroaching less, on the right? The prospect that the government must offer evidence and reasoned argument on such questions before independent and impartial judges keeps the political process faithful to all its constituents. Whereas La Forest J. would see us all as winners or losers in the political game, the Charter would have us all sustain our rights or their justified limitation.

Justice La Forest thus resists the idea that rights guarantees impose duties and restrictions upon every exercise of state power, with judicial review to ensure state compliance. He objects to a Charter that would prevent our political representatives, acting within the dynamics of the ordinary political process, from inadvertently, ignorantly or intentionally sacrificing the rights and freedoms intrinsic to the modern liberal state to other preferences and priorities. He prefers judicial deference to the legislature, which leaves these rights and freedoms hostage to the ordinary political process. Preservation of pre-Charter judicial deference to ordinary politics cannot provide the conceptual foundation for the understanding of the Charter's institutional roles. As former Justice Wilson has written,\(^{122}\)

The doubt about the legitimacy of judicial review persists and finds expression by different members of the Court in different ways — in terms of a distinction made between law and policy, law being for the courts and policy for governments, or in terms of courts not getting into the wisdom as opposed to the vires of the legislation (the pre-Charter Laskin concern), or perhaps the most straightforward rationale, namely the concept of the courts owing deference to the legislature as the elected representatives of the people. I must confess that to me judicial review and deference to the legislature are an incompatible pair and I fear that our attempt to combine them has simply resulted in a muddying of the jurisprudential waters!


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V. CONSTITUTIONAL MODELS

Coinciding with the advent of the Charter was a confluence of factors that augured well for the fulfilment of its remedial objectives. The inadequacy of the previous arrangements was plain to view and widely acknowledged. The Charter project commanded popular acceptance and even enthusiasm across the country. The drafting process had left behind the compromises of the political actors, to produce an innovative scheme of interlocking responsibilities with the strengths and weaknesses of the continuing Canadian institutions in mind. Building on the postwar model, the Charter text envisaged a comparatively narrow and principled mode of judicial review. It bolstered the legitimacy of the judicial function by imposing constitutional roles on both the legislature and executive. This complex institutional structure was designed to put the Charter beyond the standard realist critiques. The rich and varied jurisprudence of the postwar model was available for interpretive guidance. And a strong Supreme Court was ready to elaborate the legal doctrines that would realize the Charter's remedial purposes after numerous other attempts to protect rights had proved inadequate.

From the beginning it was obvious that the fate of the Charter depended on the interpretation of the express limitation formula common to modern constitutional bills of rights. Without a normatively directed limitation clause, i.e., one that differentiated between normative, principled limitations and non-normative, power-based abrogation of rights, the Charter would betray the very rights and freedoms it was supposed to protect. This is why the government withdrew the "Mack Truck" version when public interest groups and experts in rights-protection pointed out that it would perpetuate the discredited status quo. The Charter text thus came to embody the postwar model, giving the courts the task of forwarding rights-based principles even when justifying limitation on guaranteed rights.

The revised deferential understanding of the limitation provision preferred by La Forest J. poses the danger of moving the Charter far from its text, original design and chosen models. In the face of established modes of legal interpretation, the "Mack Truck" version seems to have miraculously survived its public denunciation and excision from the Charter text. This erosion of the Charter's limitation formula has not marked a stable stopping point. Interpretation that turns away from text, remedial purposes and stipulated

institutional roles has no stopping point. Sankey L.C., in the Edwards case, suggested that we look on our written constitutional instrument as a “living tree capable of growth and expansion within its natural limits,” not soft clay in which a judge may imprint and preserve his personal political philosophy. As one might expect, the final legacy of La Forest J.’s theory of the Charter is not simply the expansion of the grounds of limiting rights to create a very deferential judicial role, but the parallel narrowing of the scope and content of the guaranteed rights as well.

This deferential approach has little regard for the constitutional history that produced the Charter. Those who opposed entrenchment ultimately accepted a Charter with a rich array of rights and a narrow, principled limitation formula. In return, they secured a heavily qualified legislative override power, which by their design, made departure from Charter norms a potentially costly political option given the Charter’s popularity. The resurrected deferential limitation formula would give the “gang of 8” provinces, which opposed the Charter, the victory they failed to secure either in public debate or in the federal-provincial battlefield. When it interprets the Charter’s guarantee-and-limitation formula as giving primacy to legislatures engaged in ordinary politics, the Court enables the state to abrogate rights without paying the cost of using the override. And, as if that were not enough, it does so by resurrecting the rubber-stamp, limitation clause emphatically rejected by the people in Parliament. This stance amounts to an unexpected windfall to those who opposed the Charter.


125 See Rodriguez, supra note 98; Egan, supra note 98; and Law v. Canada (Minister of Employment and Immigration) (1999), 170 D.L.R. (4th) 1. Other cases, such as TétraULT-GadourY v. Canada, [1991] 2 S.C.R. 22, Eldridge v. B.C., [1997] 3 S.C.R. 607 might suggest otherwise. But these cases pivot on relief against disadvantage, not Charter rights at large. It does not follow from the fact that the claim succeeds that the Court has interpreted and applied the Charter’s strictures correctly. The wide discretion that the deference-minded judges accord to themselves opens the door to deference in cases where the legislature is preserving or forwarding the cultural majority’s moral code, tradition values, and general consensus. Vriend v. Alberta, [1998] 1 S.C.R. 493 and M. v. H., [1999] 2 S.C.R. 3 may suggest recommitment to the postwar model and its fundamental values, but Law v. Canada, [1999] 1 S.C.R. 497 and Corbiere v. Canada, [1999] 2 S.C.R. 203 may indicate otherwise.

126 They also secured agreement to their preferred formula for constitutional amendment, with some modification.

127 Deference to ordinary politics has influenced the Court’s interpretation of the override as well. See Weinrib, supra note 73.
Texts offer a range of interpretive flexibility; there is very rarely only one interpretive possibility. Over time, constitutional texts in some ways offer more flexibility than other legal instruments because of their abstract formulation, higher law norms and principled response to changed circumstances. But interpretation has its limits; it should stop short of undoing the clear historical compromises that informed the drafting of specific constitutional amendments to achieve focussed remedial ends. In other contexts, the Court has given such compromise great respect.

Seen in the light of our judicial history, the Court’s treatment of the limitation formula is not without its ironies. Our great judges demonstrated in the past their ability to use whatever strands of legal reasoning came to hand to create what we would now recognize as rights-protection. Lord Chancellor Sankey presupposed gender equality in the interpretation of general language in a written constitution. Justice Idington, in dissent in *Quong Wing*, invoked the status of British subject as an interpretive shield against statutory imposition of racial discrimination. In *obiter dicta*, in *Reference Re Alberta Statutes*, Duff C.J. and Canon J., recognized freedom of speech and the press as inherent, democratic norms embedded in our federal arrangements. Many judgments of Rand J. read a full array of original freedoms in the interstices of Canadian federalism. These judges, lacking anything approaching the mandate of the *Charter*, did so much with the interplay of the written and unwritten components of our constitutional arrangements, anticipating the Supreme Court’s recent return to the idea of pre-eminent, deeply embedded constitutional principles.

The postwar period has been called the age of rights. Those who translated the remedial purposes of the *Charter* into legal text and institutional design emulated the value structure and institutional design of the postwar model of rights-protection. It is a disappointment then that, on occasion, judges of the Supreme Court of Canada have failed to carry through this commitment. It is

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129 *Quong Wing v. The King* (1914), 49 S.C.R. 440, 18 D.L.R. 121.
132 See Weinrib, * supra* note 97.
133 *Supra* note 5.
134 Although the Supreme Court has not been consistent in acknowledging the *Charter*’s international roots in its domestic operation, the *Charter* has nevertheless had a remarkably strong influence beyond Canada’s borders. Many other systems of rights-
perplexing that these judges have turned away from the obvious foundations for Charter interpretation — the Charter’s political history, text and chosen model. It is even more perplexing to note that they have, in effect, moved toward another constitutional model, i.e., the more conservative strands of the United States Supreme Court’s approach to the Bill of Rights: insularity, disquiet as to judicial legitimacy, and subservience of constitutional norms to ordinary politics. These elements mark retreat from the brief engagement with the ideas of postwar constitutionalism by the Warren Court. The Warren Court, however, was not based on a prolonged public debate culminating in the adoption of a new constitutional bill of rights setting down institutional roles designed to give constitutional guarantees effective protection.

That the U.S. Supreme Court’s rejection of the Warren Court’s strong protection of equal human dignity, as the core of constitutional rights-protection, should provide a guide for interpretation of the Canadian Charter by some Canadian judges must surely stand as one of the stranger developments within modern constitutional discourse. One would have thought that the application of comparative constitutional analysis to the Charter would have turned all eyes elsewhere, to find the Charter’s roots and institutional legitimacy in the shared values and purposes of the postwar world in which we live and in which our Charter was formulated.

The judges who prefer a deferential approach to the Charter’s limitation formula stand committed to the lessons learned from the New Deal crisis that so traumatized American constitutional thought in the early twentieth century. The end of that era marked the triumph of legislatures over the courts. Social legislation attuned to public welfare supplanted outdated, regressive ideas of market neutrality in the form of sacrosanct contract and property rights. Recent historical analysis has, however, rehabilitated the Lochner era judiciary to some extent, recognizing that its allegiance to economic liberty was neither personal indulgence nor an expression of judicial class bias. Rather, it was a futile attempt to retain a traditional idea of limited government and residual liberties, cherished in a pre-industrial economy — not a misguided negation of democratic government. Nonetheless, the prospect of strong, judicially enforced rights-


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protection continues to carry the taint of *Lochner, i.e.*, the spectre of judges imposing their own elite values on society against legislative initiatives designed to protect a wider public, especially the disadvantaged. The *Charter*, constructed upon its postwar rights framework in the shadow of democratic failure combined with unprecedented state atrocities, moves beyond that debate. Therefore, modern rights-protecting instruments not only provide a framework for economic activity and public welfare but also ensure fidelity to the principles of liberty, equality and respect for human dignity. Judicial review does not undermine the democratic function. On the contrary, it intensifies accountability and broadens representation. It thus legitimates the democratic, majoritarian process in an increasingly diverse and pluralistic society.

Judges who resist the *Charter*’s postwar commitments and institutional framework on a post-*Lochner* template seek to ensure that rights-protection does not once again rigidify into a complex, judicially constructed doctrinal labyrinth that offers safe passage only to the rich and powerful. They prefer to keep the system flexible, fluid, contextual, and responsive. These aspirations are admirable. They do not, however, necessitate preemptive deference to majoritarian institutions. In fact, the *Charter* addresses these very concerns in ways that do not divest legislatures of their important role. Thus the *Charter* gives no privilege to pure economic rights, an omission designed to preclude any tendency of rights protection to privilege the privileged.\(^{136}\) The non-discrimination provisions are generous and open to further expansion. The guarantee of security of the person has demonstrated capacity to promote fair distribution of limited resources. The interpretive provisions highlight gender equality, pluralism and diversity.

Moreover, other grounds for a deferential approach to rights adjudication, also deriving from the post-*Lochner* paradigm, should have minimal traction in Canada. Interpretive methodology based on fidelity to text and original understanding, tarnished by their instrumental, conservative agenda in the United States context, stand on more legitimate ground in Canada. We have a new

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\(^{136}\) The *Charter* responds to the critique that rights-protection is socially retrograde by providing interpretive directives as to gender equality and multiculturalism, often proxies for exclusion, bias, prejudice, stereotypes and disadvantage. By prohibiting state discrimination on an open list of prohibited grounds, and by permitting affirmative action initiatives, the *Charter* does not stand in the way of progressive policy.
constitutional text, one that marks the culmination of a prolonged, well-informed and participatory debate about the strengths and weaknesses of existing institutions, which rights to protect and how best to deliver that protection. Many models were considered and rejected, including a deferential model that was ultimately rejected not only by parliamentarians, but by the people in Parliament. The model that was chosen was attractive because it would fulfil the remedial objectives, offer an established, structured approach already operative in other Commonwealth countries and reflect Canada’s international obligations. It was popular across the country because it held promise to remedy widely acknowledged failings in the legal system.

The Charter’s institutional arrangements should also undercut the standard American critique that strong rights protection is countermajoritarian. It vests authority over a circumscribed set of rights, plus a clearly articulated standard of limitation, in courts of law, consistent with judicial expertise, independence and individuated adjudication. In addition, it provides a statutory override that requires no more than a majority vote by a legislature willing to act expressly against the Charter guarantees of its constituents. There is very little that is novel in the Charter’s legal structure. Much of the discipline that the Charter imposes on government is drawn from the rule of law. Examples include the requirement that public policy stand as the product of public and deliberative democratic process in a form that is accessible and intelligible to the rightholder. Preemptive deference to a legislature that has not satisfied these standards does not fulfil any meaningful understanding of legislative supremacy.137

The interlocking institutional roles under the Charter ensure that courts can be courts and legislatures can be legislatures. Neither institution usurps the other’s prerogatives. Each has an important and legitimate, freestanding, constitutional role, accentuating its institutional strengths. Judges who propose that courts should defer to the ordinary legislative process undermine the Charter’s complex rearrangement of institutional responsibility. In addition, they create a fissure in the unified conceptual foundation of our part-written and part-unwritten constitutional edifice.138 If there is a sound interpretive or theoretical basis to preemptive deference to the ordinary political process in socio-economic contexts, it lies hidden.


138 Secession Reference, Judges Remuneration References, supra note 5.

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Those who subscribe to the deferential approach to Charter adjudication wish to avoid repetition of the perceived errors of the Lochner era judiciary. But ironically, in a markedly different social and legal context, they repeat precisely the error they wish to avoid. Like the vilified judges whose work they repudiate, they cling to a constitutional model that the world has passed by. By taking up the call to deference by which the legal realists triumphed decades ago, they do not support progressive public policy. To use Sankey L.C.'s words, they illegitimately subordinate reason to custom and tradition.  