ADVISORY REVIEW: THE REINCARNATION OF THE NOTWITHSTANDING CLAUSE

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The notwithstanding clause is the cornerstone of our Canadian constitutional architecture. It has a high ambition to reconcile constitutionalism with democracy. But the notwithstanding clause finds itself conceptually situated between illegitimacy and desuetude in a constitutional purgatory. This is not a promising portrait. Nonetheless, it is a blessing in disguise. The tragic failure of the notwithstanding clause is a fortuitous opportunity to create a new process that will allow us to achieve its objectives while also remaining loyal to the intentions of its creators. This new process — which the author calls advisory review *— is a new form of judicial review that is uniquely Canadian, born of Canadian roots, and consistent with Canadian constitutional traditions.*

La disposition de dérogation est la pierre angulaire de l'architecture constitutionnelle canadienne. Elle espère allier constitutionalisme et démocratie. Or, du point de vue conceptuel, la disposition de dérogation se trouve entre l'illégalité et la désuétude dans un purgatoire constitutionnel. Ce n'est pas un portrait prometteur. Néanmoins, c'est un mal d'un bien. L'échec tragique de la disposition de dérogation constitue une occasion fortuite de créer une nouvelle procédure qui nous permettra de réaliser ses objectifs tout en demeurant fidèle aux intentions de ses créateurs. Cette nouvelle procédure, que l'auteur appelle révision consultative, est une nouvelle forme de révision judicaire qui n'existe qu'au Canada, née de racines canadiennes et conformes aux traditions constitutionnelles du pays.

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I. INTRODUCTION

The *Canadian Charter of Rights and Freedoms* contains a clause authorizing legislatures to suspend a judicial decision for up to five years.[1] This "notwithstanding clause" (the Clause) was fashioned to reconcile parliamentary sovereignty with constitutional democracy. Theoretically, the Clause allows legislatures to trump the judiciary in the construction of constitutional rights. But, in reality, the Clause is no longer a viable instrument in the continuing Canadian constitutional discourse. Its use entails enormous political cost, which helps explain why it has been invoked with diminishing frequency.[2]

Quite apart from this disconnect between theory and practice, the notwithstanding clause fails to satisfy the three functions that have historically been attributed to it. First, the Clause was intended to ensure legislators the last word in shaping public policy, but its inoperability has effectively divested legislators of this power. Second, the Clause cannot foster an institutional dialogue between courts and legislatures because it actually obstructs dialogue. Finally, the Clause has not preserved parliamentary sovereignty because it is conceptually impossible to preserve parliamentary sovereignty against the backdrop of the *Charter*. I explore these criticisms more fully in Part II.

Besides its inability to discharge its three functions, the notwithstanding clause has created more problems than it has solved. First, the constitutional text of the Clause places the legislature in the unpalatable position of suspending the *Charter* itself rather than a judicial interpretation of the *Charter*. This conflates a *Charter* right with a judicial interpretation of that right, with grave consequences for the moral authority of the legislature. Second, the Clause creates the presumption that judicial decision-making is constitutionally correct and that legislative deliberation fails to reach a comparable standard of legitimacy. This is a weak presumption that rests on even weaker premises. I develop these two additional critiques in Part III.

In light of its current state, the Clause is beyond rehabilitation or revival. It instead appears doomed to constitutional purgatory.[3] But this is a blessing in disguise. The desuetude of the

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 33 [*Charter*]:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

2 H.B. McCullough, "Parliamentary Supremacy and a Constitutional Grid: The Canadian Charter of Rights" (1992) 41 I.C.L.Q. 751 at 764.

3 But see Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525 at 553-55 (concluding from empirical study that nothing suggests "definitively the delegitimization of the override on *Charter* adjudication" (at 555)).

notwithstanding clause is a fortuitous opportunity for Canada to chart a new constitutional course that satisfies the unfulfilled functions of the Clause. The notwithstanding clause embodies laudable aims. It is an integral feature of the *Charter* that holds great promise for Canadian constitutionalism and whose founding impetus remains as compelling today as ever before.

The Clause embodies the modern grundnorm of Canadian constitutional law and politics. It is a valuable constitutional device for various reasons that can be situated along two distinct axes. The first axis is practical value, and the second is normative merit. On the first point, the notwithstanding clause represents the final piece to the constitutional puzzle that gave birth to the *Charter*. Without it, the *Charter* is likely to have met the same fate that befell the Meech Lake Accord and Charlottetown Accord years later.[4] Indeed, the notwithstanding clause has been described as "crucial"[5] to the constitutional process that created the *Charter*, a necessary condition of the political "horse-trading"[6] that purchased the necessary provincial favour to strike the Canadian constitutional bargain,[7] the product of the ultimate "political compromise"[8] that made the *Charter* possible, and a "pragmatic"[9] solution to the impasse that threatened to derail Canadian constitutional renewal.

Moreover — and although it may not have been regarded at the time as an innovation of "high constitutional principle"[10] — the Clause does indeed boast a high ambition for constitutional statecraft: to reconcile the tension between parliamentary sovereignty and judicial supremacy.[11] At its conception, the Clause endeavoured to strike a balance between judicial and legislative power.[12] In the intervening years since then, the fragile balance that was envisioned between courts and legislatures is thought by some to have shifted toward the courts as a result of what one scholar calls the judicialization of Canadian constitutionalism.[13] I do not necessarily adopt that criticism of the judicial-legislative balance. Indeed, in this article, I remain purposely agnostic on the normative role of the judiciary in a liberal democracy. My agnosticism on this contentious point serves two objectives: first, it allows me to proceed from the proposition that we should take seriously the animating purposes of the notwithstanding clause; and, second, it smoothes the terrain

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4 Philip Zylberberg, "The Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective" (1992) 37 McGill L.J. 27 at 66.

5 James Allan & Grant Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts" (2006) 43 San Diego L. Rev. 1 at 19.

6 Nicholas Stephanopoulos, "The Case for the Legislative Override" (2005) 10 UCLA J. Int'l L. & Foreign Aff. 250 at 255.

7 William C. Hodge, "Patriation of the Canadian Constitution: Comparative Federalism in a New Context" (1985) 60 Wash. L. Rev. 585 at 619.

8 Claire L'Heureux-Dubé, "Outsiders on the Bench: The Continuing Struggle for Equality" (2001) 16 Wis. Women's L.J. 15 at 18.

9 Janet L. Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82 Tex. L. Rev. 1963 at 1967-68.

10 See e.g. Sujit Choudhry, "The *Lochner* era and comparative constitutionalism" (2004) 2 International Journal of Constitutional Law 1 at 45.

11 Sarah K. Harding, "Comparative Reasoning and Judicial Review" (2003) 28 Yale J. Int'l L. 409 at 433-34.

12 A. Wayne MacKay, "The Legislature, The Executive And The Courts: The Delicate Balance Of Power Or Who Is Running This Country Anyway?" (2001) 24:2 Dal. L.J. 37 at 56.

13 See e.g. Matthew S.R. Palmer, "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dal. L.J. 1 at 11.

for brainstorming a new and creative mechanism that will do justice to the intent of the now-toothless Clause. Accordingly, I focus my attention on how best to achieve the unfulfilled promise of the Clause.

In Part IV, I build on the previous Parts to unveil a new model of judicial review — which I call *advisory review* — that will fill the void of the fading notwithstanding clause. Advisory review reincarnates the spirit of the notwithstanding clause into a new judicial-legislative institutional relationship that recasts the marriage of parliamentary sovereignty and constitutional democracy. Its immediate ambition is to fulfill the unfulfilled functions of the notwithstanding clause. Its larger ambition is to conciliate courts and legislatures, reformers and traditionalists, activists and minimalists, and liberals and conservatives.

The new model of advisory review clothes legislative decision-making in a presumption of constitutional correctness. Constitutional review consequently becomes purely advisory insofar as the new model endows the legislature with the discretion to decide whether to bring its impugned legislative enactment into conformity with the court judgment. The new model does not compel the legislature to adopt a judicial decision that recommends either revisions to or invalidation of its legislative enactment, but nonetheless recognizes that the legislature will face public pressure to do so. This first wrinkle to the current model of judicial review relocates the locus of constitutional decision-making in the legislature.

But the new model of advisory review also guards against the peril of majority rule, which remains the lynchpin of parliamentary sovereignty. Advisory review concedes that a court ruling on constitutional rights may sometimes be so compelling as to justify binding the legislature to heed that judgment. Perhaps the legislature has so flagrantly overstepped its bounds that the judiciary issues a decision whose force leaves the legislature with no palatable political option but to revise or repeal its impugned law. Those special instances are unanimous Supreme Court judgments. They are exceptional because judges are political actors holding dissimilar political beliefs. Judicial unanimity — which represents the aggregation of divergent political views — conveys an undeniable force of reason that demands corrective action. The new model of advisory review obliges the legislature to cede only when the judiciary issues a unanimous *Charter* opinion invalidating or revising a legislative enactment.

Together, these twin suggestions respond to the five criticisms of the notwithstanding clause raised above — each grounded in political practice, dialogue theory, parliamentary theory, constitutional design, and institutional design, respectively — and bring into focus a new model of advisory review that is uniquely Canadian. Advisory review moderates the existing institutional tension between courts and legislatures by creating an advisory instead of a confrontational relationship between the two institutions. Advisory review also removes the legislature from the impracticable position of invoking a desuete constitutional mechanism whose unfulfilled function is to keep the legislature at the vanguard of constitutional discourse. Finally, advisory review privileges constitutional discourse — instead of judicial decision-making alone — and invites the very kind of institutional dialogue that constitutional scholars argue is the basis for Canadian constitutional democracy. More broadly, this new model of advisory review captures the essence of what the notwithstanding clause could have been — but has failed to become — by reincarnating

the spirit of the Clause from a purely legislative aspiration into a collaborative arrangement between courts and legislatures.

II. CONSTITUTIONAL FUNCTION

The *Charter* introduced several new features to the Canadian democratic landscape. Three of them in particular merit mention: (1) an entrenched bill of rights; (2) judicial review of those constitutional rights; and (3) the notwithstanding clause. The notwithstanding clause is perhaps anomalous among the three because it has uniformly failed to satisfy the constitutional functions that politicians, scholars, and historians have attributed to it. First, the Clause cannot guarantee legislators the final say on public policy. Second, it cannot cultivate an institutional dialogue between courts and legislatures. Third, it cannot preserve parliamentary sovereignty against the backdrop of the *Charter*. For these and other reasons, the notwithstanding clause must be replaced by a new mechanism that can fulfill its worthy functions.

A. POLITICAL PRACTICE

Let us return to the creation of the Clause. The federal Minister of Justice of the day, described it as a mechanism to "ensure that legislatures rather than judges have the final say on important matters of public policy."[14] Politicians were concerned that the new power of judicial review would embolden judges.[15] They consequently allocated to legislators the reserve notwithstanding discretion to overrule courts.[16] Praiseworthy objective or not, the notwithstanding clause cannot fulfill it. The Clause could perhaps once have been a legislative trump card, but politicians discarded it long ago. It has been delegitimized since its first uses, and is now desuete and inoperable. Invoking the Clause entails a prohibitive political cost — one that risk-averse politicians are unwilling to incur.

The notwithstanding clause has been invoked only 17 times since its inception.[17] Jeffrey Goldsworthy posits that the reluctance to use the Clause may be traced to Quebec.[18] Only months after the enactment of the *Charter*, the Quebec provincial legislature passed a law repealing, re-enacting, and inserting a notwithstanding provision in all of Quebec's pre-*Charter* laws.[19] Goldsworthy concludes that Quebec's "perceived abuse" of the Clause made the Clause "virtually unusable" before it had even been given a chance to be used

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14 *House of Commons Debates*, Vol. 12 (20 November 1981) at 13042-43 (Jean Chrétien), cited in David Johansen & Philip Rosen, "The Notwithstanding Clause of the Charter" (February 1989) (Ottawa: Parliamentary Information and Research Service, 1989), online: Library of Parliament <http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>.

15 Janet Hiebert, "The Evolution of the Limitation Clause" (1990) 28 Osgoode Hall L.J. 103 at 107-24.

16 The Honourable Peter Lougheed, "Why a Notwithstanding Clause?" *Points of View*, No. 6 (Edmonton: Centre for Constitutional Studies, 1998) at 4, 13, 16.

17 Barbara Billingsley, "Section 33: The *Charter*'s Sleeping Giant" (2002) 21 Windsor Y.B. Access Just. 331 at 339-41.

18 Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy" (2003) 38 Wake Forest L. Rev. 451 [Goldsworthy, "Judicial Review"].

19 *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 [*Ford*].

legitimately.[20] This has steered the Clause to its current state, where it finds itself stalled in a self-reinforcing inertia that renders it incapable of escaping its own illegitimacy.

As a result, the Clause unwittingly establishes the conditions for legitimacy, which I understand to mean the quality of acceptability that characterizes official conduct. The Clause draws a boundary separating judicial and legislative constitutional decision-making, blessing the former with a presumption of correctness and saddling the latter with the de-legitimizing burden of exceptionalism. By so narrowly setting the terms of legitimacy, the Clause creates a form of path dependence — path dependent illegitimacy — that divests legislative constitutional decision-making of the authoritativeness that judicial constitutional decision-making commands.

At its core, path dependence theory holds that events or decisions made at an earlier time will limit the universe of possibilities for future events and decisions. Scholars have formulated this phenomenon in various ways, namely that "what has happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time,"[21] or "the impact of decisions made in the past persists into the present and defines the alternatives for the future."[22] Path dependence analysis seeks to understand how choices erect structures and establish institutions that themselves determine subsequent choices.[23] Path dependent systems typically have at least three features: (1) causal properties; (2) an inability to predict the final outcome from initial conditions; and (3) inertial qualities that launch self-reinforcing sequences.[24]

The theory of path dependence has been applied to the law. One scholar has identified three path dependence variants: (1) increasing returns path dependence, whose principal insight teaches that it is less costly to remain on — than to diverge from — the initially chosen course; (2) evolutionary path dependence, holding that a future course of action is constrained by the evolutionary changes of the past; and (3) sequencing path dependence, which observes that the sequence in which multiple players choose among multiple alternatives determines the ultimate outcome.[25]

For our purposes, the most relevant of these three variants is increasing returns path dependence. Systems exhibiting this form of path dependence create expectations that compel actors to behave in ways that only strengthen the odds that other actors will behave similarly.[26] This generates a certain predictability and permanence that is difficult to dislodge. It bears a strong resemblance to autocatalysis, a scientific process in which

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20 Goldsworthy, "Judicial Review," *supra* note 18 at 468-69.

21 William H. Sewell Jr., "Three Temporalities: Toward an Eventful Sociology" in Terrence J. McDonald, ed., *The Historic Turn in the Human Sciences* (Ann Arbor: University of Michigan Press, 1996) 245 at 262-63.

22 Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley: University of California Press, 1997) at 11.

23 James Mahoney, *The Legacies of Liberalism: Path Dependence and Political Regimes in Central America* (Baltimore: Johns Hopkins University Press, 2001).

24 James Mahoney, "Path dependence in historical sociology" (2000) 29 Theory & Society 507 at 511.

25 Oona H. Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 Iowa L. Rev. 601 at 606-608.

26 *Ibid.* at 609.

elements generate a product that gives rise to the scientific reaction generating the same product.[27] These systems are also likely to have indeterminate outcomes at the time of construction, meaning that the consequences of their structure are indeterminate and unpredictable *ex ante* until some initial action transpires.[28]

Increasing returns systems often produce an effect called "lock-in,"[29] under which the universe of available alternatives is narrowed considerably, often leaving only one outcome. This property is called "self-reinforcement." The initial system adopts a conventional syntax that changes rarely and only with great difficulty once in place — even if change is desirable. Path dependence fuses history and causation insofar as it recognizes the importance of beginnings to an end, distinguishes causation from correlation, and understands results through their native trajectory. We may therefore perceive its five properties: (1) permanence, or the closure of a matter; (2) sequentialism, where outcomes turn on conditions; (3) compulsion, or obliging one route over another; (4) consistency, whose interests are served by compulsion; and (5) predictability, thus creating expectations for future conduct.[30]

These very properties of increased returns path dependence and lock-in are discernible in the notwithstanding clause. The self-reinforcement, predictability, and inertia of the Clause help create the presumption that judicial decision-making is clothed with a measure of legitimacy that extends beyond the reach of legislative action or, put more squarely, that judicial decision-making is constitutionally correct and legislative action is not necessarily so. By authorizing Parliament to pass an unconventional law only through an extraordinary procedure, the Clause conveys a message that its use by Parliament or provincial legislatures falls beyond the bounds of normal governance and arises only in exceptional circumstances. This message solidifies the supremacy of the judiciary in constitutional interpretation and reinforces the view that the judiciary is paramount. It thus creates a callus, hardening the status of the judiciary under the *Charter*, which has adorned judicial review with the unquestionable authority that comes only from conventional, regular, and standardized exercise. The notwithstanding clause has in turn lived an inverse existence: unconventional, irregular, and uncommon.

The effect of this path dependent illegitimacy is twofold: (1) to reinforce the conventional narrative that constitutional interpretation must be the exclusive province of the judiciary; and (2) to pre-empt deliberation on whether the legislature should ever engage in constitutional interpretation. Such presumed illegitimacy works a significant harm upon the Canadian project of constitutionalism. It discredits the notwithstanding clause, narrows the universe of legitimate legislative action, and establishes a presumption that Parliament is ill-equipped to engage in constitutional decision-making, thus precluding Parliament from invoking the Clause at the risk of depleting its political capital. This in turn prevents the Clause from fulfilling its first function: to ensure legislators the final say on public policy.

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27 Stuart Kauffman, *At Home in the Universe: The Search for the Laws of Self-Organization and Complexity* (Oxford: Oxford University Press, 1995).

28 *Ibid.*

29 Hathaway, *supra* note 25 at 610.

30 Michael J. Gerhardt, "The Limited Path Dependency of Precedent" (2005) 7 U. Pa. J. Const. L. 903 at 922-37.

B. INSTITUTIONAL DIALOGUE

In addition to ensuring legislators the final say in shaping public policy, the second function attributed to the notwithstanding clause is to foster dialogue between Parliament and the judiciary about the scope of *Charter* rights.[31] This is a laudable objective. But just as the Clause cannot fulfill its first function of ensuring legislators the final say on public policy, the Clause cannot satisfy its second function. The promise of dialogue that heralded the advent of the notwithstanding clause remains unfulfilled, and cannot be satisfied because the Clause actually obstructs institutional dialogue. Its conferral of veto power to Parliament over the judiciary creates finality where continuity is preferable. Therefore, if judicial-legislative dialogue is the end, the Clause cannot be the means.

Canadian dialogue theory traces its origins to the work of Peter Hogg and Allison Bushell. In their powerful defence of judicial review, they posit that the *Charter* creates a dialogic democracy in which courts and legislatures enter into dialogue about the meaning of *Charter* rights and justifiable limits on those rights.[32] They conclude that judicial invalidation of a statute on *Charter* grounds is not illegitimate because it invites dialogue between the judiciary and legislature on how to reconcile individual and group rights.[33]

The showpiece of their theory holds that several *Charter* provisions double as dialogic prompts for legislators to respond to judicial decisions: (1) Section 1, authorizing the legislature to shape the content of rights in particular instances; (2) Sections 7-9 and 12, which are subject to contextual standards of fairness and reasonableness; (3) Section 15(1), governing equality rights; and (4) the notwithstanding clause.[34] Hogg and Bushell characterize the Clause as the most direct way for legislatures to trump courts but acknowledge that the political climate has neutralized its effectiveness.[35]

Scholars have advanced competing conceptions of the role of the notwithstanding clause in fostering institutional dialogue. I have identified four models of dialogue under which each of their theories may be classified: (1) partnership; (2) judicial primacy; (3) legislative primacy; and (4) popular catalysis. Only the scholars whose work represents the fourth model — popular catalysis — recognize that the notwithstanding clause cannot promote dialogue between courts and legislatures. Those scholars instead envision a different form of dialogue, a form of civic dialogue in which the participants are legislatures and citizens. This conception of the notwithstanding clause reflects its fundamental promise. Yet the promise of civic dialogue remains unfulfilled — as does the promise of institutional dialogue — because the Clause is now politically radioactive.

Hogg and Bushell articulate the first of the four models. Their conception of dialogue regards courts and legislatures as equal partners in *Charter* construction. Though each may possess comparative advantages, neither courts nor legislatures are seen as superior. Judges

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31 This function has been retrospectively attributed to the Clause in Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75.

32 *Ibid.*

33 *Ibid.* at 105.

34 *Ibid.* at 79-82.

35 *Ibid.* at 83.

and legislators collaborate in giving meaning to the constitutional text whose four corners are to be delimited only through an iterative relationship grounded in rational discourse undertaken in good faith. This model is proceduralist. It finds virtue in triggering the actual process of dialogue between courts and legislatures — a process through which the *Charter* evolves and civil society advances. Other scholars have also adopted this partnership model.[36]

In the second model, courts and legislatures are not partners. They stand apart in a hierarchical relationship, with the judiciary holding ascendancy. This is the judicial primacy model.[37] Judges are thought to possess special competencies that imbue them with legitimacy, and their constitutional interpretation with authority. For Owen Fiss, this special competence is public reason, which judges endeavour to reflect in their judgments, and which is at once an authority-conferring and power-limiting device for the judiciary.[38] The notwithstanding clause, to Fiss, does not undermine the primacy of the judiciary because the Clause merely suspends the operation of a judgment, negating neither the impugned *Charter* right nor the judicial interpretation of that right.[39] This functionalist perspective of dialogue hinges on the competing institutional proficiencies of courts and legislatures.

The third model is the opposite of judicial primacy: legislative primacy. This model also adopts a functionalist perspective of dialogue, though it diverges from the model of judicial primacy insofar as legislative primacy views legislatures as better situated than courts to resolve differences in *Charter* interpretation.[40] Accounts of legislative primacy echo the charges lamenting the rise of judicial activism in Canada.[41] For scholars in this school, the notwithstanding clause is a mechanism whose promise lies in halting the descent toward juristocracy that, according to them, risks undermining Canadian democracy.[42]

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36 See e.g. Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal & Kingston: McGill-Queens University Press, 2002) at 52-72; Michael J. Perry, "Protecting Human Rights in a Democracy: What Role for the Courts" (2003) 38 Wake Forest L. Rev. 635 at 690-91 [Perry, "Human Rights"]; Jeremy Webber, "Institutional dialogue between courts and legislatures in the definition of fundamental rights: lessons from Canada (and elsewhere)" (2003) 9 Austl. J. H. R. 135; Lorraine Eisenstat Weinrib, "Learning to Live With The Override" (1990) 35 McGill L.J. 541 at 564-65.

37 See e.g. Michael Plaxton, "In Search of Prophylactic Rules" (2005) 50 McGill L.J. 127 at 145-48; John D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta. L. Rev. 347 at 354-55; Paul C. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 Mich. J.L. Reform 51 at 68-77 [Weiler, "Rights"].

38 Owen M. Fiss, "The Supreme Court 1978 Term — Foreword: The Forms of Justice" (1979) 93 Harv. L. Rev. 1 at 9-17.

39 Owen Fiss, "Between Supremacy and Exclusivity" in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Mass.: Cambridge University Press, 2006) 452 at 463.

40 See e.g. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346 at 1357, n. 34 [Waldron, "Core of the Case"]; Goldsworthy, "Judicial Review," *supra* note 18 at 470; Mark Tushnet, "*Marbury v. Madison* Around the World" (2004) 71 Tenn. L. Rev. 251 at 272.

41 See e.g. Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2003); F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

42 See e.g. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004) at 18.

The fourth model construes dialogue under the notwithstanding clause as a popular catalysis.[43] Unlike the other models, the dialoguing parties under the popular catalysis model are not courts and legislatures. They are instead legislatures and citizens. This popular catalysis model is perhaps more aspirational than descriptive since it strives to catalyze popular participation in the construction of constitutional rights. It seeks a particular result from dialogue: civic engagement in public discourse.

Of the four conceptions of dialogue inspired by the notwithstanding clause — partnership, judicial primacy, legislative primacy, and popular catalysis — only the fourth recognizes that the notwithstanding clause cannot foster dialogue between courts and legislatures.[44] The fourth model also dovetails with history insofar as no judicial-legislative dialogue has in fact sprung from past uses of the Clause.[45] Indeed, the Clause cannot create that kind of dialogue because it authorizes legislatures to cut short any judicial-legislative interchange.

Consider the steps involved after a legislature invokes the Clause to suspend a judicial decision. There are none. Once the legislature has passed a duly-authorized law pursuant to the notwithstanding clause, there is no further role for the judiciary to play. The Supreme Court of Canada has itself acknowledged this point.[46] The legislature speaks and the court must listen, powerless to act or otherwise continue the conversation. Paradoxically, this creates a monologue — precisely what advocates of the Clause applaud when it generates legislative monologue but are all too eager to decry when judicial review leads to what they perceive as judicial monologue.[47]

There is a further distinction between forms of dialogue: pre-emptive and conventional uses of the notwithstanding clause. This distinction is not positioned along the same axis as the four models unveiled above. It instead involves *when* the Clause is invoked, whether prior or subsequent to a judicial decision. In pre-emptive uses, legislatures shield a law from *Charter* review by inserting a notwithstanding declaration in its text. The result is to bulletproof legislation and to bar courts from entering the conversation.[48] This has prompted the argument that pre-emptive overrides are problematic[49] and should be proscribed.[50] In

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43 See e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 58 [Roach, *Supreme Court*]; Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup. Ct. L. Rev. (2d) 49 at 60; Julie Debeljak, "Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights" (2002) 26 Melbourne U.L. Rev. 285 at 322-23; Tsvi Kahana, "The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the Charter" (2001) 44 Can. Pub. Admin. 255 [Kahana, "Public Discussion"]; Peter H. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L. Rev. 293 at 299 [Russell, "Standing"].

44 Christopher P. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" (2004) 23 Sup. Ct. L. Rev. (2d) 105.

45 See e.g. Billingsley, *supra* note 17; Johansen & Rosen, *supra* note 14; Kahana, "Public Discussion," *supra* note 43.

46 *Ford*, *supra* note 19 at 740.

47 See e.g. F.L. Morton, "Dialogue or Monologue?" *Policy Options* (April 1999) 23; Morton & Knopff, *supra* note 41.

48 Po Jen Yap, "Rethinking Constitutional Review in America and the Commonwealth: Judicial Protection of Human Rights in the Common Law World" (2006) 35 Ga. J. Int'l. & Comp. L. 99 at 122.

49 Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" (2004) 23 Sup. Ct. L. Rev. (2d) 135 at 151-60.

50 Kahana, "Public Discussion," *supra* note 43.

contrast, conventional uses occur when legislatures invoke the Clause after courts have invalidated a law. This revives the law and shields it for five years from *Charter* review. Neither pre-emptive nor conventional instances encourage dialogue. Both end the discussion before it has even begun.

Nonetheless, institutional dialogue does indeed transpire between courts and legislatures. But it does not occur through the notwithstanding clause. It occurs instead through s. 1 of the *Charter*.[51] Section 1 has two functions, according to the Supreme Court: (1) to guarantee the civil and political rights of Canadians; and (2) to provide a standard against which to assess the justification of limits imposed and deemed necessary by the state to those rights.[52] Under the Court's jurisprudence, s. 1 analysis is divided in two steps. First, the claimant bears the burden of showing that the state has infringed one of her *Charter* rights. Second, the onus shifts to the state, which must defend its infringement as demonstrably justified in a free and democratic society.[53] This is an intricate dance that requires the state to make four showings: (1) the law pursues a sufficiently important objective that warrants infringing a *Charter* right; (2) the means adopted in pursuit of that objective are rationally connected to it; (3) the law is minimally impairing of the *Charter*; and (4) the salutary and deleterious effects of the infringement are proportionate.[54]

As Kent Roach explains, the true engine of *Charter* dialogue is s. 1.[55] Hogg and Bushell agree that s. 1 facilitates dialogue between judges and legislators. Assuming, they explain, that a reviewing court invalidates a law on the most likely ground — that the law does not satisfy the minimal impairment or least restrictive means requirement — the court will outline the four corners of a less restrictive alternative law that would have fulfilled the s. 1 standard. They further observe that legislatures may adopt this alternative law, knowing that it is likely to be upheld.[56] Should the legislature be unmoved by the alternative law, it may instead submit a different yet stronger justification in defence of its invalidated law in a future s. 1 case.[57]

It is therefore accurate to characterize the relationship between courts and legislatures in Canada as dialogic if we assess that institutional relationship through the lens of s. 1. With respect to the notwithstanding clause, a "judicial-legislative exchange" is perhaps the most accurate label to affix to the interaction between Parliament and the judiciary.[58] Even then, the exchange is one-sided, dominated, and directed by the legislature. It is instead s. 1 of the *Charter* — whose design compels the legislature to engage the judiciary on its social,

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51 *Charter*, *supra* note 1, s. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

52 *R. v. Oakes*, [1986] 1 S.C.R. 103 at 135-36.

53 Rt. Hon. Antonio Lamer, "Protecting the Administration of Justice from Disrepute: The Admissibility of Unconstitutionally Obtained Evidence in Canada" (1998) 42 Saint Louis U.L.J. 345 at 348-49.

54 Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities" (2002) 4 J. App. Pr. & Pro. 27 at 36-37.

55 Roach, *Supreme Court*, *supra* note 43 at 156, 176.

56 Hogg & Bushell, *supra* note 31 at 85.

57 Tsvi Kahana, "Legalism, Anxiety and Legislative Constitutionalism" (2006) 31 Queen's L.J. 536 at 561.

58 Caroline S. Earle, "The American Judicial Review Quagmire: A Canadian Proposal" (1993) 68 Ind. L.J. 1357 at 1373.

cultural, and economic goals for civil society — that actually spurs dialogue between courts and legislatures in Canada.

Although s. 1 is a vehicle for dialogue, it cannot fully substitute for the notwithstanding clause. Section 1 can assuredly fulfill the dialogic aspirations of the notwithstanding clause. But it does not descend from the theory of parliamentary sovereignty as does the notwithstanding clause, and cannot fulfill that role. Section 1 therefore cannot be the complete answer to the desuetude of the Clause.

C. PARLIAMENTARY THEORY

While political practice demonstrates that the Clause cannot ensure legislators the final say in shaping public policy and institutional design reveals that the Clause cannot promote dialogue between courts and legislatures, parliamentary theory also helps to assess the function of the Clause. Historical accounts report that the drafters of the *Charter* created the notwithstanding clause expressly to preserve parliamentary sovereignty.[59] In the face of the new *Charter* regime of constitutional rights review that threatened to frustrate the long-standing principle of parliamentary sovereignty, advocates defended the Clause as a necessary compromise to ensure legislatures a paramount role in interpreting rights.[60] Scholars have bolstered history with theory, arguing that the notwithstanding clause has done precisely what its drafters intended: to preserve parliamentary sovereignty.[61]

Alongside this historical argument, one could assemble a strong textual case that parliamentary sovereignty indeed remains a fundamental feature of the Canadian polity. First, parliamentary sovereignty is securely situated in the preamble to Canada's founding Constitution — the *British North America Act, 1867*[62] — which establishes a Constitution "similar in Principle to that of the United Kingdom."[63] The *BNA Act* created federal and provincial legislatures with absolute, quasi-sovereign, and plenary power within their respective jurisdictions,[64] each possessing British parliamentary powers[65] and each tracing its authority to the Westminster system of parliamentary sovereignty.[66] Second, the *BNA Act*

59 See e.g. Gil Rémillard, "Petite histoire de la clause 'Nonobstant'" *Policy Options* (February 2007) 69 at 69-70; The Honourable R. Roy McMurtry, "The Creation of an Entrenched *Charter of Rights* — A Personal Memoir" (2006) 31 Queen's L.J. 456 at 466-67; Howard Leeson, "Section 33, The Notwithstanding Clause: A Paper Tiger?" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2001) 297 at 311-12; Roy Romanow, John Whyte & Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 197-214; Robert Sheppard & Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982) at 145.

60 See e.g. Patrick J. Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002) at 387-441.

61 See e.g. Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 908-10; Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am. J. Comp. L. 707 at 721; Christopher D. Jenkins, "The Institutional and Substantive Effects of the Human Rights Act in the United Kingdom" (2001) 24:2 Dal. L.J. 218 at 222; Mark D. Walters, "Common Law, Reason, and Sovereign Will" (2003) 53 U.T.L.J. 65 at 87.

62 (U.K.), 30 & 31 Vict., c. 3 [*BNA Act*].

63 *Ibid.* at Preamble.

64 *Fredericton (City of) v. Canada*, [1880] 3 S.C.R. 505 at 561.

65 *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 805-806.

66 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 43 [*Secession Reference*]; *New Brunswick Broadcasting v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 368.

defines Canadian parliamentary powers in relation to British sovereign powers.[67] Finally, traces of parliamentary sovereignty are discernible in the *Charter*'s parent *Constitution Act, 1982*,[68] which affirmed the continuing force of the *BNA Act* by renaming it the *Constitution Act, 1867*. Viewed together, these historical and textual claims seem compelling.

Yet they are unconvincing. The notwithstanding clause cannot carry the heavy burden that theorists have placed upon it. It is theoretically impossible for parliamentary sovereignty to survive in a regime of constitutional rights review, which by definition empowers courts to invalidate parliamentary laws and constrains the permissible scope of legislative action. The *Charter*'s "supremacy clause" lifts courts to a supervisory position over the legislature, authorizing the former to pass judgment on the constitutional competence of the latter.[69] The supremacy clause endows the judiciary with both the responsibility to serve as a sentinel for the *Charter* and the power to shape the content of parliamentary laws bearing on the rights and freedoms preserved within it.[70] Constitutional rights review therefore denies legislatures the very autonomy that, for A.V. Dicey, was the basis of sovereignty: the power to make or unmake any law, and the immunity of those laws from override or repeal by another body.[71]

Parliamentary sovereignty itself admits of no exception. It means precisely what it says: Parliament is sovereign. Parliament may legislate even contrary to fundamental human rights[72] and it may condition individual rights on majority approval.[73] As Ivor Jennings illustrates with colourful examples, Parliament may legislate *ex post facto*, legalize illegalities, confer dictatorial powers upon the executive government, and may even proclaim the U.K. a communist state.[74] Admittedly, moral and political imperatives may compel parliamentarians to moderate their exercise of parliamentary sovereignty.[75] For instance, Jeffrey Jowell argues that Parliament would forfeit its sovereign authority in the eyes of the people were it to pass an act outlawing elections or decreeing one-party rule.[76] Trevor Allan echoes the broader point, which is that the legal omnipotence of Parliament is qualified in practice by moral limits.[77] Nonetheless, these practical, moral, and political constraints do not undermine the theoretical boundlessness of sovereignty.

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[67] *BNA Act*, *supra* note 62, s. 18.

[68] (U.K.), 1982, c. 11.

[69] *Ibid.*, s. 52(1).

[70] Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 Dal. L.J. 5 at 11; Honourable John D. Richard, "Federalism in Canada" (2005) 44 Duq. L. Rev. 5 at 18-19.

[71] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915) at 3-4.

[72] *R. v. Secretary of State for the Home Department, Ex parte Simms*, [2000] 2 A.C. 115 at 131 (H.L.).

[73] Douglas W. Vick, "The Human Rights Act and the British Constitution" (2002) 37 Tex. Int'l L.J. 329 at 340.

[74] Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 147.

[75] Mark Elliott, "Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention" (2002) 22 L.S. 340 at 341-42.

[76] Jeffrey Jowell, "Parliamentary Sovereignty under the New Constitutional Hypothesis" (2006) P.L. 562 at 572.

[77] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 216-21.

Furthermore, there are no degrees of sovereignty. Parliament is either sovereign or it is not. If sovereignty is compromised, it is no longer sovereignty. Martin Loughlin encapsulates the concurrent breadth and vulnerability of sovereignty, stating that "sovereignty divided is sovereignty destroyed."[78] Thus is it incorrect to claim that "[t]he *Charter* constricts, but also constitutionalizes, the theory of parliamentary sovereignty."[79] Parliamentary sovereignty cannot be constricted because constricting it creates a new institutional arrangement. Likewise, it is inaccurate to interpret the *Charter* as "weakening parliamentary supremacy."[80] Parliamentary supremacy, otherwise referred to as legislative supremacy, is no longer parliamentary supremacy if weakened. Therefore, the notwithstanding clause did not — because it could not — preserve parliamentary sovereignty under the *Charter*.

However, when viewed in tandem, the *Charter* and the notwithstanding clause did occasion two important changes for Canada. First, they replaced parliamentary sovereignty with *Charter* sovereignty, thus setting the *Charter* as the ultimate authority. Second, the *Charter* and the Clause created an institutional hierarchy to avoid constitutional crises. Under this hierarchy, legislatures may now trump courts pursuant to a new sub-structure that I call legislative ascendancy. I review both of these points briefly in turn.

It is perhaps now most accurate to define Canada as a *Charter* sovereignty. The *Charter* is sovereign, first, in theory. It is the highest constitutional authority, serving as the point of reference for executive, legislative, and judicial action. The *Charter* is sovereign also in practice. It is the source of tension between courts and legislatures. Each competes for *Charter* credence. The *Charter* contemplates this competition between courts and legislatures by granting both institutions certain tools to assert themselves against each other. Courts enjoy the power of judicial review — a defensive mechanism to protect the sanctity of the *Charter* and to withhold from legislatures the free reign that characterizes parliamentary sovereignty. In contrast, the *Charter* grants legislatures the counterbalancing notwithstanding mechanism — a constitutional self-defence device that legislatures may invoke to halt the slide of constitutional democracy into judicial sovereignty.[81] Both tools share the same purpose: to moderate institutional overextension by courts and legislatures, and to preserve *Charter* sovereignty.

The *Charter* and the notwithstanding clause have also created a legislative ascendancy. Conceptually, legislative ascendancy is a lesser form of parliamentary sovereignty. It narrows the scope of parliamentary power, yet also gives the legislature authority to assert itself over the judiciary. It is also a lesser form of legislative supremacy, which holds that the legislature is supreme in the legislative function and unconstrained in that function by external rules.

Under legislative ascendancy, Parliament may still pass any law. This is a power Parliament enjoys under parliamentary sovereignty. But unlike parliamentary sovereignty

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78. Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) at 84.
79. David H. Moore, "Religious Freedom and Doctrines of Reluctance in Post-Charter Canada" (1996) B.Y.U.L. Rev. 1087 at 1102.
80. Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389 at 392.
81. Hirschl, *supra* note 42.

(which suffers no limitations on the power of legislatures, shields legislation from invalidation, and requires courts to obey any legislative act[82]) and unlike legislative supremacy (which does not tolerate external manner-and-form requirements), legislative ascendancy in a *Charter* regime imposes two restrictions on the exercise of legislative authority. First, the *Charter* constrains that power by subjecting legislative enactments to constitutional review. Second, the *Charter* restricts the exercise of legislative authority by inserting a potential intermediate step between the enactment and enforcement of a law. That intermediate step is the notwithstanding process.

Legislatures must first comply with the manner-and-form requirements of the Clause in order to unlock their legislative ascendancy. These requirements are the product of the constitutional process that yielded the *Charter* through super-legislative means. Goldsworthy regards these as procedural or formal requirements that do not limit parliamentary law-making authority.[83] To illustrate, after the judiciary invalidates a law on certain *Charter* grounds, the legislature may subsequently override that judgment only by fulfilling the several conditions commanded by the notwithstanding clause. These include expressly declaring the validity of its statute notwithstanding a *Charter* right, and doing so with specific reference to both the impugned statute and the *Charter* right that is being compromised.[84] This is the additional step that legislatures must now take in the *Charter* context in order to assert their legislative ascendancy. It is a non-negotiable step. It is accordingly a constraint on legislative authority because it demands legislative action that would otherwise be superfluous in a parliamentary sovereignty.

Nonetheless, the *Charter* contemplates a means for legislatures to manifest their ascendancy, permitting them even to legislate contrary to enshrined civil and political rights, much as Adam Tomkins argues with respect to the U.K. *Human Rights Act 1998*.[85] But this ascendancy is neither sovereignty nor supremacy, because legislatures are no longer sovereign under this regime nor are they supreme in the legislative function. Sovereignty would not stipulate recourse to a device like the notwithstanding clause and supremacy would not subject the legislative function to manner-and-form requirements imposed by an extra-legislative body.

The evolution from parliamentary sovereignty to legislative ascendancy within a *Charter* supremacy calls for reconceptualizing the relationship between courts and legislatures. To borrow from Nicholas Barber in the British context, it may be that the Canadian legal system no longer recognizes only one supreme law-making body but now instead possesses multiple unranked sources of legal power.[86] Or, as Allan posits, the marriage of parliamentary sovereignty with entrenched rights may have created a shared judicial-legislative sovereignty

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82 Dicey, *supra* note 71 at 4.

83 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) at 15.

84 Hogg, *supra* note 61 at 912.

85 (U.K.), 1998, c. 42; Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003) at 121-22.

86 N.W. Barber, "Sovereignty Re-examined: The Courts, Parliament, and Statutes" (2000) 20 Oxford J. Legal Stud. 131 at 139.

that is sustained by political morality.[87] Both are consistent with the view that parliamentary sovereignty cannot survive alongside constitutional rights review.

The distinction between parliamentary sovereignty and legislative ascendancy is a subtle but significant one that reaches beyond mere syntax. This distinction accomplishes four tasks. First, it recognizes that the notwithstanding clause does not symbolize the conquest of parliamentary sovereignty over constitutional rights but instead signals the emergence of a new constitutional arrangement.[88] Second, it acknowledges the transformational effect of the *Charter*, whose text vaults the judiciary into a new position of constitutional authority.[89] Third, it concedes that Canadian legislatures are answerable to the judiciary on civil and political rights and are no longer sovereign. Finally, it explains the constitutional significance of the notwithstanding clause and its interplay with constitutional rights review. This final point underscores the theoretical incompatibility of parliamentary sovereignty and constitutional rights review, and helps to distinguish the intended function of the Clause — to preserve parliamentary sovereignty — from its actual result.

III. CONSTITUTIONAL DESIGN

Having surveyed the theory of the notwithstanding clause and concluded that it is unable to fulfill the three functions that have been historically attributed to it, I now turn to the text of the Clause to demonstrate that it actually undermines the promise of the notwithstanding clause. Consider the relevant text of the notwithstanding clause:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in [the] Charter.[90]

This formulation exhibits two principal weaknesses: (1) it casts legislatures as *Charter* antagonists; and (2) it disregards the catalytic role of the judiciary in invoking the Clause. I marshal this argument in the service of my larger one: the notwithstanding clause is no longer viable and its spirit must be reincarnated into another form.

A. THE CONSTITUTIONAL TEXT

First, the notwithstanding clause deems legislatures a menace to the *Charter*. This is the consequence of its text, which implicitly recognizes two kinds of laws: (1) a standard law that conforms to the *Charter*; and (2) a deviant law that contravenes it. The extraordinary procedure that the Clause requires legislatures to satisfy in order to pass such a deviant law paints them as neither champions nor defenders of the *Charter*. Quite the reverse, by authorizing legislatures to enact laws that appear contrary to countervailing *Charter* liberties, the Clause gives Canadians reason to fear legislative rights transgressions. The text of the

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87 T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 Oxford J. Legal Stud. 563 at 583-84.

88 Weinrib, *supra* note 36 at 564.

89 Richard, *supra* note 70 at 18-19.

90 *Charter*, *supra* note 1, s. 33(1).

Clause thus marginalizes the use of the Clause itself as a radical legislative reaction to a judicial decision.

This is problematic for both the legitimacy of the Clause and the role of legislatures in constitutional discourse. The text of the Clause intimates that any use of the Clause necessarily amounts to legislative overreaching. This in turn cultivates the conviction that legislators should not invoke the Clause lest they risk displeasing their constituents. That conviction cannot help but reflect adversely upon the Clause and its legitimacy. One immediate effect of this delegitimization is to shrink the constitutional boundaries of parliamentary participation and to sequester the delegated power of legislatures to engage in constitutional conversation with the judiciary. The larger significance is devastating: legislatures become reluctant to invoke the notwithstanding clause even when high stakes of constitutional design and statecraft stand in the balance.

The Clause is weak in its current form for a second reason: the Clause fails to acknowledge the unique role of the judiciary in triggering its use. This textual imprecision results in hoisting the judiciary above other constitutional actors and endowing courts with a certain unassailability. The Clause elevates courts out of the political thicket and smoothes the terrain for the judiciary to discharge an exclusive role in constitutional interpretation. The text of the Clause therefore assumes the unsettled point that courts are better than legislatures at constitutional interpretation.[91] This conspires with the political climate — which discourages invoking the Clause — to give the judiciary a constitutional monopoly in interpreting the *Charter*.

Furthermore, the Clause as it currently reads conveys a false impression about how it actually works. The text suggests that legislatures stand opposed to the *Charter* and that their use of the Clause merely camouflages their intention to legislate contrary to fundamental *Charter* protections. This is incorrect. First, there is no reason to believe that legislatures will abuse the Clause to trample on the rights of Canadians.[92] There is in fact reason to believe that those suspicions are misplaced.[93] Second, as a practical matter and more importantly as a matter of constitutional design, legislatures do not actually ever pass a law "that shall operate notwithstanding a *Charter* right" when they legislate pursuant to the notwithstanding clause. They act rather more subtly, passing a law that shall operate notwithstanding a *judicial interpretation* of that *Charter* right. Goldsworthy has made a similar observation.[94]

This is an important qualitative difference that the text of the Clause fails to convey. By shielding the judiciary from view, the Clause effectively detaches the judiciary from its catalytic role in the prelude to invoking the notwithstanding clause. It conceals the critical detail that judicial action or threat of judicial action is a condition precedent to any use of the

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[91] James Allan, "An Unashamed Majoritarian" (2004) 27 Dal. L.J. 537 at 547.

[92] Justice John C. Major, "Unconscious Parallelism: Constitutional Law in Canada and the United States" (Speech delivered at the Washington University School of Law, (20 October 2004)), (2005) 19 Wash. U.J.L. & Pol'y 139 at 142.

[93] See e.g. Tsvi Kahana, "What Makes for a Good Use of the Notwithstanding Mechanism?" (2004) 23 Sup. Ct. L. Rev. (2d) 191 at 210.

[94] Goldsworthy, "Judicial Review," *supra* note 18 at 467.

Clause.[95] Legislatures invoke the Clause only after weighing an actual or anticipated *Charter* judgment and they subsequently intervene only to neutralize the effect of that judgment. This action is neither hostile nor friendly to the *Charter*. It is *Charter*-neutral insofar as legislatures act only in response to a judicial triggering event, without which the Clause would be dissolved of its function.

B. THE TEXT REVISED

Suppose the notwithstanding clause instead read as follows:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding *an incompatible judicial interpretation of* a provision included in [the] *Charter*.

In addition to addressing the two textual concerns raised above in Part III.A., this revised formulation would serve two additional objectives: (1) illuminating the high stakes in *Charter* construction; and (2) spurring interchange among citizens and their government agents. I review each of these four objectives in turn.

The first result of this textual revision is to relocate legislatures from the summit of *Charter* antagonism to *Charter* advocacy. Whereas the original formulation depicts legislatures adopting a hostile posture toward the *Charter* and openly derogating from it, this revised version focuses the gaze of legislatures onto the judiciary. Granted, legislatures retain the antagonism that characterized them in the original text but their target is no longer the *Charter*. It is the particular court that has invalidated — or threatened to invalidate — a duly-passed law. Legislatures thus become activists for their own conception of *Charter* rights and freedoms.

This leads directly to the second result of the revision. What was then concealed is now made plain: legislatures invoke the notwithstanding clause in response to a calculated action of the judiciary and not as an unprovoked offensive strike, as one might otherwise conclude from the original wording of the Clause. By stressing that legislatures may pass a law that will supplant a contrary judicial decision, the revised text keeps faith with how the notwithstanding process actually unfolds and also underscores the catalytic role of the judiciary in triggering that extraordinary procedure.

Perhaps most notably, the revised formulation of the notwithstanding clause also draws an unmistakable portrait of its gravity. Consider the understood pre-conditions for Parliament to invoke the notwithstanding mechanism: (1) in the course of litigation, a court must interpret a *Charter* provision in a certain way, or Parliament must have reason to believe that a court will interpret a *Charter* provision in a certain way; (2) Parliament must disagree with the court's actual or anticipated interpretation; (3) Parliament must muster a majority to act on this disagreement; and (4) Parliament must, in full view and subject to public criticism, propose a bill expressly rejecting the court's interpretation. The notwithstanding process is

[95] Donna Greschner & Ken Norman, "The Courts and Section 33" (1987) 12 Queen's L.J. 155 at 188.

consummated only after the bill has successfully navigated the parliamentary law-making trajectory. This leaves no doubt about the momentous quality of the Clause — something that becomes apparent in light of the direct confrontation setting Parliament against the judiciary.

Fourth, the revised text of the Clause serves the larger interest of triggering public discourse among citizens and their legislative and judicial agents. This is the product of the tug-of-war pitting Parliament against the judiciary, the prize being the sacred trust of public confidence. These two institutions do battle for the authority to silence the other in matters of constitutional interpretation. If the judiciary wins the faith of the public, Parliament's use of the notwithstanding device becomes unreasonable, possibly illegitimate, and nonetheless ultimately obsolete. If Parliament prevails, its reliance on the Clause to suspend judgments gains favour as a politically sensible policy. The people decide which institution prevails by supporting the majority or leading party in Parliament, lobbying for a particular settlement, urging judges to be less deferential to legislators, applying legislative pressure, lending political support or obstruction, staging public outcry, or otherwise. Whatever the result of the clash between Parliament and the court, it is one blessed with the consent of the governed.

The purpose of this counterfactual textual provision is twofold. The first purpose is to accentuate the degree to which the politics of the notwithstanding clause have soured its prospects for serving the larger interests of Canadian constitutional democracy. The Clause has embittered both institutional actors — courts and legislatures — each distrusting and cursing the encroachments of the other. Such is the current landscape of the Clause. But the landscape would be similar even if the text of the Clause were reformulated as suggested above or by others.[96] A contest for control would nonetheless ensue as foreseen above, ultimately leading to a resentful institutional relationship between courts and legislatures. Worse yet, a revised notwithstanding clause would do nothing to rehabilitate the political process in the public mind, leaving the people with a similar sense of disillusionment about their political agents that ensnares them today.

The second purpose of this counterfactual is to return full-circle to the existing text of the Clause. Something resembling a constitutional convention now controls its use.[97] A constitutional convention is a social rule that possesses the constitutional and political force to prescribe standards of behaviour, to allocate and control the exercise of power among the various incarnations of state authority, and to survive without court enforcement.[98] It may arise by agreement among parties that resolve to adopt a particular rule of conduct in the service of a prevailing or acknowledged principle.[99] This agreement by accession among political actors is fundamentally a contract, subject to breach like any other, that binds them,

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96 See e.g. Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" (2004) 23 Sup. Ct. L. Rev. (2d) 7 at 38; Jeffrey Goldsworthy, "Legislation, Interpretation, and Judicial Review" (2001) 51 U.T.L.J. 75 at 81.

97 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 147-48.

98 Joseph Jaconelli, "Do Constitutional Conventions Bind?" (2005) 64 Cambridge L.J. 149 at 151-52.

99 Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 9.

and governs their interaction.[100] A convention may also arise by contest, just as it may arise by inaction or abdication. The significance of a constitutional convention is that it seals the gaps within and among constitutional instruments to allow the state to function effectively. A constitutional convention, if one emerges, offers an ideal therapy for a constitutional provision whose meaning is unclear yet whose scope is non-justiciable.

History, political actors, custom, and political practice have conspired to confer upon the Clause its current standing. A certain measure of legislative inertia has since crystallized an additional layer of durability onto this convention — a convention whose only saving grace is that it is adaptable, evolving, non-justiciable, and will endure only as long as it survives the political process. Indeed, the convention that currently governs the notwithstanding clause is like other conventions insofar as it is a creature of politics, just as Dicey suggested long ago in categorizing conventions not as a body of laws but of constitutional and political ethics.[101] The notwithstanding clause convention stands at the intersection of law and politics as the product of the political arena.[102] But creating a new constitutional convention to govern the present notwithstanding clause will require one of two changes: (1) constitutional revisions to the text of the Clause; or (2) political will to invoke the Clause and legitimize it. At this moment, neither appears likely.

IV. CONSTITUTIONAL RECONSTRUCTION

Although it may retain some symbolic meaning, the notwithstanding clause is no longer a useful device to express popular will. Perhaps legislatures are at fault for letting the Clause drift.[103] Whatever the cause, this is inconsistent with the three functions envisioned for the notwithstanding clause: (1) leaving politicians the last word in policy-making; (2) cultivating an institutional dialogue between courts and legislatures; and (3) keeping legislatures at the vanguard of rights construction. In order to preserve the spirit of the Clause and to fulfill its mission, we must recalibrate the institutional relationship between courts and legislatures.

To achieve this balance — the very balance contemplated by Canadian constitutional texts and history — Canada should construct a refined model of judicial review. Creating this model will first entail deconstructing the existing one. We must be prepared both to challenge the assumptions that underlie our current model and to rethink traditional paradigms where necessary. There can be no predetermined boundaries. But we must be guided by principle. The refined model of judicial review should at once concede the transformative force of the *Charter*, hold true to Canadian parliamentary traditions, and respect the foundational principles of popular sovereignty, democratic legitimacy, and judicial independence. The new model of judicial review should also embrace the *Charter*, which embodies the new Canadian constitutional culture of entrenched rights and judicial review, and whose inspiration remains as powerful today as ever before: the protection of

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[100] Henri Brun & Guy Tremblay, *Droit constitutionnel*, 2d ed. (Cowansville: Édition Yvon Blais, 1990) at 45.

[101] Dicey, *supra* note 71 at 417.

[102] Heard, *supra* note 97 at 156.

[103] Roach, *Supreme Court*, *supra* note 43 at 7; Mark Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations" (2002) 3 Chicago J. Int'l L. 435 at 450.

fundamental rights from majoritarian excess. I unveil this new model — which I christen *advisory review* — in the following pages.

A. DUELLING MAJORITIES

Let us focus on two of the three unfulfilled functions of the Clause: (1) leaving politicians the last word in policy-making; and (2) keeping legislatures at the vanguard of rights construction. The Clause was a powerful innovation precisely because it sought to satisfy these ends. Yet in practice, the desuetude of the Clause has undermined its own intended functions. The question therefore becomes how to fulfill these functions *without* the Clause. In the absence of an effective notwithstanding clause, the only way to satisfy these two functions is to suspend the practice of judicial review in *Charter* cases. This is the first step in our reconstitutive analysis.

I pause here to make an important qualification. First, our project is to deconstruct the existing model of judicial review in order to reconstruct it in a manner that reflects the spirit of the notwithstanding clause. We are proceeding step-by-step to design our new model. Judicial review will return later in our analysis and will ultimately form a core element of the new model of advisory review. Second, I insist on making the observation that contemporary critics of judicial review are fighting a losing battle. Judicial review is firmly anchored in Canadian constitutional traditions and finds more recent affirmation in the history of the *Charter*. Critics should embrace the new *Charter* judiciary, recognizing that judges are well-intentioned professionals who discharge their mandate in good faith. Nonetheless, critics should not be discouraged from exploring the relative competences of Canadian courts and legislatures. This inquiry into relative institutional competences should begin with a study of the similarities and differences between courts and legislatures.

Canadian courts and legislatures share several institutional commonalities. First, they are both public institutions. Second, they are agents of the citizenry and discharge their functions with popular sanction. Third, their members are named through election or appointment. Both elections and appointments are political processes but the politicization of judicial appointments in Canada is arguably a recent development,[104] as is the politicization of the judiciary.[105] Fourth, courts and legislatures are decision-making bodies that shape and delimit every facet of social life. Finally, they both routinely decide by simple majority vote. This fifth point is significant because it raises the spectre of duelling majorities.

Legislative majorities depart from judicial ones in fundamental respects. First, judicial majorities may be more fragile. Keith Whittington observes that an individual decision-maker

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104 See e.g. Jeffrey Simpson, "Harper's counterattack on the activists: The Conservatives are prepared to fix what they see as a judicial imbalance in the land," Comment, *The Globe and Mail* (13 February 2007) A17; Campbell Clark, "Tories deny goal is to stack court system: Minister dismisses outcry over judges, suggesting it's prompted by sour grapes" *The Globe and Mail* (14 February 2007) A6.

105 See e.g. James Stribopoulos & Moin A. Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (2007) 45 Osgoode Hall L.J. 315.

is more likely to be decisive on a judicial panel than a legislative assembly.[106] Second, according to Morris Cohen, the constitutive rules of legislatures — regular election of members, procedural transparency, and popular participation — may provide defensible reasons to prefer legislative over judicial majorities.[107] Finally, judicial majorities are tougher to reverse than legislative ones[108] because they harden under the doctrine of *stare decisis* and typically require extraordinary circumstances to undo.

These differences are magnified when we recall our objective: to reincarnate the spirit of the notwithstanding clause and to fulfill its unfulfilled functions. To do so, we must rethink the judicial-legislative boundary. Of the three functions of the Clause — leaving politicians the last word in policy-making, cultivating an institutional dialogue between courts and legislatures, and keeping legislatures at the vanguard of rights construction — two may be satisfied by stamping legislative decision-making with a presumption of constitutional correctness and therefore tempering the power of judicial review.

B. LEGISLATIVE DECISION-MAKING

Canada is not a judicial supremacy in the American mould.[109] It is a constitutional democracy born of parliamentary roots. Despite this parliamentary pedigree, Tsvi Kahana defends the ascendancy of courts, maintaining that legislatures should not participate in rights construction. As majoritarian institutions, he argues legislatures would be inclined to invite majority preferences into their constitutional calculus — something that liberal democracy should not tolerate.[110] Therefore, courts, he concludes, are better equipped than legislatures to engage in constitutional interpretation.[111]

I agree with the first proposition. The *Charter* is not a device for implementing majority preferences or denying fundamental rights. One of its animating purposes is the very contrary ambition: to moderate popular will in defence of fundamental rights. Canada's constitutional instruments set a humanizing aspiration for the national consciousness, reflecting a more open, affirming, tolerant, freedom-loving, and freedom-living society. Kahana's latter point raises a fascinating question: whether courts are better equipped than legislatures to correctly interpret the *Charter*. But it is not the right question. We should instead ask what is consistent with the new structure of legislative ascendancy within the new regime of *Charter* sovereignty.

Legislative ascendancy authorizes legislatures to trump courts. Specifically, it relocates the locus of decision-making in legislatures, gives legislatures a significant role in rights construction, and ensures them the last word in policy-making. These are two of the three

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106 Keith E. Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses" (2002) 80 N.C.L. Rev. 773 at 803-804.

107 Morris R. Cohen, "Legal Theories and Social Science" (1915) 25 International Journal of Ethics 469 at 488-89.

108 Dennis Baker & Rainer Knopff, "Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases" (2002) 21 Windsor Y.B. Access Just. 347 at 357-58.

109 Perry, "Human Rights," *supra* note 36 at 667, 690-91.

110 Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 U.T.L.J. 221 at 240-41.

111 *Ibid.* at 225.

functions of the notwithstanding clause. We cannot fulfill them if we rigidly hold allegiance to the conventional view that courts must necessarily retain monopoly rights over constitutional interpretation. Though the conventional position may be normatively appealing for several reasons, it is incompatible with the design of the *Charter* and the notwithstanding clause. In our exercise to reincarnate the spirit of the notwithstanding clause, we must confine ourselves within the four corners of the *Charter* blueprint. That must be our anchor.

The notwithstanding clause evidently tips the constitutional balance in favour of legislatures. It gives legislatures the power to overrule courts on *Charter* construction. But its implicit message is not that legislatures are better than courts at constitutional interpretation. It is the more modest statement that judicial decisions are not always correct. This is a non-controversial point. Hogg, for instance, does not believe that courts necessarily decide issues of social and political justice more wisely than legislatures.[112] Janet Hiebert concurs, doubting whether judges can set aside their own assumptions about the role of the state in either adjudicating rights disputes or crafting objectively correct solutions to constitutional problems.[113] She therefore, echoes Hogg's view that there is no intrinsic reason to prefer courts to legislatures in rights construction.[114]

Another scholar, likewise, resists the claim that judicial constitutional interpretation is necessarily better than its legislative equivalent. Paul Weiler — whose scholarship inspired the Clause[115] — regards both courts and legislatures as imperfect decision-making institutions.[116] To him, the *Charter* creates an institutional division of labour between courts and legislatures, each participating in rights construction and each checking the missteps of the other.[117] Thus, the *Charter* gives them each other as a foil to mitigate their respective fallibilities.

Jeremy Waldron reaches the same conclusion as Hogg, Hiebert, and Weiler — that courts will not necessarily reach better decisions than legislatures — but he also helps illuminate why legislative ascendancy rejects the conventional wisdom that only courts must interpret rights. Waldron begins with the proposition that rights disagreements are reasonable in a liberal democracy. But those disputes, he adds, should be resolved with procedures that facilitate broad public consultation.[118] Since we generally cannot agree on the content of disputed rights, courts can claim no greater legitimacy than legislatures in interpreting those rights.[119] Waldron favours legislatures as the adjudicative forum for rights disputes because they facilitate the right of popular participation. That right, to Waldron, is central to his conception of democracy for four reasons: (1) it connects outcomes to participation in the political process; (2) it allows participants to exercise a self-protective function; (3) it

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112 *Ibid.*; Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2 (Toronto: Thomson Carswell, 1985) at 36-10 - 36-11.

113 Janet L. Hiebert, "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" (2004) 23 Sup. Ct. L. Rev. (2d) 169 at 178-79.

114 *Ibid.* at 180.

115 See e.g. Paul C. Weiler, "Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights" (1980) 60 Dalhousie Rev. 205.

116 Weiler, "Rights," *supra* note 37 at 83.

117 *Ibid.* at 84.

118 Waldron, "Core of the Case," *supra* note 40 at 1406.

119 Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 224-31 [Waldron, *Law*].

improves the quality of public deliberation by aggregating diverse views; and (4) it enhances the dignity, autonomy, and self-government of participants.[120]

To presuppose that courts alone should resolve rights disputes does not help reconcile the tension inherent in the *Charter*, which has sought to marry parliamentary sovereignty with an entrenched bill of rights — the former viewing the legislature as supreme, the latter regarding the courts as paramount. Likewise, to ask whether courts are better equipped than legislatures to correctly interpret the *Charter* is to neglect the more pertinent question: what should be the role of legislatures in constitutional interpretation under the new structure of legislative ascendancy within the new regime of *Charter* sovereignty? The answer to this question doubles as the first and perhaps most contentious adjustment to make in our reconstitutive analysis: legislatures must reclaim the leading role in rights construction and policy-making.

C. ADVISORY REVIEW

Having suspended judicial review in order to satisfy two functions of the notwithstanding clause in our reconstructive project, we must now reinsert the judiciary into our model to fulfill the third function of the notwithstanding clause: cultivating an institutional dialogue between courts and legislatures. Two principles must guide our design. First, the judiciary must occupy a critical role emblematic of its enhanced status under the *Charter*. Second, the judiciary must perform its role independently. This is obligatory in any liberal democracy.

Under the new model of advisory review, the judiciary retains the authority to review legislation for *Charter* infirmity. But this constitutional review becomes only advisory. What was once judicial review — authorizing the judiciary to compel the legislature to act in conformity with its judgment—is now advisory review. The judiciary is still summoned to assess the constitutionality of legislation, but its decisions are no longer binding. The legislature is not required to revise its impugned legislation consistent with a judicial decision. This fosters judicial deference to legislative choice, which meshes with the effort to relocate the locus of constitutional decision-making in the legislature.

In practice, this form of advisory review is likely to promote the very dialogue that the notwithstanding clause augured. Consider a leading Canadian Supreme Court case as an example.[121] Here are the facts: X is a permanent Canadian resident but not a citizen; the provincial law society denies X's application for membership because X is not a citizen; X argues that the province has discriminated against her based on nationality and violated s. 15 of the *Charter* guaranteeing her right to equal protection and equal benefit of the law. X loses at trial then successfully appeals to the intermediate court. The province subsequently appeals to the Supreme Court, where the Court finds in favour of X by a margin of 4 to 2, holding that denying membership to non-citizens is an unjustifiable violation of s. 15.

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[120] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J. Legal Stud. 18 at 36-38.

[121] *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143.

Under the existing Canadian model of judicial review, the court's simple majority judgment would compel the province to admit X to the law society. But under the new model of advisory review, the court's judgment would not bind. The province would instead take the court's judgment under advisement. Depending upon the public importance and awareness of the issue, the court's judgment would trigger legislative debate and popular deliberation about whether the province should adopt the judicial recommendation. The arguments for each side would draw from various sources, including policy choices, political considerations, and the court's majority and dissenting reasons. The judiciary, legislature, stakeholders — they would all contribute to the legislative and political processes, and widen the prospects for public discourse on public issues. Popular engagement, therefore, becomes a product of advisory review.

Whether or not the legislature adopts the court's recommendations, the legislature will have proceeded through several iterations of exchange with judicial and non-judicial actors. Even if the legislature rejects the court's recommendations, the legislature will have to give good reason. This is because the judiciary is revered as a competent and trusted Canadian institution[122] — much more so than the legislature.[123] Indeed, a majority of Canadians believe that courts should retain the last word in *Charter* construction.[124] The public standing of courts will constrain the legislature by: (1) obliging an adequate response to a judgment; and (2) requiring convincing reasons for departing from it. Therefore under the new model of advisory review, legislatures will face political pressure to either comply or justify their non-compliance instead of facing constitutional exigencies to comply with judgments.

Advisory review is not foreign to Canada. The statutory creation of the Supreme Court authorized the Court to issue advisory opinions on questions of law referred by the Governor-in-Council.[125] Granted, there are critical differences between the Supreme Court's statutory reference jurisdiction and the new model of advisory review. First, the Court currently issues advisory opinions at the request of a state party. Advisory review would instead arise in the normal course of *Charter* litigation. Second, only the Supreme Court can issue an advisory opinion pursuant to its reference jurisdiction. In contrast, the new model would authorize any court to engage in advisory review.

But there are equally important parallels between advisory opinions and advisory review. Like advisory opinions, advisory review would be just that — advisory. Just as advisory opinions now bind neither petitioning parties nor judges nor even future similarly situated parties,[126] advisory review would not oblige the legislature to adopt the Court's advice. Moreover, just as advisory opinions have been important in moulding the contours of the

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122 Kirk Makin, "After 25 years of Charter, most think Supreme Court on right course" *The Globe and Mail* (16 February 2007) A8.

123 Joseph F. Fletcher & Paul Howe, "Canadian Attitudes toward the Charter and the Courts in Comparative Perspective" (2000) 6:3 Choices 4, online: Institute for Research on Public Policy <http://www.irpp.org/choices/archive/vol6no3.pdf> at 5-22; Kirk Makin, "Judges garner greater trust than politicians, survey finds: Use of notwithstanding clause remains divisive issue among respondents" *The Globe and Mail* (9 April 2007) A5.

124 Andrew Parkin, "The *Charter* and Judicial Activism: An Analysis of Public Opinion" (2002) 21 Windsor Y.B. Access Just. 361 at 370.

125 *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 53-54.

126 *Re Jurisdiction over Provincial Fisheries* (1896), 26 S.C.R. 444 at 539.

Canadian legal system,[127] the same would be true of advisory review given the iterative dynamic it would foster among the legislature, judiciary, and populace.

Judges are eminently suited to this advisory role. Erik Luna views judges as constitutional cartographers who can suggest resolutions to enduring constitutional problems, sketch constitutional roadmaps to navigate constitutional strictures, and trigger civic discourse.[128] Only judges can perform this function. They are shielded from the political pressures that constrain or compel elected officials. This detachment permits judges to: (1) render publicly esteemed advice that may be politically unpopular yet constitutionally imperative; and (2) address several audiences in their judgments, including the Parliament, provincial legislatures, the electorate, and even interest groups. For Neal Katyal, these and other features of judicial advice-giving promote democratic self-rule, accountability, and adaptability.[129] Judicial advice may also contribute to enhancing the legislative process itself.[130]

But one scholar has articulated a stinging criticism of judicial advice-giving. Christine Bateup argues that judicial advice-giving does not actually encourage dialogue between courts and legislatures but instead empowers activist courts to signal to legislatures how they must perform their legislative functions.[131] The new model of advisory review escapes these crosshairs precisely because it does not compel legislatures to adopt judicial advice. That choice is instead left to legislative discretion and political considerations.

Finally, the theory of advisory review has distinguished origins. Alexander Bickel's passive virtues,[132] Guido Calabresi's second-look doctrine,[133] Cass Sunstein's judicial minimalism[134] — these are the intellectual antecedents to advisory review. Constitutional forms of advisory review also exist in western democracies, including pre-promulgation review on the French Constitutional Council[135] and declarations of incompatibility under the U.K. *Human Rights Act*.[136] We must of course be mindful of the dangers of constitutional borrowing.[137] It is a precarious enterprise that requires a subtle appreciation of the history, context, and culture of both lending and borrowing nations. The new model of advisory review avoids this constitutional peril. It is inspired by foreign models. But it does not

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127 James L. Huffman & MardiLyn Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74 Minn. L. Rev. 1251.

128 Erik Luna, "Constitutional Road Maps" (2000) 90 J. Crim. L. & Criminology 1125 at 1185-99.

129 Neal Kumar Katyal, "Judges As Advicegivers" (1998) 50 Stan. L. Rev. 1709 at 1711.

130 Ronald J. Krotoszynski, Jr., "Constitutional Flares: On Judges, Legislatures, and Dialogue" (1998) 83 Minn. L. Rev. 1 at 7.

131 Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 Brook. L. Rev. 1109 at 1123-28.

132 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven: Yale University Press, 1986) at 111-98.

133 Guido Calabresi, "The Supreme Court 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Bennan Debate Ignores)" (1991) 105 Harv. L. Rev. 80 at 104-105.

134 Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999) at ix-x, 259-63.

135 See e.g. Daniel Mockle, "Mondialisation et État de droit" (2000) 41 C. de D. 237 at 267-68.

136 See e.g. Tomkins, *supra* note 85; Clive Walker & Russell L. Weaver, "The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World" (2000) 33 U. Mich. J.L. Ref. 497 at 546-52.

137 Wiktor Osiatynski, "Paradoxes of constitutional borrowing" (2003) 1 Int'l J. Const. L. 244.

transplant them. The new model of advisory review is uniquely Canadian. It is born of Canadian circumstances and embodies a Canadian solution that is consistent with Canadian constitutional traditions.

D. MAJORITARIAN EXCESS

Let us retrace our steps. Our reconstructive exercise has thus far yielded a model that reincarnates the spirit and functions of the notwithstanding clause. The new model gives politicians the last word in policy-making, cultivates an institutional dialogue between courts and legislatures, and keeps legislatures at the vanguard of rights construction. It fulfils this mission by: (1) affording a margin of appreciation to legislative rights construction; and (2) replacing judicial review with advisory review. But our model is not yet complete because it lacks an effective safeguard against the threat of majoritarian excess.

The strongest defence of judicial review is that it is tasked with the mission to protect fundamental rights from majoritarianism. This has found expression in leading cases[138] and texts.[139] The Canadian Supreme Court has nobly interpreted the *Charter* with courage and conviction to shield the voiceless from dominant majorities. For instance, the Court has preserved fundamental rights in the context of language,[140] religion,[141] freedom of expression,[142] sexual orientation,[143] and disability.[144] Without the Court in their corner, politically powerless groups would enjoy their rights only at the behest of the commanding majority. On this point, Erwin Chemerinsky is correct: the goodwill of an impulsive majority is insufficient to guarantee the full panoply of constitutional rights.[145]

The new model of advisory review guards against majoritarianism. Its impetus is the celebrated John Whyte/Peter Russell colloquy in which one rejects and the other praises the notwithstanding clause, yet both agree that constitutionalism must dispel the dangers of political passion.[146] Advisory review constructs a way to protect the powerless. That mechanism is the judicial unanimity rule. The new model distinguishes between unanimous and non-unanimous Supreme Court decisions, deeming the former authoritative, and the latter only advisory. When a judicial panel issues a unanimous *Charter* decision that invalidates or recommends revisions to a law, the new model of advisory review compels the legislature to modify its legislation consistent with that judgment. This rule of judicial unanimity suspends legislative discretion, rejects political considerations, and consequently withholds from legislatures the power to trump unanimous *Charter* judgments.

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138 *Secession Reference*, *supra* note 66 at para. 81; *United States v. Carolene Products*, 304 U.S. 144 at 152, n. 4 (1938).

139 Hon. Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 3d ed. (Toronto: Irwin Law, 2005) at 32-36; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) at 145-57.

140 *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

141 *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551.

142 *R. v. Zundel*, [1992] 2 S.C.R. 731.

143 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

144 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

145 Erwin Chemerinsky, "In Defense of Judicial Review: A Reply to Professor Kramer" (2004) 92 Cal. L. Rev. 1013 at 1023-25.

146 Whyte, *supra* note 37 at 355-56; Russell, "Standing," *supra* note 43 at 295.

This new baseline rule governing the judicial-legislative interface shifts the presumption of constitutional correctness from courts to legislatures. This is a critical modification. Under the current model, a legislative decision to invoke the notwithstanding clause to interpret the *Charter* is cast as a deviation from the governing *Charter* standard of judicial construction. The text of the Clause itself conspires with the Clause's self-reinforcing inertia to create the presumption that judicial decision-making attains a level of legitimacy that legislatures cannot reach. This is the consequence of requiring legislatures to invoke an extraordinary mechanism — one that has been delegitimized through practice and custom — in order to displace a judicial decision.

In contrast, the new model of advisory review — which aspires to reincarnate the spirit of the Clause — reverses these judicial and legislative presumptions. First, the model designates legislative constitutional interpretation as the standard practice by permitting legislatures to take non-unanimous judicial decisions only under advisement and not as binding. Second, the model respects the judicial role in constitutional interpretation by obliging legislatures to comply with unanimous *Charter* decisions. The model also gives judicial constitutional interpretation a touch of exceptionalism. Yet this exceptionalism is unlike the delegitimizing exceptionalism that currently undermines the notwithstanding clause. It is instead power-conferring, authority-reinforcing, and it preserves a focal judicial function in *Charter* interpretation.

The rule of judicial unanimity reflects the transformative character of the *Charter*. Requiring the legislature to bend to a unanimous decision recognizes the undeniable force of reason that such a united judicial posture entails. At this juncture, it is important to address why the powerful arguments in favour of judicial unanimity are *insufficient* to require the legislature to fall in line with a non-unanimous judicial decision. This question probes the qualitative difference between unanimous decisions (9-0) and divided decisions (5-4, 6-3, 7-2, and 8-1) issued by full Supreme Court panels. The answer draws on two interrelated points: (1) the Court is a political institution; and (2) the principal purpose of judicial review is the protection of fundamental rights. Let us review each of these in turn.

First, courts are political institutions staffed by political actors who hold political views and are selected through political processes.[147] Given the political nature of the craft of

[147] Perhaps the best exposition of the proposition that judges are political actors is found in Richard Devlin, A. Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 Alta. L Rev. 734 at 752-58. I adopt the Devlin-MacKay-Kim construction at 757 [emphasis in original, footnote omitted]:

> To be clear, when the claim is made that judges are political actors and that the judiciary is a political institution, we are not claiming that they are the same as politicians and legislators. Rather, the distinction is one of degree, not of kind. It is the *form*, *forum*, and *processes* that are different, not the ultimate function. It is the exercise of state power. Thus, in the same way that society acknowledges that bureaucrats and the bureaucracy wield political power in a particular form and forum, so too do judges and the judiciary. We do not assert that judges are political actors like the rest but rather that they are political actors of a certain character, who operate in their own particular form and forum. Courts, nonetheless, engage in the kind of interest and value choices that characterize a political process. They are part of the contested terrain within which value disputes are resolved.

See also David M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990) at 3 (describing the role of courts in shaping social policy); Jonathan

judging, it is remarkable when such a diverse group of principled lawyers possessing dissimilar convictions reach agreement on contentious *Charter* issues. This is not a criticism of the judiciary. It is merely a recognition of the Canadian political context in which judges discharge their delegated function. The political nature of courts and the dissimilar judges that constitute them make *Charter* division unsurprising and indeed expected. This in turn helps explain the significance of *Charter* unanimity. It also hints at the implicit point of my earlier discussion about duelling majorities. A non-unanimous judicial majority can claim neither greater legitimacy nor even a higher likelihood of correctness than a legislative majority. To allow a non-unanimous judicial majority to overrule a legislative majority simply relocates the locus of decision-making from one political body to another. It also undermines the customary institutional distinctions that democratic theorists have advanced about courts and legislatures. Those distinctions are familiar: unlike courts, legislatures are representative, elected, and accountable.[148] In this light, a non-unanimous judicial majority

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L. Black-Branch, *Rights and Realities: The Judicial Impact of the* Canadian Charter of Rights and Freedoms *on Education, Case Law and Political Jurisprudence* (Aldershot: Ashgate/Dartmouth, 1997) at 184-87 (arguing that Canadian courts discharge a political function); W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) at 283: "The force of the judiciary under the Charter comes not only from what they do but how their decisions are put in the balance against other creators of public policy, particularly the legislatures and especially in terms of complex policy formulation"; Brian Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution" in The Honourable Gérald-A. Beaudoin & Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) 1-1 at 1-17 [footnotes omitted]: "American experience gives credence to the comments of Alexis de Tocqueville in 1832 that 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question'. And so, it seems in Canada"; Mark R. MacGuigan, "Sources of Judicial Decision Making and Judicial Activism" in Sheilah L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 30 at 30: "At this stage in our jurisprudential evolution, I believe it is no longer open to serious question that judges are truly legislators, even though their legislation is of a limited kind: they make law but within the bounds established by their constitutional position and within the limits of statutory intent and language"; Morris Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the* Constitution Act, 1982 (Toronto: Emond-Montgomery, 1983) at 24-50 (arguing that the *Charter* conferred a political law-making function upon the judiciary); James B. Kelly & Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor" (2005) 35 Publius 217 (describing the "meta-political" function of the judiciary in a way that betrays the political calculus that inheres in judicial decision-making); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Oxford: Oxford University Press, 2001) at xi (describing judges as "political actors"); Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 35 (observing that the "perception of the judiciary as the politically neutered branch of government may well be undermined by the political nature of the judiciary's responsibilities under the new Charter"); Sharpe & Roach, *supra* note 139 at 25-43 (rebutting false assumption that *Charter* questions presented to courts are strictly legal and not political in nature); Jennifer Smith, "*R. v. R.D.S.*: A Political Science Perspective" (1998) 21 Dal. L.J. 236 at 237-41 (reviewing political science literature on judges as political actors); Alec Stone Sweet, "The politics of constitutional review in France and Europe" (2007) 5 Int'l J. Const. L. 69 at 72-92 (surveying the various notions of "political" that characterize the role of courts in constitutional review); Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 210: stating that "the document, tradition, and precedent can only provide some guidance for judges, leaving the Court to make policy choices about the appropriate bounds of jurisdiction for national and provincial communities and, thus, through their decisions, to help constitute our political institutions."

[148] See generally Hirschl, *supra* note 42; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Waldron, *Law*, *supra* note 119 at 293-94; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994); Bickel, *supra* note 132; Michael J. Perry, *The Constitution, the Courts, and Human*

should be afforded no greater authoritativeness than a legislative majority. Quite the contrary, in the context of a legislative ascendancy that reincarnates the spirit of the notwithstanding clause, a legislative decision should not be displaced by anything less than a unanimous judicial decision in defence of fundamental rights.

The second part of the answer to the question about the difference between unanimous and non-unanimous judgments is that the stakes rise when the Supreme Court speaks unanimously. Granted, a unanimous judicial panel remains a political body to the same extent as a non-unanimous one. But its unanimity transcends its politicization in a powerful way when justices agree on a significant *Charter* issue despite equally significant political differences among them. Consider that judicial unanimity is less frequent in the *Charter* context than in general. Peter McCormick reports that from 1970 to 2002, the Court was unanimous in 63.7 percent of all cases.[149] But from 1984 to 1990 — after Canada adopted the *Charter* in 1982 — the Dickson Court was unanimous in only 33.3 percent of its *Charter* cases.[150] Likewise, from 1991 to 1999, the Lamer Court was unanimous in a comparably low number of *Charter* judgments: 44.3 percent.[151] These figures suggest to McCormick that the *Charter* has fragmented the Supreme Court and made disagreement in *Charter* cases twice as likely as in non-*Charter* cases.[152] These numbers and McCormick's conclusion corroborate the claim that unanimity among a group of disparate judges is rare and uniquely compelling.

This helps defend the rule of judicial unanimity in the defence of fundamental rights. If fundamental rights are unjustifiably threatened by legislative action, we can expect the judiciary to return a unanimous judgment invalidating that action. That has been the modern record of the Supreme Court. It has served as an effective check against majority will when that majority has sought to undermine the fundamental principles of liberal democracy. The new model retains the fundamental practice under the current model, which obliges the legislature to comply with unanimous judgments. But the new model departs from the current model where courts return non-unanimous judgments. In that case, the new model only invites, but does not compel, a legislative response.

In adopting the rule of judicial unanimity, the new model of advisory review also accepts that the strongest defence of judicial review is the protection of fundamental rights. If a Supreme Court panel agrees unanimously that a legislative enactment violates certain fundamental *Charter* rights, it is difficult to construct an agreement — within the confines of the transformative *Charter* — that the legislature should be free to disregard this judgment. Supreme Court panels are composed of individuals who come from all corners of Canada, have walked different paths, have lived assorted experiences, and view Canada and

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Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary (New Haven: Yale University Press, 1982).

149 Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 Osgoode Hall L.J. 99 at 107.

150 *Ibid.* at 123-24.

151 *Ibid.* at 127.

152 *Ibid.* at 134.

the *Charter*'s role within it through unique lenses.[153] This is precisely what gives judicial unanimity on the *Charter* its force of reason.[154] It shows that reasonable minds cannot disagree on certain fundamental rights. It moreover sends an unmistakable message of purpose and clarity to legislators — and calls for remedial action.[155]

Nevertheless, the rule of judicial unanimity would actually undermine one of the three principal functions of the notwithstanding clause: it would not encourage dialogue in practice. However, dialogue is an acceptable casualty when the rights of unpopular or powerless groups stand in the balance. Nonetheless, the rule of judicial unanimity under the

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153 David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 145-46 (noting the different perceptions that inform judicial decision-making).

154 Unanimous judgments have important legal and political consequences. First, as McCormick observes, it is settled that unanimous judgments "have the greatest impact on lower courts and other actors": Peter J. McCormick, "The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court 1991-97" (1999) 22:1 Dal. L.J. 93 at 102, n. 31. Second, they convey a perception of unassailability that commands public approval. Unanimous judgments appeal to the popular imagination for at least four reasons. First, unanimous judgments resonate precisely because "unanimity signals that the legal merits of the case are so clear that a case is to the left or to the right of all the justices": Benjamin R.D. Alarie & Andrew Green, "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada" (2007) 57 U.T.L.J. 195 at 205, n. 31. Second, they express in an authoritative voice and posture that "there is a right answer and everyone has figured it out": Adrian Vermeule, "The Constitutional Law of Congressional Procedure" (2004) 71 U. of Chicago L. Rev. 361 at 421. Third, they demonstrate that there is little or no doubt about how best to resolve a legal problem. See Peter McCormick & Suzanne Maisey, "A Tale of Two Courts II: Appeals from the Manitoba Court of Appeals to the Supreme Court of Canada, 1906-1990" (1991) 21 Man. L.J. 1 at 11. Fourth, unanimous judgments reinforce the primacy of the court as an arbiter of moral issues that divide or threaten to divide a particular constituency. See David A. Skeel, Jr., "The Unanimity Norm in Delaware Corporate Law" (1997) 83 Va. L. Rev. 127 at 170 (examining the motive and effect of unanimity in corporate law). In turn, these four grounds make it exceedingly difficult to imagine a competing branch or organ of the state defying the judiciary when it presents this common front. For a particularly strong illustration of this point, see Steven J. Brams & Douglas Muzzio, "Unanimity in the Supreme Court: A Game-Theoretic Explanation of the Decision in the White House Tapes Case" (1977) 32 Public Choice 67 at 72-76.

155 One of the strongest arguments undermining the rule of judicial unanimity is that the compromise required to reach unanimity may perhaps dilute the robustness of the particular civil right, liberty, or legal principle that is the subject of the judgment. See e.g. Diana Majury "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297 at 311-15. This sometimes occurs in crafting *per coram* opinions: Peter McCormick, "'With Respect...' — Levels of Disagreement on the Lamer Court 1990-2000" (2003) 48 McGill L.J. 89 at 95-96. It may also have been the case on the Laskin Court: see Peter McCormick, "Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973-1984" (1998) 24 Queen's L.J. 237 at 273-74. It was almost certainly the case during the Chief Justiceships of John Marshall and William Howard Taft: see Sandra Day O'Connor, "William Howard Taft and the Importance of Unanimity" (2003) 28 J. Sup. Ct. Hist. 157 at 158-62. The larger consequence of this artificial form of unanimity is that it may risk divesting genuine unanimity of its force. See Scott D. Gerber & Keeok Park, "The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices" (1997) 91 American Political Science Review 390 at 404-406. Granted, judges may sometimes reach unanimity through compromise. Nevertheless, this reality of the judicial function does not weaken the rule of judicial unanimity because *advisory review* continues to accommodate judges who wish to issue separate concurring opinions in which they delimit the four corners of the terms of their concurrence with the unanimous judgment. Another equally powerful argument against the rule of judicial unanimity is one that endows a lone dissenter with disproportionate influence. See Douglas W. Rae, "The Limits of Consensual Decision" (1975) 69 Am. Pol. Sci. Rev. 1270 at 1273-74. This is undeniably the case. Yet a judicial holdout will be expected to abide by convention and issue considered dissenting reasons for departing from the majority judgment — a judgment that would otherwise have been unanimous. These dissenting reasons will of course be subject to public scrutiny.

new model of advisory review would not depart from the current model of judicial review. Consider, for example, how the new rule would function in a landmark Canadian Supreme Court case.[156] Assume X is charged with violating the *Lord's Day Act*,[157] a federal statute prohibiting the sale of goods on a Sunday; X argues that the statute unconstitutionally violates her right to freedom of conscience and religion guaranteed in the *Charter*. Assume that X is acquitted at trial. Further, assume that the state unsuccessfully appeals the acquittal. On further appeal to the Supreme Court, assume that the Court decides unanimously that the *Act* is an unjustifiable infringement on X's *Charter* right.

Unlike a divided decision under the new model — which would foster institutional dialogue and offer the legislature the choice of adopting the court's judgment — the unanimity rule under the new model would compel the legislature to abide by the judicial decision, and therefore act swiftly to protect fundamental rights. The practical effect of this rule is to create a constitutional hierarchy in which judicial unanimity trumps the legislature, but in which the legislature trumps a judicial majority. In ascending order of authority, the hierarchy under this new model of advisory review may be depicted as follows: judicial majority < legislative majority < judicial unanimity.

This illustrated hierarchy represents the two principal rules comprising the new model of advisory review. First, a judicial majority is insufficient to overrule the legislature. If the court invalidates or otherwise rejects legislative action by a non-unanimous majority, the legislature is not compelled to revise its action into conformity with the judicial decision. The legislature may instead take the decision under advisement and consider adopting the recommendations of the court. The second principle is that judicial unanimity overrules the legislature. If the court invalidates or otherwise rejects legislative action by a unanimous vote, the new model of advisory review compels the legislature to abide by the judicial decision.

Although the new model of advisory review would generate a cascade of minor additional changes to the current model — for instance, by requiring a full Supreme Court panel for all *Charter* cases instead of retaining the current practice that permits the Court to hear *Charter* cases in panels of five, seven, or nine — the new model has assumed its skeletal form. The flagship component of the new model is the rule of judicial unanimity. It is designed to neutralize the dangers of majoritarian excess that characterize parliamentary systems. It is primarily inspired by the democratic defence of judicial review, which holds that entrenched rights exist to protect the politically weak. It also derives from the institutional differences distinguishing courts from legislatures. Finally, the rule preserves a critical supervisory role for the judiciary in interpreting the *Charter*.

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156 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

157 R.S.C. 1970, c. L-13.

V. CONCLUSION

The notwithstanding clause is not yet dead. But it is dying. It is a desuete constitutional device that once augured great promise for Canadian constitutional democracy. According to politicians, scholars, and historians, the Clause boasts three important functions: (1) leaving control over public policy to legislators; (2) cultivating an institutional dialogue between courts and legislatures; and (3) preserving parliamentary sovereignty. But it has failed to fulfill these ambitions. In addition to missing this mark, the notwithstanding clause has paradoxically undermined the legislative role — its very converse intention. Textualism, the conventional presumption of judicial correctness, and path dependence have helped illuminate this curious phenomenon.

Despite its many weaknesses, the Clause still embodies laudable aims. Canada should chart a new constitutional course that satisfies these unfilled functions of the notwithstanding clause. The new model of advisory review presented in these pages proposes to do just that. The new model reincarnates the spirit of the notwithstanding clause into a new institutional structure between courts and legislatures — a structure that fills the void of the fading Clause. Advisory review establishes a decision-making hierarchy under which judicial unanimity trumps a legislative majority, which in turn trumps a judicial majority. This achieves several objectives. First, the new model of advisory review clothes legislative decision-making in a presumption of constitutional correctness consistent with the theory of legislative ascendancy. Legislatures consequently remain at the vanguard of rights construction and retain the last word in policy choices. Second, the new model cultivates institutional dialogue. *Charter* review that yields a judicial majority recommending either revisions to or invalidation of legislation invites the enacting legislature into an exchange with the reviewing court about the constitutional bounds of rights. Finally, the new model of advisory review elevates the judiciary into precisely the critical supervisory role that the *Charter* contemplates. The keystone rule of judicial unanimity guards against perilous majoritarianism by compelling legislatures to comply with unanimous *Charter* decisions. It therefore underwrites entrenched rights by preventing legislative ascendancy from descending into legislative tyranny.

But the highest aspiration of advisory review is to inspire dialogue about the notwithstanding clause itself and its function in the Canadian project of democracy. This constitutional dialogue must expand from the courts, legislatures, and the academy to also include citizens. It must be a national conversation about how Canada should pursue several disparate yet important objectives: (1) recognizing the transformative force of the *Charter*; (2) embracing the new *Charter* judiciary; (3) respecting Canadian parliamentary traditions; (4) achieving the objectives of the notwithstanding clause; (5) guarding against majoritarian excess; and (6) defending judicial independence. The new model of advisory review strives to reconcile these competing considerations and to relocate the discussion onto new ground in a way that will generate public deliberation and discussion. Advisory review is therefore itself a dialogic model whose ambition is to encourage civic and political discourse. Let the conversation begin.