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Essay
Political Legitimacy, Judicial Review, and the Legislative Override

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Abstract

This paper argues that (1) political community requires an agreed method of deciding disputes about the norms that will govern; (2) a decision method that includes a legislative process, strong judicial review, and a legislative override is a method with components that work at cross purposes; and (3) that such a method cannot be agreed upon responsibly. Points (1) and (2) describe Canada's method of decision-making in which the legislative override is called the notwithstanding clause. An argument at cross purposes is incoherent and cannot responsibly be accepted, nor can someone responsibly obey a command that involves contradictory directives. By analogy of reasoning, steps that work at cross purposes in a decision-making system can weaken or erode agreement to it. In other words, the political legitimacy of that method is weakened and contributes to its illegitimacy. Optimally for democratic decision-making, eliminating strong judicial review removes this weakness.

Keywords: *political legitimacy; judicial review; legislative override; notwithstanding clause*

Introduction

Recent threatened and actual 'pre-emptive' use of the 'notwithstanding clause' (NWC) of the *Canadian Charter of Rights and Freedoms*[1] by the provincial legislatures of Ontario, Quebec, and Saskatchewan[2] has provoked heated public

1. *Canadian Charter of Rights and Freedoms*, s 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
2. Ontario threatened to invoke the NWC to shrink the size of the Toronto city council in 2018, to limit third-party election spending in 2021, and to impose a contract on education workers threatening to strike in 2022: see John Rieti, "Premier Doug Ford to use notwithstanding clause to cut size of Toronto city council", *CBC News* (9 September 2018), online: www.cbc.ca/news/canada/toronto/judge-ruling-city-council-bill-election-1.4816664; *Protecting Elections and Defending Democracy Act, 2021*, SO 2021, c 31, s 4; *Keeping Students in Class Act, 2022*, SO 2022, c 19, s 13; *Keeping Students in Class Repeal Act, 2022*, SO 2022, c 20. Quebec used the NWC to prevent government employees from wearing religious symbols in the workplace and invoked its use in its language reform legislation: see *Act respecting the laicity of the State*, CQLR c L−0.3, s 34; *An Act respecting French, the official and common language of Québec*, SQ 2022, c 14, ss 121, 217. Saskatchewan pre-emptively invoked the NWC in Bill 137 (Parent's Bill of Rights), which required schools to inform a student's parents when the student chose to go by a new personal name or pronoun: see *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46, s 197.4.

debate about the role of the legislative override clause in the Canadian constitutional democracy.[3] The pre-emptive use of the clause, achieved by inserting it into a piece of proposed legislation that relates to basic rights, is said to undermine the rule of law by denying the appellate courts their constitutional role to strike down, nullify, or displace legislation that does not comply with (because it is not a reasonable limit on) the rights and freedoms recognized by the *Charter* in the Constitution.[4] These provincial governments—all three elected by large majorities, as it happens—and their proponents, argue that the NWC is a constitutionally recognized tool to preserve the democratic principle that the final decision on legislation belongs to the people through their elected representatives. Both sides have a point: The Constitution provides for both judicial review and for the NWC. However, the Constitution contains no guidelines or principles as to how judicial review and the NWC can play complementary roles to protect our basic rights. This essay argues that judicial review and the NWC are steps in democratic decision-making that work at cross purposes and therefore cannot complement one another as parts of a democratic political authority that is legitimate. Consequently, they cannot work together to protect our rights. The impossibility of complementarity has gone largely unnoticed in the current debate, in favour of defending the role of each constitutional provision in relation to the other. But a democratic method of deciding disputes about basic rights that contains functional parts that are at cross purposes cannot warrant legitimacy in the sense of responsible obedience or consent, a concept to be explained in this paper. Eliminating the override does eliminate the incoherence, but so too does eliminating judicial review, as it renders the NWC unnecessary. I argue that eliminating *Charter* review is the more democratic move. I concede that Canadians' rights could be more effectively protected by improved democratic processes and institutions. However, the point is that judicial review is not one of those improvements.

The paper's first section examines the view that the NWC complements judicial review by ensuring that group rights can be protected if appellate jurisprudence fails to do so. I explain why this approach implies the competence of the liberal democratic legislative process to protect our rights and, therefore, undermines the need for judicial review and therefore, the NWC. Section 2 argues that an agreed political decision system is legitimate but that the legitimacy is weakened if the system contains parts that cannot be responsibly agreed to. This implies that a system may be agreed by the governed despite parts in the system

3. I mean 'public debate' conceived broadly to include academic contributions: see e.g. Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Menard, "Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order" (2023) 110 SCLR (2d) 135 at 135, nn 2-3, online: *SSRN* ssrn.com/abstract=4123003.

4. I use '*Charter* review' and 'judicial review' interchangeably without difference in meaning, and I mean the strong form of judicial review that has the power to strike down, nullify, or displace legislation. Not all democratic regimes attach that power to appellate review: see C Neal Tate & Torbjörn Vallinder, "The Global Expansion of Judicial Powers: The Judicialization of Politics" in C Neal Tate & Torbjörn Vallinder, eds, *The Global Expansion of Judicial Powers* (New York University Press, 1995) 1.

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that tend to erode agreement. Section 3 explains why resolving the incoherence problem—and thereby strengthening legitimacy—should take the form of eliminating or greatly restricting judicial review. My approach is to evaluate the two main justifications of *Charter* review—*nemo judex in causa sua*[5] and *audi alteram partem*.[6] I explain that these justifications are unconvincing as constitutional requirements; that they are problematic correctives of undemocratic potential in legislative decision-making; or that they are sound principles of natural justice mistakenly applied to political decision-making.

Sections 3.5 and 3.6 examine examines whether the acknowledged multiple and diverse deficiencies of the democratic legislative process of decision may be taken together as a justification for judicial review—a kind of cumulative case for it. The deficiencies are real but, as I explain, they are not so thoroughgoing as to justify the role of a non-representative arbitrator (with its own deficiencies). The paper's final section, section 3.7, suggests that political unity suffers from judicial review because it institutionalizes a weakness to the legitimacy of the method of deciding disputes by standing for (a) a different definition of democracy than that of the Parliamentary process, and (b) a different idea of majority rule. Counting on widespread agreement with Parliament's many decisions is unlikely to result in strengthening political unity, but eliminating important weaknesses in the political decision-system is more promising. I maintain that the latter approach requires eliminating judicial review.

1. Justifying the NWC

Two common justifications of the NWC are to protect group identity and to counter the decisions of 'obstructionist judges'. André Binette defends the override to secure Quebec's regulation of religious symbols among public employees in the workplace—teachers, for example—by asserting that "[f]reedom of religion of teachers is ranked lower than freedom of conscience of children in Quebec, and that is a justifiable and ethical position to take in a modern liberal society."[7] Similarly, Benoît Pelletier agrees that the legislative override is justified by allowing "a specific community to prioritize collective interests, to enhance collective rights or quite simply to make particular collective choices."[8] Their arguments do not question the role of judicial review in protecting our

5. "No one should be a judge in their own cause." Incorporated Council of Law Reporting for England and Wales: Glossary, online: *ICLR* www.iclr.co.uk/knowledge/glossary/, sub verbo "Nemo iudex in causa sua" [*ICLR Glossary*]. Note that "iudex" is often written as "judex."

6. "Hear the other side (of the argument)." Merriam-Webster Dictionary, online: merriam-webster.com, sub verbo "audi alteram partem".

7. André Binette, "Safety Valve for Canadian Unity: The notwithstanding clause allows different conceptions of liberalism to coexist in a single state" (2023) 53 Inroads, online: inroadsjournal.ca/safety-valve-for-canadian-unity/.

8. Benoît Pelletier, "The notwithstanding clause is at the very heart of federalism", *Policy Options* (18 November 2022), online: policyoptions.irpp.org/magazines/august-2022/notwithstanding-constitution-heart-federalism/

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individual rights but believe the legislature's role is to counter a narrow jurisprudence at the top court that prioritizes individual rights at the expense of group identity. However, two points need to be made here: First, the override would be unnecessary if jurisprudence at the top court took subgroup identity more seriously as an absolute limit on the homogenizing tendency of human rights thinking, which tends to construe the dignity of individual rights holders to be independent of membership in a particular subgroup.[9] As Lustig and Weiler demonstrate, the 'identity voice' in human rights jurisprudence at the international level is becoming increasingly applied as a kind of corrective to this homogenizing view of human dignity.[10] Secondly, as I will argue below, to concede the competence of the legislature to protect group rights is to concede its ability to protect individual rights as well.

Gordon Lee argues that the NWC defends Parliamentary democracy against 'obstructionist judges', citing several cases of apparently egregious judicial overreach.[11] The problem with Lee's anecdotal approach is that supporters of judicial review have their own list of legislative injustices. Consequently, these supporters will say that judicial 'obstruction' of the legislature is precisely what they and many in the electorate value about judicial review. Moreover, the practice is common across the international democratic community.[12] Therefore, it will take a more principled argument than anecdotes about judicial overreach to defend the NWC as a way to strengthen democratic decision-making. We avoid the anecdotal issue by noting that a legislature capable of protecting individual rights is *ipso facto* also capable of protecting group rights. This is because reasoning about group rights requires a grasp of individual rights. This is partly because some group rights are derivative of individual rights. To see this, we need to remind ourselves of the challenge of specifying the duties that our rights enjoin.

The duties involved in the protection of groups can, in some cases, be best understood as derivative of the duty to protect individual rights. For example, people have a need for identity formation that group membership can provide.

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9. In fact, Pelletier appears to recognize that the 'balance' provided by the NWC in Charter interpretation is contingent on current jurisprudence: "The reality is that we would not be where we are today if the courts were not so resolutely committed to a unifying interpretation of the *Charter*. Nor … if they were more sensitive to collective interests and the specificity of Quebec." *Ibid*.

10. See Doreen Lustig & JHH Weiler, "Judicial review in the contemporary world—Retrospective and prospective" (2018) 16:2 Intl J Constitutional L 315 at 340ff.

11. See Gordon Lee, "Obstruction of the Justices: Why We Need the Notwithstanding Clause More than Ever", *C2C Journal* (12 March 2023), online: c2cjournal.ca/2023/03/obstruction-of-the-justices-why-we-need-the-notwithstanding-clause-more-than-ever/.

12. See Tate & Vallinder, *supra* note 4 at 2. Although judicial review has been popular, the level of trust Canadians have in their Supreme Court has been eroding steadily over the past several years: see Agnès Whitfield, "Do Canadians have confidence in their Supreme Court?" *Law360 Canada* (5 January 2023), online: www.law360.ca/ca/articles/1760711. According to a 2023 PBS/Marist poll, the level of trust Americans have in their Supreme Court was currently at the lowest level in five years: see Domenico Montanaro, "Americans aren't thrilled with the government. The Supreme Court is just one example", *Oregon Public Broadcasting* (3 May 2023), online: www.opb.org/article/2023/05/03/americans-aren-t-thrilled-with-the-government-the-supreme-court-is-just-one-example/.

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The group into which one is born often satisfies that need, but an adopted group may do so equally well. Consequently, it makes sense to view the protection of the individual right to freedom of association as imposing a duty on government not to interfere with—and indeed, positively support—groups that are important sources of identity formation and maintenance. By focusing on duties, we can see that individual rights can obligate government to treat a group as having a (derivative) right to protection.

Of course, a group may itself directly possess a right to something that the government is obliged to protect or should be obliged to protect. This introduces the issue of the relationship between group and individual rights. For a group to exercise its interest and its right to its identity, presumably it is entitled to impose obligations on its members that relate to maintaining the group's identity. How much scope does a group have in defining what members are obliged to do for the survival of the group's identity? For example, should a group have a right to physically force members—against their will—to participate in a group practice deemed essential to maintaining group identity? If so, these members—who also enjoy an individual right to security of the person—may well claim they are wronged to be so forced. In the celebrated case of *Thomas v. Norris*,[13] the defense held that "the most important issue before the court is: Are the individual rights of aboriginal persons subject to the collective rights of the aboriginal nation to which he belongs?"[14] In this case, the judge held that the common law right of security of person "would prevail … for obvious reasons."[15]

But are they obvious? The group leaders are responsible for protecting the identity of the group, which they have a right to do. Group members such as Thomas have a known obligation to participate in identity-related practices. In a sense, Thomas has no right to refuse to do so: It is the 'price' of membership. On the other hand, the group leaders, in addition to their obligation to protect group identity, are also obliged to respect Thomas's security of person, since both he and the leaders themselves are members of the wider society that enjoys that right. We should not infer that the two obligations are non-compossible because the rights appear to be in conflict. This is because the duties that arise from rights of the sort under consideration are partly indeterminate or lack precise description. For that reason, it may be possible to conceive of the duties in a way that makes them commensurable. For example, could the duty to force Thomas to

13. [1992] 2 CNLR 139, 1992 CanLII 354 (BC SC) [*Thomas*].

14. Thomas Isaac, "Individual versus Collective Rights: Aboriginal Peoples and the Significance of *Thomas v. Norris*" (1992) 21:3 Man LJ 618 at 622 [footnote omitted]. The basic facts of the case are: "On February 14, 1988, the plaintiff, David Thomas, a member of the Lyackson Band of British Columbia and of the Coast Salish People, was 'grabbed' from a friend's house and taken to the Somenos Long House by the defendants. He was imprisoned at the Somenos Long House for four days. While there he underwent an initiation ceremony for spirit dancing which included assault, battery and unlawful imprisonment. The plaintiff contended that at no time did he voluntarily agree to the events which took place. He claimed non-pecuniary, aggravated, punitive and special damages for assault, battery and unlawful imprisonment" (*ibid* at 618-19).

15. *Thomas*, *supra* note 13 at 49. Eisenberg denies that the judge's reasoning is about resolving a conflict of rights: see Avigail Eisenberg, "The Politics of Individual and Group Difference in Canadian Jurisprudence" (1994) 27:1 Can J Political Science 3 at 17-19.

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participate be accomplished without physical force—say, by the threat to have his membership cancelled or some of the benefits of membership suspended for a time? Or, given that Thomas's personal circumstances are not those of the typical member who may be forced to participate in the religious practices—typically, it is youth members whose parents cooperate with the elders' enforcement—could the leaders exercise their duty not by physically forcing but by providing an incentive to participate? Different conceptions of the duty to have everyone participate in religious ritual are possible and, for that reason, potentially compossible with other duties owed to Thomas, such as the duty to recognize his basic right to security of person.[16]

The point here is that it is not possible to reason about collective rights in isolation from reasoning about individual rights. This comes out clearly by considering the duties that arise from rights. To conclude: Either the legislature is competent to reason effectively about the full range of our rights, or it is not. If it is, judicial review would seem to be unnecessary. If not, judicial review may have a role in protecting our rights. But in that case, the NWC works at cross purposes to that role.

1.1 Is There a Principled Justification of the Legislative Override?

I contend that no principled justification of the NWC is available, because judicial review and the override work at cross purposes. If a court concludes that a

16. A more recent case involving Aboriginal group rights in relation to basic *Charter* rights is the *Dickson* case: see *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*]. Cindy Dickson, a member of the Vuntut Gwitchin First Nation (VGFN), challenged a requirement in the VGFN constitution that all elected Chiefs and Councillors must reside on VGFN settlement land in northern Yukon (the Residence Requirement) (*ibid* at paras 1-2). Ms. Dickson, who lives in Whitehorse because her son requires medical services not available on the VGFN, and whose wish to be a candidate for the VGFN Council was denied by the Council, claimed that the Residence Requirement violated her right to equality under section 15 of the *Charter* (*ibid* at paras 1-2, 28-37). The Supreme Court held that the Residence Requirement did violate her individual right to equality (*ibid* at para 6). But it also held that section 25 of the *Charter* entitled an Aboriginal group to have a residency requirement if it was necessary to protect important cultural practices and beliefs (*ibid* at paras 5-6). Moreover, the Court deemed section 25 to override the individual's *Charter* rights in the case where the group rights and individual rights were non-compossible. But non-compossibility in this case entails that the Residence Requirement is itself the cultural practice to be protected, not that it was a means to the protection of other cultural beliefs and practices. In effect, a Councillor is fulfilling their VGFN constitutional duty to protect culture by simply living in the community. As a result, the case appears to be unavoidably about whether a group right trumps an individual right. However, the majority opinion was not swayed by the Court's only Aboriginal member, O'Bonsawin J, who, in her dissent with Martin J, argued to the effect that a residence requirement does not constitute an Aboriginal cultural difference (*ibid* at para 237; see also paras 388, 393). In addition, even a residence requirement could be subject to interpretation: for example, if Ms. Dickson was fully invested in VGFN culture and pledged to spend blocks of time in the community while maintaining her residence in Whitehorse, could those facts not be a reasonable interpretation of meeting the requirement? Moreover, would the vote of VGFN members not serve as an adequate criterion of whether Ms. Dickson could uphold the spirit of the residence requirement? *Dickson* and *Thomas* both illustrate that competence to protect group and individual rights is one indivisible competence. Whether the judiciary exceeds the competence of the legislature in the protection of rights is for later discussion in this paper.

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piece of legislation violates the *Charter*, surely this entails that an override of that conclusion permits Parliament to do what is, in effect, unlawful?[17] Consider the following thought experiment: Citizen A claims that the 'downstream' law against bigamy contravenes the 'upstream' constitutional right to freedom of association. Citizen A argues that he, his current wife B, and a proposed additional wife C, all agree to be together in a marital situation and, based on their free mutual consent, no law should prevent it. Assume that the court agrees with A and strikes down the law against bigamy—despite its long history, general popularity, and basis in widely shared values. By that nullification, the judiciary contributes to the law in the sense that similar future cases will be viewed in the same way. By then invoking the NWC, the legislature would, in effect, be prioritizing its own contribution to the law over that of the court. Does this power imply that the legislative process is competent to protect our rights? If so, what purpose is served by judicial review? If not, or if the legislature cannot be trusted to act competently sufficiently often, why provide it with the power of override?

I wish to turn now to explain the problem for political legitimacy that is posed by a decision process that includes both judicial review and the NWC. However, before doing so, there is a technical objection to my thesis that should be addressed.[18] It seems clear that the Parliamentary process that involves public consultation, committee work, and 'sober second thought' input from the Senate is a process of ordinary or natural reasoning and argumentation, whereas the judicial process of determining the legality of Parliament's decision under the *Charter* must adhere to rules of precedent (like cases treated alike), legal doctrine, and a scope of concerns that is narrower than the arguments amongst which the legislature must decide. Natural reasoning is inductive and indefinite in scope: There is always the possibility of another relevant premise. Legal reasoning is largely deductive and must generally avoid innovative interpretations premised on, say, a judge's personal view of the social purpose of a law.[19] Do these differences entail that judicial review and the legislative override do not work at cross purposes? I think not. Granting differences in the form of reasoning does not entail that legislative and judicial reasoning cannot be at cross purposes.[20] Both are concerned with contributing to the law and, therefore, the rule of law. Somewhat facetiously, if the legislature were to use a system of lots for its decision, and the judiciary were to employ the entrails of chickens, they would use different methods of decision, but they would be deciding on the same thing—namely, a contribution to the law.

17. 'Unlawful' in the sense that the legislation ought not to be a contribution to law.

18. I am indebted to Kerry Sun for pointing out the relevance and importance of this distinction to my argument.

19. See Frederick Schauer, "The Limited Domain of Law" (2004) Va L Rev 90:7 1909; Barbara A Spellman & Frederick Schauer, "Legal Reasoning" in Keith J Holyoak & Robert G Morrison, eds, *The Oxford Handbook of Thinking and Reasoning* (Oxford University Press, 2012) 719.

20. I further discuss the issue of natural versus legal reasoning in section 3.4, below, where the issue is judicial review of rights claims and the suitability of legal reasoning for that task.

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Jeff Goldsworthy argues that the legislative override ensures that the core idea of representative democracy is preserved by giving the legislature the final decision.[21] But this suggests that judicial review is a component in the decision system that does no real work and therefore, like Wittgenstein's gearwheel, is not really a part of the system at all.[22] But this is a mistake. It is no defense against my thesis to argue that the NWC effectively means that strong judicial review is merely either a gatekeeper or an advisor, not a decision-maker about what goes into the law.[23] By an interpretation of the law that nullifies a piece of legislation, the judges make a contribution to the law—both in the sense that this is what legal interpretation aims at, and also in the sense that the effect of the interpretation is that future like cases will be treated the same way.[24] Consequently, when an appellate interpretation of a *Charter* provision results in nullifying legislation, the judges are simply preferring their own contribution to law to that of Parliament. By empowering an override of that preference, the system becomes one that works at cross purposes as to what shall be contributed to the law, and hence, to the rule of law.

2. Legitimate Political Authority and Agreement

As Hanna Pitkin points out, the several concepts of legitimate government, the limits of government power, the grounds of obligation to government, and the person or system of rule to which obligation is owed are all inter-linked and, in the tradition of political philosophy, intimately connected with the concept of consent or agreement.[25] For this discussion, I will assume that to be a political community, individuals and families that live side by side or intermingled require a shared or agreed method of deciding disputes as to what shall be done in the name of all—one which they cannot decide themselves through discussion. I will use the expressions 'decision-making method', 'governing arrangements', 'decision system', 'system of rule', or 'the political authority' to refer to this requirement, without difference in meaning. Here I assume there cannot be political community without agreed governing arrangements, because human beings living side by side who try to resolve disputes in an *ad hoc* way through discussion are likely to resort to violence to get their way if discussion does not work. That may be fine for the stronger members, until they realize they are

21. See Jeff Goldsworthy, "Judicial Review, Legislative Override, and Democracy" (2003) Wake Forest L Rev 38:2 451.

22. "[A] wheel that can be turned though nothing else moves with it, is not part of the mechanism." Ludwig Wittgenstein, *Philosophical Investigations*, 3rd ed, translated by GEM Anscombe (Basil Blackwell & Mott, 1958) at 95e.

23. See Goldsworthy, *supra* note 21.

24. "[R]oughly speaking, legal interpretation seeks the contribution that statutory and constitutional provisions make to the content of the law." Mark Greenberg, "Natural Law Colloquium: Legal Interpretation and Natural Law" (2020) 89:1 Fordham L Rev 109 at 110 [footnote omitted].

25. See Hannah Fenichel Pitkin, "Obligation and Consent—I" (1965) 59:4 American Political Science Rev 990.

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vulnerable to effective coalitions of the weaker members. Hence, a decision method with the power to enforce decisions equally benefits all. (From this perspective, the Canadian constitutional system of coercive rule—comprised of Parliament, judicial review, and the NWC—is a system of governing arrangements or a method of decision-making.) Finally, and very importantly, in addition to an agreed decision-system, a political community requires some shared values in order for the members to agree on governing arrangements.[26]

Clearly, the Canadian system has formal legitimacy—or a right to rule—simply because the Constitution is positive law established by an accepted democratic process. But, due to its coercive power, allegiance to those arrangements may simply be prudent avoidance of enforcement.[27] The duty to obey seems to require some deeper justification than merely having met a standard process for being put in authority. To meet that standard is to be morally legitimate. The issue for my thesis is whether a decision method comprised of functional parts that work at cross purposes can have moral legitimacy. In other words, is it reasonable for one to have a moral duty to accept and obey a system of rule that has such parts? Going forward, I will use the expressions 'legitimate' or 'legitimacy' to mean 'moral legitimacy'.

It seems to me that governing arrangements are legitimate if most citizens see themselves as having a duty to obey the arrangements and have a relevant reason for doing so. If that is the case, the status of being a legitimate authority is tightly linked to the consent of persons to having a duty to obey. Which comes first? The rightful governing arrangements or the consent to them as rightful? The arrangements come first, but that is because they reflect the shared values of the governed: They are a sort of concrete expression of those values. But we confuse the relationship of legitimacy and consent if we conceive the governing arrangements as the justification for consenting to them as legitimate. To see this, consider Robert Dahl's argument for the justification of a person's consent to democratic decision-making arrangements: "The democratic process is generally believed to be justified on the ground that people are entitled to participate as political equals in making binding decisions, enforced by the state, on matters that have important consequences for their individual and collective interests."[28] However, the phrase "that people are entitled to participate as political equals" is a loose description of the liberal democratic decision-making process and, therefore, cannot justify consent to it.

Rather than search for a justification, think of the various reasons people could have for consenting to democratic governing arrangements as rightful and

26. I owe this way of thinking about the relation of authority to political community to J.R. Lucas: see JR Lucas, *The Principles of Politics* (Clarendon Press, 1966) at §§ 1-4.

27. "The stronger is never strong enough to be forever the master unless he transforms his force into right and obedience into duty." Jean-Jacques Rousseau, "On the Social Contract" in John T Scott, ed, *Major Political Writings of Jean-Jacques Rousseau: The Two Discourses & The Social Contract*, translated by John T Scott (University of Chicago Press, 2012) 153 at 166.

28. Robert Dahl, *Controlling Nuclear Weapons: Democracy Versus Guardianship* (Syracuse University Press, 1985) at 5.

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obligating: for example, that one has had a say in the decision, or that the authority consulted them, or that he or she would decide in the same way if they were in authority, or that the arrangements and decisions are based in natural law, or even because the decisions of the authority are efforts to coincide with the divine will. These reasons are not idiosyncratic but omni-personal in the sense that they could apply to anyone holding liberal democratic values and reasoning about whether the ruling arrangements they find themselves living under warrant their obedience. The reasons reflect shared values. Having a say in decisions meets the expectation of autonomous thinking beings that their views on what the community should do are invited into the decision process. Similarly, consulting citizens dignifies their desire to participate in determining what happens to their community. That decisions are based on natural law responds to the expectations of reasonable people to have decisions be reasoned and not arbitrary. And so on.

However, such reasons are not beyond questioning. That the governing arrangements are reasonably well-ordered toward consulting people or inviting their say for consideration can be denied. In addition, the performance of the arrangements can be criticized as sufficiently contrary to shared values as to count against the legitimacy of the performance. But the only background against which the criticisms make sense is a shared value commitment to what arrangements should be and do, i.e., that in a democracy they should consult and invite the governed to have a say. It follows that both the governing arrangements and the performance by government are debatable and often contested by the governed as not legitimate or not rightful. For example, a policy decision that redefines eligibility for welfare payments independently of desert can be criticized not as merely imprudent but actually illegitimate.[29] Or, the value of having a say in decisions through one's elected representative in the legislature can be eroded by a practice of excessive power concentration in the office of the Prime Minister, or by improper use of the party whip. But such contestation does not entail wholesale denial of one's duty to obey. If I desperately need a drink of water, I will take some that barely meets the accepted standard for potable water though preferring one that more fully meets it.

Locke thought that a legitimate government could only be one that protected and advanced citizens' "lives, liberties, and estates," not one that cared for their souls or guided them to a more virtuous life.[30] Given the universal agreement on

29. See Clifford Orwin, "Welfare and the New Dignity" (1983) 71 The Public Interest 85. See also John Rawls, *A Theory of Justice: Revised Edition* (Belknap Press, 1999). Rawls argues, in effect, that we should value need, or greatest need, and not desert as the basis for a just distribution of a good such as welfare assistance. But this entails that the effort to not be a burden on one's fellow citizens is unimportant to the shared value of cooperation that helps bind us together as a community. The role of desert is a recognition that someone's effort to avoid need can be defeated by circumstances beyond their control and, as such, they have, in a sense, earned an entitlement to the assistance funded by their fellow citizens.

30. John Locke, "The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government" in Ian Shapiro, ed, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003) 100 at 155 (§ 123) [Locke, "Second Treatise"]. Locke argues that "Nothing can make any man [a member of a commonwealth], but his actually entering into it by positive engagement, and express promise and compact" (*ibid* at 154, § 122).This

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the benefit that only governing arrangements with coercive power can bestow, Locke argues that we are compelled—on penalty of irrationality—to regard such arrangements as legitimate.[31] We can concede that civil government benefits everyone equally by laws that protect our interests and aspirations. But Locke defined these and their relative priority as non-contestable, universal, and self-evident.[32] However, Locke's list is oversimplified and cannot be observed to hold in actual human societies. Take Locke's value of 'life' or 'self-preservation' as an example.[33] Is this the priority non-contestable value that Locke says it is? Many are prepared to give up their life or have it threatened for their children, for their country, or for their God. Moreover, some see no importance to "money" or "furniture," nor is everyone bent on being maximally free to want whatever they want, because there are some things it is bad to want. To summarize, it is consistent to both agree to governing arrangements and to government performance as legitimate while also criticizing some of the arrangements and performance as falling short of what they should be, and therefore, as illegitimate.[34] At some point, the weight and scope of criticism can lead to dissent

highlights the role of individual consent to abide by terms that are in his or her interest, but only because others have the same interest and make the same pledge. Locke's idea of rational contractual consent is not the consent involved in agreeing to perform one's duty.

31. Irrational because it would imply an intent to put oneself into a worse condition, and, as Locke says, "no rational creature can be supposed to change his condition with an intention to be worse." *Ibid* at 156 (§ 131).

32. "The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing of their own civil interest. Civil interest I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like. . . . [A]ll civil power, right, and dominion, is bounded and confined to the only care of promoting these things." John Locke, "A Letter Concerning Toleration" in Shapiro, *supra* note 30, 211 at 218. "And, were it not for the corruption and viciousness of degenerate men, there would be no need of any other [community than man's natural estate]; no necessity that men should separate from this great and natural community, and by positive agreements combine into smaller and divided associations." Locke, "Second Treatise", *supra* note 30 at 156 (§ 128).

33. "The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of . . . their lives, liberties, and estates, which I call by the general name property." Locke, "Second Treatise", *supra* note 30 at 155 (§§ 124, 123).

34. Is deliberation about whether governing arrangements and performance are legitimate only meaningful if restricted in scope? Rawls restricts political discussion, and therefore, discussion about legitimate government "to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial." John Rawls, *Political Liberalism* (Columbia University Press, 1996) at 224. This amounts to the requirement that there is, or should be, a contract among citizens to restrict their reasoning about important political matters such as legitimacy or justice, to current biases and beliefs about what constitutes acceptable thinking. But rather than unite people with diverse views as is presumably the intent of the 'reasoning contract', it likely would divide them because some, perhaps a large number, would be prevented from contributing to public policy formation the perspective of their deeply held beliefs that may not be 'mainstream'. For example, for a discussion about market capitalism, such a contract about reasoning would prevent a Christian from explaining that money is the root of all evil, or a Muslim from warning about the dangers of loan interest. For a good discussion of the problems for political life that Rawls' 'reasoning contract' implies, see Jeremy Waldron, "Public Reasoning and 'Justification' in the Courtroom" (2007) 1:1 J Law, Philosophy & Culture 107.

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and wholesale withdrawal of consent, but that is just an implication of the relationship between legitimacy and consent.

Returning to the question for my thesis: Can components of a political decision-making method that work at cross purposes be criticized as illegitimate? Based on the discussion of legitimacy above, I argue that a governing arrangement that is unnecessary for democracy or for ensuring obedience to the overall method of decision-making can be criticized as illegitimate. I think judicial review warrants those criticisms which, if persuasive, renders the NWC unnecessary, thus eliminating the problem of incoherence in the Canadian method of political decision-making. I now turn to that task.

3. Against Judicial Review

Judicial or *Charter* review that can nullify legislation is not analogous to the common practice of judicial interpretation of a statute's meaning. A judicial interpretation of a statute may mean only that the formulation of the law is not effective for achieving the legislature's intended purpose. In contrast, to declare a law unconstitutional is to criticize the legislation's purpose. A legal regime may attach to the role of constitutional criticism the power to invalidate ordinary law, but that does not justify the practice. Common justifications argue that judicial review is implied by the Constitution, whether written or not, as part of what it means to be 'upstream' or supreme law.[35] Other approaches argue that judicial review strengthens democracy in one way or another.[36] These efforts are all unconvincing but, in their favor, they are attempts to theorize a more just regime. For that reason, I think the most common justifications can be viewed as relying on—or being forms of—one of two generally accepted principles of justice: *nemo judex in causa sua* (no one may be judge in their own cause), and *audi alteram partem* (always hear the other side).

3.1 Judicial Review Is Necessary to Constitutional Criticism

In *Marbury v Madison*, Chief Justice Marshall invoked a form of *nemo judex in causa sua* by arguing, in effect, that constitutional criticism is intended to provide legal 'control' of legislative decision-making and, therefore, to prevent that branch from 'controlling its own cause': For Marshall, constitutional control of legislation meant that law judged to be "repugnant to the constitution" is thereby invalidated.[37] He was thinking of 'control' as a form of gatekeeping.

35. See e.g. Asher Honickman, "The Constitutional Basis for Judicial Review in Canada" (12 February 2020), online: *Advocates for the Rule of Law* www.ruleoflaw.ca/articles/the-constitutional-basis-for-judicial-review-in-canada/

36. See e.g. Samuel Issachroff, "Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World" (2019) 98:1 NCL Rev 1; Yasmin Dawood, "Democracy and Dissent: Reconsidering the Judicial Review of the Political Sphere" (2013) 63 SCLR 59.

37. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) at 177. "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . and consequently

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But 'control' has several meanings. For example, a teacher may try to control a student discussion by offering guidance to keep it on track. Using control in this sense, constitutional criticism means explaining why a law is in violation of a 'higher' law, thereby contributing important guidance to the public deliberative process of the people, through their chosen representatives, in forming, amending, and repealing the laws that govern them. In other words, the control of ordinary law-making does not automatically entail the power to invalidate. By choosing a meaning of 'control' that suits his desired conclusion, Marshall's reasoning becomes tautological: The constitution has control over ordinary law only if unconstitutional law can be invalidated; therefore, an unconstitutional law can be invalidated.

3.2 Judicial Review is a Necessary Means to Ensure Constitutional Criticism is Obeyed

It might be countered that the power to invalidate 'downstream' law, although not entailed by the idea of constitutional criticism, is yet a necessary means to ensure that constitutional criticism is sufficiently respected to be obeyed. The idea is that without judicial review there is no legal means to prevent lawmakers from 'judging in their own cause'. This confuses legal and moral means. Procedural rules for the proper formation of law do invalidate law if they are not followed. For example, a bill receiving only minority support in the legislature is not valid law. However, no legal norm, whether about procedure or about basic rights, can ensure absolute obedience, or even grudging respect. Respect for and obedience to the law are matters of moral commitment, not legal compliance.

3.3 Judicial Review Strengthens Democracy

It has been argued that judicial review strengthens democracy by ensuring that law is the result of a properly formed majority. This limits review to procedural matters and would carry the day if it could be shown to be the only way to achieve that goal. But there are regimes without judicial review that respect the proper formation of a majority. Moreover, procedural review does not necessarily protect against a majority that is following proper procedures being intent on suppressing the rights of a minority of citizens.

The possibility of an unjust majority gives rise to the argument that judicial review strengthens democracy by being the only way to protect everyone's basic rights.[38] However, by adding a judicial step in democratic decision-making for

the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void" (*ibid*).

38. Consider: "The exercise of liberty by the citizen should not be restricted unless the state can show, to the satisfaction of an independent tribunal of justice, that such a restriction is both necessary and proper." Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, 2004) at 321. See also Andrew Coyne: "When a government makes promises of the kind contained in the Charter—we will not intrude upon the following freedoms, 'subject only to such reasonable limits etc.'—it is preferable to have

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rights protection, democracy is re-defined. It is no longer about the people, through their representatives, realizing their freedom by choosing the norms that will govern them, but is now about the supervision of their choice of norms from a rights perspective. Again, the implication of supervision is that citizens cannot be ultimate deciders of their own cause. In addition to revising a traditional notion of the core of democracy, this second argument assumes that legislatures cannot be counted on to fairly weigh arguments about basic rights.

A thought experiment can illustrate how this justification might arise. Canada accepts that education is a human right but also that a union of education workers is free to withhold that education unless there is an agreed contract with the employer. Consequently, a move by the legislature to impose a contract is contestable.[39] Some may argue that the government's measure does not respect the *Charter* right to freedom of association, because an agreed contract is essential to the purpose of a labour union.[40] Others may argue that, given the circumstances of a recent major disruption of normal education by pandemic restrictions, the harm of a strike would be too great a burden on children and their parents. Still others may argue that taxpayers cannot afford the increased compensation the union requires in order to agree to a contract. These are the voices of a public in dispute over what their community should do in particular political circumstances. The role of the legislature is to weigh the often quite reasonable arguments of the disputants and decide by majority vote the arguments that are most persuasive. Is this to be construed as the legislature 'judging in its own cause'? On close inspection, *nemo judex in causa sua* does not apply to the legislative process. In fact, the legislative method of decision is the democratic way to prevent citizen groups in dispute from judging in *their* own cause. Moreover, if majority rule at the legislative level is deemed to be judging in one's own cause, it is not clear why a judicial majority opinion would not also be so construed. So, unless we wish to enter a regress of *quis custodiet ipsos custodes* ("who will guard the guards themselves"),[41] we cannot argue that judicial review strengthens democracy on the basis of *nemo judex in causa sua*, even if we concede that the legislative process could use some improvement.[42]

3.4 Judicial Review Ensures All Sides Are Heard

A different argument for judicial review, though closely linked to the previous view, is derived from the natural justice principle of *audi alteram partem* (hear

someone other than the government decide whether it has kept its word." Andrew Coyne, "Courts err. That's not an argument that governments should override them", *The Globe & Mail* (9 November 2022) A13.

39. The Ontario government recently provides a case on point: see Colin D'Mello, "Ford government to table legislation to impose contract on education sector union", *Global News* (30 October 2022), online: globalnews.ca/news/9237976/ontario-cupe-strike-legislation/.

40. See *Charter*, *supra* note 1, s 2(d).

41. "Who will guard the guards themselves?" *ICLR Glossary*, *supra* note 5, sub verbo "Quis custodiet ipsos custodes?"

42. But, as noted above, this is not to argue that the legislative process needs no improvement.

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the other side).[43] The democratic legislative process is prone to representatives of the governing party hearing arguments about what rights and freedoms mean within a pre-determined set of opinions. This can result in dismissing out of hand, or at least giving short shrift to, arguments that do not align with those opinions. Three points should be made here.

First, representative democracy cannot avoid elected representatives holding opinions that reflect the views of those who elected them and reflect party policy. That is why, in large measure, they and their party were elected. But the process of forming party policy and making election promises involves party members and candidates, at least to some extent, in an objective effort to justify their opinions and to weigh public input as they deliberate toward a decision. Deliberative debate on, and the considered formation of public policy about, the disputes that need addressing in our common life does not begin on the floor of the House.

Secondly, in some democratic decision systems, the provision of a 'sober second thought' by a Senate provides some protection of rights against poorly thought-out policy or the undue influence of elites on the legislature. (This is the case federally in Canada.) Thirdly, the appellate process does not and cannot 'hear the other side' in the sense of reviewing the actual arguments, including those that did not prevail in the legislative process. It does not hear the other side because the court's focus is on determining whether a proposed 'downstream' law is a sufficiently unreasonable breach of an 'upstream' law to justify its nullification. It cannot hear the other side because the legal reasoning process of the court must minimize the role of the natural reasoning process of public debate that originally gave shape to the dispute and was used in taking sides in that dispute.[44] These observations are sufficient to show that *audi alteram partem* is not a sound basis to argue for judicial review.

That last point may be too quick. Legal reasoning as a specific form of movement in thinking cannot be divorced completely from natural reasoning, i.e., from the concepts of ordinary, natural reasoning. Strictly legal reasoning involves treating like cases alike, tests of reasonableness, and premises about the social purpose of a right or about shared fundamental values. These are all notions that are rooted in natural reasoning concepts and therefore, interpreting the law to adjudicate a claim that a government measure cannot be justified under the *Charter* is reasoning that is inherently linked to—even rooted in—ordinary reasoning.

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43. For an argument that only a judicial hearing is sufficient to comply with the principle of 'always hear the other side', see Alon Harel & Tsvi Kahanna, "The Easy Core Case for Judicial Review" (2010) 2:1 J Leg Analysis 227. I comment on this argument below: see the text accompanying note 47.

44. Speaking of judicial review in the US, Jeremy Waldron notes: "It is worth bearing in mind, however, as we read what passes for 'reasoning' in Supreme Court decisions, that much of that discourse is oriented not to the specific merits of the moral issues that need to be confronted on the issue itself, but to issues about interpretive technique, or issues about precedent or jurisdiction or other legalisms." Waldron, *supra* note 34 at 132 [footnote omitted].

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While judges may not completely avoid judgements rooted in natural reasoning, they can minimize them being rooted in their personal moral or social biases. By way of illustration, consider a government measure to impose a contract on education workers with whom it has so far been unable to reach an agreement. To adjudicate a claim that the measure is an unjustified infringement of the *Charter* right to freedom of association, the court likely will apply a test of proportionality that involves four steps.

1. Does the measure have a legitimate, or perhaps important, purpose?
2. To what extent does the measure impact the *Charter* right?
3. Are there less impactful but equally effective ways to achieve the purpose?
4. Is the benefit from the measure greater than the burden that results from the infringement on the right?

Argument must satisfy the court at each step in order to proceed to the next. However, each step requires the court to make a contestable decision. Is the government's purpose to prevent a strike or to ensure no further post-pandemic disruption in education?[45] Is there only one purpose or could there be more? Assuming that the purpose of imposing a contract on education workers is to ensure continuous, uninterrupted instruction, the issue at this step is how 'purpose' is defined: Must it be an important purpose or merely constitutional? If important, then important in current circumstances or in general? Education is a human right; perhaps it is a solemn duty of government to ensure that it is not interrupted by labour action? If a majority of judges are agreed that the first step is met, then the next issue is whether the measure will achieve its purpose. While it may seem so to some judges, others may doubt there will be sufficient compliance with the contract by education workers for the measure to work. If a majority of judges decide the second step is met, the third then addresses the possibility that the legislature could achieve its purpose equally well in a way that is less intrusive on the right at stake. One judge may think that back-to-work legislation is equally effective and less intrusive, whereas another judge may observe that back-to-work legislation permits an interruption of education, which is precisely what the government is trying to avoid. If the court overcomes that difference of opinion, the fourth step is then a balancing exercise to determine whether the social benefit of the measure outweighs the social burden of the restriction on the right. One judge may think that the social benefit of free association in the case of unions is to equalize bargaining power between labour and management, and on that basis may conclude that allowing management to impose a contract constitutes too great a burden on that right in relation to the benefits. Another may reject the idea that the community is united in wanting unions to have equal power to management and may find that the benefits of the measure outweigh the infringement in these circumstances.

45. A contract protects against various possible forms of disruption, including a strike.

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The point of the preceding thought experiment is to show that at no point in the so-called proportionality test of reasonableness is there a decision rule for objectively deciding whether the step has been met. The judges simply hear the legal arguments and decide, often by a simple majority vote. This is not logically different from the legislative process. But one material difference is that the legislature considers the full scope of public debate, whereas the court cannot. For example, while the legislature can consider the possibility that the union is unreasonably withholding agreement to management's offers, the court cannot. But, somewhat inconsistently, the third step of the proportionality test allows the court to decide that the government is being needlessly parsimonious with the public purse and could therefore settle with the union to avoid infringing its right. To question the legislature's budget priorities is surely to leave legality behind and enter public debate. However, while the proportionality test lends a veneer of objectivity to the judicial handling of a claim that the legislature is mistaken about the content of rights, the reasoning required to apply the test is not logically different from that of the legislature. It follows that while the judges may well have important points to make in a public service role of providing constitutional criticism of legislation, it does not follow that the role should have the power to enforce its opinion to render legislation inoperable.[46]

3.5 Do Democratic Deficiencies Justify Judicial Review?

Majoritarian democracy can disappoint, and over time, it can disappoint a majority of citizens, as Elizabeth Anscombe proved in a well-known paper.[47] Over a series of votes, a majority of voters can have the proposal each care most about voted down. As it is for individual voters, so it can be for sub-groups of the electorate. Multiple groups of voters that individually did not get what they favored can constitute a majority of voters. But that is not the majority that counts. Only the actual majority vote on the issue at hand matters. This structural feature of majority rule can lead to a great deal of frustration, but it is not a problem that judicial review can prevent. The judiciary may turn an issue's defeat in the legislature into a win, but that decision does not mean that a frustrated majority on the matter has now been turned into a minority.

46. Harel and Kahanna argue that under the rule of law, a claim that legislation intrudes on our constitutional rights is entitled to a hearing and that the court is best suited to provide it because "the judicial process involves, ideally at least, a genuine reconsideration of the decision giving rise to a challenge, which may ultimately lead to an overriding of the initial decision." Harel & Kahanna, *supra* note 43 at 249 [footnote omitted]. I think their claim of a "genuine reconsideration" cannot be substantiated. Moreover, there is sufficient dispute among political theorists about the meaning of 'the rule of law' that it cannot automatically carry the weight of justifying a hearing for someone who feels that their rights have been infringed by a duly passed law. On this point, see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21:2 Law & Phil 137 at 164.

47. Anscombe constructed a matrix of voters and their votes to show how this outcome is possible: see Elizabeth Anscombe, "On the Source of the Authority of the State" (1978) 20:1 Ratio 1.

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3.6 A Cumulative Case for Judicial Review?

Many other deficiencies may be charged against democracy, so it might be thought that, although each on its own is insufficient to justify judicial review, they add up to a convincing case for institutionalizing a judicial arbitrator in democratic decision-making. This argument is a cumulative case.[48] Let us call this argument the problems of 'majoritarian representative democracy' (MRD). To name a few of these problems: Representatives may pay more attention to the votes needed for re-election than they give responsible attention to community issues. The Prime Minister's Office (PMO) may prohibit Members of Parliament (MPs) or even Ministers from disagreeing with government policy. Appointed Senators may feel a duty to the government that appointed them. Elections may be held too infrequently for voters to hold the government to account. The elected government may be the result of a minority of voters. And so on.

However, these concerns are not without some qualifiers: The concerns of minorities are not always ignored or given short shrift. Substantial minorities, whose members are widely dispersed throughout the country, could be represented in the Commons just as expatriate French citizens are represented in the French legislature. An MP's exclusive focus on vote-getting can be identified by voters and soundly punished next election. The present government may be in place because of a minority of citizens' votes, but it may well see the need to govern so as to avoid being ousted next time by a majority or even a different minority. The PMO may limit MPs' freedom to speak their minds, but not completely, and voters are not necessarily against this: Although we imagine the ideal of a decision system in which the peoples' elected representatives are relatively free to take public input and deliberate amongst themselves on how best to decide an issue, such a system does not guarantee a decision that most citizens will 'own'. In a very large community, the voter has a say not so much on how a particular issue is managed but on the broad policy direction of a particular party. If representatives were mostly free of that direction, a voter might view their vote as being undermined by debate in the Commons and so might welcome the PMO stepping in to ensure that the broad policy direction is maintained. The point is that many of the claims against MRD are not so intractable that we should give up on efforts to improve parliamentary process in favour of resorting to an arbitration process that is subject to its own deficiencies as discussed above. From this perspective, the deliberations of 328 elected representatives in possession of public and committee input, as well as the views of 105 Senators, is a forum for considering those assumptions that seems to be a lesser risk than that of 9 judges who may allow their social views to shape their

48. Waldron stipulates that a reasonably well-functioning democratic system is a condition for the elimination of judicial review: see Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346. A cumulative case would amount to a convincing empirical demonstration that a system is not reasonably well functioning.

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legal opinions. The many and various deficiencies of parliamentary democracy are an argument for piecemeal improvement, not for adding judicial review.[49]

3.7 Incoherent Decision Method and Political Unity

I have been arguing that a democratic decision-making method that includes both strong judicial review and a legislative override is a system with components that work at cross purposes, and therefore—considered as a complex single method by which the people decide among their competing preferences for governing norms—it is incoherent and thus illegitimate. In addition, I have argued that such a decision-making method encompasses opposing definitions of democracy. I wish to conclude now with the further claim that such a method is also ambivalent over what constitutes majority rule.

In *The Republic*, Socrates suggests that the sign of good government is a situation in which 'most' citizens agree both on how decisions are made and on the actual decisions themselves.[50] But how are we to understand 'most'? The proponents of judicial review would seem forced to say that 'most' means a large majority in agreement.[51] The implication of the top court striking down legislation passed by a simple majority vote implies that the legislature can achieve its intention by assembling a larger majority vote to amend the constitution. The availability of the NWC override represents the opposing view that a simple majority should rule. It is not clear why a larger than simple majority makes a democratic decision more justifiable. To require a large majority would allow an organized minority to prevent the will of the majority from deciding what is to be done. The only way to prevent that would be to require a one hundred percent majority, which would seem either impossible or so rare as to be impractical. The fact that a large majority typically is required to amend a constitution is no justification of large majority rule, since the high bar set for constitutional change may simply reflect the prudent desire to make change difficult so as to encourage efforts to improve the functioning of the existing simple majority process. As a result of incoherence and ambivalence about democracy and majority rule, citizens are unable to unite around a clear, coherent democratic vision of how to decide disputes about their governing norms.

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49. To give one example: the federal Senate could be made more influential as a source of 'sober second thought'. This could be done by requiring a referendum in the event that the Senate and Commons cannot, within a reasonable period of time, (say, one year) come to an agreement on a government bill. This is a suggestion by J.R. Lucas: see JR Lucas, *Responsibility* (Oxford University Press, 1995) at 223.

50. In Book V of *The Republic*, Socrates suggests that a city is not well-governed if "some are overwhelmed and others overjoyed by the same things happening to the city and those within the city." Plato, *The Republic of Plato*, 2nd ed, translated by Allan Bloom (Basic Books, 1968) at 141 (Book V, 462b-c). He goes on to ask rhetorically, "Is, then, that city in which most say 'my own' and 'not my own' about the same things and in the same way, the best governed city?" *Ibid.*

51. My discussion of judicial review at 3.1, 3.2, 3.3 and 3.7 above is indebted to Michel Troper, "The logic of justification of judicial review" (2003) 1:1 Intl J Constitutional L 99 at 112-13.

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Finally, although simple majority rule can disappoint many, there is no reason to believe that institutionalizing large majority rule or rule by the majority vote of a few judges will lessen the risk of disappointment. In a liberal democracy, we can take some solace in the possibility of being united politically around both our shared disappointment in, and our collaborative efforts to improve the functioning of, a coherent and agreed legislative decision-making method that respects the core idea of democracy and simple majority rule.

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