

# Dialogic Judicial Review and its Critics

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The idea that judicial review can produce a dialogue between courts and legislatures has been getting much scrutiny in Canada. This attention can be explained by the structure of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> By allowing ordinary legislation to place limits on rights as interpreted by the courts and even to override them, the Charter contemplates and invites dialogue between courts, legislatures and the larger society about the treatment of rights in a free and democratic society. The Charter is a prototype of a dialogic bill of rights because it allows legislatures to prescribe by law and justify limits on all rights without restricting the range of legislative objectives that can justify a limit on the right. The Charter's most famous dialogic instrument allows the enactment of legislation notwithstanding most Charter rights for a renewable five-year period.

The dialogic structure of the Charter has influenced other modern bills of rights. New Zealand and the United Kingdom have opted for a weaker form of dialogic judicial review that allows courts to presume compliance with rights in the absence of clear statements to the contrary. Courts can declare laws to be incompatible with rights and invite legislative reconsideration, but they cannot strike laws down.<sup>2</sup> South Africa has opted for a stronger form of dialogic judicial review that allows laws to be struck down and does not allow the legislature, except

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<sup>1</sup> Being Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>2</sup> *New Zealand Bill of Rights Act* (N.Z.), 1990/109; *Human Rights Act 1998* (U.K.), 1998, c. 42.

in emergency situations, to derogate from rights as interpreted by the courts. South Africa has also followed Canadian practice with respect to allowing legislatures to justify reasonable limits on rights and allowing courts to suspend declarations of invalidity to allow legislative as opposed to judicial correction of a matter.<sup>3</sup> From this constitutional perspective, the future of dialogic judicial review looks bright. The design differences are significant and should be studied, but the idea that there should be dialogue between courts and legislatures with respect to the treatment of rights seems to be gaining ground.

But there are clouds on the horizon. The judges on the Supreme Court of Canada have invoked the metaphor of dialogue to attempt to justify some of their more controversial constitutional decisions in recent years. The results have been mixed if not muddled, with judges using the dialogue metaphor to justify both judicial revision and invalidation of legislation and judicial deference to legislation. At first, the Court argued that the possibility of dialogue through the use of the override helped to justify its decision to read sexual orientation as a prohibited ground of discrimination into Alberta's Human Rights Code.<sup>4</sup> A year later, however, the Court used dialogue as a justification for upholding an "in your face" Parliamentary reply to a previous controversial decision about the accused's right to full answer and defence in sexual assault cases.<sup>5</sup> More recently, judges have disagreed about the meaning of dialogue, with some stressing that it cannot be an excuse for an abdication of an anti-majoritarian judicial role even when evaluating a Parliamentary reply to a previous Supreme Court decision,<sup>6</sup> and others suggesting that it requires judges to defer when Parliament expresses reasonable disagreement with the Court's reconciliation of individual and social interests.<sup>7</sup> From this judicial perspective, the future of dialogic judicial review does not look bright. Inconsistency and indeterminacy

<sup>3</sup> *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, ss. 36, 172(1).

<sup>4</sup> *Friend v. Alberta*, [1998] 1 S.C.R. 493, at 562-67.

<sup>5</sup> *R. v. Mills*, [1999] 3 S.C.R. 668, at 711-13 [hereinafter "Mills"].

<sup>6</sup> *R. v. Hall*, [2002] 3 S.C.R. 309, at paras. 127-28, Iacobucci J., dissenting [hereinafter "Hall"].

<sup>7</sup> *Sanv  v. Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519, at para. 17, McLachlin C.J.C. [hereinafter "Sanv "].

<sup>8</sup> *Mills*, *supra*, note 5, at paras. 56-60, Iacobucci and McLachlin JJ.; *Sanv *, *supra*, note 6, at para. 98, Gonthier J. dissenting.

in the use of the dialogue metaphor<sup>8</sup> suggest that it will be no more a satisfactory theory of judicial review than its predecessors, whether they be based on originalism, the re-enforcement of democracy or the protection of fundamental rights.<sup>9</sup>

In the first part of this article, I will outline the major features of dialogic judicial review in Canada as a political or constitutional theory about how both courts and legislatures can contribute to debates about controversies about rights and freedoms. These key features include both sections 1 and 33 of the Charter, the exercise of remedial discretion to allow legislatures to select among a range of constitutional options and cabinet-dominated Parliamentary government. I will argue that dialogue theory is not a theory of judicial review that will tell judges how to decide hard cases. Judges do not dialogue with legislatures. They decide cases according to their view of the law. Dialogue theorists should be addressing their arguments as much to the public and legislators as to the judges. One positive impact of dialogue theory is that the recent debate about judicial activism in Canada on issues such as gay marriage and decriminalization of marijuana seems to be slowly shifting focus from criticisms of the Court for doing its job to criticisms of Parliament for failing to do its job.

A conclusion that dialogue theory is not in itself a theory of judicial review, however, begs the more difficult question of what, if anything, justifies giving the unelected judiciary any role in the political dialogue about rights and freedoms. Some critics of dialogue argue that "dialogue theory lacks normative content ... The fact that one institution can escape the consequences of another's actions says nothing about the latter's legitimacy".<sup>10</sup> In the second part of this article, I will respond to this important critique by acknowledging that there is a need to articulate what courts can uniquely contribute to political debates about rights. Courts should play a role that will not otherwise be played by legislatures.

<sup>8</sup> For more discussion of inconsistency in the Court's use of the dialogue metaphor see Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003", in this volume.

<sup>9</sup> The critical literature on these conventional theories of judicial review is vast. See e.g., Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (1998).

<sup>10</sup> Pether, "Rip Van Winkle in Charterland" in Bazowski (ed.), *The Charter at Twenty* (forthcoming); Ewing, "Human Rights" in Cane and Tushnet (eds.), *The Oxford Handbook of Legal Studies* (2003).

Such a judicial role includes good faith interpretation of the constitutional text, fair hearings of claims about rights and injustice and the protection of minorities and fundamental values that are vulnerable to hostility or neglect in the legislative process.<sup>11</sup> On such issues, defenders of dialogic judicial review may appear to be getting too close to traditional theorists of judicial review, but they only bear the burden of justifying judicial contributions to political debates about rights, and not judicial supremacy.

But what about the argument that although the Charter does not contemplate judicial supremacy, it can result in judicial supremacy when the courts seem to have the last word on controversial matters such as abortion and perhaps gay marriage?<sup>12</sup> Concerns have been expressed that the Charter gives judges a privileged and unwarranted place, if not a monopoly, in articulating constitutional values.<sup>13</sup> In the third part of this article, I will attempt to disentangle empirical and normative strands in this important critique of dialogue theory. At an empirical level, we need a better understanding of when and why legislatures accept certain judicial decisions. This will increasingly take those interested in dialogic judicial review into the realm of case studies of the interaction of the judicial and legislative processes.<sup>14</sup> Comparative studies may also assist in a better understanding of the importance of the placement of the burden of legislative inertia and the conditions that are necessary to surmount various burdens. The focus should be on how particular bills of rights and judicial decisions influence the process of dialogue between courts and legislature, and also the influence of other actors in civil society such as the media, advocacy groups, and international organizations in influencing legislative priorities. In addition, the role of popular perceptions of both rights and courts should be examined. One hypothesis is that popular perceptions of judicial review may still be rooted in an older vision of judicial supremacy and may not have caught up to

<sup>11</sup> See generally Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), at ch. 12.

<sup>12</sup> Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 53 U.T.L.J.

89. <sup>13</sup> Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd ed., 2001).

<sup>14</sup> See e.g., Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002) [hereinafter "Charter Conflicts"].

new understandings of dialogic judicial review. Another is that legislatures require increased capacity to engage in their own independent interpretation of the Charter.

Increased study of dialogue in practice will provide valuable insights, but it will not end the normative controversy about whether dialogue between courts and legislatures contributes to democracy. There is a danger that empirical accounts of dialogue will run at cross purposes if their normative premises are not made clear and debated. For some, there is genuine dialogue even when legislatures fail to revise or reverse Charter decisions.<sup>15</sup> A government is democratically accountable for such decisions because it has ample tools under the Charter and in Parliament to revise or reverse Charter decisions and because dialogue may result in agreement. Parliament has been able to reverse and revise unpopular decisions about the rights of the accused,<sup>16</sup> perhaps the most unpopular group in our democracy. On matters such as abortion and gay rights, however, public opinion is more divided and the political benefits of challenging the Court less certain. Hence, the Court's decisions have had more sticking power. When the legislature fails to revise a Charter decision, the people may still be getting what they want or at least, not being stuck with a state of affairs that they clearly do not want.

Others, however, argue that there is no genuine dialogue unless the legislature acts on its own interpretation of the Charter.<sup>17</sup> This raises the question of whether legislatures are suited to interpreting the rights of minorities and the accused and long-term fundamental values. The track record of legislatures on Charter issues is not strong. The dangers are not only that legislatures will gang up on the unpopular and act as a judge in their own majoritarian causes, but also that they will avoid or finesse issues of principle. Courts may have a legitimate role in slowing down majorities and sending signals to them about the consequences of

<sup>15</sup> Hogg and Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 *Osgoode Hall L.J.* 529.

<sup>16</sup> Parliament's robust responses to the Supreme Court's decisions about the Charter rights of the accused in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter "Seaboyer"]; *R. v. Daviault*, [1994] 3 S.C.R. 63 [hereinafter "Daviault"]; and *R. v. O'Connor*, [1995] 4 S.C.R. 411 [hereinafter "O'Connor"] are discussed in Hiebert, *supra*, note 14, at ch. 5, and Roach, *supra*, note 11, at ch. 10.

<sup>17</sup> Manfredi and Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushnell" (1999) 37 *Osgoode Hall L.J.* 513.

their actions for minorities and fundamental values. Courts may also have a legitimate role in provoking legislatures to confront issues of principle and exclusion that they would rather ignore. Dialogic judicial review may serve as a means of placing important and uncomfortable issues on the legislative agenda. The government will then have to decide whether it is prepared to expend limited political capital and energy in enacting ordinary legislation to revise or reverse the relevant Charter decision. Under this view of dialogic judicial review, the people should not always get what they immediately want or be allowed to enjoy the comfort of a status quo that may infringe rights. Their preferences should be tested by allowing the courts to consider claims of rights and injustice in a way that is procedurally different from the way that such issues are discussed on the floor of the legislature. Popular preferences can still be vindicated through legislation revising or reversing Charter decisions, but the process will be characterized by fuller deliberation and debate and better awareness of the consequences because of the court's contribution to the dialogue about rights and freedoms.

Even if one accepts that legislatures can revise or reject Charter decisions, this begs the question of the legitimacy of such legislative actions. Here the worry is that dialogic judicial review may place both fundamental rights and vulnerable minorities, as protected by courts, at risk from legislatures. This criticism of dialogic judicial review has largely been nascent, but it will increase in the years to come as dialogic judicial review gains greater prominence.<sup>18</sup> Conventional theorists of judicial review, whether they are attracted to Bork, Ely or Dworkin, will surely challenge dialogue theory as too willing to sacrifice judicial attempts to reach right answers through the vagaries of politics. There are also concerns that dialogue theory will give judges an excuse to back away from constitutional commitments especially when legislatures have responded negatively to previous court decisions. In other words, dialogue theory may send a message to minorities that courts are not

<sup>18</sup> For some such criticisms of dialogue see Cameron, "The Charter's Legislative Override: Feat or Fignment of the Constitutional Imagination?" in this volume (criticizing the override); Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. (2d) 267 (criticizing the use of suspended declarations of invalidity); Leclair, "Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien" (2002) R. du B. 379; Weinrib, "The Canadian Charter's Transformative Aspirations" (2003) 19 S.C.L.R. (2d) 17, at 19 (more general critique of dialogue).

truly committed to rights and to legislatures that "if at first you do not succeed, try, try again."<sup>19</sup> In Canada, the possibility that the override could be used to prevent gay marriages is disconcerting for many and Quebec has already used the override to limit the rights of its non-francophone minorities. Here defenders of dialogic judicial review will need assistance from the very theorists who have criticized them for leaving too little room for legislatures. In other words, proponents of dialogue will need to justify legislative participation in societal debates about the treatment of rights and freedoms. On these issues, dialogue theorists may appear to be getting too close to traditional theories of legislative supremacy, but it is important for defenders of dialogic judicial review to explain why elected legislatures, as well as courts, are important and legitimate interlocutors in societal dialogues about rights. Dialogue theorists must defend a vision of constitutional democracy that avoids either judicial or legislative supremacy.

## I. WHAT IS DIALOGIC JUDICIAL REVIEW?

Dialogic judicial review refers to any constitutional design that allows rights, as contained in a bill of rights and as interpreted by the courts, to be limited or overridden by the ordinary legislation of a democratically enacted legislature. This definition of dialogic judicial review focuses on issues of constitutional design and the constitutional rejection of both judicial and legislative supremacy. It does not capture all the dialogue that actually occurs between courts, legislatures and the broader society. For example, it would exclude Bruce Ackerman's theory of constitutional moments even though that theory provides an interesting account of how the United States Supreme Court at crucial times in its history has been checked by society and the elected branches of government. The reason why Ackerman's theory would not qualify is that the dialogue that he outlines was achieved not by ordinary legislation, but by a Civil War and consequent constitutional amendments prohibiting slavery and by threats to pack the Court before its acceptance of New Deal legislation.<sup>20</sup> Attempting to change the Court or the

<sup>19</sup> *Saravé, supra*, note 6, at para. 17, per McLachlin C.J.C. (in the context of dismissing such an argument).

<sup>20</sup> Ackerman, *We the People: Foundations* (1993).

Constitution are drastic and desperate forms of dialogue that accept judicial supremacy as the condition of ordinary politics. Similarly a variety of sophisticated sub-constitutional devices used in the United States to encourage dialogue between courts and legislatures in the shadow of constitutional norms would not qualify under the above definition of dialogic judicial review.<sup>21</sup> Although these devices allow the legislature to respond to the court's decision with ordinary legislation, they fail to produce a full constitutional decision by the courts on the merits.<sup>22</sup> Dialogic judicial review combines constitutional decisions of courts with legislative revision or rejection of those decisions by means of ordinary legislation.

The key to understanding dialogue under the Charter or other modern bills of rights is that those constitutional documents allow court decisions about rights to be revised or rejected by ordinary legislation. It is not necessary for courts to avoid or minimize constitutional decisions in order to leave room for legislative replies. It is also not necessary to gain the extraordinary consensus necessary to amend the formal constitution to revise court decisions or to use the appointment process as an indirect device to encourage the Court to alter its decisions. Under dialogic judicial review, constitutional decisions of the Court can be addressed by the legislature on their merits and through ordinary legislation.

Drawing on the work of Guido Calabresi,<sup>23</sup> I have suggested elsewhere that the ability of Canadian legislatures to respond to Charter decisions through ordinary legislation means that there are important continuities between common law and dialogic constitutionalism.<sup>24</sup> Long before the Charter, the courts enforced a common law bill of rights in many fields of public law. The courts' common law decisions

<sup>21</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., 1986) at ch. 4; Eskridge, *Dynamic Statutory Interpretation* (1994); Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

<sup>22</sup> On the state of dialogue in the United States with comparison to Canada see Mathen, "Constitutional Dialogues in Canada and the United States" (2003) 14 N.J.C.L. 403.

<sup>23</sup> Calabresi, *A Common Law for our Age of Statutes* (1982); Calabresi, "Foreword: Anti-discrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)" (1991) 105 Harv. L. Rev. 80.

<sup>24</sup> See Roach, *The Supreme Court on Trial*, supra, note 11, and Roach "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481.

to allow judicial review or require hearings in administrative law or to require proof of subjective fault in criminal law were often quite controversial. Nevertheless, they could be revised or rejected should the legislature be prepared to clearly displace the common law. Under the Charter, legislatures can similarly use ordinary legislation to accept, revise or reject a judicial decision defining rights. As Peter Hogg and Allison Bushnell note in their important and influential article about Charter dialogue, "[w]here a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue".<sup>25</sup>

The structure of both the Charter and Canadian legislatures are key to understanding the process of dialogue between these two institutions. Section 1 of the Charter allows legislatures to prescribe by law reasonable limits on all Charter rights in the name of any pressing and substantial governmental objective. The "prescribed by law" requirement is an important dialogic feature of the Charter that has frequently been neglected. It continues the common law tradition of requiring clear statements by the legislature when they infringe rights, a device that should promote democratic deliberation and accountability for the limitation of rights. This is especially important given that much Charter litigation is directed against actions taken by state officials such as the police. The prescribed-by-law requirement forces these officials to demonstrate that their actions in limiting rights have in fact been authorized and contemplated by the people's elected representatives. The German Constitutional Court has recognized the need for legislation to authorize executive action, not only to respect the rule of law, but so that "official action [will] be comprehensible and to a certain extent predictable for the citizen." The Israeli Supreme Court has drawn the link between the rule of law and democracy even more clearly, concluding that "the legislature may not refer the critical and difficult decisions to the executive without giving it guidance" because the legislature "is elected by the

<sup>25</sup> Hogg and Bushnell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75, at 79.

people to enact its laws".<sup>26</sup> Unfortunately, the Supreme Court of Canada has been fairly lax in enforcing the prescribed-by-law requirement. It has often allowed officials to take shelter in broad legislative grants of discretion without requiring clear statements that the legislature has considered and authorized its officials to place limits on Charter rights.<sup>27</sup> The requirement that limits on rights be prescribed-by-law can play an important role in prompting democratic debates in the legislature about the treatment of rights and freedoms.

In order to justify a limit on Charter rights, however, the government must do more than clearly state in legislation its intent to limit rights. The legislation must also be justified on the basis of a legitimate and important governmental objective. Section 1 differs from comparable limitations provisions in the European Convention on Human Rights or the International Covenant on Civil and Political Rights because it does not attempt to limit the range of objectives for legislative limits on rights and because it applies to all rights. Canadian legislatures can define the terms of the justification process by articulating in legislation and through devices such as preambles the particular legislative objectives that in their view justify restrictions on Charter rights. To be sure, the Supreme Court has in relatively rare cases rejected some objectives as not important enough to limit Charter rights. For example, attempts to impose a state religion through Sunday closing laws or attempts to explain rather than justify a legislature's neglect of gays and lesbians have been held not to be sufficiently important objectives to limit Charter rights.<sup>28</sup> As Hogg and Bushell note, dialogue may be precluded in the

<sup>26</sup> Quoted in Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv. L. Rev. 16, at 137. For arguments that judicial supervision of police practices do not detract from liberal constitutionalism or result in judicial supremacy see Kelly, "The Supreme Court of Canada and the Complexity of Judicial Activism" in James, Abelson and Lusztig (eds.), *The Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution in Canada* (2002), at 97.

<sup>27</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120. For further argument relating the prescribed-by-law requirement to democratic dialogue between courts and legislatures, see Choudhry and Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1.

<sup>28</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Friend v. Alberta*, [1998] 1 S.C.R.

relatively rare cases where the courts rule the legislative objective not to be worthy enough to limit the Charter right.<sup>29</sup> At the same time, however, this is a relatively rare restriction on dialogue<sup>30</sup> and one that can be overcome if the legislature re-formulates its objective for limiting the relevant Charter right. For example, legislatures were able to successfully defend Sunday closing laws on the basis of the secular objective of imposing a common pause day.<sup>31</sup> The generality of section 1 of the Charter means that legislatures have considerable scope to place limits on rights as interpreted by the Court.

Once the legislative objective is determined, the courts apply a proportionality analysis that inquires into the fit between the objective and the particular rights violation, as well as the overall balance between the ability of the impugned law to accomplish the objective and the effect on the Charter right. The courts exercise considerable discretion in this analysis, but the legislature also plays an important role. The government has the burden under section 1 and may introduce a wide range of evidence to justify a limit on a Charter right. It can clarify its precise objective through the use of preambles and other devices. It can also commission and introduce evidence to demonstrate why a policy alternative that the court might see as less restrictive of rights will not be feasible or effective in achieving the legislature's policy objective. Judges should not conduct section 1 analysis in the abstract; they should listen and learn from the government and respond to the government's arguments. Although section 1 analysis can be contentious, the terms of

<sup>29</sup> Hogg and Bushell, *supra*, note 25, at 92-95. The legislature may also have a diminished role in cases such as *R. v. Mills*, [1999] 3 S.C.R. 668, where the Court reconciles competing Charter rights for itself without reaching s. 1 and in cases such as *United States v. Burns*, [2001] 1 S.C.R. 283, in which the Court indicates that s. 1 limits on s. 7 rights can only be justified in an emergency situation.

<sup>30</sup> One study of Supreme Court decisions found that the Court accepted the legitimacy of the legislative objective in 97 per cent of cases. Trakman, Cole-Hamilton and Gatién, "R. v. Oakes, 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83.

<sup>31</sup> *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. In some important recent cases, however, the courts have indicated some serious reservations about whether the government's objectives were important enough to justify a limitation on a Charter right, but have assumed so and gone on to determine whether the limitation was proportionate to the objective. See *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (denial of voting rights to prisoners to promote the rule of law and punish prisoners); *EGALE v. Canada* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.); *Halpern v. Canada* (2003), 65 O.R. (3d) 161 (C.A.) (denial of marriage to gays and lesbians to promote procreation and recognize companionship).

the debate can be shaped by the legislature. In its more rigid guises, section 1 analysis can seem constrained by what Jeremy Waldron has criticized as the "obsessive verbalism of a particular written *Charter*." From its inception and increasingly in recent years, however, section 1 analysis has proven to be relatively flexible and attentive to context. At all times, it avoids the one step formula of American constitutional law in determining whether the government has infringed "speech", "religion", "cruel and unusual punishment" or "due process" in favour of a more "free and flexible discourse of politics".<sup>32</sup> Of course, Professor Waldron's desire is not to encourage an even more flexible discourse of politics in the courtroom. My point is only to illustrate how the legislature can help shape the terms of justification under section 1 of the *Charter*.

The other main structural device for dialogue under the *Charter* is section 33. It allows legislatures to enact legislation notwithstanding the fundamental freedoms, legal and equality rights of the *Charter* for a renewable five-year period. The courts have deferred to legislative uses of the override upholding Quebec's omnibus use of the override and have only have struck down retroactive uses of the override.<sup>33</sup> Thus the legislature can override *Charter* rights for whatever objective it selects. It is not necessary for the legislature to declare a state of emergency. Section 33(1) echoes clear statement rules by requiring the legislature to "expressly declare" that the specific act will operate notwithstanding specified parts of the *Charter*. Section 33, like derogation provisions in other modern bills of rights, contemplates continued democratic dialogue over rights and freedoms because the override must be renewed every five years, a time that dovetails with the maximum duration of a legislature under section 4 of the *Charter*.<sup>34</sup> The use of the override can potentially be an issue in the next election.

<sup>32</sup> Waldron, *Law and Disagreement* (1999) at 221. This flexibility is significantly diminished however to the extent that the Supreme Court has indicated that it would rarely, if ever, accept a violation of s. 7 or s. 12 of the *Charter* as a reasonable limit under s. 1 of the *Charter*, and also when the Court rejects the objective offered by the legislature.

<sup>33</sup> *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

<sup>34</sup> For example, s. 17 of the *Human Rights Act, 1998* (U.K.), 1998, c. 42, follows s. 33 of the *Charter* by requiring that derogations from Convention rights be reviewed at least every five years.

There are several contentious design features of section 33. One is that it can and often has been used in a pre-emptive fashion before a court has issued a *Charter* decision. A pre-emptive use of the override shuts up the dialogue before the judges have even uttered a word on the matter. If all other governments had followed Alberta's lead in 2000 and used the override to preclude challenges to traditional definitions of marriage, the courts would have been unable to hear claims of discrimination by gays and lesbians and society would have been deprived of judicial decisions deciding whether the traditional definition of marriage discriminates against gays and lesbians and whether it can be justified as a reasonable limit in a free and democratic society. Pre-emptive uses of section 33 are problematic from a dialogic perspective.

Another contentious issue is that the wording of section 33 requires a legislature to state that it is overriding rights. Jeremy Waldron has argued that section 33 forces the legislature into declaring misgivings about rights whereas there is most often only a reasonable disagreement about rights.<sup>35</sup> It might well have been preferable to have followed Christopher Manfredi's suggestion that section 33 be worded in a manner that only allows a legislature to override judicial interpretations of rights.<sup>36</sup> Nevertheless, the wording of section 33 is not fatal to the dialogue model. When the override is used to reverse a court decision, it is likely that people will realize that the legislature is not really overriding the relevant *Charter* right, but rather the court's interpretation of the right. On the other hand, when the legislature uses the override preemptively to shut down dialogue with the courts about the meaning of the right, it is not unreasonable for the legislature to be required to take the heat for overriding the right. The legislature is effectively saying that it does not care how the court interprets the right. On this view, Quebec's omnibus use of the override in 1982 could reasonably be portrayed as misgivings about *Charter* rights<sup>37</sup> but Quebec's use of the override after the Supreme Court's signs decision could not reasonably be seen as a

<sup>35</sup> Waldron, "Some Models of Dialogue Between Judges and Legislators", in this volume.

<sup>36</sup> See the proposal made in Manfredi, *supra*, note 13, at 192-94 for requiring that the override be used only after a final judicial decision.

<sup>37</sup> Even in that case, the people knew that Quebec's use of the override was largely an objection to the patriation process as most of the *Charter*'s rights were already contained and protected under Quebec's own *Charter*.

misgiving about freedom of expression as such, but rather as an objection about how the Supreme Court in a particular case balanced its broad interpretation of free expression against Quebec's interest in promoting French as its official public language. Although section 33 required Quebec to state it was legislating notwithstanding section 2 of the Charter, the people should be given some credit for knowing the true nature of the dispute between the court and the legislature.

Another design issue is why some rights in the Charter — democratic, mobility and language rights — are exempted from the override. In the *Saveé*<sup>38</sup> case about prisoner voting, the majority concluded that the exemption of the right to vote from the override underlined the prime importance of this democratic right. The right to vote and the right to have periodic elections can indeed be seen as the most basic rights in a democracy. Minority language rights may also have been exempted from the override because of a concern about the tyranny of large linguistic majorities over small linguistic minorities. This may also explain why Aboriginal and treaty rights protected under section 35 of the *Constitution Act, 1982* are exempted from both sections and from section 33.<sup>39</sup> At the same time, it is less clear why mobility rights are not subject to the override. It could be argued that the dialogic structure of the Charter would be improved if the override were available for all rights.

In some cases, courts can fashion their decisions to keep open the option of using the override. In 1998, the Supreme Court struck down an election law as an unreasonable violation of freedom of expression and avoided deciding the case under the right to vote in part to preserve

<sup>38</sup> *Saveé*, *supra*, note 31.

<sup>39</sup> The Supreme Court, has, however read in a s. 1 type justification process into the adjudication of existing Aboriginal and treaty rights. The dialogue model may require some modification when applied to Aboriginal rights so as to encourage not only dialogue between courts and legislatures but also dialogue and negotiation between Canadian governments and the representatives of Canada's various Aboriginal peoples. See Schneiderman, "Review" [2003] W.Y.B. Access to Justice. For judicial statements about the importance of such negotiations see *Delgamuikw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Powley*, [2003] 2 S.C.R. 207. For discussion of how judicial remedies for violations of Aboriginal rights may facilitate negotiation between governments and Aboriginal peoples see Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498 and "Remedies in Aboriginal Litigation" in Magnet and Dorey (eds.), *Aboriginal Rights Litigation* (2003).

Parliament's right to override the decision.<sup>40</sup> Such an approach could also have been used in *Saveé* because the case was argued on the alternative grounds that it violated the equality rights of prisoners. In my view, little would have been lost in terms of judicial reasoning had the Court taken this approach. Restrictions on the franchise in Canada are intimately connected with the struggle of the poor, women, racial minorities, and Aboriginal people for equality.<sup>41</sup> To be sure, deciding *Saveé* only on section 15 grounds would have left a very vulnerable minority — prisoners serving federal time, nearly a fifth of whom are Aboriginal — open to denial of their rights by a majority, an issue that raises serious normative questions that will be examined in the final part of this article. At the same time, it would have allowed Parliament an opportunity to re-evaluate its policy in light of the Supreme Court's conclusion that prisoner disenfranchisement was an ineffective means to punish offenders or to signal the importance of the franchise and the rule of law in a democracy. The exemption of some rights from the override may frustrate some forms of dialogue, but the fact remains that by far the most litigated provisions of the Charter remain subject to the override.

Sections 1 and 33 are the main instruments of dialogue under the Charter. From a democratic perspective, what is noteworthy about both provisions is that they require legislation to prescribe limits on Charter rights or to expressly override such rights. In this sense, both sections enhance democracy as represented by the process of the people's elected representatives deliberating and voting on some piece of legislation. Both sections 1 and 33 provide a direct vehicle to engage the merits of particular court decisions and can be contrasted favourably to the epic political battles and current deadlock over the appointment of judges that presently beset the American system and constitute, at best, an indirect means to respond to and to anticipate judicial decisions. Under the Canadian system, legislators are allowed to address specific court decisions directly. They can discuss the merits and shortcomings of such

<sup>40</sup> *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at 935.

<sup>41</sup> I represented an intervenor in that case, Aboriginal Legal Services of Toronto, who argued that the law should be struck down as an unreasonable violation of the equality rights of prisoners and Aboriginal prisoners. The four dissenting judges found no violation of these equality rights and the five judges in the majority did not decide the equality rights issue.

decisions and in most cases can enact legislation to revise or reverse those decisions. In the American system, legislators are often limited to speculating about the possible future voting patterns of this or that judicial nominee. I agree wholeheartedly with Jeremy Waldron that "important debating" about what "a few black-robed celebrities" might decide in the future "is hardly the essence of democratic citizenship."<sup>42</sup> Enacting ordinary legislation that revises or rejects a court's constitutional decision, however, is a very significant act of democracy.

Another important feature of dialogic review in Canada has been the courts' exercise of their remedial discretion in such a way as to leave governments room to revise their judgments and to select from a range of constitutional options. The most important remedy<sup>43</sup> in this respect has been the delayed or suspended declaration of invalidity which has developed as an important and innovative remedy since it was first used by the Supreme Court of Canada in the *Manitoba Language Reference*.<sup>44</sup> Although the Court in *Schachter v. Canada*<sup>45</sup> attempted to limit the use of suspended declarations of invalidity and to reject the dialogic idea that they can be justified on the basis of concerns about the relative role of courts and legislatures, the Supreme Court has in many subsequent cases suspended declarations of invalidity in order to allow legislatures an opportunity to pre-empt the court's blunt remedy of a declaration of invalidity.<sup>46</sup> The delayed declaration of invalidity, a novel remedial

<sup>42</sup> Waldron, *Law and Disagreement* (1999), at 291. See Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), at 295.

<sup>43</sup> General declarations as opposed to specific injunctions can also be seen as dialogic remedies because they allow the executive considerable discretion to determine the exact means to be used to comply with the court's general articulation of constitutional entitlement. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 96, the Supreme Court justified the use of a declaration on the dialogic basis that there were "myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished." For an evaluation of the strength and weaknesses of reliance on declaratory relief see Roach, "Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity" (2002) 35 U.B.C. L. Rev. 211.

<sup>44</sup> *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.  
<sup>45</sup> [1992] 2 S.C.R. 679.

<sup>46</sup> See most recently *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at paras. 119-21. For contrasting views about the use of delayed or suspended declarations of invalidity compare Choudhry and Roach, "Putting the Past Behind Us" (2003) 21 S.C.L.R. (2d) 205 and Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. (2d) 267. For an assessment of the various uses of delayed declarations of invalidity and how many of these

instrument that is now specifically contemplated in South Africa's constitution,<sup>47</sup> is an instrument of dialogue because it allows the legislature to enact ordinary legislation to revise the court's remedy before that remedy takes effect. To be sure, the legislature may not always be able to act in the six- to 18-month periods that the courts generally allow and sometimes the reply legislation may follow the court's judgment fairly closely. Nevertheless, the suspended declaration of invalidity allows the legislature an important opportunity to select among a range of constitutional options and pre-empt the court's remedy. Moreover, there have been legislative replies in the majority of cases in which suspended declarations of invalidity have been used.<sup>48</sup> As will be discussed below, the Ontario Court of Appeal's immediate and mandatory remedy in the gay marriage case has been controversial<sup>49</sup> and reduced the range of dialogue available between courts and legislatures on the same-sex marriage issue.

There is a final feature of the Canadian Constitution that is important in facilitating dialogue between courts and legislation. That feature is the nature of Canadian parliamentary government. Canadian parliamentary government is characterized by Cabinet and even prime ministerial domination, a first past the post system that encourages majority governments and tight party discipline. To be sure, all of these features of Canadian governance are controversial. Many argue that they produce a democratic deficit that diminishes the accountability of governments to the people. There are many calls to increase the power of backbenchers and committees, increase the power of the Senate through election, diminish the hold of party discipline and to introduce devices

do fit into the *Schachter* categories see Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, as updated), at ch.14.

<sup>47</sup> Section 172(1) of the South African Constitution provides that:

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—  
(i) an order limiting the retrospective effect of the declaration of invalidity; and  
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

<sup>48</sup> There has been reply legislation in 11 of 14 cases in which the Supreme Court of Canada has used a delayed declaration of invalidity. See Choudhry and Roach "Putting the Past Behind Us", *supra*, note 46, at table B.

<sup>49</sup> *Halpern v. Canada*, *supra*, note 31, at paras. 151-53.

such as proportional representation and referenda. Leaving aside the merits of such proposals, as well as claims that the defects of the present system are so great that Canada's elected governments themselves lack democratic legitimacy,<sup>50</sup> the present system has the virtue of generally ensuring that a government can quickly enact legislation to respond to a Charter decision.<sup>51</sup> In other words, even if the American Bill of Rights was amended to include dialogic devices such as sections 1 and 33 of the Charter and judicial remands of issues to legislatures, it would still be more difficult to enact effective legislative replies to court decisions under the American Congressional system of internal checks and balances than under the Canadian parliamentary system of Cabinet domination.

To summarize, dialogue theory in Canada is a constitutional or political theory that explains how the Court's Charter decisions can be reversed or revised by ordinary legislation under sections 1 or 33 of the Charter, legislative selection among a broad range of constitutional options, and by the type of quick legislative activism that is presently available in Canada's system of parliamentary government. Dialogue theory does not claim to provide judges with the right answers to the difficult questions that come before the courts in Charter cases. Some what ironically given its frequent invocation by Justices of the Supreme Court in a number of Charter cases, the original Hogg and Bushell article conceded that "judges have a great deal of discretion in 'interpreting' the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges."<sup>52</sup>

<sup>50</sup> Andrew Petter, who has returned to academe from a decade of distinguished service in British Columbia's Cabinet, has written that "my political experiences have persuaded me that the major threats to Canadian democracy lie in the undemocratic character of our democratic institutions ... Unlike dialogue theorists, I do not believe these institutions, as currently structured, can claim legitimacy for themselves, let alone for judicial review. Nor do I see how the interplay between unaccountable legislatures and elected judges qualifies as 'democratic dialogue'." "Rip Van Winkle in Charterland", *id.*, Bazowski (ed.), *The Charter at Twenty* (forthcoming).

<sup>51</sup> When I referred to strong legislatures in *The Supreme Court on Trial* some reviewers took me to task on the grounds that legislatures are not strong under the present system of Cabinet domination. See Kelly, "Review" (2002) 17 *Can. J. of Law and Society* 174, at 179. My point was and remains that legislatures are strong under the Charter in the sense that they can quickly respond to court decisions should the political will in Cabinet be present.

<sup>52</sup> Hogg and Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 *Osgoode Hall L. J.* 75, at 77.

This is a fairly robust concession — indeed one that I will suggest in the next part is a bit too robust — to legal realism and judicial discretion in interpreting the Charter. It may only feed concerns that unelected judges will "inevitably" use the Charter to impose their own personal values on the polity and that dialogue theory is lacking in moral content and fails to justify the judicial role in dialogues with the legislatures. Hogg and Bushell are, however, certainly right to concede that dialogue theory does not provide judges with right answers to hard cases. Dialogue theory departs from the preoccupation of much contemporary constitutional theory because it does not focus on finding the right answers to difficult cases. In turn, it is not set back or shattered by a conclusion that people can reasonably disagree with a particular court's decision about rights.

Dialogue theory represents a concession that the conventional theories of judicial review have reached something of a dead end. The mythical judge — Dworkin's Hercules — who can reach reliably right answers is just that: a myth. Reasonable disagreement about how judicial review should be practiced has led dialogue theorists to examine a different question: the options available for legislatures and society to respond and revise the court's perhaps flawed decisions. There is no guarantee that the judges will find reliably right answers to the difficult questions that they face and for that reason, dialogic judicial review allows legislatures room to debate and to revise and even to reject judicial decisions.

## II. JUSTIFYING THE JUDICIAL ROLE IN THE DIALOGUE

Although dialogue theory does not claim to provide judges with the right answers to hard cases, I believe it is a mistake for dialogue theorists to accept that judges have a strong form of discretion to decide Charter cases that is not informed by their views about the law. The positivistic idea that judicial decision-making under the Charter is in hard cases a matter of unguided discretion leaves dialogue theory vulnerable to Andrew Petter's criticism that "dialogue theory lacks normative content, and exerts no moral claim to support judges involvement in Charter decision-making... The fact that one institution can escape the

consequences of another's actions says nothing about the latter's legitimacy.<sup>53</sup> Keith Ewing in his recent contribution to the *Oxford Handbook of Legal Studies* made a similar point, namely that "if judicial review is to be justified, it must be for reasons of principle which are intrinsic to the process itself, and not because the process is not as intrusive or as expansive in practice as might otherwise be claimed by the opponents of judicial review of legislation."<sup>54</sup> Dialogue theorists bear the burden of justifying the judicial role in the dialogue about rights and freedoms.

There is some mischief in criticisms that dialogue theorists have not justified judicial review. Dean Petter, for one, believes that any attempt to justify the judicial role is a "futile search for legitimacy" and he is somewhat nostalgic for the days when supporters of the Charter justified it on the basis of conventional theories of judicial review based on the intent of the framers. Ely's theory of democracy or Dworkin's theory of rights. To the extent that dialogue theory moves in the direction of the legitimacy debate, it can be criticized for being not only unoriginal, but more importantly undemocratic. In other words, conventional theories of judicial review are open to criticism for being too substantive. As my colleague David Dyzenhaus has argued, they contain a vision of "liberal constitutionalism" based on rights as trumps that can be contrasted with a more open-ended vision of "democratic constitutionalism" based on governments justifying their actions.<sup>55</sup> There is a democratic justification for dialogue theory focusing more on the ability of the legislature to revise or reverse court decisions than on how a judge should decide a hard case under the Charter.

At the same time, however, Petter and Ewing have a valid point when they argue that dialogue theorists need to justify the judicial contribution to the dialogue. For my own part, I am reluctant to go as far as Hogg and Bushnell seem to do in conceding that constitutional interpretation is a matter of judicial discretion. The judicial role in the dialogue would not be justified if judges were flipping coins, making decisions without reasons or simply imposing their own vision of the good society in their decisions. Dialogue theorists need to pay more attention to the

<sup>53</sup> Petter, "Rip Van Winkle in Charterland", *supra*, note 50.

<sup>54</sup> Ewing, "Human Rights", in Cane and Tushnet (eds.), *The Oxford Handbook of Legal Studies* (2003), at 309.

<sup>55</sup> Dyzenhaus, "Law as Justification: Etienne Murecinik's Conception of Legal Culture" (1998) 14 S.A.J.H.R., at 31-33.

legitimacy of judicial contributions to societal debates about rights and freedoms. This process will bring them closer to the conventional debate about judicial review, albeit with the important caveat that dialogue theorists do not have to justify judicial supremacy. The dialogic structure of the Charter makes it possible to have Dworkin's Hercules as a judge, but to harness Hercules by ordinary legislation that revises or reverses his decisions.

Even though Hercules' decisions may be revised or reversed by the legislature, Hercules' role must still be justified. Dialogic judicial review is derived from a legal process tradition that is concerned with the unique attributes of courts as compared to legislatures or the executive. Following Bickel and Fuller and others in the legal process tradition, dialogic judicial review must account for the unique institutional role of the judiciary and of the process of adjudication. As Bickel recognized, the role of the courts in a democracy can only be defined in relation to the role of the legislature and the executive:

The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of courts; which will not likely be performed elsewhere if the courts do not assume it....<sup>56</sup>

Other unique attributes of courts include their commitment to allowing structured and guaranteed participation from aggrieved parties; their independence from the executive, and their commitment to giving reasons for their decisions.<sup>57</sup> In addition, courts have a special commitment to make sense of legal texts that were democratically enacted as foundational documents. It is important that judges have to make some effort to engage in a good faith interpretation of the constitutional text, even though the fact of reasonable disagreement is evident to all.

Critics of judicial review love to focus on 5:4 decisions to reveal the contingency of judicial reasoning about rights. If judges are so closely divided, so the argument goes, why should their views prevail over larger groups of elected representatives who are also divided and who

<sup>56</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., 1986), at 24.

<sup>57</sup> See e.g., Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353; Bickel, *supra*, note 56.

also vote? Judges, however, do not vote simply by standing when their names are called. They are not subject to coercion from the party whip. Judges write reasons, sometimes overly long reasons, but reasons nevertheless to explain their vote. The reasons should respond to the arguments and evidence submitted by the parties who have a guaranteed ability to marshal their case and the ability to define the issues and present evidence and argument in support of their case. Pleadings in court do not have to lobby for some face time with the decision-maker and they do not have to worry about other pleaders making secret submissions or have disproportionate time to influence the decision-maker. The pleader in court has a guaranteed right of participation and a right to a reasoned decision that addresses the arguments made in court, as well as the relevant text of the democratically enacted law. The fair process of adjudication and the requirement for reasons help justify why unelected judges should play an important role in our debates about rights and freedoms.

The differences between how issues concerning rights and freedoms are debated and decided in legislatures and courts can be revealed by comparing the legislative debates when Parliament enacted a law denying the vote to prisoners serving sentences of two years' imprisonment or more and the debates within the Supreme Court when it decided in a 5:4 decision that the law was an unjustified violation of the right to vote. To be sure, some of the same arguments made by the majority in the Supreme Court about the importance of the right to vote in a democracy, prisoners' legitimate claims to citizenship and the inability of disenfranchisement to serve valid penal ends and its tension with the goal of rehabilitation and re-integration were made by a minority in Parliament.<sup>58</sup> An important difference between the legislative and the court debates, however, was the those defending the restriction on the vote did not really have to answer these arguments. Only a few members and no

<sup>58</sup> Peter Milliken, an opposition member from a riding containing a large number of federal penitentiaries, moved a motion to allow prisoners to vote and criticized the restriction on the vote as "harsh and unfair." He argued that punishment for crime did not result in an offender "being stripped of his or her citizenship" and that the Charter required prisoners to be able to vote. Hansard, April 2, 1993, at 18012. Milliken also argued that "It does not aid in the punishment that the person not have a right to vote." *Id.*, at 18013. Another opposition member, Louis Plamondon, argued that the restriction on the vote "would limit prisoners' rights as though they were perpetual outcasts from society and did not deserve consideration because they had made a mistake." *Id.*, at 18019.

minister even bothered to defend the law in Parliament. One with reference to Clifford Olson, a notorious mass murderer, argued that he "just cannot get excited about such people losing their right to vote for the period they are incarcerated"<sup>59</sup> and another argued that the denial of the vote to offenders was "simple common sense."<sup>60</sup> The government was not required, as it was in court, to marshal its arguments about its precise objectives in limiting the vote of prisoners. Finally, the procedure used to resolve differences of opinion in Parliament and the Supreme Court were also quite different, even though both involved voting. A motion to give prisoners the right to vote was defeated in Parliament on a yelled voice vote despite objections that there was no quorum in the House,<sup>61</sup> while all nine Justices were present and signed lengthy reasons when the issue was decided in the Supreme Court.

Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process. This means embracing an anti-majoritarian judicial role so that courts do what they can to protect minorities who are vulnerable to discrimination in the legislative and administrative processes of government. Thus a judge at a minimum should be influenced by the work of John Hart Ely and the *Carolene Products* footnote.<sup>62</sup> As non-elected officials with tenure, judges have a special role to look out for vulnerable minorities. As Wilson J. recognized, this judicial role is a dynamic one as the outcasts of today may not be the outcasts of tomorrow.<sup>63</sup> Indeed, I would go further and suggest that judges in a dialogic system should be concerned not only with the protection of vulnerable minorities, but also with the protection of fundamental values in a manner similar to that contemplated by Dworkin.<sup>64</sup> The fact that their decisions under the Charter can be

<sup>59</sup> *Id.*, at 18016, per Pat Nowlan.

<sup>60</sup> *Id.*, at 18018, per John Reimer.

<sup>61</sup> The bells were, however, rung and a quorum obtained before a second motion, restricting the right to vote to those serving sentences of five years' imprisonment or more, was also defeated by a voice vote: *id.*, at 18019.

<sup>62</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); *United States v. Carolene Products Co.*, 304 U.S. 144, at 152 (1938).

<sup>63</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>64</sup> Dworkin, *Law's Empire* (1986). Here I am indebted to Guido Calabresi, who argues that courts should enforce both anti-discrimination norms and hold legislatures accountable

revised or reversed by the legislature suggests that judges can afford to err on the side of more robust approaches to judicial review. This does not mean that they can afford to be irresponsible or simply impose their own personal views of the good society. They must still make a good faith effort to offer a reasonable interpretation of the text and the purposes of the Charter and to respond to the arguments of the parties, including the section 1 justification offered by the government.

There may be concerns that dialogic forms of judicial review can undercut the judicial role by giving judges an incentive to defer to the legislature whenever it revises or reverses a Charter decision. The record here is mixed with cases such as *Mills*<sup>65</sup> and to a lesser extent *Half*<sup>66</sup> suggesting that the court may use the dialogue metaphor as a ground to defer to legislative replies to its previous decisions, but decisions such as *Sauvé*<sup>67</sup> reject the idea that the legislature should always succeed on its second try. Although it is possible that judges may use the dialogue metaphor as a justification for deference, such deference may betray the deeper dialogic structure of the Charter. In *Mills* for example, the Court could have struck down Parliament's reversal of its prior decision, but still left the door open to dialogue through the use of the override. Alternatively, the Court could have engaged in an internal form of dialogue and overruled its prior decision in *O'Connor*<sup>68</sup> on the basis that it did not give adequate weight to the equality interests of female complainants in sexual assault cases. There is nothing inherent in the dialogic structure of the Charter that counsels judicial deference.<sup>69</sup>

Dialogue theory allows for the possibility that judges may select the wrong minorities or values to protect or that they may go too far in

for their treatment of a wider range of constitutional values. See Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability" (1991) 105 Harv. L. Rev. 80.

<sup>65</sup> *R. v. Mills*, [1999] 3 S.C.R. 668. In this case, the majority of the Court accepted Parliament's reply even though it was largely based on the dissenting judgment in *R. v. O'Connor*, [1995] 4 S.C.R. 411. In my view, an "in your face" reply to a Court's decision should generally be accompanied by the use of the override. Other options might include a reference to ask the Court to re-consider or overrule its prior decisions.

<sup>66</sup> *R. v. Half*, [2002] 3 S.C.R. 309. In this case, the majority of the Court did accept most of Parliament's reply to its previous Charter decision, but did sever the denial of bail on the basis of any just cause as excessively vague.

<sup>67</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

<sup>68</sup> *O'Connor*, *supra*, note 65.

<sup>69</sup> For a similar conclusion see Mathen, "Constitutional Dialogues in Canada and the United States" (2003) 14 N.J.C.L. 403, at 461.

protecting such minorities and such values.<sup>70</sup> If, as critics on the left have claimed, judges protect corporations and the wealthy too much, legislatures can respond with better justifications of why the rights of these entities should be limited. If, as critics on the right have claimed, judges protect criminals and unpopular minorities too much, legislatures can respond with better justifications of why the rights of these people should be limited. In all cases, legislatures also have the right to attempt to mobilize society to support the use of the override. There is nothing under the Charter that prevents a political party from running against the Court and committing itself to more frequent or even omnibus uses of the override. In Quebec, the Parti Québécois government employed this strategy in the early 1980s and in the late 1990s, the neo-conservative Reform Party adopted such a strategy before retreating from it as part of an attempt to gain a broader base of support. A Canadian political party could mould much of its legislative agenda on opposition to the Court. It would not have to content itself with cranky and futile proposals to change the Constitution or the Court, but rather could introduce ordinary legislation to revise or reverse specific judicial decisions. The fact that an anti-Court platform would not at present appeal to a majority of Canadians can be explained by their moderate political preferences and their perceptions of rights and courts. Such attitudes could, however, change. In any event, they are not dictated by the structure of the Charter.

Although dialogue theorists do not have to bear the burden of justifying judicial supremacy, they do have to bear the burden of justifying the ability of the judiciary to place issues on the legislative agenda — issues that the government of the day may often prefer to avoid. Before the Supreme Court entered the fray, Parliament was content to leave its 1969 abortion law in place. The law provided that women could obtain a legal abortion if a committee of doctors concluded that the continuation of the pregnancy would endanger the women's life and health.<sup>71</sup> By invalidating the abortion law, the Supreme Court disturbed the status quo and perhaps even the policy preferences of our elected

<sup>70</sup> For a provocative argument that discrete and insular minorities may often have enough political clout to look after themselves see Ackerman, "Beyond Carolene Products" (1985) 98 Harv. L. Rev. 713.

<sup>71</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

representatives to avoid the abortion issue so as not to alienate people on both sides of the debate. But this policy preference was a fraudulent one in the sense that Parliament had not taken responsibility for legislation that specifically authorized a "local option" system in which abortions were not available in some provinces or which gave committees arbitrary discretion to apply different standards to married and unmarried women. Parliament had enacted a national law that promised that all women could obtain an abortion if the continuation of a pregnancy would endanger their life or health. The pre-Charter status quo ante on abortion was also an unprincipled one in the sense that it had not been challenged by those who argued that it violated the rights of either women or the fetus. In its abortion decisions, the Supreme Court was able to cast light on the low visibility decisions made by hospitals and therapeutic abortion committees and to test the legislation against various rights claims. The Court found the 1969 abortion law to be unconstitutional, but it did not assert any particular solution for the abortion issue as the final word. Only one judge came close to a *Roe v. Wade*<sup>72</sup> trimester approach and all the judges recognized that Parliament could justifiably limit a woman's rights in order to protect the fetus. The Court's decision striking the law down required Parliament to take responsibility for what individual officials acting in its name actually did when they denied women access to abortions. The Court's decision did not prevent Parliament from justifying restrictions on abortions under section 1 or even exempting a new law from the Charter.

F.L. Morton and Rainer Knopff have argued that court decisions on abortion and gay rights are undemocratic because they disturb the policy preferences of democratically elected legislatures.<sup>73</sup> For example, the Court's decision reading in protection against discrimination on the basis of sexual orientation into the human rights code disturbed Alberta's decision not to include it and placed the province in a position where it was effectively forced to go along with the Court's decision or use the section 33 override to reverse the Court's decision. In the gay marriage cases, the courts' decisions have similarly disturbed Parliament's policy preference to affirm the traditional understanding of marriage as a union between a man and a woman both in a 1999 resolution

<sup>72</sup> 410 U.S. 113 (1973).

<sup>73</sup> Morton and Knopff, *The Charter Revolution and the Court Party* (2000), at 157ff.

and in legislation enacted in 2000 that extended benefits to same-sex couples. The courts' decisions have placed the issue of gay marriage on the agenda of a legislature that was content with maintaining the traditional status quo even when it recognized that in other respects same-sex couples were entitled to the same state recognition and benefits as other couples. The courts' ability to set part of the legislative agenda is a considerable power, but in my view can be justified on the basis of the guarantees in the Charter and its dialogic structure. What the Charter does is allow individuals to challenge the status quo on the basis of claims of principle as articulated in Charter rights. The Charter and the courts can force governments to confront issues of principle that they may well be inclined to ignore or finesse, but in most cases they cannot force a committed legislature to accept the court's resolution of the larger matter of policy. Charter decisions can be seen in a mature democracy as a means to manufacture disagreement<sup>74</sup> and to turn complacent majoritarian monologues into democratic and, at times, divisive dialogues. As a result of controversial court decisions on issues such as gay marriage, we have more not less democratic debate and disputation in Canada and the debate has a sharper and clearer edge. Regardless of whether one agrees with the outcome of the dialogue between courts and legislatures, the Charter has placed issues such as abortion, gay rights, and the rights of the accused on the legislative agenda, and by doing so has improved democracy.

### III. WHEN COURTS APPEAR TO HAVE THE LAST WORD IN THE DIALOGUE

Even if one accepts the argument that the Charter and the parliamentary system give elected governments the power to revise and reject Charter decisions, concerns have been raised that on some issues the Court has had or shaped the last word. Fears have been expressed that whatever its potential, dialogic judicial review can degenerate into judicial

<sup>74</sup> Waldron, *Law and Disagreement* (1999), at 311. Professor Waldron might argue, however, that judicial decisions are not necessary because there is already enough disagreement about many of the issues confronted by the courts under the Charter. But this may underestimate the difficulty that unpopular minorities and especially the criminally accused may have being heard in political debates were it not for their ability to claim Charter rights or engage in Charter litigation.

monologue and supremacy. This critique has both empirical and normative dimensions. Empirically, the concern is that the court's assignment of the burden of legislative inertia can be decisive.

In order to explore the empirical issue, the conditions under which legislatures have successfully revised or rejected court decisions and the conditions under which they have failed to do so should be studied and compared. Acceptance of a judicial decision may in the real world of politics simply reflect the fact that reply legislation was not enough of a priority to get on a limited legislative agenda. A failure to reply or alter a court decision may also reflect the way the issue was packaged by the litigants, the courts or the media. What may be more helpful than quantitative approaches that depend on debatable and norm driven classification schemes are case studies of actual court decisions and the subsequent reply or lack of reply by the legislature.<sup>75</sup> Such case studies will have the beneficial effect of making constitutional scholarship less centered on the courts. Even popular discourse in Canada about judicial activism seems to be evolving in a less court-centred direction. For example, in recent debates about gay marriage and the decriminalization of marijuana, there seems to be somewhat less of a focus on criticizing the judges than in past debates and more on how Parliament has exercised or failed to exercise its policy-making role. All of this is healthy and suggests dialogic theories of judicial review may be playing some role in reviving interest in the legislative process and its reform. At the same time, however, even an enriched empirical debate about dialogue will likely not resolve the debate about whether dialogue under modern bills of rights contributes to democracy. The empirical debate is often driven by normative assumptions about what constitutes genuine dialogue and the proper role of legislatures and courts in a democracy.

One of the most famous examples of the Court having the last word under the Charter is with respect to abortion. In its 1988 decision in *R. v. Morgentaler*, the Supreme Court struck down the 1969 abortion law that allowed abortions when approved by a hospital committee as necessary to prevent danger to the life or health of the woman. The majority of the Court was careful to invalidate the law mainly on procedural grounds relating to the committee structure and to indicate that the protection of the foetus was a legitimate objective to limit the rights of pregnant

<sup>75</sup> See, e.g., Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002).

women under section 1 of the Charter. There seemed to be a fairly broad range of possible legislative responses to the Court's decision, but the government of the day was not eager to take on the issue. It allowed a free vote on a series of propositions, all of which were defeated. The government eventually prepared a new law which allowed legal abortions whenever a single doctor was of the opinion that the health or life of the woman would be threatened. This law was passed by a vote of 140 to 131 in the House of Commons with party discipline only being applied to the Cabinet. It was subsequently defeated by a tied 43-43 vote in the Senate, the first defeat of a government bill in the unelected Senate in 30 years. This case demonstrates how relaxation of party discipline could make it more difficult for the government effectively to respond to a court decision. It also suggests that the Court is more likely to have the final word when public opinion is polarized and the government is unwilling or unable to make a strong case for a compromise. This observation may be of more than historical interest in light of divided opinion on the gay marriage issue.<sup>76</sup>

The case of gay marriage is a moving topic, but it has provoked some commentators to argue that the courts are routinely having the last word on policy matters. Indeed, Jeffrey Simpson used the gay marriage cases as support for a provocative argument that Parliament should simply relinquish the job of developing policy to the courts.<sup>77</sup> Even Simpson, however, was forced to admit that Parliament still had some options if it was prepared to use the notwithstanding clause to stop gay marriages.<sup>78</sup> A closer look at the gay rights issue reveals some of the

<sup>76</sup> See Parkin, "A Country Evenly Divided on Gay Marriage", *Policy Options* (October, 2003), 39.

<sup>77</sup> The federal government's reference to the Supreme Court of Canada of a draft bill on same-sex marriages underscores the need to change Canadian democracy. Parliament, in the Age of the Charter of Rights and Freedoms, is increasingly an institution of secondary importance ... So the political system should adapt to new circumstances. It should bring the Supreme Court and other higher courts fully into the political process, where the courts are anyway, by letting them decide much earlier what should or should not be done in public policy. The legislatures could rubber-stamp or fine-tune what the courts decide, and all Canadians would understand who's making the important decisions.

Simpson, "Why don't we just turn policy over to courts", *Globe and Mail* (22 July 2003).

<sup>78</sup> Simpson, "Heed the courts or change the Constitution", *Globe and Mail* (9 August 2003). He subsequently predicted that the override would never be used because of the

complexities of dialogue between courts, Parliament and society. Although many may share Simpson's concerns that the courts are calling the shots on this issue, elected governments have already made some important decisions and may do so in the future.

As Alexander Bickel recognized, there will be false starts and delays in the recognition of the rights of unpopular minorities and the court "interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation ... And it is a conversation, not a monologue."<sup>79</sup> When the Charter was drafted in the early 1980s, Parliament was not prepared to list sexual orientation as a prohibited ground of discrimination. At the same time, however, it was not prepared to make the nine enumerated grounds of discrimination exclusive and left room in the drafting of section 15 of the Charter for the courts to add new grounds of discrimination to the list.<sup>80</sup> In 1995, the Court recognized sexual orientation as an analogous ground of discrimination. At the same time, however, a majority of the Court rejected the case for extending benefits to same-sex couples. Four judges saw couples as essentially heterosexual while the fifth judge believed that Parliament and society should be given more time to recognize same-sex partnerships.<sup>81</sup> Four years later, however, the Court was prepared in a 8:1 decision to recognize that same-sex couples should generally have the same burdens and benefits as opposite sex couples.<sup>82</sup> The Court, however, allowed the legislature an opportunity to develop its precise response to the issue and went out of its way to indicate that its decision did not cover marriage. Legislatures responded to this decision in a variety of ways with Ontario taking a separate but equal approach, Alberta using the section 33 override in an attempt to preserve the traditional definition of marriage, British Columbia making moves to accepting gay

Liberal pledge not to use the notwithstanding clause. As Simpson noted, however, Prime Minister Chrétien helped negotiate s. 33, casting some doubts on the argument that "the use of one perfectly legitimate, negotiated Charter provision will destroy the entire document." Simpson "Same-sex debate: Irrelevancy is Parliament's fate", *Globe and Mail* (17 September 2003).

<sup>79</sup> Bickel, *The Morality of Consent* (1975), at 111. See also Bickel, *The Supreme Court and the Idea of Progress* (1970).

<sup>80</sup> Fraser, "What the Framers of the Charter Intended", *Policy Options* (October, 2003), 78.

<sup>81</sup> *Egon v. Canada*, [1995] 2 S.C.R. 513.

<sup>82</sup> *M. v. H.*, [1999] 2 S.C.R. 3.

marriage, and Nova Scotia and Quebec developing registered partnership schemes.<sup>83</sup> The federal structure of Canada is a sometimes neglected feature of dialogic judicial review. It allows space for multiple governments to develop their own responses to court decisions, but as will be seen, in areas of exclusive federal jurisdiction, it may constrain the ability of governments to fashion their own responses to court decisions.

The federal Parliament also addressed the definition of marriage. In 1999, a motion that "marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps to preserve this definition of marriage in Canada" was passed.<sup>84</sup> A year later, a provision defining marriage as the union of a man and a woman to the exclusion of all others was added to a bill providing equal benefits to same-sex couples. It is instructive to compare the nature of the debate about marriage in Parliament with the debate in the courts. In both the 1999 and 2000 debates in Parliament, proponents of the traditional definition of marriage stressed over and over that they had received numerous phone calls, letters and petitions from their constituents in favour of retaining the traditional definition of marriage. The dominant idea was that the majority of Canadians believed that marriage was and should be limited to opposite sex couples. Leaving aside the question of whether this was an accurate perception of public opinion on this matter, it does illustrate how Parliament regards itself as an institution that is accountable to the majority and can justify its actions simply on the basis of the desires of the majority. As Eric Lowther, who moved the 1999 motion, explained:

Our job is to represent our constituents and Canadians on issues that are important to them. We believe that marriage should remain the union of a man and a woman. It is foundational to family and foundational to the strength of the nation. We believe that strong families make strong nations and marriage is part of that.<sup>85</sup>

<sup>83</sup> Murphy, "Dialogic Responses to *M. v. H.*: From Compliance to Defiance" (2001) 59 U.T. Fac. L. Rev. 299.

<sup>84</sup> Hansard, June 8, 1999, at 15960.

<sup>85</sup> *Id.*, at 15963.

John Bryden, a Liberal member who supported the motion and the subsequent amendment, similarly argued that "many Canadians still believe ... absolutely in the sanctity of marriage. We owe those Canadians an obligation to respect their feelings on this issue."<sup>86</sup> As was the case with respect to the law denying the right to vote to federal prisoners, supporters of the motion and the amendment made radically under-articulated and question-begging arguments. For example, Tom Wappel argued that the amendment "simply restated what most people in this country know to be the definition of marriage. ... This is exactly what marriage is and that is what I would argue marriage should remain."<sup>87</sup>

Debate in Parliament on the marriage issue was also very undisciplined compared to debate in the courts. Proponents of the traditional definition of marriage would frequently explore side issues by accusing the government of being "anti-family" on a wide variety of unrelated matters such as young offenders and pornography. Some members also made arguments that appealed to prejudice against gay men.<sup>88</sup> In contrast, intervenors supporting the traditional definition of marriage in the courts could not make such veiled appeals to prejudice and stereotype, but rather were required to make more detailed arguments relating to the applicability of the Charter and the justifications for restricting marriage to heterosexual couples. In turn, the minority in Parliament who opposed the motion and the amendment affirming the traditional definition of marriage also engaged in some name calling that would not go far in court.<sup>89</sup> Overall, there was little debate in Parliament about the central issues that would occupy the courts; namely the objectives of marriage and whether these were related to and justified the exclusion of gays and lesbians from the institution of marriage.

The formal procedures and conventions of adjudication — equal time to make arguments, structured arguments, professional traditions

<sup>86</sup> *Id.*, at 15992.

<sup>87</sup> Hansard, April 3, 2000, at 5567.

<sup>88</sup> *Id.*, at 5577, *per* Clarry Breitkreuz, expressing concerns that those who practised "buggery" received benefits from the state and stressing the need to protect children.

<sup>89</sup> Svend Robinson criticized the amendment as "a shameful collapse by the Minister of Justice to the pressure of her own backbenchers, the so-called family caucus in the Liberal Party, which some have called the dinosaur wing of the Liberal caucus" and based on a "campaign of fear, of distortion, of lies by too many people in the public and those, in some cases, in the House." Hansard, April 3, 2000, at 5565.

of respect and courtesy — focused and disciplined debate in court. The argument from tradition was filtered into an argument that the 1867 Constitution incorporated the common law definition of marriage by giving Parliament jurisdiction over "marriage and divorce" and that the 1982 Charter could not apply to such a definition of marriage. It was also channeled into arguments that any changes to the common law definition of marriage must be incremental. These arguments were more articulate than the refrain in Parliament that marriage must remain as it had been. Arguments under section 15 of the Charter required the lawyers and judges to address the effects of the traditional definition of marriage on gays and lesbians. The issue was not examined on the basis of the feelings of either the majority or the minority, but rather on the basis of what a reasonable person with the same characteristics and history as the Charter applicants would conclude about the effects of the impugned provision. The analysis was also contextual because it paid attention to the actual circumstances, needs and capacities of same-sex couples. Section 1 of the Charter allowed the government to make its best case for the traditional definition of marriage. The government had the burden of fleshing out the rationales for excluding same-sex couples from the institution of marriage and it introduced expert evidence to support its case. The analysis under section 1 of the Charter was more rigorous than the debate in Parliament because it went beyond the invocation of general objectives such as the promotion of families and companionship to explore questions about whether there was a rational connection between these objectives and the exclusion of same-sex couples and a comparison of the proportionality between the benefits and harms of excluding same-sex couples. The tests for determining whether there was a violation of equality rights and whether any such violations could be justified as reasonable limits were fairly settled,<sup>90</sup> so that all parties could marshal their best arguments and not be diverted by surprises, side issues, and appeals to pure emotions.

The judges who heard the gay marriage cases, unlike the parliamentarians who considered the issue, were not deluged with phone calls and faxes from their constituents. They did not have to worry about opinion polls and re-election. They did, however, have to worry about fairly

<sup>90</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Oakes*, [1986] 1 S.C.R. 103.

listening to the parties and responding to their arguments. Both the British Columbia and Ontario Courts of Appeal responded with detailed reasons about why the Charter applied to the traditional common-law definition of marriage despite the fact that the Attorney General of Canada conceded this issue on appeal. In doing so, they were respectfully responding to the arguments made by interveners who supported the traditional definition of marriage, as well as the reasons given by the one trial judge who found that the Charter did not apply. The judges then went on to examine the effects of the traditional definition of marriage on the Charter applicants, same-sex couples who wanted their relationships recognized as marriages. The judges then responded to each of the objectives presented by the Attorney General of Canada as justifying the exclusion of same-sex couples. The adjudicative process can itself be seen as a form of dialogue in which the parties have a guaranteed and meaningful ability to participate and the judges are obliged to respond to the arguments and give reasons for accepting or rejecting the arguments.

Most of the judges were careful to preserve some space for legislatures to respond to their decisions recognizing same-sex relationships as marriages. They suggested that the path of principle and equality led to reformulation of the definition of marriage to include same-sex couples, but they delayed the implementation of this remedy for a two-year period.<sup>91</sup> To be sure, delayed or suspended remedies are a departure from the traditional ideal of adjudication which stresses the close and immediate connection between the recognition of rights and the provision of retroactive remedies. At the same time, however, delayed or suspended constitutional remedies are an important instrument of dialogue because they give the legislature a finite period of time to select among constitutional options while articulating what the court's remedy will be should the legislature not intervene. As discussed above, suspended remedies have become quite routine in Canada and are now specifically contemplated under the South African Constitution.<sup>92</sup>

<sup>91</sup> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.); *EGALE v. Canada* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.) (remedies suspended until July 12, 2004). The Quebec trial decisions gave a slightly longer period to September 2004. *Hendricks v. Québec*, [2002] J.Q. No. 3816 (S.C.).

<sup>92</sup> See *supra*, note 47.

The Ontario Court of Appeal's decision in the summer of 2003 altered this dialogic balance by providing that judicial recognition of same-sex marriages should apply immediately and by imposing a mandatory order that the government allow the successful Charter applicants to marry. In quick order, a significant number of gay marriages have been solemnized in Ontario, "facts on the ground" that may constrain the approach eventually taken by federal and provincial legislatures. The Ontario Court of Appeal's immediate and mandatory remedy is difficult to justify from a dialogic perspective. The immediate remedy may preclude the federal government, perhaps in concert with the provinces, from trying to devise an alternative to gay marriage that could perhaps be justified under section 1 of the Charter as a reasonable limit on the equality rights of gays and lesbians. Any new regime would create horizontal inequities between same-sex couples who have had an opportunity to be married and those, either under any new regime or in other provinces, who have not had such an opportunity. Even if the Ontario Court of Appeal had concluded, and it is not clear from its judgment that it had, that no alternative to same-sex marriages could be justified under section 1 of the Charter, they also should have recognized the possibility that Parliament might be prepared to use the override to prevent same-sex marriages. In fact, a motion that seemed to authorize the use of the override was defeated by a narrow 137-132 vote in Parliament a few months after the Court of Appeal's decision.<sup>93</sup> Even if the Court of Appeal was firmly of the view that nothing short of the override could justify any depart from same-sex marriage, they should have respected Parliament's ability to use the override as part of the Charter.<sup>94</sup> The Court of Appeal also should have known that legislatures cannot use the override in a retroactive fashion.<sup>95</sup> Should Parliament have been prepared to use the override to back up its commitment to the traditional definition of marriage, the Ontario Court of Appeal's immediate remedy would again have created horizontal inequities between the successful

<sup>93</sup> Lunan and Fagan, "Marriage divides the house", *Globe and Mail* (17 September 2003).

<sup>94</sup> As Christopher Manfredi has argued: "The notwithstanding clause is part of the Charter, the Charter would not exist without it, and the Supreme Court has on several occasions recognized the legitimacy of its use." Manfredi, "Same-Sex Marriage and the Notwithstanding Clause", *Policy Options* (October, 2003), 21, at 24.

<sup>95</sup> *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

Charter applicants and other same-sex couples who had become married pursuant to the court's immediate remedy and those who could not become married after Parliament had employed the override.

To be sure, the Ontario Court of Appeal had some justifications for its immediate and mandatory remedy. The Supreme Court's leading decision on remedies can be read as limiting suspended remedies to emergency situations where an immediate remedy would threaten the rule of law, public safety or benefits received by others, factors that were not present in the gay marriage cases. Moreover, some statements in that case suggest that courts should not use suspended declarations of invalidity for dialogic reasons relating to the respective role of courts and legislatures.<sup>96</sup> Nevertheless, the fact remains that the Supreme Court itself has routinely not observed these restrictions and has frequently suspended its own remedy to allow legislatures an opportunity to intervene and pre-empt the Court's remedy. The Court of Appeal may have followed the letter of the Supreme Court's judgment in *Schachter*, but it did not follow the Supreme Court's practice of routinely suspending declarations to allow the legislature time to select among the range of constitutional options.

The Court of Appeal may also have been moved by the equity of the case, the fact that the successful Charter applicants wanted their right to marry recognized now. Suspending the court's remedy but exempting the successful applicants from the period of suspension was not an option because this would have created inequities with respect to other similarly situated same-sex couples who wanted to be married, but who might have to wait a year or more and who might find themselves precluded from marrying if Parliament and the provinces had pre-empted the court's remedy with a different regime. The Ontario Court of Appeal acted on the traditional corrective ideal that successful litigants should receive immediate remedies from the courts. Nevertheless, the Court of Appeal's immediate and mandatory remedy limited the range of possible legislative responses to its ruling. It also produced anger and frustration among some Parliamentarians who believed that the court had

<sup>96</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679. For my criticisms of this limited approach see Roach, *Constitutional Remedies in Canada* (as updated), at 14.1640-14.1670.

deliberately pre-empted the work of a committee that was holding public hearings and examining the marriage issue.<sup>97</sup>

Even the Ontario Court of Appeal's strong actions, however, have not stopped the federal government from playing an important role on the gay marriage issue. The government could have appealed the decision and even have sought a stay of the court's remedy pending the hearing of an appeal before the Supreme Court. A decision was made by the Cabinet, however, not to appeal the ruling but rather to draft legislation recognizing gay marriages but exempting religious from recognizing such marriages. The Cabinet made a conscious decision to balance state acceptance of gay marriage with state acceptance of religious freedom not to recognize gay marriage. Although this policy has not satisfied some opponents of gay marriage, it was a significant act of accommodation and statecraft. It broadened the debate beyond the issue being litigated, namely whether traditional restrictions on marriage were a justified restriction on the equality rights of gays and lesbians.<sup>98</sup> Leaving aside for the moment the fact that the government made a decision not to have the draft legislation debated or enacted in Parliament, the draft legislation is an example of dialogue between courts and elected governments in which the two institutions play distinct and complementary roles. The courts have responded to claims by same-sex couples that they have been unjustly excluded from the institution of marriage. The government seems to have accepted the injustice of that exclusion but has broadened the debate beyond the civil definition of marriage to include the freedom of religious to decide on their own whether to recognize same-sex marriages.

The Cabinet also decided to direct a reference on the constitutionality of the draft legislation to the Supreme Court. The reference procedure is an important dialogic instrument that allows governments to refer draft pieces of legislatures to the court and can be contrasted with

<sup>97</sup> For example, Janet Hiebert has argued that "the judicial decision to change the law before Parliament had completed its deliberations demonstrates contempt for Parliament." Hiebert, "From Equality Rights to Same-Sex Marriage — Parliament and the Courts in the Age of the Charter", *Policy Options* (October, 2003) 10, at 14.

<sup>98</sup> Both Courts of Appeal did mention that their decisions did not affect the freedom of religions, but these comments can be seen as *obiter dicta* that went beyond the case as pleaded and argued by the parties. See *EGALE v. Canada* (2003), 225 D.L.R. (4th) 472, at paras. 133, 181 (B.C.C.A.); *Halpern v. Canada* (2003), 65 O.R. (3d) 161, at para. 138 (C.A.).

the prohibition of references under the non-dialogic American Bill of Rights. The government made a controversial decision not to refer the question of whether something short of same-sex marriage could be justified under the Charter. Unfortunately, Cabinet decisions, unlike judicial decisions, are made with a high degree of confidentiality and are not always accompanied with formal reasons. One Cabinet Minister, Steve Mahoney, is reported to have urged "some kind of 'compromise' at the cabinet table, such as civil unions for gays and lesbians, but said the government's legal advice is that it would create a two-tiered system of marriage likely to be struck down by the court." Another Cabinet Minister, Solicitor General Wayne Easter has expressed reservations about the plan adding "It would be nice to know what the Supreme Court would say if we didn't use the word 'marriage'. That's what I would like to know."<sup>99</sup> Martin Cauchon, the Attorney General of Canada, has made a strong argument that civil unions or registered partnerships would fall "short of true equality. Clearly, we must do better than almost equal."<sup>100</sup> The decision to limit the range of options before the court was a decision of the government of the day. Nevertheless, it may change, especially because Prime Minister Paul Martin has made commitments that suggest openness to alternatives to same-sex marriages provided they are consistent with the Charter.<sup>101</sup>

The eventual resolution of the same-sex marriage issue remains uncertain, but the important point from a dialogic perspective is that it has remained a matter of continued political controversy and debate. Although the courts have provoked this debate, they do not own it. In the aftermath of the Ontario Court of Appeal decision, there has been more interest about how Members of Parliament will vote than how the Supreme Court will decide the reference.<sup>102</sup> The official opposition was able to force a vote on a motion re-affirming the 1999 resolution in favour of the traditional definition of marriage. It was defeated by a narrow 137-132 vote, even though the resolution could be read as

<sup>99</sup> MacCharles, "Faith can be reconciled with gay bill, Liberals say", *Toronto Star* (8 August 2003) A7.

<sup>100</sup> Cauchon, Notes for an Address to the Canadian Bar Association (18 August 2003).

<sup>101</sup> Clark, "'Civil union' is an option on same-sex, Martin says", *Globe and Mail* (20 August 2003).

<sup>102</sup> Laghi, Lunman and Clark, "Liberals facing defeat in same-sex free vote", *Globe and Mail* (14 August 2003); "Where the MPs Stand", *id.*

authorizing Parliament to use all its powers, including the notwithstanding clause, to preserve the traditional definition of marriage. The excitement surrounding the vote belies extravagant claims that Parliament is dead in the age of the Charter. It remains unclear whether and when the draft legislation will be introduced into Parliament or whether it will be introduced in its current form. The government has committed itself to a free vote on the issue. Legislation recognizing same-sex marriages could be defeated in Parliament, especially if the controversial use of the override is taken off the table. The defeat of the bill would, however, not alter the new status quo in Ontario and British Columbia where courts have now recognized gay marriages with immediate effect. A new legislative majority would have to be formed either to develop a third option other than traditional or gay marriage and that option would likely be tested under the Charter. Yet another majority would have to be formed to use the override to affirm the exclusion of gays and lesbians from marriage notwithstanding the equality rights of the Charter. The gay marriage controversy is far from over and it could well be an issue in the next election. The conservative opposition may make opposition to same-sex marriage a key element of its platform. It could present a third option, offer to use the override and/or promise to hold a referendum on the issue. These various scenarios, all of which depend in part on what elected Members of Parliament are prepared to do, belie Jeffrey Simpson's arguments that "Parliament could vote 301-0 against same-sex marriage and it wouldn't matter, because the courts have decided what the definition should be."<sup>103</sup>

Even if the draft legislation is approved by the Court and enacted by Parliament, the elected government will have played a significant role in the debate both by ratifying the Court's decision on the principle of gay marriage and by balancing that with concerns about freedom of religion. The draft legislation provides that "marriage, for civil purposes, is the lawful union of two persons to the exclusion of others" but that "nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs." The government has made an important policy decision to

<sup>103</sup> Simpson, "Heed the courts or change the Constitution", *Globe and Mail* (9 August 2003).

accept gay marriage<sup>104</sup> and to introduce a competing principle of religious freedom into the debate. In this sense, the draft law lives up to the Minister of Justice's press release announcing the reference that concluded with the statement that:

The Government of Canada believes that a strong, effective democratic system depends on a dynamic dialogue between Parliament and the courts. This dialogue enhances the democratic process by ensuring that our laws reflect the fundamental values of the *Charter*. That is why the Government chose this course of action.<sup>105</sup>

Some of the government's actions are more questionable from a dialogic perspective. Although the government has ensured that Members of Parliament will be able not only to vote on the draft bill, but to do so in a free vote without party discipline, it may have been preferable for the bill to have been introduced and debated in Parliament. Some have questioned whether a reference to the Supreme Court is necessary, but it is probably advisable given that the government has chosen not to appeal the Court of Appeal's ruling. Nevertheless, it should be clear that the government as represented by the Cabinet has made a policy decision to accept gay marriage but to balance that with the religious freedom clause. Even more debatable from a dialogic perspective is the government's decision to invite the Court to rule that the draft act defining marriage "for civil purposes" as "the lawful union of two persons to the exclusion of all others" is within the exclusive legislative authority of the federal Parliament. The federal division of powers provides Parliament with jurisdiction over "marriage and divorce" and, unlike the *Charter*, is not subject to either reasonable limits or an override. Some provinces such as Alberta will argue that provincial jurisdiction over the "solemnization of marriage in the province" provides them with some jurisdiction to reply to the courts' decision, if not the federal legislation. Federalism, combined with dialogic structure of the *Charter*, can allow a

<sup>104</sup> The government in the reference has switched the terms of the debate from the question in previous court cases of whether the traditional definition of marriage violates the *Charter* to the question of whether the draft bill "which extends capacity to marry to persons of the same-sex" is "consistent with the Canadian *Charter of Rights and Freedoms*." See Department of Justice Reference to the Supreme Court Background (17 July 2003).

<sup>105</sup> Press Release Minister of Justice Announces Reference to the Supreme Court of Canada (17 July 2003).

range of reasonable policy alternatives to be recognized. Nevertheless a ruling that marriage is the exclusive preserve of the federal Parliament, combined with the determination of the present federal government never to use the override, could inhibit the range of possible legislative replies to the gay marriage decisions. Dialogue will be precluded not so much by the *Charter* but by the division of powers, which does not have the same dialogic structure as the *Charter*.

My point in this discussion of the gay marriage cases is not to attempt to read the political tea leaves, but only to show that even on an issue where the courts have been quite bold, elected governments have already played an important role and could play an even more important role in the future. Democracy should be measured not only by the possibility of legislative reply, but also by the tenor of democratic debate. In large part because of the courts' bold decisions, gay marriage is headline news and the subject of much debate. The courts have provoked a more vigorous and open political debate on the issue than occurred either when Parliament affirmed the traditional definition of marriage or Alberta used the override to preclude *Charter* litigation of the issue. The current debate is in no way limited to speculation about what the Supreme Court will decide in the reference. Much of the debate is about what Members of Parliament and the Prime Minister will do now that they have been forced by the courts to confront this issue. The legislative agenda on gay marriage has largely been set by *Charter* litigation and the courts, but its outcome remains in the hands of our elected governments.

Close empirical examinations of legislative decisions to accept, revise or reject court decisions will enrich our understanding of dialogue, but at the same time, they will not resolve the normative controversy about whether dialogic judicial review is a more democratic and acceptable alternative to either judicial or legislative supremacy. One normative issue that looms large in the empirical debate about the frequency and quality of legislative replies to court decisions is the true meaning of dialogue. Different understandings of dialogue lie at the heart of the disagreement between Hogg and Thornton on the one hand and Manfredi and Kelly on the other about the true extent of dialogue under the *Charter*. Hogg and Thornton classify legislative acceptance of a judicial decision as a form of dialogue:

remembering that the legislature nearly always has a range of choice, it is difficult to maintain that the legislature is not exercising any of that choice when it implements the court's decision. After all, in common experience, dialogue does sometimes lead to agreement. ... if a new law is slow to materialize, that is just one of the consequences of a democratic system of government, not a failing of judicial review under the *Charter*.<sup>106</sup>

In contrast, Manfredi and Kelly characterize genuine dialogue in a much more restrictive manner that requires that the legislature interpret the *Charter* differently than the majority and perhaps even the minority of the Court. They argue that "[g]enuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an *effective* means to assert that interpretation."<sup>107</sup> Behind their empirical dispute about the number of legislative replies to *Charter* decisions lies a normative debate about what constitutes dialogue between courts and legislatures.

Hogg's and Thornton's argument that dialogue occurs even when a legislature accepts or fails to reverse or revise a *Charter* decision is supported by the nature of parliamentary government in Canada. As discussed above, governments in Canada generally do not have significant problems implementing their legislative agenda. Power is concentrated in the Cabinet and increasingly the Prime Minister. This concentration of power focuses democratic responsibility for the acceptance or rejection of *Charter* decisions. If Canadians do not like the way the federal government is responding to the gay marriage cases, they can blame the Prime Minister. They can, of course, blame the judges and increased criticism of the courts are legitimate in a democracy. Nevertheless such criticisms are in a sense futile because of the independence of the judiciary. What should not be futile, however, is criticism of the elected government that allowed the Court decision to stand. As Jeffrey Goldsworthy has argued, democrats should accept responsibility for the legislature not responding to a judicial decision and not using the override because it is the "electorate's democratic right" to prefer a judicial

<sup>106</sup> Hogg and Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 *Osgoode Hall L.J.* 529, at 536; Hogg and Bushnell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 *Osgoode Hall L.J.* 75, at 96.

<sup>107</sup> Manfredi and Kelly, "Six Degrees of Dialogue" (1999) 37 *Osgoode Hall L.J.* 513, at 524; Manfredi and Kelly, "Dialogue, Defiance and Restraint: Judicial Independence and Trial Procedures" (2001) 64 *Sask. L. Rev.* 323, at 336.

decision to a legislative decision to override that right as interpreted by the courts.<sup>108</sup> I do not discount, however, the possibility that Canadians may increasingly feel that their criticisms and engagement with democratic governments are impotent, but this should not count as a strong criticism of dialogic judicial review. If anything, dialogic judicial review provides citizens with one more lever for articulating grievances against their government.

Manfredi and Kelly dispute the idea that legislative acceptance or failure to reverse a *Charter* decision constitutes genuine dialogue between the court and the legislature. They argue that such dialogue only occurs when the legislature interprets the constitution for itself and they express skepticism about whether this occurs even when the legislature reverses a *Charter* decision by adopting the legal position of a minority on the Court. In the United States, Mark Tushnet has recently argued that legislatures should be encouraged to act on their own interpretation of the "thin" constitution.<sup>109</sup> Co-ordinate construction has impressive democratic credentials going back at least to the thought of Thomas Jefferson and James Madison at the time of the founding of the American Republic. It is being reclaimed by scholars and has emerged as a strong theory of dialogue that challenges conventional theories of judicial review on the basis that they give the courts a privileged role in interpreting constitutional values.

A number of responses are available to the proponents of co-ordinate construction. One is that regardless of its desirability, legislatures in Canada have not appeared overly able or eager to interpret the *Charter* for themselves. Even when Parliament has been prepared to reverse a *Charter* decision, it has been attracted to the legal opinion produced by dissenting judges and unprepared to generate a genuinely novel interpretation of the Constitution.<sup>110</sup> Parliament and its legal

<sup>108</sup> Goldsworthy, "Legislation, Interpretation and Judicial Review" (2001) 51 *U.T.L.J.* 75, at 81. See also Goldsworthy, "Judicial Review, Legislative Override, and Democracy" (2003) 38 *Wake Forest L. Rev.* 451.

<sup>109</sup> Tushnet, *Taking the Constitution Away from the Courts* (1999).

<sup>110</sup> The legislative response to both *R. v. Daviault*, [1994] 3 S.C.R. 63 and *R. v. O'Connor*, [1995] 4 S.C.R. 411 were based on the logic of the dissenting judges. The legislative response to *R. v. Seaboyer*, [1991] 2 S.C.R. 577 was in my view more complex because it expanded the debate beyond the rape shield issue, but on the rape shield issue, it was influenced by the Court's majority opinion.

advisers have also fastened with perhaps undue haste on policy suggestions that the courts have made about less drastic alternatives.<sup>111</sup> Some legislative replies to Charter decisions have been accompanied by little debate. For example, there was little discussion in Parliament when it resurrected a public interest criteria for denying bail in response to a Charter decision and one judge has characterized legislative debate about the reasons for denying prisoners the vote as "more fulmination than illumination."<sup>112</sup> One hypothesis advanced by Professor Hiebert is that legislatures lack the capacity to engage in their own interpretation of the Constitution and this should be augmented through increased use of legislative committees and devices such as preambles.<sup>113</sup>

It is not clear that even with increased capacity and incentives that legislatures will want to produce their own interpretations of the Charter.<sup>114</sup> There already is extensive capacity within the executive branch of government to engage in Charter interpretation.<sup>115</sup> The Attorney General who sits in Parliament bears responsibility for ensuring that all public bills are consistent with the Charter, but has so far not once exercised the statutory duty to report to Parliament that a bill is inconsistent with the Charter.<sup>116</sup> This suggests that legislators may be unwilling to interpret the Charter in a manner that is more generous than the courts. The fact that legislatures have made infrequent use of section 33 also suggests that legislatures may be reluctant to develop and take responsibility for alternative interpretations of the Constitution. This may suggest that many in our democracy associate rights with courts and that the possibility of legislatures reasonably interpreting rights may lack popular support. American ideas of judicial supremacy may be as common in Canada as American-style critiques of judicial activism or American

<sup>111</sup> See the response to *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 as discussed in Hiebert, *Charter Conflicts* (2002).

<sup>112</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at para 21.

<sup>113</sup> Hiebert, *supra*, note 111.

<sup>114</sup> Mandel, "Against Constitutional Law (Populist or Otherwise)" (2000) 34 U. Rich. L. Rev. 443.

<sup>115</sup> See Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and its Entry into the Centre of Government" (1999) 42 Can. Public Admin. 476; Sossin "Review" Osgoode Hall L.J. (forthcoming).

<sup>116</sup> *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1.

popular culture.<sup>117</sup> On this argument, the problem of courts having the last word in the interpretation of rights lies less with the structure of the Charter or the idea of dialogue and more with the people's faith in courts and the unwillingness or inability of legislatures to provide compelling alternative interpretations of the Charter.

Another response to the proponents of co-ordinate construction is at a more normative level. Should legislatures concerned with re-election be encouraged to define the rights of minorities, the rights of the accused or the treatment of fundamental values that are threatened by crises such as post-September 11 fears about terrorism? My concern is that Parliament may interpret the constitution to impose extreme costs on either *de jure* or *de facto* non-citizens who do not have either the legal right to vote or a meaningful right to vote in the sense that they are not the marginal voters that political parties worry about. When Parliament limited the voting rights of prisoners, it imposed costs on an unpopular and feared minority that, if it had its way, could not even vote. Even now that prisoners can vote, they and their families lie outside the mainstream of marginal voters. Once a minority is outside of the range of potential and influential voters of the governing party, it can be dismissed by the elected government and any party that hopes to become the elected government. Although it is possible to design the legislative process to maximize the power of minorities, the Canadian legislative process does not do so. The interests of rural residents and smaller provinces are somewhat overrepresented on the electoral map and representational concerns play a role in the formation of the Cabinet and appointments to the Senate, but there is little attempt to guarantee a voice for disadvantaged minorities in the legislative process. It would take a strong faith in the very limited checks and balances of Canadian representative democracy<sup>118</sup> to trust legislatures to address the rights of

<sup>117</sup> In opinion polls 71 per cent of respondents "say that if the Supreme Court declares a law unconstitutional because it conflicts with the Charter, the Court — not Parliament — should have the final say. Only 24 per cent would give Parliament the final say." Parkin, "A Country Evenly Divided on Gay Marriage", *Policy Options* (October, 2003), 39, at 40.

<sup>118</sup> For arguments that his opposition to judicial activism is based on a defence of representative government as opposed to populism see Knopf, "How Democratic is the Charter? And Does it Matter?" (2003) 19 S.C.L.R. 199, at 216-18. Professor Knopf may be right that I have misunderstood his invocation of Lord Durham, but I remain skeptical that the representative and responsible government that he advocates will provide adequate protection for minorities in the absence of judicial protection. For example in the work which invokes Lord Durham for the proposition that "parliamentary sovereignty was the key to protecting

minorities in a fair and open manner. In my view, there are enough reservations about co-ordinate construction that it should generally be limited to those cases in which the legislature is prepared to use the override. Hopefully, this will encourage legislatures to give full reasons for their interpretation of the Charter<sup>119</sup> and in any event will require them to re-evaluate their reasons in five years' time.

A more restrained approach to co-ordinate construction is to give legislatures a role in defining reasonable limits on rights as opposed to defining the rights of minorities and fundamental values themselves. Professor Hiebert has argued that the dialogue metaphor "does not differentiate between the rights-oriented dimension of defining normative values in the Charter and the more policy-laden task of assessing the reasonableness of complex policy objectives."<sup>120</sup> She seems less comfortable than Professors Manfredi or Tushnet with judicial interpretation of Charter rights — or at least what she believes are "core rights"<sup>121</sup> —

Durham for the proposition that "parliamentary sovereignty was the key to protecting rights." he also candidly explains the decision of the Alberta government not to protect gays and lesbians from discrimination was made on the basis that "the Klein government could safely ignore this issue, upsetting only a small coalition of activists, few of whom were Tory supporters in any case." Morton and Knopff, *The Charter Revolution and the Court Party* (2000), at 153, 165. So much for the idea that "parliamentary sovereignty was the key to protecting rights" or that political opponents should be treated as "fellow citizens" as opposed to "activists" not relevant to the governing coalition.

For an interesting account of how checks and balances such as disallowance, defeat of bills in the Senate and even federalism have declined in Canada and how the Court has emerged as a new check on Cabinet domination see Flanagan, "Canada's Three Constitutions: Protecting, Overturning, and Reversing the Status Quo" in James, Abelson and Lusztig, *The Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution in Canada*, (2002), at 127-33. For a populist call for the use of referenda as a means of "transferring the decision to invoke the notwithstanding clause from the politicians to the people," see Morton "Can Judicial Supremacy Be Stopped?", *Policy Options* (October, 2003) 25, at 29.

<sup>119</sup> But see Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44 Can. Public Admin. 255 for examples of the override being used without public engagement.

<sup>120</sup> Hiebert, *supra*, note 111, at 51. In other words, a "judge's expertise lies more in defining rights than in suggesting appropriate ways to pursue complex legislative initiatives." *Id.*, at 223.

<sup>121</sup> *Id.*, at 57. Her definition of core rights is somewhat unhelpful and selective. She writes that core rights "include the conditions necessary to ensure the just treatment of individuals in their encounters with the coercive powers of the state, such as due process and freedom from arbitrary arrest and detention" (*id.*, at 57), but then writes approvingly of Parliament's rejection of the Court's approach to the accused's right to full answer and defence in *O'Connor*, suggesting that this right is not core, or at least not immune from

but argues that Parliament's interpretation of policy under section 1 of the Charter deserves greater respect from the court. There is something to be said for the idea that co-ordinate construction is more acceptable under section 1 of the Charter. In a sense, section 1 is the government's turf and it may have some advantages over the courts in determining its true purposes in limiting rights, the alternatives available and the overall balance struck.

But there are problems in courts deferring to Parliament's interpretation of section 1. Parliament will have an incentive to define the purpose of the legislation strategically in order to maximize its chance of survival under section 1. In many cases, it may focus on the broad objectives of the law as opposed to the more limited objectives of limiting Charter rights. Although Parliament should be in a good position to speak to the proportionality of the means used to pursue its objectives, it has often failed to address the tough issues of section 1 analysis. For example, the legislative reply to *Daviault*<sup>122</sup> did not explain why Parliament concluded it was necessary to reverse the Court's Charter decision as opposed to creating a new intoxication-based offence as suggested by the Court.<sup>123</sup> It may well be that Parliament has some good reasons for not adopting this widely discussed option, but they are not found in the reply legislation or in the preamble to the reply legislation. Similarly, the Court's oft-criticized decision striking down restrictions on tobacco advertising was in large part driven by the Court's perception that the government was hiding the ball by failing to disclose its own studies about the effectiveness of less restrictive regulations on tobacco advertising.<sup>124</sup> If the government's interpretation of what constitutes a reasonable limit on rights is to receive more deference from the courts, it must not avoid the more difficult questions. One of the virtues of judicial review is that judges often ask the difficult and uncomfortable questions that politicians too frequently avoid or gloss over. Should political debate become more searching and candid, then Parliament's claim to respect for its interpretation of section 1 will be much stronger.

rebalancing by Parliament. *Id.*, at 110-17. In other places, Professor Hiebert suggests that Parliament should re-evaluate the court's interpretation of "extremely marginal rights claim" which she believes includes commercial advertising. *Id.*, at 90.

<sup>122</sup> *Supra*, note 110.

<sup>123</sup> *Supra*, note 110.

<sup>124</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 33.1, as amended by S.C. 1995, c. 32, s. 1. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

Although there is room for improvement in the legislative contributions to section 1 analysis, I remain skeptical that courts should defer to even new and improved legislative interpretations of section 1. Even when legislatures bolster their interpretative capacity through the use of legislative preambles,<sup>125</sup> courts still will need to conduct an independent evaluation of the objective for limiting Charter rights. Moreover, the independent judiciary still has an important role in determining the overall balance between the social objectives of limiting the right and the harm caused by the violation of a right. Even though legislatures should become more adept at articulating the purposes of the limitation and the harmful consequences for society of not limiting a Charter right, there is still a danger that they will undervalue the harms of violating some Charter rights. Even if Parliament takes the Charter seriously, it may still be inclined to ignore or neglect the rights of minorities and the unpopular because of its nature as an elected institution. This is particularly a danger in the field of criminal justice which empirically assumes a significant majority of all Charter cases. In my view, it is no coincidence that the two pieces of legislation that Professor Hiebert praises as based on Parliament's "alternative interpretation of the Charter"<sup>126</sup> were laws that diminished the rights of those accused of committing sexual violence. The accused will always be less popular than the victim. There will always be more votes in appearing tough on crime and sympathetic to victims than in appearing to be soft on crime and unsympathetic to victims.<sup>127</sup> Thus in criminal justice, which lies at the heart of Charter litigation, there will be a continued need for the independent judiciary to rigorously scrutinize Parliament's claim to have enacted new criminal laws based on its own interpretation of the Charter.

In summary, cases where legislatures fail to revise or reject court decisions raise interesting issues for dialogue theory. There is a need for

<sup>125</sup> On the increased use of preambles in legislation, most of which only speak to issues of legislative purpose and not proportionality, see Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129.

<sup>126</sup> Hiebert, *supra*, note 111, at 224.

<sup>127</sup> Dripps, "Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?" (1993) 44 Syracuse L. Rev. 1079; Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051.

continued empirical research to better understand the complexities of dialogue between courts and legislatures. It is possible that popular understandings of rights and court rulings are more absolute than contemplated under dialogic theories of judicial review. Thus one of the goals of dialogue theory should be to explain the range of options open to legislatures after Charter decisions. Legislatures may not have the necessary capacity to generate interpretations of the Charter that are independent from those of the courts. Should this capacity become enhanced and in those cases in which it is exercised, however, normative questions about co-ordinate construction remain. In my view, it is not wise to think that a legislature elected by the majority and concerned with re-election is the best institution to interpret the rights of minorities, the rights of the accused and fundamental and long-term values such as freedom of expression and procedural fairness that may be neglected in times of perceived crisis. In any event, legislatures can help shape section 1 analysis and they can act on their own interpretations of the Charter if they are prepared to use the override. Governments can also be held democratically accountable for their acceptance of Charter decisions. For example, if a majority of Canadians are strongly opposed to gay marriage, they will be able to punish the government for its acceptance of the courts' decision on that topic in the next election.

#### IV. WHEN LEGISLATURES APPEAR TO HAVE THE LAST WORD IN THE DIALOGUE

The above reservations about the ability of legislatures to interpret the Constitution lead to the question of why trust legislatures to play any role in dialogues about the rights of minorities and fundamental freedoms. In other words are the flaws in the legislative process so great as to justify judicial supremacy on such issues? Most conventional theories of judicial review answer yes, but that option is not open to theories of dialogic judicial review. Although most critiques of dialogue theory have been made by supporters of either legislative supremacy or co-ordinate construction, conventional theorists of judicial review should not be far behind in criticizing dialogue theory. Their concern will not be that dialogic judicial review gives judges too strong and privileged a role, but rather that it sacrifices their right answers, whether they be based on framers' intent, the protection of minorities vulnerable in democracy or fundamental values, to the vagaries of politics. Dialogue

theorists who now find themselves defending the role of courts from charges that they are engaged in undemocratic judicial activism may someday find themselves defending bills of rights that allow legislatures to derogate from rights through ordinary legislation. Defenders of conventional judicial review will ask dialogue theorists why they are prepared to place the rights of minorities and fundamental values at risk from legislative majorities. This will not be an easy question to answer.

What are the justifications for allowing legislative revisions and rejections of court decisions about rights? The justifications are found both in democracy and in a pragmatic appreciation of the limits of constitutional adjudication. One justification is found in the dangers that courts may over-enforce certain rights. The history of judicial review in the 20th century suggests that courts may over-enforce various rights at various times. Dialogic judicial review allows elected governments an opportunity to correct such judicial errors. Note that such corrections will generally only occur when courts are perceived to have gone too far in enforcing rights. It is only then that sections 1 and 33 of the Charter can be used to limit or override rights as interpreted by the courts. If courts under-enforce Charter rights, perhaps by strategically trimming their sails to avoid criticism or the possibility of a legislative override, legislative correction is still possible, but less likely. In the 1970s, Parliament corrected widely criticized judicial decisions that under-enforced the *Canadian Bill of Rights* by refusing to invalidate capital punishment, wiretapping without a judicial warrant, reversals of jury acquittals by an appellate court and discrimination against women when they were pregnant. In the Charter era, however, there are far fewer examples of legislatures correcting judicial decisions that were seen to under-enforce rights.<sup>128</sup> Judicial review may be most harmful to democracy not when it provokes a noisy "in your face" legislative reply or an override of a court decision, but rather when courts quietly accept dubious laws and practices as consistent with the Charter and such laws can be enacted and applied with little or no controversy or debate.

<sup>128</sup> See, however, the legislative revision of tax laws even after they were found to be consistent with the Charter in *Thibault v. Canada*, [1995] 2 S.C.R. 627 as discussed in Hogg and Bushnell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75, at 104-105.

Even when legislatures do accept court decisions, there is a value to knowing that the decision could have been revised or reversed if the legislature so desired. Such knowledge can provide increased democratic legitimacy for court decisions and might help avoid the sort of defiance of court orders that has sometimes occurred under the American Bill of Rights. Even if the court plays the role of Socrates in teaching legislators and the people about the importance of long-term values, the lessons are better learned by the knowledge that the students and the electorate could overpower the Socratic Court if they really desired to do so. The polity may be more willing to consider the merits of the courts' decisions if it knows it can reject them. This argument is in a sense the flip side of Jeremy Waldron's argument that even assuming that courts would reach the right answers to difficult questions involving rights, something would be lost if correction came from outside and from the wisdom of unelected judges. My argument is that something is gained when citizens debate controversial court decisions knowing that their government could, if it wanted, take formal action and responsibility for limiting or overriding the decision.

The debate about gay marriage is improved by the fact that Parliament could override the courts' decisions and prevent gay marriage. I want to be clear that this is not a result that I as a citizen desire. Nevertheless, I think it is both democratic and educational for citizens to think through the possibility that their government could override the court decisions through the use of the override. This thinking through of all the options is better for society than sullen acceptance of a court decision or exploration of extra-legislative means to nullify or disobey the court decision. A democratically debated and enacted override of the gay marriage decisions would be regrettable and embarrassing in the future, but it would not make the controversy go away. The courts' argument that equality requires gay marriage would be preserved and held in abeyance for five years when we as a society would have to debate whether the override should be renewed.

It is unfortunate in my view that some defences of gay marriage have been premised on rhetoric that seems to assume judicial supremacy. For example, one of the lawyers for the successful applicants in *Halpern* has been reported as stating "the government doesn't really have a choice in the matter and the courts have clearly spoken, that equality requires that this be done." One of the successful applicants in *Halpern* similarly declared "it's done, it's over with ... No Supreme

Court is going to say we're unmarried. That's un-Canadian."<sup>129</sup> These comments may simply reflect the understandable thrill of a hard-fought court-room victory and the fact that the Ontario Court of Appeal provided an immediate and mandatory remedy that resolved the matter in the applicants' favour. Nevertheless, as suggested above, the larger political issue is still very much in play. Backbenchers and candidates in the next election, not to mention the voters, need to be convinced of the merits of the case for gay marriage. The fact that advocates of same-sex marriage have won in court is not enough to convince these people. Parliament could use either sections 1 or 33 to limit or override the judicial decisions that equality requires the recognition of same-sex marriage. Even if the draft legislation in enacted, the debate about same-sex marriages will shift from the legislature to religious organizations and people will still have to be convinced of the justness of the case for gay marriage. It is always short-sighted in a democracy not to engage fellow citizens about the justice of your cause. The bonds of community in our society can also be strengthened by the possibility of legislative revision or reversal of court decisions. In a democracy, a win in court should not be enough.

The gay marriage issue may be somewhat unique because it is so symbolic and because court decisions such as the Ontario Court of Appeal's appear to be self-executing. In contrast, rights advocates on issues such as abortion, free speech, police powers, Aboriginal rights and prison reform cannot generally afford to stop after court victories because both public and governmental support is required to make the rights recognized by the courts real and effective. A win in court is often only the start of a difficult process of achieving reform. Members of the so-called Court Party of civil libertarians, feminists and minorities understand that they must work with legislators, administrators and citizens, as well as judges, to achieve meaningful reform. As Bickel recognized even under the American Bill of Rights "the effectiveness of the judgment universalized depends on consent and administration."<sup>130</sup>

<sup>129</sup> The first quote is from Joanna Radbord and the second from Michael Leshner. See: [www.cbc.ca/stories/2003/06/10/ont\\_samesex030610](http://www.cbc.ca/stories/2003/06/10/ont_samesex030610). See also Tibbets, "Minister mulls creating new marriage law", *National Post* (12 June 2003).

<sup>130</sup> Bickel, *The Supreme Court and the Idea of Progress* (1970), at 91.

Under a dialogic bill of rights, the need to engage the government and the public after court decisions is even greater.

If one is inclined to take a pessimistic view of democracy, it can be argued that the override will be used in those cases in which society would in any event resist and refuse to obey a highly controversial court decision about the rights of the unpopular. An override to prevent gay marriage would on this view simply represent attitudes in society that would have provoked an extra-legal backlash and have made the legal recognition of gay marriage something of a "hollow hope".<sup>131</sup> In this sense, dialogic judicial review accommodates a tragic sense of human nature. It recognizes that rights will be violated and minorities ganged up on regardless of whether there is judicial review or not. The least dangerous branch will not save us from the worst sides of our nature. What the courts can do, however, is make society more aware of the consequences of its actions and require sober second thoughts and perhaps extraordinary majorities before the override is used. It also recognizes the potential for moral growth and evolution by requiring continued debates about whether the override should be renewed.

But dialogic judicial review also appeals to a more optimistic view of democracy and human nature. The gamble here is that majorities will frequently decide that they can live with judicial decisions proclaiming the rights of the unpopular. Left to their own devices, legislatures may avoid divisive issues such as abortion or gay rights and cling to the comforts of the status quo. On this view, legislative majorities are not inherently malevolent, but happy to pursue the route of least resistance. When courts disturb the status quo and make decisions applying principles such as equality and fairness, legislative majorities will often accept such decisions and avoid being held accountable for new legislation that authorizes treatment that the courts have held is unequal or unfair. There is a history of legislatures acting in this very fashion. Many common law presumptions prevailed before the Charter because legislators were unwilling to make clear statements that people should be denied hearings or convicted in the absence of fault.

It was an optimistic take on democracy that led my colleague Sujit Choudhry and me to urge that Parliament address the issue of racial and

<sup>131</sup> On the resistance to Supreme Court decisions on desegregation, voting rights and police powers see Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (1991).

religious profiling in its *Anti-terrorism Act*<sup>132</sup> enacted in the wake of the September 11 terrorist attacks. The legislation avoided the profiling issue even though it was very much on the public's mind. Our argument was that Parliament should either take responsibility for profiling and authorize it in the legislation or it should clearly prohibit it as unacceptable in a democracy committed to equality. The gamble was that Parliament would select the latter course and we were optimistic that "an express policy of profiling could not withstand the scrutiny of legislative and public debate. Canada is now a very different country than when it turned against its residents of Japanese descent." Parliament, however, continued to duck the issue, as it often does on divisive issues. The result is that the *Anti-terrorism Act* does not prohibit or specifically authorize racial profiling and any remedy for specific acts of profiling would likely be limited to requests by individuals for some form of compensation. This state of affairs is undesirable in part because it diminished democratic debate and accountability on the profiling issue. Some could "argue that our preference for provoking a democratic debate on profiling, as well as for theories of judicial review which promote dialogue between courts and legislatures, leaves vulnerable minorities at risk" to an explicit Parliamentary authorization of profiling.<sup>133</sup> But this would at least have been more candid than allowing the issue to go underground by being delegated to the Executive. Specific legislative authorization of profiling would have prompted more democratic debate about the subject. Parliament would have been forced to contemplate whether it wanted to take responsibility for clear statements authorizing profiling. Such clear legislative statements would have facilitated Charter challenges to profiling, perhaps requiring Parliament to consider whether it was prepared to enact legislation notwithstanding equality rights in order to authorize profiling.<sup>134</sup> If Parliament was truly

<sup>132</sup> S.C. 2001, c. 41.

<sup>133</sup> Choudhry and Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1, at 35-36.

<sup>134</sup> There would be a strong case that racial or religious profiling violated s. 15 of the Charter and could not be justified as a proportionate means to prevent terrorism. If profiling had been authorized by legislation, the appropriate remedy would be a declaration that the statute was invalid under s. 52 of the *Constitution Act, 1982*. The same arguments can be made against profiling that is not specifically authorized by legislation, but the available remedy would be damages under s. 24(1) of the Charter and the exclusion of evidence under

prepared to override equality rights in order to authorize profiling, little would be lost by such legislation particularly if the legislation would expire in five years' time after which hopefully the injustice and the inefficiency of profiling would be better known to the people. A society that was so determined to single people out because they were of Arab descent or the Muslim religion that it would authorize profiling, perhaps by means of the override, would be a society that would practise discriminatory profiling regardless of what the law said. The override would, at least, make society more aware of what it was doing and would require the legislature to re-visit the matter in five years' time, when calmer heads would hopefully prevail.

A dialogic bill of rights such as the Charter allows the legislature to revise or reverse judicial decisions that seem as manifestly wrong-headed as *Lochner v. New York*<sup>135</sup> or as manifestly right as *Brown v. Board of Education*.<sup>136</sup> A society that is prepared to override its *Brown* would not, however, be a society that would live its justice even in the absence of an override. On the other hand, a society that could seriously debate whether it should override *Brown* and decide that it should not might become a society that accepts and internalizes the decision in a way that might not occur under a regime of judicial supremacy in which citizens have the limited options of disobeying court decisions or futilely attempting to change the Court and the Constitution.

## V. CONCLUSION

Dialogic judicial review is a theory that rejects the idea that either the judges or the legislators are infallible. Dialogic judicial review is prompted by a concern that legislators may ignore fundamental long-term values or gang up on the unpopular in the absence of independent courts having the ability to apply a bill of rights. Dialogic judicial review can place justice issues on the legislative agenda and can counter the tendency of legislators to duck divisive issues or defer to the status quo. Judicial activism on issues such as abortion and gay marriage

s. 24(2). These remedies would be less likely to trigger democratic debate and accountability about profiling.

<sup>135</sup> 198 U.S. 45 (1905).

<sup>136</sup> 347 U.S. 483 (1954).

should increase rather than decrease meaningful democratic deliberation. At the same time, dialogic judicial review does not set the judges up as infallible Platonic guardians. Section 1 and 33 of the Charter, combined with the government's ability to implement its legislative agenda, mean that in most cases, the legislature should be able to revise and reverse most Charter decisions. Although legislators may frequently accept court decisions through explicit legislation or simply by not revisiting the issue, they still bear democratic responsibility for their decisions not to enact ordinary legislation that revises or reverses the Charter decision. In short, accountable legislators have ample ability under the Charter and parliamentary government to say no to the Court. Dialogic bills of rights trust citizens to make responsible and just decisions about rights as interpreted by the courts.

In the end dialogic judicial review seems destined to be attacked from both sides: from the defenders of rights as declared once and for all by the judiciary and from defenders of democracy who are suspicious of judicial fetters on the legislature. In response to the first line of critics, dialogue theorists will have to justify a strong legislative role in debates about rights while not going all the way to legislative supremacy. In response to the latter, dialogue theorists will have to justify a strong judicial role in debates about rights while not going all the way to judicial supremacy. The future of dialogic judicial review will be a continued rejection of the extremes of legislative or judicial supremacy and continued interest in both what the courts and legislatures have to say about justice issues. Defending dialogic judicial review as a halfway house between legislative and judicial supremacy will not be easy given that many commentators are committed to judicial or legislative supremacy and have suspect that dialogic judicial review leans towards the position that they oppose. Dialogue theorists should make clear that their theories will not tell judges how to decide hard cases, but are directed more at how society should struggle together for the best answers to controversies about justice. The normative and empirical premises of dialogue will continue to be contested, but dialogic judicial review will survive and hopefully thrive as a theory that makes sense of the Charter and other modern bills of rights which allow rights as defined by the courts to be limited or overridden by ordinary legislation.

## The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003

Christopher P. Manfredi\*

In 1930, Lord Sankey of the Judicial Committee of the Privy Council coined the most famous metaphor in Canadian judicial history: the Constitution as a "living tree."<sup>1</sup> For more than 70 years this metaphor has proved remarkably adaptable as a justification for broad judicial powers of constitutional interpretation.<sup>2</sup> So powerful is the metaphor that McLachlin C.J.C. alluded to it — albeit obliquely — in her June 2003 speech to the Canadian Club of Toronto, describing the Court's constitutional role as one of "shaping and nurturing plants so that they grow as intended, occasionally pulling out a weed that offends the plan on which the garden is based."<sup>3</sup>

In 1998 Iacobucci J. introduced another powerful metaphor to the Court's vocabulary: Charter review as an integral part of a dialogue between courts and the other branches of governance.<sup>4</sup> The extrajudicial origins of this "dialogue metaphor" are well known,<sup>5</sup> and its

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<sup>1</sup> *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136. According to Lord Sankey, "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."

<sup>2</sup> The Supreme Court quoted this metaphor with approval in its first Charter decision. See *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at 365. Perhaps most famously, Lamer J. relied on the metaphor to reject giving more than minimal weight to "framers' intent" when interpreting the Charter [*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].

<sup>3</sup> "If the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth." *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at 509.

<sup>4</sup> Rt. Hon. Beverley McLachlin, "Judging, Politics, and Why They Must Be Kept Separate" (Speech to the Canadian Club of Toronto, June 17, 2003).

<sup>5</sup> *Friend v. Alberta*, [1998] 1 S.C.R. 493, at para. 138 [hereinafter "Friend"].

Hogg and Bushnell, "The Charter Dialogue Between Courts and Legislatures (or Maybe the Charter of Rights and Freedoms Isn't Such a Bad Thing After All)" (1997) 35