Osgoode Hall Law Journal

Volume 45, Number 1 (Spring 2007)
Charter Dialogue: Ten Years Later

Article 6

Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisted"

Carissima Mathen

Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisted"

Abstract
By suggesting that we view the judicial-legislative relationship as a dialogue, the authors of "Charter Dialogue" have greatly influenced constitutional debate in Canada. This commentary offers three observations about the authors' latest contribution. First, it queries the continued usefulness of the term "dialogue." Second, it raises concerns with the idea that section 1 of the Charter promotes dialogue, as the term is now explained by the authors. Finally, it queries the authors' perspective on judicial review and their accompanying terminology.

Keywords
Canada; Canada. Canadian Charter of Rights and Freedoms; Judicial review

Commentary

DIALOGUE THEORY, JUDICIAL REVIEW, AND JUDICIAL SUPREMACY: A COMMENT ON "*CHARTER* DIALOGUE REVISITED"©

CARISSIMA MATHEN*

By suggesting that we view the judicial-legislative relationship as a dialogue, the authors of "*Charter* Dialogue" have greatly influenced constitutional debate in Canada. This commentary offers three observations about the authors' latest contribution. First, it queries the continued usefulness of the term "dialogue." Second, it raises concerns with the idea that section 1 of the *Charter* promotes dialogue, as the term is now explained by the authors. Finally, it queries the authors' perspective on judicial review and their accompanying terminology.

En suggérant que nous voyons la relation judiciaire-législative comme un dialogue, les auteurs de « *Charter* Dialogue » ont fortement influencé le débat constitutionnel au Canada. Ce commentaire livre trois observations au sujet de la dernière contribution des auteurs. Premièrement, il questionne l'utilité continue du terme « dialogue. » Deuxièmement, il explique la préoccupation concernant l'idée selon laquelle la Partie 1 de *la Charte* favorise le dialogue selon l'explication qu'en donnent maintenant les auteurs. Enfin, il questionne le point de vue des auteurs sur la révision judiciaire, et la terminologie dont ils l'accompagnent.

Over the last two decades or so in Canada, the relationship between the judicial and legislative branches has been the subject of

---

* Faculty of Law, University of New Brunswick. The author wishes to thank Michael Plaxton for reviewing earlier drafts and Angelique Wojcik for providing valuable research assistance.

much constitutional scholarship and political theory.[1] In recent years, the relationship has been analyzed in terms of a subsidiary argument drawn from an article, written in 1997, that described the relationship as a "dialogue."

In "*Charter* Dialogue," Peter Hogg and Allison A. Bushell[2] argued that, due to certain structural features of the Constitution of Canada, judicial review is not as strong as generally supposed.[3] The authors illustrated the thesis with an empirical survey that showed that, in a majority[4] of *Charter*[5] cases where the Supreme Court struck down a

---

[1] Joel C. Bakan, "Strange Expectations: A Review of Two Theories of Judicial Review" (1989-1990) 35 McGill L.J. 439; Gérald A. Beaudoin, "Le Contrôle Judiciaire de la Constitutionalité des Lois" (2003) 48 McGill L.J. 325; Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051 [Cameron, "Dialogue"]; Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525; Frederick C. DeCoste, "The Separation of State Powers in Liberal Polity: *Vriend v. Alberta*" (1998-1999) 44 McGill L.J. 231; James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 Osgoode Hall L.J. 625; A. Wayne MacKay, "The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who Is Running this Country Anyway?" (2001) 24 Dal. L.J. 37; Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2d ed. (Toronto: Oxford University Press, 2001); Christopher P. Manfredi & James B. Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001) 64 Sask. L. Rev. 323; Robyn Martin, "Legitimizing Judicial Review Under the *Charter*: Democracy or Distrust" (1991) 49 U.T. Fac. L. Rev. 62; Carissima Mathen, "Constitutional Dialogue in Canada and the United States" (2003) 14 N.J.C.L. 401 [Mathen, "Constitutional Dialogue"]; Beverley M. McLachlin, "The Role of the Court in the Post-*Charter* Era: Policy-Maker or Adjudicator?" (1990) 39 U.N.B.L.J. 43; Andrew Petter, "Twenty Years of *Charter* Justification: From Liberal Legalism to Dubious Dialogue" (2003) 52 U.N.B.L.J. 187 [Petter, "Twenty Years"]; F.L. Morton, "Dialogue or Monologue" (April 1999) Policy Options 23 [Morton, "Dialogue"]; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*]; Kent Roach, "Remedial Consensus and Dialogue under the *Charter*: General Declarations and Delayed Declarations of Invalidity" (2002) 35 U.B.C. L. Rev. 211; Alex Van Kralingen, "Dialogic Saga of Same-Sex Marriage: EGALE, Halpern, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights" (2004) 62 U.T. Fac. L. Rev. 149; and John D. Whyte, "Legality and Legitimacy: The Problem of Judicial Review of Legislation" (1987) 12 Queen's L.J. 1.

[2] Now Allison A. Bushell Thornton.

[3] Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 ["*Charter* Dialogue"].

[4] Peter Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 1 at 3 ["*Charter* Dialogue Revisited"]. The authors write: "There were 66 cases in which a law was held to be invalid for breach of the *Charter*. Of those 66 cases, all but 13 had elicited some response from the competent legislative body. In seven cases, the response was simply to repeal the offending law. In

law or provision,[6] the legislature responded by doing something other than repealing the law outright. The authors described this phenomenon as a "dialogue" about rights-based limits on legislative power.[7]

The elegance and simplicity of this thesis was attractive to the Supreme Court, which in recent years has been the subject of strident criticism. I have argued elsewhere that "dialogue" casts the Court in a more benign light than the power-mad institution commonly invoked by opponents of judicial activism.[8] Thus, it is no coincidence that the Court's first reference to dialogue occurred in a case—*Vriend v. Alberta*—where the majority settled on an unquestionably assertive remedy.[9]

In "*Charter* Dialogue Revisited," Peter Hogg, Allison A. Bushell Thornton, and Wade K. Wright[10] revisit the premises of the 1997 article.[11] The authors reconsider some of the principal claims made in 1997 in light of the Supreme Court's subsequent use of the dialogue metaphor; the wide-ranging academic commentary and criticism of dialogue theory; and post-1997 Supreme Court decisions. While the authors stand by the original thesis that judicial review in Canada allows for a range of legislative responses, they do modify or augment it in

---

the remaining 46 cases—more than two-thirds of the total—a new law was substituted for the old one."

[5] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[6] Throughout this commentary, reference to a court striking down "a statute" includes cases where the impugned law is only one provision of a larger statute, such as *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 [*Sauvé*] (striking down s. 51(e) of the *Canada Elections Act*, R.S.C. 1985, c. E-2).

[7] The authors have consistently included only the legislature as the second party in the "dialogue." In my opinion, there are equally valid concerns regarding judicial review of executive action. However, these concerns do not form part of the original argument in "*Charter* Dialogue" and are therefore not discussed here.

[8] Mathen, "Constitutional Dialogue," *supra* note 1.

[9] [1998] 1 S.C.R. 493 [*Vriend*]. In *Vriend*, the Court held that Alberta's failure to include "sexual orientation" as a prohibited ground of discrimination in a human rights statute violated the right to equality in section 15(1) of the *Charter*. A majority of the Court found that striking down the law entirely would defeat Alberta's purpose in enacting human rights legislation and decided instead to read the words "sexual orientation" into the offending provision.

[10] For ease of reference, throughout this comment I refer to Peter Hogg, Allison A. Bushell Thornton, and Wade K. Wright as "the authors" in reference to "*Charter* Dialogue Revisited" and the original "*Charter* Dialogue."

[11] "*Charter* Dialogue Revisited," *supra* note 4.

several respects. Perhaps most noteworthy, the authors downplay the word "dialogue" itself. What is significant, they argue, is not the word but the process it represents—a process that reflects a constitutional structure inhibiting strong judicial review.

In this commentary, I offer three observations about the authors' latest contribution to the debate. First, I query the continued usefulness of the term "dialogue." Second, I explain my concerns with the idea that section 1 of the *Charter* promotes "dialogue" as the term is now explained by the authors. I respond as well to a point they make about section 33. Finally, I return to the legitimacy question to query the authors' perspective on judicial review and their accompanying terminology.

I. WHAT'S IN A NAME?

The concept of dialogue has heavily influenced the Canadian debate over judicial review. Part of that influence likely is due to the power of the word itself. "*Charter* Dialogue" characterized a complex and unpredictable relationship as a straightforward give-and-take between equally matched institutions.[12] "Dialogue" suggests cooperation, exchange, and, most importantly, the possibility of mutual moderation.[13] Yet the authors now protest that far too much has been made of the word, and that they never placed quite as much stock in it as their critics did. The authors claim that the word "dialogue" *always* operated as a loose marker, rather than a precise analogy for the judicial-legislative relationship.

I appreciate the authors' wariness of wading into a semantic thicket which, at times, seems to involve more psychoanalysis than constitutional interpretation.[14] That said, I am not quite convinced that,

---

[12] The authors were not the first to characterize rights-based decision making in this way. See *e.g.* Alexander Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975).

[13] Indeed, in this respect "dialogue" is one of the key aspirations of democratic deliberation in legislative assemblies: Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy" (2003) 38 Wake Forest L. Rev. 451 at 460 [Goldsworthy, "Legislative Override"]; Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" (2004) 23 Sup. Ct. L. Rev. (2d) 7 at 36 [Waldron, "Models of Dialogue"].

[14] For example, the legislature is sometimes described as cowed or debilitated in its relationship with the judicary: Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94 Mich. L. Rev. 245.

in their earlier work, the authors placed so little emphasis on the common sense understanding of dialogue.[15]

In "*Charter* Dialogue Revisited," the authors write: "We would cheerfully adopt another word [over dialogue] ... but no one has so far suggested a better word."[16] Certainly, no one has suggested another word that captures legal and scholarly attention in the same way. However, other possibilities do exist.

To illustrate, let us take a sentence from "*Charter* Dialogue":

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and competent legislative body as *a dialogue*.[17]

and replace "dialogue" with some alternatives:

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and competent legislative body as *one of judicial deference*;
>
> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and competent legislative body as one which is *characterized by weak-form judicial review*;
>
> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and competent legislative body as *one providing more readily for rights infringements*;
>
> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and competent legislative body as one which *ultimately reinforces legislative supremacy*.

These substitutions are not exhaustive. Yet, notice how once "dialogue" is removed from the equation the argument reflects a much franker prioritization of legislative concerns. The authors may well argue that none of the above formulations precisely expresses their thesis. However, in the ensuing debate, critique, and discussion, it is clear that

---

[15] "*Charter* Dialogue," *supra* note 3. The word "dialogue" appears eleven times in headings and twenty-nine times in the body of the article. It appears over fifty times in "*Charter* Dialogue Revisited," *supra* note 4.

[16] "*Charter* Dialogue Revisited," *ibid.* at 26.

[17] "*Charter* Dialogue," *supra* note 3 at 79 [emphasis added].

the word "dialogue" enjoys no more consensus around its meaning than any other word.

On the lack of consensus, one interesting point to come out of "*Charter* Dialogue Revisited" is the extent to which any initial, modest reading of dialogue theory has been overtaken by subsequent judicial invocations of the term. As the authors point out early in the article:

> "*Charter* Dialogue" was focused on the *legislative sequels* to judicial decisions. We did not anticipate that our observations of the dialogue phenomenon would be of any interest to judges, who are well and truly out of the picture by the time a legislature enacts legislation in response to one of their decisions. It came, therefore, as a considerable surprise that our article captured so much judicial attention, and to find that the Supreme Court of Canada and other courts have made frequent reference to the article.[18]

This observation is important and accurate, but the authors do not take the next step of considering whether the dialogue metaphor has been helped or hindered by the Court's appropriation of it. I believe that the Court's appropriation of the term has achieved nothing except to render its meaning incoherent.

For example, it is clear that the Supreme Court (or at least some of its members) has resorted to the language of dialogue as a normative response to questions about the legitimacy of judicial review. In *Vriend*, Justice Iacobucci used the dialogue metaphor to insulate the Supreme Court from criticisms of robust judicial review by claiming that through dialogue "each of the branches is made somewhat accountable to the other."[19]

At the same time, dialogue has also emerged as a contentious issue *among* the justices, as illustrated in *Sauvé* and *Hall*.[20] Tension arose over whether the fact that the legislation at issue was the result of a "second look" merited any special consideration. The Court reached different conclusions, endorsing Parliament's redraft in *Hall* while rejecting it in *Sauvé*.[21]

---

[18] "*Charter* Dialogue Revisited," *supra* note 4 at 7 [emphasis added].

[19] *Vriend*, *supra* note 9 at 566.

[20] *Sauvé*, *supra* note 6; *R. v. Hall*, [2002] 3 S.C.R. 309 [*Hall*].

[21] Carissima Mathen, "Dissent and Judicial Authority in *Charter* Cases" (2003) 52 U.N.B.L.J. 321 [Mathen, "Dissent and Judicial Authority"]. In both cases, the Court was sharply divided.

In the end, I wonder whether the notion of dialogue has accomplished much more than provide the courts with a convenient catch-all word within which to situate its own discussions of judicial review.

If "dialogue" does not have a common-sense meaning, perhaps the thesis itself should be restated. In "*Charter* Dialogue Revisited," the authors write that the dialogue phenomenon "demonstrates that we have a weak form of judicial review in Canada, which makes judicial review easier to overcome and therefore easier to justify."[22] Although I take issue with their reference to "weak" judicial review,[23] as stated the dialogue metaphor is simply a way to describe the balance of power in a state with a written constitution. Empirical evidence of legislative responses to Supreme Court *Charter* decisions works to soften the impact of constitutional supremacy on legislative power when that supremacy is enforced by the judicial branch. The real import of dialogue, therefore, is not so much an issue of making judicial review "easier to justify" as it is one of weakening the very notion of judicial review. Entrenching rights and freedoms in a written constitution is not "such a bad thing after all,"[24] because in a system marked by dialogue it is less likely that those rights and freedoms will actually prevent the legislature from maintaining certain policy preferences.

If that is what dialogue really means, does it make sense to continue to use that term? Perhaps the issue is not that no one else has proposed a more useful term. Perhaps the issue is that, unmoored from its common-sense meaning, dialogue has limited utility in the debate over judicial review.

II. DIALOGUE AS A PRODUCT OF CONSTITUTIONAL STRUCTURE

In "*Charter* Dialogue," the authors observed that the *Charter* incorporates several structural features[25] that grant the legislature a special role that, ultimately, results in dialogue: section 33; section 1; the

---

[22] "*Charter* Dialogue Revisited," *supra* note 4 at 53.

[23] This point is further developed in Part III, below.

[24] "*Charter* Dialogue," *supra* note 3.

[25] *Ibid.* at 82. See also Roach, *The Supreme Court on Trial, supra* note 1; Goldsworthy, "Legislative Override," *supra* note 13; and Mathen, "Constitutional Dialogue," *supra* note 1.

qualifying language found in rights such as sections 9[26] and 12;[27] and the nature of the equality rights in section 15.[28] This argument is also made in "*Charter* Dialogue Revisited," but like most post-1997 analyses, it is heavily skewed towards section 1.

Section 1 provides that the individual rights and freedoms found in the *Charter* are themselves subject to limitation. To the extent that one conceptualizes rights as *absolute*, any features which permit derogation may seem incompatible with that status. And, to the extent that the judiciary is "the guardian" of the constitution, including the *Charter*, features that permit those rights to be limited may seem to involve considerations better suited to the legislature than the judiciary. However, in order to frame section 1 as leading to a dialogue in the way the authors intend (that is, reserving a separate, important role to the legislature) it is necessary to go beyond such observations.

If section 1 allows an expanded role for the legislature, it must be for a reason, and I suggest that two might apply here. The first reason is that section 1 analysis requires information that the court often will not possess, but the legislature will. The second reason is that the very existence of section 1 means that the legislature has a unique role to play in determining acceptable limits on rights.[29] The first reason is outcome-based: it justifies a greater role for the legislature because that will ensure a better section 1 analysis. The second reason is policy-based: it allocates a greater role to the legislature because it is more consistent with the purpose of *Charter* rights for the legislature to have that role. While these reasons may be persuasive in particular cases, I do

---

[26] Section 9 of the *Charter* states: "Everyone has the right not to be arbitrarily detained or imprisoned."

[27] Section 12 of the *Charter* states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[28] Section 15 of the *Charter* states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[29] These reasons are closely related but conceptually distinct, as one relates to capacity, and the other, to constitutional structure.

not think that they are sufficiently justified at a general level to recast section 1 as a mechanism for reinforcing legislative supremacy.

Turning to the first reason, it is true that, sometimes, an optimal section 1 analysis requires information beyond a court's competence. For example, consider a law prohibiting certain activities as "terrorism" that is challenged as an infringement of freedom of expression and freedom of association. It may be necessary to gather social facts relating to the actual problem and risks associated with terrorist activity in Canadian society, as well as the state's demonstrable need to counter that threat by proscribing certain expressive and associational activities. With respect to gathering these sorts of facts, the legislature enjoys a significant advantage over the court.[30]

Yet, it is important not to confuse the need for evidence in some section 1 cases (which, usually, only the legislature can provide) with section 1 itself. Section 1 exists because a decision was made to frame every *Charter* right as qualified as opposed to absolute. The legislature must adduce facts to support its section 1 argument because it bears the burden of justifying a prima facie breach of the *Charter*. If the legislature does not make an adequate argument, the Court should rule in favour of the *Charter* claimant and proceed directly to the remedy stage.[31]

A dialogic analysis of section 1 thus risks confusing the *burden* imposed on the government respondent to justify a prima facie infringement with a *privilege* or *power* on the part of the legislature to determine when rights limits are justified.[32] In my opinion, the

---

[30] While the court does have significant control over the appellate process, such as the ability to demand additional argument or appoint an *amicus curiae*, it cannot commission the gathering of evidence to support such arguments. The legislature, on the other hand, is well-equipped to engage in exactly that sort of investigation.

[31] I recognize that there are cases where this does not happen because (a) the government determines that the case is "politicized" and refuses to participate except in the most minimal way (arguably, the government took this route in the latter stages of the same-sex marriage cases, including the *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698); (b) the government believes that the evidence that might be most supportive of its position ought not to be disclosed on the basis of a privilege or some other practical consideration (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199); or (c) the government simply does not have requisite evidence at hand (*R. v. Butler*, [1992] 1 S.C.R. 452 [*Butler*]).

[32] Conceptualizing section 1 of the *Charter* as part of a "dialogue" also runs the risk of being misleading; given the separation of powers under which the legislature enacts laws, it is actually the executive that has the duty to defend laws. It is generally inaccurate to refer to the "legislature" as the responding party in a *Charter* challenge. *Charter* claims are normally brought

government is best restricted to the former role, with some latitude granted in cases where evidence is needed or the decision to be made cuts across the normal lines of debate (such as where the government confronts an issue of competing rights). It is the government's duty to make a section 1 argument, but it is not the government's sole prerogative to do so. It is quite possible for the court to complete the section 1 analysis itself or to rely on other parties, such as intervenors, to flesh out the argument. In *Vriend*, the Alberta government did not justify the explicit exclusion of sexual orientation as a prohibited ground of discrimination from its human rights law; it made no argument beyond the general need for a provincial human rights law. The narrow focus of Alberta's section 1 argument was mistaken, as the Court ruled that both the statute as a whole and the under-inclusive element had to be considered. On a strict understanding of section 1, Alberta simply did not satisfy its burden of proof. Nonetheless, Justice Iacobucci proceeded with a full analysis of section 1.[33] Clearly, the Court did not feel incompetent to perform the analysis.

Now, perhaps the Supreme Court was simply wrong to engage in such analysis. This brings us to the second possible reason mentioned above, namely, that the very existence of section 1 implies a special and unique legislative role in *Charter* analysis. Interestingly, the authors argue that interpretive finality on *Charter* issues ought to rest with the Court.[34] Given that position, the second reason should not be persuasive to them. However, there is a sense in which the second reason may nevertheless inform the authors' analysis, because they occasionally characterize section 1 in ways that connote it as a trump on *Charter* rights. Consider their descriptions of the legislative responses to *O'Connor* and *Daviault*:

---

against the Crown in right of Canada or a province. Therefore, there is an additional complexity in the relationship.

[33] *Vriend*, *supra* note 9. For another example of substitution of the Court's analysis for what should have been the government's evidence, see the majority opinion in *Lavoie v. Canada*, [2002] 1 S.C.R. 769.

[34] "*Charter* Dialogue Revisited," *supra* note 4 at 31: "Our position is that the final authority to interpret the *Charter* rests properly with the judiciary (or, to put it differently, that judicial interpretation of the *Charter* is authoritative)."

> In [*Daviault*, the decision was] effectively overruled.... through the use of section 1.[35]
>
> After the decision in *O'Connor*, Parliament replaced the judicially imposed process with the 1997 statutory regime for the disclosure of confidential records in sexual assault cases ... The statute contained a lengthy preamble, reciting Parliament's concern with the prevalence of sexual violence against women and children ... . The preamble had obviously been inserted with a view to supporting a section 1 justification in the event of a constitutional challenge.[36]

Thus, the notion that section 1 promotes dialogue (meaning weak(er) judicial review) appears to rest on an oppositional model of the *Charter*, with the protected rights and freedoms on one hand and section 1 on the other. On this view, the legislature *always* has a predominant role in the section 1 analysis, because only the legislature can provide the appropriate perspective regarding the competing social interest which may justify infringing the right.

As I have explained, this reason conflicts with the authors' view that interpretive finality properly rests with the Supreme Court. More fundamentally, though, I believe that the second reason distorts section 1 both in terms of its text and as a matter of normative constitutional theory. Recall that, in *R. v. Oakes*, the Supreme Court made it clear that section 1 does not operate as a "trump" on constitutional rights:

> [Any] s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada ... "[It] is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."
>
> ...
>
> Inclusion of [the words "free and democratic society"] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic ... The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[37]

The importance of defining section 1 as compatible with, and not opposed to, rights is apparent when one considers the kind of objectives

---

[35] *Ibid.* at 3-4.

[36] *Ibid.* at 20-21 [footnotes omitted]. For a similar argument, see Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup. Ct. L. Rev. (2d) 49 at 71-72 [Roach, "Dialogic Judicial Review"].

[37] [1986] 1 S.C.R. 103 at 135-36.

that have consistently been held *not* to be pressing and substantial. Were section 1 to operate as a true "trump," it would be illogical to rule out any legislative objective. Yet, several purposes have been ruled out of bounds, including sectarian preferences,[38] pure animus towards minorities,[39] and moral imperatives based purely on distaste.[40]

Certainly, the Supreme Court has not always been faithful to the broad principles set out in *Oakes*, and I believe the *Charter* jurisprudence has suffered for it.[41] Nevertheless, the original conception of section 1 is crucial if the *Charter* is to continue to fulfill what I take to be its primary purpose: safeguarding fundamental principles of equality and dignity against the routine invocation of the general welfare. It would be unfortunate—indeed it would defeat the *Charter*'s very purpose—if section 1 operated solely as a means for the legislature to avoid the burden of respecting fundamental rights and freedoms.

Additionally, confusion over the role of section 1 runs the risk of entrenching deference in inappropriate places and at inappropriate levels. In an earlier article authored by Hogg alone, he argued that courts may well owe the legislature more deference where dialogue has occurred (a so-called second look case):

> [One] application of dialogue to judicial decision-making occurs when the Court is reviewing a law that has been re-enacted in response to a judicial decision. The theory of dialogue, if applied to the courts, would suggest that the Court should give increased deference to the legislation in that situation, and should normally uphold the "second try."[42]

In "*Charter* Dialogue Revisited" the authors disavow that conclusion: "[O]n further reflection, it cannot be right that increased deference is appropriate solely because the case is a second look case."[43]

---

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

[39] *Vriend, supra* note 9.

[40] *Butler, supra* note 31.

[41] Some argue that the Supreme Court's fidelity to the *Oakes* approach lasted exactly ten months, until *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. See *e.g.* Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 Sup. Ct. L. Rev. (2d) 501 at 506.

[42] Peter W. Hogg, "Discovering Dialogue" (2004) 23 Sup. Ct. L. Rev. (2d) 3 at 5.

[43] "*Charter* Dialogue Revisited," *supra* note 4 at 48.

However, the authors maintain that the Court should appropriately acknowledge in its reasons the fact that the legislature has engaged in dialogue following the initial decision:

> While all new laws are vetted for constitutionality ... in a second look case there will inevitably have been a particularly focused assessment of the means chosen to accomplish a legislative objective in light of the court's decision that a prior enactment failed to give due consideration to the *Charter*. Accordingly, what may appear to be "judicial deference" by the court in a second look case may be merely an appropriate acknowledgement of the process in which the legislature has explicitly engaged, including assessment of complex social science evidence, consideration of the interests of competing groups, or allocation of scarce resources. In a second look case, these considerations are not merely an *ex post facto* justification .... Rather, the consideration of the least restrictive means of accomplishing the legislative objective *will have been informed by the previous decision*. ... The mere fact of legislative deliberation does not carry a law over the section 1 barrier. However, in a second look case, the dialogic process that followed the previous decision is likely to yield *a particularly strong case for section 1 justification*.[44]

With great respect, the final two passages are hard to reconcile. The longer quote appears simply to provide a more detailed explanation of why increased deference—or, as it is now described, "a particularly strong case for section 1 justification"—is likely to be appropriate in a second look case. There are a number of assertions made about the likely legislative process that assume a "best practices" legislative drafting model. Since, in most cases, the issue will have been forced onto the legislative agenda, such an assumption is unrealistic.[45] For example, the two best-known second look cases, *Hall*[46] and *Sauvé*,[47] provide little evidence of a detailed examination of this kind. In addition, there is great emphasis placed on legislative preambles. At most, the preamble can clarify the legislative objective and delineate any competing interests. It is difficult to see how the preamble *itself* can provide justification for the rights limit.[48] I remain unconvinced that a

---

[44] *Ibid.* at 48-49 [emphasis added].

[45] There are exceptions, of course. Prior to the *O'Connor* decision, Parliament was already investigating the increasing problems surrounding requests for confidential records in sexual assault proceedings initiated by the accused. See Mathen, "Constitutional Dialogue," *supra* note 1 at 450, citing *R. v. Mills*, [1999] 3 S.C.R. 668 at 744-45.

[46] *Supra* note 20.

[47] *Supra* note 6.

[48] See *e.g.* Cameron, "Dialogue," *supra* note 1 at 1062 (arguing that the purpose of a preamble "is self-serving and, as a result, its imprecatory words should not be taken at face value").

second look case provides any stronger basis per se for concluding that section 1 of the *Charter* has been satisfied.

Moving away from section 1, the *Charter* does contain an explicit fail-safe provision: the override, or section 33.[49] I agree with the authors that section 33 provides a significant "safety valve" for an ultimate expression of legislative will. While I acknowledge the concerns expressed by some that any use of section 33 raises the possibility of perpetuating prejudice,[50] the override provides a way to respond to a decision that, in the public's view, unacceptably compromises collective interests. Controversial decisions in the area of public health care[51] and sexual assault[52] reveal situations where a decision to use the notwithstanding clause might well be defended (by some people at least) as progressive.

Insofar as the authors continue to cite section 33 as a structural feature militating against judicial supremacy (which they characterize as strong judicial review), I am in general agreement. However, the authors may underestimate the problem posed by the wording of section 33 for dialogue theory. The substance of the critique is that because section 33 requires the legislature to enact a law "notwithstanding" the *Charter* itself, it exacts too high a political cost and, thus, does not act as the "check" one might expect.[53]

---

[49] Section 33(1) of the *Charter* states: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 through 15 of this *Charter*."

[50] Patricia Hughes, "Section 33 of the *Charter*: What's the Problem, Anyway? (Or, Why a Feminist Thinks Section 33 Does Matter)" (2000) 49 U.N.B.L.J. 169.

[51] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.

[52] Many feminists regarded the *Seaboyer* decision as wilfully blind to the larger context of gender inequality in sexual assault. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577. See generally Elizabeth J. Shilton & Anne S. Derrick, "Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Y.B. Access Just. 107; Elizabeth A. Sheehy, "Feminist Argumentation Before the Supreme Court of Canada in *R. v. Seaboyer*, *R. v. Gayme*: The Sound of One Hand Clapping" (1991) 18 Melbourne U.L. Rev. 450.

[53] See Waldron, "Models of Dialogue," *supra* note 13 at 36:

> On the face of it, to legislate *notwithstanding* the *Charter* rights is a way of communicating to the polity that you (the legislature) do not think that *Charter* rights matter, at least so far as the legislation in question is concerned. But the characteristic standoff between court and legislature on individual rights does not involve one group of people (the judges) who think rights matter and another group of people (the legislators) who thinks that they do not matter ... What such

The authors argue that "it is likely that the public will realize that the legislature is, in fact, overriding a judicial interpretation of a particular *Charter* right or freedom, rather than the actual *Charter* right or freedom itself."[54] I have no quarrel with this reply as a general observation.[55] More intriguing to me is the assumption that overrides are most likely (perhaps most appropriately) to occur in *response* to court decisions. Although some uses of section 33 have been in response to legislative decisions,[56] others have not been.[57] Given the authors' insistence that "dialogue" is not to be understood as a "conversation," it is interesting that they appear to limit section 33 to responses to particular decisions. Such an approach to the override makes more sense within a framework where dialogue means what most people think it means: that courts and legislatures in some way "talk" to each other, and section 33 provides a way for the legislature to "adjourn" the discussion unilaterally. If dialogue is merely evidence of weak(er) judicial review in Canada, it seems perfectly consistent to approach section 33 as a tool that legislatures can use to cut off the possibility of judicial review.

III. HOPE SPRINGS ETERNAL? THE LEGITIMACY OF JUDICIAL REVIEW

In "*Charter* Dialogue Revisited," the authors stress that their dialogue theory is not a justification for judicial review. They agree with scholars who write that arguments supporting judicial review must be intrinsic to the process itself, and that dialogue does not satisfy such a

---

stand-offs usually involve is two [groups of people] *all of whom think rights matter*, though they disagree about how the relevant rights are to be understood.

[54] "*Charter* Dialogue Revisited," *supra* note 4 at 35 [footnote omitted].

[55] Like most observations about section 33, it is necessarily speculative because of the rarity of the provision's use.

[56] Section 33 was used in response to *Retail, Wholesale and Department Store Union, Local 544. v. Saskatchewan* (1985), 19 D.L.R. (4th) 609 (Sask. C.A.) (regarding back-to-work legislation in Saskatchewan); *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 [*Ford*]; and *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790 (both regarding the exclusive use of French on signs in Quebec).

[57] In 1982 Quebec repealed and re-enacted every provincial law to operate notwithstanding sections 2 and 7 through 15 of the *Charter*: *An Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21. In *Ford*, *ibid.*, the Supreme Court largely upheld Quebec's use of the override.

requirement.[58] Indeed, in 1997 the authors wrote that judicial review cannot be justified solely on the basis that it is textually supported in the Constitution of Canada. Such a claim would be "hollow" and "unsatisfactory"[59] because of the large measure of discretion and value judgment that informs any *Charter* case.[60]

I have had trouble discerning the authors' views on the wisdom of judicial review in "*Charter* Dialogue Revisited." In some places, the authors refer to judicial review as a reality to be accepted, rather than a good in itself.[61] In other places, the authors discuss the desirability of courts reviewing actions that harm minorities, as well as the general undesirability of having the legislature review its own laws. For example, the authors respond to the "status quo" argument,[62] not by denying the force of constitutional decisions, but by embracing them as a rights-protecting tool:

> There is some force to Morton and Knopff's point about the staying power of this [judicially created policy] status quo. However, we question whether it is a bad thing that some judicial decisions striking down legislation for unjustifiably infringing a *Charter* right or freedom bring about a form of legislative inertia ... . [T]he public respects judicial interpretation of the *Charter*, making it politically difficult to reverse a decision

---

[58] "*Charter* Dialogue Revisited," *supra* note 4 at 27-29; Petter, "Twenty Years," *supra* note 1; and Roach, "Dialogic Judicial Review," *supra* note 36 at 51.

[59] "*Charter* Dialogue," *supra* note 3 at 77.

[60] The very bluntness of this admission bothers other dialogic theorists. See Roach, "Dialogic Judicial Review," *supra* note 36 at 68:

> I am reluctant to go as far as Hogg and Bushell 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 legitimacy of judicial contributions to societal debates about rights and freedoms.

[61] For the authors' discussion of the "political" and "legal" justifications for judicial review, see "*Charter* Dialogue Revisited," *supra* note 4 at 28-29.

[62] The "status quo" argument states that a *Charter* decision exerts such a powerful influence that it effectively changes the legal status quo. See Morton, "Dialogue," *supra* note 1. This argument would certainly explain the reaction to the court decisions that found the common law definition of marriage to be an unjustified violation of section 15 of the *Charter*. See *Hendricks v. Québec* (*A.G.*), [2004] R.J.Q. 851 (C.A.); *Halpern v. Attorney General of Canada* (2003), 65 O.R. (3d) 161 (C.A.) [*Halpern*]; and *EGALE Canada Inc. v. Canada* (*Attorney General*) (2003), 225 D.L.R. (4th) 472 (B.C.C.A.). Given that a majority of parliamentarians voted in 1999 in favour of an opposite-sex definition of marriage, it is difficult to explain the complete turn-around in legislative opinion a mere seven years hence without acknowledging the power of those court decisions.

> of the Court on a *Charter* issue (particularly a divisive *Charter* issue). As one of the authors has commented elsewhere, is that not as it should be?[63]

Yet, one also finds the statement that "[i]t is obviously much easier to justify a weak form of judicial review than a strong form, because the influence of the unelected courts on public policy is much less when the courts' powers to review the laws enacted by the elected legislative bodies are only of the weak Canadian kind."[64]

I have two points to make in relation to the last statement. First, the authors appear to accept some major premises of rights skeptics: that entrenching rights beyond the reach of ordinary legislation is inherently undemocratic; they also agree that democracy[65] is a fundamental good in itself. Most rights skeptics do not go much further than these assertions.[66] Yet, neither premise is immune from challenge.

Now, I do recognize the deep tension within the modern constitutional state: an unelected body, concretely accountable to no one, must find some persuasive basis for claiming authority when its judgment runs counter to the express wishes of a democratically elected body. How can a people be considered self-governing if they permit critical issues of law and policy to be resolved by judicial fiat?

These are critically important questions, and the length of this commentary limits my ability to respond.[67] Briefly, though, one possible response is to ask in what sense the current political system is itself democratic. Surely it is only in the most abstract and, frankly, formalistic

---

[63] "*Charter* Dialogue Revisited," *supra* note 4 at 41.

[64] *Ibid.* at 29-30.

[65] Of course, democracy can be understood in a variety of ways. See *e.g.* Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at 187 [Dworkin, *Sovereign Virtue*]. I assume that when the authors discuss "democracy" they mean something akin to Jeffrey Goldsworthy who uses it to describe a process where "ordinary people [enjoy the right] to participate on an equal basis in public decision-making." Goldsworthy, "Legislative Override," *supra* note 13 at 454.

[66] I should clarify that I do not think Hogg, Bushell Thornton, or Wright are *Charter* or rights "skeptics" at least not on the basis of their arguments about dialogue. Their position is consistent with a strong rights-protection framework. There are many points in "*Charter* Dialogue Revisited" and other of their scholarly works that evince sympathy for both minority rights and a role for the Supreme Court in protecting those rights. Nevertheless, the fundamental premises in their argument are open to scrutiny on the grounds that those premises rest on idealized assumptions.

[67] I have discussed the issue in "Constitutional Dialogue," *supra* note 1 at 406-14 and in "Dissent and Judicial Authority," *supra* note 21.

terms that one could so describe the Canadian political system. Aspects of Canadian politics vulnerable to criticism on democratic grounds are legion, and include the minimal diversity in Parliament (particularly, the lack of women, Aboriginal peoples, and minorities); the limited role of backbenchers; the appointment process and powers of the Senate; unfixed elections and the legitimacy of the plurality voting system ("first past the post"); hard-line party politics and the infrequency of free votes in Parliament; infrequent use of referenda; and the lack of policy expertise in Parliament.[68]

Assuming, however, that one does accept our current political system as democratic, a second possible explanation for the tension described above is that "democracy" can exist both within and across political generations. A decision can be made democratically to bind future generations to certain fundamental principles. Those fundamental principles are subject to change, albeit through a particularized form (most commonly by constitutional amendment). But, the very essence of a constitution is to obtain that "pre-commitment." In other words, it is both rational and just for a society at one time to agree on certain ground rules meant to persist through future incarnations of that society.[69]

In a slightly different vein, one might suggest that we value democracy, not because it is inherently good, but because it leads to other things that are good, as, for example, enhanced feelings of civil participation and belonging, or the reinforcement of equality among

---

[68] Other aspects of the Canadian political system that have been criticized include the executive appointment of judges; the competition (and lack thereof) within and between political parties; the executive powers of appointment to administrative boards and tribunals; the lack of ministerial accountability; the role of the media in public education; and, more recently, transparency regarding national security issues. See Peter Aucoin & Lori Turnbull, "The Democratic Deficit: Paul Martin and Parliamentary Reform" (2003) 46 Can. Pub. Admin. J. 427; Herman Bakvis & Gerry Baier, "Democracy, Parliamentary Reform and Federalism" *Democracy and Federalism Series* (Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, 2005), online: <http://www.iigr.ca/pdf/publications/387_Democracy_Parliamentary_.pdf>; and F. Leslie Seidle & David C. Docherty, eds., *Reforming Parliamentary Democracy* (Montreal: McGill University Press, 2003). In "Legislative Override," *supra* note 13, Goldsworthy describes as "democratic" an arrangement whereby the people delegate legislative power to elected officials for fixed periods, and those officials bestow extensive law-making powers to unelected officials. It is true that this sort of arrangement is routinely seen as "democratic," but it is just as true that it does not truly reflect, in theory or practice, the ordinary understanding of democracy.

[69] For a critique of this argument, see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 257-60.

citizens.[70] In other words, the best justification for democracy may not be deontological, but rather consequentialist. If democracy is so understood, then the entrenchment of the *Charter* means that democracy no longer provides the ultimate benchmark for evaluating the appropriateness of judicial review. Other goods are more important: if a legislature's decision reinforces subordination it is no longer sufficient to point to a democratic process as providing justification for that decision.[71] On this view, democracy is an important process but is not the ultimate end to which the society strives. The ultimate end is a more just society.

My second point is also in response to the following statement:

> [I]t is obviously much easier to justify a weak form of judicial review than a strong form, because the influence of the unelected courts on public policy is much less when the courts' powers to review the laws enacted by the elected legislative bodies are only of the weak Canadian kind.[72]

I question this description of judicial review in Canada as "weak." Given the authors' claim that dialogue is evidence of weak judicial review because the legislature can respond to *Charter* decisions, they appear to equate weak judicial review with failing to have the last word. But the question of who has the last word is really a question of finality, which is better understood as an argument about supremacy.[73] The hierarchy mandated by the *Charter* indicates that supremacy is actually split, with section 33 being the dividing line. There cannot be judicial supremacy over a set of rights for which the constitution provides a legislative escape clause. Of course, section 33 covers most of the rights that produce controversy (namely, the fundamental freedoms, legal rights, and equality). Still, that leaves the Court with "the last word" for the rest of the *Charter* (as well as Aboriginal rights and the division of powers). Of course, the authors advocate investing the Court

---

[70] Dworkin, *Sovereign Virtue*, *supra* note 65 at 187.

[71] This argument was starkly referenced in the recent parliamentary vote to re-open the same-sex marriage issue. Some have argued that it is inappropriate to subject rights issues to a vote at all. See generally Chantal Hebert, "Minority Rights Ugly Subtext in Same-sex Debate" *Toronto Star* (8 December 2006) A25; Nelson Wyatt, "Dion goes into first caucus meeting with whip in hand ahead of same-sex vote" *Canadian Press NewsWire* (3 December 2006) (Proquest).

[72] "*Charter* Dialogue Revisited," *supra* note 4 at 29-30.

[73] Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346.

with *final* interpretive authority over the scope of all *Charter* rights as well.[74]

So the authors appear to answer the question, "How strong is judicial review in Canada, and what role does dialogue play in that?" by reference to the question, "Is the Court's decision in a *Charter* case always the last word?" In other words, they answer a question about judicial review with a statement about judicial supremacy. Leaving aside the fact that they themselves subscribe to judicial finality in *Charter* interpretation (which, on one understanding at least, is all that one needs to prove supremacy), by equating judicial finality with judicial supremacy, they also overlook an important measure of the scope of judicial review, namely, the courts' remedial powers. Using remedies as the measure, I do not see how courts in Canada can be described as exercising anything other than extraordinarily strong powers of review. Courts have declared that under section 52 they may sever offending portions from statutes or read in provisions to comply with *Charter* rights.[75] In some cases the Supreme Court has used its interpretive powers to read into laws complex interpretations,[76] limitations,[77] and exemptions[78] that are difficult to reconcile with the text of the statute. In addition, the courts have taken it upon themselves to suspend their orders for anywhere from six months to two years. It is hardly an exaggeration to describe suspended declarations of invalidity as essentially suspending the constitution itself.[79] I do not see how the exercise of such powers can possibly be described as "weak" judicial review.

---

[74] "*Charter* Dialogue Revisited," *supra* note 4 at 31.

[75] *Schachter v. Canada*, [1992] 2 S.C.R. 679.

[76] *Butler, supra* note 31.

[77] *R. v. Keegstra*, [1990] 3 S.C.R. 697.

[78] *R. v. Sharpe*, [2001] 1 S.C.R. 45.

[79] See Bruce Ryder, "Suspending the *Charter*" (2003) 21 Sup. Ct. L. Rev. (2d) 267. I acknowledge that in some cases the Supreme Court has identified important social benefits that were safeguarded by suspending the effect of a declaration. See *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504. At other times, the Court has chosen to suspend its order out of a belief in the legislature's superior ability to determine the shape that an amended law should take. See *Corbiere v. Canada (Minister of Indian Affairs)*, [1999] 2 S.C.R. 203. These good intentions do not alter the enormity or scope of the remedial jurisdiction the Court has reserved for itself.

The crux of the authors' dialogue argument is that, because the legislature may respond, judicial review is weak. But the fact that the legislature can respond—by changing the law or enacting a new one—does not diminish the courts' powers.[80] Certainly, the Supreme Court can take account of the response, and it is clear that in at least some cases, the fact that the case constitutes a second look has tilted the balance in favour of the legislation. In other cases, though, the Court was just as assertive in its review. The differing levels of deference are due to a number of factors, including the Court's perception of the importance of the right, the conduct of the legislature or the government, and the existence of reasonable alternatives. However, the variable levels of deference do not disturb the fact that, in the end, the Court remains the final arbiter of whether the *Charter* has been adequately respected. Even if the legislature—having an eye to a future section 1 argument—attempts to insert justificatory language into the subsequent version of the law, the existence of such language does not alter the fact that the Court, and not the legislature, ultimately will determine whether the justification offered by the legislature satisfies the *Charter*.

IV. CONCLUSION

Without question, the authors' initial presentation of the dialogue metaphor has contributed to the Canadian debate over judicial review. On a personal note, I was sufficiently intrigued by their method to enter into the discussion, and the dialogue metaphor has assisted me in my own work. However, ten years on, I wonder whether the dialogue metaphor may obscure more than it enlightens. Dialogue theory has received attention from the Supreme Court, but the attention has served only to heighten uncertainty over what it is and its place in the judicial-legislative relationship.

I have argued that "dialogue," as understood by the authors, is not evidence of weak(er) judicial review. Dialogue does not in any way

---

[80] A good example, from 2004, is the Ontario Court of Appeal's immediate and mandatory remedy that same-sex marriages were henceforth legal in Ontario: see *Halpern*, *supra* note 62. Once same-sex couples got married it would have been extremely difficult politically to invalidate those marriages. I note that Prime Minister Harper's recent (failed) overtures to reinstate an opposite-sex definition clearly avoided any retroactive application of the law, though such application would have been possible.

soften the courts' powers in constitutional disputes (though it may be an ad hoc factor in the courts' own judgment over how they exercise their power). Nor do I believe that it is fruitful to continue to characterize section 1 of the *Charter* as providing the legislature with a unique or special role in assessing justifiable rights limits (which is the only way to understand the continued insistence that section 1 is an integral part of any dialogue theory). I do think that there is worthwhile work to be done in assessing individual cases and evaluating the factors that prompt a particular legislative response (or non-response, as the case may be). But, on the whole, and given the authors' own minimalist understanding of the term, perhaps we would do better to resist the temptation to label such responses as part of a dialogue.