TWENTY YEARS OF *CHARTER* JUSTIFICATION: FROM LIBERAL LEGALISM TO DUBIOUS DIALOGUE

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"Those are my principles. If you don't like them I have others." - Groucho Marx

I. Introduction

It has been more than twenty years since Canadian courts first cut their teeth on *Charter*[1] adjudication. In that time, the *Charter* has called upon judges to address a mind-boggling array of issues, including Sunday closing laws, election spending controls, welfare cuts, abortion rights, assisted suicide, rape shield laws, gay and lesbian rights, anti-hate laws, pornography regulations, religious freedoms and the regulation of tobacco advertising, to name a few.

The purpose of this paper is not to canvass these issues, but rather to consider the approach taken by the Supreme Court of Canada in addressing them. Few would dispute that these and other concerns that have come before the courts under the *Charter* involve contentious matters of public policy. Prior to 1982, these matters were widely regarded as falling within the preserve of politics, to be addressed, if at all, by governments and legislatures. The enactment of the *Charter* in that year, however, endowed these issues with a legal dimension that both empowers and obliges courts to pass judgment on their merits.

This, in turn, raised serious questions about the legitimacy of the courts providing answers to what previously were viewed as political questions. What

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

qualifies judges, who are neither elected by nor accountable to the Canadian people, to resolve such matters of public policy? Why should judges' decisions regarding these matters displace the decisions of duly elected governments and legislatures? And what are the implications of all this for Canadian democracy?

One of the main challenges confronting courts in discharging their responsibilities under the *Charter* has been to adopt an approach to judicial review that, in addition to resolving the substantive issues before them, answers these questions in a manner that maintains a sense of institutional legitimacy. This is a challenge that, along with other *Charter* responsibilities, judges did not seek out, and it has proved to be a difficult one. As I will attempt to show, the approach taken by the courts in addressing this challenge has shifted radically over the past twenty years from one based upon assumptions of liberal legalism to one based upon assertions of democratic dialogue. Looking particularly at the record of the Supreme Court of Canada, I shall argue that this shift has reflected and driven changes concerning not only courts' justification for judicial review, but also concerning judges' understanding of the scope and nature of the *Charter*, and of their role in its enforcement. Finally, I will consider the larger implications of this for the *Charter* and for Canadian democracy.

II. The Rise of Liberal Legalism

The approach first adopted by the Supreme Court to address the dilemma of *Charter* legitimacy was founded on the assumptions of liberal legalism. These assumptions, based on nineteenth century liberal ideals, hold that the role of courts is to act as impartial arbiters whose responsibilities do not to extend to policy-making, which is the preserve of politicians, but are limited to the objective interpretation of legal texts and the unbiased adjudication of legal issues. Early *Charter* cases are steeped in rhetoric that reflects these assumptions. In *Reference Re Motor Vehicle Act (B.C.)*, for example, the Court maintained that, by subjecting the *Charter* to a "purposive analysis", it could derive "objective and manageable standards" for its operation, thereby "avoiding adjudication of the merits of public policy."[2] And while grappling with the thorny issue of abortion in *R. v. Morgentaler*, the Court insisted that its task was "not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of [legislation] against the Charter."[3]

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[2] *Reference Re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 495-500.

[3] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 46, 138.

These same assumptions are evident in the Court's approach to the "reasonable limits" clause in section 1. This clause establishes an amorphous standard that appears to call upon courts to engage in interest-balancing, an activity normally associated with political decision-making. As such, it represents a threat to liberal legalism and its vision of judges as objective interpreters of the constitutional text. In *R. v. Oakes*, Supreme Court judges responded to this threat by setting out a two-stage "proportionality test."[4] By converting the section 1 inquiry from one focused on the "reasonableness" of legislation to one focused on the "proportionality" between legislative means and ends, and by stipulating specific criteria and a stringent standard for determining whether the requisite degree of "proportionality" had been met, the *Oakes* test diminished the subjective appearance of section 1 by providing an ostensibly neutral framework for judicial decision-making.

The Court's resort to liberal legalism as the basis for understanding and explaining its new *Charter* role is also reflected in other aspects of its early *Charter* work. One example is the position it articulated in early *Charter* cases that the purpose of *Charter* rights is to constrain governmental action, not to authorize or compel it.[5] This precept is grounded in nineteenth century liberal assumptions that the division between public and private spheres is clear and uncontested, and that state interference with private action represents the greatest threat to individual liberty. According to this view, the role of courts under the *Charter* is simply to police the boundary between these spheres so as to constrain the state from unduly interfering with individual freedoms.[6] Thus the Court in *R.W.D.S.U. v. Dolphin Delivery Ltd.* was able to refer to judges as "neutral arbiters" whose conduct (except when linked to legislative or executive actions) was non-governmental and beyond the scope of *Charter* scrutiny.[7]

A related view embraced by the Court in early *Charter* cases was its insistence that, because the role of judges is adjudicative rather than legislative, they were limited to striking down legislation inconsistent with the *Charter*, rather than repairing or extending it. In *Hunter v. Southam Inc*, for example, the Court refused

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[4] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[5] See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156 [*Hunter*].

[6] See Alan C. Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278 ["Private Rights/Public Wrongs"].

[7] *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 600-01.

to read provisions into the *Combines Investigation Act*,[8] stating that it did "not fall to the courts to fill in the details that will render legislative lacunae constitutional."[9] Similarly, in *Singh v. Canada (Minister of Employment and Immigration)*, the Court declined to repair deficiencies in the *Immigration Act*,[10] noting that the *Charter* allowed the courts to perform "some relatively crude surgery on deficient legislative provisions, but not plastic or re-constructive surgery."[11]

III. The Demise of Liberal Legalism

Drawing on the values of liberal legalism, the Court by the late 1980s had forged a seemingly coherent and consistent set of positions not only in relation to its justification for judicial review under the *Charter*, but also concerning the scope and nature of *Charter* rights, and the role of judges in their enforcement. Sadly for the Court, however, these positions contained within them the seeds of their own destruction. There are a number of reasons for this. First, the Court's attempts to portray *Charter* decision-making as neutral and apolitical were simply not credible in a post-realist age. Whatever the Court said, none but a few true-believers were willing to accept that judges' interpretations of contested *Charter* rights, such as liberty and equality, were the objective outcome of "purposive reasoning", or that grappling with issues like abortion did not require judges to make subjective judgments based on their personal moral values.

Second, the paradigm of liberal legalism, founded as it was on nineteenth century assumptions about the role of the state, was out of sync with twentieth century social norms and realities. The notion that *Charter* rights could constrain but not compel state action, that judges could strike down legislation but not repair or extend it, and that courts would apply a stringent standard against upholding legislation under section 1, gave the *Charter* an ideological slant and hard edge that was at odds with, and at times hostile to, political expectations concerning the

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[8] *Combines Investigation Act*, R.S.C. 1970, c. C-23.

[9] *Hunter, supra* note 5 at 168-69.

[10] *Immigration Act*, 1976, S.C. 1976-77, c. 52.

[11] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 235-36.

regulatory and redistributive functions of the modern state.[12]

Third, as the Court was confronted with increasingly complex and difficult cases, splits started to emerge amongst judges, as some, feeling uncomfortable with the consequences of these assumptions, began to modify them or back away from them altogether. As a result, the number of Supreme Court *Charter* cases that were unanimously decided plummeted from over 85 percent in the first two years of *Charter* judgments (1984 and 1985) to about 60 percent in the next four years (1986 to 1989).[13] These growing divisions within the Court further undermined the appearance of judicial objectivity.

By the turn of the decade, some Supreme Court judges were openly admitting that the *Charter* imposed upon them significant policy-making powers. The most candid acknowledgment of this came from Madam Justice McLachlin, who, in a lecture delivered in 1990, spoke of "the impossibility of avoiding value judgments in *Charter* decision-making," and referred to such value judgments as "essentially arbitrary."[14]

As judges abandoned the myth of judicial objectivity, they also dispensed with many of the trappings of liberal legalism associated with it. By the early 1990s, some judges were not only conceding that the *Oakes* test required them to make difficult policy decisions under section 1, but were arguing publicly about how those decisions should best be made.[15] The Court also started shifting ground on its approach to state action, acknowledging that judicial decisions should not be insulated from *Charter* norms[16] and accepting, in certain circumstances, that the

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[12] See Andrew Petter, "The Politics of the Charter" (1986) 8 Supreme Court L. R. 473; Andrew Petter, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16 Journal of Law and Society 151; and "Private Rights/Public Wrongs", *supra* note 6.

[13] F.L. Morton, P.H. Russell & M.J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1 at 11.

[14] Madame Justice Beverly M. McLachlin, "The Charter: A New Role for the Judiciary?" (1991) 29 Alta L. Rev. 540 at 545-46.

[15] See *e.g.* Gerard V. LaForest, "The Balancing of Interests Under the Charter" (1992) 2 N.J.C.L. 133; and Hon. Bertha Wilson, "Constitutional Advocacy" (1992) 24 Ottawa L. Rev. 265.

[16] As Professor Peter W. Hogg has pointed out, the Court started shifting position on this in the late 1980s in cases like *B.C.G.E.U. v. B.C. (Attorney General)*, [1988] 2 S.C.R 214; see Peter W. Hogg, *Constitutional Law of Canada, Student Edition* (Scarborough: Carswell, 2000) at 706-09.

Charter may require as well as constrain governmental action.[17] At the same time, the Court abandoned earlier claims that it was limited by its adjudicative role to striking down legislation, and began to embrace new *Charter* remedies – including severance,[18] declarations of temporary validity,[19] and reading in statutory extensions[20] and exclusions[21] — that allowed it to reshape legislation in creative ways.

As liberating and necessary as these shifts may have been, their effect was to dismantle the platform of liberal legalism upon which the Court had built and justified its *Charter* enterprise. This, in turn, raised a difficult question: if the Court was no longer able to justify its *Charter* role on the basis that judges' decisions were grounded in purposive interpretations and objective standards, what justification could it offer?

IV. Dialogue Theory to the Rescue

Fortunately for the Court, an answer was in the making. While judges had been busy jettisoning key elements of their justificatory theory for judicial review, academic commentators sympathetic to the *Charter* enterprise had been labouring on alternative theories. In 1997, Peter Hogg and Allison Bushell published a paper defending the legitimacy of *Charter* review based on the claim that the *Charter* creates a dialogue between courts and legislatures.[22] According to the authors, *Charter* decisions were seldom determinative of issues, but merely set the stage for legislative responses that, more often than not, achieved the same objective in a different way. Thus the *Charter* did not undermine democratic decision-making, but merely encouraged public debate about rights issues as part of an interactive process — that they described as a "dialogue" — between courts and legislatures.

The radical nature of this theory is apparent from the fact that the authors

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[17] See *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [*Dunmore*] at paras. 19-29.

[18] See *R. v. Hess*, [1990] 2 S.C.R. 906 and *Tétreault-Gadoury v. Canada*, [1991] 2 S.C.R. 22.

[19] See *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 715-17.

[20] *Ibid.* at 695-702. See also *Miron v. Trudel*, [1995] 2 S.C.R 418 at para. 180.

[21] See *R. v. Sharpe*, [2001] 1 S.C.R. 45 at 111-127.

[22] 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.

proceeded from the assumption that judicial review is highly subjective. Noting that "judges have a great deal of discretion in 'interpreting' the law of the constitution," they freely conceded that "the process of interpretation inevitably remakes the constitution into the likeness favoured by judges."[23] This concession was important not only in accounting for the normative nature of judicial decision-making, but also in explaining why legislatures should be allowed to correct or modify judicial decisions. According to Hogg and Bushell's dialogue theory, democracy alone provides the rationale for public policy-making, and *Charter* decisions are merely another contribution to the democratic policy-making process.

Another feature of the theory is the shift in attitude it marks toward key provisions of the *Charter*, most notably sections 1 and 33. Section 1, which previously had been viewed with suspicion by *Charter* adherents because of its capacity to weaken the *Charter*'s commitment to liberal values, was now embraced for its tendency to strengthen the *Charter*'s commitment to democratic dialogue. This it does, according to Hogg and Bushell, not only by allowing governments to defend legislative provisions as being "reasonable limits" on *Charter* rights, but also by providing them opportunities to respond to adverse judicial decisions with legislative changes that propose alternative means to achieve the same objectives. Section 33, the override clause, which in earlier days had been shunned by *Charter* adherents as a provision that undermined judicial authority to protect fundamental rights and freedoms, was now welcomed as a provision that, by allowing legislatures the final say, fortified the legitimacy of judicial decisions enforcing those rights and freedoms.

Supreme Court judges did not waste any time adopting dialogue theory as their own. Speaking for the majority in the 1998 *Vriend v. Alberta* decision, Mr. Justice Iacobucci embraced the concept of dialogue put forward by Hogg and Bushell, noting that, "the final word in our constitutional structure is in fact left to the legislature and not the courts."[24] He went on to say:

> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and

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[23] *Ibid.* at 77.

[24] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 137 [*Vriend*].

> accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[25]

Given the tattered state of the Court's previous efforts to justify judicial review under the *Charter*, the fervour with which it seized upon dialogue theory is perhaps not surprising. Not only did dialogue theory provide a ready alternative, it also had the advantage of flexibility. Unlike liberal legalism, which is animated by a fixed set of norms concerning the role of judges, and the relationship between individuals and the state, dialogue theory is normatively agnostic. Thus, while judges can claim that their role in the dialogue is to make "reasoned and principled decisions,"[26] the theory does not dictate what the nature of those reasons and principles should be.

Yet how successful is dialogue theory in providing a justification for judicial review? And what are its implications for the *Charter* and Canadian democracy? It is to these questions that I will now turn.

V. A Dubious Dialogue

In some respects, dialogue theory certainly seems to provide a more satisfactory account than legal liberalism of judicial review under the *Charter*. Most obviously, dialogue theory better explains and accommodates key provisions of the *Charter*, especially sections 1 and 33. These provisions, by creating space for legislatures to enact laws that impose reasonable limits on or override *Charter* rights, sit more easily with a theory that envisages a significant role for legislatures in *Charter* decision-making.

Dialogue theory is also more compelling in its rejection of what Kent Roach refers to as "the myths of right answers"[27] — arguments that any one theory of judicial review will reliably produce the "right answer" in difficult constitutional cases — and in its assumption that judicial review is a value-laden and subjective exercise. In this way, the theory helps to demystify judicial decision-making and to encourage a fuller and franker debate about judicial review and its consequences.

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[25] *Ibid.* at para. 139.

[26] *Ibid.* at para. 136.

[27] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 225-38.

Furthermore, dialogue theory has greater capacity to allow courts to produce *Charter* decisions that are more socially progressive. Because the theory is not tied to nineteenth century liberal assumptions, it provides courts greater scope to impose positive obligations, to protect collective interests and to fashion creative remedies. The theory's influence in this regard is most evident in the *Vriend* case, in which the Supreme Court invoked the theory to support its decision to extend the reach of Alberta human rights legislation to prohibit employment discrimination on the basis of sexual orientation.[28] And the theory seems to have informed other recent developments, such as the Court's decision in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* to abandon the common law prohibition on secondary picketing,[29] and its decision in *Dunmore v. Ontario (A.G.)* to find that the legislature had a positive obligation to enable agricultural workers to organize under Ontario's labour relations regime.[30]

It would be a mistake, however, to exaggerate the significance of these decisions. While dialogue theory may provide some comfort to judges who wish to modify law on the margins, the values that underlie liberal legalism continue to exert a powerful guiding influence at the core of the *Charter* enterprise. There is no clearer confirmation of this than the Court's recent judgment in *Gosselin v. Quebec (Attorney General)*, in which the majority held that section 7 of the *Charter* did not place on government any positive obligation to protect the life, liberty or security of the person of a Quebec resident whose welfare benefits were reduced as a result of changes to that province's social assistance scheme.[31]

In other respects, I believe that dialogue theory is seriously deficient. While held out as a justification for judicial review under the *Charter*, dialogue theory mitigates more than it legitimates. By acknowledging the subjective nature of *Charter* decision-making, dialogue theory undercuts the legitimacy of judicial review as it seeks to explain why legislatures should be allowed to trump judicial decisions. And, in arguing that court decisions under the *Charter* are ultimately less influential than is sometimes supposed, dialogue theory calls into question why courts should be allowed to make such decisions in the first place.

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[28] *Vriend*, *supra* note 24.

[29] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 at para. 86 (in which the Court noted that its decision did not forestall legislative action).

[30] *Dunmore*, *supra* note 17 at para. 66 (in which the Court justified its remedy by referencing the legislature's ability to enact a statutory amendment).

[31] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84.

This is particularly so given that dialogue theory lacks normative content, and exerts no moral claim to support judges' involvement in *Charter* decision-making. Evidence of this can be found in both judicial opinions and academic writings that expound the theory. In recent cases, judges have taken to arguing amongst themselves as to whether particular *Charter* decisions are consistent with or contrary to the theory.[32] Academic proponents of dialogue theory disagree on whether it cuts in favour of judicial activism or restraint.[33] And the Supreme Court of Canada has relied upon the theory to support decisions that are both narrow and expansive.[34]

Another deficiency of dialogue theory is its tendency to discount the extent to which judicial decision-making under the *Charter* drives public policy-making in Canada. This happens in three ways. First, dialogue theorists tend to exaggerate the influence of legislatures in responding to judicial decisions. As others have pointed out, not all legislative responses are evidence of genuine dialogue,[35] and many are better characterized as reflections of, rather than responses to, judicial norms.[36]

Second, dialogue theorists play down the privileged position that courts occupy in *Charter* dialogues. Not only do courts get to speak in the rhetoric of rights, leaving legislatures to mouth the language of limits, but it is the judges whose

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[32] See *R. v. Hall*, 2002 SCC 64 [*Hall*], in which McLachlin C.J., on behalf of herself and four others, described the interplay between Parliament and the Court with respect to the bail provisions of the *Criminal Code* as "an excellent example of [constitutional] dialogue" (para. 43); while Iacobucci J., on behalf of himself and three others, claimed that this interaction "demonstrates how ... constitutional dialogue can break down" and accused the Chief Justice of having "transformed dialogue into abdication" (para. 127). See also *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*].

[33] Contrast P. Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80 Can. Bar Rev. 374 at 392, arguing that dialogue theory is best served by the courts producing "minimalist rulings" in order to leave "the greatest scope possible for potential responses by the legislative and executive branches," with Roach, *supra* note 27 at 154, referring to minimalist definitions of rights as "unfortunate," and arguing that constitutional dialogue permits legislatures to respond to "even bold and broad judicial rulings."

[34] Contrast *Vriend, supra* note 24 at 138, in which the Court invoked dialogue theory to justify extending the scope of Alberta human rights legislation, with *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 65-66, in which the Court invoked dialogue theory to justify its refusal to interpret the federal Radiocommunication Act so as to make it conform to the *Charter*. Contrast also the majority and minority judgments in *Hall, supra* note 32, and in *Sauvé, supra* note 32.

[35] C.P. Manfredi & J.B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513.

[36] F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 166.

interpretation governs the meaning of *Charter* rights and, absent a section 33 override, whether a given limit on those rights can be justified.[37]

Third, and perhaps most importantly, dialogue theory ignores the extent to which *Charter* rights shape public debate and influence public policy independently of any dialogue taking place.[38] In the age of the *Charter*, constitutional rights, and judicially conditioned assumptions about their interpretation, permeate every aspect of political life, from deciding how best to regulate the use of tobacco, to debating election finance reform, to determining the standards for legal liability in environmental offences.

VI. Conclusion

While I have concluded that dialogue theory represents an improvement over liberal legalism in some of its aspects, it fails in its central mission of legitimizing *Charter* review. The argument advanced in support of judicial review by Hogg and Bushell, and accepted by the Court, essentially boils down to the assertion that, under the *Charter*, legislatures can have the final say. The reason we should accept the legitimacy of judicial review, they tell us, is because the institution being reviewed can escape its consequences. Not only is this assertion questionable (for reasons I have explained above), it does not support the proposition with which it is associated. The fact that one institution can escape the consequences of another's actions may say something about the latter's efficacy, but it says nothing about its legitimacy.

Beyond this, there is a more troubling aspect to dialogue theory. In the past, theories that have conceded the subjective nature of judicial decision-making have drawn on that insight to question the legitimacy of judicial review or, at minimum,

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[37] See J. Webber, "Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)" in Wojciech Sadurski, ed., *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International, 2002) 61 at 97, noting that rights under a constitutional charter assume "a superordinate importance, resistant to balancing", and that any effort by legislators to influence their application is seen as "an illegitimate attempt to impair fundamental liberties." He further notes that in this context "section 33 becomes virtually unusable." See also Manfredi & Kelly, *supra*, note 35 at 523, pointing out that what Hogg and Bushell call *Charter* dialogues involve legislatures "subordinating themselves ... to the Court's interpretation of the *Charter*'s language."

[38] See J.L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 7-18.

to urge judicial deference to democratic institutions. Dialogue theory is different. While some of its proponents are less activist than others, none of them regard the theory as raising fundamental questions about the legitimacy of judicial review or the privileged position afforded courts in defining *Charter* values.

For this reason, the rise of dialogue theory carries with it a disturbing message about the declining value of democracy in Canada. Say what you will about liberal legalism, its acceptance of judicial interference with democratic decisions is based on its assumption that judicial review yields "right answers." By accepting judicial interference with democratic decisions in the absence of this assumption — indeed in the presence of an assumption to the contrary — dialogue theory shows itself more willing to compromise democracy than its theoretical predecessors.

I am not suggesting that there is no cause for despair about the current state of Canadian democracy. On the contrary, it seems to me that our parliamentary structures are horribly unrepresentative of, and unaccountable to, the citizens they are supposed to serve. But subjecting one undemocratic institution to review by another does not make either less so. And celebrating the interaction of the two as a "democratic dialogue" trivializes democracy and lends credence to those who argue that Canada's commitment to democratic values is on the wane.

So what lesson can be learned from more than twenty years of *Charter* justification? Hopefully it is not that we need to devote more time and energy to concocting yet another justificatory theory for judicial review. We live in a time when governments seem increasingly unable to respond to the needs of ordinary Canadians, political participation rates are falling, and Canada is suffering from what the Law Commission of Canada refers to as a "democratic malaise."[39] Rather than directing our energies to what Lawrence Tribe has called "the futile search for legitimacy,"[40] or looking for democracy where it does not reside, we would do better to try resuscitating it where it does, by seeking ways to reform and revitalize the faltering institutions of the democratic state.[41] A strong and effective democracy —

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[39] Canada, Law Commission of Canada, *Renewing Democracy: Debating Electoral Reform in Canada* (Ottawa: Law Commission of Canada, 2002) at 11.

[40] Lawrence H. Tribe, *Constitutional Choices* (Cambridge: Harvard University Press, 1985) at 3.

[41] For one view of what this might entail, see Andrew Petter, "Putting the 'D' in Social Democracy: The Need for a Re-energised State" (McGill Conference on the Future of Social Democracy, Institute for the Study of Canada, McGill University, 25 May 2001), online: McGill University < http://www.misc-iecm.mcgill.ca/socdem/petter.htm (date accessed: 24 March 2003).

one that is more inclusive of and responsive to citizens needs — would provide Canadians a better demonstration that their rights are being taken seriously than even the most compelling theory of judicial review.