

Commentary

THE DAY THE DIALOGUE DIED: A COMMENT ON *SAUVÉ V. CANADA*[©]

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In *Sauvé v. Canada* (2002) a sharply divided Supreme Court of Canada nullified the inmate disenfranchisement provision of the *Canada Elections Act*. One of the more important aspects of the majority decision by Chief Justice McLachlin is her refusal to let the concept of dialogue take her down the path of judicial deference. This commentary examines the chief justice's reasons for not taking this path and explores how these reasons reveal the limitations of the dialogue metaphor as originally articulated by Peter Hogg and Allison Bushell. The commentary concludes that any meaningful concept of legislative-judicial dialogue must recognize a coordinate legislative authority to interpret a constitution.

Dans l'affaire *Sauvé c. Canada* (2002), la Cour suprême du Canada, âprement partagée, rendait nulle la disposition de la *Loi électorale du Canada*, relative à l'incapacité électorale d'un détenu. L'un des volets les plus importants de la décision majoritaire de Mme McLachlin, juge en chef, est son refus de laisser le concept de dialogue l'emmener sur la voie de la retenue judiciaire. Ce commentaire examine les motifs pour lesquels la juge en chef n'a pas voulu suivre cette voie, et explore en quoi ces motifs révèlent les limitations de la métaphore du dialogue, comme l'ont à l'origine formulée Peter Hogg et Allison Bushell. Le commentaire conclut que tout concept significatif de dialogue législatif-judiciaire doit reconnaître une autorité législative coordonnée pour interpréter une constitution.

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On 31 October 2002 the Supreme Court of Canada delivered its decision in *Sauvé v. Canada (Chief Electoral Officer)*.¹ At issue was the constitutionality of section 1(e) of the *Canada Elections Act*,² which disenfranchised individuals “imprisoned in a correctional institution

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¹ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 [*Sauvé No. 2*].

² *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 51(e), as am. by S.C. 1993, c. 19, s. 23.

serving a sentence of two years or more.”³ In an unusually acrimonious set of opinions, the Court nullified the provision by a single vote. Two aspects of the judgment stand out in particular. The first aspect is Chief Justice Beverley McLachlin’s openly hostile attitude toward the state of U.S. jurisprudence on the question. She did not cite—even to reject—the controlling U.S. decision on the matter, and she dismissed the practice of criminal disenfranchisement in other jurisdictions in terms that questioned whether such jurisdictions could even be called democracies.⁴ The second aspect is her refusal to allow the concept of dialogue to take her down the path of judicial deference.

Both of these elements of the judgment merit closer analysis, but in this commentary I focus on the second: the concept of dialogue. Since 1999, either alone or in collaboration with James Kelly, I have been a participant in the debate generated by Peter W. Hogg and Allison A. Bushell’s original dialogue article “*Charter Dialogue*.”⁵ The essence of that participation has been to argue that the “*Charter Dialogue*” argument about legislative-judicial dialogue is normatively flawed and empirically problematic. I suggest in this commentary that these weaknesses are strikingly apparent in *Sauvé No. 2*, which effectively brought an end to the short history of the dialogue metaphor as a useful guide to judicial decision making. This commentary begins by describing the path that brought criminal disenfranchisement to the Supreme Court in *Sauvé No. 2*. It then turns its attention to a general discussion of the dialogue question, revisiting many of the arguments I have advanced in other contexts. Finally, it turns to the *Sauvé No. 2* judgment itself, in order to explore what it reveals about the limitations of the dialogue concept.

³ *Ibid.*, s. 51(e). In effect, this meant that only inmates of federal penitentiaries would be affected by the voting restriction, since sentences of less than two years are served in provincial prisons and/or jails.

⁴ *Supra* note 1 at 548, per McLachlin C.J.C. (“that not all self-proclaimed democracies adhere to principles of inclusiveness, equality and citizen participation, ... says little about what the Canadian vision of democracy embodied in the *Charter* permits”).

⁵ 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*”].

I. THE ROAD TO THE SUPREME COURT

In contrast to the United States, where the U.S. Supreme Court upheld the plenary power of states to disenfranchise convicted persons,⁶ prisoners' rights advocates in Canada during the 1980s and 1990s were successful in challenging provincial and federal voting restrictions. Constitutional challenges to the *Canada Elections Act* began in earnest in 1988 and produced mixed results until a Supreme Court decision in 1993.⁷ Prisoners' rights advocates achieved trial court victories in 1988 and 1991,⁸ but also lost one case in 1988.⁹ At the appellate level, they lost one case in 1988,¹⁰ but won two cases in 1992.¹¹ As a result, by the end of 1992, prisoners' rights advocates had secured decisions from the Ontario Court of Appeal and the Federal Court of Appeal declaring the relevant provisions of the *Canada Elections Act* unconstitutional. Indeed, the Ontario court refused even to acknowledge the legitimacy of the federal government's reasons for criminal disenfranchisement, and the federal appellate court found the restriction to be "arbitrary, unfair, and based on irrational considerations."¹²

On 27 May 1993 the Supreme Court delivered its unanimous judgment in the companion cases *Attorney General of Canada v. Sauvé* (*Sauvé No. 1*) and *The Queen v. Belczowski*.¹³ The Court found the lower court judgments in these cases so compelling as to require only a two-paragraph oral judgment affirming that the act disenfranchised prison inmates and thus violated the right to vote guaranteed by section 3 of the *Charter*. Parliament responded to the *Sauvé No. 1* decision by redrafting the *Canada Elections Act* to narrow the affected class of persons to inmates of federal penitentiaries who have been convicted of indictable offences. Predictably, prisoners' rights advocates reacted to

⁶ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁷ [1993] 2 S.C.R. 438.

⁸ *Badger v. Canada* (1988), 55 Man. R. (2d) 198 (Q.B.); *Belczowski v. Canada*, [1991] 3 F.C. 151 (T.D.) [*Belczowski* 1991].

⁹ *Sauvé v. Canada (Attorney General)* (1988), 66 O.R. (2d) 234 (H.C.J.).

¹⁰ *Badger v. Canada* (1988), 55 Man. R. (2d) 198 at 204-05 (C.A.).

¹¹ *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.) [*Belczowski* 1992]; *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.).

¹² *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-39 [*Oakes*], cited in *Belczowski* 1991, *supra* note 8 at 165.

¹³ *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 [*Sauvé No. 1*].

the amended legislation by filing new constitutional challenges to the *Canada Elections Act*. A challenge was once again filed on behalf of Richard Sauvé, while another was filed on behalf of a group of Aboriginal inmates in Manitoba led by Sheldon McCorrister.¹⁴ In addition to the standard voting rights arguments, these challenges also advanced two novel equality rights arguments.¹⁵ First, they argued that prisoners, as a group, constitute a discrete and insular minority that has been historically subjected to social, legal, and political discrimination. Second, they argued that the criminal justice system is riddled with systemic discrimination, as reflected in the disproportionate representation of Aboriginal Canadians in the federal inmate population.

In contrast to the *Sauvé No. 1* judgment, the trial court judgment in *Sauvé No. 2* recognized that there were important objectives underlying the inmate voting disqualification and that the disqualification had a rational connection to those objectives. More precisely, the trial judge concluded that inmate disenfranchisement could enhance civic responsibility and respect for the rule of law, as well as the retributive component of criminal sanctions. He found, however, that the disqualification was overly broad because of its blanket application to *all* inmates serving terms of two years or more. In his view, this was simply too blunt an instrument for achieving the federal government's objectives. Instead, he suggested that the decision to disenfranchise should be left to the discretion of sentencing judges, who could decide on a case-by-case basis whether the individual circumstances of the convicted offender warranted the additional sanction of disenfranchisement. In that way, he argued, the disqualification would affect only those inmates who actually deserved to have their right to vote suspended.

The federal government appealed this judgment to the Federal Court of Appeal, which issued its decision on 21 October 1999. Justice Allen Linden introduced his majority judgment by observing that

[t]his case is another episode in the continuing dialogue between courts and legislatures on the issue of prisoner voting. In 1992 and 1993, two appeal courts and the Supreme

¹⁴ *Sauvé v. Canada (Chief Electoral Officer)* (1995), 132 D.L.R. (4th) 136 (F.C.T.D).

¹⁵ Although an equality rights argument had been raised (and rejected) in *Belczowski* 1991, *supra* note 8 at 162, the arguments presented in this new litigation were far more systematic and sophisticated.

Court of Canada held that a blanket disqualification of prisoners from voting, contained in earlier legislation which was challenged, violated section 3 of the *Charter* and could not be saved by section 1 of the *Charter*. Parliament responded to this judicial advice by enacting legislation aimed at accomplishing part of its objectives while complying with the *Charter*.¹⁶

After noting that the federal government had conceded a violation of section 3, and providing a pre-*Charter* and post-*Charter* history of prisoner disenfranchisement, Justice Linden emphasized the need for “close attention” to the particular context of the case in determining whether the limitation on voting rights was proportionate to the government’s objectives.¹⁷

Justice Linden identified two contextual factors of some importance to the case: the statute’s relationship to the regulation of the electoral process and the exercise of the criminal law power. In both of these areas, Justice Linden stated that Parliament is entitled to a relatively high level of judicial deference.¹⁸ In practice, this meant that “Parliament need not examine the finest details of each and every option open to them,” nor “choose the absolutely least intrusive means of achieving a legislative goal.”¹⁹ Justice Linden, along with Chief Justice Julius Isaac, thus rejected the trial judge’s view that Parliament should have enacted an even narrower form of inmate disenfranchisement in which the decision would be left to the sentencing judge. In Justice Linden’s judgment, the objectives of the statute were simply too complex for the statute to be treated merely as a sentencing provision:

This prohibition is a hybrid which possesses elements of the criminal sanction as well as elements of civil disability based on electoral law. While it is linked to the exercise of the criminal law power, the provision also pursues valid electoral goals. With respect, the Trial Judge impoverished the provision when he reasoned that it was merely a supplementary sentencing provision. Parliament, basing itself on electoral policy, is entitled to add civil consequences to the criminal sanction in subtle, multi-dimensional ways.²⁰

¹⁶ *Sauvé v. Canada*, [2000] 2 F.C. 117 at 148 (C.A.).

¹⁷ *Ibid.* at 162.

¹⁸ *Ibid.* at 173-74.

¹⁹ *Ibid.* at 178.

²⁰ *Ibid.* at 182.

In the final analysis, therefore, Justice Linden reversed the trial court and found section 51(e) to be a reasonable limit on the right to vote.

By invoking the concept of dialogue in the first paragraph of his judgment, Justice Linden was effectively issuing a challenge to the Supreme Court: either let the legislation stand or rule definitively that Parliament may not, for any reason or by any means, disenfranchise inmates. Before turning to the Court's response to this challenge, I offer my own summary and perspective on the dialogue question.

II. THE DIALOGUE QUESTION

In 1998, Supreme Court Justice Frank Iacobucci chastised those who suggested that Canadian courts are “wrongfully usurping the role of the legislatures” for having misunderstood “what took place and what was intended when our country adopted the *Charter*.”²¹ Rather than posing a danger to “democratic values,” as these critics and commentators alleged, Justice Iacobucci ruled that the *Charter* promotes a “dialogue between and accountability of each of the branches” that has “the effect of enhancing the democratic process, not denying it.”²² In making this assertion, Justice Iacobucci gave the Court's seal of approval to the idea that the *Charter*'s structure provides an ingenious solution to the problem of judicial supremacy. According to this “dialogue metaphor,” or theory of “dialogic constitutionalism,” the presence of a reasonable limits clause (section 1) and legislative override clause (section 33), in particular, ensure that courts cannot use “rights talk” to have the last word on public policy.

The dialogue metaphor to which Justice Iacobucci alluded had its origins, of course, in the “*Charter* Dialogue” article that is the subject of this special issue of the Osgoode Hall Law Journal.²³ Although the “*Charter* Dialogue” article is as well known as any in recent Canadian legal scholarship, it is nevertheless useful to summarize my understanding of its argument. The article's purpose is to confront criticisms of the *Charter* that, the authors claimed, are “based on an

²¹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 563 [*Vriend*].

²² *Ibid.* at 566.

²³ *Supra* note 5.

objection to the legitimacy of judicial review in a democratic society.”²⁴ The *Charter* dialogue strategy was to pursue an “intriguing idea ... raised in the literature ... [but] ... left largely unexplored. That is the notion that judicial review is part of a ‘dialogue’ between the judges and legislatures.”²⁵ Although there are some instances where dialogue is precluded,²⁶ Hogg and Bushell argued that structural features of the *Charter* ensure that the “normal situation” is one in which “the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process.”²⁷

The structural features to which Hogg and Bushell refer, and which Justice Iacobucci affirmed, are fourfold.²⁸ First, section 33 gives legislatures the ultimate power to reverse judicial interpretations of the *Charter*. Second, section 1 allows legislatures to implement and defend alternative means of achieving important objectives following judicial nullification. Third, some rights are internally qualified and therefore do not constitute an absolute prohibition on certain actions. Finally, the *Charter* contemplates a variety of remedial measures short of nullification. Taken as a whole, these features of the *Charter* mean that the *Charter* “can act as a catalyst for a two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms, but ... rarely raises an absolute barrier to the wishes of the democratic institutions.”²⁹ To Hogg and Bushell, the theory and practice of dialogue meant “that the critique of the *Charter* based on democratic legitimacy cannot be sustained.”³⁰

As Hogg and Bushell recognized, the idea of dialogue in constitutional interpretation was not particularly novel.³¹ So why did their particular version of the argument attract Justice Iacobucci’s attention? The answer to this question lies in their empirical analysis of “legislative sequels,” which they defined operationally as “some action

²⁴ *Ibid.* at 77.

²⁵ *Ibid.* at 79.

²⁶ *Ibid.* at 92-96.

²⁷ *Ibid.* at 80.

²⁸ *Ibid.* at 82-92. See also *Vriend*, *supra* note 21 at 565.

²⁹ *Supra* note 5 at 81.

³⁰ *Ibid.* at 105.

³¹ *Ibid.* at 79, n. 12.

by the competent legislative body” following judicial nullification.³² Examining sixty-six cases in which a court struck down legislation on *Charter* grounds, they found that 80 per cent of those decisions had evoked a legislative response.³³ In addition, the exercise of judicial review encouraged legislatures to engage in “*Charter*-speak” by incorporating the language of *Charter* review (“pressing and substantial objectives” and “reasonable limits”) into statutory preambles.³⁴ Finally, they found dialogue in judicial deference, as legislatures identified flaws in statutes that required correction in the process of defending them, even where courts did not detect a constitutional violation.³⁵ In some ways, Hogg and Bushell suggested that Canadian courts had fulfilled the *Charter*’s promise of transforming “rights-talk” into “democratic conversation.”³⁶ Where others had discussed dialogue as an abstract possibility, they claimed it had become a concrete reality.

What does dialogue mean, then, in practice? As alluded to above, Hogg and Bushell offered two very different definitions of dialogue in their original article. First, they suggested that “[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.”³⁷ Where this condition is met, they continued, “any concern about the legitimacy of judicial review is greatly diminished.”³⁸ A few pages later, in setting out their empirical test of dialogue, they indicated that “the ‘dialogue’ to which this article refers consists of those cases in which a judicial decision striking down a law on *Charter* grounds is followed by *some action* by the competent legislative body.”³⁹

As the Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright contribution to this special issue of the Osgoode Hall Law

³² *Ibid.* at 82, 98.

³³ *Ibid.* at 97.

³⁴ *Ibid.* at 101-04.

³⁵ *Ibid.* at 104-05. See *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

³⁶ See Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 184-220. Hutchinson, of course, was highly skeptical about whether the *Charter* could achieve this transformation.

³⁷ *Supra* note 5 at 79 [emphasis added].

³⁸ *Ibid.* at 80.

³⁹ *Ibid.* at 82 [emphasis added].

Journal notes, Kelly and I have argued that this definitional shift is problematic.⁴⁰ The practical question, then, is about what it means for a legislature to “reverse, modify, or avoid” a *Charter* nullification of legislation. The authors contend that we misread their suggestion that the possibility of reversal, modification, or avoidance of judicial decisions is a *sufficient* condition for dialogue as that it is also a *necessary* condition for it. They reiterate that their definition of dialogue is, and always has been, “some action” by the legislature following judicial nullification of a law. I do not deny that this is their definition, but I do question whether this definition is operationally meaningful enough to test their decisions about dialogue empirically. The range of phenomena encompassed by the term “some action” is so broad as to be analytically problematic. Under this definition, the only time dialogue does not occur is when legislatures do not act at all after judicial nullification. Yet, if every response is dialogue, then the argument becomes tautological: dialogue occurs when legislatures respond, and when legislatures respond there is dialogue. For social scientists, a narrower definition of dialogue in which one of reversal, modification, or avoidance is both a necessary and a sufficient condition is more useful analytically. The practical question, then, is what it means for a legislature to “reverse, modify, or avoid” judicial nullification of legislation on *Charter* grounds.

Legislative reversal of a *Charter* decision is the most aggressive response to judicial nullification, and it entails an outright rejection of a court’s basic constitutional interpretation that there is a conflict between the impugned action and the *Charter*. I agree with the authors that legislative reversal involves a legislature’s acting on an interpretation of the *Charter* that conflicts with that given by the judiciary.⁴¹ I also agree that the principal device for reversal in this sense is section 33. However, for reasons explored elsewhere, legislative reversal in this sense is nearly non-existent.⁴² A modification response to judicial nullification involves legislative acceptance of a court’s basic constitutional holding, but it

⁴⁰ Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1 [“*Charter* Dialogue Revisited”].

⁴¹ *Ibid.* at 33.

⁴² Christopher P. Manfredi, “Judicial Power and the *Charter*: Reflections on the Activism Debate” (2004) 53 U.N.B.L.J. 185.

takes advantage of the opportunity provided by the usual practice in *Charter* adjudication of combining judicial affirmation of legislative objectives with constitutional concerns about the means selected to pursue those objectives. This is, in fact, the sense in which Justice Linden invoked the dialogue metaphor to describe the relationship between section 51(e) and earlier judicial decisions on inmate disenfranchisement.

Of the three possible dialogic responses available to legislatures, avoidance is the most difficult to define. In one sense, it can refer to the obvious point that legislatures can *always* avoid judicial nullification by persuading courts that legislation does not violate the *Charter*. As it turns out, legislatures are actually quite successful at “dialogue through litigation” in about two out of every three *Charter* cases decided by the Supreme Court.⁴³ The decision to appeal a lower court loss, and the process of defending legislation in appellate courts, should thus be understood as an important aspect of judicial-legislative dialogue; indeed, it is the most direct form of dialogue. But are there techniques of avoidance available to legislatures when the Supreme Court finally strikes down legislation? One obvious form of avoidance for the legislature is simply to ignore the decision. Legislatures might also avoid *Charter* decisions by withdrawing from the relevant policy area. However legislatures approach avoidance, it can only be considered dialogic if it leaves the pre-decision policy status quo unchanged or produces a new status quo that differs significantly from the one approved by the Court. Legislative inaction that results in the implementation of the Court’s preferred policy position by default does not really satisfy the requirements of dialogue.

To many observers of the *Charter*, especially outside of Canada, the dialogue metaphor describes a mechanism through which Canada has successfully implemented a constitutionally entrenched, judicially enforceable bill of rights that simultaneously avoids the democratic threat posed by judicial supremacy. Yet, there may be reasons to be skeptical about the success of this mechanism. In particular, the *Charter*’s structure—especially section 1—may not be as robust a guarantee against judicial supremacy as the dialogue theorists suggest.

⁴³ Matthew Hennigar, “Government Appeals as ‘Dialogue’: Expanding a Contemporary Debate” (Paper presented to the Canadian Political Science Association Annual Conference, 30 May 2003) [unpublished].

Section 1 of the *Charter*, which provides that the rights and freedoms set out in the document are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” recognizes that constitutionally guaranteed rights cannot be absolute in any functioning society. In this respect, section 1 resembles the “giving reasons” requirement that animates judicial review of administrative decision making in the United States and other jurisdictions. Under this requirement, rule-making discretion is mildly constrained by the obligation to “inform the citizens of what [decision makers] are doing and why.”⁴⁴

However, as Martin Shapiro argues, it is very difficult to prevent the “giving reasons” requirement from becoming a substantive standard of review. The reason for this “inevitable and peculiarly easy” conversion, according to Shapiro, is that the requirement to give reasons forces decision makers “to give a fairly full account of the factual basis for [their] decisions, making it far easier for judges to second-guess those decisions.”⁴⁵ It is relatively easy, Shapiro argues, for courts to move from “did not give reasons” to “did not give *good* reasons” to “did not give *good enough* reasons.” Ultimately, the distinction between “good enough reasons” and “good enough policy” breaks down. “Indeed,” Shapiro concludes, “in rejecting various offered reasons, a court can usually signal what substantive policy it would accept.”⁴⁶ In fact, one can see this conversion in the Supreme Court’s interpretation and application of the “reasonable limits” requirement of section 1.

The Court offered its first definitive interpretation of this term in *R. v. Oakes*.⁴⁷ The *Oakes* test contains two elements. First, the government seeking to defend the limit in question must show that its legislative objective relates to “concerns that are pressing and substantial in a free and democratic society.”⁴⁸ Second, the limit itself must be proportionate to the legislative objective, which courts determine according to a three-pronged proportionality test. To pass the

⁴⁴ Martin Shapiro, “The Giving Reasons Requirement” in Martin Shapiro & Alec Stone Sweet, eds., *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002) 228 at 230.

⁴⁵ *Ibid.* at 235.

⁴⁶ *Ibid.* at 248.

⁴⁷ *Oakes*, *supra* note 12 at 138-40.

⁴⁸ *Ibid.* at 138.

first prong of this test, the limit must be rationally connected to the legislative objective. Next, the government must show that, by impairing the relevant right or freedom as little as possible, the limit in question represents the least restrictive means of achieving this objective. Finally, it must be clear that the collective benefits of the limitation outweigh its individual costs. Although superficially procedural, proportionality and minimal impairment analyses represent strong forms of substantive review. This is because they imply that a court can envision a better law than the one under review, in the sense that the court's alternative would achieve legislative goals at less cost to competing rights claims.⁴⁹

III. *SAUVÉ NO. 2* AND THE LIMITS OF DIALOGUE

Although the Federal Court of Appeal considered *Sauvé No. 2* to be a prime example of dialogue at work, the case actually offers a good illustration of the limitations of the dialogue metaphor as initially articulated by Hogg and Bushell. For example, two of the key structural components of dialogue are missing. First, section 3 of the *Charter* is written in absolute rather than qualified terms. Unlike the right to be free from “unreasonable” search or seizure, for example, the right to vote is an either/or proposition. Thus, there is no opportunity for legislatures to avoid judicial nullification by entering into a dialogue with courts in litigation about whether the right has, in fact, been infringed. Indeed, in one of the earlier inmate voting rights cases, a different panel of the Federal Court of Appeal described section 3 as “straightforward,” “unambiguous,” and in need of “no interpretation at all.”⁵⁰ It is little wonder, then, that the government quickly conceded the rights violation in *Sauvé No. 2*.

The second missing structural component is that section 3 is exempt from the notwithstanding clause of section 33, thereby precluding direct legislative reversal of judicial nullification. Chief Justice McLachlin interpreted this as evidence of the “special importance” accorded to the right to vote by the *Charter*'s framers.⁵¹ Moreover, this exemption from section 33 argued for applying a stringent standard of justification for inmate disenfranchisement rather

⁴⁹ *Supra* note 44 at 253.

⁵⁰ *Belczowski* 1992, *supra* note 11 at 452.

⁵¹ *Supra* note 1 at 536.

than for adopting an attitude of judicial deference. Ironically, since this exemption leaves the last word on voting rights to courts and precludes legislative review of judicial review—contrary to Justice Iacobucci’s understanding of dialogue in *Vriend*⁵²—Chief Justice McLachlin could just as easily have interpreted the non-applicability of section 33 as a reason for judicial caution. Indeed, the dialogue metaphor would seem to support the view that judicial deference should *increase* as the potential for dialogue decreases.

To be sure, perhaps the most central structural component of dialogue—section 1 and the reasonable limits justification—was still present in *Sauvé No. 2*. Yet, the Court’s ultimate resolution of the inmate disenfranchisement question illustrates the problematic—even arbitrary—nature of dialogue, even under section 1. Writing for a narrow five-justice majority, Chief Justice McLachlin was dismissive of the Federal Court of Appeal’s call to dialogue as a justification for deference. According to her, the healthy and important promotion of dialogue between the legislature and the courts should not be debased to a rule of “if at first you don’t succeed, try, try again.”⁵³ The “you” to which the Chief Justice referred was obviously the legislature, and in so referring she was confirming the privileged position of the judiciary in the dialogic exchange by virtue of its power to terminate the dialogue at a moment of its choosing. This was precisely what she decided to do with respect to inmate disenfranchisement, by structuring her judgment in such a way as to preclude any further legislative response to judicial nullification short of formal constitutional amendment.

The capacity of section 1 to serve as an instrument of dialogue is limited to cases where judicial nullification is based on the “least restrictive means” prong of the *Oakes* proportionality test. In these cases, governments can re-enact their legislative objectives through ordinary legislation, albeit within new parameters set by the court. However, if legislation is nullified because its objectives are determined not to be “pressing or substantial,” or because the court fails to find a rational connection between the means and ends, then legislatures are left with severely limited or non-existent response options. In *Sauvé No. 1*, the Supreme Court avoided this outcome by ignoring these

⁵² *Supra* note 21 at 565-66.

⁵³ *Supra* note 1 at 538.

components of the *Oakes* test and simply focusing on the fact that section 51(e) was overly broad to meet the minimal impairment component of the proportionality test.⁵⁴ Similarly, the trial court in *Sauvé No. 2* accepted both the government's objectives and the rational connection between inmate disenfranchisement and the achievement of those objectives. Chief Justice McLachlin, however, took a very different view of these questions in the majority judgment.

The Chief Justice began the judgment by characterizing the dispute as one concerning “core democratic rights” rather than “competing social philosophies.”⁵⁵ The judicial role under the *Charter*, she continued, is to uphold and maintain “an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good.”⁵⁶ Courts must therefore be “vigilant in fulfilling their constitutional duty to protect the integrity of this system” when “legislative choices threaten to undermine the foundations of the participatory democracy.”⁵⁷ In contrast to the courts below, Chief Justice McLachlin was highly skeptical of the reasons underlying the legislative choice to disenfranchise penitentiary inmates. In her view, these reasons were not connected to the correction of any “specific problem or concern.”⁵⁸

Instead, “vague and symbolic” objectives—enhancing civic responsibility, respect for the rule of law, and the general purposes of criminal sentencing—drove the decision to disenfranchise inmates. Such “broad and abstract” objectives, the Chief Justice argued, are susceptible to “distortion and manipulation.”⁵⁹ After articulating several reasons why such suspect objectives should not be considered pressing and substantial, the Chief Justice ultimately decided that, “despite the abstract nature of the government's objectives and the rather thin basis upon which they rest, prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government's objectives outright.”⁶⁰ Inmate disenfranchisement thus survived the first

⁵⁴ *Supra* note 13.

⁵⁵ *Supra* note 1 at 536-37.

⁵⁶ *Ibid.* at 537.

⁵⁷ *Ibid.* at 537-38.

⁵⁸ *Ibid.* at 540.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at 542.

step in the *Oakes* test with the weakest possible judicial endorsement. However, an already skeptical Chief Justice McLachlin became explicitly—even if respectfully—hostile when she turned to the rational connection prong of the proportionality test.

The Chief Justice stated the government’s burden succinctly and directly: it had to demonstrate, by evidence or logic, that inmate disenfranchisement would enhance respect for the law and impose legitimate punishment.⁶¹ She identified three theories that might serve the government’s purpose in this respect: first, that inmate disenfranchisement educates prisoners and the general public about the importance of respect for the law; second, that inmate voting demeans the political system; and third, that disenfranchisement is a legitimate form of punishment for any offence. She dismissed the first theory as counterproductive. Relying on logic rather than evidence, she concluded that inmate disenfranchisement communicates messages that tend to undermine, rather than enhance, respect for law and democracy. Indeed, she characterized the first theory as a “novel” one “that would permit elected representatives to disenfranchise a segment of the population.”⁶² This theory, she declared, has “no place in a democracy built upon principles of inclusiveness, equality, and citizen participation.”⁶³ Similarly, she rejected the second theory as being based on the “ancient and obsolete” idea that categories of persons could be disenfranchised because of “moral unworthiness.”⁶⁴ This idea, she stressed, “is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*.”⁶⁵

The government’s last theory fared no better in Chief Justice McLachlin’s judgment. In her view, the argument that disenfranchisement was a legitimate component of the state’s punitive arsenal failed for two reasons. First, she was not convinced that denying constitutional rights unrelated to legal rights could be used as punishment. Second, she found that inmate disenfranchisement was arbitrary and failed to promote any of the acceptable purposes of

⁶¹ *Ibid.* at 543.

⁶² *Ibid.* at 550.

⁶³ *Ibid.* at 548.

⁶⁴ *Ibid.* at 550.

⁶⁵ *Ibid.*

criminal sanctions (*i.e.* deterrence, rehabilitation, retribution, and denunciation). After stripping away the “façade of rhetoric” from this third theory, she found the claim that “criminals are people who have broken society’s norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights” to be untenable.⁶⁶ The Chief Justice was unconvinced and she simply rejected the argument that inmate disenfranchisement advanced lawful penal objectives.

Chief Justice McLachlin’s judgment elicited a particularly sharp dissent from Justice Charles Gonthier, which was supported by Justices Claire L’Heureux-Dubé, John Major, and Michel Bastarache. Justice Gonthier described his disagreement with the Chief Justice as lying at a more fundamental level than simply the immediate question of inmate disenfranchisement. In his view, the case rested “on philosophical, political and social considerations which are not capable of ‘scientific proof.’”⁶⁷ There was, in other words, no compelling reason to prefer her view that temporary disenfranchisement of inmates injures the rule of law, democracy, and the right to vote over his view that the Court should defer “to Parliament’s reasonable view that it strengthens these same features of Canadian society.”⁶⁸ To do otherwise, he argued, would be to make judicial preferences the principal criterion for judgment under section 1 and to ignore the fact that “neither the courts nor Parliament hold a monopoly on the determination of values.”⁶⁹

Why did Justice Gonthier consider it reasonable for Parliament to conclude that inmate disenfranchisement might strengthen Canadian democracy? He began by stressing the moral purposes underlying criminal punishment, and the fact that Parliament had linked inmate disenfranchisement to serious criminal conduct. Where Chief Justice McLachlin saw disenfranchisement as an attack on the dignity and worth of inmates, Justice Gonthier saw it as a recognition, through punishment, of the rationality and autonomy of serious criminal offenders. Moreover, he viewed such temporary disenfranchisement as “morally educative” for inmates and the general population alike

⁶⁶ *Ibid.* at 553.

⁶⁷ *Ibid.* at 558.

⁶⁸ *Ibid.* at 559.

⁶⁹ *Ibid.* at 577.

because it “reiterates society’s commitment to the basic moral values which underpin the *Criminal Code*.”⁷⁰ The social contract underlying the denunciation of crime, he continued, “relies upon the acceptance of the rule of law and civic responsibility and on society’s need to promote the same;” to permit serious offenders to vote would undermine those two values.⁷¹ Finally, Justice Gonthier’s review of both provincial and foreign practices—including American practices—indicated that Canada’s statute fell within the wide range of existing international approaches to inmate disenfranchisement.⁷²

Needless to say, Justice Gonthier’s *Oakes* analysis generated a very different result from the one produced by Chief Justice McLachlin. In particular, he offered a more flexible understanding of the proof necessary to establish a rational connection between means and ends. Citing *RJR-MacDonald*, Justice Gonthier understood that a rational connection could be established through “reason, logic, or simply common sense.”⁷³ In the absence of an empirically demonstrable causal relationship—in either direction—between inmate disenfranchisement and its legislative objectives, Justice Gonthier looked to whether those objectives “are at least logically furthered” by Parliament’s chosen policy.⁷⁴ He answered this question in the affirmative, and reacted harshly to Chief Justice McLachlin’s opposite view by accusing her of simply replacing “one reasonable position with another” and improperly “dismissing the government’s position as ‘unhelpful.’”⁷⁵

Chief Justice McLachlin’s view that dialogue should not be transformed into a doctrine of judicial deference seems to have been influenced by an equally sharp dissent by Justice Iacobucci in *R. v. Hall*,⁷⁶ decided only three weeks before *Sauvé No. 2*. At issue in *Hall* was the constitutionality of bail provisions enacted in response to a negative judicial decision. Led by Chief Justice McLachlin in a 5:4 decision, the majority found part of the new provisions unconstitutionally vague, but upheld another part as constituting an

⁷⁰ *Ibid.* at 561-62.

⁷¹ *Ibid.* at 583-84.

⁷² *Ibid.* at 586-94.

⁷³ *Ibid.* at 599, citing *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 352.

⁷⁴ *Ibid.* at 600.

⁷⁵ *Ibid.* at 603, Gonthier J., citing McLachlin C.J.C. at 546.

⁷⁶ [2002] 3 S.C.R. 309 at 334 [*Hall*].

intelligible standard. In defending deference on this second point, Chief Justice McLachlin invoked the dialogue metaphor, arguing that *Hall* “is an excellent example of such dialogue.”⁷⁷ Justice Iacobucci reacted strongly, accusing the Chief Justice of transforming “dialogue into abdication.” “The mere fact that Parliament has responded to a constitutional decision of this Court,” he argued, “is no reason to defer to that response where it does not demonstrate a proper recognition of the constitutional requirements imposed by that decision.”⁷⁸ Chief Justice McLachlin was apparently persuaded by this argument, having essentially adopted Justice Iacobucci’s activist interpretation of dialogue in *Sauvé No. 2*, just as Justice Gonthier’s dissent in *Sauvé No. 2* adopted the deferential interpretation for which Justice Iacobucci had been criticized in *Hall*.

The McLachlin-Gonthier dispute in *Sauvé No. 2*, which was quite sharp by Canadian standards, reveals the limitations of dialogue as a formula for overcoming the inherent conflict between constitutional judicial review and democracy. Like the interpretation of “reasonable limits,” the meaning of dialogue can vary from justice to justice. While some justices—like Justice Iacobucci in *Vriend* and *Hall* and Chief Justice McLachlin in *Sauvé No. 2*—may view it as a licence for aggressive judicial review, others—like Justice Gonthier in *Sauvé No. 2* and Chief Justice McLachlin in *Hall*—may view it as a rationale for judicial deference. To return to the challenge that Justice Linden posed in the Federal Court of Appeal’s decision in *Sauvé No. 2*, a bare majority of the Court—and certainly the Chief Justice—decided that the time had come to end the conversation about criminal disenfranchisement. In this instance, the Court decided to have the last word, and it had at its disposal the means to do so.

IV. CONCLUDING REMARKS

The serious attention given to the “*Charter Dialogue*” article by both scholars and judges is testimony to the problematic relationship between rights-based judicial review and liberal constitutionalism. On the one hand, rights-based judicial review is a positive element of liberal democracy because it allows courts to perform the important counter-

⁷⁷ *Ibid.* at 333-34.

⁷⁸ *Ibid.* at 370.

majoritarian function of safeguarding individual rights and liberties by enforcing constitutional limits on legislative and executive power. On the other hand, rights-based judicial review taken to its extreme becomes an anti-democratic power wielded by courts to alter the fundamental character of a nation's constitution without significant popular participation or even public awareness. This tension exists even in Canada, where constitutional supremacy and judicial authority to nullify legislation is explicitly provided for in the constitutional text.⁷⁹

Elsewhere, I have described this relationship as the “paradox of liberal constitutionalism,” which can be understood in the following way: the purpose of a constitution is to constrain political power; rights-based judicial review is a form of political power, and therefore constitutions must constrain rights-based judicial review. The paradox is this: if rights-based judicial review evolves such that political power in its judicial guise is limited by a constitution whose meaning courts alone define, then judicial power is no longer itself constrained by constitutional limits.⁸⁰ The “dialogue metaphor” in essence suggested a way out of this paradox by arguing that constitutional supremacy had not degenerated into judicial supremacy in Canada. This is undoubtedly the largest point of contention between my position and the one articulated in the “*Charter Dialogue Revisited*” article. Contrary to their position,⁸¹ I believe that legislatures *do* have coordinate authority to interpret the constitution and that this authority is explicitly recognized in the notwithstanding clause of section 33. As I have been arguing since the first edition of *Judicial Power and the Charter* in 1993, when understood and used properly, section 33 “can have a positive impact by encouraging a more politically vital discourse on the meaning of rights.”⁸² What we need to encourage is real dialogue about what rights mean, rather than automatic deference to the meaning offered by a single political institution.

⁷⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s.52.

⁸⁰ Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Oxford: Oxford University Press, 2001) at 22.

⁸¹ *Supra* note 40 at 30-31.

⁸² Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland & Stewart, 1993) at 207-08. I repeated this point in the second edition, *supra* note 80 at 191.