exercised more stringent. Once again, the general amending formula would have to be applied in order to do this.

Instead of applying for a maximum of five years, the clause could be limited to three years. As well, the present situation is that a majority in Parliament is sufficient to invoke it. We might change this to require a two-thirds majority for that purpose. And while at present the five-year period for which an override applies may be renewed indefinitely, we could limit the possibility of reusing the clause. Other variants can also be imagined.

V. CONCLUSION

Twenty years ago, the *Canadian Charter of Rights and Freedoms* came into force. So far, the hopes that the Charter inspired have not been disappointed. By applying a liberal and generous, dare we say dynamic, interpretation of the Charter, the Supreme Court has consigned the limited scope given to the *Canadian Bill of Rights* to the shadows of history.

In so doing, the Court has breathed life into a fundamentally important document, one that is the pride of Canadians, an inspiration to other democratic countries, and an example throughout the world.

HOW DEMOCRATIC IS THE CHARTER? AND DOES IT MATTER?*

Rainer Knopff**

I. INTRODUCTION

How democratic is the Charter? Not very. Does it matter? Not much. This paper addresses five democratic defences of judicial power under the Charter:[1] (1) pre-commitment, (2) public responsiveness, (3) democracy reinforcement, (4) democracy-as-more-than-simple-majoritarianism, and (5) democratic dialogue. In my view, all of these defences are flawed, but this in itself should occasion neither celebration among the Charter's critics nor despair among its defenders. The real arguments for and against the Charter lie elsewhere.

II. PRE-COMMITMENT

According to McLachlin J., the worldwide growth of judicially enforceable bills of rights reflects the fact that "no longer is democracy synonymous with naked populism."[2] Naked populism is apparently what democracy meant before bills of rights, and what we would still have in Canada had we not adopted the Charter. On its face this is a startling statement. Our pre-Charter experience was

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** Professor, Department of Political Science, University of Calgary.

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

2 B. McLachlin, "Courts, Legislatures, and Executives in the Post-Charter Era," (1999) 20 Policy Options, at 42.

certainly not dominated by initiatives, referenda, recalls, and other devices of direct democracy generally associated with populism. To the contrary, representative government — which some of us have been defending against both populism and the politics of rights[3] — has always been at the core of our political system. The "naked populism" that McLachlin J. attributes to our pre-Charter situation must thus refer to the fact that even representative legislatures can respond too readily to the popular will. Not that democratic responsiveness is generally a bad thing. In fact, we want and need a good deal of it. "The will of the people as expressed through their elected representatives," says McLachlin J., "must be paramount." Nevertheless, that will is properly "limited by the need to conform to certain basic norms."[4] Simply put, majority opinion, when it becomes too self-interested and impassioned, can be dangerous to the legitimate rights of individuals and minorities. In a sense, McLachlin J. is invoking the well-known problem of majority tyranny and sees judicially enforceable bills of rights as the worldwide consensus remedy.

On reflection, however, "tyranny of the majority" is probably not the best way to describe the danger to which bills of rights are thought to respond. No one believes that robed judges waving the "parchment barriers" of a bill of rights could stop a truly tyrannical majority — one that might institute slavery or genocide, for example.[5] The danger McLachlin J. and others have in mind is more accurately described as one of well-meaning but self-deluded majorities, not tyrannical ones (at least not ones that are tyrannical by instinct or intention). This understanding animates the argument that the Charter represents a democratic majority's pre-commitment to high ideals from which it will be tempted to stray unless a more rational "trustee" of that pre-commitment — the judiciary — can remind the majority of its better instincts, calling it to its senses, as it were.

The Supreme Court cast the Charter in precisely this light in *Vriend*:

[3] See, for example, R. Knopff, "Populism and the Politics of Rights: The Dual Attack on Representative Democracy" (1998) 31 Can. J. of Pol. Sc. 683.

[4] B. McLachlin, "Courts, Legislatures, and Executives," *supra*, note 2, at 42.

[5] F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000), at 35-37.

> [O]ur *Charter's* introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.
>
> So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.[6]

The Charter here appears as a way not of countering the democratic will of the majority, but of more effectively implementing it. The public will is presented as existing on two levels: the deeper more profound level of pre-commitment represented by the Charter, and the more immediate day-to-day will on particular issues, which may be clouded in ways that undermine the pre-commitment. Judicial trustees stop the nearsighted missteps a majority is tempted to take precisely because they can appeal to that majority's deeper and better commitments. As Barry Strayer, a key drafter of the Charter, has put it, judicial review "is not a matter of judges imposing their will in conflict with the popular will; it is a matter of judges forcibly reminding the public and its elected representatives that some immediately attractive goal is in conflict with more pervasive and durable norms previously accepted by this society."[7] This resolves the apparent contradiction between McLachlin J.'s commitment to the "paramount" will of the people and the need for "certain basic norms" to limit that will. The limiting norms are themselves the deepest level of the "paramount" public will. The people, with the assistance of the court, limit themselves.

One cannot deny the surface plausibility of the pre-commitment argument. It is confirmed by what we daily experience as individuals. We all fall short of our personal ideals and commitments, and we make resolutions (often vainly) to do better. Moreover, given the manifest discomfort of "cognitive dissonance,"

[6] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 564.

[7] B.L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* 3d ed. (Toronto: Butterworths, 1988), at 54–55.

we sometimes delude ourselves into thinking that our lapses are not lapses at all, but entirely consistent with our pre-commitments. As human beings, we have a wonderful capacity for rationalization. When rationalization has stilled or distorted the internal voice of conscience, we sometimes need external help, a true friend who will risk our displeasure by issuing the wake-up call we really need.[8] Such a friend might well be said to serve as "trustee" of our pre-commitments.

What we understand in our bones to be true in our personal lives seems all the more likely to be true of our collective, public lives, in which both virtues and vices tend to be amplified. In the public sphere as much as the private — nay, more so — self-interest and passion can distort judgment. The public, as much as the individual, needs mechanisms of conscience, ways of bringing out its better self and drawing somewhat closer to its ideals. One such mechanism — in McLachlin J.'s view the primary one — is a judicially enforceable bill of rights, which establishes the court as the public's faithful friend, prepared honestly and courageously to point out self-delusion.

Despite its apparent plausibility, however, the analogy between personal and public pre-commitment is problematic. The pre-commitment argument depends on a stark distinction between decisions made under the primary influence of reason, and less rational decisions made under the influence of short-term passion and interest. This is certainly what happens at the personal level — when, for example, we decide to quit smoking and then find we cannot resist the temptation to light up. The same thing is much less likely at the level of public policy. For example, the principle of freedom of religion is understood by some to require exemptions from otherwise valid laws in order to accommodate religious conscience. Thus, while everyone else might be prohibited from using a particular drug, those for whom that drug has sacramental significance should be given an exemption. For those who take this view, the contrary position — that no one has the right (though they may be granted the privilege) to ignore valid secular laws — gives effect to simple prejudice. But how then to explain John Locke, an acknowledged father of religious freedom, who took precisely that alternative view? Are we to understand Locke's principled arguments against religiously based exemptions from valid secular

[8] R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson, 1992), at 143.

laws as simply the rationalization of his bias, or should we take them to indicate the possibility of reasonable disagreement on this question? The latter view seems more plausible.[9]

Jeremy Waldron similarly concludes that the analogy between individual and societal pre-commitment breaks down. The drinker who asks a teetotaller friend to hold his car keys and to resist drunken pleading for their return is not ultimately analogous to "a society whose members disagree, even in their 'lucid' moments about what rights they have, how they are to be conceived, and what weights they are to be given in relation to other values."[10] The drinker is clearly rational before the party and knows his judgment will be impaired later. Moreover, everyone will agree with this pre-commitment both in its abstract form ("I must not drink and drive") and in its derived policy prescription ("hold my keys and don't give them back"). By contrast, lucid disagreement at the level of principle itself is endemic to public life. One "need not appeal to aberrations of rationality to explain these disagreements; they are...sufficiently explained by the subject matter itself."[11]

Waldron uses the following analogy to illuminate his point. In contrast to the drinker-key example, he asks us to imagine Hannah,

> a woman torn between competing religious beliefs who opts decisively one day for the faith of a particular church. She commits herself utterly to that religion and she abjures forever the private library of theological books in her house that had excited her uncertainty in the past. Indeed, she locks the library and gives the keys to a friend with instructions never to return them, not even on demand.[12]

Unfortunately, the certainty that led to this pre-commitment eventually wanes, and Hannah, finding herself once more beset by doubts, asks to have the keys returned. The key holder's duty is not nearly as clear in this case as it is with respect to the would-be drunken driver. To refuse to return the keys in Hannah's case, says Waldron,

[9] *Id.*, at 149.

[10] J. Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J. of Legal Stud., at 47-48.

[11] *Id.*, at 48. See also J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 304.

[12] J. Waldron, "Freeman's Defense of Judicial Review" (1994) 13 Law & Phil. 38. When Waldron incorporated this argument in *Law and Disagreement*, he turned Hannah into Bridget; see at 268-69.

> would be for the friend to take sides in a dispute between two or more conflicting selves (or two or more conflicting aspects of the self) of the agent in question, in a way that is simply not determined by any recognizable criteria of pathology or other mental aberration. To uphold the precommitment is to sustain the temporary ascendancy of one aspect of the self at the time the library keys were given away, and to neglect the fact that the self that demands them back has an equal claim to respect for its way of dealing with the vicissitudes of theological uncertainty.[13]

The situation of Waldron's Hannah emphasizes the element of reasonable disagreement involved in most rights issues, and in this respect comes closer to capturing the situation of public bill-of-rights pre-commitment than the drinker-key analogy (where there is no reasonable disagreement). Nevertheless, Hannah's situation is not yet a faithful reflection of the typical Charter dispute. While Hannah changed her mind about her religious conversion, it is difficult to imagine our society changing its mind about such motherhood Charter commitments as religious freedom, freedom of expression, equal treatment, and the like — and God save us if it did, because no Charter could. A better analogy is provided by the layabout (call him Harry), who won't hold a job and neglects his children. One day Harry undergoes a personal change of heart and makes a solemn commitment to be a better father. He appoints his wife as "guardian of his conscience," asking her to help him live up to the commitment. Almost immediately, Harry faces a dilemma: should he take the better-paying job on offer despite its very long hours and travel commitments, thus enabling him to provide better for the children's education, or the lower-paying job, which will allow him to spend more quality time with the children? He is torn, and when he turns to his wife, he finds her similarly ambivalent. Unlike Hannah, Harry has not changed his mind about his commitment. Instead, he has made a commitment at a certain level of abstraction and then discovered that it is difficult to derive concrete policy prescriptions. This is what generally happens with bill-of-rights pre-commitments. Given the level of abstraction at which such constitutional pre-commitments are phrased, well-meaning people, who quite agree on the abstract statement — religious freedom, free expression, equality of treatment, etc. — will vigorously disagree about how to implement the abstraction. Rarely can concrete policy be unambiguously derived

[13] J. Waldron, "Freeman's Defense," *id.*, at 38.

from abstract constitutional commitments in the way that "don't return the keys" is derived from "don't drink and drive."

There is still a sense in which the analogy is imperfect. Both Hannah and Harry, as their situations have been presented thus far, appointed singular guardians of their commitments when in fact final courts of appeal are plural. Waldron recognizes this and thus provides a second version of Hannah's case, in which she hands "the keys of the library to a group of friends." One can imagine Harry appointing a similar group to be the guardian of his conscience. The likely result, as Waldron notes, is that the plural group (the "court") will disagree "along the very lines of the uncertainty" torturing Hannah and Harry.[14] It is difficult to improve on Waldron's conclusion:

> The idea of a society binding itself against certain legislative acts in the future is problematic in cases where members disagree with one another about the content or character of those bonds. It is particularly problematic where such disagreements can be expected to develop and change in unpredictable ways. And it becomes ludicrously problematic in cases where the form of precommitment is to assign the decision, procedurally to another body, whose members are just as torn and conflicted about the issues as the members of the first body were.[15]

Among other things, this means that one cannot easily sustain the stark (and facile) distinction often drawn between reasonable/principled judges (keepers of the keys) and impassioned/interested legislatures (would-be drunk drivers). The image of legislatures as responding in a knee-jerk fashion to every impassioned majority is as overdrawn as the image of disinterested judges above the political fray.[16] In matters of reasonable disagreement, interest, passion, and

[14] *Id.*, at 39.

[15] *Id.* See also J. Waldron, *Law and Disagreement*, *supra*, note 11, at 15.

[16] One reason for the prevalence of this bipolar model is the unrealistic assumption that any discussion that does not reach the heights of "high minded citizens converging on the truth" in a more-or-less philosophical fashion, as legislative argumentation most certainly does not, must be animated primarily by interest. Waldron suggests that this is a false dichotomy, arguing that "The proper alternative to the self-interest model is a model of opinionated disagreement — a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what's in it for them but by a desire to get it right." (*Law and Disagreement*, *supra*, note 11, at 305). He then argues that most political

reason are found on all sides, and in all participating institutions.[17]

In sum, on publicly controversial issues it is rarely clear that the side favoured by the court — perhaps by a bare majority of the court — embodies a democratic pre-commitment from which passion and interest have diverted the other side. Of course, to the extent that the court is not enforcing a democratic pre-commitment but taking sides in a reasonable disagreement, the pre-commitment model cannot serve to ground its democratic *bona fides*.

III. Public Responsiveness

This defence emphasizes the unrepresentative[18] character of executive-dominated[19] legislatures elected by the first-past-the-post method, and argues that the court is often the more responsive and hence more democratic institution.[20] Here the court's democratic credentials lie not in its defence of a deeper level of the public's will against the legislative implementation of its more immediate desires, but precisely in the court helping to implement current public desires against legislative recalcitrance.

argument probably involves a blend of this kind of "opinionated disagreement" and self-interest (*id.*). See the next note for further elaboration.

[17] Alexander Hamilton's comment in *Federalist* 1 is apt: "So numerous indeed and so powerful are the causes which serve to give a false bias to the judgement, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions, of the first magnitude to society.... [Further] we are not always sure, that those who advocate the truth are actuated by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives, not more laudable than these, are apt to operate as well upon those who support, as upon those who oppose, the right side of a question." See A. Hamilton, J. Madison, & J. Jay, *The Federalist Papers*, ed. by Clinton Rossiter (New York: New American Library), at 34. Note that for Hamilton reasonable disagreement does not entail relativism. Although there are wise and good men on the wrong as well as on the right side, Hamilton does not doubt that there *is* a wrong and right side. For a related rejection of the view that moral objectivity excludes reasonable disagreement or vice versa see J. Waldron, *Law and Disagreement*, *supra*, note 11, ch. 8.

[18] For example, D. Greschner, "Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle*" (1990) 35 McGill L.J. 645.

[19] For example, M. Jackman, "The Cabinet and the Constitution: Participatory Rights and *Charter* Interests: *Manicom v. County of Oxford*" (1990) 35 McGill L.J. 944-45.

[20] For example, J. Fletcher & P. Howe, "Supreme Court Cases and Court Support: The State of Canadian Public Opinion" (2000) 6 Choices 42.

The obvious tension between the two views is compounded by the fact that those who sometimes praise the courts for representing public opinion more faithfully than do executive-dominated legislatures also applaud the latter for resisting what they consider to be unjust public desires (to reinstate capital punishment, for example). In other words, public responsiveness is really doing none of the work. Being right is. But being right can only be counted as democratic if the standards of right were laid down in a fundamental democratic pre-commitment. Thus the public responsiveness claim actually collapses back into the pre-commitment claim. The court, in this view, is always the partisan of the more fundamental pre-commitment, standing against public desires that conflict with the pre-commitment and with public desires that advance it. Thus, executive-dominated legislatures can be seen as sometimes being in tune with the public will (as they evidently were in adopting the Charter itself), and sometimes out of step with the public. Moreover, immediate public opinion might sometimes accord with the democratic pre-commitment and sometimes conflict with it. The following matrix reflects this combination of the two positions:

		Immediate Public Desires	
		Conflict with Pre-commitment	*Advance Pre-commitment*
Executive-Dominated Legislature	*In Step with Public*	A. Court invalidates legislation	B. Court upholds legislation
	Out of Step with Public	C. Court upholds legislation	D. Court mandates change

The original pre-commitment (enactment of the Charter) is not represented in the table, though it comes closest to cell B, in the sense that executive-dominated legislatures were responsive to public will — in this case the deepest level of public will. Thereafter,

such legislatures may or may not be responsive to shorter-term public desires, which themselves can either impede or advance the original pre-commitment. The court, as consistent partisan of the pre-commitment, opposes publicly responsive legislation that conflicts with the pre-commitment and supports similarly responsive legislation that advances the pre-commitment. Thus, were Parliament to re-enact capital punishment in response to public demand, one might expect the court (after *Burns*[21]) to strike down that law as a form of "cruel and unusual punishment" (Cell A), while it would uphold popular legislation protecting gays and lesbians against discrimination (Cell B). Similarly, the court supports legislative resistance to unjust public desires and requires recalcitrant legislatures to implement just public opinion. Thus, it would side with an abolitionist legislature against a widespread public sentiment that the death penalty would increase public security (Cell C), and read "sexual orientation" into human rights legislation that does not include it (Cell D).[22]

In sum, the public responsiveness defence is not consistently maintained and is better understood as playing a role subordinate to pre-commitment. With pre-commitment remaining the real defence of the court's democratic credentials, of course, we are back to the fundamental weakness of the pre-commitment defence.

IV. Reinforcing Democracy

Judicial power under the Charter is sometimes said to enhance or reinforce democracy in ways originally set out, in the American context, by John Hart Ely.[23] Ely opposed the judicial imposition of substantive values, but thought judicial power could legitimately police the procedures of democracy, ensuring that all views, including especially those of disadvantaged minorities, get a fair hearing. This argument is related to Charles Epp's contention that the "rights revolution" and the consequent growth of judicial power are democratic insofar as they are rooted in the demands and

[21] *United States of America v. Burns*, [2001] 1 S.C.R. 283.

[22] *Vriend v. Alberta*, *supra*, note 6.

[23] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

support of "civil society" groups.[24] In the Canadian context, distaste for executive-dominated legislatures, which contributes to the "public responsiveness" defence, also helps to sustain this democracy-reinforcing defence.

Fully untangling and addressing the various dimensions of the democracy-reinforcing defence is a large undertaking that would occupy us for much more than the length of this article. I have elsewhere addressed one aspect of Epp's "civil society" argument.[25] Here I am content to rely on Kent Roach's recent treatment of the issues. Roach rightly observes that much of the Charter involves substantive values, not just the procedural protection of politically relevant views and minorities. Following Ely would thus mean truncating the Charter.[26] More important in the present context, Roach thinks there is a great deal of "indeterminacy" even in deciding upon the appropriate procedures of democracy or "identifying the groups that need judicial protection because of a malfunctioning of democracy."[27] With respect to the latter question, for example, Ely thought that women, a numerical majority, did not need judicial protection. Roach points out that this view is controversial, "given the traditional under-representation of women in positions of power and the stereotypes they face relating to biology and socially constructed gender."[28] Roach clearly considers women a disadvantaged group, partly because they remain "underrepresented in Parliament."[29] On the other hand, he presents Parliament as having "an interest to maximize the rights of more popular groups, such as the women's groups, and to minimize the rights of less popular groups, such as those who stand accused of sexual assault."[30] The latter have "less political clout than the organized women's groups who ... so effectively campaigned for [sexual assault] and

[24] C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), at 5.

[25] R. Knopff, "Civil Society vs. Democracy," in K. Brock, ed., *Connections Between Governments and Nonprofit and Voluntary Organizations: Public Policy and the Third Sector* (Montreal & Kingston: McGill-Queen's University Press, 2002), at 34-39.

[26] K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), at 230.

[27] *Id.*

[28] *Id.*

[29] *Id.*, at 280.

[30] *Id.*, at 280-81.

other legislation."[31] On sexual-assault issues, at least, women are for Roach the popular majority whose interests are likely to tyrannize the unpopular minority. Women's groups, of course, might see the judicial watering down of sexual assault laws as evidence of the continuing power of the patriarchy. My point, following Roach himself, is simply that identifying the disadvantaged and politically excluded is a far-from-straightforward exercise, and may be subject to reasonable disagreement.

V. Democracy as More Than Simple Majoritarianism

Democratic defenders of judicial power agree that, as the Supreme Court put it in the *Secession Reference*, "Democracy...means more than simple majority rule."[32] Recall, in this context, McLachlin's characterization of majoritarianism even in representative legislatures as a form of "naked populism." Or, as Kent Roach has put it, "Democracy in Canada has never been about unfettered majority rule."[33] Or, in Peter Russell's words, "the democracy we treasure and fight wars to preserve... is one in which even the most popular governments are constrained by law..."[34]

There is much to be said for this view, and I shall return to its virtues (and weaknesses) in the paper's concluding section. Here I focus only on the ironic fact that the court itself operates according to precisely the kind of majoritarianism that its defenders reject in the political realm. Disagreements among the judges are settled by simple majority vote, with even a narrow one-vote majority determining the issue. Being "right" has nothing to do with it, because a subsequent judicial majority can determine that the current one was "wrong."[35] Thus, defenders of judicial power do not actually reject simple majoritarianism. It is more accurate to say that they prefer majoritarianism in the courtroom to majoritarianism in the electoral and legislative arenas. Not that they think judicial majorities always get it right; but they insist that only

[31] *Id.*, at 280.
[32] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at 292.
[33] K. Roach, *The Supreme Court on Trial*, *supra*, note 26, at 223.
[34] P.H. Russell, "Judging in the 21st Century" (2002) 25 Advocates' Q. 321.
[35] J. Waldron, "Freeman's Defense," *supra*, note 12, at 31-32; J. Waldron, *Law and Disagreement*, *supra*, note 11, at 26 and 306.

subsequent judicial majorities, not legislatures, can legitimately correct the interpretive errors.[36]

Once again, this privileging of judicial majoritarianism might make sense if one could clearly distinguish between courts as institutions of disinterested rationality and the political process as simply the realm of passion and interest. In that case, even disagreements among judges would have a higher status than mere political disagreement. Judicial disagreements would reflect the deficiencies of reason that afflict even the most disinterested thinkers rather than aberrations of rationality caused by interest and passion. But if judicial disagreements actually fall "along the very lines of the uncertainty" that also torture the public and their representatives, and for essentially the same reasons — if, in short, we are really talking about reasonable disagreements – then privileging judicial opinion cannot be counted as democratic.

VI. Democratic Dialogue

Dialogue theory is currently the most popular democratic defence of judicial power, partly because it appears to accommodate the reality of reasonable disagreements about rights. Thus, Hogg and Thornton (formerly Bushell), who launched the current Canadian wave of dialogue theory,[37] reject the "conventional" rule-of-law model of constitutional interpretation, according to which the courts simply enforce constitutional provisions. The Charter, they argue,

> is for the most part couched in such broad, vague language that in practice judges have a great deal of discretion in applying its provisions to laws that come before them. The process of applying the Charter inevitably involves "interpreting" its provisions into the likeness favoured by the judges. This problem has been captured in a famous American aphorism: "We are under a Constitution, but the Constitution is what the judges say it is."[38]

Judges, in this view, far from faithfully implementing a rational pre-commitment, have considerable discretion to shape vague

[36] Section 33 of the Charter notwithstanding. See the discussion of dialogue theory in the next section of this article.
[37] P.W. Hogg & A.A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 1.
[38] P.W. Hogg & A.A. Thornton, "The Charter Dialogue Between Courts and Legislatures" (1999) 20 Policy Options, at 19-20.

constitutional provisions according to *their* liking in a context with no clearly right answers. Kent Roach, a dialogue enthusiast, similarly rejects the "myth of right answers."[39] Reasonable judges, he says, will disagree in interpreting the Charter and reasonable people will disagree with judicial decisions.[40]

Dialogue theory concedes that it is undemocratic to give unelected judges the final say on matters of reasonable disagreement, but denies that courts have such conclusive power. What saves judicial power from democratic challenge, in this view, is that legislatures can typically respond to and modify judicial rulings — indeed, that they generally get the last word. Accordingly, one should understand "judicial review under the Charter" not as trumping democracy but as contributing to an enriching "dialogue between the independent judiciary, the elected legislatures, and the people."[41] Ted Morton and I made a similar argument in 1992. Judges, we said, "can make valuable contributions to the policy-making process, as long as their pronouncements are seen as precisely that: contributions, not legalistic trumps."[42]

The problem with contemporary Canadian dialogue theorists is that they surreptitiously continue to treat judicial pronouncements as trumps. They actually leave no room for reasonable disagreement between courts and legislatures about the meaning, content, or appropriate boundaries of a vaguely worded right. For them, the legislative role in dialogue is limited to redesigning invalidated laws within the bounds of section 1 reasonableness or overriding rights altogether under section 33. But neither section 1 nor section 33 is engaged unless a right has been violated. On this crucial prior question — precisely the question dialogue theorists otherwise admit is open to reasonable disagreement — courts get the final say. The disavowals of judicial supremacy regularly made by our most prominent dialogue theorists must thus be taken with a grain of salt. It is more accurate to say that these scholars want to retain judicial finality in *interpreting* the Constitution even as they deny judicial supremacy over policy outcomes.

[39] K. Roach, *The Supreme Court on Trial*, *supra*, note 26, c. 12.
[40] *Id.*, at 237.
[41] *Id.*, at 236.
[42] R. Knopff & F.L. Morton, *Charter Politics*, *supra*, note 8, at 226.

Kent Roach's reaction to *Mills*[43] provides a dramatic illustration. In *Mills*, the Supreme Court upheld legislation that codified an earlier dissent in *O'Connor*.[44] In effect, the *Mills* majority upheld a policy that the Court had previously found unconstitutionally restrictive.[45] The *Mills* Court employed the dialogue metaphor to justify this reversal, but Roach thought it had misunderstood and misused the concept. For him, while section 1 dialogue allows legislatures to choose from an array of policy alternatives *less* restrictive of rights than the one rejected by the Court, the legislation at issue in *Mills* was *more* restrictive. Roach was troubled by both the legislature's "in your face" challenge of the Court and the Court's capitulation. Not that "in your face" challenges were entirely illegitimate, but the appropriate mechanism, for Roach, was a section 33 override.[46] Roach clearly wants judicial finality in defining rights and the line between reasonable and unreasonable limits. So do Hogg and Thornton.[47]

Yet, surely it is a matter of reasonable disagreement whether the policy at stake in *Mills*[48] had even violated a right. After all, this issue had occasioned a 5-4 split among "reasonable judges" in *O'Connor*.[49] The "myth of right answers" seems especially mythical in this context. If judicial finality in matters of reasonable disagreement is incompatible with democracy — as dialogue theory generally concedes — why is it not undemocratic to give a narrow five-judge majority the final say on this interpretive issue?

Nor does the availability of the section 33 override ameliorate this democratic difficulty. Under assumptions of judicial finality in interpretation, the use of section 33 clearly implies that legislatures are *infringing* rights rather than reasonably *disagreeing* about their proper meaning and scope.[50] This is, in fact, how Roach often

[43] *R. v. Mills*, [1999] 3 S.C.R. 668.
[44] *R. v. O'Connor*, [1995] 4 S.C.R. 411.
[45] C.P. Manfredi & J.B. Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures" (2001), 64 Sask. L.R. 323; J.L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal & Kingston: McGill-Queen's University Press, 2002), at 106-107.
[46] K. Roach, *Supreme Court on Trial*, *supra*, note 26, at 243, 277-82.
[47] C.P. Manfredi & J.B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J., at 513-27; J.L. Hiebert, *Charter Conflicts*, *supra*, note 45, at 46.
[48] *Supra*, note 43.
[49] *Supra*, note 44.
[50] R. Knopff & F.L. Morton, *Charter Politics*, *supra*, note 8, at 179, 231-32.

characterizes the use of section 33.[51] It is also why he insists on the continuing "sober second thought" required by an endless series of 5-year renewal deadlines for the section 33 override.[52] After all, any sensible person would want to regularly revisit the need to violate a right. But this simply begs the prior question of reasonable disagreement, namely, whether the right has been violated at all. If it hasn't, then the legislature should not have to bear the heavy burden of continually justifying a rights violation.

Between *O'Connor*[53] and *Mills*,[54] the Court had obviously changed its mind on the central interpretive question of the meaning and limit of the rights in question, with two of the judges on the *O'Connor*[55] majority switching sides in *Mills*.[56] Such judicial changes of mind are in other contexts considered quite legitimate. For example, between *Egan*[57] and *M. v. H.*[58] the Court clearly changed its mind on spousal benefits for gays and lesbians.[59] Roach does not decry this shift. He appears to dislike the shift from *O'Connor*[60] to *Mills*[61] mainly because the Court was responding to an "in your face" legislative rebuke of the *O'Connor* majority.[62] But, again, if the *O'Connor* question is truly one of reasonable disagreement, why shouldn't the legislature exert pressure in favour of one side? And why does this in any way taint the judicial change of mind? A Court that felt strongly enough about its *O'Connor* precedent could have stuck by it, forcing the legislature to back down or use section 33. Why isn't a judicial change of mind in the face of considered legislative reaction — especially when the legislature had done no more than codify the opinion of a strong judicial minority[63] — a perfectly acceptable form of "sober second thought" in the inter-

[51] K. Roach, *Supreme Court on Trial*, *supra*, note 26, for example, at 156, 236; but see at 243.
[52] *Id.*, at 265, 274.
[53] *Supra*, note 44.
[54] *Supra*, note 43.
[55] *Supra*, note 44.
[56] *Supra*, note 43.
[57] *Egan v. Canada*, [1995] 2 S.C.R. 513.
[58] *M. v. H.*, [1999] 2 S.C.R. 3.
[59] P. McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer, 2000), at 174.
[60] *Supra*, note 44.
[61] *Supra*, note 43.
[62] *Supra*, note 44.
[63] C.P. Manfredi & J.B. Kelly, "Dialogue, Deference and Restraint," *supra*, note 45.

institutional give and take envisaged by dialogue theorists? Roach's claim that Parliament and the Court were not listening or learning from each other in the *O'Connor-Mills* sequence is not persuasive.[64]

In *Charter Politics*, Ted Morton and I wrote that "[f]rom a checks-and-balances perspective there may be advantages in factoring the judicial perspective on general policy into the overall policy equation, *as long as everyone understands that it is only one contributing factor, not the controlling factor.*"[65] "Upon reconsideration," we continued, "the objections to judicial policy-making outlined in the previous sections should more properly be seen as objections to oracular judicial finality than to judicial involvement in the policy process altogether."[66] This was an early expression of dialogue theory. The currently popular versions of this theory retain the essential elements of "oracular judicial finality" on matters of reasonable disagreement, and to that extent fail to reconcile judicial power with democracy.

VII. Does it Matter that the Charter is Undemocratic?

Those who know my work will hardly find it surprising that I consider the Charter undemocratic. What may be more surprising — though it shouldn't be — is that I do not regard this as a decisive argument against the Charter and judicial power. Defenders of the Charter are quite right in thinking that "naked populism" and "simple majoritarianism" are not appropriate standards by which to assess political regimes. Because democracy has become such a totemic term in modern society, Charterphiles generally argue for a richer definition of the term, one that incorporates several standards of political good in addition to majoritarianism. In the *Secession Reference*, for example, the Supreme Court insisted that democracy, properly understood, "exists in the larger context of other constitutional values such as... federalism... constitutionalism and the rule of law, and respect for minorities."[67] There is, as I indicated above, much to be said for this rhetorical use of the term "democracy"

[64] K. Roach, *Supreme Court on Trial*, *supra*, note 26, at 282.
[65] R. Knopff & F.L. Morton, *Charter Politics*, *supra*, note 8, at 225 (emphasis in original).
[66] *Id.*, at 226.
[67] *Secession Reference*, *supra*, note 32, at 292.

as shorthand for the good regime, and I often resort to this usage myself. It does make for a certain analytical mushiness, however, covering over certain important tensions. There is a good reason why we often speak of *liberal* democracy, or *constitutional* democracy, or *representative* democracy.[68] We appear to need those extra terms to indicate the admixture of something valuable that does not itself seem unambiguously democratic, something that may, indeed, be in tension with our common sense understanding of democracy. For example, representative government embodies elements of aristocracy, which is certainly in tension with democracy.[69] Similarly, bicameralism has often been explicitly understood as a counterweight to democracy. What is the essence of democracy that must be offset by such counterweights? Why majoritarianism, of course. It is difficult, in other words, to completely escape the common sense association of "democracy" with majoritarianism. At least in this sense, judicial power, like bicameralism or representation, is not democratic. But if that is true, then, like the defenders of judicial power, I am not an unadulterated democrat. Alternatively, if one insists on using "democracy" as the shorthand for both the majoritarian and non-majoritarian requirements of a good regime, then I am not a simple majoritarian.

Thus, Roach is quite wrong to include me among "enthusiasts for direct... democracy" who, not yet able to attain their populist goal, "are willing to defer to the legislative process they see as the best approximation of the democratic will."[70] In Roach's view, representative government is something I am willing to settle for as an imperfect way station to the promised (and Charterless) land of direct democracy. Indeed, Roach contends that my "majoritarian premises" make me "hostile" not only to representation but also to federalism, because I "unapologetically invoke Lord Durham," who advocated legislative union as a means of assimilating French Canadians.[71] I am clearly one of those critics who, according to Roach, have used "the vulnerability of the Court in a populist age to rewrite Canadian history and to recast Canadian democracy in a

[68] See, for example P.H. Russell, "Judging in the 21st Century," *supra*, note 34, at 319.

[69] R.A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton: Princeton University Press, 2001), at 15-27.

[70] K. Roach, *Supreme Court on Trial*, *supra*, note 26, at 80; see also, at 76, 220, 223, 244.

[71] *Id.*, at 76 and at 219 n. 31.

purely majoritarian light that fails to explain other fundamental aspects of our society, including federalism, minority rights, and the common law."[72] Nothing could be further from the truth! I have explicitly defended our tradition of representative government against both populism and what I consider the excesses of the politics of rights.[73] I am a partisan of *representative* government and checks and balances, both of which constrain simple majoritarianism, and both of which were formulated precisely in order better to protect rights.[74] I certainly regard federalism as a valuable part of our overall system of checks and balances, as the infamous "firewall" letter attests.[75] Lord Durham, as Roach ought to know, is as much praised for his promotion of "responsible government" as he is vilified for his assimilationism. Invoking Durham's checks-and-balances understanding of responsible government[76] in no way implies hostility to federalism; to suggest otherwise is sloppy thinking at best and a cheap shot at worst. Nor am I opposed to the kind of common law dialogue between courts and legislatures that preceded the Charter. Roach presents judicial power under the Charter as part of a seamless package of valuable checks on simple majoritarianism and appears (absurdly) to assume that one who is sceptical about any part of it must reject the whole package.[77] He is thus blinded to any non-majoritarian subtleties in

[72] *Id.*, at 223.

[73] R. Knopff, "Populism and the Politics of Rights: The Dual Attack on Representative Democracy," *supra*, note 3, at 683-705; F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party*, *supra*, note 5, at 151-55.

[74] See J. Waldron, *Law and Disagreement*, *supra*, note 11, ch. 13, for an extended and subtle account of why the conviction that democracy and rights are independent does not ineluctably imply judicial power under an entrenched bill of rights. On the matter of how the doctrines of popular sovereignty and majority rule depend on a conception of equal rights see H.V. Jaffa, *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates* (Seattle: University of Washington Press, 1973), at 348-49.

[75] S. Harper, T. Flanagan, F.L. Morton, R. Knopff, A. Crooks, K. Boessenkool, "The Alberta Agenda" (2001) Policy Options, at 17-19.

[76] J. Ajzenstat, *The Political Thought of Lord Durham* (Kingston & Montreal: McGill-Queen's University Press, 1988), at 64; R. Knopff, "Populism and the Politics of Rights," *supra*, note 3, at 693-94.

[77] J. Waldron, *Law and Disagreement*, *supra*, note 11, at 305-6, shows how one can support a variety of checks and balances on simple majoritarianism without thereby committing to every additional one, and particularly to a constitutionalized judicial check.

the arguments of Charter sceptics, and regularly overstates his disagreements with them.

He certainly overstates our disagreements about Charter dialogue, which turn on just how "judicial-centric" the inter-institutional interaction should be.[78] As indicated above, I have expressed openness to judicial power under the Charter as a potentially valuable contribution to the counter-majoritarian checks and balances we need — but only if this power is liberated from the assumptions and rhetoric of oracular finality in constitutional interpretation.[79] That even proponents of so promising an idea as inter-institutional "dialogue" fall back upon oracularism is one reason that I have pretty much lost hope on this score.

[78] J.L. Hiebert, *Charter Conflicts*, *supra*, note 45.
[79] R. Knopff & F.L. Morton, *Charter Politics*, *supra*, note 8, at 225-33.

MEMORIES

Jean-François Gaudreault-DesBiens*

I. INTRODUCTION

People remember, and that is why they resist organizations and sustain their allegiances.[1]

The *Canadian Charter of Rights and Freedoms*[2] is just over 20 years old. What impact has it had on Canadian society? This is a wide-ranging subject, if ever there was one, and because of its nature, one cannot deal with it in a satisfactory manner from the perspective of positive law alone. Although this subject may certainly give rise to interesting arguments on the jurisprudential evolution of the various rights and freedoms entrenched in the Charter, and, possibly, on the effect that certain decisions rendered under it have had on society as a whole, I believe it lends itself more to broader socio-legal reflection, rather than a classic positivist analysis, which, given the theme of this article, would be unduly narrow. Incidentally, I will be dealing with the impact of the Charter on *Canadian society*, not on that society's *positive law*. However, choosing a socio-legal approach to a given topic does not in any way help in specifying the topic itself. I will thus rephrase my initial question as follows: what *in particular* must we remember with regard to the impact of the Charter on Canadian society over the past 20 years?

This wording indicates rather clearly, I believe, that I will approach my topic from the perspective of *memory*, that is, from the perspective of the construction of the possible meanings that can be given to certain events or developments that have occurred over the past 20 years and may reasonably be associated with the Charter in

* Associate professor, Faculty of Law, University of Toronto.
[1] F. Dumont, *Raisons communes* (Montreal: Boréal, 1995), at 53, translation.
[2] *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 (hereinafter referred to by its full title, or as the "Charter" or the "Canadian Charter").