ARTICLE

The legitimacy of judicial review: The limits of dialogue between courts and legislatures

Luc B. Tremblay*

According to the theory of ''institutional dialogue,'' courts and legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate. This essay sets out to demonstrate that there are important limits to the capacity of insitutional dialogue to legitimize the institution of judicial review. To that end, it situates the theory of institutional dialogue within the debate over the legitimacy of judicial review of legislation within democracy and introduces a distinction between two conceptions of dialogue—dialogue as deliberation and dialogue as conversation—and examines the limits of each theory. The author does not contend that there can be no dialogue between courts and legislatures but, rather, that the kind of dialogue that would be needed to confer legitimacy on the institution and practice of judicial review does not—and cannot—exist. Consequently, the normative character of institutional dialogue theory, as conceived thus far, is ultimately rhetorical.

The theory of "institutional dialogue," as I shall call it, may be seen as a Canadian contribution to the debate over the democratic legitimacy of judicial review.[1] According to this theory, the courts and the legislatures participate in a dialogue regarding the determination of the proper balance between constitutional principles and public policies, and, this being the case, there is good reason to think of judicial review as democratically legitimate. It is an ongoing dialogue because the judiciary does not necessarily have the last word with respect to constitutional matters and policies; the legislatures would almost always have the power to reverse, modify, or void a judicial decision nullifying legislation and, therefore, to achieve their social or economic policy ends. Consequently the countermajoritarian objection to judicial review cannot be sustained.[2]

* Faculty of law, University of Montreal; email: luc.tremblay@umontreal.ca

[1] The theory of institutional dialogue, as I shall understand it, has been put forward by Peter Hogg and Allison Thornton in 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)*, 35 Osgoode Hall L.J. 75 (1997). *See infra*, section I.

[2] I briefly recall the nature of this objection below, in section I.

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The theory of institutional dialogue has emerged conceptually out of the experience of Canadian constitutionalism and in light of constitutional practice under the Canadian Charter of Rights and Freedoms.[3] The theory claims that this form of dialogue has been made possible by virtue of various Charter provisions, the two most important of which are the "limitation" clause (section 1) and the "override clause" (section 33). According to the limitation clause, legislatures are constitutionally allowed to limit by law any guaranteed rights, provided that the limits comply with a set of justificatory requirements amounting to complex tests of legitimacy, rationality, necessity, and proportionality.[4] Under the override clause, legislatures are constitutionally permitted to override by law certain specific guaranteed rights, provided that the overriding law expressly declares that "it shall operate notwithstanding" the provisions that mention the relevant specific guaranteed rights.[5] One might believe, therefore, that the theory of institutional dialogue merely describes a peculiar feature of the Canadian constitutional structure. This would be wrong. The theory has much broader pertinence and appeal.[6] On the one hand, the idea that some form of dialogue, discussion, communication, deliberation, or discourse may confer legitimating force on political authority and decision making has been a recurrent theme in contemporary legal, political, and social philosophy.[7] On the other, an institutional dialogue may occur anywhere legislatures are able to reverse, modify, avoid, or otherwise reply to judicial decisions nullifying legislation. In particular, it may occur in any jurisdiction where the constitution contains explicit

[3] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, 1982, c. 11 (U.K.) [hereinafter "the Charter"].

[4] Section one provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The justificatory tests have been expounded by the Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[5] Section 33 provides: "(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. . . . (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4)."

[6] *See, e.g.*, Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. Toronto L.J. 89 (2003).

[7] *See, e.g.*, Jürgen Habermas, Moral Consciousness and Communicative Action (Christian Lenhart & Shierry Weber Nicholson trans., MIT Press 1991); Jürgen Habermas, Between Facts and Norms (William Rehg trans., MIT Press 1996); Bruce Ackerman, *Why Dialogue?*, 86 J. Phil. 5 (1989). *See generally*, Deliberative Democracy: Essays on Reason and Politics (James Bohman & William Rehg eds., MIT Press 1997).

limitation clauses,[8] or, in the absence of an explicit limitation clause entrenched in the constitution, where the courts have introduced some form of balancing test to control the constitutionality of the laws limiting guaranteed rights.[9] Indeed, according to institutional dialogue theorists, in Canada the institutional dialogue would mostly proceed under the limitation clause.

My purpose in this text will be to show that there are important limits to the theory of institutional dialogue. This is not to say that no form of dialogue between the courts and the legislatures is possible; at least my arguments do not entail such a conclusion. Rather, my claim is that the *kind* of dialogue that would be needed to confer legitimating force on the institution and practice of judicial review does not and cannot exist. Consequently, the normative character of institutional dialogue theory, as so far conceived, is ultimately rhetorical in nature.[10] The essay's first section spells out the theory of institutional dialogue in the debate about the legitimacy of judicial review within a democracy. The second section introduces a distinction between two conceptions of dialogue: dialogue as conversation and dialogue as deliberation. The third and the fourth sections introduce two limits to the theory of institutional dialogue as deliberation. The first limit stems from what I call the doctrine of "judicial responsibility." The second and most important limit derives from the conditions judicial power and judicial decisions must satisfy in order to be accepted as morally legitimate. The fifth section examines the limits of the theory of institutional dialogue as conversation.

1. The problem of legitimacy and the institutional dialogue theory

The problem of legitimacy raised by the institution of judicial review is well known. It is rooted in the majoritarian assumption that the ultimate source of legitimate lawmaking in a democracy lies in the will of a majority of the people or of their elected representatives. It has been generally assumed, therefore, that legislation enacted in accordance with majority rule by the people or by their elected representatives is, in principle, democratically legitimate. On the other hand, judicial review involves judges who are able to nullify legislation democratically enacted in accordance with the majority

[8] *See, e.g.*, Grundgesetz (German Basic Law), adopted in 1949; Const. S. Afr., adopted in 1993; and the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5.

[9] *See, e.g.*, the American doctrine of due process of law and the tests articulated by the American Supreme Court as required by various levels of scrutiny.

[10] My colleague Jean Leclair also concludes, for other reasons, that the theory is merely rhetorical. *See* Jean Leclair, *Reflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien* [*Critical reflections on the metaphor of dialogue in Canadian constitutional law*], 2003 Revue du Barreau (Numéro special) 379, 402–412.

rule, and yet these judges neither are the people nor are they elected by them; they neither represent the citizens and nor are they held accountable for their decisions. This state of affairs is understood to be essentially countermajoritarian. It follows, then, that judicial review is democratically illegitimate in principle, and that the onus of showing it is legitimate necessarily rests on those who believe it desirable. To this end, various strategies have been propounded, which may be described, variously, as source based, process based, or substance based.[11]

The most enduring and relevant approach for our purposes has been source based. It postulates that judicial review can be legitimized if, and only if, it can be shown that, in some ways, such an approach possesses a positive democratic source or pedigree. There have been two main source-based strategies. The first constitutes the prevailing orthodoxy in Canada and has been such in the United States for a long time. The legitimacy of the judicial review of legislation, in this view, lies in the fact that the written constitution, on the basis of which judicial review finds its authority, was initiated, willed, or ratified by the people or by their elected representatives. In Canada, for example, in an important decision dealing with the legitimacy of judicial review, *Motor Vehicle Act (B.C.) Reference*, the Supreme Court said:

> It ought not be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.[12]

In the U.S., this view corresponds to Chief Justice Marshall's reasoning in *Marbury v. Madison.*[13] The will or consent of the majority of the people or of their elected representatives provides the kind of democratic pedigree that can confer legitimating force both on the constitution and, consequently, on the institution and practice of judicial review based on that constitution.

[11] *See,* Robert Bork, The Tempting of America (MacMillan 1990) (source-based/originalism); John Hart Ely, Democracy and Distrust (Harvard Univ. Press 1980) (process-based/pluralist-utilitarian democracy); Ronald Dworkin, Freedom's Law (Harvard Univ. Press 1996) (substance-based/egalitarian moral theory).

[12] *Motor Vehicle Act*, [1985] 2 S.C.R. 486, 497.

[13] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Chief Justice Marshall said that "the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness" and that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.* at 176–177.

But this view proves incoherent. Insofar as the strategy postulates that democracy represents the ultimate normative principle underlying legitimate lawmaking, it means that the people or their elected representatives not only have the ultimate right to rule over their society, that is, to make or unmake any law whatsoever, but that they are entitled, as well, to change their minds with respect to any legal principle and social policy. This idea is expressed in the notion of popular sovereignty and requires that a democracy be continuous. Accordingly, and as a matter of principle, the courts should always uphold the law that best represents the will or the consent of the actual people or of their elected representatives. It follows that where there is a clear conflict of laws, they should uphold the law that has been enacted by the later democratic body of citizens. Yet, the first strategy states that it would be morally permissible for the courts to uphold the will or judgment of past citizens—the source of the legitimating, democratic pedigree—against the will or judgments of present-day citizens and thus limit their power to determine democratically for themselves what kinds of policies, values, interests, and ends should be promoted pursuant to their own interests. The end result is that the first strategy postulates that democracy should be continuous but seeks, at the same time, to legitimize a form of "ancestor worship."[14]

The second strategy purports to avoid this incoherence. The legitimacy of judicial review, here, derives from the fact that constitutional norms and values express a kind of collective will that is democratically *superior* to the will or consent expressed in ordinary legislation. This strategy may take various forms. According to Bruce Ackerman's notion of "democratic dualism," for example, the democratic superiority of the American Constitution, would derive from the fact that its values are the result of rare moments of lawmaking that entrench the considered judgments of a mass of mobilized citizens debating together, whereas ordinary legislation merely reflects the daily work of politicians who speak through institutions that normally do not truly—as it were—represent the citizens. Thus courts, in upholding constitutional values against some particular piece of legislation, may be said to thwart legitimately the will of representatives on behalf of the people.[15] Another form of this second strategy proceeds from what may be called a "metaphysical democratic dualism." Such a view presupposes, for example, that there exists a tension within a democratic polity between the "true" people, who would be rational or committed to the authentic purposes of the community, and the "empirical" people, those who express themselves mostly

[14] The phrase is borrowed from Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). Indeed, this argument might not hold when the legislation has been enacted prior to the enactment of the constitution.

[15] *Id.*; *see also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (Belknap Press of Harvard Univ. Press 1991).

as voters in an election and, quite often, are guided by their emotions, self-interests, passions, immediate needs, rhetoric, and expediency in general. Thus, where some instance of ordinary legislation would be inconsistent with the rational values of the people or the true purposes of the community, the "true" (albeit theoretical) people would "really" wish to nullify policies they—manifested as voters—"actually" wish to promote. Consequently, the courts would be morally entitled to uphold constitutional values against particular legislation, for they would be upholding the "true" will of the people.[16]

These versions of the dualist strategies, as well as others, might be objectionable on their merit. But even if they were acceptable and internally coherent, they hardly legitimize the institution of judicial review.[17] First, the strategies cannot succeed unless the norms expressed or embodied in the written constitution truly constrain the process of constitutional review. Otherwise, the courts would be basing their decisions on values not expressed or embodied in the constitution and, consequently, on values not legitimated by their democratic pedigree. Now, it is widely acknowledged that constitutional provisions are vague and indeterminate, and it is arguable, for example, that the Supreme Court of Canada has rejected any form of legal formalism with respect to constitutional interpretation.[18] Source-based democratic arguments, therefore, hardly show that judicial review is legitimate. The strategies described above require constitutional norms to be carved in a democratic stone, but the text looks like an empty shell.

Finally, even if the constitution were democratically superior to ordinary legislation, it would not necessarily follow that judges should have the power to review legislation. Insofar as political legitimacy is a matter of democratic pedigree, it seems to follow that the legislatures, not the courts, should be morally entitled to make the final decisions with respect to constitutional interpretation and application—for the very reason that they best represent the people. These strategies seem to require legislative supremacy even as they actually seek to legitimize judicial supremacy.

The theory of institutional dialogue can be thought of as a response to the foregoing objections; namely, the objection from the continuous character of democratic legitimacy, the objection from indeterminacy, and the objection from judicial supremacy. There are various versions of the theory of

[16] *See, e.g.*, Alexander Bickel, The Least Dangerous Branch 24 (Yale Univ. Press 1962).

[17] I have put forward certain criticisms in Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 Oxford J. Leg. Stud. 525, 534–538 (2003).

[18] I have explored this theme in various texts. *See, e.g.*, Luc B. Tremblay, *L'interprétation téléologique des droits constitutionnels* [*Teleological interpretation in constitutional law*], 29 Rev. Jurid. Thémis 459 (1995); Luc B. Tremblay, *Marbury v. Madison and Canadian Constitutionalism: Rhetoric and Practice*, 37 Rev. Jurid. Thémis 375 (2003). More generally, see Luc B. Tremblay, *Le droit a-t-il un sens? Réflexions sur le scepticisme juridique* [*Does the law have direction? Reflections on legal skepticism*], 42 Revue interdisciplinaire d'études juridiques 13 (1999).

institutional dialogue.[19] The most influential, so far, has been put forward by Peter Hogg and Allison Bushell (now Thornton).[20] I shall take theirs as paradigmatic.

According to this version, judicial review would be, as a matter of empirical fact, "part of a 'dialogue' between the judges and the legislatures."[21] This dialogue would be characterized by the fact that judicial decisions based on the constitution, even those striking down legislation, are almost always open to reversal, modification, or avoidance through the ordinary legislative process. While the judges may assess the validity of the laws in accordance with the values of the constitution, as they understand them, the legislatures generally will be able either to respect judicial judgments or to correct them, whether by redrafting their laws or by enacting new legislation that carries out the former legislative objectives.

Legislative corrections may take a variety of forms. The Canadian Charter, for example, provides four procedures, the first two being the most important: (*a*) the legislatures may directly override the judicial decision nullifying their law in accordance with section 33;[22] (*b*) the legislatures can enact alternative laws that would achieve the legislative objectives of the invalidated law, albeit by somewhat different means, in accordance with section 1 of the Charter;[23] (*c*) where the rights are internally "qualified," the legislatures are permitted to enact new laws that satisfy the Court's understanding of the internal standards of fairness and reasonableness;[24] and (*d*), where a law is struck down

[19] For a very good overview of different theories of institutional dialogue for the purposes of constitutional theory, see K. Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. B. REV. 481, 490–501 (2001). *See also* KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (Irwin Law 2001).

[20] *See* Hogg & Bushell, *supra* note 1. This version has been refined or endorsed by various scholars. *See, e.g.*, Roach, *supra* note 19; A.Wayne MacKay, *The Legislature, The Executive and the Courts: The Delicate Balance of Power or Who is Running the Country Anyway?*, 24 DALHOUSIE L.J. 37 (2001).

[21] Hogg and Bushell, *supra* note 1, at 79.

[22] Section 33: "(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. . . . (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4)."

[23] Section one provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[24] For example, section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 8 states: "Everyone has the right to be secure against unreasonable search or seizure."

on the ground of equality rights, the legislatures have a variety of remedial measures that allow them to set their own priorities.[25] Of course, where section 1 does not apply and section 33 is not available, or where the objective of the law is unconstitutional and section 33 not available, the dialogue is precluded. However, these cases are exceptional. The normal situation would be one of institutional dialogue.

According to Hogg and Thornton, the empirical evidence supporting institutional dialogue refutes "the critique of the Charter based on democratic legitimacy."[26] Indeed, where a judicial decision striking down a law on Charter grounds can be reversed, modified, or avoided by a new law, "any concern about the legitimacy of judicial review is greatly diminished."[27] The objection founded on the continuous character of democracy is refuted. While the courts may nullify legislation on the basis of past citizens' views, their decisions almost always leave room for contemporary legislative responses. Similarly, the objection from indeterminacy loses its point. Even if the judges were "activist" and enforced values either not consistent with an "original" understanding of the text or not objectively commanded by the text, the legislatures would normally be able to devise a response "which accomplishes the social or economic objectives that the judicial decision has impeded."[28] Finally, the objection from judicial supremacy is much weaker than generally thought. While the courts may nullify legislation on the basis of their own formal or substantive understanding of constitutional principles and purposes, the legislatures may almost always reverse, modify, or avoid their decisions. Thus, as already noted, the courts would not have the last word concerning the proper balance between individual interests and social policies, and the constitution would not necessarily be whatever the courts say it is.

It follows that judicial review would rarely raise "an absolute barrier to the wishes of the democratic institutions."[29] To this extent, it is not anti-democratic. As Hogg and Thornton argue, "[i]n the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial

[25] Section 15 provides: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[26] Hogg and Bushell, *supra* note 1, at 105.

[27] *Id.* at 80.

[28] *Id.*

[29] *Id.* at 81.

review is not 'a veto over the politics of the nation.' "[30] Moreover, judicial review would even enhance democracy because it would occasion a "public debate" in which Charter values would play a "more prominent role" than they would have if there had been no judicial decision.[31]

> To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have to deal with. And, of course, the precise terms of any new law would have been powerfully influenced by the Court's decision. The legislative body would have been forced to give greater weight to the Charter values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are constraints on the democratic process, no doubt, but the final decision is the democratic one.[32]

The concept of dialogue purports to describe the whole of the process by which judicial review constitutes the "beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole."[33] Kent Roach has refined this thesis. He argues that the courts' expertise in interpreting rights justifies their drawing "the attention of the legislature to fundamental values that are likely to be ignored or finessed in the legislative process,"[34] but not in their attempting to "end the conversation or conduct a monologue in which [their]... Charter rulings are the final word."[35] Thus, even if the legislatures are required to explain explicitly why they wish to limit or override certain rights and freedoms, their ability to reply to the Court without "attempting to curb the Court or change the Constitution," as would occur under the "American model of judicial supremacy," means that the Court "need not have the last word."[36] Under a dialogic approach, says Roach, "the dilemma of judicial activism in a democracy diminishes perhaps to the point of evaporation. The answer to what is called judicial activism is legislative activism."[37]

In a number of decisions, certain judges of the Supreme Court of Canada have explicitly referred to the theory of institutional dialogue. In

[30] *Id.* at 105.

[31] *Id.* at 79.

[32] *Id.* at 80.

[33] *Id.* at 105.

[34] *See* Roach, *supra* note 19, at 530–531.

[35] *Id.* at 531.

[36] *Id.* at 532.

[37] *Id.*

Vriend v. Alberta,[38] for example, Justice Frank Iacobucci referred to this theory, among others, in order to respond to the arguments that judicial review would not be democratically legitimate. He said:

> As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some.[39] In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.[40]

In *R. v. Mills*,[41] Justices McLachlin and Iacobucci evoked the idea of institutional dialogue—endorsed in *Vriend*—as a rationale for not viewing the common law rules involving interpretation of the *Charter* as the only possible basis for a constitutional regime.[42] In *Mills*, the Supreme Court had to decide whether a specific piece of legislation[43] enacted by Parliament, altering a common law procedure established in accordance with Charter standards by the Court in *R. v. O'Connor*,[44] was constitutionally valid. According to the judges, "it is important to keep in mind that the decision in *O'Connor* is not necessarily the last word on the subject. The law develops through dialogue between courts and legislatures: see *Vriend*. . . . Against the backdrop of *O'Connor*, Parliament was free to craft its own solution to the problem consistent with the *Charter*."[45]

[38] [1998] 1 S.C.R. 493, paras. 138–139.

[39] *See, e.g.*, Hogg & Bushnell, supra note 1.

[40] [1998] 1 S.C.R. 493, paras. 138–139.

[41] [1999] 3 S.C.R. 668.

[42] *Id.* at para. 57.

[43] Bill C-46, S.C. 1997, c. 30. It came into force on May 12, 1997 and amended the Criminal Code, R.S.C., 1985, c. C-46.

[44] [1995] 4 S.C.R. 411.

[45] *Mills*, *supra* note 40, at para. 20.

> As a result of the consultation process, Parliament decided to supplement the "likely relevant" standard for production to the judge proposed in *O'Connor* with the further requirement that production be "necessary in the interests of justice." The result was s. 278.5. This process is a notable example of the dialogue between the judicial and legislative branches discussed above. This Court acted in *O'Connor*, and the legislature responded with Bill C-46. As already mentioned, the mere fact that Bill C-46 does not mirror *O'Connor* does not render it unconstitutional.[46]

The theory of institutional dialogue has been endorsed by other judges as well.[47] Nonetheless, this theory has been vigorously criticized. Christopher Manfredi and James Kelly, for example, have probably captured some of the main weaknesses of its empirical claims.[48] According to them, the empirical demonstration on which the notion of dialogue appears to depend suffers from several flaws. In particular, they claim that many of the legislative sequels regarded as evidence of dialogue could be regarded as simple acts of compliance with judicial decisions and that most legislative sequels have involved more than minor amendments. Their analysis of the data suggests that the institutional dialogue is both more complex and less extensive than claimed by Hogg and Thornton.[49]

But the most important criticism, for our purposes, has focused on the normative claims of the institutional dialogue theory. According to some, the theory's main weakness—from a normative perspective—lies in the fact that it maintains, indeed enhances, the supremacy and authority of the judges with respect to constitutional interpretation. For example, Manfredi and Kelly argue that, even apart from the flawed empirical claims, the metaphor of dialogue "provides only a weak response to the normative issues."[50] Following Mark Tushnet, they maintain that the kind of dialogue described by Hogg and Thornton both distorts policy and debilitates

[46] *Id.* at para. 125.

[47] *See, e.g.*, Justice Bastarache in *M. v. H.*, [1999] 2 S.C.R. 3, paras. 286, 328; Justice L'Heureux-Dubé in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 116; Justice Gonthier in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, paras. 104–108; Justice Major in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, para. 37.

[48] Christopher P. Manfredi & J. B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 Osgoode Hall L.J. 513 (1999). *See also* Christopher P. Manfredi, Judicial Power and the Charter 176–181 (Oxford Univ. Press 2d ed. 2001).

[49] Manfredi, *supra* note 47, at 520–521. For similar criticisms, see F. L. Morton and Rainer Knopff, The Charter Revolution & The Court Party 162–166 (Broadview Press 2000). In their view, the dialogue "is usually a monologue, with judges doing most of the talking and legislatures most of the listening." *Id.* at 166. *See also* Tushnet, *supra* note 6.

[50] Manfredi, *supra* note 47, at 515.

democracy. It distorts policy because the legislatures may "tailor statute[s] to judicially articulated norms of constitutional meaning"; may believe mistakenly that the preferred policy "is outside the available range"; or may modify their laws before a final appellate court decision, where the threat of constitutional reversal exists.[51] Dialogue of this sort may debilitate democracy because it entails legislative subordination (or obedience) to the courts' monopoly over the correct interpretation of the constitution. In their view, genuine dialogue "only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation."[52]

It has been argued that *Mills* is an illustration of "genuine" institutional dialogue.[53] In this case, the Supreme Court referred to the idea of institutional dialogue as a reason for recognizing the constitutionality of certain ordinary legislation otherwise inconsistent with its own judicial precedent in establishing and applying Charter standards and in spite of the fact that this law did not use the override provision (section 33).[54] A number of authors have consequently maintained that the theory of institutional dialogue may weaken, indeed deny, the supremacy and authority of the judges with respect to constitutional interpretation. Jamie Cameron, for example, has maintained that this form of dialogue is dangerous and flawed.[55] It is dangerous because it invites the legislatures "to override Supreme Court of Canada authority by ordinary legislation and thereby avoid paying the institutional price of relying on s. 33."[56] It is flawed because of its "inherent and unavoidable malleability."[57] Since the Court may invoke the concept

[51] *Id.* at 522.

[52] *Id.* at 524. *See also* Manfredi, *supra* note 47, at 178–181. This form of "genuine dialogue" corresponds to what other authors have called "coordinate construction." See Roach, *supra* note 19, at 529. *See also* Dennis Baker & Rainer Knopff, *Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases*, 21 Windsor Y.B. Access Just. 347 (2002)(they clearly argue in favour of "coordinate interpretation"). *See also* David Schneiderman, *Kent Roach, the Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, 21 Windsor Y.B. Access Just. 633 (2002); Janet L. Hiebert, Charter Conflicts: What is Parliament's Role? 202 (McGill-Queen's Univ. Press)(proposing to conceive the shared responsibility with respect to constitutional interpretation in "relational" terms, instead of in terms of dialogue); Tushnet, *supra* note 6.

[53] *See, e.g.*, Roach, *supra* note 19; Baker & Knopff, *supra* note 51; Christopher P. Manfredi & James B. Kelly, *Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures*, 64 Sask. L. Rev. 323 (2001).

[54] The precedent established a common law procedure on the basis of Charter's values. *See, supra* notes 37–42.

[55] Jamie Cameron, *Dialogue and Hierarchy in Charter Interpretation: A Comment on R. v. Mills*, (2000) 38 Alta. L. Rev. 1051 (2001).

[56] *Id.* at 1067.

[57] *Id.* at 1063.

both in deference to Parliament, as in *Mills*, and to defend decisions striking down legislation, as in *Vriend*, Charter interpretation can hardly be principled.[58] The power to decide important questions "ricochets between institutions engaged in some ad hoc form of dialogue"[59] and decisions appear to follow a "political barometer"; when the judges believe that the legislature has been progressive, its law should be upheld, and when they believe that the legislature has acted regressively, the Charter can be enforced.[60] Cameron concludes that the dialogue is "likely to compromise entitlements and destabilize Charter jurisprudence."[61]

For another, Jean Leclair has argued that the theory of institutional dialogue, especially as articulated by the Canadian Supreme Court in *Vriend* and in *Mills*, should be abandoned.[62] Since the dialogue purports to make each of the branches somewhat "accountable" to the other, it would appear to be inconsistent with the normative principle of the separation of powers. According to Leclair, the separation of powers is required not only for the good of individual freedom but also for the legitimacy of both the legislative and the judicial powers. If the legitimacy of legislation lies in its democratic pedigree, the legitimacy of the judicial power derives from the nature of its specific "adjudicative" function, that is, from the fact that controversies are decided by a disinterested third party after hearing both sides. In the case of constitutional matters, this detachment or disinterestedness requires that the judges be true to their antimajoritarian nature, to their precedents, and to their own mode of reasoning in the process of constitutional lawmaking.[63] This explains why the principle of the separation of powers emphasizes conflict not collaboration, much less confusion, between the courts and the legislatures. Consequently, Leclair argues that the courts should replace the theory of institutional dialogue with other kinds of dialogical approaches that would respect the principle of the separation of powers and the principle

[58] *Id.*

[59] *Id.* at 1060.

[60] *Id.* at 1063.

[61] *Id.* at 1068. According to Cameron, "either the Constitution is supreme or it is not. If it is supreme, Parliament could only overrule O'Connor, legislatively, by invoking s. 33. On that view, the Court's choices in Mills were to overrule O'Connor or to strike down parts of the legislation. Alternatively, if constitutional interpretation is not supreme, then s. 33 serves little purpose because the Court's interpretations of the Charter are collapsed into the political process." *Id.* at 1062–1063. For similar criticisms, see Roland Penner, *Charter Conflicts: What is Parliament's Role?*, 28 Queen's L.J. 731 (2003); Leclair, *supra* note 10, at 402–412; David M. Paciocco, *Competing Constitutional Rights in the Age of Deference: A Bad Time to be Accused*, 14 Sup. Ct. L. Rev. (2d) 111 (2001); Don Stuart, *Mills: Dialogue with Parliament and Equality by Assertion at What Cost?*, 28 Crim. Rep. (5th) 275 (1999).

[62] Leclair, *supra* note 10.

[63] *Id.* at 395–402.

of participatory democracy. Such approaches would require the courts to work within some version of judicial minimalism[64] and the legislatures to listen to all the citizens potentially affected by the laws that might limit fundamental values.[65]

I tend to be persuaded by most of these criticisms, although I do not necessarily endorse any one specific form of dialogue or version of judicial supremacy, deference, or activism assumed to be legitimate by the various critics. Of course, these criticisms have invited replies, new objections, and refinements, and the debate still goes on.[66] Nevertheless, what has been said so far is sufficient for my purposes.

2. Two conceptions of dialogue

That a dialogue between the legislature and the court could legitimize the institution of judicial review in a democracy is a powerful and appealing notion. Yet, the theory of institutional dialogue is problematical. In order to see why, it is necessary to clarify what is meant by "dialogue" as the idea pertains to the legitimization of judicial review. In a general sense, a dialogue assumes that two or more persons, recognized as equal partners, exchange words, ideas, opinions, feelings, emotions, intentions, desires, judgments, and experiences together within a shared space of intersubjective meanings. But there are various kinds of dialogue. In what follows, I will introduce two distinct conceptions of dialogue.

In the first instance, the word dialogue can be used to describe a conversation. In this sense, a dialogue involves at least two persons, recognized as equals, exchanging words, ideas, opinions, feelings, and so forth together in rather informal and spontaneous ways. In a conversation, the participants have no specific practical purpose other than the general goal of exploring or creating a common world and body of meanings, learning something new about others, or discovering new perspectives. Discussions with friends over a meal are generally of this kind. We exchange points of view on a plurality of subjects freely, with no specific goal, no timetable,

[64] The phrase "judicial minimalism" can be associated with Cass Sunstein's works. *See* Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard Univ. Press 1999). Judicial Minimalism is similar in principle to Alexander Bickel's "passive virtues". See Bickel, *supra* note 16.

[65] Leclair, *supra* note 10, at 412–420. Leclair's criticisms and reflections use the application of the "reading in" doctrine of *Vriend* as his main target.

[66] See, for example, Peter W. Hogg & Allison A. Thornton, *Reply to "Six Degrees of Dialogue"*, 37 Osgoode Hall L.J. 529 (1999); Manfredi & Kelly, *supra* note 52. For further refinements, see, for example, Kent Roach, *American Constitutional Theory for Canadians (And the Rest of the World)*, 52 U. Toronto L.J. 503 (2002); Kent Roach, *Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U. B. C. L. Rev. 211 (2002).

no strong debate and argumentation, and, sometimes, with humorous comments. A dialogue as conversation can be more or less successful, depending on the degree of mutual understanding. In order to be successful, the participants must encounter each other in a shared world through a common language. This presupposes cooperation. Each participant must have an interest in, and a serious commitment to, what the others have to say. A conversation may fail, therefore, when the participants talk at cross-purposes or when they do not truly open themselves to the others or to what they have to say. I shall call this form of dialogue a "dialogue as conversation."

Since a dialogue as "informal" conversation has no specific practical purpose, it does not aim at taking a collective decision; reaching agreement; solving problems or conflicts; persuading others that a given opinion or thesis is true, the most justified, or the best; or determining together which particular view should govern actions or decisions. For this reason, a dialogue as conversation has no practical outcome to legitimize. Of course, it may possess some normative value; however, it possesses no legitimating value. Nevertheless, however informally it proceeds, a successful conversation may have an impact, however minimal, on the life of the participants. If I talked to someone who told me that she loves the tango or is keen to rent a villa in the city of Florence, our conversation may have provoked in my mind new interests, such as taking tango lessons or going to Florence next summer. But the purpose of our conversation was not the organization of my spare time or my next holiday. It would not be a failure if no such consequences followed from our dialogue, and if I stuck to my original plan to take Spanish lessons or to go to Istanbul.

By contrast, the word dialogue is sometimes used to describe a process of deliberation. I shall call this second form of dialogue "dialogue as deliberation." In this sense, a dialogue still entails two or more persons, understood as equals, exchanging some words, ideas, opinions, feelings, and so forth, but the exchange is more formal and less spontaneous than in the dialogue as conversation. A dialogue as deliberation has specific mutual practical purposes: it aims at taking decisions in common; reaching agreement; solving problems or conflicts collectively; determining together which opinion or thesis is true, the most justified, or the best; or which particular practical view should govern actions or decisions. Town meetings that involve lawmaking by assembled voters is an example of dialogue as deliberation. In such meetings, citizens have an opportunity to debate budget questions and other issues before they are put to a vote. There are many other institutions or forums in which the members are entitled to debate among themselves the stronger thesis and the better argument; a jury or elected representative assembly are typical instances of dialogue as deliberation. Indeed, deliberative democracy theory, which postulates that legitimate lawmaking lies in the process

of public deliberation by free and equal citizens, probably offers the most fully articulated model of dialogue as deliberation.[67]

No dialogue as deliberation could operate or sustain itself unless it satisfies certain conditions. First, each participant must recognize the other as an equal partner. Each participant must be equally entitled to put forward theses, to make proposals, to defend particular options, and to take part in the final decision. No one should be excluded from the dialogue, no one should impose by fiat where the dialogue should lead, and no hierarchy must confer in advance on one or more of the participants the authority to settle the disagreements. Second, a dialogue as deliberation must be a process of rational persuasion, not a form of coercion. Accordingly, the participants must have good reason to believe that the positions they defend are true, justified, or best, and they must try to convince the others of the force of their position. Yet, a dialogue as deliberation is not a debate one must absolutely win or in which one's views must absolutely prevail. Considering the specific common practical goals, each participant must be willing to expose their views to the critical analysis of the others and must be ready to change them if others put forth better arguments. Otherwise, the dialogue would not be a deliberation: the participants would stick to their original views and the dialogue would be a form of conversation. Third, a dialogue as deliberation must aim at producing some practical judgment, action, or decision that can be the object of reasoned agreements among the participants. Thus, the participants must justify their positions according to rules of evidence and argument that are, in principle, acceptable to all others. They must take into account each other's perspective and try to incorporate them into their own views. Of course, in particular cases, the pressure of time or the nature of the reasons may make it impossible for the participants to reach rational agreement. In these cases, they must agree to disagree. Nevertheless, the process of dialogue as deliberation must be constrained by this regulative ideal: any outcome must be the result of free and reasoned agreement (or disagreement) among the participants recognized as equal partners. Otherwise, the deliberation would not hold and the dialogue would be a form of conversation.

A deliberative dialogue is a process that has a particular normative value, and, at least in certain contexts, it may have legitimating force. It may confer legitimacy on its outcomes, whatever the final action or decision. Many different arguments support this general assertion. For example, one may appeal to the epistemic value of the process of deliberation. If one assumes, say, that all the participants have equal *expertise* with respect to some specific issue or as to what constitutes the most appropriate or fair judgment or action in a context of epistemological uncertainty or disagreement, then it is reasonable to claim that the process of dialogue as deliberation could confer some

[67] See the various essays in Deliberative Democracy, *supra* note 7.

legitimacy on the results. Alternatively, one could appeal to the idea of respect for human dignity. If one assumes, for example, that all participants have an equal *right* to participate in the process of determining a practical judgment or action that may affect them or others, it is also reasonable to claim that a deliberative dialogue among these participants may confer some legitimacy to its outcomes. Of course, this equal right may be based on various considerations: the participants may have the right to be convinced by reason (alone) that a final action or decision is appropriate and fair; or, more radically, they may have the right to be the author of the practical position the dialogue is meant to settle. Whatever the correct underlying justification, however, dialogue as deliberation may be thought of, at least in certain contexts, as specifically designed to confer legitimacy on its outcomes.[68]

The theory of institutional dialogue claims that judicial review is democratically legitimate because it constitutes "part" of a dialogue between the courts and the legislatures. But what kind of dialogue is presupposed by this theory? That is, which dialogue confers democratic legitimacy on judicial review—dialogue as conversation or dialogue as deliberation? Considering what has just been said, the answer is likely to be the latter, for only this form of dialogue seems to possess legitimating force. Dialogue as deliberation seeks to make collective decisions, to settle practical conflicts, and to reach agreements. It seems to be specifically designed to confer legitimacy on some practical outcome. Consequently, one might reasonably argue that this form of dialogue, qua dialogue, could legitimize judicial review and courts nullifying legislation, provided that such dialogue satisfies the conditions that confer legitimacy on the results: equality, rationality, and reasoned agreement.

Of course, within this process, each institution has a distinct role to play; the courts may emphasize the importance of maintaining fundamental, substantive, and procedural values, while the legislatures may emphasize the importance of promoting certain social and economic goals. But the courts must try to convince the legislatures that their conceptions of the right balance between fundamental values and collective good are stronger, from a constitutional point of view, than the legislatures' conceptions; in their responses, the legislatures must do the same with respect to their own conceptions. Each institution must put forward the best arguments in favor of their conceptions of constitutional justice, yet each must also be committed to changing their views if the other institution's positions appear stronger.

[68] This conception of dialogue as deliberation has an obvious connection with much contemporary theories of deliberative democracy. My own contribution to this question is found in Luc B. Tremblay, *Deliberative Democracy and Liberal Rights*, 14 Ratio Juris 424 (2001). *See generally*, Deliberative Democracy: Essays on Reason and Politics, *supra* note 7.

If it adequately represented the kind of dialogue that prevails, or could prevail, between the courts and the legislatures, the deliberative conception of institutional dialogue arguably could confer legitimating force on judicial review. Judicial review would be part of an ongoing process designed to arrive at reasoned agreements, and the institutional dialogue theorists would be right to claim that the final decisions are democratic. Hogg and Thornton, for example, have argued that when a legislature responds to a judicial decision by doing exactly as the court orders, the legislature is not necessarily complying with the decision as a subordinate institution. It has simply chosen to implement the court's decision. "After all, in common experience, dialogue does sometimes lead to agreement."[69] Unfortunately, deliberation cannot represent the form of dialogue that characterizes the dialogue that exists between the courts and the legislatures. In the next two sections, I put forward two important limits to the theory of institutional deliberative dialogue as a rationale for the legitimacy of judicial review.

3. Dialogue as deliberation and the doctrine of judicial responsibility

The first limitation to the theory of deliberative institutional dialogue derives from what I will call the doctrine of "judicial responsibility." According to this doctrine, judges should be totally committed to the decisions they reach in particular cases. They must regard themselves as the authors of their decisions and should be capable of justifying them on the basis of reasons they sincerely believe are good and sufficient according to their best understanding of the law. In this sense, judicial decisions according to law should be truly attributable to the judges who sign them. In a word, judges must be "responsible." The doctrine of judicial responsibility goes to the heart of the rule of law and constitutes a central part of the standards, norms, and virtues that constitute judicial ethics.

It follows from the foregoing that judges must not subordinate their own convictions and practical judgments to the will or judgment of others. They must not allow their family or social relationships, for example, to influence their judgments. They must not defer to some position or thesis they cannot rationally share or accept. A judge who would issue a ruling he or she did

[69] Hogg & Thornton, *supra* note 65, at 536. Manfredi and Kelly have responded that "legislative acquiescence may be indicative of a dialogue that has produced agreement. This argument is only persuasive, however, if agreement is bi-directional. In other words, there should be examples of cases where the Court acquiesces in a legislative decision. This is why the Court's judgment in Mills [R. v. Mills, [1999] 3 S.C.R. 668] is so important in constructing and defending the dialogue metaphor, since it appears to present a paradigmatic case of dialogue: a judicial decision, followed by legislation modifying that decision and judicial agreement with the new legislation. Yet close analysis of Mills raises questions about this characterization." Manfredi & Kelly, *supra* note 52, at para. 16.

not believe in or conceive of as the best, indeed, as *the* right legal decision under the circumstances would not be behaving responsibly. In fact, they would be making an illegitimate use of judicial power to interpret and apply the laws that govern society. Responsible judges, therefore, must make up their own minds with respect to the best or the right answer to the specific questions of law and must take full responsibility for their judgments and rulings according to law.

The doctrine of judicial responsibility specifically applies to the process of constitutional adjudication. Judges who are asked to review the constitutionality of legislative acts must follow their own constitutional convictions. They must assess the validity of a challenged law in light of their own best understanding of constitutional norms and values. This means they cannot subordinate their own constitutional views to the will or judgment of others or formally defer to the views of others. And this proposition would apply equally to the judges' relationships to legislatures. Judges who would simply defer to the legislatures, with respect to constitutional interpretation and validity, would not be responsible. As a consequence, the doctrine of judicial responsibility must be considered inconsistent with the idea of judicial deference to the legislatures with regard to the constitutionality of challenged laws. Moreover, judges do not have to justify their decisions on the basis of reasons that legislatures would necessarily accept. The judicial decisions must be in accordance with the judges' deepest convictions about what the law requires in particular cases.

Of course, the government is generally entitled to explain to the court the reasons that support the challenged laws and to defend its view about the proper constitutional balance between principles and policy. But there is nothing special about this. The doctrine of judicial responsibility includes a certain number of duties, such as the adjudicative duty to accord to every legally interested person in a proceeding the full right to be heard prior to a decision. However, the mere fact that judges, in constitutional cases, listen to the government and attend to its arguments does not necessarily mean that a deliberative dialogue is going on between the courts and the legislatures. The justification of the government's right to be heard does not correspond to an equal right to participate in a process aiming at a reasoned agreement among equals. The justification of the government's right to be heard is the right to state one's case, to present one's version of the facts, and to submit one's best conception of constitutional interpretation to a third party—the courts—which have the ultimate responsibility of making a just constitutional decision. It is significant that this aspect of the judicial process is called a "hearing," not a dialogue. Moreover, insofar as the doctrine of judicial responsibility requires the judges to be convinced that their decisions are legally the best, indeed, the only correct ones, it is highly desirable that prior to a decision, the judges hear and seriously try to understand what the legislatures thought about the validity of the laws. This is a case

where the quantity of information, presented as competing views and arguments, increases the probability of reaching the correct decision. Of course, for this very reason, judges might extend the right to be heard to all those who have something relevant to say about constitutional interpretation: philosophers, sociologists, political scientists, journalists, judges in other jurisdictions, legal scholars, and the like. But that is another subject.

The doctrine of judicial responsibility requires that judges have the last word with respect to the proper meaning, force, and scope of the constitutional values and principles they apply in particular cases. This last word holds not only in cases where judges nullify a piece of legislation, that is, where the courts are thought of as initiating a dialogue, but also in all subsequent cases where new laws, enacted to correct what the legislatures regard as mistaken judicial nullification, are challenged. In other words, the judges cannot recognize as constitutionally valid a particular law enacted to reverse, modify, or avoid a judicial decision nullifying a former legislative act unless they are convinced, on balance, that the corrective legislation is consistent with their best understanding of the proper meaning of constitutional norms and values.

An institutional dialogue theorist might reply that, at least in Canada, the override provision empowers the legislatures to make the final authoritative decisions. But this is misleading. First, the override provision empowers the legislatures to avoid specific judicial decisions nullifying particular legislation only with respect to a limited set of rights and only for a limited period of time.[70] Second, even within this limited set of rights, section 33 does not empower the legislatures to make authoritative determinations with respect to the proper meaning, force, and scope of the constitutional norms and values. The provision only empowers the legislatures to override, in limited fashion, such authoritative determinations as are made by the courts. Legislation using the override might be temporarily valid, but it would not properly contribute to the authoritative determination of the proper balance between constitutional values and social policies.[71]

[70] This obvious statement is, indeed, admitted by all institutional dialogue theorists.

[71] Kent Roach seems to acknowledge that section 33 is not a means by virtue of which the legislatures can contribute to the final determination of the proper balance between constitutional values and social policies, but a means that preserves the court's constitutional interpretation and decision. In a criticism of *Mills*, he explicitly argues that: "To the extent that one of the Court's concerns in Mills was to make room for dialogue between it and the Parliament, the section 33 override also would have accomplished this task by preserving the Court's decision in O'Connor and ensuring further public discussion of this difficult and evolving subject in five years time when the override would expire." Roach, *supra* note 19, at 528–529. This is paradoxical because one justification of the theory of institutional dialogue is the fact that the legislatures would participate in the process of determining the proper balance between constitutional values and social policies. For example, elsewhere, Roach argues that section 33 "allows the legislatures to reverse a Court decision and is consistent with strong and radical dialogic theories which suggest that the legislature can interpret the Constitution itself or hold accountable a Court that issues a judgment that is unacceptable to the majority." *Id.* at 531.

On the other hand, an institutional dialogue theorist might reply that there exists a doctrine of "legislative responsibility" according to which legislatures must also take full responsibility for their own political decisions. Like the courts, they too must determine for themselves whether the law they enact or redraft, in order to correct what they regard as judicial mistake, is consistent with their best understanding of the proper meaning and scope of the constitutional norms. It would not be true, then, to claim that the judges have the last word. From the point of view of the doctrine of judicial responsibility, no form of legislative responsibility can trump the ultimate responsibility of the judges to decide cases according to their own constitutional lights; however, from the point of view of a similar doctrine of legislative responsibility, no form of judicial responsibility can trump the ultimate responsibility of the legislatures to determine what legislation is constitutionally permissible in accordance with their own constitutional beliefs.[72] This would be a form of institutional dialogue.[73] The courts and the legislatures would necessarily participate, as equal partners, in an ongoing process—the deliberative dialogue.

But this view is also misleading. The situation it describes leads to practical constitutional conflicts. And since there would be no institution empowered to make authoritative determinations with respect to the proper meaning, force, and scope of the constitutional norms and values, including—in the case of Canada—the override provision, the practical conflicts could lead to a serious constitutional crisis threatening the rule of law.[74] Moreover, the dialogue that would emerge from such a constitutional crisis would not be the same kind of dialogue that is implicit in the theory of institutional dialogue. It would be a "political dialogue," not a legal or constitutional dialogue. And it would proceed independently of the ways provided for in most constitutions.

Finally, an institutional dialogue theorist might reply that the courts could recognize a second-order rule of constitutional interpretation, one which provided that judges ought to accept formally all legislative reversals and avoidances of former judicial nullification. Moreover, such second-order rule could be consistent with the doctrine of judicial responsibility. I agree. But this rule would entail a radical form of judicial deference or submission to the

[72] The doctrine of legislative responsibility has been debated in various terms within American constitutional history. *See, e.g.*, Bickel, *supra* note 16, at 259–272.

[73] This form of dialogue would constitute a version of what some have called "coordinate dialogue." *See supra* note 51.

[74] This plausible outcome might constitute one compelling reason to favor judicial supremacy. See the arguments put forward by the American constitutional scholars Larry Alexander and Frederick Schauer in *On extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997). *See also*, Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455 (2000). See also Cameron's argument, supra note 54.

judgments of the legislatures, something similar in principle to the conception of the role of the judiciary within the orthodox doctrine of parliamentary sovereignty. Although this strategy could be acceptable from a normative point of view, it cannot be thought of as constituting a form of deliberative dialogue. Judicial deference or submission to the views of another is inconsistent with the idea of dialogue among equals. As Kent Roach rightly maintained, dialogic theories "should not be confused with . . . judicial deference."[75]

4. Dialogue as deliberation and the legitimacy of judicial review

The theory that there is a form of deliberative dialogue between the courts and the legislatures encounters a substantial limitation in the doctrine of judicial responsibility. I now want to examine what I consider to be the most important limit to the theory of institutional dialogue. This second limit supports the first; it is both normative and conceptual. This limitation has its origin in the general conditions that judicial power and decision making must satisfy in order to be accepted as morally legitimate.[76]

It is generally admitted within our political and legal tradition that judicial power ought to act, as far as possible, in a legitimate manner. This view expresses and corresponds to an abstract and general principle of political morality, which, in essence, asserts that "all political authorities in a state ought to act, as far as possible, in a legitimate manner." This abstract and very general principle is rarely made explicit within normative political and constitutional theory. But it has underpinned most systematic thinking on moral and political legitimacy within liberal and democratic thought. The recurrent debate over the legitimacy of judicial review logically presupposes the more abstract principle's validity; the interest in the theory of institutional dialogue would be futile, indeed unintelligible, without the existence of such moral principle.

Since judges exercise political authority in the state, they would come within the ambit of this moral principle. It follows that they, too, are subject to a basic abstract moral duty: they ought to act, as far as possible, in a legitimate fashion. But what general conditions must judicial power satisfy in order to be accepted as morally legitimate? The modern constitutional answer has generally postulated two main conditions. I shall call the first the "rule-of-law condition." Judicial authority may be accepted as

[75] Roach, *supra* note 19, at 489.

[76] I have examined these conditions in greater details in Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 Oxford J. Legal Stud. 525 (2003).

legitimate if, and only if, it acts in accordance with the law. This condition entails not only that the composition of the courts and the judicial process must be "according to law" but that judicial decisions must be based on reasons that are, in a certain sense, "legal." As I have argued elsewhere, the concept of the rule of law minimally means that judicial decisions must be rational and that the reasons for decisions must be, in that certain sense, legal.[77] I call the second condition the "legitimacy-of-law condition." The judicial power can be accepted as legitimate if, and only if, the law that governs its composition, process, and decision making is, in a certain sense, "legitimate." This condition is less obvious than the first but is clearly understandable. If it is true that the moral legitimacy of judicial power is conditioned by the law that governs it (the rule-of-law condition), then this power has no more legitimacy than the moral legitimacy of the governing law. It follows, then, that the legitimacy of the judicial power is conditioned by the legitimacy of the law that governs the composition, process, and decision making of the courts (the legitimacy-of-law condition).

In order to fulfill their basic moral duty to act, as far as possible, in a legitimate way, judges must satisfy both conditions. Within certain modern conceptual systems, it has been argued that the rule-of-law condition is sufficient to establish the moral legitimacy of the judicial power. This view corresponds to what has often been referred to as "legalism." But legalism does not offer an adequate theory of judicial moral legitimacy. Legalism is a formal condition. It postulates that moral legitimacy is a matter of acting in accordance with a set of valid legal rules, independently of their intrinsic moral worth or consequences. It reduces moral legitimacy to legality. Legalism would imply that a judicial decision enforcing a totally arbitrary rule (the killing of all red-haired Canadians, for example) enacted in accordance with constitutional form and process by a dictator who has taken power in a nondemocratic way would be morally legitimate. But this is incoherent from the point of view of political morality. Moral legitimacy requires consistency with at least one standard of political morality that can provide the conditions the state's system of laws and institutions must satisfy in order to be morally acceptable. Since no moral standard could legitimize a dictator's decree to put one class of citizens to death for no reason at all, such a decree cannot be conceived as morally permissible. Yet, legalism claims that judicial decisions enforcing such a decree would be morally legitimate. Since the decree cannot confer moral legitimacy on any decision based on it (the decree has no moral force), legalism must presuppose the existence of at least one independent moral principle that could morally require the courts to enforce decrees that are not morally permissible. But there is no such principle. If there were such a principle, political morality would be incoherent. On the

[77] *See* Luc B. Tremblay, The Rule of Law, Justice, and Interpretation (McGill-Queen's University Press 1997), at ch. II.

one hand, totally illegitimate governments could legitimize their own arbitrary decrees merely by having them enforced by the courts; on the other hand, the judicial authority would be morally entitled to enforce what is not entitled morally to enforcement.

Legalism is not a sufficient condition to establish the legitimacy of judicial action. Judicial power cannot execute its basic abstract moral duty unless it satisfies the rule-of-law condition and the legitimacy-of-law condition. Accordingly, if the norms (that is, the rules, principles, standards) that govern courts' composition processes, and decisions were not, in a certain sense, legal or, if legal, were not, in a certain sense, morally legitimate, then judicial authority would not be legitimate. More specifically, if the reasons for judicial decision in a certain sense, legal, or if they were legal reasons but not, in a certain sense, morally legitimate, then the decision based upon them would not be legitimate either. The legitimacy of the judicial power, therefore, requires that judges justify their own actions and decisions on the basis of reasons that are, at least in a certain sense, legal, provided that these legal reasons are also morally legitimate.

This reasoning explains and justifies the fundamental moral and conceptual basis of judicial review. In sum, the process of judicial review constitutes the means by which judges are able to execute their basic moral duty to act, as far as possible, in a legitimate way. On the one hand, judicial review is the process whereby judges may verify whether the particular norms they are asked to apply or enforce in specific cases are, in those special senses, legal and legitimate. On the other hand, by means of judicial review judges may choose not to enforce or give effect to norms that are not legal or that are not morally permissible. In short, the process of judicial review constitutes the institutional instrument by which judges verify whether a given norm is entitled to judicial enforcement or not and act accordingly. In practical life, judicial review becomes operational as a result of the judges' own commitments to execute their basic, albeit abstract, moral duty to act in a legitimate way. It further follows that the process of judicial review derives from and is made morally legitimate—in principle—by the still more general principle of political morality that provides that "all political authorities in a state ought to act, as far as possible, in a legitimate way."

I have called the foregoing thesis the "General Legitimacy Thesis."[78] This theory argues that the legitimacy of judicial review does not depend on any specific legitimating fact or moral authorization. The legitimacy of judicial review is general in the sense that it depends on a basic, abstract moral principle conferring a general authority on the courts. The general legitimacy thesis should be distinguished from various versions of what may be called the "Specific Legitimacy Thesis."[79] According to this thesis, specific legitimacy is

[78] *See* Tremblay, *supra* note 75, at 538–544.

[79] *Id.* at 527–538.

conferred on an institution when a moral principle indicates a positive legitimating fact (or set of facts) that specifically confers authority to act. The principle of consent, for example, indicates a specific fact, the act of consent, and this fact specifically confers moral authority on what has been consented to. Or—another example—according to the principle of democracy, a certain form of democratic pedigree specifically confers legitimacy on political decisions. According to the general legitimacy thesis, however, no such principle specifically authorizes judicial review. Judicial review is morally legitimate by virtue of a basic, abstract, and general moral principle imparting general authority to judges to verify whether the conditions they must satisfy in order to act in a legitimate way are actually satisfied and then to act accordingly.

Where a state is committed to the moral legitimacy of its system of laws and institutions, the institution of judicial review is both necessary and permissible. Yet, it does not follow that the judges should always nullify, in part or as a whole, all the norms that are not legal or legitimate. First, as recourses there are other technical devices; for example, the judges could interpret the norms in ways that may make them legally valid or morally legitimate. Second, in particular cases, legal and moral reasons might be trumped by prudential or pragmatic reasons; for example, where nullification is likely to provoke social chaos, arbitrary repression, greater injustices, or institutional loss of credibility it might be better for the courts, on balance, to enforce illegal norms or illegitimate laws. Finally, good faith and judicial responsibility require that the judges be fully persuaded, after weighing all the reasons, that the norm they are prepared to nullify is neither legal nor legitimate. A certain rational process of discussion, argumentation, and justification must be conducted prior to decision.

Various consequences follow from the General Legitimacy Thesis.[80] For our present purposes, it is sufficient to recall three of them. First, the onus for demonstrating that the exercise of this particular judicial power is morally legitimate is reversed. It is not the legitimacy of judicial review that must be justified in principle but the legitimacy of the legislation the courts are asked, in some particular case, to apply or enforce. As I have shown, the legitimacy of judicial review is morally justified by means of a principle that provides that the court, as a political authority, ought to act, as far as possible, in a legitimate way. The onus of justification, therefore, rests on the parties who claim that the legislation at issue is entitled to judicial enforcement. In order to establish this, the parties must show that this legislation is both legal and morally legitimate. The main theoretical question, thus, concerns the conditions legislation must meet in order to be entitled to judicial enforcement, that is, to be accepted by the courts as legally valid and morally legitimate.

[80] *Id.*

Second, for the purpose of undertaking their basic, abstract duty to act legitimately, judges must give a rational response to the following theoretical challenge. They must establish and recognize at least one norm (rule, principle, standard) specifying the conditions that legislation must satisfy in order to be accepted as legally valid and morally legitimate and, consequently, as entitled to judicial enforcement. These conditions must take the form of normative criteria of legality and normative criteria of legitimacy. Since such criteria are among the reasons justifying a judicial decision as to whether or not legislation is entitled to judicial enforcement, they must be determined and accepted by judges prior to such decision.

Third, since the observance of these criteria constitutes a precondition for (*a*) the legal validity and (*b*) moral legitimacy of legislation, their normative force and status are logically prior to the legislation they define as legally valid and morally legitimate. Where do they come from? The normative criteria for the validity of legislation logically derive from, and take their force and status from, the law of the constitution, written or unwritten, and must be recognized as binding by the courts; they derive, in a more fundamental sense, from what the judges understand as the "best" theory of constitutional law available (leaving aside for the moment what this means).[81] The norms that constitute these criteria of validity may be called the "antecedent rules with respect to the validity of legislation."[82] The normative criteria for legitimacy follow the same pattern, and here we can apply language nearly identical to that which we used when speaking of validity. Hence: the normative criteria of legitimacy also logically derive from, and take their force and status from, the rules and principles of a political morality recognized as binding by the courts; they derive, in a more fundamental sense, from what the judges take to be the "best" theory of political legitimacy available (again, leaving aside for the moment what that means). The norms that constitute these criteria may be called—as above—the "antecedent norms with respect to the legitimacy of legislation."[83]

These consequences (of the general legitimacy thesis) entail, therefore, a second important limitation for the theory of institutional dialogue. If no particular norm is entitled to judicial enforcement unless that norm is accepted as valid and legitimate prior to any decision (and according to criteria of validity and legitimacy recognized by the judges as binding), then no

[81] In Tremblay, *supra* note 76, I argued that this theory, in Canada, corresponds to what I called the "Rule of Law as Justice." *See* chs. 4, 6 and 7.

[82] I used this phrase in *id.* ch. III.

[83] I used this phrase in Tremblay, *supra* note 75, at 542. In this text, I maintained that there exists a normative and conceptual link between the criteria of validity or legality and the criteria of legitimacy. This means that over a period of time, the basic principles of constitutional law tend to resemble to the principles of political morality, as understood and enforced by the courts. *See id.* at 544–561. It is not necessary to develop this point here.

redrafted law or new law enacted in order to correct what the legislatures regard as "judicial mistakes" can be entitled to judicial enforcement—unless it is shown that this new or redrafted law is consistent with the criteria of legality and legitimacy previously recognized by the judges. Otherwise, a court could act on the basis of a norm that may not be valid or morally legitimate, and this would undermine its own legitimacy. Since the normative criteria are partly expressed in terms of basic constitutional rules and principles, written and unwritten, it follows that it always belongs to the courts, in final analysis, to decide which legislation, including corrective laws, is to be recognized as constitutionally valid.[84]

One might argue that where there is more than one reasonable interpretation of constitutional law and of political morality, the courts ought to consider respectfully the legislative response to judicial nullification when seeking the proper balance between constitutional values and social goals or public goods. But this view would miss the essential point. If no legislation is entitled to judicial enforcement unless it satisfies the criteria of validity and legitimacy recognized by the courts as binding, then the legislatures cannot, after the fact and on their own, enact corrective legislation that determines the criteria of constitutionality and legitimacy that ought to be applied by the courts in the process reviewing the particular law. Since the observance of the criteria of validity and legitimacy is a precondition of the legal validity and moral legitimacy of legislation, these criteria are logically antecedent to any redrafted or new law purporting to be valid and legitimate. This means that a law enacted by a legislature for the purposes of reversing or avoiding a judicial decision that had nullified prior legislation has no normative force, no authority, no right to be respected unless the judges who are asked to enforce it conclude that it satisfies the criteria of validity and legitimacy that are logically antecedent to it. In short, a law cannot establish its own criteria of validity and legitimacy.

This means that the courts can never simply defer to the legislative judgments embodied in particular corrective laws, purporting to establish the proper balance between constitutional values and policies, because the normative force and validity of such judgments are conditioned by constitutional standards that are logically prior to them. In essence, judges always have the final word with respect to the proper balance between constitutional norms and public policies. Moreover, the judicial final word is not morally illegitimate; it derives from the abstract and general principle of political morality requiring that the judiciary ought to act, as far as possible, in a legitimate way, and from the courts' commitment to maintain their own legitimacy. The judges who would enforce legislation without verifying whether it is entitled to judicial enforcement could undermine their own legitimacy.

[84] *Id.*

The theory that courts and legislatures participate in a deliberative dialogue is, therefore, conceptually and normatively limited by the general conditions that judicial authority and decision making must satisfy in order to be accepted as morally legitimate, namely, the rule-of-law condition and the legitimacy-of-law condition. It follows that the force and effect of the legislatures' views, in particular cases, are also conditioned by or dependent on prior judicial judgments about the normative force and effect that ought to be given to these views and arguments, since the courts have already taken into account a set of criteria that are necessarily and logically antecedent to and independent of the expression of the views of the legislatures.

5. Dialogue as conversation and the legitimacy of judicial review

The thesis that the institutional dialogue between the courts and the legislatures would be a form of deliberation is not acceptable. Would it not be better to conceive of this dialogue as a form of conversation? There are reasons to think that the answer would be in the affirmative. The dialogical process shows that judicial decisions nullifying legislation express just one conception of the proper balance between constitutional values and public policies. Democratic institutions are almost always capable of expressing and imposing some other conception of the proper constitutional balance. Indeed, while the courts may emphasize fundamental principles and values, the legislatures may focus on social and economic policies. Still, each institution is entitled to stick with its particular set of judgments and concerns; the courts may enforce the constitution as they understand it, and the legislatures will remain free to realize their original objectives, and, for that matter, by way of the original legislative means, all in accordance with their own understanding of constitutional requirements. The judges may comply with the doctrine of judicial responsibility and execute their basic abstract moral duty to act in a legitimate way, but this does not prevent the legislatures from proceeding along a like course, to whatever extent they can. Accordingly, the courts and the legislatures may be seen as conversing together.

We may admit that the conception of dialogue as conversation constitutes a better, perhaps more accurate, description of the relationship that prevails between the courts and the legislatures. But how are we to understand the claim that this form of dialogue could legitimize the institution of judicial review? As we saw, a dialogue as conversation has no specific common practical purpose; it has no collective decision to make, no conflict to settle, no agreement to reach. Since it has no specific shared purpose, it has no collective practical judgment, action, or decision to legitimize qua dialogue. Consequently, a dialogue as conversation, in this sense, can hardly legitimize the institution of judicial review, much less court rulings nullifying legislation. Rather, such conversation constitutes a social and political fact, namely,

that two institutions, disagreeing over the proper constitutional balance, exchange words, ideas, opinions, judgments, and experiences within a space of intersubjective meanings and institutional settings but without a specific commitment to reach practical mutual agreement.

An institutional dialogue theorist might argue that this is not the correct way to look at the matter. The kind of dialogue that describes the theory of institutional dialogue is a conversation, and it is as such that it has legitimating force. The reason is that, within the theory of institutional dialogue, the legitimacy of judicial review constitutes a "negative" claim. Judicial review is democratically legitimate because it does *not* prevent the democratic institutions from accomplishing their prior objectives; indeed, it does not forestall them from accomplishing these goals through the original means. Judicial review, then, would be democratically legitimate not because it possesses some positive democratic source or pedigree or justification but just because, ultimately, it would *not* be countermajoritarian.

The argument is interesting but somewhat confusing. First, it is not clear why we should understand the negative claim of legitimacy for judicial review in the context of the theory of "dialogue". As described here, judicial review would be morally permissible only because the legislatures would have the last word. But if legitimacy derives from the fact that, ultimately, the legislatures almost always have the power to impose their will, then the only fact that matters for the purposes of legitimate lawmaking is the democratic character of the legislative process. In this case, the concept of dialogue as conversation does not add much either to the more traditional conceptions of democratic legitimacy—be they majoritarian, pluralist, or utilitarian—or to the traditional understanding of parliamentary sovereignty and undemocratic judicial review. The conversation that would characterize the dialogue between the courts and the legislatures, then, would do nothing, qua dialogue, to legitimize judicial review.

Second, the negative claim seems a very strange way of defending the institution of judicial review, here understood as the power of the courts not to give effect to democratic legislation that appears inconsistent with the courts' interpretation of the constitution. The negative claim justifies the legitimacy of judicial review at the cost of depriving it of its constraining power and meaning. It is significant that the ultimate argument supporting the negative claim is the existence of section 33's override provision. Consequently, the theory of institutional dialogue as conversation appears to be not so much about justifying the legitimacy of judicial review as about denying its authority. Yet, most influential institutional dialogue theorists postulate that the Charter values identified by the courts, in the process of judicial review, do constitute authentic constraints on the democratic process. Explaining and justifying the legitimacy of judicial review must make sense of these constraints.

Third, insofar as the legitimacy of judicial review depends on the fact that, ultimately, the courts almost always enforce the will of the legislatures as

expressed in legislation,[85] the negative claim may reveal that the theory of institutional dialogue as conversation is just new garb for a radical theory of judicial deference. But deference is not dialogue, for dialogue presupposes equality and mutual respect. Indeed, it has been argued that in *Mills*, for example, the Supreme Court has used the concept of dialogue in order to justify a radical posture of deference to Parliament.[86] One must agree, then, with Jamie Cameron when she argues that "[w]ith the Supreme Court of Canada granting the government a license to ignore its interpretations of the Charter, it is difficult to see how this symmetry of respect actually works."[87]

The notion that the courts and the legislatures participate in a conversational dialogue may be acceptable as a descriptive thesis. However, it is quite limited as normative theory regarding the democratic legitimacy of judicial review. Since this idea of dialogue has no specific and practical decision, action, or judgment to legitimize, it can hardly legitimize, qua dialogue, the institution of judicial review, where court rulings can nullify legislation. Insofar as the normative claim for judicial review is conceived in negative terms, it seems to deny both the importance of the dialogue as a legitimating fact and the very existence of what it is meant to legitimize, namely, the institution of judicial review.

6. Conclusion

The theory that institutional dialogue represents a form of conversation between the courts and the legislatures is no more acceptable than the theory that it represents a form of deliberation. Dialogue as deliberation could confer, qua dialogue, legitimating force on its outcomes. But this does not constitute an adequate representation of the kind of dialogue that can prevail between the courts and the legislatures. The doctrine of judicial responsibility and the abstract moral duty to act, to the greatest extent possible, in a legitimate way constitute two important limitations on the theory that the courts and legislatures participate in the kind of deliberation that could confer legitimacy on judicial review. By contrast, dialogue as conversation may constitute an adequate representation of the sort of dialogue that obtains between courts and legislatures. But it cannot, qua dialogue, legitimize the institution of judicial review or specific judicial rulings. Such dialogue is not designed to

[85] This would be particularly true with the use of section 33.

[86] *See* Cameron, *supra* note 54, at 1058–1059.

[87] *Id.* at 1059. Kent Roach rightly maintained that dialogic theories "should not be confused with . . . judicial deference." *See* Roach, *supra* note 19, at 489. Roach also criticizes *Mills*: the judicial deference manifested in *Mills* "may be in tension to judicial independence and the Court's anti-majoritarian role." *Id.* at 502. Also, "undue deference to legislative interpretations of the Charter presents some danger of Parliament being a judge in its own majoritarian causes." *Id.* at 503.

impart legitimacy to practical decisions, actions, or judgments. Insofar as the legitimacy of judicial review is conceived of in negative terms, then, not only does it not seem to be grounded on the fact or the principle of dialogue but it seems to deny the existence of what it is meant to legitimize, namely, the institution judicial review.

In my view, these conclusions are supported by what the Supreme Court of Canada actually has in mind, or seems to, beyond the rhetoric of institutional dialogue. In *Vriend,* for example, the important case in which certain judges of the Supreme Court of Canada introduced the metaphor of institutional dialogue as an argument to refute the countermajoritarian objection to judicial review, Justice Iacobucci explicitly asserted the supremacy of the judicial power over constitutional interpretation and integrity. First, he said that it was "the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid."[88] Then, in order to refute the countermajoritarian objection, he added:

> it should be emphasized again that our *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.*[89]

Of course, this responsibility is not free, but it is authoritative:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, *the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.*[90]

Similarly, for the judge, the supremacy of the Constitution entails judicial supremacy, and this is in no way illegitimate.

> Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and *if they fail to do so, courts should stand ready to intervene to protect these democratic values*

[88] *See Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 132.

[89] *Id.* at para. 134 [emphasis added].

[90] *Id.* at para. 136 [emphasis added].

> *as appropriate*. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*.[91]

Moreover, even in *Mills*, where the metaphor of dialogue was used by certain judges to justify their decision to uphold a legislative regime apparently inconsistent with a former judicial precedent nullifying the former regime, it was explicitly asserted that

> Parliament has enacted this legislation after a long consultation process that included a consideration of *the constitutional standards outlined by this Court in* O'Connor. *While it is the role of the courts to specify such standards*, there may be a range of permissible regimes that can meet these standards. It goes without saying that this range is not confined to the specific rule adopted by the Court pursuant to its competence in the common law.[92]

Accordingly, the courts determine the constitutional standards, and, while there may be a "range of permissible regimes that can meet these standards," it always belongs to the courts, in the final analysis, to determine whether the particular regime adopted by the legislatures actually satisfies those standards. This is entirely consistent with the doctrine of judicial responsibility and with the general conditions the judiciary must satisfy in order to maintain its own moral legitimacy.

These passages are difficult to reconcile with the theory of institutional dialogue as deliberation. They may be consistent with some form of institutional dialogue as conversation, but then the theory would be descriptive. In effect, the theory becomes a description of the social and political state of affairs constituted by the dynamic process by which the institutions of the state contribute to the evolution of the law. The courts are the trustees of constitutional values insofar as disputes arise concerning their interpretation; and the legislatures must act within the constitutional limits as understood and enforced by the courts. In this ongoing "conversation," new constitutional questions produce new understandings, and new constitutional positions and new constitutional values emerge. It may be the case that, in the long run, the legislatures or the electors impose their constitutional conceptions on the legal order as understood and enforced by the courts. But such an eventuality is not necessary, since the legal state of affairs in the here and now depends, ultimately, on authoritative judicial judgments, and the question whether a "conversation" has happened or not would be simply an empirical question of fact.

[91] *Id.* at para. 142 [emphasis added].

[92] *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 59 [emphasis added].