

# Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*

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THE 2015 ASSISTED DYING case, *Carter v Canada*, involved an issue as fundamental to personal liberty as any the Supreme Court of Canada has ever dealt with under the *Charter of Rights and Freedoms*. The substantive questions at the core of the case remain relevant, and policy-makers and scholars continue to examine the difficulties associated with regulating access to medical aid in dying. Yet, beyond its central issue, the *Carter* case and its fallout also implicate a host of subsidiary matters relating to judicial review under the *Charter*. This paper assesses *Carter* as a microcosm for examining a set of issues that have occupied *Charter* scholars, including inter-institutional dialogue, judicial remedies, and positive rights. These issues will remain pivotal as the *Charter* moves beyond its 35<sup>th</sup> anniversary. The *Carter* case serves as a lens of analysis for these issues, functioning, to a significant degree, as a critical juncture for an exploration of the evolution of these concepts/debates.

L'ARRÊT *CARTER C CANADA*, rendu en 2015 en matière d'aide médicale à mourir, portait sur un des enjeux les plus fondamentaux pour la liberté personnelle que la Cour suprême du Canada ait eu à trancher en vertu de la *Charte des droits et libertés*. Les questions de fond au cœur du litige demeurent toujours d'actualité et les décideurs comme les chercheurs continuent d'examiner les difficultés liées à la réglementation de l'accès à l'aide médicale à mourir. Et pourtant, au-delà de sa question centrale, la décision *Carter* et ses retombées impliquent également une myriade de questions subsidiaires liées à l'examen judiciaire en vertu de la *Charte*. Dans cet article, on considère l'arrêt *Carter* comme un microcosme permettant d'examiner un ensemble d'enjeux ayant fait l'objet d'études de la part des spécialistes de la *Charte*, notamment le dialogue interinstitutionnel, les recours judiciaires et les droits positifs. Ces sujets demeureront cruciaux alors que la *Charte* poursuit son cheminement après avoir célébré son 35<sup>e</sup> anniversaire. L'arrêt *Carter* sert de lorgnette pour analyser ces enjeux et, dans une plus large mesure, constituera un tournant critique pour une exploration de l'évolution de ces concepts/débats.

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# Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*

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## INTRODUCTION

The assisted dying case, *Carter v Canada (Attorney General)*,<sup>1</sup> involves an issue as fundamental to personal liberty as any the Supreme Court of Canada (“the Court”) has dealt with under the *Charter of Rights and Freedoms*.<sup>2</sup> The Court unanimously held that the federal criminal prohibition on assisted suicide violates the right to life, liberty and security of the person under section 7 of the *Charter*. The Court declared the prohibition “void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.”<sup>3</sup> The Court suspended the declaration of invalidity for 12 months.<sup>4</sup> During that time, an intervening election took place, and the new Liberal government sought a six-month extension to craft appropriate response legislation. The Court granted a four-month extension.<sup>5</sup>

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1 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

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

3 *Carter*, *supra* note 1 at para 4.

4 *Ibid* at para 147.

5 *Carter v Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13 [*Carter II*].

In June 2016, Parliament passed Bill C-14, which regulates access to medical aid in dying for individuals at least 18 years of age who suffer from a “grievous and irremediable medical condition.”<sup>6</sup> The new legislation establishes a relatively narrow threshold for access, one that is more restrictive than outlined by the Court. Among the criteria, a person with a grievous and irremediable medical condition must be in “an advanced state of irreversible decline in capability,” and their natural death must be “reasonably foreseeable.”<sup>7</sup> Without using the word “terminal,” the new law effectively limits access to people with terminal conditions—a limit that the Court’s baseline threshold for access does not contemplate. As Carissima Mathen notes, the government’s narrow approach “may prove to be constitutionally suspect.”<sup>8</sup>

There will continue to be debate over the Court’s substantive reasoning in *Carter* and the constitutionality of the government’s new legislation.<sup>9</sup> Yet, beyond the substantive policy and constitutional issues at stake, the *Carter* case and its fallout also implicate a host of heavily-debated matters important to judicial review under the *Charter*. In the spirit of a special issue on the 35<sup>th</sup> anniversary of the *Charter* and Constitution 150, which seeks to examine both the legacy of the *Charter* as well as offer forward-looking analysis, this paper will focus on three of these key issues: (1) *Charter* dialogue; (2) remedies; and (3) positive rights. I argue that *Carter* and its aftermath highlight each of these distinct facets of both the *Charter* and judicial review in ways that reinforce their serious operational or conceptual deficiencies. As a result, the *Carter* case serves as a microcosm, offering lessons for the utility of the dialogue concept, the Court’s use of a suspended declaration of invalidity, and the complex question of positive rights under the *Charter*.

In Part I, I examine the implications of Bill C-14 for the notion that there is an inter-institutional dialogue under the *Charter*. Under the dialogue metaphor, legislatures are purportedly able to respond to judicial

6 *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3, s 3, amending *Criminal Code*, RSC 1985, c C-46, s 241.2(1)(b)–(c) [*Bill C-14*].

7 *Ibid.*, s 3, amending RSC 1985, c C-46, s 241.2(2)(b), (d).

8 Carissima Mathen, “A Recent History of Government Responses to Constitutional Litigation” (2016) 25:3 *Const Forum Const* 101 at 102 [Mathen, “A Recent History”].

9 See Dwight Newman, “Judicial Method and Three Gaps in the Supreme Court of Canada’s Assisted Suicide Judgment in *Carter*” (2015) 78:2 *Sask L Rev* 217; Benny Chan & Margaret Somerville, “Converting the ‘Right to Life’ to the ‘Right to Physician-Assisted Suicide and Euthanasia’: An Analysis of *Carter v Canada (Attorney General)*, Supreme Court of Canada” (2016) 24:2 *Med L Rev* 143; Dianne Pothier, “Doctor-assisted Death Bill Falls Well Within Top Court’s Ruling”, *Policy Options* (29 April 2016), online: <policyoptions.irpp.org>.

decisions by implementing new legislation, demonstrating that courts do not necessarily have the final say over the fate of the policy objectives at stake.<sup>10</sup> Bill C-14's restrictive threshold for access to medical aid in dying, as described above, seems to be an excellent example of dialogue given that it departs from the Court's policy prescription. However, the perception that Bill C-14 will prove unconstitutional would undoubtedly lead some observers to reject the new law as an example of dialogue. The utility of the dialogue metaphor to accurately describe the relationship between courts and legislatures under the *Charter* has been subject to extensive empirical and conceptual debate.<sup>11</sup> *Carter* serves as yet another, and perhaps final, nail in the concept's coffin.<sup>12</sup>

Part II provides a critique of the Court's use of the suspended declaration of invalidity in the *Carter* case. The Court's increasing application of this remedy, for which it had previously established strict parameters (now ignored), has been the subject of critical analysis by commentators for some time.<sup>13</sup> I argue that the *Carter* case, the government's subsequent request for an extension on the suspended declaration, and the Court's decision to provide one in *Carter II*, expose in pronounced terms fundamental problems associated with the liberal use of the remedy.

In Part III, I examine the implications of *Carter* for the distinction between negative and positive rights under the *Charter*. Although the

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- 10 Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.
- 11 Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall LJ 513; Matthew A Hennigar, "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court *Charter* Decisions" (2004) 37:1 Can J Political Science 3; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1; Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on '*Charter* Dialogue Revisited'" (2007) 45:1 Osgoode Hall LJ 125; Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 34:1 Intl Political Science Rev 39 [Macfarlane, "Dialogue or Compliance?"]; Emmett Macfarlane, "Conceptual Precision and Parliamentary Systems of Rights: Disambiguating 'Dialogue'" (2012) 17:2 Rev Const Stud 73.
- 12 This statement is best read as a normatively hopeful one. In reality, scholars will continue to employ and discuss the dialogue concept. Further, I am not the first person to suggest that a specific case signifies (or ought to signify) the end of dialogue (see e.g. Christopher P Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé v Canada*" (2007) 45:1 Osgoode Hall LJ 105).
- 13 Bruce Ryder, "Suspending the Charter" (2003) 21 SCLR (2nd) 267; Kent Roach, "Principled Remedial Discretion Under the Charter" (2004) 25 SCLR (2nd) 101 [Roach, "Principled Remedial Discretion"].

focus of the Court's section 7 analysis was the criminal law prohibition on assisted suicide, the case has significant repercussions for access to medical aid in dying as a function of provincial delivery of health care. While *Carter* is ostensibly a negative rights case—negative rights being those rights infringed or limited by state action—it has obvious positive rights implications that may require state action and resources to facilitate. Federalism is an important intervening variable in cases that pertain to criminal law but that have consequences for health care delivery. As with previous cases regarding criminal law but fundamentally relating to questions of *access to health services*,<sup>14</sup> the Court does not sufficiently confront this issue in its reasoning.

Part IV briefly concludes by arguing that *Carter* offers a number of lessons for relevant actors. I offer some brief thoughts about how these various issues might develop.

## I. DIALOGUE: AN INCREASINGLY CONTESTED CONCEPT

Peter Hogg and Allison Bushell's 1997 article on *Charter* dialogue captured the imagination of academics, lawyers, and even some Supreme Court justices; the concept has also been met with significant criticism, particularly from political scientists. One of the central issues is the extent to which dialogue actually exists in practice. In their original formulation of dialogue, Hogg and Bushell state that dialogue occurs when "a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law."<sup>15</sup> Using this definition, political scientists found that dialogue was actually quite rare. One study, looking at the substantive legislative responses to all Supreme Court *Charter* invalidations, found that dialogue occurs in as few as 17.4 percent of cases.<sup>16</sup>

A key source of disagreement over the empirical measurement of dialogue questions whether laws that merely enact judicially prescribed policies (or even instances where legislatures simply repeal laws that have been subject to judicial invalidation) should count as dialogue. Despite defining dialogue as occurring when legislatures pass a new law to reverse, modify, or avoid the policy effects of judicial decisions, Hogg and Bushell

14 *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* 1988 cited to SCR]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community Services* cited to SCR].

15 Hogg & Bushell, *supra* note 10 at 80.

16 Macfarlane, "Dialogue or Compliance?", *supra* note 11 at 47.

count *any* legislation as dialogue, including decisions to repeal invalidated laws. As they argue, “it is always possible that the outcome of a dialogue will be an agreement between the participants!”<sup>17</sup> From an empirical perspective, however, it is difficult to know whether governments engage in “genuine agreement” or “grudging compliance.”<sup>18</sup> Given the evidence that governments often feel that it is necessary to comply with judicial decisions,<sup>19</sup> simply counting all instances of legislative repeal or amendment as dialogue runs counter to any conceptual definition where dialogue preserves, in whole or in part, legislative policy objectives.

This empirical disagreement is thus much more fundamental than a tricky measurement problem. In fact, it strikes at the core of whether dialogue has any functional utility as a concept that describes the regular occurrence of *meaningful* legislative responses to judicial *Charter* invalidations. It is the substantive content of the legislative response, not the process by which it is enacted, that matters. Although the notwithstanding clause<sup>20</sup> could theoretically serve as a key instrument of dialogue, its well-documented political obsolescence<sup>21</sup> means that dialogue almost always occurs through the use of new or amended legislation, particularly by invoking new arguments under section 1.

Despite this empirical debate, Parliament’s response to the *Carter* decision, Bill C-14, appears to fit both proponents’ and critics’ understanding of dialogue. As described above, Bill C-14 is much more restrictive than the Court’s guidelines for access to medical aid in dying, and therefore represents a modification of the Court’s explicit policy prescription. However, some constitutional experts, including Hogg, contend that the new legislation is likely unconstitutional.<sup>22</sup> In an appearance before a Senate committee on Bill C-14, Hogg noted that “Carter herself would not have satisfied the new conditions in the bill... Parliament can’t turn around and

17 Hogg & Bushell, *supra* note 10 at 98.

18 Macfarlane, “Dialogue or Compliance?”, *supra* note 11 at 42–43, citing Hennigar, *supra* note 11 at 8.

19 Macfarlane, “Dialogue or Compliance?”, *supra* note 11 at 43.

20 See *Charter*, *supra* note 2, s 33 (section 33 of the *Charter* permits Parliament or the legislature of a province to pass legislation that operates notwithstanding a provision included in section 2 or sections 7 through 15 of the *Charter*. The legislation must be renewed every five years to remain in effect).

21 Peter H Russell, “The Notwithstanding Clause: The Charter’s Homage to Parliamentary Democracy”, *Policy Options* (February 2007) 65, online: <[irpp.org/wp-content/uploads/assets/po/the-charter-25/russell.pdf](http://irpp.org/wp-content/uploads/assets/po/the-charter-25/russell.pdf)>.

22 Sean Fine & Laura Stone, “In Absence of Federal Law, Assisted Dying Enters Era of Uncertainty”, *The Globe and Mail* (6 June 2016), online: <[theglobeandmail.com](http://theglobeandmail.com)>.

suddenly exclude from the right a group of people that have just been granted the right by the Supreme Court.”<sup>23</sup>

It is clear from his comments that Hogg does not view Bill C-14 as an example of healthy or legitimate dialogue. Proponents of the dialogue concept argue in other contexts that “in-your-face” legislative responses—laws that effectively reverse a judicial decision on the basis that the Court’s interpretation of the *Charter* was wrong or simply unacceptable—should not be employed without recourse to the notwithstanding clause.<sup>24</sup> Examples of “in-your-face” replies include Parliament’s reversal of a Supreme Court decision that upheld an extreme intoxication defence for perpetrators of sexual assault,<sup>25</sup> in which Parliament enacted legislation that adopted the dissenting justices’ view; and the reversal of a Supreme Court decision on access to sexual assault victims’ counselling records<sup>26</sup> via a law that also relied on the dissenting judgment and was later upheld as constitutional by the Court.<sup>27</sup>

It is not clear whether Bill C-14 constitutes an “in-your-face” reply in this sense. On the one hand, to the extent that Bill C-14 narrows a fundamental aspect of the constitutional threshold for access to medical aid in dying outlined by the Court, it does so in opposition to a unanimous decision. In this vein, Parliament’s new legislation is an even more egregious example of “legislative lip”<sup>28</sup> than when it relied on dissenting judgments to support its response to a judicial decision. On the other hand, Bill C-14 is less of a reversal than it is a modification of the Court’s decision. As Mathen notes, any new constitutional challenge to Bill C-14 would need to consider the law’s objective, “which might well impact the section 7 analysis and, in particular, the degree to which further limits could be found to be overbroad.”<sup>29</sup> Parliament did not attempt to re-introduce the impugned prohibition but instead passed a law that arguably warrants a new section 1 analysis. In this sense, Bill C-14 should be viewed as an example of dialogue.

However, another notable aspect of Bill C-14 is that the government’s defence of it and its obvious departure from the Court’s reasons were not

23 *Ibid.*

24 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, revised ed (Toronto: Irwin Law, 2016) at 308 [Roach, *Supreme Court on Trial*].

25 *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469.

26 *R v O’Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

27 *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1.

28 Roach, *Supreme Court on Trial*, *supra* note 24 at 308.

29 Mathen, “A Recent History”, *supra* note 8 at 106, n 30.



premised on dialogue *per se*. Rather, as Eleni Nicolaidis and Matthew Hennigar contend, they were premised on the concept of coordinate interpretation—the idea that legislatures, and not just the courts, have the legitimate power to interpret the Constitution, even in a manner that disagrees with judicial outcomes.<sup>30</sup> Where dialogue critics like Christopher Manfredi and James Kelly sometimes view an “in-your-face” reply on this basis as “an excellent example of genuine dialogue,”<sup>31</sup> dialogue proponents fundamentally disagree. Kent Roach, for example, describes coordinate interpretation as “dangerous,”<sup>32</sup> and argues that use of the override provision would at least commit the government to “more democracy and debate.”<sup>33</sup>

Dialogue proponents tend to see dialogue almost everywhere, counting virtually any legislative response *except* where critics of dialogue occasionally see it, which is in cases where the legislature fundamentally modifies or constrains the judicial policy prescription at stake. For critics, it is those instances of disagreement that would make dialogue a meaningful concept of inter-institutional contestation over what the Constitution requires. *Carter* offers a pronounced example: while Parliament’s response signals disagreement with a core prescriptive element of the Court’s decision, in the eyes of the most prominent proponent of dialogue, the new law is illegitimate.

30 Eleni Nicolaidis & Matthew Hennigar, “*Carter* Conflicts: The Supreme Court of Canada’s Impact on Medical Assistance in Dying Policy” in Emmett Macfarlane, ed, *Policy Change, Courts, and the Canadian Constitution* (University of Toronto Press) [accepted for publication]. See generally Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen’s University Press, 2010) (for more on coordinate constitutionalism in the Canadian context).

31 Manfredi & Kelly, *supra* note 11 at 520.

32 Roach, *Supreme Court on Trial*, *supra* note 24 at 311.

33 *Ibid* at 312 (it is unclear how a government avoids “democracy and debate” when it passes legislation without recourse to the notwithstanding clause. Previous instances of “in-your-face” replies were the product of significant parliamentary and public debate, and any future legal challenge brought against a new law would compel further public debate. Roach argues that one reason recourse to coordinate interpretation absent the notwithstanding clause is dangerous is that it provides Parliament with an “incentive to minimize the rights of the most unpopular—the Daviaults [criminal sex assault defendants] of the world—and maximize the rights of the more popular—women, children, and others who could be victimized by drunken violence” (*ibid* at 311). This logic presumes that courts get the balance of those competing interests right. Indeed, one could make a strong argument that Parliament’s coordinate interpretative approach in the area of rules surrounding sexual assault cases has not been to privilege a popular group but to finally strengthen safeguards for a historically disadvantaged one (victims of sexual assault) in the context of the justice system).

If Bill C-14 does not count as dialogue,<sup>34</sup> then *Carter* further signifies the metaphor's lack of conceptual utility; for it surely fails to function as a particularly useful concept if it only applies to legislative responses that do not signal a meaningful disagreement with judicial decisions. This lack of utility is not simply a matter of debate over application as scholars might have regarding concepts like justice or equality. Instead, dialogue has been defined as an empirical concept by its proponents in a way that makes it impossible to verify empirically.

## II. UNFAIR AND UNNECESSARY: THE SUSPENDED DECLARATION OF INVALIDITY

The Court's written reasons in *Carter* are conspicuously silent about why a 12-month suspended declaration of invalidity was necessary. The Court simply stated that "[i]t is for Parliament and the provincial legislatures to respond, *should they so choose*, by enacting legislation consistent with the constitutional parameters set out in these reasons."<sup>35</sup> The Court's wording here implies the Justices recognized that a myriad of legislative responses, including no federal response at all, were possible. Given the individual rights implicated by the suspended declaration of invalidity, it is difficult to justify the remedy.

The Court originally deployed the remedy in the 1985 *Manitoba Language Rights Reference*, where it determined that Manitoba was required to enact legislation in both French and English.<sup>36</sup> This finding meant, in essence, that almost all of the province's laws were invalid; the Court held that the declaration of invalidity be postponed to avoid virtual lawlessness.<sup>37</sup> In *Schachter v Canada* in 1992, the Court outlined that the temporary suspension of invalidity was appropriate where striking down a provision poses a danger to the public, threatens the rule of law, or the law at stake

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34 It should be noted that even if *Bill C-14*, *supra* note 6 is found unconstitutional in a future legal challenge, that would not necessarily mean that as a legislative response it did not constitute dialogue. Indeed, my own view is that the *Charter* requires an even more robust form of access to medical aid in dying than the Court itself laid out in *Carter*.

35 *Carter*, *supra* note 1 at para 126 [emphasis added].

36 *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

37 It is not clear why a formal remedy was required in this case. Technically, reference opinions, as advisory in nature, are non-binding. This issue was not raised or acknowledged by the Court in its reasons.

involves underinclusive legislation (and thus striking down the law would deprive deserving persons of benefits).<sup>38</sup>

As Sarah Burningham notes, the courts have liberalized their use of the remedy to the point where suspensions “are now so routine that declarations of invalidity made under s. 52 are suspended in more cases than not.”<sup>39</sup> Scholars examining this development argue the Court should revisit these rules; some calling for a more robust justificatory approach,<sup>40</sup> and others presenting a broader set of considerations, including “effective remedies, proper institutional role[s], and fairness.”<sup>41</sup> The defence of suspended declarations as facilitating dialogue is a popular approach, and there is some evidence to support the idea that the remedy encourages legislative responses. According to one study, dialogue occurs at a rate of 36 percent following cases where the Court employed the suspended declaration, in contrast to 16 percent of cases where an immediate invalidation occurred.<sup>42</sup> However, this outcome arguably reflects, at least to some degree, the ability of the Court to ascertain when legislative responses were more likely.

Moreover, it is not clear that facilitating dialogue is a sufficient justification for extending the very harms associated with the law in the first place. As Burningham writes in relation to the suspension in *Carter*:

With its remedy, the Court has imposed on [people entitled to medical aid in dying] another year of ‘intolerable suffering’—suffering that, combined with the prohibition on ending that suffering, results in a violation of their constitutional rights. These individuals may never be able to access physician-assisted suicide, as they may lose capacity during the suspension period or they may die, in a manner not of their choosing, before the suspension period is up.<sup>43</sup>

*Carter* is a particularly heightened example of the harms suspended declarations can impose on rights-holders. The Court compounded this issue in *Carter II* when it granted the Federal Government’s request for an extension.

38 *Schachter v Canada*, [1992] 2 SCR 679 at 715–16, 93 DLR (4th) 1 [*Schachter*].

39 Sarah Burningham, “A Comment on the Court’s Decision to Suspend the Declaration of Invalidity in *Carter v Canada*” (2015) 78 Sask L Rev 201 at 202, citing Grant R Hoole, “Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law” (2011) 49:1 Alta L Rev 107 at 114.

40 Ryder, *supra* note 13 at 282–86.

41 Roach, “Principled Remedial Discretion”, *supra* note 13 at 142.

42 Macfarlane, “Dialogue or Compliance?”, *supra* note 11 at 49–50.

43 Burningham, *supra* note 39 at 206 [footnotes omitted].

Numerous problems arise in the Court's written reasons granting the extension. For example, the majority wrote that to "suspend a declaration of the constitutional invalidity of a law is an extraordinary step,"<sup>44</sup> perhaps unaware of how commonplace the Court's practice has become. The Justices extended the suspension for four months (instead of the requested six) on the basis that the period starting from the dissolution of Parliament for the 2015 election until Parliament resumed constituted "the length of the interruption of work on a legislative response"<sup>45</sup>—work that had not progressed for months due to government foot-dragging—something that apparently did not concern the Court. In fact, it is likely that were it not for the suspended declaration, the Federal Government would have passed a new law much sooner. The previous Conservative government would have been unlikely to remain idle in the absence of criminal law regulating medical aid in dying. Further, although the duration of the election was longer than expected, the election itself came as no surprise given the existence of the federal fixed-date election law. Presumably, the Court provided the initial 12-month suspension with full knowledge that an election was expected in the fall and that it was unlikely Parliament would sit through the summer months.

More fundamentally, it is not clear that a new criminal law was even required in *Carter's* aftermath. At the hearing on the extension, there was confusion regarding the nature of the remedy provided in the first *Carter* decision. Some of the Justices seemed taken aback at the suggestion that the *Carter* decision effectively read down the impugned provisions rather than invalidated them entirely. However, the language the Court used when it applied the remedy and established a constitutional threshold for access certainly implies that circumstances falling beyond its scope remained effectively criminalized. The decision states, "[t]o the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void,"<sup>46</sup> and that the provisions "are void *insofar as* they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."<sup>47</sup> Even if the Court did not mean to read down the

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44 *Carter II*, *supra* note 5 at para 2.

45 *Ibid.*

46 *Carter*, *supra* note 1 at para 126 [emphasis added].

47 *Ibid.* at para 127 [emphasis added].

impugned provisions, other provisions of the *Criminal Code* continue to provide protection against euthanasia without consent (*i.e.* murder).

Moreover, it is not clear that a new federal law was appropriate or desirable in the policy field. The *Carter II* majority appears to acknowledge that, at the very least, a federal vacuum in criminal law is not necessarily a problem if the provinces take action. This is demonstrated by the exemption granted to Quebec during the four-month extension of the suspended declaration of invalidity. The province's national assembly passed a law in 2015 governing end-of-life care, including medical aid in dying.<sup>48</sup>

Once it was no longer subject to criminal prohibition, medical aid in dying policy is properly within the purview of the provinces under their jurisdiction over health care. A focus on federal law, specifically criminal regulation, does little to ensure provinces act to provide ready access. Indeed, no other province has acted to pass comprehensive legislation like Quebec.<sup>49</sup> Meanwhile, for the period of the suspended declaration, Quebec residents had access to a right that those in the rest of Canada did not. Individuals in other provinces were free to apply to the Superior Court of their jurisdiction for access to medical aid in dying for the period of the extension. The majority justified this on the grounds that it “ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people.”<sup>50</sup> However, it created an onerous procedural obstacle for people to overcome, particularly in the face of a serious medical condition.

For their part, the dissenting Judges would not have granted an exemption to Quebec or provided for individual exemptions. They wrote:

We do not underestimate the agony of those who continue to be denied access to the help that they need to end their suffering. That should be clear from the Court's reasons for judgment on the merits. However, neither do we underestimate the complexity of the issues that surround the fundamental question of when it should be lawful to commit acts that would otherwise constitute criminal conduct. The complexity results not only from the profound moral and ethical dimensions of the question, but

48 *Act respecting end-of-life care*, CQLR 2014, c S-32.0001 [*End-of-life care Act*].

49 The fact that Quebec's law predates the federal one arguably helps to explain the former's comprehensive nature, as it was developed with the assumption that the province had a virtually free hand to set policy (which is interesting, because had the Federal Government's prohibition been upheld on *Charter* grounds, the Quebec law would likely have been determined to be *ultra vires* provincial authority).

50 *Carter II*, *supra* note 5 at para 6.

also from the overlapping federal and provincial legislative competence in relation to it. The Court unanimously held in its judgment on the merits that these are matters most appropriately addressed by the legislative process. We remain of that view. That the legislative process needs more time is regrettable, but it does not undermine the point that it is the best way to address this issue.<sup>51</sup>

Here, the dissenting Judges recognize the existence of overlapping federal and provincial competencies in the medical aid in dying context, but they do so in a manner where the focus of the extension remains solely on the Federal Government. The Court justified an extension on the basis of presumed provincial involvement in the policy, but the length of the extension itself was premised only on the federal election and parliamentary calendar. The role of federalism or the provinces as legitimate, indeed primary, players in the policy field seems relegated to a mere mention in order to justify the decision on the basis of its complexity. However, the provincial role in regulating the medical profession is arguably a factor that should have militated against the use of the suspended declaration remedy in the first place.

A final factor that should serve to constrain the use of the suspended declaration in some contexts is the availability of the notwithstanding clause. At the hearing on the extension, Justice Brown asked the Crown why Parliament could not just employ the notwithstanding clause if it felt it needed more time to craft a law. Indeed, it seems odd for the government to request that the Court extend a suspended declaration when Parliament is free to give itself more time by employing a readily available constitutional tool. As a general rule, when the notwithstanding clause is available, it is questionable whether courts should provide suspensions in contexts that fall outside of the *Schachter* guidelines.

*Carter* marks a prime example of the problematic use of suspended declarations: the Court provides no justification for its remedy; the remedy is insufficiently attentive to the obvious provincial role at stake in the policy environment; and the Court exacerbates the impact on rights-holders by extending the suspension. Some of the underlying problems with the liberal use of the remedy were exposed in the *Carter II* hearing, which will hopefully signal to the Court that employing suspended declarations warrants more careful consideration going forward.

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51 *Ibid* at para 14.

### III. ACCESS TO HEALTH CARE IN A NEGATIVE RIGHTS FRAME

The *Carter* decision also has implications for access to care that muddy the distinction between negative and positive rights. While negative rights emphasize freedom *from* government interference with rights, positive rights require some direct state action (such as spending or program delivery) to ensure access to rights. Normative arguments in favour of interpreting the *Charter* to include positive social and economic rights, like a right to housing, welfare, or health care are well established.<sup>52</sup> However, the broader debate over the appropriateness of judicial interpretation of positive rights is beyond the scope of this paper.<sup>53</sup> Although the Court famously left the door open to the possibility that section 7 may one day be interpreted to include positive rights,<sup>54</sup> it has thus far approached the right to life, liberty and security of the person as a negative right, a decision that has been followed in the health care context by lower courts.<sup>55</sup>

Nothing emanating from the Court's decision in *Carter* compels provinces to act to ensure widespread access to medical aid in dying. The Court's reasoning under section 7, however, is predicated on the notion that a lack of access to medical aid in dying imposes "pain and psychological stress" that deprives patients in the claimant's circumstances of control over their bodily integrity.<sup>56</sup> From the perspective of a rights-holder, then, it makes little difference if the lack of access is the result of a state prohibition or mere state inaction. It is not yet clear that all provinces will take action to regulate access to medical aid in dying as opposed to largely relying on the new criminal law, leaving regulation to the medical community. Even if provinces do move to regulate in the policy field, there is little guarantee that they will ensure the service is available throughout the system or at every institution, as Quebec has done through its legislation.

The detrimental impact of a lack of access on rights-holders that flows from provincial inaction will be functionally equivalent to the harms associated with restrictions or prohibitions under criminal law. Provinces that

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52 See Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20:2 Ottawa L Rev 257; Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 CJWL 185; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539.

53 See e.g. Emmett Macfarlane, "The Dilemma of Positive Rights: Access to Health Care and the *Canadian Charter of Rights and Freedoms*" (2014) 48:3 J Can Stud 49.

54 *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 82–83, [2002] 4 SCR 429.

55 See e.g. *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538, 91 OR (3d) 412.

56 *Carter*, *supra* note 1 at para 65.

impose significant barriers to access or that do not ensure readily available services could cause significant and unnecessary suffering. These barriers especially impact low-income people who cannot afford to pay out of pocket to travel to a jurisdiction providing such services. Regardless of their ability to pay to go to other provinces, people might not be able to gain access if, as in Quebec's case, provinces limit access to people insured under that province's public health insurance scheme.<sup>57</sup>

*Carter* is not the first case to demonstrate that inattention to federalism in *Charter* cases involving access to health care raises difficulties for the conceptual distinction between negative and positive rights. In the 1988 *Morgentaler* case, a majority of the Supreme Court struck down section 251 of the *Criminal Code*, which required women seeking access to abortion services to obtain approval from "therapeutic abortion committees" at accredited hospitals.<sup>58</sup> Notably, most of the Justices in the majority focused exclusively on the negative rights infringement of the criminal law, and specifically on its procedural aspects. Justice Jean Beetz, for example, explicitly stated that "[t]here must be state intervention for 'security of the person' in s. 7 to be violated;"<sup>59</sup> while then-Chief Justice Brian Dickson focused on how the criminal law's procedure itself constituted "state interference with bodily integrity and serious state-imposed psychological stress."<sup>60</sup> Dickson thus concluded that "[i]t is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice."<sup>61</sup> Only one of the Justices, Justice Bertha Wilson, identified a substantive right to abortion under the *Charter*; however, even her reasons do not imply a positive dimension to the right.

In the aftermath of the *Morgentaler* decision, with Parliament unable to enact a new law, most provinces enacted restrictions on abortion access, some of which were challenged on the basis that they effectively replicated the impugned criminal provisions and were invalidated on

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57 *End-of-life care Act*, *supra* note 48, s 26(1) (patient must be an "insured person within the meaning of the Health Insurance Act (chapter A-29)"); *Health Insurance Act*, CQLR c A-29, s 1(g.1) (defines "insured person" as "a resident or temporary resident of Quebec who is duly registered with the Board").

58 *Morgentaler* 1988, *supra* note 14 at 67–68, 184.

59 *Ibid* at 90.

60 *Ibid* at 56.

61 *Ibid*.



constitutional or administrative law grounds.<sup>62</sup> A myriad of other constraints imposed on women seeking access to abortion services serve to create a policy environment in which access to abortion in Canada varies widely depending on province (or even within provinces, depending on where one lives). For example, until recently, a two-doctor referral rule existed in New Brunswick, and there was a total absence of services in Prince Edward Island.<sup>63</sup> The result is what Linda White refers to as a failure of rights implementation, whereby despite recognition of the harms resulting from a lack of access, barriers persist because full implementation relies on another order of government (in this case, the provinces).<sup>64</sup>

A similar dynamic resulted from the 2011 *PHS Community Services* case, where the Court ruled that the federal Minister of Health's denial to extend the criminal law exemption for Insite, a supervised drug injection facility, violated users' section 7 rights.<sup>65</sup> Given the evidence that Insite helps save lives and prevents the spread of disease, a decision not to renew the exemption imposed unfair harm on the facility's clients. The Court's focus was narrow and, ultimately, rested on the Minister's decision about the exemption in relation to this particular facility. The resulting impact, however, is that addicts in Vancouver have a right to access a service that addicts in other parts of the country do not. While the Court's decision, rooted firmly in a negative rights context, enjoys an internal logical consistency, it rests entirely on the distinction between the state's *Charter* obligation, to keep a facility open, versus the state not having to open facilities in other locations where they may be needed. From the perspective of rights-holders, this is a (life-altering) distinction without a difference in terms of the harms created.

The nature of the Court's approach to section 7 means that its reasoning in these cases falls firmly within the nexus of negative rights; that is, a prerequisite of state action or interference with the rights being claimed. Specifically, the imposition of the criminal justice system on rights-holders. Yet, the underlying logic the Court employs is fundamentally about

62 *R v Morgentaler*, [1993] 3 SCR 462, 107 DLR (4th) 537; *Morgentaler v New Brunswick (Attorney General)* (1994), 152 NBR (2d) 200, 117 DLR (4th) 753. See also Joanna N Erdman, "In the Back Alleys of Health Care: Abortion, Equality and Community in Canada" (2007) 56 *Emory LJ* 1093.

63 Rachael Johnstone & Emmett Macfarlane, "Public Policy, Rights, and Abortion Access in Canada" (2015) 51 *Intl J Can Stud* 97 at 108–09.

64 Linda A White, "Federalism and Equality Rights Implementation in Canada" (2014) 44:1 *Publius: J Federalism* 157.

65 *PHS Community Services*, *supra* note 14 at para 141.

access to health services and the harms associated with limits or prohibitions on that access. When the resulting policy landscape remains rife with significant barriers to access (along with the attendant harms), not because of criminal law, but because of state inaction, the conceptual distinction between negative and positive rights seems non-existent from the perspective of rights-holders. This dilemma reflects poorly on both the Court and governments; the former for paying little heed to the implications of its reasoning, the latter for failing to attend to obvious rights obligations.

The Court needs to seriously consider when access to health care is implicated by cases that ostensibly involve negative rights issues. One way to do this would be to abandon the formalistic approach to *Charter* cases where the Court fails to address other *Charter* provisions after it has already decided the outcome on the basis of a particular right. In *Carter*, the Court refused to address arguments surrounding section 15 equality rights after making a determination under section 7.<sup>66</sup> Yet, there are very good reasons that *Carter* ought to have been considered, first and foremost, an equality rights case.

First, as David Lepofsky argues, *Carter* is about a “glaring Charter disability equality violation” brought by claimants who “were people with serious disabilities.”<sup>67</sup> This context has obvious implications for any reasoning that flows from the Court’s decision. Choosing to privilege section 7 over equality rights in cases like *Carter* and *Morgentaler* means tailoring the rights issues at stake in a particular, and arguably narrow, way rather than confronting them directly.

Second, governments take cues from judicial reasoning. By not addressing all of the *Charter* issues at stake in a case, the Court risks failing to give governments and legislatures the full benefit of its constitutional analysis. Had these cases been settled under section 15, the provinces may have received a clearer signal about their rights obligations in the respective policy environments, particularly as those obligations relate to ensuring access to health services in a *Charter*-compatible manner. A key problem is that the Court has struggled to develop a coherent overarching

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<sup>66</sup> *Carter*, *supra* note 1 at para 93.

<sup>67</sup> David Lepofsky, “*Carter v Canada* (Attorney General), The Constitutional Attack on Canada’s Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter’s Disability Equality Guarantee” (2016) 76 SCLR (2d) 89 at 90–91.

framework in its equality rights jurisprudence.<sup>68</sup> The Supreme Court Justices have disagreed on a basic approach for identifying discrimination, and over time have introduced “human dignity” as a key component of the analysis,<sup>69</sup> only to later drop it after it became exceedingly difficult for claimants to succeed.<sup>70</sup> More recently, the Court has also cautioned against a “formalistic” comparator analysis because it could undermine hopes for a robust approach to substantive equality.<sup>71</sup> Perhaps it is not surprising that Chief Justice Beverley McLachlin described equality as “the most difficult right” under the *Charter*.<sup>72</sup> The evolution of jurisprudence and the unsettled disagreement at the Court about developing a coherent approach to identifying discrimination under section 15 thus presents a challenge going forward. This difficulty hardly offers reasons for optimism that the Court might identify a positive dimension of the right. Despite this, a reading of substantive equality emanating from *Andrews*—the first section 15 case—provides room for circumscribed positive rights. As Justice McIntyre wrote in *Andrews*, section 15 requires that “[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application.”<sup>73</sup> If governments are going to provide services like health care, they cannot do so in a discriminatory manner. Under section 15, state inaction can constitute discrimination where people with particular medical conditions are owed recognition on the grounds of disability, as in the assisted dying context, or in relation to state-imposed barriers to gendered-based access to services, as in the abortion context.

68 For recent analyses, see Margot Young, “Social Justice and the *Charter*: Comparison and Choice” (2013) 50 Osgoode Hall LJ 669; Jennifer Koshan & Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNB LJ 19; Jennifer Koshan, “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*” (2014) 3:1 Can J Human Rights 115; Mel Cousins, “Pregnancy as a ‘Personal Circumstance’? *Miceli-Riggins* and Canadian Equality Jurisprudence” (2015) 4:2 Can J Human Rights 237; Jonnette Watson Hamilton & Jennifer Koshan, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination under Section 15 of the *Charter*” (2015) 19:2 Rev Const Stud 191.

69 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 52–54, 170 DLR (4th) 1.

70 *R v Kapp*, 2008 SCC 41 at paras 21–24, [2008] 2 SCR 483.

71 *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2, [2011] 1 SCR 396.

72 The Right Honourable Beverley McLachlin PC, “Equality: The Most Difficult Right” (2001) 14 SCLR (2d) 17 at 17, 19.

73 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 168, 56 DLR (4th) 1.

Where the state makes end-of-life services available to everyone, providing medical aid in dying ensures that this benefit extends to people who suffer irremediable medical conditions in a non-discriminatory manner. The logic here is similar to the principle the Court applied to ensure deaf patients received sign language interpretation in hospitals in the 1997 *Eldridge* case.<sup>74</sup> Such an equality rights analysis contemplates more robust obligations on the part of the state—and specifically the provinces—than is apparent in the Court's section 7 analysis. Indeed, this may be precisely why the Court has favoured section 7 in such cases: it allows the Court to reach similar outcomes but arguably in a less policy-intrusive manner, without dealing with the jurisprudential disagreement that has plagued the Court under section 15.

While I do not predict that we will see a shift away from an over-reliance on section 7 towards a more forthright equality jurisprudence, I think it is inevitable that failure to do so will only continue to cause the problems that we have seen in the aftermath of cases like *Carter* and *Morgentaler*.

#### **IV. MOVING FORWARD: RECONSIDERING PAST AND PRESENT ISSUES UNDER THE CHARTER**

*Carter* stands as one of the most significant *Charter* cases decided in its 35-year history, not only for the magnitude of the substantive issue it addresses but also for how it illustrates a host of important issues relating to judicial review under the Constitution. In this paper, I have examined three of these matters: (1) the dialogue concept; (2) judicial use of the suspended declaration of invalidity; and (3) the distinction between positive and negative rights. How should courts, other institutional actors, and scholars approach these issues in light of their development and what does *Carter* as a microcosm illustrate for the various problems they raise?

Of the three issues explored here, dialogue remains predominantly of academic interest. While some of the Supreme Court Justices invoked the dialogue metaphor in their written reasons in the early 21<sup>st</sup> century,<sup>75</sup> the apparent disagreement about what, if any, prescriptive significance the concept held—such as whether deference is called for in the face of a legislative

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74 See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 80, 38 BCLR (3d) 1.

75 See e.g. *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519; *Harper v Canada (Attorney General)*, 2004 SCC 33, [2004] 1 SCR 827.

response—appears to have led them to abandon explicit discussion of the concept.<sup>76</sup> This is probably for the best, given that dialogue was not meant to provide normative guidance to institutional actors. Rather, as a concept that attempts to describe the extent to which legislatures are able to re-assert their policy objectives in the face of judicial invalidation of legislative provisions, dialogue is meant to be an empirical lens through which to understand inter-institutional relationships under the *Charter*.

Unfortunately, as explored above, there is substantial disagreement among scholars about how to measure dialogue. Political scientists have drawn on the definition provided by dialogue's progenitors—dialogue is an attempt to reverse, modify, or avoid a judicial invalidation with a new law—and have found much lower rates of dialogue than its proponents in legal scholarship. To put it bluntly, this disparity is the result of proponents counting legislative responses that do not reverse, modify, or avoid judicial policy prescriptions as dialogue.

*Carter* and Parliament's response in Bill C-14 represent the underlying gulf between many legal scholars and political scientists over dialogue. Where dialogue's critics would regard Bill C-14 as a clear example of dialogue, it is not clear that dialogue's proponents would agree, precisely because the new law is a modification—an unconstitutional one, in Hogg's view—of the Court's policy prescription. Thus, for dialogue's proponents, legislative responses that signal clear disagreement with the Court are unacceptable examples of the concept; but for dialogue's critics, they are precisely what should count for the concept to have any utility. Otherwise, Hogg and Bushell's original thesis captures little more than legislatures complying with or agreeing to, judicial decisions.

Part of the reason dialogue has remained so popular is its terminological attractiveness; it is admittedly awkward to speak of complex institutional interactions over the *Charter* without the simple cue provided by a cute metaphor. Yet, it is time that scholars drop dialogue entirely, as it has proven to be so empirically vacuous and conceptually contested that it ultimately offers little accuracy in describing the institutional relationships at stake.

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76 For a discussion on the justices' use of the dialogue metaphor, see Richard Haigh & Michael Sobkin, "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts" (2007) 45:1 *Osgoode Hall LJ* 67; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 165–72; *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 610 (the last Supreme Court case to specifically refer to dialogue in the sense described here).

The other two issues explored in this paper, the use of the suspended declaration and the distinction between positive and negative rights, can only be addressed by institutional actors; principally, the courts. The Supreme Court needs to revisit its liberal use of the suspended declaration of invalidity. This remedy's use has evolved: first, it has become completely untethered from the sensible *Schachter* guidelines; and second, it is being employed absent any stated justification. *Carter* and *Carter II* are emblematic of the problems with this approach to remedies. The harms imposed on rights-holders are based on implicit deference to Parliament absent any real consideration of the policy environment—all in a case where there are good policy reasons to question whether a federal law is even necessary. While deference might rightly be afforded to governments or legislatures in the context of complex social policy issues, deference should come during a judicial assessment of policy objectives and the means chosen to address those objectives. Yet, a suspended declaration in the context of cases like *Carter* does not demonstrate deference in this sense. Instead, it extends an unconstitutional *status quo* and the very harms that accompany it. Where the Court cannot be sure a legislative response is even necessary, at least from the level of government to which it provides a suspended declaration, undue deference creates more harm than good.

In the *Carter* context, the role of the provinces and the medical community, while briefly mentioned in both decisions, is fundamentally neglected. This is despite good reasons for thinking that a capacity for dealing with questions of consent in end-of-life care already existed, as in contexts like do-not-resuscitate orders and decisions to end life-saving treatment (*i.e.* passive euthanasia). Instead, the Court employed the suspended declaration on the questionable assumption that Parliament would need to replace the impugned prohibition. In the face of the obvious harms associated with further abrogating the rights of individuals seeking medical aid in dying, at the very least, the Court needed to offer a more robust justification for using the remedy.

Finally, the Court needs to address the underlying harm-based approach of its section 7 jurisprudence when cases implicate *access to* services like health care. The requirement for state action, which maintains section 7 as fundamentally about protecting negative rights, may be jurisprudentially and institutionally appropriate in the context of that provision. However, it risks potentially adverse effects or even absurdities when considered in the broader context of the rights issues (and harms) at stake. For this reason, I have argued that the Court needs to consider

such cases in light of their obvious equality rights implications. The Court may be avoiding section 15 because of the difficulties the Justices have encountered in reaching consensus on the correct approach for identifying discrimination. But by doing so, the Court has failed to provide a clear signal to governments and legislatures about their rights obligations.

In light of this analysis, *Carter's* significance extends well beyond the landmark nature of the Court's decision to invalidate the long-standing prohibition on assisted suicide in Canada. It marks the continued (and troubling) evolution of a host of important issues relating to judicial review, including the notion of dialogue, the use of the suspended declaration, and judicial reasoning that has implications for the distinction between negative and positive rights. I hope the relevant institutional actors pay heed to these issues going forward. Scholars can gain a better understanding of the institutional relationships under the *Charter* by abandoning dialogue and its attendant baggage. More importantly, the harms created by the liberal use of the suspended declaration reflect the relative inattention by courts to their justificatory responsibilities. This needs to change. Finally, both rights-holders and governments would benefit from greater reflection by the Supreme Court on the full panoply of rights issues at stake in cases implicating health care; privileging section 7 over other provisions like equality rights needs to be reconsidered.

