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The Supreme Court of Canada, Charter Dialogue, and Deference

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Abstract
For those concerned about the democratic legitimacy of Charter review by Canadian courts, the idea of dialogue offers a promising middle path between the extremes of judicial and legislative supremacy. Current dialogue theory, however, largely fails to live up to this promise of compromise. Instead of distinguishing democratic worries associated with US style, strong-form judicial review, it largely endorses the legitimacy of such review. For dialogue to live up to its original promise, a new theory that more clearly distinguishes Canada from the United States is required. This article offers a new theory of dialogue in which the willingness of the Supreme Court of Canada (SCC) to defer to reasonable legislative sequels will be the key to success. As a result, section 33 of the Charter will play a valuable, but largely background role in promoting dialogue. The advantage of this approach, compared to rival approaches that would weaken judicial review, is that it is more realistic and more in line with existing SCC practice. Moreover, this approach is normatively desirable when judged from the perspective of the courts' capacity to counter blockages in the legislative process that might otherwise impair the enjoyment of Charter rights.

Keywords
Canada. Supreme Court; Judicial review; Canada. Canadian Charter of Rights and Freedoms; Canada

The Supreme Court of Canada, *Charter* Dialogue, and Deference

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For those concerned about the democratic legitimacy of *Charter* review by Canadian courts, the idea of dialogue offers a promising middle path between the extremes of judicial and legislative supremacy. Current dialogue theory, however, largely fails to live up to this promise of compromise. Instead of distinguishing democratic worries associated with US style, strong-form judicial review, it largely endorses the legitimacy of such review. For dialogue to live up to its original promise, a new theory that more clearly distinguishes Canada from the United States is required. This article offers a new theory of dialogue in which the willingness of the Supreme Court of Canada (SCC) to defer to reasonable legislative sequels will be the key to success. As a result, section 33 of the *Charter* will play a valuable, but largely background role in promoting dialogue. The advantage of this approach, compared to rival approaches that would weaken judicial review, is that it is more realistic and more in line with existing SCC practice. Moreover, this approach is normatively desirable when judged from the perspective of the courts' capacity to counter blockages in the legislative process that might otherwise impair the enjoyment of *Charter* rights.

Pour ceux qui voient d'un œil inquiet la légitimité démocratique de l'examen de la *Charte* à laquelle procèdent les tribunaux canadiens, l'idée d'un dialogue offre un compromis prometteur entre deux extrêmes - la suprématie du pouvoir judiciaire et la suprématie du pouvoir législatif. Toutefois, la théorie actuelle du dialogue ne respecte aucunement cette promesse d'un compromis. Au lieu de distinguer les préoccupations démocratiques associées au style américain - une revue judiciaire pure et dure - elle cautionne largement la légitimité d'un tel examen. Pour que le dialogue remplisse sa promesse de départ, il faut une nouvelle théorie qui établisse une distinction plus claire entre le Canada et les États-Unis. Dans cet article qui propose une nouvelle théorie du dialogue, la volonté de la Cour

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suprême du Canada à se déférer à des séquelles législatives raisonnables représentera la clé de la réussite. Par conséquent, le chapitre 33 de la *Charte* remplira un rôle important, mais surtout accessoire, sur le plan de l'incitation au dialogue. L'avantage d'une telle démarche par rapport aux démarches rivales qui affaibliraient la revue judiciaire, c'est qu'elle est plus réaliste, plus harmonisée à la pratique existante de la Cour suprême. En outre, cette démarche est souhaitable du point de vue normatif quand on la juge sous l'angle de la capacité des tribunaux à surmonter les blocages dans le processus législatif, blocages qui autrement entraveraient l'appréciation des droits que confère la *Charte*.

FOR SOME, MORE THAN ENOUGH HAS BEEN SAID about the idea of dialogue as a metaphor for the relationship between courts and legislatures under the Canadian *Charter of Rights and Freedoms*.[1] There have been more than ten years of debate about dialogue in Canada,[2] but little progress in persuading skeptics that the practice of judicial review by the Supreme Court of Canada (SCC)

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

2. See *e.g.* Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 [Roach, "Common Law"]; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup. Ct. L. Rev. (2d) 49 at 54 [Roach, "Dialogic Review"]; Kent Roach, "Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience" (2005) 40 Tex. Int'l L.J. 537 [Roach, "Canadian Experience"]; Kent Roach, "A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue" (2007) 57 U.T.L.J. 449; and Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 2.

can be reconciled with a commitment to self-government in a democracy, as the original literature on dialogue promised.[3]

For skeptics, the primary democratic worry about judicial review under the *Charter* is that, when it comes to open-ended *Charter* guarantees, Canadian courts may adopt an interpretation that is directly counter-majoritarian in nature.[4] While the *Charter* is not intended to be a purely majoritarian instrument, from a democratic point of view, the constitutional understandings of a majority of Canadians still have an important role to play in the interpretation of the *Charter*. Rights guarantees are open-ended and permit multiple reasonable interpretations—there is no objectively ascertainable, "correct" interpretation.[5] This applies to the text and history of the *Charter*, to Supreme Court precedent, and to the matter of *Charter* values—because, at an abstract philosophical level, there will be just as much (if not more) room for reasonable disagreement about the scope and priority to be given to particular, individual rights.[6]

If Canada is committed to principles of democracy, as section 1 of the *Charter* suggests, the only principled way of interpreting such guarantees is by reference to the actual understandings of Canadians about specific *Charter* guarantees, or to the more general requirements of section 1 itself. If equality matters in the process of self-government, the understandings of every Canadian

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3. For the promise of reconciliation in dialogue theory, see the special issue, "Charter Dialogue: Ten Years Later" (2007) 45 Osgoode Hall L.J. See also Hogg & Bushell, *ibid.* at 105. For the failure of dialogic arguments to persuade skeptics, see *e.g.* Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B. Kelly & Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (Vancouver: UBC Press, 2008); Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)" (2007) 45 Osgoode Hall L.J. 147.

4. See *e.g.* Petter, *ibid.* In the US context, compare Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven: Yale University Press, 1986) at 16-23, 235. For other democratic objections to judicial review, such as those based on its capacity to discourage or distort legislative constitutional deliberation, see James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129; Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94 Mich. L. Rev. 245 at 292, 299 [Tushnet, "Policy Distortion"].

5. See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 112-13, 149-63 [Waldron, *Disagreement*].

6. *Ibid.*

should also count in a roughly equal way in this context. A problem arises when the SCC prefers its own understanding of the *Charter* to that of a clear majority of Canadians.

In the United States, this problem has spawned a large literature on the "counter-majoritarian difficulty" associated with judicial review by the United States Supreme Court (USSC).[7] The sense of difficulty is particularly acute, most American scholars agree, because it is almost impossible to modify the effect of Supreme Court decisions by amending the Constitution under the terms of Article V.[8] It is also compounded by the insistence of the USSC, in recent years, upon its broad and exclusive authority to determine the meaning of constitutional rights—even in the face of legislative "dialogue" by Congress under section 5 of the Fourteenth Amendment—and by its rigid, categorical approach to assessing the constitutionality of particular legislative provisions.[9]

In Canada, dialogue scholars, such as Peter Hogg and Allison Bushell, have argued that certain structural features of the *Charter*, together with the actual record of legislative responses to SCC decisions, mean that these same concerns about democratic legitimacy "cannot be sustained" or, at the very least, are "greatly diminished."[10] They argue that because Parliament or the legislature, in reliance on these structural features, have almost always been able to reverse, modify, or avoid the effect of SCC *Charter* decisions with which they disagree, "it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue."[11] Together with Wade Wright, Hogg and Bushell further suggest that this dialogue indicates that, under the *Charter*, a balance is achieved between the extremes of judicial supremacy and legislative supremacy, known as "strong-form" and "weak-form" judicial review, respec-

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7. See Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five" (2002) 112 Yale L.J. 153.

8. See *e.g.* Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995).

9. For a critique of the Supreme Court's approach in this context from a perspective sympathetic to, though not synonymous with, new dialogue theory, see *e.g.* Robert C. Post & Reva B. Siegel, "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power" (2003) 78 Ind. L.J. 1 at 25, 28.

10. Hogg & Bushell, *supra* note 2 at 80, 105.

11. *Ibid.* at 79.

tively.[12] More specifically, they suggest that, since the *Charter*, Canada has adopted something of "a halfway house between the strong form of judicial review typified by the United States and the statutory bill of rights typified by the *Canadian Bill of Rights* of 1960."[13]

The idea of dialogue also clearly supports this understanding.[14] By describing the possibility of an ongoing exchange between courts and legislatures in their interpretations of the *Charter*, dialogue as a metaphor clearly points to a potential midway path between the extremes of both legislative and judicial *finality*. It suggests that, rather than courts or legislatures being wholly final in their interpretation of the *Charter*, both court decisions and legislative responses to those decisions—"legislative sequels"—could be understood to have a much more provisional, penultimate legal force.[15]

On closer inspection, however, current dialogue theory's interpretation of provisions such as sections 1 and 33 of the *Charter* provides little basis for distinguishing Canada's version of review from US style, strong-form (*i.e.*, strongly final) judicial review.[16] By interpreting section 33 as a more or less exhaustive vehicle for interpretive dialogue under the *Charter*—when section 33

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12. Hogg, Bushell Thornton & Wright, *supra* note 2 at 4. On the idea of strong- versus weak-form judicial review, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) [Tushnet, *Weak Courts*].

13. Hogg, Bushell Thornton & Wright, *ibid.* at 29.

14. *Cf. The Oxford English Dictionary*, 2d ed., s.v. "dialogue."

> Dialogue, *n.*: 1. a. A conversation carried on between two or more persons; a colloquy, talk together; b. Verbal interchange of thought between two or more persons, conversation; c. In *Politics* ... valuable or constructive discussion or communication.

15. *Cf.* Dan T. Coenen, "A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue" (2001) 42 Wm. & Mary L. Rev. 1575 at 1582-83 (arguing that dialogue involves court decisions being provisional or revisable in character); Michael J. Perry, "Protecting Human Rights in a Democracy: What Role for the Courts?" (2003) 38 Wake Forest L. Rev. 635. Perry advances a theory of judicial "penultimacy" in which "electorally accountable legislators have the last word" (at 674) and links the theory of penultimate review to the concept of dialogue (at 676).

16. Section 1 provides that Parliament or the legislature may impose limits on rights (judicially understood), though subject to certain conditions. Section 33, or the so-called "notwithstanding clause," provides that Parliament or the legislature may, for a certain period, override particular *Charter* rights, provided it does so expressly. For further discussion of these provisions, see *infra* notes 86-96.

has almost never been used for that purpose—dialogue scholars effectively validate, rather than challenge, the obstacles to Congress or state legislatures in the United States overriding USSC decisions via Article V. Similarly, by arguing that the SCC is not required to show any deference (under section 1 or internal limitation clauses) to legislative attempts to engage in dialogue, these scholars also affirm, rather than criticize, the approach of the USSC towards provisions such as section 5 of the Fourteenth Amendment.

For dialogue theory to live up to its original promise of persuading skeptics about the democratic legitimacy of rights-based review in Canada, a new theory of *Charter* dialogue is therefore required.[17] The purpose of this article is to develop such a theory. In the new theory of dialogue, the key to "weakening" judicial review in Canada, relative to that in the United States, will be to insist that the SCC defer to Parliament or the legislature's interpretation of the *Charter* in "second look cases," provided that such a deference is reasonable when judged by reference to certain minimal criteria.[18] As a complement to this, dialogue will also require that the SCC stand ready, in second look cases where it has previously reasoned broadly under the *Charter*, to narrow the force of that reasoning *ex post*, so as to reconcile *ex post* deference with its prior precedents. There are several reasons, outlined below, for adopting such an *ex post* deference-based approach.

First, it is unrealistic to regard section 33 as a routine vehicle for dialogue, given both its history and structure. Instead, section 33 should be understood as a valuable incentive for (and a textual confirmation of the desirability of) the SCC's engagement in *ex post* deference or narrow statement of this kind. It serves this function by providing Parliament and the legislature with a residual power to override the SCC, in the event that the SCC fails to show such deference.

Second, an *ex post* deference-based approach gives the SCC maximum flexibility to counter blockages in the legislative process that might otherwise impair the enjoyment of *Charter* rights. By preserving scope for the SCC to rea-

17. *Cf.* Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Markham: LexisNexis Canada, 2004) 7 at 39-46 [Waldron, "Models"].

18. *Ibid.* at 46 (suggesting that "if the Court is never willing to defer ... to anyone or anything except past decisions by the Court, then there is little chance of genuine engagement and dialogue").

son "deeply" in first look cases, *ex post*—or "second look"[19]—deference enhances the SCC's ability to *persuade* Parliament, the legislature, and even the public, to give greater attention or accommodation to *Charter* rights.[20] By insisting that first look decisions are binding, this approach also gives the SCC greater ability than pure weak-form theories of review to counter the most persistent forms of legislative inattention to *Charter* rights claims. The proposed theory also has the advantage of having a greater degree of fit with existing *Charter* history and SCC practice than rival theories.

It may look as though the SCC is being asked to practice two different forms of review, but, as the article explains, this approach to second look decision making should not be rejected out of a concern for judicial independence. Provided that courts are mindful of certain preconditions, such an approach will be fully compatible with the maintenance of judicial independence.[21] Furthermore, given the inevitability of some interpretive uncertainty under the *Charter*, and the stability created by a presumption of constitutionality at the second look stage, this theory of *ex post* deference and judicial narrow statement does not meaningfully threaten interpretive consistency or predictability under the *Charter*.

This new understanding reveals that the history of dialogue under the *Charter* to date has tended to be more real than skeptics fear and more contingent than dialogue scholars assure. (That is to say, there has been a higher rate

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19. The distinction between first and second look cases will, of course, be somewhat fluid, given that first look cases may involve indirect consideration of prior precedents, and second look cases may involve consideration of new circumstances in addition to prior precedents. See *e.g. Canada (Attorney General) v. JTI-Macdonald*, [2007] 2 S.C.R. 610 [*JTI-Macdonald*]. The distinction, however, is one that both the SCC and commentators have endorsed as helping to distinguish between circumstances in which the SCC lacks reliable information about the considered *Charter* views of Parliament or the legislature on a particular question on the one hand, and from those in which such information is directly available from recent legislative debate and action on the other. In a scholarly context, see Hogg & Bushell, *supra* note 2.

20. On the concept of deep reasoning, see Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999). Sunstein defines "depth" in terms of the degree to which a judge's reasons are overtly theoretical or normative (16-19).

21. At most, concerns about judicial independence may imply that some form of delay in the consideration of second look cases is an additional requirement of successful dialogue, not that the theory of new dialogue itself should be abandoned. See also *infra* notes 32-38, 145-49.

of dialogue than skeptics admit, but fewer instances and less endorsement of dialogue than advocates claim.)

The most important test of dialogue in new dialogue theory will be whether the SCC or lower courts are willing, in second look cases, to actually defer to legislative sequels that evidence interpretive disagreement with the courts. On this measure, there has already been a high rate of dialogic success. Another important test will be whether legislative sequels of this kind enjoy meaningful *de facto* success. On this criterion, there have been an even greater number of instances of dialogic success.

At the same time, there have been relatively few cases—no more than four at the SCC level—in which dialogue has truly been tested. This means that it is still premature to draw firm conclusions about the relative strength or weakness of *Charter* review by Canadian courts. Even more important is that while generally acting consistently with the requirements of new dialogue theory, the SCC has not endorsed its premises, and, as such, the future of dialogue still hangs in the balance.

This article is divided into four parts. Part I outlines the broad contours of current dialogue theory and explains how it tends largely to endorse, rather than to distinguish, US style, strong-form judicial review. Part II develops the core elements of a new, alternative theory of dialogue, its prescriptions for section 33 of the *Charter* as a vehicle for dialogue, its advantages over rival theories, and its answers to potential criticisms. Part III reassesses the record of dialogue under the *Charter* to date, in light of the understandings of what constitutes new dialogue, as set out in the preceding parts. Part IV concludes by considering the preconditions for, and therefore the contingency of, new dialogue under the *Charter* in the future.

I. DIALOGUE, DEMOCRACY, AND THE UNITED STATES AS A COMPARATOR

In comparative constitutional scholarship on judicial review, the United States is generally understood as the archetypical model of strong-form—or *final*—judicial review.[22] This is not because Congress or state legislatures consistently

22. See Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am. J. Comp. L. 707 at 709-10; Mark Tushnet, "New Forms of Judicial Review and the

defer to the USSC's interpretations of the Constitution or decline to re-enact legislation that has been struck down for inconsistency with the Constitution.[23] Like their Canadian counterparts, it is common practice for Congress and the state legislatures to respond to USSC decisions that invalidate their legislation for inconsistency.[24] For example, Justice Mitchell Pickerill has shown that, between 1954 and 1997, Congress responded to USSC decisions at a rate of sixty-two per cent.[25] In only a small minority of those instances did Congress repeal the prior legislation, with the result that in almost fifty per cent of cases, it chose to re-enact its statutory policy.[26] Notwithstanding this practice on the part of American legislatures, the reason the United States is considered to embody a system of strong-form judicial review is that Congress and state legislatures in the United States face a number of obstacles to success when they seek to engage in "dialogue" of this kind.[27]

Substantial formal legal barriers under Article V of the US Constitution deter Congress or state legislatures from formally overriding a decision of the Supreme Court. Constitutional amendments require the support of a two-thirds majority of both the House of Representatives and the Senate, and ratification by three-fourths of the states.[28] As the size of the House, Senate, and number of states in the United States have increased, this requirement has become increasingly onerous.[29] In recent decades, even proposed amendments enjoying a high degree of popular support—such as the Equal Rights Amendment (which would have inserted an express guarantee of equal protection on the grounds of gender into the Fourteenth Amendment)—have failed. In

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Persistence of Rights- and Democracy-Based Worries" (2003) 38 Wake Forest L. Rev. 813 at 814 [Tushnet, "New Forms"].

23. See Barry Friedman, "Dialogue and Judicial Review" (1993) 91 Mich. L. Rev. 577 [Friedman, "Dialogue"]; Neal Devins & Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004).

24. *Ibid.*

25. J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham: Duke University Press, 2004) at 42.

26. *Ibid.*

27. See Devins & Fisher, *supra* note 23; Friedman, "Dialogue," *supra* note 23.

28. U.S. Const. art. V.

29. Rosalind Dixon & Richard Holden, "Amending the Constitution: Article V and The Effect of Voting Rule Inflation" (National Bureau of Economic Research (NBER), Working Paper, 2009) [copy on file with author].

only one instance during the twentieth century, following the decision of the USSC in *Oregon v. Mitchell (A.G.)*,[30] has Congress succeeded in initiating a constitutional amendment in order to modify the effect of a USSC decision.[31] *Oregon* also involved a question of federalism, or Congress's power to prescribe the minimum voting age for state elections, rather than (at least most directly) an issue of constitutional rights parallel to those involving interpretation of the *Charter*.

Another, more contingent reason for the strong degree of finality enjoyed by the USSC in its interpretation of the Constitution is that the Court itself has consistently insisted upon broad and exclusive authority to determine the meaning of constitutional rights, even in the face of dialogue by Congress. For example, in *United States v. Eichman*,[32] the Court considered the *Flag Protection Act*,[33] enacted following the Court's decision in *Texas v. Johnson*,[34] which struck down an earlier flag burning prohibition. The Court rejected the argument that there was a clear "'national consensus' favoring a prohibition on flag-burning" because "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."[35]

In *(City of) Boerne v. Flores*,[36] the Court again held that only the USSC had the authority to interpret, rather than enforce, the meaning of the Constitution. The issue there conceived the *Religious Freedom Restoration Act*,[37] which was a response to *Employment Division, Department of Human Resources of Oregon v. Smith*.[38] It ruled:

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30. 400 U.S. 112 (1970) [*Oregon*].

31. Pickerill, *supra* note 25 at 47-48. Three earlier instances of dialogue via Article V involved: the adoption of the Eleventh Amendment in response to the decision of the Supreme Court in *Chisholm v. Georgia*, 2 U.S. 419 (1793); the adoption of the Fourteenth Amendment as a response to *Dred Scott v. Sandford*, 60 U.S. 393 (1856); and the adoption of the Sixteenth Amendment in response to *Pollack v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895). See discussion in Geoffrey R. Stone, "Precedent, the Amendment Process, and Evolution in Constitutional Doctrine" (1988) 11 Harv. J.L. & Pub. Pol'y 67.

32. 496 U.S. 310 (1990) [*Eichman*].

33. 18 U.S. §700 (1989).

34. 491 U.S. 397 (1989).

35. *Eichman*, *supra* note 32 at 318.

36. 521 U.S. 507 (1997) [*Boerne*].

37. 42 U.S.C. §2000bb (1993).

38. 494 U.S. 872 (1990).

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[39]

More recently, in *Dickerson v. United States*,[40] the USSC invalidated an attempt by Congress to modify the effect of the *per se* exclusionary rule, established by its earlier decision in *Miranda v. Arizona*.[41]

When it comes to attempts by state officials to engage in dialogue, the USSC has been even more insistent on its exclusive authority to interpret the Constitution. In *Cooper v. Aaron*,[42] in the context of violent disputes about the implementation of a school desegregation order in Arkansas, the Court insisted on the importance of executive compliance with court orders as an important dimension to the rule of law. Furthermore, it also insisted on the general supremacy of the Court's interpretation of the Constitution over competing legislative and executive interpretations. Specifically, Chief Justice Warren declared that, since *Marbury v. Madison*,[43] judicial supremacy had been "a permanent and indispensable feature of [the US] constitutional system" and that "[n]o state legislator or executive or judicial officer can war against the [Court's interpretation of the] Constitution without violating his undertaking to support it."[44]

Equally famous is *Planned Parenthood of Pennsylvania v. Casey*[45] and the questions of whether and to what extent to overrule *Roe v. Wade*.[46] In *Casey*, a plurality of the USSC held that legislative attempts to narrow the scope of *Roe*

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39. *Boerne*, *supra* note 36 at 519.

40. 530 U.S. 428 (2000) [*Dickerson*].

41. 384 U.S. 436 (1966) at 444. Chief Justice Warren ruled that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant," unless it could demonstrate that a person had been "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" (at 444).

42. 358 U.S. 1 (1958) [*Cooper*].

43. 5 U.S. 137 (1803).

44. *Cooper*, *supra* note 42 at 18.

45. 505 U.S. 833 (1992) [*Casey*].

46. 410 U.S. 113 (1973) [*Roe*].

pointed *against*, rather than in favour of, the Court revisiting its abortion decisions.[47] As deference could be interpreted by the public as "surrendering to political pressure," the Court should be less, not more, willing in such a watershed case to revisit its interpretation of the Constitution.[48]

The USSC's rigid, three-tiered approach to the standard of review also reinforces the system of strong-form judicial review in the United States. Where laws violate fundamental rights or fundamental interests under the equal protection clause, or are based on a suspect classification (such as a classification based on race), the Court applies strict scrutiny—or asks whether a law is substantially narrowly tailored to advance a compelling government interest.[49] Where a law imposes a time, manner, or place restriction, or another content-neutral restriction on the enjoyment of a fundamental right, or where a law is based on a quasi-suspect classification (such as gender), the Court applies intermediate scrutiny—or asks whether a law is substantially narrowly tailored to advance an important government objective.[50] In all other cases, the Court applies a rational basis review, which asks whether a law has some rational connection to a legitimate government purpose.[51]

The consequence of this three-tiered approach is that the USSC must apply the same approach to any legislative sequel—or second look case—as it did in its first look. While individual justices can always "gloss" over the requirements of strict scrutiny, such scrutiny clearly requires that legislation not unduly infringe the enjoyment of constitutional rights that have previously been recognized by the Court in order to be valid.[52] This, in turn, makes it more difficult for individual justices to simultaneously follow the Court's own

47. *Supra* note 45 at 867-69.

48. *Ibid.* at 867.

49. See *e.g. Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (voting as fundamental interest); *Casey*, supra note 45 (reproductive privacy as fundamental right); and *Johnson v. California*, 543 U.S. 499 (2005) (race-based classifications).

50. See *e.g. Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (time, manner, and/or place restrictions); *United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutrality test); and *United States v. Virginia*, 518 U.S. 515 (1996) (gender discrimination).

51. See *e.g. Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

52. See *e.g. Grutter v. Bollinger*, 539 U.S. 306 (2003). For a discussion of this case, see Marisa Lopez, "Constitutional Law: Lowering the Standard of Strict Scrutiny" (2004) 56 Fla. L. Rev. 841.

precedents *and* show deference to legislative Constitutional judgments, even if they favour doing so in order to uphold a congressional sequel.

Canadian scholars suggest that, by reason of the *Charter*'s distinctive features, judicial review in Canada is "weaker" than in the United States.[53] Compared to Article V of the US Constitution, section 33 of the *Charter* provides a relatively undemanding mechanism by which Parliament or the legislature may override the effect of an SCC decision interpreting the *Charter*. At any given time, reliance by Parliament or the provincial legislatures on section 33 simply requires an express declaration and the support of a legislative majority.[54] After five years, Parliament or the provincial legislatures must re-enact the legislation to re-engage the override.[55] Therefore, dialogue scholars argue that Section 33 of the *Charter* creates a "big difference between Canada and the United States."[56] Compared to the various provisions of the US *Bill of Rights*,[57] which make no express provision for the limitation of rights, section 1 of the *Charter* also alters the way in which the SCC approaches the assessment of the proportionality or justifiability of limitations on rights.[58]

On closer inspection, however, the way in which dialogue scholars interpret the significance of provisions such as sections 33 and 1 means that, in the vast majority of cases, their theory actually provides little basis for distinguishing the legitimacy of US style, strong-form judicial review. When it comes to section 33 of the *Charter*, dialogue scholars generally argue that it should be understood to exhaust, not confirm, the scope for true interpretive dialogue between

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53. See *e.g.* Peter W. Hogg, "Constitutional Dialogue Under a Bill of Rights" (2007/2008) 23 N.J.C.L. 127 at 134 [Hogg, "Bill of Rights"].

54. *Charter*, *supra* note 1, s. 33(1). This provision holds that Parliament or the legislature may enact legislation that shall operate notwithstanding ss. 2 or 7-15.

55. *Ibid.*, s. 33(3).

56. Hogg, "Bill of Rights," *supra* note 53. Compare Peter H. Russell, "Standing Up for Notwithstanding" (1991) 29 Alta. L. Rev. 293; Paul C. Weiler, "Rights and Judges in a Democracy: A New Canadian Vision" (1984-1985) 18 U. Mich. J.L. Ref. 51 at 79-84.

57. U.S. Const. amend. I-X.

58. *Cf.* Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (New York: Oxford University Press, 2002) c. 6. For examples of internal (de)limitation in the US. Constitution, see U.S. Const. amend. V (which protects life, liberty, and property only to the extent of a requirement of due process).

courts and legislatures under the *Charter*.[59] Thus, in the context of section 1 of the *Charter* (or an equivalent clause-specific limitation), dialogue scholars claim that legislatures are not free to engage in dialogue about the meaning of the *Charter* itself, but only about the way in which the *Charter* relates to particular policy objectives.

In their 1997 article, Hogg and Bushell argue that, in this context, it is for the courts to interpret the meaning of *Charter* rights and for legislatures to respect "the *Charter* values ... identified by the [c]ourt[s]," while continuing to pursue their prior policy objectives.[60] In *Charter Dialogue Revisited*, Hogg, Bushell Thornton, and Wright make this division of responsibility between courts and legislatures even more explicit. Under their view, while legislatures remain responsible for determining how to achieve social and economic policy objectives, they "may not act on an interpretation of the *Charter* which conflicts with an interpretation provided by the courts."[61] Other dialogue scholars, such as Kent Roach, also see dialogue as "an interchange ... between judges and legislators in which the former focus on rights and the latter are allowed to explain why they believe it is necessary to limit rights in the circumstances."[62]

The difficulty for dialogue scholars, given this view of section 33, is that in the thirty-seven years in which the *Charter* has been in operation, there has only been one case in which the notwithstanding clause has been used to override a decision by the SCC under the *Charter*.[63] That instance involved the SCC's decision in *Ford v. Quebec (A.G.)*[64] and the decision by the Quebec legislature to reinstate a preference for French-only, as opposed to bilingual, signs in the province.[65] Parliament has never invoked section 33 of the *Charter*, and provincial

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59. See *e.g.* Hogg, Bushell Thornton & Wright, *supra* note 2 at 36; Roach, "Common Law," *supra* note 2 at 487.

60. *Supra* note 2 at 79.

61. Hogg, Bushell Thornton & Wright, *supra* note 2 at 3, 33.

62. Roach, "Canadian Experience," *supra* note 2 at 543.

63. Compare Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" in Huscroft & Brodie, *supra* note 17 at 135.

64. [1988] 2 S.C.R. 712 [*Ford*].

65. See Bill 178, *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54, s. 10. Thereafter, the Quebec legislature repealed its own attempt at dialogue by passing legislation that was designed to give much broader effect to the decision of the SCC in *Ford*, *ibid.*, suggesting that a more narrowly tailored alternative to French-only signage laws would be

legislatures have used it only fifteen times in addition to its usage in connection with *Ford*. Twelve of those further instances also involved Quebec.[66] Peter Hogg suggests that this is because "public opinion outside Quebec has not been deeply disturbed by decisions of the Court," at least when compared to the US public's reaction to decisions such as *Lochner v. New York*,[67] or *Roe*.[68] The difficulty with this view, however, is that it tends to imply only the narrowest of differences between judicial review in Canada and the United States.

Concerns about the democratic legitimacy of judicial review in the United States are far from confined to decisions such as *Lochner* or *Roe*, where the USSC adopted a sweeping view of the due process clause in direct tension with the constitutional understandings of a large number of Americans.[69] Those concerns extend to a much larger number of decisions in which the USSC has frustrated a national majority in its interpretation of the constitution.

Nor is it true that the SCC's *Charter* decisions have been met with universal, popular approval. Take, for example, the decisions of the SCC in *R. v. Seaboyer*[70] and *RJR-MacDonald Inc. v. Canada (A.G.)*,[71] which struck down, as incompatible with the *Charter*, certain respective "rape-shield" and tobacco advertising provisions, respectively. In both cases, the SCC's decision met strong opposition from women's groups and public health organizations, not to mention the public at large.[72] This opposition was not limited to the result, but also extended to the Court's approach to *Charter* interpretation. In *Seaboyer*, women's groups argued that, by failing to recognize the relevance of the complainant's equality rights to the justifiability of the provisions under challenge, the SCC took too narrow a view of the scope of the constitutional value-ordering that is created by section

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laws requiring French to be "present and predominant" on all signs. See Bill 86, *An Act to Amend the Charter of the French Language*, S.Q. 1993, c. 40, s. 18 (Bill 86).

66. See Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter" (2001) 44 Can. Pub. Admin. J. 255 at 256-58 [Kahana, "Section 33"].

67. 198 U.S. 45 (1905) [*Lochner*].

68. See Hogg, "Bill of Rights," *supra* note 53 at 135.

69. See David A. Strauss, "Why Was *Lochner* Wrong?" (2003) 70 U. Chicago L. Rev. 373.

70. [1991] 2 S.C.R. 577 [*Seaboyer*].

71. [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

72. See Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 85, 93 [Hiebert, *Charter Conflicts*].

15(1) of the *Charter*.[73] In *RJR-MacDonald*, public health advocates argued that the SCC should not have treated tobacco advertising as speech or granted tobacco companies the standing to assert *Charter* rights.[74] In these and other cases, it is difficult to accept, as Hogg suggests, that the threshold of disagreement was not sufficient to engage section 33.

When it comes to section 1 of the *Charter*, dialogue scholars have tended to approach this provision in a way that creates little *relevant* difference between Canada and the United States. For the most part, they suggest that the significance of section 1 (and of guarantees with internal limitations) is that it discourages an absolutist approach to the definition of rights.[75] If rights are subject to reasonable limits, there is great scope for dialogue between courts and legislatures about the ways in which rights and policy objectives should be balanced.[76]

One difficulty with this approach is that it misconceives its American counterpart. In fact, there are few areas in which the USSC has adopted anything like an absolutist approach to the protection of constitutional rights.[77] Even in the context of the free speech clause of the First Amendment, the USSC—with the notable exception of Justices Black and Douglas—has consistently adopted a non-absolutist approach to the scope of the guarantee of speech.

A more promising path emphasizes the degree to which section 1 creates greater "flexibility for legislative sequels than ... the American Bill of Rights

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73. See *e.g.* Elizabeth J. Shilton & Anne S. Derrick, "Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Y.B. Access Just. 107 at 118-19; Lois G. MacDonald, "Promoting Social Equality through the Legislative Override" (1994) 4 N.J.C.L. 1.

74. *RJR-MacDonald*, *supra* note 71. For arguments to this effect, see *e.g.* Hiebert, *Charter Conflicts*, *supra* note 72 at 80-82.

75. See Roach, "Canadian Experience," *supra* note 2 at 541.

76. Compare Hogg & Bushell, *supra* note 2 at 82; *ibid.*

77. See Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 52 U.T.L.J. 89 at 93; Jeremy Webber, "Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)" in Wojciech Sadurski, ed., *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Massachusetts: Kluwer Law International, 2002) 61. See also Andrew S. Butler, "Limiting Rights" (2002) 33 V.U.W.L.R. 113 at 116; Stephen Gardbaum, "Limiting Constitutional Rights" (2007) 54 UCLA L. Rev. 789 at 805.

without a limitation clause."[78] The Court has also subsequently indicated that these requirements are to be applied in a context-sensitive way, with proper regard, among other things, to whether the government is seeking (via particular legislation) to protect vulnerable groups or to otherwise promote *Charter* values.[79] At least as it has been interpreted over the years, the SCC's *Oakes* test represents a significantly more generalized, "floating" approach to assessing the proportionality of limitations on rights than a US style test of strict (or even intermediate) scrutiny.[80] The second, minimal impairment limb of the *Oakes* proportionality requirement is also generally (in the way it is applied) a less demanding requirement than the equivalent requirement of narrow tailoring (or substantial narrow tailoring) that is applied in the United States. This means that, when it comes to assessing the compatibility of a legislative sequel with the *Charter*, Canadian justices enjoy greater flexibility than their US counterparts to uphold such sequels, consistent with their own court's prior precedents.

It is curious that dialogue theorists do not ultimately permit Canadian justices to use this flexibility to promote a more dialogic approach to review. Notably, they argue that courts "should not approach second look cases any differently than they approach first look cases"[81] but are always required to "decide cases according to their view of the law."[82] Any other approach, Hogg claims, "would be offensive to the judicial function."[83] According to this view, legislative sequels that challenge the SCC's interpretation of the *Charter* will be rendered invalid, unless there is a change in the composition of the Court, or broader social changes persuade justices to revisit their own prior decisions. This, in turn, is exactly what happens in the United States—though there is mandatory retirement for SCC judges, but not for members of the USSC, which tends somewhat to increase relative turnover on the SCC.[84]

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78. Hogg, "Bill of Rights," *supra* note 53 at 134.

79. See Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1995) at 61-71 [Hiebert, *Limiting Rights*].

80. *Ibid.* For an elaboration of the test, see *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

81. Hogg, Bushell Thornton & Wright, *supra* note 2 at 47-48.

82. Roach, "Dialogic Review," *supra* note 2 at 51.

83. See Peter W. Hogg, "Discovering Dialogue" in Huscroft & Brodie, *supra* note 17 at 5.

84. See Thomas R. Klassen & C.T. Gillin, "The Heavy Hand of the Law: The Canadian Supreme Court and Mandatory Retirement" (1999) 18 Can. J. Aging 259. On the US

II. DIALOGUE AS COMPROMISE: THE IMPORTANCE OF DEFERENCE

For dialogue theory to live up to its promise of distinguishing US style concerns about the democratic legitimacy of judicial review, a new account of sections 1 and 33—and of dialogue—is required.

A. NEW DIALOGUE AND DEFERENCE (*EX POST*)

In the new account of dialogue, the key to distinguishing Canadian from US style review will be the understanding that, in second look cases—such as those that are equivalent to *Eichman*, *Boerne*, or *Dickerson*—the SCC should show some degree of *deference*, under section 1, to the measures adopted by legislators. It also requires that, in order to reconcile a showing of *ex post* deference with the less deferential approach taken in an earlier case, the SCC should be willing either to overrule that earlier case or to engage in a form of narrow restatement (or narrow statement *ex post*).

The idea of a narrow judicial statement *ex ante* is familiar to common law lawyers in both Canada and the United States as a means by which courts may increase the scope for legislators to revise the ongoing, practical effect of their decisions. The key benefit to a narrow statement *ex ante*, in this context, is that it signals clearly to Parliament and the provincial legislatures that there is space to adopt a different interpretation of the *Charter* in future cases.

The idea of narrow statement *ex post* builds on this idea by asking members of the SCC to apply that concept to a second look case. In other words, they would uphold a legislative sequel under a narrow statement of the first look decision as both reasonable and also consistent with that decision. But if the legislative sequel could not be saved by a narrow statement of the earlier decision, the first look decision would prevail. Narrow restatement of this kind will also have a central role to play in new dialogue theory because overruling a decision will generally be unnecessary (and therefore undesirable), given that the SCC's interpretation of the *Charter* was itself premised—at least implicitly—on

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position, see *e.g.* Stephen B. Burbank, "The Selection, Tenure, and Extrajudicial Authority of the Chief Justice and Other Justices – Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices" (2006) 154 U. Pa. L. Rev. 1511.

the understanding that a legislative sequel might take the form of a disagreement with a SCC decision.[85]

The main reason, in new dialogue theory, for insisting on such *ex post* deference under section 1 is that section 33 does not provide a realistic alternative avenue for ordinary, as opposed to extraordinary, interpretive dialogue.[86] One reason for this is the historic link between the use of section 33 and Quebec's demands for recognition as a "distinct society." Not only did the first remedial use of section 33 occur in this context,[87] but, as many other commentators have noted, in both instances the Quebec legislature relied on section 33 in a way that was both widely noticed and deeply unpopular in the rest of Canada.[88] Quebec's use of the override was an important factor in the 1987 *Constitutional Accord* (Meech Lake Accord), which recognized Quebec as a "distinct society" within Canada.[89] Subsequent use of the power has also, for most Canadians, simply confirmed the link between section 33 and Quebec's demands to be treated as a distinct society, exempting itself from broader Canadian constitutional commitments and thereby making it extremely costly for Parliament and Anglophone legislatures to contemplate using section 33 as a means of engaging in dialogue.[90]

Even if this history did not exist, section 33 would still be an unlikely vehicle for routine legislative dialogue under new dialogue theory. By creating a broad power to override *Charter* rights, section 33 provides legislators with a natural vehicle for setting limits on the extent to which rights apply to particular cases or circumstances—or for expressing what Jeremy Waldron has called

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85. *Contra* Cameron, *supra* note 63 at 164 (arguing that, at the very least, considerations of transparency favour the Court explicitly overruling its prior precedent in such cases).

86. Section 1 provides a natural textual basis, or hook, for such an approach in Canada. According to new dialogue theory, however, it is not necessary for such a hook to exist in order for judicial *ex post* deference or narrow statement to be desirable. In principle, the lessons of new dialogue theory also apply to the United States, which lacks any textual hook or confirmation of such an approach.

87. See Kahana, *supra* note 66.

88. See Hiebert, *Limiting Rights*, *supra* note 79 at 140; Tushnet, "Policy Distortion," *supra* note 4 at 292.

89. *Ibid.* See *Constitutional Accord*, online: <http://www.parl.gc.ca/information/library/prbpubs/bp406.htm#A.%20The%20Meech>.

90. Kahana, "Section 33," *supra* note 66. Kahana discusses the sixteen instances in which s. 33 has been used (at 257-59).

"misgivings" about the application of rights.[91] It provides a much less natural vehicle by which Parliament or the legislature can express disagreement with the SCC about the content or priority of *Charter* rights in particular, concrete circumstances ("rights disagreements").[92] In such cases, if Parliament or the legislature is to invoke section 33 in aid of dialogue, it will be required, to some degree, to *misrepresent* the nature and scope of its disagreement with the SCC. By making legislators seem less trustworthy, misrepresentation of this kind will also tend to make it far more difficult for legislators to persuade the public that, in seeking to engage in dialogue, they are motivated by principled disagreement with the SCC, and not just by pure political expediency. This, in turn, can mean that the political price of dialogue for Parliament or the legislature exceeds the benefits that are derived from achieving a more democratic and responsive *Charter* outcome.

For this reason, new dialogue theory holds that, while section 33 of the *Charter* will be important to dialogue, its role will tend to be largely background in nature. The most important function of section 33 will be to give the SCC greater incentive to adhere to a commitment to *ex post* deference. Given the simple mechanism for applying section 33, if the SCC declines to defer to Parliament or the legislature in second look cases, there is at least *some* prospect that Parliament or the legislature will decide to override wholly the Court's interpretation of the *Charter* in favour of its own preferred interpretation.[93] If members of the SCC are in any way "constitutional maximizers," they will have much greater incentive than justices in the United States to defer to legislative sequels that take some account of their preferred constitutional vision.[94] If they show such deference, they can be fairly confident that their preferred *Charter*

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91. Waldron, "Models," *supra* note 17 at 9-18.

92. Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy" in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone, eds., *Protecting Human Rights: Instruments and Institutions* (New York: Oxford University Press, 2003) 263; *ibid.* at 35-37.

93. This assumes, of course, that, while the use of s. 33 has been rare, there is no established convention against its use. *Contra* Howard Leeson, "Section 33, the Notwithstanding Clause: A Paper Tiger?" (2000) 6:4 CHOICES 3 at 20, online: <http://www.irpp.org/choices/archive/vol6no4.pdf>.

94. For examples of US scholarship that treat judges in this way, see Lewis A. Kornhauser & Lawrence G. Sager, "The One and the Many: Adjudication in Collegial Courts" (1993) 81 Cal. L. Rev. 1; Adrian Vermeule, "The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division" (2005) 14 J. Contemp. Legal Issues 549.

interpretation will have some influence. If they strike down Parliament's or the legislature's attempt at dialogue, they run a risk, not only of losing influence in a particular area of *Charter* interpretation, but also of losing influence more generally, in the eyes of the public. If members of the Court are at all risk averse about constitutional outcomes, they will have a clear incentive to defer to *reasonable* legislative sequels. By contrast, members of the USSC have every incentive in second look cases to insist upon their own uniquely preferred interpretation of the constitution because the chances of reversal are smaller.

A second important function of section 33 in new dialogue theory will be to provide valuable textual confirmation to the SCC of the desirability of adopting a commitment to *ex post* deference under the *Charter*. In this sense, section 33 will serve much the same function *vis-à-vis* section 1 (and other internal limitation clauses) as section 15(2) of the *Charter* does with respect to section 15(1)—*i.e.*, it provides a helpful cue to the SCC of the preferability of one interpretation of the nature and structure of a particular *Charter* provision over another.[95] Admittedly, section 33 will not provide a perfect textual cue to the SCC in this context, given its connection to the idea of rights misgivings as opposed to rights disagreements and its potential to be read as either confirming or exhausting the proper scope for dialogue under the *Charter*. However, section 33 will again have much in common with parallel provisions, such as section 15(2), which has also been interpreted by the SCC to involve some potential ambiguity.[96] Therefore, while the notwithstanding clause cannot ensure that a justice will adopt a particular, preferred dialogic approach to the process of justification under section 1, it can, like section 15(2), provide valuable textual *support* for a justice who is adopting such an approach, if she or he deems it desirable.

In this context, a related function served by section 33 is to confirm to the SCC that the deference required of it in second look cases is not unlimited. The *precise* limits that apply to *ex post* deference may not exactly mirror the limits to section 33, but they will tend to be closely parallel. In fact, the very existence of limits in the latter context will also provide valuable additional confirmation to the SCC that there should be some limits in the former.

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95. See *Lovelace v. Ontario*, [2000] 1 S.C.R. 905 at paras. 105-08 [*Lovelace*] (holding that s. 15(2) confirms the substantive nature of the equality guarantee found in s. 15(1) of the *Charter*, rather than establishing a special or exhaustive provision to govern the constitutionality of affirmative action measures).

96. *Ibid.*

One such limit, for example, will be the requirement that a legislative sequel be within the outer bounds of reasonable interpretations of the *Charter* (or that it should not be patently unreasonable). This reflects the fact that strong-form judicial review is problematic to the extent that there is scope for reasonable disagreement among Canadians about what the text, history, and normative values that underpin the *Charter* entail in particular cases. The moment that such disagreement ceases to be reasonable, according to any plausible interpretive theory, democratic objections to the SCC that have final authority to interpret the *Charter*, according to that theory, also disappear.

A second limit stems from the understanding that, ideally, norms of interpretive deference should be reciprocated between the courts and the legislatures. This helps to ensure that, where the public favours some form of compromise between competing *Charter* values (or public rights and policy concerns), the path to achieving such a compromise is as smooth as possible. Absent a norm of mutual deference between judges and legislators, the path to long-term constitutional stability will tend to involve sharp swings between differing judicial and legislative constitutional interpretations, pending the ultimate "resolution" of such disagreements by Canadians via electoral or other means. The legislative branch could consistently pass the most extreme, "in your face" legislative sequels, which have effect for some period of time, and the SCC could consistently strike down these statutes and thereby restore the legal status quo, pending passage of another sequel.[97] This type of behaviour undermines legal stability and predictability in a way that is neither necessary nor desirable from a dialogic perspective. As a result, dialogue theory favours a more controlled process of interpretive exchange under the *Charter*, whereby both judges and legislators commit to modify, wherever possible, (rather than to wholly disregard) the interpretations of the other branch.[98]

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97. For the idea of "in your face" replies, see Roach, "Common Law," *supra* note 2.

98. Compare T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 Oxford J. Legal Stud. 563 at 571; Dawn E. Johnsen, "Presidential Non-Enforcement of Constitutionally Objectionable Statutes" (2000) 63 Law & Contemp. Probs. 7 at 36.

B. NEW DIALOGUE, JUDICIAL MINIMALISM, AND *CHARTER* CONVERSATION COMPARED

By emphasizing the importance of judicial deference and narrow statement *ex post* under section 1 of the *Charter*, new dialogue theory gives Canadian courts maximum flexibility *ex ante* to counter blockages in the legislative process that might otherwise impair the enjoyment of *Charter* rights.[99]

I have suggested elsewhere that reasonable disagreement about the meaning of constitutional rights means that, in most cases, a court such as the SCC cannot legitimately seek to enforce a wholly freestanding historical or moral conception of *Charter* rights. This does not mean, however, that the Court's role under the *Charter* is necessarily insignificant, given the range of potential blockages in the legislative process that surround the protection of *Charter* rights.[100] Because legislative processes in Canada are frequently subject to blockages, such as those caused by "blind spots" and "burdens of inertia," Canadians will often be prevented from enjoying even those *Charter* rights that a majority of citizens would be willing to grant them.[101]

Legislative blind spots alone can take at least three distinct forms. They can relate to the application of laws to particular cases in a way that limits rights

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99. As a result, some critics may, of course, regard new dialogue as supporting an unduly activist approach to judicial review *ex ante*. See *e.g.* Christopher P. Manfredi & James B. Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudry and Claire E. Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49 McGill L.J. 741.

100. See Rosalind Dixon, "Creating Dialogue About Socio-economic Rights: Strong-form Versus Weak-form Judicial Review Revisited" (2007) 5 I.CON. 391 [Dixon, "Socio-economic"]. In this sense, new dialogue theory is, to some degree, an inheritor to "representation-reinforcing" approaches to judicial review. See *e.g.* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980). At the same time, by emphasizing the pervasive existence of reasonable disagreement and rejecting any strict process/substantive distinction whereby procedural values are understood to be free of such disagreement, new dialogue theory frees itself from some of the analytic failings of pure procedural theories. For criticisms of the theory on this ground, see Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 Yale L.J. 1063 at 1063-65, 1067-79. In doing so, it aligns itself more closely with the idea that judicial review is providing a valuable additional veto/initiation point for the protection of rights. Compare Richard H. Fallon, Jr., "The Core of an Uneasy Case *for* Judicial Review" (2008) 121 Harv. L. Rev. 1693 (emphasizing the idea of courts as an additional veto point only).

101. For the introduction of these concepts, see Dixon, "Socio-economic," *ibid.*

(blind spots of application), to certain perspectives not directly represented in the legislature (blind spots of perspective), and to opportunities for low-cost accommodation of rights claims (blind spots of accommodation). Each form of blind spot will arise for somewhat different reasons, including time constraints, expertise, diversity, or the focus of legislators.

Blind spots of application will often arise simply as a result of time constraints on legislators. When legislators are required to consider hundreds of bills in any given session, as well as perform constituency-related functions, they will often lack time to study individual pieces of legislation in detail. In other cases, blind spots of application can arise even where legislators do turn their minds to a particular issue because legislators, like all of us, are subject to forms of bounded rationality and will therefore have limited foresight about the full range of circumstances in which a law may impair rights in the future.

Blind spots of perspective will arise in Canadian legislatures wherever a group lacks "descriptive" representation in the legislature and legislators lack the appropriate incentive or mechanism for reaching out to these excluded voices.[102] In some cases, limits of this kind will be the product of deliberate, formal restrictions on the franchise (such as those that exist in the case of non-citizens and which used to exist for prisoners.)[103] In other cases, these limits will be the product of electoral dynamics. As a result, political parties will have little incentive to select a diverse range of candidates with perspectives that are very different from those of the median voter. In each case, legislators will often have limited incentive to engage with the arguments and experiences of such groups, and, in any event, they will find that they have few institutional opportunities for such engagement.

Blind spots of accommodation, in turn, can arise in legislative processes as a consequence of limits on both the time and the expertise of legislators. Such limitations often lead legislators to delegate the task of identifying appropriate rights protections to the minister who is responsible for particular legislation or to a legislative sub-committee, even when these legislators themselves often lack the experience that is necessary in order to craft appropriate rights protections. They also tend to have a disproportionate interest in achieving the relevant leg-

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102. On the concepts of descriptive and substantive representation, see Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972).

103. See *infra* note 178.

islative objective in a way that can lead them to overlook opportunities for the accommodation of rights, even if such accommodations represent only a minimal cost to the legislature's policy aims.[104]

In many cases, legislative blind spots can also intersect with subsequent legislative inertia in a way that prevents the ongoing correction of earlier oversights. Inertia of this kind can take at least three distinct forms and impede legislative responsiveness to broader changes in constitutional understandings. Legislative burdens of inertia can be the product of competing legislative priorities (priority-driven inertia), competing factions within political parties in the legislature (coalition-driven inertia), and bureaucratic delay on the part of the executive, combined with poor oversight by legislatures (compound inertia). Priority-driven inertia can arise because capacity constraints on legislatures, at both levels of government, cause legislators to prioritize demands for action that benefit a large number of citizens and neglect the demands of minorities, even where those demands find tacit support from a much larger majority.

Coalition-driven forms of inertia can arise in a different set of circumstances, where legislative behaviour is dominated by partisan political considerations. Against such a background, divisions within political parties over a *Charter* issue may cause legislators to avoid addressing that issue, even where there is fairly clear majority support for legislative change in the broader constitutional culture. In Canada, as in most constitutional democracies, affiliation with a major political party is extremely important to a legislator's chances of election; legislators, therefore, have a strong interest in promoting both the actual and the apparent coherence of their party. That coherence can also be threatened where a *Charter* issue divides a party internally. In these circumstances, party leaders face two broad options: either allow a free vote among party members on the basis of their conscience, or impose party discipline on members in the minority. Both options can be costly for the coherence of the party. Allowing a conscience vote can undermine the public perception of solidarity, but imposing party discipline can erode the internal cohesion of a party; if such discipline is imposed frequently enough, members of a minority faction may no longer feel it is in their interest to remain part of the broad,

104. There are, of course, attempts to change this by introducing new legislative committee structures with specific responsibility for human rights issues. See *e.g.* Janet L. Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82 Tex. L. Rev. 1963 at 1978.

party-based coalition.[105] Faced with this catch-22, legislators may therefore decide to keep an issue off the agenda—even in the face of demands for legal change from the broader constitutional culture.[106] The strategic question is whether the short-term electoral gains of greater legislative responsiveness outweigh the damage to party coherence.

Alternatively, compound forms of inertia have the potential to arise wherever the realization of a *Charter* right requires some form of positive action from the executive. Where this is the case, time constraints, competing priorities, and defiance on the part of executive officials can mean that changes that advance rights are substantially delayed.[107] Legislatures, with their own competing priorities, can fail to counter or punish such bureaucratic inertia where it arises. However, none of these blockages need be insurmountable in a constitutional system such as Canada's, which provides for broad judicial review.

All Canadian courts, not merely the SCC, will be well placed to identify blockages, such as those caused by blind spots of application. The fact that Canadian courts generally hear cases on a concrete, case-by-case basis means that they have ample opportunity to consider the application of laws to particular circumstances. Judges at higher levels of appeal will also, by virtue of prior experience in practice or in lower courts, be highly skilled at identifying the kinds of procedural protection or narrow substantive exceptions to laws that could be adopted at low cost to a particular legislative objective, thereby overcoming existing blind spots of accommodation. When it comes to burdens of inertia, appellate judges in particular will also have a range of sources available to them—domestic and foreign—that can help them to identify the degree of popular support for a particular *Charter* claim.[108] Given their powers under the

105. See Tushnet, "New Forms," *supra* note 22 at 834.

106. See Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary" (1993) 7 Stud. Am. Pol. Dev. 35 at 40; F.L. Morton, "Dialogue or Monologue?" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111.

107. Consider the gap in this context between changes in popular understandings of the rights of domestic violence victims and changes in police practices in many localities. See *e.g. B.M. v. British Columbia (A.G.)*, [2001] 105 A.C.W.S. (3d) 962.

108. For a critical evaluation of these different sources, see Rosalind Dixon, "A Democratic Theory of Constitutional Comparison" (2008) 56 Am. J. Comp. L. 947 [Dixon, "Democratic Theory"].

Charter, Canadian courts will also have a broad range of tools available to them with which to counter such blockages, once identified.

The coercive remedial powers that Canadian courts enjoy by virtue of section 24(1) of the *Charter* gives them the direct ability to counter almost all forms of legislative blind spot, simply by striking down or modifying the effect of legislation in a particular case.[109] These powers also mean that, compared to purely political interventions made by social movements or human rights commissions, judicial interventions in the name of the *Charter* provide legislators with a greater incentive to address a previously neglected issue. If they do not, it is likely that courts themselves will address the issue in a way that legislators find less appealing. The communicative aspect of courts' reasoning also gives them an extremely valuable, additional tool with which to counter both legislative blind spots and burdens of inertia: appellate courts, and particularly the SCC, generally provide much readier access to national media attention for rights claimants than do direct, popular attempts at constitutional change.[110] In doing so, they provide a powerful tool for countering both blind spots of perspective and coalition-driven forms of inertia.

Different approaches to weakening the finality of the SCC's interpretations of the *Charter*, however, imply varying degrees of constraint on the capacity of the SCC to use these tools with a view to countering such blockages. As a logical matter, there are two predominant ways, other than via *ex post* deference, by which the Court could weaken the finality of its decisions without Parliament or the legislature resorting to the application of section 33. One option would be for the SCC to adopt a much narrower approach to the scope of judicial review *ex ante*. Another option would be for it to accept that Parliament and the provincial legislatures may disregard its decision, or treat it as lacking binding force.[111] The first option is generally associated with theories of

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109. By "coercive," I do not mean to suggest that courts literally have the power to enforce their judgments via coercive means. I mean simply to suggest that they have the power to issue mandatory legal commands or directives that, in a system in which court orders are generally obeyed, will be given coercive effect by the executive in due course.

110. For evidence in the US context to this effect, see Roy B. Flemming, B. Dan Wood & John Bohte, "Attention to Issues in a System of Separated Powers: The Macrodynamics of American Policy Agendas" (1999) 61 J. Pol. 76 at 84. Compare also Roach, "Dialogic Review," *supra* note 2 at 54.

111. Another option would be to make judicial review even narrower and more deferential *ex ante*, and limited to cases in which the approach adopted by Parliament or provincial

"judicial minimalism" that have been proposed by scholars such as Cass Sunstein and Patrick Monahan in the United States and Canada, respectively.[112] In the United States, the second option is associated with the idea of departmentalism,[113] while it is connected in the United Kingdom to the idea of judicial review as "conversation."[114]

Theoretically, all three approaches are capable of responding to the possibility that, in seeking to counter perceived legislative blockages, Canadian courts may sometimes misjudge the degree of democratic support for, or practical effect of, recognizing a *Charter* right. Especially when compared to the predominant understanding of judicial review in the United States, each approach ensures that decisions of the SCC are at least fairly open to revision by Parliament or the legislature. The advantages of new dialogue theory are that it preserves the maximum scope possible for review *ex ante*—thereby countering blockages in the legislative process—and adopts a more deferential position *ex post.*

Compared to judicial minimalism, new dialogue theory gives Canadian courts much greater flexibility in first look cases to determine whether to engage in broad versus narrow (and therefore also shallow versus deep) forms of reasoning *ex ante.*[115] By doing so, it gives courts greater ability to use persuasion

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legislatures was patently unreasonable, or "clearly in error." See *e.g.* Thayer, *supra* note 4. Such an approach would, however, be both strongly contrary to existing SCC practice and far from a true compromise between full-scale judicial and legislative responsibility for interpreting the *Charter.*

112. See Sunstein, *supra* note 20.

113. For a definition of departmentalism, see *e.g.* Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is" (1994) 83 Geo. L.J. 217; Mark Tushnet, "Alternative Forms of Judicial Review" (2003) 101 Mich. L. Rev. 2781; and Keith E. Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses" (2002) 80 N.C.L. Rev. 773 at 783.

114. See *e.g.* Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin Books, 2000). Conversational theories have also been advocated in the United States. See Robert W. Bennett, "Counter-Conversationalism and the Sense of Difficulty" (2001) 95 Nw. U.L. Rev. 845. In Canada, see Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52 U.T.L.J. 221.

115. If courts are to reason narrowly, they must also reason in a "shallow" way. See Sunstein, *supra* note 20 at 16-19 (noting that there are few decided cases that even attempt to combine narrow and deep reasoning, given the tension between the two demands). In Canada, see *e.g. R. v. Morgentaler* [1988] 1 S.C.R. 30 at para. 258 (seeking expressly to leave scope for Parliament to respond to the decision of the Court to strike down s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34 [*Criminal Code*, 1970], by holding that "the precise point in the

as a tool for promoting the enjoyment of rights. In many cases, persuasion of this kind will allow courts to address legislative blockages, such as those caused by blind spots of perspective and accommodation, or by priority-driven burdens of inertia. Blockages of this kind will often arise in a consistent, closely related pattern across different settings. Court decisions that seek to counter such blockages via case-specific, coercive means will tend to leave undisturbed a large number of other statutes that embody parallel blockages. In contrast, those that persuade legislators to give increased attention to a particular rights argument, concern, or issue—in more systemic terms—are likely to have a much broader impact on overall blind spots or inertia of this kind.[116]

In comparison to conversational and departmental theories, new dialogue theory gives Canadian courts greater capacity to address legislative blockages, particularly those caused by the most persistent coalition-driven and compound inertia. Unlike conversational theories that limit the courts' review choices, new dialogue theory gives courts broad power—through remedies—to directly counter such inertia.[117] In the face of such inertia, it allows them to create a new, more democratically responsive legal equilibrium with the expectation that, unless the Court clearly misjudges democratic constitutional understandings, this new equilibrium will endure for some period of time.

Unlike departmental theory, new dialogue theory also gives Canadian courts a much broader capacity to indirectly counter such inertia by further insisting that, whatever remedial orders courts do issue, such orders should be treated as (at least narrowly) binding against both legislators and executive officials. It ensures that, whether courts issue a suspended declaration of invalidity

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development of the foetus at which the state's interest in its protection becomes 'compelling' I leave to the informed judgment of the legislature").

116. Consider *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 147, 72-73 [*M. v. H.*] for an example in which the Court used a clear combination of both coercive and persuasive tools and issued a suspended declaration of invalidity, at para. 147; also for overtly normative language, with an apparent view to countering such blockages, when considering the range of contextual factors relevant to analysis under s. 15(1), at paras. 72-73.

117. In a conversational understanding (since the Court's role is simply to deliberate and not to decide) countering legislative inertia is, according to Robert Bennett, "of no particular moment." Bennett, *supra* note 114 at 892. In new dialogue theory, by contrast, the capacity of Canadian courts to counter such inertia will be extremely important to their ability to promote a more expansive interpretation of *Charter* rights that is consistent with respecting reasonable disagreement among Canadians about the meaning of the *Charter*.

or a mandatory injunction setting a timeframe for legislative or executive action, the court's intervention necessarily alters the incentives facing legislators when deciding whether to address a particularly controversial or complex *Charter* issue. Without a binding time frame for addressing such an issue, legislators with competing priorities or strong internal disagreements will have little reason to give increased attention to a particular issue. But when such a timeframe is backed by the threat of legislative invalidation or contempt of court, judicial intervention will create strong incentives for at least some legislators with a particular interest in, or responsibility for, an issue.

Another argument for new dialogue theory over rival minimalist, conversational, or departmental approaches is that this approach fits more easily within the structure of the *Charter*, as well as with the actual history of *Charter* review in Canada.[118] In the United States, there is some historical support for departmental understandings, given that it is far from clear that the framers of the Constitution intended to establish judicial supremacy, at least at the expense of Congress. Furthermore, as Larry Kramer has shown, there was also a long period in the nineteenth century during which the president, Congress, and state officials actively exercised their "departmental" authority to interpret the Constitution.[119]

In the United Kingdom, where conversational theories have gained the most attention, defining the court's role in purely communicative terms also makes some sense at the level of fit, given the constraints of the *Human Rights Act 1998* (HRA).[120] Section 3 of the HRA provides that British courts have an obligation "so far as it is possible to do so [to] read and giv[e] effect [to legislation] in a way which is compatible with the Convention rights." Section 4 provides that where a compatible reading is impossible, courts may make a "declaration of incompatibility." Such a declaration does not, in turn, "affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings in which it is made."[121] As a result, a section 4 declaration may plausibly be considered conversational, rather than legally binding.

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118. On notions of "fit" generally, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 110-18.

119. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

120. (U.K.), 1998, c. 42 [*HRA*]. See *e.g.* Klug, *supra* note 114.

121. *HRA*, *ibid.*, s. 4(6).

In contrast, due to Canada's history and the structure of the *Charter*, it is less appropriate to treat Canadian courts' decisions as lacking binding legal force. By the time the *Charter* was adopted in 1982, it was accepted that court decisions are legally binding against other branches of government, at least in the narrow sense that other branches must respect the decisions of courts as the final word on the rights and liabilities of individual parties before them, rather than the more general legal issues raised by a case.[122] Section 52(1) of the *Constitution Act, 1982*, empowers Canadian courts to invalidate unconstitutional legislation. Therefore, it also makes less sense to treat the role of Canadian courts as primarily persuasive or communicative, rather than coercive.[123]

If one considers the SCC's approach to *Charter* review since 1982, it is clear that members of the Court have frequently departed from a strictly minimalist, narrow, and shallow approach to judicial reasoning *ex ante*. Take the approach of the SCC in cases in which it invalidates a law for inconsistency with section 1 of the *Charter*. Truly narrow reasoning in such cases would involve an exclusive focus by the SCC on the minimal impairment limb of the *Oakes* test (*i.e.*, the question of whether a law limited a protected right as little as possible). Unlike a finding that a law lacked an appropriately important objective or failed the rational basis test, such a finding would not in any way suggest that Parliament or the legislature was precluded from closely re-enacting the measure. Similarly, unlike a finding about ultimate proportionality, such a finding would also avoid comment on what would be required for legislation to pass muster in a second look situation.

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122. Compare Hogg, Bushell Thornton & Wright, *supra* note 2 at 28. Unlike Hogg, Bushell Thornton & Wright, I do not think that this practice necessarily extended to requiring legislators to give full effect to a court's reasoning as it might apply to future cases. See *e.g. Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914 [*Labatt*] (striking down federal Food and Drug labeling requirements under a narrow conception of what constituted regulation affecting the nation as a whole); *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 at paras. 34-40 (upholding 1981 amendments to the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, and implying a broader reading by Parliament than by the SCC in *Labatt* of the relevant limb of the trade and commerce power). For a discussion of *Zellberbach*, see James C. MacPherson, "Economic Regulation and the *British North America Act*: *Labatt Breweries* and Other Constitutional Imbroglios" (1981) 5 Can. Bus. L.J. 172; Peter W. Hogg, "Comment on James MacPherson's Paper on Economic Regulation and the British North America Act" (1981) 5 Can. Bus. L.J. 220.

123. See *Schachter v. Canada*, [1992] 2 S.C.R. 679.

The SCC, however, has rarely chosen to rely exclusively on this limb of the *Oakes* test. While the minimal impairment test has been critical, the Court has also emphasized multiple bases of potential invalidity when striking down legislation. Between 1986 and 1997, Leon E. Trakman, William Cole-Hamilton, and Sean Gatien found that in nine per cent and sixteen per cent of cases, respectively, the SCC found that the legislation not only failed minimal impairment, but also the requirements of rational connection and proportionality.[124] At a more qualitative level, the SCC's section 1 reasoning is at times overtly normative and, to that degree, somewhat broad, even when ostensibly connected to the idea of minimal impairment itself.[125]

From this perspective, an approach that emphasizes the desirability of giving the SCC flexibility to determine when and how much to engage in narrow statement *ex post*, as opposed to *ex ante*, will therefore also have clear advantages when it comes to considerations of fit.

III. OBJECTIONS TO JUDICIAL DEFERENCE *EX POST*

Two main objections may be raised to the idea of judicial deference, or narrow statement, *ex post*. One is that an approach of this kind on the part of the SCC has the potential to undermine interpretive stability—or consistency—at a lower court level, when the constitutional status of a legislative sequel is at issue.[126] Another objection is that deference of this kind is contrary to the independence of the judiciary, which is an unwritten constitutional principle.[127] However, while both point to valid concerns, neither provides a persuasive basis for rejecting, at least out of hand, the desirability of new dialogue theory as a preferred account of the balance between the SCC and Parliament or the legislature under the *Charter*.

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124. Leon E. Trakman, William Cole-Hamilton & Sean Gatien, "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83 at 145.

125. See *e.g. M. v. H.*, *supra* note 116 at paras. 72-73.

126. Compare Larry Alexander & Frederick Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv. L. Rev. 1359.

127. See *e.g. Reference Re Remuneration of Judges of Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; Luc B. Tremblay, "The Legitimacy of Judicial Review: the Limits of Dialogue Between Courts and Legislatures" (2005) 3 I CON 617 at 634-38. Compare also Roach, "Dialogic Review," *supra* note 2 at 51, 72, 96 (rejecting the idea of deference as part of the metaphor of dialogue).

When it comes to concerns about interpretive stability, it is important to recognize that whatever approach the SCC adopts, some degree of interpretive inconsistency is inevitable.[128] It is predictable that lower courts will apply the SCC jurisprudence in different ways and arrive at different outcomes. In the case of legislative sequels, lower courts are also likely to apply a strong presumption of constitutionality—which, in effect, mirrors the consequences of the SCC applying *ex post* deference—in a way that creates little difference between these and other cases.

Take the pattern exhibited in lower court decisions in the period between the SCC's decision in *Seaboyer* and its subsequent decision in *R. v. Darrach*,[129] which considered whether Parliament's new rape-shield law violated the *Charter*. In a number of cases during this period, the defendant wished to present evidence that had not been addressed by the SCC in *Seaboyer*—evidence of a complainant's prior, *non-consensual* sexual activity. In determining the admissibility of such evidence, especially prior to the SCC's decision in *R. v. Crosby*,[130] the lower courts were guided by the SCC's interpretation of the purpose of the rape-shield regime discussed in *Seaboyer*. According to the Court, its obligation was to prevent juries from being distracted by evidence that suggested that a complainant was either more likely to consent to sexual intercourse, or less likely to be credible, by reason of her prior sexual activity (the "twin myths").[131] For the most part, the lower courts had difficulty with this issue and were inconsistent in the approach they took in this area.[132]

In cases more directly parallel to *Seaboyer*, where applying the legislative sequel required consideration of whether the SCC was likely to defer to (and

128. For a definition of hard cases, see Ronald Dworkin, "Hard Cases" (1975) 88 Harv. L. Rev. 1057.

129. [2000] 2 S.C.R. 443 [*Darrach*].

130. [1995] 2 S.C.R. 912 at para. 17.

131. *Seaboyer*, *supra* note 70 at para. 41.

132. The Prince Edward Island and Nova Scotia Courts of Appeal, for example, held that the admissibility of such evidence was not limited by the relevant regime. See *e.g. R. v. Harper* (1996), 149 Nfld. & P.E.I.R. 295 (P.E.I.S.C., A.D.); *R. v. O.B.* (1995), 45 C.R. (4th) 68 (N.S.C.A). The British Columbia Supreme Court took the opposite view, holding that the relevant provisions were equally applicable to both prior consensual and non-consensual conduct in the case of a child complainant. See *e.g. R. v. Vanderest* (1994), 91 C.C.C. (3d) 5 (B.C.C.A.); *R. v. Moraes*, [1998] B.C.J. No. 2871 (S.C.).

uphold) such legislation, lower courts arguably adopted a more consistent approach. Unless asked to do so, they did not question the validity of the relevant amended legislation, but instead applied a presumption in favour of validity. By carefully considering the SCC's guidance in *Seaboyer* about the twin myths—to which such legislation responded—the lower courts consistently identified certain categories of cases (such as those involving children's evidence) where the rape-shield regime was inapplicable.[133] They also managed, when applying the *Criminal Code*,[134] to balance the probative value versus the prejudice of particular evidence in a fairly consistent way.[135] If the SCC had better clarified that it favoured a commitment to *ex post* deference and narrow statement at the first look stage (in *Seaboyer*), lower courts would very likely have approached these cases in an even more consistent way.

In the context of section 1 of the *Charter*, the SCC has made it clear that there will often be a need to "nuance" the application of the *Oakes* test and give what amounts to deference to the legislature in an attempt to balance competing *Charter* values.[136] Post 9/11, in the national security context in particular, the SCC held that it is appropriate for courts to show heightened deference to Parliament, and by extension the executive, in assessing whether a violation of *Charter* rights can be justified.[137] Other courts, including the USSC and the House of Lords, have endorsed similar principles of deference, or a similar "margin of discretionary judgment," in the context of cases involving questions of foreign affairs, immigration, and national security.[138] Therefore, it cannot be

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133. See *e.g. R. v. W.S.C.*, 1994 CanLII 7592 (N.S.C.A.); *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.).

134. *Supra* note 115, s. 276, as am. by *An Act to Amend the Criminal Code (Sexual Assault)*, S.C. 1992, c. 38, s. 2.

135. See *e.g. R. v. Majid* (1995), 98 C.C.C. (3d) 263 (Sask. C.A.); *R. v. Ecker* (1995), 96 C.C.C. (3d) 161 (Sask. C.A.); and *R. v. C.E.N.* (1998), 129 C.C.C. (3d) 198 (Alta. C.A.).

136. See Hiebert, *Limiting Rights*, *supra* note 79 at 61-71.

137. See *e.g. Suresh v. Canada (Minister for Citizenship & Immigration)*, [2002] 1 S.C.R. 3 at paras. 30, 120 (noting the importance of deference to Parliament, and by extension the Minister, in assessing the constitutionality of the deportation of non-citizens who are deemed a threat to security).

138. In the United Kingdom, see *A. and others v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 at para. 29 per Lord Bingham of Cornhill (noting the importance of deference to Parliament in assessing the compatibility of a system of control orders with Article 5 of the *European Convention on Human Rights*). In the United States, see *e.g.*

that *any* form of deference by courts to legislative constitutional judgments is antithetical to principles of judicial independence. The question must be one of degree, rather than kind. As a matter of degree, narrow judicial restatement will require deference of only a limited kind by Canadian courts.

Under this principle, in determining whether to defer to a reasonable legislative sequel, Canadian courts will still be required to make a number of important substantive findings. First, they must decide whether a legislative sequel is reasonable in light of the basic constitutional commitment to freedom and democracy in section 1 of the *Charter*. Second, they must determine whether it is reasonable in light of their own prior judgments. In either instance, rather than suspending its own judgment, the Court will be required to make complex evaluative judgments about the nature of both prior judicial and prior legislative reasoning.

On this point, the history of *Darrach* is instructive. In *Seaboyer*, (the first look case) a majority held that the rape-shield regime in section 276 of the *Criminal Code* imposed an unjustifiable limitation on an accused's rights under sections 7 and 11(d) of the *Charter*. One reason was that the scheme was both unduly rigid and substantially overbroad in its approach, and failed to exclude only irrelevant evidence (*i.e.*, evidence going to the advancement of the twin myths). Parliament responded in a way partially compliant with this reasoning—*i.e.*, it enacted a new regime that gave judges discretion to admit evidence of the kind considered in *Seaboyer*: "relevant, specific in nature, and [which has] significant probative value which is not substantially outweighed by the danger of prejudice to the administration of justice."[139] However, Parliament also sought to narrow the extent to which *Seaboyer* would lead to the admission of such evidence (even if it was plausibly, but minimally, relevant) by introducing additional requirements of specificity and significance.[140]

Mathews v. Diaz, 426 U.S. 67 (1976) (noting the importance of deference to Congress in the immigration context); *Boumediene v. Bush*, 128 S. Ct. 229 (2008) (noting the importance of deference to the political branches in assessing the constitutionality of restrictions on access by suspected terrorists on access to habeas corpus procedures).

139. *An Act to Amend the Criminal Code (Sexual Assault)*, *supra* note 134. See discussion in *Darrach*, *supra* note 129 at para. 17.

140. *Ibid.*

In *Darrach*, the SCC upheld this new law by, in effect, engaging in a form of narrow restatement. Rather than insisting on a broad reasoning of its prior decision in *Seaboyer*, it emphasized two of its specific concerns in *Seaboyer*. First was the way the legislative sequel addressed the blanket nature of the prohibition and its pigeon-hole approach to relevance in the earlier, problematic provision. Second was *Darrach*'s decision to downplay *Seaboyer*'s broader reasoning about the irrelevance of particular legislative objectives (such as increasing the willingness of complainants to report sexual assault) and the need to prioritize the accused's right of full answer and defence by admitting *all* potentially relevant and probative evidence that did not have the potential to cause substantial prejudice.[141] Furthermore, the complainant's privacy played a different role in the analyses; in *Darrach*, the Court held that excluding evidence of a complainant's sexual history could legitimately be considered as furthering the "proper administration of justice."[142] In upholding the legislation as consistent with the requirements of fundamental justice, *Darrach* also held that it was legitimate for Parliament to "direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties to these cases."[143]

Therefore, in *Darrach*, the Court engaged in its own independent, evaluative judgment about the reasonableness of the legislation. Before deciding to uphold the sequel, it gave careful consideration to the degree to which Parliament had avoided an overly rigid, pigeon-hole approach to admissibility, and also applied a balancing approach to determine the admissibility of evidence, as endorsed by *Seaboyer*.[144] The SCC specifically held that, by requiring evidence to have significant probative value in order to be admissible, Parliament had not raised the "threshold for admissibility to the point that it [was] unfair to the accused."[145] The Court also considered the reasonableness, in a more independent sense, of Parliament seeking to exclude evidence of prior sexual history adduced to support inferences other than those based on the twin myths.[146]

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141. See *e.g. R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 36, 53-55.

142. *Darrach*, *supra* note 129 at para. 41.

143. *Ibid.* at para. 40.

144. *Ibid.* at paras. 34, 36, 38.

145. *Ibid.* at para. 38.

146. *Ibid.* at para. 41.

In fact, the main relevance of concerns about judicial independence in such a case was at the level of perception, rather than reality. This also helps to explain why it was important, if one looks at *Darrach* from a broader perspective, that there was an eight year delay between the hearing of the first and second look cases. While *ex post* deference by the SCC in a case such as *Darrach* and similar cases will not, according to my argument, involve any actual compromise in judicial independence, there is always some danger that the public will see them in this way—*i.e.*, mistake a decision to engage in dialogue as simply a decision to bow to political pressure. Where this occurs, there could be a cost to the standing of the judiciary. One way for the SCC to avoid this is to try to ensure some delay in the hearing of sensitive second look cases.[147]

Delay between the enactment of a legislative sequel and its consideration by the Court increases both the actual and perceived insulation of the justices from the particular political pressures leading to the sequel itself. It therefore has an important capacity to reduce the risk that Canadians will mistake judicial dialogue for capitulation. In some cases, delay will occur in the hearing of second look cases without any deliberate action on the part of the SCC, but in others it will require the Court to make strategic use of jurisdictional control devices, such as the doctrines of mootness and ripeness.[148]

Compared to a commitment to narrow restatement, use of such devices will do less to distinguish judicial review in Canada from that in the United States, where the USSC controls its docket with a view to some forms of constitutional avoidance.[149] However, if one considers the timeframe of second look cases, such as *Eichman* and *Boerne*, in which there was a one- and four-year delay, respectively, between the relevant first and second look decisions of the USSC, it still remains an important potential basis for distinguishing judicial review in Canada from that in the United States.[150]

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147. Compare *Casey*, *supra* note 45 at 867 (noting the costs to public confidence in the USSC of being perceived to "overrule under fire").

148. See *e.g. Canadian (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para. 50 [*Liberty Net*] (holding as moot a challenge to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 13(1)[*CHRA*]). See further, *infra* notes 191-92.

149. See *e.g. Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (dismissing a Constitutional challenge to the pledge of allegiance on the grounds of the petitioner's lack of standing, given his status as a non-custodial parent).

150. See *supra* notes 32-38.

IV. REVISITING THE RECORD OF DIALOGUE THUS FAR

One question which arises is how the record of dialogue to date should be assessed under new dialogue theory. In current theories of dialogue, the test is whether decisions which invalidate legislation are followed by a sequel. Dialogue does not depend on the nature of the response: whether the legislature agrees or disagrees with the Court's interpretation of the *Charter* is irrelevant because the focus is on the legislature's decision to respond. In new dialogue theory, by contrast, successful dialogue requires both that: (i) the legislature modify a judicial decision in a manner that evidences some form of interpretive disagreements, and (ii) that the SCC either uphold the legislative sequel by applying an appropriate degree of *ex post* deference under section 1, or avoid rapid reconsideration of their validity. Despite these differences in approach, there is a striking similarity between the findings of current dialogue theory and those of new dialogue theory about the rate of dialogue under the *Charter* to date.

In *Charter Dialogue*, Hogg and Bushell suggest that dialogue has occurred in approximately eighty per cent of cases involving a SCC or "significant" lower court invalidating decision.[151] After updating their study in 2007, in conjunction with Wade Wright, they again claimed that dialogue had occurred in substantially more than half, or approximately sixty-one per cent of cases.[152] Skeptics of judicial review, by contrast, suggest that dialogue has occurred at a much lower rate, and certainly at a rate of less than fifty per cent.[153] Some departmental scholars, who emphasize the importance of section 33 to Parliament and the legislature's ability to contribute to the interpretation of the *Charter*, argue that true dialogue—if there is such a thing—has occurred in as few as two per cent (or one out of fifty-four cases).[154] Others, who are willing to grant the possibility of dialogue under section 1, suggest that dialogue has occurred at a somewhat higher, but still troublingly low, rate of thirty per cent.[155]

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151. Hogg & Bushell, *supra* note 2 at 96-98.

152. Hogg, Bushell Thornton & Wright, *supra* note 2 at 51-52.

153. See Christopher P. Manfredi & James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513 at 521 [Manfredi & Kelly, "Six Degrees"].

154. *Ford*, *supra* note 64. See Leeson, *supra* note 93 at 14.

155. See Manfredi & Kelly, "Six Degrees," *supra* note 153. Manfredi and Kelly identify the percentage of cases in which Parliament or the legislature has enacted a sequel that evidences some form of substantive interpretive disagreement (at 521). While this approach has

New dialogue theory suggests that current dialogue scholars are largely right—even if one puts aside Quebec's use of section 33 to re-enact French-only signage laws in response to the SCC's decision in *Ford*—legislative sequels have tended to enjoy an overwhelming degree of either *formal* or *de facto* success.

Of the twelve instances between 1982 and 2005 in which Parliament or a legislature sought to narrow the SCC's interpretation of the *Charter*, four of those instances of legislative dialogue met with a clear dialogic response on the part of the SCC. One such instance, discussed above, was *Darrach* and the sequel to *Seaboyer*. The other three involved the Court's decisions in *R. v. Swain*,[156] *R. v. Morales*,[157] and *RJR-MacDonald*. In all four of these instances, the SCC used communicative and coercive remedies in the first look cases to counter perceived legislative blockages. In second look cases, when shown to have misjudged the degree of democratic support for a particular expansive reading of *Charter* rights, the Court showed a willingness to engage in *ex post* deference and narrow statement. The Court's approach to first and second look cases is a model of new dialogue theory.

In *Swain*, the SCC implicitly rested its decision on the existence of blind spots of accommodation in the provisions of the *Criminal Code* that provided for the indefinite committal of persons acquitted of a crime on grounds of insanity.[158] The Court held that such provisions burdened individuals' rights to bodily freedom and security in a way that was much broader than necessary, particularly given the unfettered power of the prosecution to put the question of insanity at issue, but also because of potential alternative civil models for commitment. Parliament responded by giving narrow effect to the Court's decision: it preserved the system of indefinite committal, but limited the right of the prosecution to put forward the question of insanity, and introduced a separate system for administrative committal for persons found unfit to stand trial or

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advantages over that taken by Hogg and Bushell, it is problematic to the extent that it cannot control for the percentage of cases in which legislative attempts at dialogue ought to have, but did not, occur. Because of this, beyond ascertaining that some legislative attempts at dialogue have in fact occurred, new dialogue theory focuses on the success rate of actual (rather than hypothetically possible) dialogic legislative sequels.

156. [1991] 1 S.C.R. 933 [*Swain*].

157. [1992] 3 S.C.R. 711 [*Morales*].

158. *Swain*, *supra* note 156.

not guilty on grounds of mental illness.[159] In a series of two subsequent cases, *Winko v. British Columbia (Forensic Psychiatric Institute)*[160] and *Penetanguishene Mental Health Centre v. Ontario (A.G.)*,[161] the SCC upheld this new legislation as consistent with section 7 almost in its entirety. In doing so, it showed implicit deference to Parliament's judgments as to the best way to combine the protection of the accused with the protection of the community. It also downplayed *Swain*'s emphasis on the dangers of indefinite detention, in favour of a narrower focus on the dangers of Parliament providing for indefinite detention without a treatment component. This shift in focus in the judicial sequel can be seen as a form of *ex post* narrow statement.[162]

In *Morales*, the SCC again identified the existence of a blind spot of accommodation, holding that the denial of bail "in the public interest" constituted a denial of the right to a fair trial provided by section 11(e) of the *Charter*, in part because other, more specific, grounds for the denial of bail made such a provision unnecessary.[163] Parliament responded in a way that sought to give the decision narrow effect: it repealed the particular ground for denying bail struck down in *Morales*, but simultaneously introduced a new, related ground for denying bail, based on the need "to maintain confidence in the administration of justice."[164] When this sequel came before the SCC in *R. v. Hall*,[165] the SCC once again showed a willingness to defer to Parliament's attempt to redefine the balance struck between competing rights, this time even referring explicitly to the idea of dialogue.[166] In doing so, it also showed a clear willingness to narrow its prior reasoning about the two exhaustive bases on which Parliament could limit access to bail. The majority opinion recognized

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159. *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*, 1985], Part XX.1; *An Act to Amend the Criminal Code (Mental Disorder)*, S.C. 1991, c. 43.

160. [1999] 2 S.C.R. 625 [*Winko*].

161. [2004] 1 S.C.R. 498.

162. *Winko*, *supra* note 160 at paras. 92-93. In 2004, in *R. v. Demers*, [2004] 2 S.C.R. 489, the Court also retreated from this position slightly, by holding that the new scheme was inconsistent with s. 7 as applied to persons permanently unfit and who do not pose a significant threat to the safety of the public.

163. *Morales*, *supra* note 157 at 40-41.

164. *Criminal Law Improvement Act*, 1996, S.C. 1997, c. 18, s. 59.

165. [2002] 3 S.C.R. 309 [*Hall*].

166. *Ibid.* at para. 43.

that it was open to Parliament to advance the administration of justice, not only by preventing direct interferences with the trial process by an accused, but also by ensuring that the presence of an accused in the community did not "call into question the public's confidence in the administration of justice."[167]

Likewise, in *RJR-MacDonald*, the SCC initially identified a blind spot of accommodation in the *Tobacco Products Control Act*, which prohibited tobacco-advertising in Canadian media and required mandatory, unattributed package warnings on tobacco products.[168] Parliament responded by expressing disagreement with the Court about the likely costs of giving greater accommodation to interests of freedom of expression in this area.[169] In *JTI-Macdonald*, the SCC deferred to this dialogic legislative sequel, this time on the stated basis that changes since *RJR-MacDonald* in attitudes towards, and understandings of, the harms caused by smoking justified the greater regulation imposed by the relevant legislative sequel.[170] In doing so, it engaged at a more implicit level in an *ex post* narrowing, or softening, of its prior reasoning about the distinct nature of lifestyle advertising on the one hand, and brand and informational advertising on the other. In *JTI-Macdonald*, the Court recognized both that "information can be packaged in many ways," and that the "sophistication and subtlety of tobacco advertising practices" meant that, at least in the case of young persons, such advertising *could* be capable of increasing smoking.[171]

Consistent with the approach counselled by new dialogue theory, there was some delay in each case between the hearing of the relevant first and second look cases. In *Swain* and *Seaboyer*, a full eight years elapsed between the legislative sequel and the Court's decisions in *Winko* and *Darrach*. Similarly, there was a six year delay between the sequel to *Morales* and the Court's decision in *Hall*.

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167. *Ibid.* at paras. 40-41.

168. *Supra* note 71; *Tobacco Products Control Act*, R.S.C. 1988, c. 20. The Court held that the 1988 Act unjustifiably infringed s. 2(c) of the *Charter*, considering that Parliament could almost as effectively have achieved its objectives of protecting children while still allowing informational and brand-preference advertising, and a government, rather than an unattributed, health-warning.

169. *Tobacco Act*, S.C. 1997, c. 13, s. 22 (allowing informational and brand advertising only in "adult-only" places and in printed matter that had an 85 per cent or higher adult readership and was delivered by direct mail).

170. *Supra* note 19.

171. *Ibid.* at para. 93.

In other cases, the absence of any judicial sequel has meant that a number of dialogic legislative sequels have enjoyed *de facto* effectiveness or success. While the degree of legislative disagreement with the SCC has varied from one case to another, seven SCC cases have, for example, arguably fallen into this category of initiating a process of *de facto* dialogic success: namely, *Committee for the Commonwealth of Canada v. Canada*,[172] *R. v. Bain*,[173] *R. v. Daviault*,[174] *Thomson Newspapers v. Canada (Attorney General)*,[175] *Corbiere v. Canada*

172. [1991] 1 S.C.R 139 (holding that provisions of the *Government Airport Concession Operations Regulations*, S.O.R./79-373, that prohibit advertising and solicitation in airports are an unjustified limitation of s. 2(b) of the *Charter*, given both the degree of impairment of political expression and the relative unimportance of the objective in general). The provincial minister responded by promulgating S.O.R./95-228, which re-enacted the original ban, but only with respect to commercial solicitation.

173. [1992] 1 S.C.R. 91 (holding that the provisions of s. 563(2) of the *Criminal Code*, 1970, *supra* note 115—allowing the Crown to standby forty-eight potential jurors and to make four peremptory challenges, while allowing the defence to make twelve peremptory challenges—are an unjustified limitation of s. 11(b) of the *Charter*, given the extent to which the provisions at least appear to create an advantage for the prosecution, and, therefore, unfairness). Parliament responded by enacting *An Act to Amend the Criminal Code (Jury)*, S.C. 1992, c. 41, s. 2, which repealed the provision for standby jurors, but simultaneously increased the number of peremptory challenges available to the prosecution to equal those that are available to the defence—that is, to twelve or twenty, according to the offence.

174. [1994] 3 S.C.R. 63 (holding that the provisions of the *Criminal Code*, 1985, *supra* note 159, that incorporate the common law rule that intoxication is not a defence to crimes of general intent are not in accordance with the requirements of fundamental justice in s. 7 and are an unjustified limitation of s. 11(d) of the *Charter*. The Court allowed the possibility of a defence of non-insane automatism, to be proven by the defence on a balance of probabilities). Parliament responded by enacting *An Act to Amend the Criminal Code (Self-Induced Intoxication)*, S.C. 1995, c. 32, s. 1, which made a defence of non-insane automatism available (but only where intoxication is not self-induced or where the offence does not involve an assault or a violation of physical integrity).

175. [1998] 1 S.C.R. 877 (holding that the provision in s. 322.1 of the *Canada Elections Act*, R.S.C., 1985, c. E-2—prohibiting the publication of "new poll" information within 3 days of an election—is an unjustified limitation of s. 2(b) of the *Charter*, given the lack of narrow tailoring or proportionality of such a prohibition). Parliament responded by enacting the *Canada Elections Act*, S.C. 2000, c. 9, ss. 326-28, which both complied with the SCC's decision by restricting the prohibition on publication of polls to election day, but also narrowed the effect of the SCC's emphasis on freedom of expression by requiring those who publish earlier polls to provide details of their statistical methods on request or to publish a disclaimer where such polls are not based on recognized statistical methods.

(Minister of Indian and Northern Affairs),[176] *R. v. Sharpe*,[177] and *Figueroa v. Canada (A.G.)*.[178]

In one additional case, a dialogic legislative sequel has also enjoyed *de facto* success by reason of a SCC decision to delay consideration of a challenge. In *R. v. Zundel*,[179] the SCC held that a provision of the *Criminal Code* prohibiting the willful publication of false news constituted an overbroad and unnecessary limitation on freedom of expression, given the lack of any intent requirement for such an offence and the availability of alternative criminal sanctions for the willful incitement of racial hatred (upheld in *R. v. Keegstra*).[180] Parliament did not re-legislate under the *Criminal Code*, but introduced a provision for the award of civil penalties in relation to the transmission of hate messages (defined

176. [1999] 2 S.C.R 203 (holding that the provisions of s. 77(1) of the *Indian Act*, R.S.C., 1985, c. I-5—requiring that voters in band council elections must be "ordinarily resident" on the reserve—are an unjustified limitation of s. 15(1) of the *Charter*, given that such a provision does not minimally impair the equality rights of band members who are directly affected by council decisions). The Minister responded by enacting new *Indian Band Election Regulations*, C.R.C., c. 952, s. 3, S.O.R./2000-391, s. 2, which provided that persons could continue to adopt a reserve as their place of ordinary residence, even in the event of a "temporary" absence from that place.

177. [2001] 1 S.C.R. 45 (holding that the importance of freedom of expression, combined with the low risk of harm caused by the possession of certain explicit material, warrants reading in exceptions to a *Criminal Code* prohibition against the possession of child pornography for entirely self-created expression and private recordings of lawful sexual activity). Parliament responded with Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004, which would replace previous specific defences with a more general, yet also narrow, defence that would be based on the fact that material does not pose "an undue risk of harm to persons under the age of eighteen years."

178. [2003] 1 S.C.R. 912 (holding that the provisions in ss. 24 and 18 of the *Canada Elections Act*, R.S.C. 1985, c. E-2 [*Canada Elections Act*]—requiring a political party to nominate candidates in at least fifty electoral districts in order to obtain registered status—are an unjustified limitation of s. 3, given more narrowly tailored means of achieving cost-savings in public funding of elections, and doubts about the importance of this objective). Parliament responded by enacting *An Act to Amend the Canada Elections Act and the Income Tax Act*, S.C. 2004, c. 24, which allowed parties to field a single candidate, but simultaneously increased the requirements of voter support and ongoing membership for the registration of parties.

179. [1992] 2 S.C.R. 731.

180. [1990] 3 S.C.R. 697.

so as not to require a showing of intent).[181] In doing so it engaged in dialogue with the SCC about the proper balance between *Charter* commitments to freedom of expression on the one hand, and dignity and equality on the other.[182] In *Canada (Human Rights Commission) v. Canadian Liberty Net*,[183] the SCC was asked to consider the validity of this dialogic sequel, but declined to do so by focusing on the jurisdiction of the federal court to make certain orders under this new remedial scheme.[184] The constitutional challenge was moot as a result.

In more than twenty years of litigation under the *Charter*, the SCC has actively refused to uphold a legislative sequel in its entirety in only one instance—in *Sauvé v. Canada (Chief Electoral Officer)(sub nom. Sauvé II)*.[185] In *Sauvé v. Canada (Chief Electoral Officer)(sub nom. Sauvé I)*,[186] the SCC struck down provisions of the *Canada Elections Act*[187] that disqualified prison inmates from voting in federal elections as an unjustified limitation on the right to vote in section 3 of the *Charter*. Parliament responded by introducing legislation that limited the disqualification of prisoners to those who were serving a sentence of two years or more, but in *Sauvé II*, the SCC again struck down the relevant limitation.[188]

While the better view is probably that *Sauvé II* was a failure of dialogue on the part of the SCC,[189] it is also arguable that *Sauvé II* was exactly the kind of case in which *ex post* deference was not required under new dialogue theory: namely, a case in which the relevant legislative response by Parliament was not even arguably reasonable in light of the text of section 3 of the *Charter* and section 1's commitment to a democratic society. While many constitutional democracies have disenfranchised convicted offenders, it is difficult, at a principled level, to reconcile such practices with democratic commitments to equal access to the franchise and treatment of the right to vote as a fundamental right.

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181. See *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 .

182. See *CHRA*, *supra* note 148, ss. 13, 53, 54.

183. *Liberty Net*, *supra* note 148.

184. *Ibid.* at para. 50 (noting the mootness of the relevant *Charter* question).

185. [2002] 3 S.C.R. 519 [*Sauvé II*].

186. [1993] 2 S.C.R. 438 [*Sauvé I*].

187. *Supra* note 178.

188. See *An Act to Amend the Canada Elections Act*, S.C. 1993, c. 19. s. 23(2).

189. Of course, the fact that four members of the SCC would have upheld the relevant sequel under s. 1 points strongly in the other direction. See Christopher P. Manfredi, "The Day Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45 Osgoode Hall L.J. 105.

From one view, legislatures in Canada have actually enjoyed a complete success rate when passing *reasonable* legislative sequels in response to SCC decisions, and, at the very least, have enjoyed a success rate of eleven out of twelve (or twelve out of thirteen, if one includes the sequel to *Ford*—a rate of ninety-two per cent). At a lower court level, dialogic legislative sequels have also enjoyed a somewhat lower, but still high, rate of formal or *de facto* success.

Assessing the pattern of dialogue at this level will, of course, be more complicated than at a SCC level. One reason is that any decision by a provincial attorney general or the federal attorney to not appeal to the SCC may imply that the legislative majority does not wholly disagree with a court's decision, and, therefore, that the first stage of dialogue (namely a dialogic legislative sequel) is less likely than at a SCC level. The second complicating factor is the difficulty, from a practical perspective, of ensuring a non-biased sample of lower court decisions. Thus, Hogg and Bushell were criticized in their initial study for deciding to include "significant" provincial court judgments drawn from Hogg's treatise, *Constitutional Law of Canada*,[190] because such an approach could be under-inclusive and might reflect the ingoing assumptions or biases of the authors.[191] The difficulty can be overcome by analyzing the more than one thousand *Charter* cases reported in the *Canadian Digest* (prepared by the Department of Justice), as those cases are selected by department officials for their significance on a stand-alone basis, rather than for dialogic relevance. An analysis of that data identifies forty-seven cases between 1982 and 2005 in which provincial courts of appeal struck down statutory provisions, but the matters never reached the SCC; seven of these met with a legislative response that evidenced clear legislative disagreement.[192]

Among those seven instances of legislative dialogue, in three instances—namely, *R. v. Pugsley*,[193] *R. v. Bryant*,[194] and *Stoney Creek (City) v. Ad Vantage*

190. (Toronto: Carswell, 2009).

191. See Manfredi & Kelly, "Six Degrees," *supra* note 153 at 516.

192. See *Canadian Charter of Rights Decisions Digest*, online: <http://canlii.org/en/ca/charter_digest/tab-cas.html>.

193. (1982), 144 D.L.R. (3d) 141 (N.S.S.C., A.D.) [*Pugsley*]. (1982), 55 N.S.R. (2d) 163 (striking down provisions in the *Criminal Code*, 1970, *supra* note 115, that required that a person arrested for murder show grounds that justified their release on bail).

194. (1984), 48 O.R. (2d) 732 (striking down provisions in the *Criminal Code*, *ibid.*, that required an accused who was subject to an arrest warrant or an interim release order, and

Signs Ltd.[195]—Canadian courts provided a dialogic response to sequels that narrowed the effect of prior judicial rulings. In each of these cases, there was also some willingness on the part of the courts to engage in a form of narrow statement or deference *ex post.*

In *Pugsley*, the Nova Scotia Supreme Court held that provisions of the *Criminal Code* that required a person who had been arrested for murder to "show cause" that justified his or her release on bail constituted an unjustified limitation on the right to a fair trial.[196] Parliament sharply disagreed and re-enacted provisions that provided for a presumption in favour of the ongoing detention of a person charged with murder, unless an accused, after being given a reasonable opportunity, could "show cause" that justified release.[197] In response to this, other provincial courts showed a willingness to give effect to this new regime, and the Nova Scotia Court of Appeal upheld this sequel as consistent with the *Charter* by explicitly narrowing the scope of its prior ruling in *Pugsley*.[198]

In *Bryant*, the Ontario Court of Appeal invalidated a provision requiring an accused who failed to appear to be tried by judge alone, in the absence of a legitimate excuse for not appearing.[199] Parliament disagreed and re-enacted the provision in precisely the same terms; two years later the Court of Appeal upheld this legislative sequel, finding that it was justified on the basis of the emerging doctrine of waiver (which was not before the Court in *Bryant*).[200]

In *Stoney Creek*, the Ontario Court of Appeal struck down, as an unjustified restriction on freedom of expression, a municipal by-law that prohibited the erection of signs in the municipality, except as authorized by the council, or where erected by a service-station or builder. The municipal-

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who failed to appear, to be tried by judge alone, unless he or she could establish to the satisfaction of the judge a legitimate excuse for his or her failure to appear).

195. (1997), 34 O.R. (3d) 65 (striking down a by-law that prohibited the erection of signs in the municipality, except as authorized by the council or erected by a service-station or builder).

196. *Criminal Code of Canada*, 1970, *supra* note 115, s. 457(7)(2)(e).

197. *Criminal Code*, 1985, *supra* note 159, s. 522(2).

198. *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.); *R. v. Sanchez*, [1999] 176 N.S.R. (2d) 52 (C.A.) [*Sanchez*].

199. *Criminal Code*, 1970, *supra* note 115, s. 526.1 (as amended by *Criminal Law Amendment Act* 1974-75-76, c. 93, s. 65).

200. *R. v. McNabb* (1986), 33 C.C.C. (3d) 266 (B.C.C.A.). Note that leave to appeal from this decision to the SCC was granted ([1987] 1 S.C.R. x), but the appeal was discontinued ([1987] 2 S.C.R. viii).

ity's response narrowed the effect of the court's decision by restricting signs to commercial property, limiting their dimensions (twenty square metres or seven metres per face), and regulating their distance from the road.[201] The SCC subsequently upheld an almost identical by-law as (implicitly) a reasonable legislative sequel.[202]

Consistent with the understanding of new dialogue theory, at least in the cases of *Pugsley* and *Stoney Creek*, there was also a delay between the hearing of the first and second look cases.[203] Three additional instances of legislative dialogue, involving legislation enacted in response to the decisions of lower courts in *MacLean v. Nova Scotia (A.G.)*,[204] *R. v. Chief*,[205] and *R. v. Music Explosion Ltd.*,[206] have also met with *de facto* dialogic success. In only two cases—those involving the sequels to *Minister of National Revenue v. Kruger Inc.*[207] and *Reform Party of Canada v. Canada (A.G.)*[208]—have lower courts insisted on a broad reading of their own prior rulings and struck down a legislative sequel that was designed to narrow a court decision. *Kruger* also involved an area of narrow disagreement between the court and the legislature about the need for residual discretion on the part of courts to refuse a warrant.

Overall, from a quantitative point of view, there has been a dialogic success rate at a lower court level of approximately seventy-five per cent.[209] At a more qualitative level, the record of dialogue to date in these cases also provides additional support for the position, under both new and current dialogue theory, that section 33 remains relevant to dialogue in Canada, even when the override is passive or dormant.

At the SCC level, all four instances in which the Court was actively willing to engage in dialogue occurred in the context of provisions—such as sections 2(c), 7,

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201. City of Stoney Creek, By-law 3042-89, *Sign By-law*, s. 5(g) (permitting a single billboard to be erected on commercial property, with limited dimensions of 20 square metres or 7 metres per face and with restrictions on the distance of the sign's location to the road).

202. *Vann Niagara Ltd. v. Oakville (Town)*, [2003] 3 S.C.R. 158 [*Vann Niagara*].

203. See *Sanchez*, *supra* note 199 (17 year delay); *Vann Niagara*, *ibid.* (6 year delay).

204. (1987), 76 N.S.R. (2d) 296.

205. (1989), 51 C.C.C. (3d) 265.

206. (1990), 68 Man. R. (2d) 203.

207. [1984] 2 F.C. 535 [*Kruger*].

208. [1995] 4 W.W.R. 609.

209. That is, six out of eight instances.

and 11—which are squarely within the purview of section 33.[210] Likewise, at a lower court level, there has also been a clear link between successful instances of legislative dialogue and the availability of section 33. All three instances in which the SCC or provincial courts have been actively willing to defer to legislative sequels to provincial court decisions have involved questions about the scope or meaning of provisions such as the fair trial guarantee in section 1, or freedom of expression under section 2(b) of the *Charter*.[211]

By contrast, with only one exception, the instances in which the SCC or the provincial courts have been unwilling to engage in dialogue—namely *Sauvé II* and *Reform Party of Canada*—have occurred in the context of challenges under section 3 of the *Charter*, and closely related freedom of expression guarantees, where section 33 does not apply, either in whole or in part.

V. CONCLUSIONS: WHAT TO MAKE OF THE RECORD THUS FAR

In confirming the existence of *Charter* dialogue in this way, new dialogue theory does not suggest that the original proponents of dialogue in Canada got it wholly right about the relationship between judicial review under the *Charter* and concerns about democracy—or about the inevitable or stable nature of dialogue under the *Charter*.

In current dialogue theory, because the SCC handed down fifty-four distinct invalidating decisions between 1982 and 2005, by the end of that period there had been fifty-four opportunities to test the presence of dialogue under the *Charter*.[212] According to the requirements of new dialogue theory, there were, by contrast, only twenty-one instances in which Parliament or the legisla-

210. See *supra* notes 139-43, 156-71.

211. See *supra* notes 193-202.

212. This is based on Manfredi and Kelly's study of cases decided by the SCC between 1982 and 1995, a further study by Kelly between 1995 and 1997, and independent examination of cases decided from 1998 through the end of 2004. See Manfredi & Kelly, "Six Degrees," *supra* note 153 at 526-27; James B. Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 Osgoode Hall L.J. 625. I note that one difference between my analysis and that of Manfredi and Kelly is that I do not treat *R. v. Downey*, [1992] 2 S.C.R. 10, as an invalidating decision, and I treat *R. v. Grant*, [1993] 3 S.C.R. 223, as a second look case. The relevant number of cases identified is also confirmed by Hogg, Bushell Thornton & Wright, *supra* note 2, at 55-59.

ture sought actively to narrow the effect of *Charter* interpretation, and thus where it was possible to consider the potential success of legislative dialogue.[213] Even more important, less than half of those instances (*i.e.*, ten or eleven cases) required the SCC or a lower court to actively articulate its approach to dialogue. At the SCC level, there were only five cases that actively tested the Court's commitment to new dialogue: namely, the four second look sequels to *Seaboyer*, *Swain*, *Morales*, and *RJR-MacDonald*, plus *Vann Niagara*. In new dialogue theory, it is therefore premature to conclude, as current dialogue theory does, that there is a well-established pattern of dialogue between the courts and legislatures.

A second reason for doubting whether dialogue is in fact as stable as current dialogue scholars suggest is that the SCC itself has not expressly endorsed the requirements of (new) dialogue—*i.e.*, the idea of *ex post* deference and narrow statement.[214] On the contrary, even when referring to the idea of dialogue, the SCC has tended to focus on the importance of legislative deference to the SCC's own reasoning, not on the need for reciprocal deference by the Court itself. Especially with respect to first look cases, the SCC has in fact appeared to suggest that the possibility of parliamentary dialogue implies that it should show less deference to legislative constitutional judgments, whether *ex ante* and *ex post*.

In *Vriend v. Alberta*,[215] the Court considered whether the failure of Alberta's human rights code to include sexual orientation as a prohibited ground of discrimination violated section 15(1) of the *Charter*. Justice Iacobucci not only cited the concept of dialogue to support the legitimacy of judicial review,[216] he also suggested that the Court could protect gay and lesbian rights in the name of dialogue and regardless of the public's conception of equality.[217]

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213. Some of these instances involve delegated legislation, and are thus more marginal cases of legislative dialogue. See *supra* notes 172, 195.

214. For the uneven treatment of dialogic ideas by the SCC, see *e.g.* Christopher P. Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" (2004) 23 S.C.L.R. (2d) 105; 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 Osgoode Hall L.J. 67.

215. [1998] 1 S.C.R. 493 [*Vriend*].

216. *Ibid.* at paras. 136-40.

217. *Ibid.*

Likewise in *M. v. H.*, when considering whether Ontario's *Family Law Act*[218] infringed section 15(1) for failure to include same-sex couples in the system of spousal support applicable to opposite-sex *de facto* couples, Justice Iacobucci suggested that while principles of dialogue favoured the Court showing more deference to legislative policy judgments than others, they favoured courts showing *less* deference to interpretive judgments, such as those involving "[t]he simple or general claim that the infringement of a right is justified under section 1."[219]

To some degree, new dialogue theory supports the approach taken by the SCC in these cases because, when judicial review is understood against a backdrop of commitments to *ex post* deference and narrow statement, courts will have greater freedom than otherwise, *ex ante*, to use all available means in order to counter perceived legislative inertia. There was also strong evidence, circa 1998 to 1999, that legislative inertia of some kind existed in Canada with respect to the recognition of gay and lesbian rights, even if the scope of such inertia was uncertain.[220]

New dialogue theory does not suggest, however, that popular constitutional understandings will be irrelevant to the legitimacy of judicial review in cases such as *Egan v. Canada*,[221] *Vriend*, *M. v. H*, or *Reference Re Same-Sex Marriage*,[222] or that Canadian courts should feel free in such cases, in the face of reasonable disagreement about the meaning of *Charter* rights, to enforce their own preferred constitutional interpretation in preference to that of a majority of Canadians, if such a majority position in fact exists.

On the contrary, it suggests that the democratic legitimacy of *Charter* review will depend in large part on the willingness of Canadian courts to adopt a more restrained approach than the USSC to assessing the constitutionality of dialogic legislative sequels, such as those that very nearly arose in Alberta following *Vriend*, and which did in fact occur in Ontario following *M v. H*,

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218. R.S.O. 1990, c. F.3.

219. *Supra* note 116 at paras. 78-79.

220. Environics Research Group, "Most Canadians Favour Gay Marriage – Approval of Homosexuality Continues to Increase" (10 May 2001), online: Media Room <http://erg.environics.net/media_room/default.asp?aID=432>.

221. [1995] 2 S.C.R. 513.

222. [2004] 3 S.C.R. 698.

albeit at the purely symbolic level of the title given to the relevant legislative sequel.[223]

The SCC, in various second look cases, has also shown a clear ambivalence, or (at least) division, on the question of deference in second look cases. Consider second look cases such as *Hall* or *JTI-Macdonald*. While in *Hall* the Court engaged in a form of implicit *ex post* narrow statement, its reasoning emphasizes legislative deference to the Court, and not the idea of reciprocal deference between the Court and Parliament. Even by referring to the idea of dialogue itself, it suggested that the key to dialogue was deference on the part of Parliament, noting:

> Since the introduction of the *Charter*, courts have engaged in a constitutional dialogue with Parliament. This case is an excellent example of such dialogue. Parliament enacted legislation ... [which the Court determined] was unconstitutional. ... After considering this Court's reasons ... Parliament replaced the "public interest" ground with new language.[224]

In *JTI-Macdonald*, the Court also showed a willingness to narrow the scope of its prior reasoning in *RJR-MacDonald*, but it rejected outright the idea that the legislation represented some form of dialogue, or legislative sequel, which should "militate for or against deference" by the Court.[225] Rather, it emphasized the degree to which Parliament, in enacting the second set of advertising restrictions, had itself shown deference to the "concerns expressed by the majority of [the] Court in *RJR-MacDonald*."[226]

In instances where the SCC has directly addressed the idea of *ex post* deference, the justices have also tended to be sharply divided on the issue. In *R. v. Mills*[227] and *Darrach*, for example, a majority of the SCC endorsed the idea of

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223. This is why I do not classify *M. v. H.* as one of the thirteen core instances of dialogue. Contrast Hogg, Bushell Thornton & Wright, *supra* note 2 at 9-10; Roach, "Canadian Experience," *supra* note 2 at 537, n. 1. However, it should be noted that, to the extent that the Ontario legislature's response was somewhat dialogic, the SCC helped ensure the success of that sequel by avoiding a decision, on its merits, of an early challenge to that sequel under the *Charter*. See Murphy, *supra* note 125.

224. *Hall*, *supra* note 165 at para. 43.

225. *JTI-Macdonald*, *supra* note 19 at para. 11.

226. *Ibid.* at para. 7.

227. [1999] 2 S.C.R. 668.

ex post deference,[228] whereas in *Sauvé II*, a differently constituted majority expressly rejected the exact same principle, suggesting that:

> The fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue." Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again."[229]

From this perspective, it may be that it is not only the history of dialogue in Canada which is more contingent than current dialogue scholars suggest. It may also be that the future of dialogue depends increasingly not so much on the embrace by the SCC of the current version of dialogue theory as a normative ideal, but rather on its rejection.

It is perhaps somewhat paradoxical, given the original concerns of dialogue theorists, but it is also what all the "to-do" about metaphors and their meaning is all about.[230]

228. *Ibid.* at para. 34.

229. *Supra* note 185 at para. 17.

230. *Cf.* Hogg, Bushell Thornton & Wright, *supra* note 2.