

Sharpening the Dialogue Debate: The Next Decade of Scholarship

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Abstract

The first part of this commentary examines the roles of coordinate construction in which legislatures act on their own interpretation of the constitution, second look cases in which the courts judge the constitutionality of a legislative reply to a judicial decision, and various constitutional remedies. The second part examines some differences in emphasis between the author's approach to dialogue and that taken by Hogg and his co-authors with respect to the justification of the judicial role in the dialogue, the relation between Charter dialogue and common law constitutionalism, and the proper interpretive approach to section 7 of the Charter. Three areas that may be a productive focus for the next decade of scholarship about institutional dialogue are outlined. They involve comparative studies, dialogue in the post-9/11 environment and increased study of the legislative role in dialogue.

Keywords

Canada; Canada. Canadian Charter of Rights and Freedoms; Judicial review

SHARPENING THE DIALOGUE DEBATE: THE NEXT DECADE OF SCHOLARSHIP[©]

KENT ROACH*

The first part of this commentary examines the roles of coordinate construction in which legislatures act on their own interpretation of the constitution, second look cases in which the courts judge the constitutionality of a legislative reply to a judicial decision, and various constitutional remedies. The second part examines some differences in emphasis between the author's approach to dialogue and that taken by Hogg and his co-authors with respect to the justification of the judicial role in the dialogue, the relation between *Charter* dialogue and common law constitutionalism, and the proper interpretive approach to section 7 of the *Charter*. Three areas that may be a productive focus for the next decade of scholarship about institutional dialogue are outlined. They involve comparative studies, dialogue in the post-9/11 environment and increased study of the legislative role in dialogue.

La première partie de ce commentaire examine les rôles d'interprétation coordonnée, où les législatures agissent selon leur propre interprétation de la Constitution, et relèguent au deuxième plan les affaires où les tribunaux jugent la constitutionnalité d'une réponse législative à une décision judiciaire et divers recours constitutionnels. La deuxième partie examine certaines différences d'intensité entre la façon dont l'auteur aborde le dialogue, et celle qu'adoptent Hogg et ses co-auteurs concernant la justification du rôle judiciaire du dialogue, la relation entre le dialogue sur *la Charte* et le constitutionnalisme de la *common law*, et l'approche interprétive adéquate de la Partie 7 de *la Charte*. On souligne trois domaines, qui peuvent constituer un point d'intérêt productif pour les érudits de la prochaine décennie au sujet du dialogue institutionnel. Y figurent les études comparatives, le dialogue dans le monde suivant les attentats du 11 Septembre, et une étude amplifiée du rôle législatif dans le dialogue.

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I. INTRODUCTION

Peter Hogg and his co-authors, Allison A. Bushell Thornton and Wade K. Wright, are to be congratulated for their careful review of the multi-faceted debate that has surrounded the concept of dialogue in Canada over the last decade. This debate was in large part sparked by their tremendously influential 1997 article in this journal.¹ Now this new article² demonstrates that the idea of institutional dialogue between courts and legislatures will continue to be debated, reshaped, and challenged for some time to come. Although the effects of this new article on courts and legislatures remains to be seen, I am confident that it will play an important role in the continuing academic debates about dialogue occurring in Canada and abroad.

In the first part of this short commentary, I will outline some areas where I agree with the authors. This part will reflect on some important debates that already exist about the role of coordinate construction, in which legislatures act on their interpretations of the constitution even when they differ from judicial interpretations; second look cases, in which the courts examine the constitutionality of a legislative reply to a judicial decision; and whether constitutional remedies should be crafted to facilitate dialogue between courts and legislatures. In the next part, I will examine a few areas where there are differences of emphasis that may distinguish my approach to dialogue from that taken by the authors. The differences of emphasis are about what justifies the judicial role in the dialogue, the relation between *Charter* dialogue and common law constitutionalism, and the proper

¹ Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 ["*Charter* Dialogue"].

² Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 1 ["*Charter* Dialogue Revisited"].

interpretive approach to section 7 of the *Charter*. In the last part of this commentary, I will outline some areas that may be a productive focus for the next decade of scholarship about institutional dialogue. If dialogue scholarship is to continue to thrive over the next decade, it may benefit from more comparative studies, study of the implications of dialogue in the post-September 11 (9/11) environment, and increased study of the legislative role in dialogue.

II. THREE AREAS OF AGREEMENT

A. *Sharpening the Debate About Coordinate Construction*

Much of the recent academic debate about dialogue involves disputes over the degree to which the legislature should be able to act on its own interpretations of the *Charter*. In Canada, a number of prominent political scientists have argued against privileging judicial interpretations of the *Charter* over legislative interpretations.³ In the United States, a number of commentators have defended the idea that legislatures can act on their own interpretation of the constitution, especially when the legislature is engaged in a reasonable disagreement with the Court.⁴ In *R. v. Mills*,⁵ the Supreme Court also seemed to concede some ground to coordinate construction when, while deferring to a legislative reversal of its prior decision on production and disclosure of confidential records in sexual assault cases, it stated: "Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups."⁶ Set against this enthusiasm for coordinate construction are reservations expressed by a number of commentators, including myself, about the legislature acting

³ Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Toronto: Oxford University Press, 2001); Janet L. Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002); and James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: University of British Columbia Press, 2005).

⁴ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); and Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

⁵ [1999] 3 S.C.R. 668 at 711-12.

⁶ *Ibid.*

on its interpretation of the constitution when it conflicts with the Court's interpretation,⁷ and the reservations expressed by the authors in their new article.

My concern about coordinate construction is that the legislature as an elected institution has an incentive to minimize and even trivialize the rights of the truly unpopular. Although the Supreme Court may be right in *Mills* that the legislature can be "a significant ally" for some vulnerable people, such as crime victims and women and children who are potential victims of sexual violence, I doubt that the legislature will be inclined to stand up for the rights of the truly unpopular such as those accused of crime, suspected terrorists, and prisoners. I am concerned not only that legislatures may devalue the rights of the accused and other unpopular groups, but also that they may avoid some of the tough questions that courts should ask when assessing whether a limit on a right is demonstrably justified and proportionate. For example, legislative preambles often focus on laudable objectives for limiting rights, but not on tougher questions such as whether the legislation is rationally connected with those objectives or why less restrictive means were rejected.⁸ The House of Lords's first Belmarsh case⁹ is an excellent example of how judges can apply a disciplined form of proportionality analysis—one that is sensitive to the equality and other rights of the unpopular—in a manner that seems to be difficult for elected legislatures to accomplish.

In "*Charter* Dialogue Revisited," the authors articulate a position on coordinate construction with which I wholeheartedly agree. Drawing on the work of Professor Brian Slattery,¹⁰ they make a useful distinction between the relatively unproblematic¹¹ first order obligation

⁷ Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2001) 38 Alta. L. Rev. 1051; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); and Carissima Mathen, "Constitutional Dialogue in Canada and the United States" (2003) 14 N.J.C.L. 403.

⁸ Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill L.J. 129.

⁹ *A. v. Secretary of State*, [2005] 3 All E.R. 169.

¹⁰ Brian Slattery, "A Theory of the *Charter*" (1987) 25 Osgoode Hall L.J. 701.

¹¹ There are important issues about who is responsible for *Charter*-vetting within government. At present, reliance is placed on the Attorney General, who at the federal level has never reported that a government bill is inconsistent with the *Charter* and who conducts *Charter* vetting in private shielded by solicitor-client privilege and Cabinet confidentiality. Other methods of *Charter* vetting include the use of legislative committees with a mandate to ensure that proposed

of the legislature, to rely on its own interpretation of the *Charter* when drafting legislation, and the much more problematic second order issue of whether the legislature can ignore or disagree with a judicial decision of the Supreme Court when drafting legislation. With respect to this second order issue, they suggest that the legislature should only act on its interpretation of the constitution when it is prepared to use the override or to present new evidence to the Court that will change its section 1 analysis. I agree. A legislature prepared to act in defiance of even a 5:4 decision of the Supreme Court should take responsibility for using the override. Anything less can threaten respect for the courts and the rule of law and encourage legislatures to casually override judicial decisions defending the rights of the unpopular. I also agree that a new section 1 defence, as opposed to the use of the override, would be sufficient if the government has made a genuine and good faith effort either to introduce new section 1 evidence or to argue a different objective for limiting rights as interpreted by the Court. In some cases, respect for the Court should require the legislature to refer such draft legislation for a judicial decision about its constitutionality.¹²

I also agree with the authors that, given traditional understandings of judicial review and the rule of law, the onus should be on the proponents of coordinate construction to demonstrate why legislatures should be able to act on interpretations of the constitution that differ from those provided by the courts. Although legislatures hold hearings before enacting legislation, the rules of the game are quite different from those that apply in court. No one is guaranteed an audience before the legislature and no one has a right to a reasoned decision from the legislature. If you do not represent an interest that is relevant to the governing coalition, you can safely be ignored. Sometimes you will be shouted down or ridiculed. I think it is particularly incumbent upon defenders of coordinate construction to demonstrate how the truly unpopular will fare in their promised land, where constitutional decisions of courts can be cast aside by a majority vote in the legislature.

legislation is consistent with the *Charter*, and perhaps to engage in coordinate construction, in which the legislature articulates its own interpretation of the *Charter*. See generally Hiebert, *supra* note 3.

¹² Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 *Queen's L.J.* 598 at 635-37.

Disagreements about coordinate construction are important and genuine and are likely to continue for some time. Although some proponents of coordinate construction seem to oppose judicial review by courts, others, especially the Canadian proponents, do not. It is also not clear that the well-established American debate about coordinate construction can simply be transferred to the Canadian context with its different system of government and political culture. Although Hogg and myself are both suspicious of coordinate construction that defies a Supreme Court ruling, we both accept that legislatures do, in the first instance, act on their views about what is permissible under the *Charter*, and that they can legitimately challenge judicial decisions, either by introducing new section 1 evidence and arguments or by using the override. At one level, scholarly disagreements about coordinate construction are an intramural debate among those who accept dialogue but differ about the role of courts and legislatures in that dialogue. At the same time, however, debates about coordinate construction may also be a form of shadow boxing over judicial review in general.

B. *The Proper Approach to Second Look Cases*

Hogg and his co-authors rightly point out that second look cases in which the Supreme Court determines the constitutionality of a legislative reply raise some of the most difficult issues with respect to dialogue. They accurately describe the inconsistent approach that the Court has taken in a variety of second look cases.¹³ After acknowledging that he originally advocated a more deferential approach to second look cases,¹⁴ Hogg, and his co-authors, conclude that the appropriate approach in a second look case is simply to determine whether the new legislation has been demonstrably justified as a limitation on *Charter* rights. At the same time, they acknowledge that reply legislation will often be drafted with the Court's decision in mind and is "likely to yield a particularly strong case for section 1 justification."¹⁵ I agree that the

¹³ Indeed, the cases cover a spectrum, with the deference of *Harper v. Canada*, [2004] 1 S.C.R. 827 at one end and the activism of *Sauvé v. Canada*, [2002] 3 S.C.R. 519 [*Sauvé*] at the other, with *R. v. Hall*, [2002] 3 S.C.R. 309 in between because of the Court's partial invalidation of the reply legislation.

¹⁴ Peter W. Hogg, "Discovering Dialogue" (2004) 23 Sup. Ct. L. Rev. (2d) 3 at 5 [Hogg, "Discovering Dialogue"].

¹⁵ *Supra* note 2 at 49.

Court should approach second look cases straight up without a predisposition to either validation or invalidation, but I am a bit less optimistic about whether reply legislation will address all the components of a section 1 analysis.¹⁶ In any event, the judicial focus should be on whether the legislation is justified and not on the institutional interaction between the Court and the legislature. The Court should not shy away from invalidation of reply legislation in appropriate cases. I do not think courts should be concerned about provoking consideration or use of the section 33 override. Section 33 is a legitimate part of the *Charter* and part of its dialogic structure.¹⁷ Judges should decide cases as they see them and let the chips fall where they may.

The authors indicate that they do not agree on the result in *Mills*, and that the Court's decision in that second look case to uphold Parliament's aggressive legislative reply is the "most difficult to rationalize."¹⁸ This may be in part because the Court in *Mills* seemed to accept that the legislature could act on a different interpretation of *Charter* rights from that provided by the Court, and in part because the Court did not require the government to justify the new legislation under section 1 of the *Charter*. Instead, the Court took a reconciliation of rights approach, which runs the risk of placing the burden of justification on the accused and allowing the accused's rights to be diminished without acknowledging that this is being done. It would have been helpful to know more about how the authors approach *Mills*. As with coordinate construction, how courts will approach second look cases involves not only understandings of dialogue, but also approaches

¹⁶ I agree with the authors that the Court's eventual decision on the constitutionality of the in-your-face reply to *R. v. Daviault*, [1994] 3 S.C.R. 63 will be an important opportunity for the Court to clarify its approach in second look cases. The government will defend the legislation under section 1 and with reference to the legislative preamble, but the preamble does not address the crucial section 1 question of whether there was a less drastic means of protecting the public from drunken offenders than taking away the extreme intoxication defence to crimes of general intent. See Kent Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4 Int'l J. Const. L. 347.

¹⁷ For an argument that the Ontario Court of Appeal should have used a delayed declaration of invalidity in its same-sex marriage case, see Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup. Ct. L. Rev. (2d) 49 at 81-89 [Roach, "Critics"]. It is interesting that the one case in which the Supreme Court struck down a legislative reply in a second look case involved one of the few *Charter* rights that was not subject to the override. See *Sauvé*, *supra* note 13, striking down reply legislation restricting prisoners' right to vote.

¹⁸ *Supra* note 2 at 50.

to judicial decision making and judicial review. The next decade of constitutional scholarship may focus more on the substance of judicial and legislative decision making within a realistic framework that recognizes the dialogue between the two institutions.

C. *Remedies as Instruments of Dialogue*

I agree with Hogg and his co-authors that the crafting of constitutional remedies is an important site of dialogue between courts and legislatures. I also agree with their defence of suspended declarations of invalidity as an instrument of dialogue and take comfort in the fact that this Canadian innovation has subsequently been endorsed in section 172 of the South African Constitution.¹⁹ I have long argued that the *Schachter v. Canada*²⁰ guidelines are too restrictive in pigeonholing suspended declarations of invalidity and eschewing considerations of relative institutional competence. At the same time, however, I have also argued that courts need to be attentive to the position of the successful litigant either by exempting that person from the period of delay or awarding costs.²¹ I also believe that courts should encourage legislatures to consider the position of all those who may be adversely affected by suspended remedies.²²

Suspended declarations are a valuable instrument of dialogue because they give the legislature an opportunity to expand the terms of debate and enact more comprehensive and creative remedies than the court's restricted remedy of invalidity. I am not convinced by arguments that they are an illegitimate incursion on rights protection²³ simply because the court postpones for six to eighteen months rather than indefinitely defers the remedy of a declaration of invalidity. If the debate about coordinate construction separates Hogg and his co-authors from those who are more suspicious of courts than they are, the debate

¹⁹ *Constitution of the Republic of South Africa 1996*, No. 108 of 1996.

²⁰ [1992] 2 S.C.R. 679 [*Schachter*].

²¹ Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, ON: Canada Law Book, 2006); Kent Roach, "Remedial Consensus and Dialogue" (2002) 35 U.B.C.L. Rev. 211.

²² Sujit Choudhry & Kent Roach, "Putting the Past Behind Us?: Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 Sup. Ct. L. Rev. (2d) 205.

²³ Bruce Ryder, "Suspending the Charter" (2003) 21 Sup. Ct. L. Rev. (2d) 267; Lorraine Weinrib, "Suspended invalidity orders out of sync with Constitution" *Law Times* (14 August 2006), online: <http://www.lawtimesnews.com/index.php?option=com_content&task=view&id=716&Itemid=82>.

about suspended declarations of invalidity may separate them from those who have greater faith in the courts than they do. If so, an interesting feature of dialogue theory is that it may occupy the middle ground between those who are suspicious of courts and rights protection and those who are passionate defenders of courts and rights protection. Dialogue theory is criticized both for defending judicial review and for allowing the legislature to override rights. There is often much wisdom in middle-ground or halfway-house positions. Alas, however, you can end up being shot at by both sides!

The authors note that Justice Iacobucci has invoked the notion of dialogue as a reason not to engage in creative interpretive remedies that could deprive the state of the ability to justify a limit on a *Charter* right under section 1 or to come up with new statutory regimes.²⁴ They argue that both the idea of dialogue and the related institutional division of responsibility between the court and the legislature favour the use of a suspended declaration of invalidity that will allow the legislature to consider the full range of its reply options under sections 1 and 33 of the *Charter*. I agree and would only add that there is democratic value in allowing the legislature to go back to the drawing board and rethink issues, such as child pornography and the permissible discipline of children, with the assistance of the Court's decisions. Creative interpretive remedies will often mean that the Court's decisions will not face the full brunt of public and legislative consideration, or what I have called democratic dialogue. The Court's recent reliance on interpretive remedies and its failure to revisit the restrictive *Schachter* guidelines, however, may suggest that its attraction to dialogue theory may be diminishing.

III. THREE DIFFERENCES IN EMPHASIS

A. *If Dialogue Does Not Justify Judicial Review, What Does?*

The authors concede in their new article that understanding judicial review as a form of dialogue does not in itself justify judicial review. This accords with a concession that I made to the same effect in

²⁴ *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

2004.²⁵ In my 2001 book, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, I devoted a chapter to the discussion of conventional attempts to justify judicial review, namely, those based on the intent of the framers, enforcing the rules of democracy, and moral principles. I concluded that reasonable persons will disagree about these justifications and that no theory of judicial review will generate reliably right answers. To my mind, this supported the wisdom of giving legislatures the options of both limiting and overriding rights as fallibly interpreted by the courts. At the same time, however, I thought I had made clear that judges need theories of judicial review, and that my own preference was for a combination of John Hart Ely's concern about minorities and Ronald Dworkin's concerns about moral principles on the basis that "judicial concern with both the ground rules of democracy and moral principles will allow judges to articulate the fullest range of fundamental values that might otherwise be neglected by the legislature or the bureaucrats."²⁶ My combination of these principled rights-based and minority protection rationales for judicial review and the situation of them in the context of dialogues between courts, legislatures, and society was hardly novel.²⁷ Still, it did provide a normative and substantive foundation for judicial review. I probably should have elaborated on these points to guard against subsequent claims that dialogue theory was devoid of moral content.²⁸ It is important to justify judicial review, but situating judicial review in the context of

²⁵ Roach, "Critics," *supra* note 17 at 67-75. Writing in the same volume, Hogg conceded that the original 1997 article "went too far" when it "claimed that we had answered the counter-majoritarian objection to judicial review." Hogg, "Discovering Dialogue," *supra* note 14 at 4.

²⁶ Roach, *supra* note 7 at 238.

²⁷ Although his work is perhaps best known for his advocacy of the passive virtues (as a dialogic device), Alexander Bickel's early defences of judicial review, including the U.S. Supreme Court's decision in *Brown v. Board of Education* (347 U.S. 483 (1954)), focused on the judicial role in protecting principles and unpopular minorities. For a modern, and in my view, underrated attempt to apply these insights to the American Bill of Rights with a recognition that they could be applied more easily in the more overtly dialogic context of the Canadian *Charter*, see Guido Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork Brennan Debate Avoids)" (1991) 105 Harv. L. Rev. 80.

²⁸ Keith Ewing, "Human Rights" in Peter Cane & Mark Tushnet eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 298; Andrew Petter, "Twenty Years of *Charter* Justification: From Liberalism to Dubious Dialogue" (2003) 52 U.N.B.L.J. 187; Allan C. Hutchinson, "Judges and Politics: An Essay from Canada" (2004) 24 L.S. 275; and Luc Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures" (2005) 3 Int'l J. Const. L. 617.

institutional dialogue can accommodate the fact that reasonable people will disagree about the justifications and rationale for judicial review.

In their new article, Hogg and his co-authors devote a paragraph to the moral, legal, and political justifications for judicial review.²⁹ For them, the moral justification lies in the need to take rights seriously, and the legal and political justifications revolve around the decision to entrench rights in the constitution. I expect that this paragraph may attract some criticism and that opponents of dialogue theory will be eager to move the debate back to the more familiar territory of the contested and indeterminate rationales for judicial review. For my part, I am somewhat uneasy with the great reliance that Hogg and his co-authors, as well as the Supreme Court, place on the entrenchment of the *Charter* as the main justification for judicial review. The *Charter* is, as they suggest, not going to go away, but I think it is necessary to explain the rationales for giving unelected courts greater powers.

I agree with the authors that the need to take rights seriously is part of the rationale for judicial review,³⁰ but there are also other normative justifications that draw on comparisons between courts and legislatures which are encouraged by both legal process thought and dialogue theory. One such rationale is the need for judicial protection of unpopular minorities that are vulnerable to discrimination from the legislature and the executive. Here inspiration can be found in both Alexander Bickel's and Ely's theories of judicial review.³¹ It is also very relevant that most *Charter* litigation involves matters of criminal justice and that the accused has few, if any, allies in the legislative process. More generally, the courts have an ability to bring questions of principle to the fore that might otherwise be ignored or finessed in a majoritarian legislative process or a non-transparent executive process. Another normative justification for the idea of democratic dialogue is the

²⁹ *Supra* note 2 at 28.

³⁰ This phrase is, of course, based on Ronald Dworkin's contributions to legal theory. I have argued elsewhere that dialogue theories of judicial review allow robust forms of judicial review such as those espoused by Dworkin's ideal judge, Hercules, to be used "not because of confidence that judges using them will always reach right answers that are consistent with democracy, but because they encourage judges to inject considerations of moral principles and less restrictive alternatives into democratic debates" Roach, *supra* note 7 at 236-37.

³¹ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986); John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

desirability of giving individuals guaranteed procedural rights to engage in adversarial challenge of the state's actions. Here inspiration can be found in Lon Fuller's work.³² Justice Iacobucci had been the leading proponent of the dialogue theory of judicial review on the Supreme Court, and I have argued elsewhere that his work on the Court is best understood as a principled defence of the rights of the accused and of vulnerable minorities that is supported at various junctures by the work of theorists such as Bickel, Fuller, and Ely.³³

A more normative turn in dialogue theory may be justified, but I think it would be a mistake to approach the normative questions without consideration of the strengths and weakness of all the institutions involved in government and how each institution serves and interacts with individuals on the ground. The normative work can be sharpened by studying our experience with the actual behaviour of courts, legislatures, and executives. A dose of empirical realism could also assist the normative debate about judicial review. Most *Charter* litigation is not about the unelected Court taking on the elected legislature, but rather is about citizens requiring the police and other unelected members of the executive to justify their coercive actions.³⁴ The normative debate about judicial review should not be limited simply to the question of what justifies the Court in striking down democratically enacted laws, but also includes what justifies the Court in requiring the executive to account for and justify its actions. This take on dialogue theory merges into a broader discussion of common law constitutionalism.

B. *Dialogue and Common Law Constitutionalism*

From the start of my work in this area, I have tried to relate dialogue under the *Charter* to common law constitutionalism, as manifested by the way courts have interpreted public laws in light of a background heritage of rights.³⁵ In my view, it is important to situate the

³² Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353.

³³ Kent Roach, "A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue" (2007) 57 U.T.L.J. [forthcoming].

³⁴ Kelly, *supra* note 3 at 15.

³⁵ Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481.

Charter in this common law context in order to counter extravagant claims about the novelty of judicial power under the *Charter*, and to show continuity with the traditions that underlie judicial review and the *Charter*. The *Charter* adds more bricks to the common law protections of the rule of law, but it is not fundamentally inconsistent with those foundations. Building on the traditional clear statement requirements, judges should require the legislature to prescribe clearly in law any limits that it places on *Charter* rights. This will help ensure some democratic debate about limits on rights and also limit executive discretion.³⁶ Once limits on rights are prescribed by law, those laws can both alert the public and constrain the executive. Ultimately, the court may have to determine whether the limits placed on *Charter* rights are proportionate and demonstrably justified, but even those decisions will not constitute the last word if the legislature is prepared to offer more section 1 evidence or to use the override as the ultimate clear statement.

Integrating the insights of common law constitutionalism with dialogue theory also helps illustrate that what is at stake under the *Charter* is not simply the respective roles of courts and legislatures, but also the role of the executive and the need for increased supervision of the executive by both the judicial and legislative branches of government. This is an insight that has become more important in the post-9/11 world, where the executive has increased power and the mechanisms of accountability have not caught up to the expanded state powers.³⁷ Dialogue theory should not in the future focus solely on courts and legislatures, but should also examine the range of other bodies, including auditors general, human rights commissions, privacy and information commissions, complaints and audit bodies, and other review bodies, that can enter into a dialogue with the executive.³⁸ The concept of dialogue is flexible enough that it can be applied not only to the work

³⁶ Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 41 Osgoode Hall L.J. 1.

³⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (Ottawa: Public Works and Government Services Canada, 2006), online: <<http://www.ararcommission.ca/eng/26.htm>>; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services Canada, 2006), online: <<http://www.ararcommission.ca/eng/EnglishReportDec122006.pdf>>.

³⁸ See David Dyzenhaus, *The Constitution of Law. Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) c. 3 for a call for creative institutions that can preserve the rule of law in times of emergency.

of adjudicative bodies that have the power to make authoritative decisions, but also to quasi-adjudicative bodies that mainly have powers of moral suasion and can call on government to respond to their rulings without necessarily being able to force governments to comply with their rulings. Moreover, the dialogue concept may also be useful to understanding some forms of international law that rely more on persuasion than command.³⁹ Relating dialogue theory under the *Charter* and other similar bills of rights to common law constitutionalism raises interesting questions about the dialogic character of many forms of law. In any event, common law constitutionalism has not been abolished by the *Charter*, and dialogue between courts and legislatures takes place not only under the *Charter* but also in terms of the common law and statutory interpretation decisions of the courts.

The reasons why the authors have not related their dialogue theory to common law constitutionalism are speculative. One reason may simply be that they have, understandably, limited their field to the *Charter*.⁴⁰ Another possibility, however, suggested by Hogg's strong criticisms of judicial decisions that rely on unwritten constitutional principles,⁴¹ may be concerns about the legitimacy of common law constitutionalism, which also relies on unwritten principles and can at times lead to judicial decisions that are at odds with the legislative text. This again points to the need for dialogue theorists to examine their theories of legitimate judging. Such debates about positivism and non-positivism should also, however, be situated and grounded in the dialogue between courts and legislatures that occurs not only under the *Charter*, but with respect to the common law and statutory interpretation.

³⁹ For a preliminary attempt to apply the concept of dialogue to human rights adjudication under international and regional law, see Kent Roach, "Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience" (2005) 40 *Tex. Int'l L.J.* 537.

⁴⁰ On dialogue under the division of powers, see Peter W. Hogg, "Canada: From Privy Council to Supreme Court" in Jeffrey Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (New York: Oxford University Press, 2006) 55 at 101-02.

⁴¹ Hogg has commented that the enforcement of an unwritten constitutional principle as if it was "an express term" of the constitution makes it "hard to avoid the conclusion that the Constitution has been amended by judicial fiat in defiance of the procedure laid down by the Constitution for its amendment": *ibid.* at 91.

C. *Passive Virtues, Constitutional Minimalism, Section 7 and Chaoulli*

Dialogue between courts and legislatures can be promoted even in the absence of a full constitutional decision. Bickel urged American courts to employ a broad array of passive virtues, including presumptions of statutory intent, as a means to promote dialogue with legislatures about whether they really meant to limit rights.⁴² Drawing on Bickel's sensitivity about the difficulties of unelected courts striking down laws enacted by elected legislatures, Cass Sunstein has urged courts to employ constitutional minimalism in order to maximize the space for legislative debate and replies.⁴³ In Canada, Patrick Monahan has similarly defended constitutional minimalism as a means to maximize the space for dialogue between courts and legislatures.⁴⁴ I have argued, however, that the *Charter's* explicit dialogic features, which distinguish it from the U.S. Bill of Rights—section 1, section 33, and suspended declarations of invalidity—combined with the fusion of executive and legislative power in the parliamentary system, all facilitate robust dialogue without the need for the intermediate strategies of the passive virtues and constitutional minimalism.⁴⁵ More recently, however, I have revised my opposition to the intermediate strategies in the context of the Court's apparent decision to read section 1 out of section 7 of the *Charter*⁴⁶ and, more particularly, in the context of the Court's decision in *Chaoulli*.⁴⁷

It would have been interesting for Hogg and his co-authors to have discussed *Chaoulli* and its relation to dialogue. Presumably, *Chaoulli* is not discussed because technically the Court did not render a majority decision under the Canadian *Charter*; Justice Deschamps'

⁴² *Supra* note 31.

⁴³ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

⁴⁴ Patrick J. Monahan, "The Supreme Court in the 21st Century" (2001) 80 Can. Bar Rev. 374.

⁴⁵ Roach, *supra* note 7 at 147-54.

⁴⁶ Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55 U.T.L.J. 733. See also Ian Leigh, "Secret Proceedings in Canada" (1996) 34 Osgoode Hall L.J. 113 at 161-63, criticizing unwillingness to reach section 1 in national security cases.

⁴⁷ Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism?" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) at 184.

decisive judgment striking down Quebec's prohibition on private insurance for health services covered by medicare was rendered only under the Quebec *Charter of Human Rights and Freedoms*. Nevertheless, *Chaoulli*, along with the same-sex marriage cases, is the most controversial example of judicial activism over the last decade. So it is somewhat artificial that proponents of dialogue would ignore this case, especially since the Court used the dialogic strategy of suspending its decision for a year to allow the legislature to craft a reply, and also since some commentators have blamed dialogue theory for the decision.⁴⁸

The *Chaoulli* decision raises a host of issues for dialogue between courts and legislatures. One is the effect of abstract facial judicial review on judicial decisions and dialogue with the legislature. The Court in *Chaoulli* refused to grapple with the complexities of any particular waiting list for medical treatment. Instead, it seemed to rely on dubious propositions that any delay could render restrictions on private-sector health care unconstitutional and that increased use of private health insurance would provide those on waiting lists with effective remedies. A Court attracted either to the passive virtues or to constitutional minimalism would not have decided the case. Moreover, the case for such an approach may be stronger because of the Court's early, and not always consistent, decisions to read section 1 out of section 7. The controversy over *Chaoulli* suggests that dialogue theorists cannot ignore the substance of the Court's decisions.

Chaoulli may not be the disaster for dialogue that some have claimed it to be. The immediate damage of *Chaoulli* was mitigated by the Court's dialogic decision to suspend the judgment for a twelve-month period, even though such a decision was unprecedented and could not be supported under the restrictive *Schachter* guidelines. Quebec has responded to *Chaoulli* with legislation that expands the dialogue by allowing private medical insurance contracts for only a few specified services, and only if those services are provided in specialized medical centres where only those physicians who have opted out of the public plan will practice.⁴⁹ Whether the Quebec legislation, or proposals

⁴⁸ Andrew Petter, "Wealthcare: The Politics of the *Charter* Revisited" in Flood, Roach & Sossin, *ibid.*, 116.

⁴⁹ Bill 33, *An Act to Amend the Act Respecting Health Services and Social Services and Other Legislative Provisions*, 2nd Sess., 37th Leg., Quebec, 2006 (assented to 13 December 2006),

elsewhere, will protect the integrity of the public system in the wake of *Chaoulli* remains to be seen, but the decision does demonstrate that legislative paralysis is not the necessary Canadian response to judicial activism. Better administrative appeals and procedures could also provide provinces with some effective responses to *Chaoulli*.⁵⁰ The Court's decision at least encourages governments to consider the cases of those denied life-saving or pain-relieving treatments. The *Chaoulli* story is not yet complete, in large part because of the role of dialogue between courts and legislatures.

IV. THREE PROJECTS FOR THE NEXT DECADE OF DIALOGUE SCHOLARSHIP

A. *A Comparative Testing of the Convergence Thesis about Weak and Strong Forms of Judicial Review*

There is a rich laboratory of comparative law that can be used to explore and test dialogue theory. Indeed, one of the most interesting facets of dialogue scholarship in the last decade has been the influence of Canadian scholarship in many countries, including the United States, Israel, Australia, the United Kingdom, and New Zealand.⁵¹ A continuum can be drawn with the American Bill of Rights at one end of the scale, as perhaps the strongest form of judicial review, and Australia at the other end, as a country without a national bill of rights and one that relies solely on common law constitutionalism and a few state bills of rights created on an explicitly dialogic basis. The South African Constitution, the Canadian *Charter*, the U.K. *Human Rights Act, 1998*,

S.Q. 2006, c. 43, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca/eng/37legislature2/projets-loi/publics/06-a033.pdf>>.

⁵⁰ Caroline Pitfield & Colleen M. Flood, "Section 7 'Safety Valves': Appealing Wait Times Within a One-Tier System" in Flood, Roach & Sossin, *supra* note 47, 477.

⁵¹ Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv. L. Rev. 16 at 133-36; Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) at 236-40; T.R.S. Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 Oxford J. Legal Stud. 563; Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act" [2004] P.L. 33; Leighton McDonald, "Rights, 'Dialogue' and Democratic Objections to Judicial Review" (2004) 32 Fed. L. Rev. 1; Tom R. Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] P.L. 306; and Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 Brook. L. Rev. 1109.

and the New Zealand *Bill of Rights* all fall in varying places in the middle and provide much raw material for testing the hypothesis advanced by Mark Tushnet that even weaker forms of judicial review will often tend to gravitate towards stronger forms of judicial review.⁵²

The comparative approach should be joined with a case study approach because the effects of judicial review are likely to be different in different areas. In "*Charter Dialogue Revisited*," the authors refer to cases such as *Vriend v. Alberta* as special cases.⁵³ Professors Morton and Knopff have raised the intriguing possibility that judicial decisions may have the greatest staying power in those cases where public opinion is relatively polarized and evenly divided (abortion and same-sex marriage being two prime examples).⁵⁴ This hypothesis could be tested across jurisdictions in order to distinguish the contexts that are more likely to produce a legislative reply from those less likely to do so. Dialogue theory may have greater explanatory power in some contexts than in others; comparative case studies may hold the key to better understanding the dialogue between courts and legislatures.

B. *Dialogue in Times of Crisis: Empowering or Weakening?*

One context that should be examined by students of dialogue is the nature of dialogue between courts and legislatures in times of crisis or perceived crisis. One hypothesis would be that judges who are relieved of the burden of judicial finality and supremacy may be more willing to stand up for rights during a crisis. At the same time, however, legislatures may make the fullest use of their dialogic powers in times of real or perceived crisis when they perceive that public safety, if not national survival, is at stake. As a result, the post-9/11 security context may be a particularly rich site for institutional dialogue.

The decisions of the U.S. Supreme Court in *Hamdi v. Rumsfeld*⁵⁵ and *Rasul v. Bush*,⁵⁶ affirming the need for some due process in the treatment of alleged enemy combatants and affirming the

⁵² Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 53 U.T.L.J. 89.

⁵³ *Supra* note 2 at 40.

⁵⁴ F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) at 163-66.

⁵⁵ 542 U.S. 507 (2004).

⁵⁶ 524 U.S. 466 (2004).

habeas corpus jurisdiction of the courts over Guantanamo Bay detainees, attracted both administrative and legislative replies in the rules for the tribunals determining enemy combatant status⁵⁷ and the *Detainee Treatment Act*,⁵⁸ which limits judicial review by way of *habeas corpus*. Similarly, the U.S. Supreme Court's more recent decision against existing military commissions in *Hamdan v. Rumsfeld*⁵⁹ received a quick legislative reply in the form of the *Military Commissions Act*,⁶⁰ which again limits *habeas corpus* review and codifies rules in regards to military commissions. These cases underline how even American courts may want to use constitutional review as a means to prompt dialogue with legislatures, but they also raise difficult questions about whether non-final dialogic judicial review will be sufficiently robust to protect rights and freedoms in times of crisis.

The British experience with post-9/11 legislation is also interesting for students of dialogue. Shortly after 9/11, the U.K. Parliament was prepared to enter into an explicit and temporary derogation from the European Convention on Human Rights in order to allow for the indeterminate detention of non-citizen terrorist suspects who could not be deported because they would be tortured.⁶¹ Unlike section 33 of the Canadian *Charter*, however, derogations under the European Convention allowed fairly searching judicial review, which at the end of 2004 produced a strong House of Lords' decision holding that it was disproportionate and discriminatory to derogate from the rights of non-citizens when the terrorist threat was so limited.⁶² Under the *Human Rights Act, 1998*, the Blair government could have simply ignored this finding, but it chose to repeal the derogating provisions and introduce new legislation providing for control orders that could be applied to terrorist suspects, both citizens and non-citizens.⁶³ Control orders are now being challenged in a round of second look cases. The

⁵⁷ For a critical review of these rules, see Kent Roach & Gary Trotter, "Miscarriages of Justice in the War Against Terror" (2005) 109 Penn State L. Rev. 967 at 1015-32.

⁵⁸ U.S., Bill, H.R. 1815, *Detainee Treatment Act of 2005*, 109th Cong., (enacted) amending 28 U.S.C. § 2241.

⁵⁹ 126 S. Ct. 2749 (2006).

⁶⁰ *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600.

⁶¹ *Anti-terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24, Part IV.

⁶² *Supra* note 9.

⁶³ *Prevention of Terrorism Act 2005* (U.K.), 2005, c. 2.

British experience suggests that courts can play an important role in requiring legislatures to justify harsh and discriminatory measures, even when their decisions are not binding. Parliament's decision to repeal the law could be seen as evidence to support the thesis that weak-form judicial review will converge with strong-form judicial review, but the robust legislative reply also cannot be ignored. Much of post-9/11 history in the United States and the United Kingdom can be seen through the lens of institutional dialogue.

Although the Supreme Court of Canada upheld investigative hearings introduced in post-9/11 legislation from *Charter* challenges,⁶⁴ it read in extended immunity provisions and open court presumptions that likely would have made investigative hearings a less attractive option for the police and may lead them to rely on other means to obtain information from reluctant witnesses. These cases follow the pattern of the Canadian Court relying on robust interpretive remedies that alter legislation. Although the Supreme Court's investigative hearing cases have not yet produced a legislative response,⁶⁵ they likely will produce a less transparent administrative one. One possible administrative response is that the authorities will be less likely to use investigative hearings because of the judicially expanded publicity and immunity requirements, and they may use a range of alternative measures, including rewards for informants or even the use of preventive or regular arrests, as a means to facilitate the questioning of reluctant witnesses or the increased use of electronic surveillance.⁶⁶ Understanding the administrative responses to court decisions is another new frontier for dialogue scholarship. One disturbing hypothesis is that robust rights protection by the Court may only inspire less transparent and perhaps harsher responses from the executive. Quasi-judicial bodies such as human rights commissions, privacy commissioners, and complaints bodies may have an important role to play in ensuring that the executive is required to publicize and justify its administrative responses to court decisions. Democratic dialogue is not

⁶⁴ *Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248; *Re Vancouver Sun*, [2004] 2 S.C.R. 332.

⁶⁵ Parliament must, however, decide in early 2007 whether the investigative hearing and preventive arrest provisions will be renewed for another five years.

⁶⁶ Another important administrative response was the decision for a time to abandon war crimes prosecutions after *R. v. Finta*, [1994] 1 S.C.R. 701 in favour of immigration law procedures.

simply a matter for courts and legislatures, but should also involve the executive and the quasi-judicial wing of the executive.

C. *Legislative Reforms: Improving or Replacing Dialogue?*

A final fertile area for dialogue scholarship will be to study how various reforms to the electoral and legislative process may affect dialogue between courts and legislatures. Dialogue theory can be seen as part of the new legal process movement in legal scholarship that paid increased scholarly attention to the legislature.⁶⁷ Political scientists who have contributed significantly to the debate about dialogue were by definition always concerned with the legislature, but there is a need for all students of dialogue to reflect on the way changes in electoral and legislative structures may affect dialogue between courts and legislatures.

One legislative reform, which has and will likely continue to attract considerable interest, is the optimal method by which proposed legislation should be vetted within the legislature and the executive to determine its consistency with the *Charter*. At present, most of this vetting is carried out by attorneys general departments. A variety of concerns have been raised about this process, including arguments that such departments are likely to follow court decisions interpreting the constitution, as well as concerns about the transparency and independence of the process.⁶⁸ Another means of *Charter* vetting is to use legislative committees, but, at present, most committees in Canada do not have many resources. The evolution of *Charter* vetting within the government may well influence the debates about coordinate construction discussed in Part IIA, above, as well as the extent to which courts will have to invalidate legislation. Although Hogg and his co-authors find generally similar rates of legislative replies to decisions striking down laws since and before 1997, a striking feature of their post-1997 data set is that it is composed of slightly less than a third of the cases striking down laws than were found in the original data set. The reasons for this decline in judicial invalidation of statutes may involve increased deference in the Supreme Court and the increased use of

⁶⁷ Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006).

⁶⁸ Hiebert, *supra* note 3.

interpretive remedies. But they are also consistent with Professor Kelly's thesis that judicial invalidation will decline because laws enacted in the *Charter* era will have been subject to *Charter* vetting before their enactment.⁶⁹ Dialogue scholarship should focus on the judicial and the legislative sides of the conversation.

In *The Supreme Court on Trial*,⁷⁰ I tried to argue that the Canadian parliamentary system, along with sections 1 and 33 of the *Charter* and suspended declarations of invalidity, should be seen as structural features of the Canadian constitution that facilitate dialogue. My point was that a committed Cabinet that can rely on party discipline could generally ensure a quick legislative reply to Court decisions, and that there were plenty of examples in the 1990s of such robust and quick legislative replies. Tight party discipline and responsible government—in which the executive and the legislature are fused—distinguish Canada from the United States. In Canada, events such as the defeat of an attempted legislative reply to *R. v. Morgentaler*⁷¹ in the Senate are exceptional. Since that time, however, we have elected consecutive minority governments. The major political parties have discussed loosening party discipline, and plans to re-invigorate the Senate through elections are building steam. At the provincial level, there is also increased interest in fixed elections, referenda, and elements of proportional representation. All of these developments have the potential to alter the dialogic balance between courts and legislatures. There may very well be good reasons for an elected Senate, looser party discipline, or the greater diversity of parties that would be produced by proportionate representation, but all of these developments may make it more difficult to enact reply legislation and may increase the staying power of the status quo created by a judicial decision.

V. CONCLUSION

Hogg and his co-authors are to be congratulated both for provoking so much debate with their original article and for responding to and enriching that debate in their follow-up piece. Not everyone will agree with either their empirical conclusion, that dialogue lives on, or

⁶⁹ Kelly, *supra* note 3.

⁷⁰ Roach, *supra* note 7.

⁷¹ [1988] 1 S.C.R. 30.

their normative conclusion that dialogue should live on. As a pragmatic middle-of-the-road position, dialogue theory will continue to be attacked by advocates of both judicial and legislative supremacy. Some will argue that dialogue gives the legislature too much room to limit rights while others will argue that it gives the legislature too little room. Hopefully, however, we can all agree that by providing alternatives to judicial and legislative supremacy, dialogue theory has significantly enriched debates about judicial review in Canada and abroad.

