

CONSTITUTIONAL AND COMMON LAW DIALOGUES BETWEEN THE SUPREME COURT AND CANADIAN LEGISLATURES

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Under both the common law and the Charter, the Supreme Court engages in dialogue with legislatures. This dialogue allows legislatures to respond to the Court's decisions with ordinary legislation without having, as under the division of powers or the American Bill of Rights, to change the Court or the Constitution. The first part of the paper examines three forms of dialogical judicial review, namely those under which both courts and legislatures have an equal right to interpret the constitution; those which focus on the ultimate accountability of the Court to legislatures and society; and those which envision the Court and the legislatures playing distinct and complementary roles. It is suggested that all three theories of dialogue find some support in recent Supreme Court judgments. The second part examines the dialogic nature of common law decisions such as presumptions of mens rea and suggests that common law decisions including presumptions of statutory interpretation resemble Charter decisions in their dialogical nature more than division of powers decisions. The third part examines dialogue under the Charter with a focus on search and seizure powers and sexual assault law. The author argues that ordinary dialogue should occur under section 1 with legislatures clarifying their objectives and alternatives in response to the Court's decisions. Extraordinary dialogue that involves legislatures reversing Charter decisions on the basis of their own interpretation of the Constitution or their claim to hold the Court accountable should only occur with the sober second thoughts and guarantee of continued dialogue inherent in the use of the section 33 override.

Cet article propose que, aussi bien dans le contexte de la Charte que de la common law, la Cour suprême poursuit un dialogue avec les législatures. Ce dialogue permet à celles-ci de réagir aux décisions de la Cour au moyen de lois ordinaires, sans devoir, comme c'est le cas en matière de partage des pouvoirs ou du Bill of Rights américain, changer la constitution ou la Cour. La première partie de cet article examine trois formes d'un tel dialogue, à savoir celles dans lesquelles à la fois les tribunaux et les législatures ont un droit égal d'interpréter la constitution; celles qui mettent l'accent sur le fait que la Cour est ultimement responsable auprès des législatures et de la société; et celles selon lesquelles la Cour et les législatures jouent des rôles différents et complémentaires. L'auteur suggère que chacune des trois théories de dialogue trouve appui dans les décisions récentes de

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la Cour. La seconde partie de l'article aborde la nature dialogique des décisions de common law, comme celles sur les présomptions de mens rea; il y est suggéré que les décisions de common law, incluant celles sur les présomptions d'interprétation des lois, ressemblent plus aux décisions sur la Charte, dans leur nature dialogique, que les décisions sur le partage des pouvoirs. La troisième partie traite du dialogue dans le contexte de la Charte, en mettant l'accent sur le droit concernant les fouilles, perquisitions et saisies et les agressions sexuelles. L'auteur soutient qu'il devrait y avoir un dialogue ordinaire dans le cadre de l'article 1, les législatures clarifiant leurs objectifs et leurs solutions de rechange en réponse aux décisions de la Cour. Un dialogue extraordinaire, dans lequel les législatures renversent les décisions de Charte en se fondant sur leur propre interprétation ou sur leur prétention que la Cour est responsable devant elles, devrait être réservé aux conditions suivantes : avoir un certain doute et garantir la poursuite du dialogue inhérent à l'emploi de la clause dérogatoire de l'article 33.

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I. Introduction

The Canadian *Charter of Rights and Freedoms* has commonly been seen as a revolution in the relationship between the Supreme Court and the legislatures. The Court has flexed its *Charter* muscles and invalidated laws on a host of subjects ranging from abortion to writs of assistance. Its decisions are no longer premised on the idea of Parliamentary supremacy which suggests that one level of government would be empowered to enact legislation that the Court has found unconstitutional under the constitutional division of powers. The idea of the *Charter* as a revolutionary change in the Court's relationship with legislatures may have been necessary to signal the judiciary's willingness to take a

constitutional approach to the protection of rights and freedoms. Greater experience and maturity with the *Charter*, however, should produce more nuanced and less extravagant views about how the *Charter* has affected the Court's relationship with legislatures. Perpetual talk of revolution is unhealthy. It is now time to start the project of integrating the *Charter* with our past experience under the division of powers, the common law, and statutory interpretation.

I will argue that the Supreme Court's relationship with legislatures under the *Charter* is not fundamentally different from its relation with the legislature when it develops the common law and interprets statutes in light of the presumptions enshrined in the common law constitution.¹ In all cases, the Court initiates a dialogue that calls the attention of legislatures to the rights, procedures and values that the Court has articulated and defended. The common law and *Charter* values proclaimed by the Court then enjoy the burden of legislative inertia. In almost all cases, however, the legislature can respond to the Court's ruling by articulating clear departures from and limitations on the starting point set by the Court's rulings. When the *Charter* is not involved, the legislature has only to assert its will to depart from the Court's rulings, but in many areas of public law, the Court's adherence to what John Willis aptly described in 1938 as a "common law 'Bill of Rights'"² has been more durable than suggested by the simple theory of legislative supremacy. Under the *Charter*, the legislature more clearly has to engage in a process of justifying limitations on the rights articulated by the Court under section 1 or declaring its resolve to depart from the Court's ruling by enacting legislation notwithstanding certain *Charter* rights under section 33. The structure of the *Charter* promotes a continuing dialogue between the Court and the legislatures similar but not identical to that achieved under the common law.

The common law and dialogic structure of the *Charter* has influenced constitutional development in other countries, including Israel, New Zealand and South Africa.³ Some distinguished American commentators have urged the Canadianization of their Bill of Rights.⁴ Yet despite this international

¹ My focus is on the institutional relations between the Court and legislatures. It is still possible that the values of the *Charter*—especially outside the context of the legal rights—could be classified as a revolutionary change in the way that Canadians, including judges, think about rights. See for example A. Cairns *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart, 1995).

² J. Willis "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1 at 17. Willis' not entirely complimentary views about the common law presumptions will be discussed below.

³ R. Hirshl "Looking Sideways: Judicial Review vs Democracy in Comparative Perspective" (2000) 34 U.Richmond L.Rev 415.

⁴ G. Calabresi "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)" (1991) 105 Harv. L.Rev. 80 at 124-25; M.A. Glendon *Rights Talk: The Impoverishment of Political Discourse* (Cambridge: Harvard University Press, 1991) at 39; M. Perry "The Constitution, the Courts and the Question of Minimalism" (1993) 88 N.W.U.L.Rev. 84 at 153-60; M. Perry, *The Constitution in the Courts* (New York: Oxford University Press, 1994) at 196-201; M. Tushnet *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

acclaim, I fear we are losing sight of the genius of the Canadian Constitution and its distinctiveness from the American. The American debate about judicial activism and supremacy has been played out in Canada with depressingly little attention to the fundamental differences between the two Constitutions, including the strength of governments produced by the Canadian Parliamentary system. In the 1980's, commentators on the left expressed concerns that the Court would stand in the way of progressive legislative reforms by *Lochnerizing* the *Charter*. In the 1990's, commentators on the right expressed concerns that the Court was following the Warren Court in imposing minority views on the polity, inventing rights and hindering the state's ability to control crime.⁵ To the extent that it assesses the legitimacy and role of courts in a free and democratic society, the debate about judicial activism is an important one that deserves to be addressed. To the extent that the Canadian debate is conceived in Americanized terms that ignore structural differences between the two Constitutions and suggests that judges can impose the last word on controversial issues of social policy, it is an unhelpful dead end. As Justice Lamer reminded us in the *B.C. Motor Vehicles Reference*⁶, we do our Constitution a disservice by allowing American concerns about judicial review define the debate for us.

The Court's *Charter* rulings, like its common law decisions and exercises in statutory interpretation, are best seen as starting points in a dialogue with legislatures and society. The Court, after listening to aggrieved and often unpopular litigants, initiates a conversation with the legislature about important values such as minority rights, fair process, fundamental freedoms and constitutionalism that may have been neglected in the legislative process. These values themselves are important components of a free and democratic society that cannot be reduced to majority rule or legislative supremacy.⁷ For that reason, they rightly enjoy the burden of legislative inertia after they have been proclaimed by the Court. At the same time, judges, like other humans, can make mistakes in defining and applying these abstract principles. For that reason, the *Charter* does not assign the Court the final word. Democracy is enhanced, however, by requiring legislatures clearly to articulate, justify and be held accountable for their decisions to limit or depart from the constitutional or common law principles articulated by the Court. This process will promote candour and honesty about the limits and denials placed on important values and encourage continued democratic debate about such difficult decisions.

The first part of this paper will discuss various theories of dialogue between courts and legislatures. There are strong arguments that the entire judicial

⁵ See for example A. Petter "The Politics of the Charter" (1986) 8 Sup.Ct.L.R. 473 and A. Hutchinson, *Waiting for CORAF* (Toronto: University of Toronto Press, 1995) for criticisms from the left and C. Manfredi *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993) and F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview, 2000) for criticism from the right.

⁶ (1985) 23 C.C.C.(3d) 289 at 298 (S.C.C.).

⁷ *Reference re Secession of Québec* [1998] 2 S.C.R. 217.

enterprise – listening and responding to litigants – can be understood in dialogic terms. The court sends important messages not only when it strikes down state action, but when it upholds it. Indeed, the greatest danger of the Court having the last word may be when it pronounces debatable policy to be “Charter-proof” or when it does not clearly declare principles that are likely to be inconvenient to legislatures. The focus in this paper, however, will be on the more controversial forms of dialogue that are available when the Court invalidates state action.

The metaphor of dialogue has often been used in a casual and confusing manner. Some have suggested that it is an inapt description of what the Court does. Judges do not engage in banter around the kitchen table. They speak in measured tones. Their judgments are final and to be obeyed. Some dialogic theories do fall victim to this trap of trivializing judicial judgment, but others recognize the need for judges to make final decisions and stick with them. I will outline three broad categories of dialogic judicial review; namely 1) those which posit that both courts and legislatures have an equal right to interpret the constitution 2) those which focus on the ultimate accountability of the Court to legislatures and society and 3) those which envision the Court and legislatures playing distinctive yet complementary roles in resolving questions that involve rights and freedoms. I will also suggest that the Court has so far shown some attraction to all three theories of dialogue and has not yet committed itself to any one theory. My preference is for the latter category, not only because it accommodates conventional understandings of the judicial process and the rule of law, but because it can produce the most constructive partnership between courts and legislatures. It avoids the routine shouting matches and showdowns that are produced when both institutions try to interpret the constitution or respond to the various constituencies of a democracy. It allows courts to educate legislatures and society by providing principled and robust articulations of the values of the *Charter* and the common law constitution while allowing legislatures to educate courts and society about their regulatory and majoritarian objectives and the practical difficulties in implementing those objectives. By allowing courts and legislatures to add their own distinctive voice, talents and concerns to the conversation, a more enriching and sophisticated dialogue is produced than could be achieved by a judicial or legislative monologue or a dialogue in which courts and legislatures engage in the same task.

The second part of the paper will explore some examples of dialogue between the Court and the legislature in the period before the *Charter*. Employing examples mainly from the criminal law, I will suggest that the best of what the Court did was to engage legislatures in a dialogue by articulating the fundamental importance of values such as fault, fairness and legal authorization of police powers that might otherwise have been ignored or finessed in the legislative process. At the same time, the Court did not insist it would have the final word. It often invited, and sometimes dared, the legislature to depart from its principled starting point. It was always open to Parliament to prescribe by law its intent to depart from the values of the common law constitution in particular contexts. Common law judicial review re-enforced democracy by requiring debate, reflection and clear statements by legislatures about how they would

treat the fundamental values identified by the court. A possible exception to this dialogic process was the enforcement of the constitutional division of powers. Although the other level of government could act, legislatures whose laws were invalidated by the courts had few options short of the drastic dialogue entailed by changing the Constitution or the Court. The constitutional division of powers is where the Canadian model is the closest to American-style judicial supremacy.

The third part of this essay will examine some important *Charter* decisions invalidating state action and suggest that they have produced vigorous dialogues⁸ with legislatures that are much closer to the dialogues between courts and legislatures over the common law and statutory interpretation than monologues based on judicial supremacy or drastic dialogues over the constitutional division of powers. In most cases, Parliament had considerable room to reply to the Court's decisions without abandoning its basic policy objectives or trying to change the Court or the Constitution. Again, employing examples mainly from the criminal law, I will suggest that in cases dealing with search and seizure and sexual assault, the Court has articulated values that the legislature was inclined to neglect or finesse. At the same time, the Court has frequently not had the last word as Parliament – often acting quickly and with support from all political parties – replied to the Court's controversial decisions. Judicial review under the *Charter* contributed to democracy by requiring the legislature to be more explicit about the powers it granted the police and to justify the balance of competing rights in the criminal law.

All of the dialogue discussed in part three of the paper occurred without use of the section 33 override. A common mistake is to pronounce dialogue to be dead because the override is rarely used. Section one now serves many of the purposes in promoting dialogue between courts and legislators that many believed would be served by the override. Legislative replies to *Charter* decisions, like replies to the common law and statutory interpretation, have become part of ordinary politics. Work needs to be done, however, in exploring when dialogue should move from ordinary conversations contemplated under section 1 to the extraordinary ones contemplated under section 33. Ordinary dialogue occurs when the legislature expands the debate beyond the options that were considered by the Court and refines and clarifies its objectives and

⁸ I will not join the debate about the statistical frequency of legislative replies because "the question of what to count is always open to argument". P. Hogg and A. Thornton "Reply to 'Six Degrees of Dialogue'" (1999) 37 *Osg. Hall L.J.* 529 at 533. My discussion of search and seizure cases includes Court judgments that the Parliamentary debates suggest were legislative replies even though they were not part of the Hogg and Bushell study because they did not invalidate legislation. This suggests that, if anything, that important study may underestimate the number of legislative replies. See P. Hogg and A. Bushell "The Charter Dialogue Between Courts and Legislatures" (1997) 35 *Osg. Hall L.J.* 75. Criticisms of the study largely depend on the acceptance of the proposition that genuine or positive dialogue only occurs if the legislature interprets the constitution for itself. See C. Manfredi and J. Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 *Osg. Hall L.J.* 513. The merits of this proposition is discussed *infra* n.19-30.

alternatives when placing limitations on rights. Ordinary dialogue allows the courts and legislatures to play distinct and complementary roles under section 1 of the *Charter*. Extraordinary dialogue occurs when the legislature uses an “in your face reply” to tell the Court it was wrong in the way it interpreted *Charter* rights or that it issued a decision that was unacceptable to the majority. Extraordinary dialogue suggests that both the Court and Parliament are engaged in interpreting the constitution or the democratic will and that Parliament’s interpretation should prevail at least for the time being. When conversation reaches this level, it is a shouting match and special care should be taken to preserve the relationship and ensure sober second thoughts. I will argue that extraordinary replies that reverse or reject the Court’s interpretation of a *Charter* right should only be accepted by the Court if the override is used. The virtue of using section 33 when the dialogue has become a shouting match over the merits of a particular Court decision is that the people are alerted to the fact that the legislature is reversing the Court’s constitutional decision in their name and the Court’s point of principle is held in abeyance until the override expires and cooler heads prevail.

II. *The Many Forms and Theories of Dialogue*

Talk of dialogue between courts and the legislatures is so common, it risks becoming a cliché. Nevertheless, there is often much truth in a cliché and we should not avoid the metaphor of dialogue if it best explains our experience. It is necessary, however, to be clear about what we mean by dialogue and what are the criteria to assess good and bad forms of dialogue.

The dialogue metaphor is evocative of much of the judicial process. Much of what judges do is listen and talk, in that order.⁹ One of the great virtues of adjudication is that it allows the parties an opportunity to tell judges their stories.¹⁰ Good judging attempts to understand the perspectives of those who come before the Court while allowing judges to speak for the law and in their own voice.¹¹ Judges on appellate courts also practice dialogue between themselves in the form of concurrences and dissents as well as collegial interchange.¹² They are immersed in a world which gives them plenty of feedback. As Alexander Bickel observed:

In these continuing colloquies, the profession – the practising and teaching profession of the law – plays a major role; the law, as Bentham long ago remarked, is made, not by judge alone, but by judge and company. But in American society the colloquy goes well beyond the profession and reaches deeply into the places where public opinion is formed.¹³

⁹ In contrast, what professors do is talk and listen, in that order!

¹⁰ M. Minow “Foreword: Justice Engendered” (1987) 101 Harv.L.Rev. 10; L. Fuller “The Forms and Limits of Adjudication” (1978) 92 Harv. L.Rev. 353.

¹¹ A. Barak “The Role of the Supreme Court in a Democracy” (1999) 33 Is.L.Rev. 1.

¹² B. Friedman “Dialogue and Judicial Review” (1993) 91 Mich.L.Rev. 577.

¹³ A. Bickel, *The Least Dangerous Branch* 2nd ed (New Haven: Yale University Press, 1986) at 240.

Although the metaphor of dialogue may describe much about the process of judging, this broad concept of dialogue will not be the primary focus in this paper.

Bickel also believed that the Court engaged in dialogue with other branches of government and society as much when it upheld state action as constitutional as when it struck it down as unconstitutional. *Plessy v. Ferguson* was no less important in sanctioning apartheid than *Brown v. Board of Education* in attempting to dismantle it. A decision upholding a law "can generate consent and may impart permanence"¹⁴ by legitimating questionable policies as constitutional. The most dangerous and debilitating consequence of judicial review for Canadian democracy may be to inhibit criticism and reform of "Charter proof" laws.¹⁵ In this paper, however, I will not focus on the important dialogue that occurs in the approximately two third of cases in which the Supreme Court upholds state action that is challenged under the *Charter*.¹⁶ Rather my focus will be on the more dramatic forms of dialogue that occur after the Court invalidates state action under the *Charter*.

Like Dean Hogg and Allison Bushell,¹⁷ I will focus on cases in which "the judicial decision to strike down a law can be reversed, modified or avoided by the ordinary legislative process." These cases are the focus of concern by the critics of judicial activism and they raise the most obvious issues about the appropriate role of independent courts in a democracy. I will attempt to go beyond Hogg and Bushell's important work which found legislative responses to approximately two thirds of *Charter* decisions invalidating state actions, by relating the dialogue under the *Charter* to dialogue under the division of powers, the common law and statutes. I will also attempt to address more directly the distinctive roles courts and legislatures should play in that dialogue and under

¹⁴ A. Bickel *The Least Dangerous Branch*: 2nd ed (New Haven: Yale University Press, 1986) at 129. Bickel drew on the work of Thayer who argued that one of the greatest dangers of judicial review was that the people and legislators would turn many "subjects over to the courts; and what is worse,fall into a habit of assuming that whatever they could constitutionally do they may do – as if honor and fair dealing and common honesty were not relevant to their inquiries... [the practice of judicial review] is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people and to deaden its sense of moral responsibility." J.B. Thayer, *John Marshall* (Boston: Houghton Mifflin, 1901) at 106-7 quoted in *The Least Dangerous Branch* at 21-22.

¹⁵ See for example my "Institutional Choice, Co-operation and Struggle in the Age of the Charter" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996).

¹⁶ F.L. Morton et al., "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis" (1995) 5 N.J.C.L.1; J. Kelly, "The Charter of Rights and the Rebalancing of Liberal Constitutionalism in Canada" (1999) 37 Osg. Hall L.J. 625.

¹⁷ "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osg. Hall L.J. 75 at 80.

what conditions dialogue should be conducted under section 1 or section 33 of the *Charter*.

Before, I outline and assess three very different understandings of dialogue between courts and legislatures and relate them to the structure of the *Charter*, it may be helpful to reflect briefly on some differences between all dialogic theories and conventional constitutional theory. Whether based on Robert Bork's theory of courts applying the original understanding of the Constitution, Ronald Dworkin's theory of courts engaging in a moral reading of the Constitution and enforcing rights as trumps or John Hart Ely's theory of the courts ensuring a functioning democracy that respects minorities, all conventional constitutional theories are based on the assumption of judicial supremacy in enforcing the constitution, however thick or thin it may be. They all focus on preventing judicial mistakes by defining the proper role for judicial review in a democracy. In contrast, dialogic theories of judicial review contemplate that judges should not necessarily have the final word. They focus on the ability of legislatures and others to respond to judicial mistakes.

Dialogic theories should not be confused with either moral relativism or judicial deference. They can make room for strong judicial voices that can proclaim what is right and just. A judge employed in dialogic judicial review may act and think as if she was Dworkin's Hercules, but the difference is that dialogic theories require the judge to consider the state's case for limiting the right and allow legislative corrections should society think Hercules has made a serious mistake.¹⁸ Dialogic theories make room for a strong judicial voice to articulate concerns about principles such as minority rights, fair process and fundamental values that may be neglected in the legislative process while not giving five Justices on the Court—who are bound to make mistakes because they are human—the final word.

In their emphasis on democracy and rejection of "one right answer" theories, dialogic theories of judicial review may seem to smack of moral relativism. For many influenced by the American tradition of judicial review, the danger of a *Dred Scott* or a *Lochner* may be worth securing the victory of a *Brown v. Board of Education*. But dialogic theories would allow judges to decide *Brown* while recognizing that society may do much to resist its just conclusion. We now know that *Brown* was not much of an immediate victory.

¹⁸ Operating within the framework of the judicial supremacy promoted by the American Bill of Rights, Dworkin is forced to argue that the victories of judicial activism such as *Brown* outweigh the dangers of judicial activism gone astray in cases such as *Dred Scott* and *Lochner* and the dangers of judicial passivism. R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 375-6. He also suggests that "truly unpopular decisions will be eroded because public compliance will be grudging" and that "old judges will eventually die or retire and be replaced by new judges appointed because they agree with a President who has been elected by the people." R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 148. This is a weak defence of judicial activism that reflects the limited means of responding to judicial decisions without something akin to ss.1 and 33 of the *Charter*.

An explicit and temporary southern override of *Brown* may not have been much worse than its sub rosa, lengthy and violent resistance. It would have been more candid. Dialogic theories of judicial review can enhance democracy by requiring legislatures and the public to confront their prejudices and fears. Sometimes they will give in to these forces, but not generally. When they do give in, nothing, not even judicial supremacy, will save the society from itself.

Once one leaves the *Brown* scenario of patent injustice, dialogic theories are even more congenial. They accommodate a range of reasonable views and encourage continuous discussion and reform. They make room for multiple voices and multiple institutions and a potentially endless circle of judicial correction of legislative mistakes and oversights followed by legislative correction of judicial mistakes and oversights. The dialogue promoted by the Canadian constitution is both traditional and post modern in spirit. It is traditional because it recognizes the fallibility of human behaviour and allows legislatures ample room to articulate and preserve a distinct Canadian political identity should they so desire. It is post-modern because it can go on and on and it does not presuppose final or right answers to the difficult questions that we as a society discuss.

A. *Dialogue Based on Co-ordinate Construction of the Constitution*

The oldest dialogic theory is that of co-ordinate construction espoused by Thomas Jefferson and James Madison. Jefferson was distrustful of giving the judiciary the final say in declaring the meaning of Constitution. He believed that if judges "could decide what laws are constitutional...for the Legislature and Executive also, would make the judiciary a despotic branch."¹⁹ Madison similarly expressed concerns that if the constitutional interpretations of courts were final "this makes the Judiciary Dept. paramount in fact to the Legislature, which was never intended and can never be proper".²⁰ Co-ordinate construction gives the legislature the power not only to reply to court decisions, but to ignore them and to interpret the constitution for itself. President Andrew Jackson relied on this theory when he vetoed a national bank that he thought was unconstitutional even though the Court had ruled otherwise. This sense that what the courts have found legal may nevertheless be constitutionally improper is not dangerous. Indeed it is congruent with our understanding of constitutional conventions.²¹ The theory of co-ordinate construction, however, allowed Jackson to ignore a

¹⁹ Jefferson to Abigail Adams as quoted in M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) at 15.

²⁰ As quoted in C. Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986) at 96. As Wolfe notes, Madison's view was that "other branches, in matters before them, are not bound by judicial opinions of constitutionality." *Ibid.* at 96 See also R. Burt *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992) ch.2 on Madison's views.

²¹ For arguments about the danger of reducing issues of constitutionality to legality see my "The Attorney General and the Charter Revisited" (2000) 50 U.T.L.J. 1

landmark Court ruling that Georgia had no power over Cherokee land, reportedly by stating that the Chief Justice "has made his decision and now let him enforce it."²² When taken to this extreme, the theory of co-ordinate construction suggests that a judicial decision is just one particular interpretation of the Constitution and not entitled to any more respect than a rival interpretation made by the executive or the legislative.²³ In other words, it suggests that what the Court has concluded to be illegal and unconstitutional may be considered by the legislature and the executive to be constitutional.

Despite (or perhaps because of) these fairly radical implications, the doctrine of co-ordinate construction is making something of an academic comeback. Robert Burt has defended a strongly dialogic theory of the American Constitution which would make the Supreme Court "equal, not hierarchically superior, to other branches".²⁴ John Agresto likewise argues that "constitutional adjudication and interpretation is a shared endeavor of the polity as a whole and not the final prerogative of the Court".²⁵ He is drawn to co-ordinate construction because of the limited means that American legislatures have to respond to the Court's constitutional decisions, but he might be satisfied with something akin to a section 33 override that would allow the legislature to correct clear judicial mistakes. Mark Tushnet would not stop at section 33. He argues that by suggesting that legislative reversal of the Court's constitutional decision is extraordinary, section 33 "may perpetuate the illusion that the Supreme Court can actually save us from ourselves. Why not go all the way?" His recent proposal for "populist constitutional law" would mean that the "people acting outside the court can ignore what the courts say about the Constitution, as long as they are pursuing reasonable interpretations of the thin Constitution."²⁶

²² S. Goldman, *Constitutional Law and Supreme Court Decision-Making* (New York: Harper and Row, 1982) at 33. Jackson explained his veto of the bank bill on the basis that "the opinion of the judges has no more authority over Congress than the opinion of the Congress over the judges, and on that point the President is independent of both. Each public official who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others." As quoted in J. Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984) at 118.

²³ "Under the adjudicative version of the separation of powers, unpersuaded governments would be free to disregard such judicial opinions and continue acting on their own views of constitutional requirements." R. Knopff and F.L. Morton, *Charter Politics* (Toronto: Nelson, 1992) at 179.

²⁴ R. Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992) at 3.

²⁵ J. Agresto, *The Supreme Court and Constitutional Democracy*, *supra* n. 22 at 119. Although he unfortunately shows no awareness of the Canadian approach, Agresto indicates that: "The perfect constitutional solution to the problem of interpretative finality and judicial imperialism would have been for the judiciary to possess the some legislative relationship to Congress as that which governs the executive." *ibid.* at 134

²⁶ M. Tushnet, *Taking the Constitution Away From the Courts* (Princeton: Princeton University Press, 1999) at 175, 33, 186. Tushnet's preference is for democracy, but he seems to assume that the people will want to think in terms of constitutional law which is not the most obvious vehicle for populism. See M. Mandel, "Against Constitutional Law (Populist or Otherwise)" (2000) 34 U. Richmond L.Rev. 443 at 459.

Transported to the Canadian context, Tushnet's proposal would authorize legislatures to act on their rival interpretation of the Constitution without resort to section 33. Parliament's interpretations of what constitutes a fair trial or equality would have as much claim to respect as the Court's. Tushnet does not seem to fear the implications that this may have for accused or unpopular minorities.²⁷

A Canadian commentator who has been attracted to co-ordinate construction is McGill political scientist Christopher Manfredi. He argues that constitutionalism will become meaningless if courts, just as much as the executive and the legislature, are given unlimited and unchecked power to act in the name of the constitution. Manfredi's concern about this "paradox of liberal constitutionalism" would have been shared by both Jefferson and Madison who, as discussed above, embraced co-ordinate construction. Manfredi is sceptical about the use of section 1 of the *Charter* and legislative replies to court decisions to avoid judicial supremacy because the judiciary still decides whether limitations on rights are justified in subsequent *Charter* litigation.²⁸ This makes sense in the light of a political theory that assumes that every institution of government is self-interested and maximizes powers, but discounts both the frequent and rapid nature of replies to many *Charter* decisions and the Court's willingness to uphold reasonable limitations on rights under section 1.²⁹ Manfredi is more optimistic about the use of the section 33 override which he sees not only as a means for Parliament to "reinstate" policies that have been overturned by the court, but as a means to "assert its equal authority to interpret the *Charter*."³⁰ He uses *Askov* and *Seaboyer* as examples of cases in which Parliament could have used the override to re-interpret the *Charter* right, presumably so that it would be less protective of the accused's interests. Like Tushnet, he assumes that legislatures are competent and interested in engaging in constitutional interpretation and that they will not interpret the constitution in a self-interested manner.

In my view, it is difficult to think that Parliament would do a better job of interpreting the right to full answer and defence or the right to a trial in a reasonable time than the courts. Given Parliament's interest in crime control and victims' rights, the tendency would be to minimize and even trivialize these rights. Rejecting the idea of co-ordinate construction, however, does not mean

²⁷ In earlier work, he suggested that legislative enactment of a criminal law that the courts would surely hold unconstitutional might be imprudent. M. Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94 Mich.L.Rev. 245 at 262-3.

²⁸ C. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Toronto: McClelland and Stewart, 1993) at 37-39, 197.

²⁹ In subsequent work, Manfredi argues that "genuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation" and on this definition only occurs in about a third of cases. C. Manfredi and J. Kelly, "Six Degrees of Dialogue" (1999) 37 Osg. Hall L.J. 513 at 524.

³⁰ C. Manfredi, *Judicial Power and the Charter*, *supra* n. 28 at 204.

that the Court should have had the last word in either of these two matters. Parliament could have enacted its own statutory regime to ensure speedy trials which could then be tested in the courts to determine if it infringed the Court's interpretation of the right or could be justified as a reasonable limit on the right. At this juncture, the Court might well defer to Parliament's judgment and knowledge about trial delays and available resources. If, however, Parliament attempted to trivialize the right, the Court could strike down the legislation regardless of what Parliament might think a reasonable time for a trial might be. As will be described below, Parliament was able to respond to *Seaboyer* without employing the override because it broadened the debate by reforming the entire law of sexual assault. This was a constructive dialogue, but not one in which Parliament told the Court that its interpretation of the right to full answer and defence was wrong. The robust theory of co-ordinate construction may not be necessary to prevent the judicial supremacy that its proponents fear.

I agree with Professor Manfredi on one point and that is the propriety of using the override to reverse a judicial decision. If Parliament simply had sought to reverse *Seaboyer*, then, as suggested by a Parliamentary sub-committee on the status of women, the override should have been used. Such a use of the override need not, however, be based on the legislature's claim of co-ordinate authority to interpret the Constitution. In fact, the use of the override might uphold the Court's interpretation of the *Charter* as valid while suspending the operation of the decision (and indeed the applicability of the *Charter* right to the new legislation) for a temporary period of time. The Court's interpretation of the right would not be extinguished and would likely play a role in determining whether the override should be renewed. The override preserves the Court's controversial interpretation of the constitution in a manner that will not occur if the override is not used and the Court upholds legislation that reverses its earlier decision.

Despite its lineage, the doctrine of co-ordinate construction challenges conventional understandings of the rule of law which suggests that the legislature should respect the Court's interpretation of the Constitution. The idea that the legislature has as much if not more right than the court to say what fundamental values, legal, equality or minority rights mean in a particular context and then act on its own interpretations also makes the legislature a judge in its own majoritarian causes. Co-ordinate construction also sacrifices the distinctive role of courts and legislatures by suggesting that they both should devote their different talents to the same exercise: constitutional interpretation. Section one allows legislatures plenty of room to engage with the Court over the objectives and alternatives considered in limiting rights without suggesting that the legislature should assert its interpretation of substantive rights over that of the Court. If the extraordinary and populist doctrine of co-ordinate construction is ever invoked to reverse a judicial misinterpretation of *Dred Scott* or *Lochner*-like proportions, it should be done with the special safeguards of the override. The override ensures that the public is alerted and that the Court's own interpretation of the *Charter* is preserved to be re-considered in calmer times when the override expires.

B. *Dialogue Based on the Court's Accountability to Society*

Some theories of dialogue suggest that courts are influenced by the political feedback they receive from legislatures and society and will not and should not stray too far from the democratic mainstream. The origins of this approach are found in an influential 1957 article by Yale political scientist Robert Dahl who concluded that as an empirical matter, the "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." Dahl also argued as a normative matter that "if the Court did in fact uphold minorities against national majorities, as both its supporters and critics often seem to believe, it would be an extremely anomalous institution from a democratic point of view". In an extraordinary statement to make in the wake of *Brown v. Board of Education*, Dahl even suggested that if the Court supported "minority preferences against majorities" it would "deny that popular sovereignty and political equality, at least in the traditional sense, exist in the United States."³¹ Dahl's majoritarian view of both democracy and judicial review would deprive the Court of what his contemporary Bickel clearly saw as its anti-majoritarian role. Dahl's approach is disturbing because it suggests that minorities could be permanently isolated and ganged up upon. It also begs the question of why bother assigning the task of judicial review to the independent judiciary when elected politicians could more safely be relied upon to reflect the wishes of the majority. Despite these disquieting implications, Dahl's radical approach to dialogue, like that of Jefferson, seems to be making something of a comeback.

Like Dahl, many of the commentators who see dialogue as a form of political interchange and accountability focus on the important task of positive description of the place of the Court in society. Charles Epp argues that the rights revolution in Canada relies less on either the *Charter* or the policy dispositions of the Court and more on the support structure provided by rights advocacy groups, legal aid, lawyers and government support. As a normative matter, he suggests that his conclusion that rights require broad support in civil society helps resolve the tension in conventional constitutional theory between democracy and rights and the power of majorities and judges.³² Ted Morton and Rainer Knopff agree about the importance of support structure or what they provocatively call "the Court Party"³³, but dispute Epp's conclusion that the *Charter's* support structure was representative or gave it democratic legitimacy.

³¹ R. Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker" (1957) 6 J. of Public Law 279 at 285, 291, 283.

³² C. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998) at 197-99; C. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms" (1996) 90 American Political Science Rev. 765.

³³ F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party*, *supra* n. 5 at 25. I have argued elsewhere that the so-called Court Party is neither a unified Party and that its members did not depend on the Court for their power. See my *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 117-118.

Whether one accepts Epp's more optimistic and pluralistic views or Morton's and Knopff's more pessimistic and majoritarian views,³⁴ they both follow Dahl in presuming that courts as a matter of democratic theory should not stray far from the democratic mainstream. Terri Peretti also follows Dahl by arguing that the tension between democracy and judicial review can be resolved by the Court making "politically sensitive" decisions designed to respond to political messages from other branches of government and to maintain the Court's public support and prestige.³⁵ All of these commentators contemplate a dialogue in which courts and legislatures speak in similar voices that reflect and defer to majority sentiment. The goal of the dialogue is to reach agreement, with the Court often following the legislature. Political theories of dialogue stress the Court's ultimate accountability to the legislature and society. In the Canadian context, they would suggest that legislatures, because they are closer to the will of the majority, should be able to reverse unacceptable court decisions without resort to the override.

Whatever its merits as a matter of empirical description, the idea that the independent courts should be accountable to the legislature and the majority should not serve as a normative guide for the participants in the dialogue. Like theories based on co-ordinate construction, theories of dialogue based on the Court's accountability sacrifice the distinctive role of courts and legislatures by suggesting that they both should devote their different talents to the same exercise: the discovery and reflection of majority sentiment. There are dangers in stressing the Court's accountability to legislatures and society or the importance of agreement in the dialogue. Although the Court should be open to education by the legislature about its objectives and why it has rejected seemingly less intrusive alternatives, the Court should be true to its anti-majoritarian nature and role, its precedents, and its own way of reasoning even if that produces a judgment that promotes widespread or focussed opposition in civil society or one that invalidates a legislative reply to an unpopular decision and provokes the use of the override. The safety valve of the override should allow "courts

³⁴ In reaching their conclusion that the Charter revolution is "fundamentally undemocratic", Morton and Knopff rely in part on Lord Durham's conception that "parliamentary sovereignty was the key to protecting rights." *The Charter Revolution and the Court Party*, *supra* at 149, 153. Although he did advocate responsible government, Durham was also a foe of minority rights and federalism. He recommended legislative union between Québec and Ontario as a means to end "the vain endeavour to preserve a French-Canadian nationality in the midst of Anglo-American colonies and states". *Lord Durham's Report* ed G.M. Craig (Toronto: McClelland and Stewart, 1963) at 50. Morton's and Knopff's unapologetic reliance on Durham reveals much about the majoritarian premises of their understanding of democracy.

³⁵ T. Peretti, *In Defence of a Political Court* (Princeton: Princeton University Press, 1999) at 188. This understanding of judicial review would make opinion polls on the public's reaction to Court's decisions relevant. The available data suggest considerable support for the Court in some areas including gay rights, but less support in other areas such as Aboriginal rights.

to be courts and legislatures to be legislatures”³⁶ without switches in time by the Court to save the Court. Strong and principled judicial interventions in the dialogue will assure that something of value that would not ordinarily be heard in democratic conversations will be added, even if the Court’s contribution ultimately does not prevail. If the assertion of majoritarian sentiment over principle and minority rights can ever be accepted (I doubt that it can), it should be done with the override so that the public is alerted to what is being done in its name and the Court’s contribution, for right or wrong, is preserved for future generations to judge.

C. *Dialogue Based on Courts and Legislatures Playing Distinct but Complementary Roles*

Alexander Bickel produced the most sophisticated theory of judicial review as based on courts and legislatures playing distinct and complementary roles in a dialogue between themselves and with society. Unlike others such as Ronald Dworkin and John Hart Ely who followed in his footsteps in attempting to justify principled and anti-majoritarian judicial review, Bickel recognized that even the Court’s final judgments on matters of constitutional principle were not and probably should not be the final word. In 1970, he wrote that “virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has the edge...[but] the effectiveness of the judgment universalized depends on consent and administration.”³⁷ The Court “interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation....And it is a conversation, not a monologue.”³⁸ Bickel was under no illusion that the Court necessarily would provide the final answer to the controversial issues it pronounced upon and he was drawn to the study of those difficult and controversial cases which placed “the Supreme Court at the bar of politics.”³⁹

Bickel’s theory of dialogue reflects its origins in the legal process tradition. The idea of dialogue emerged naturally from the legal process interest in how individuals and institutions would respond to court decisions. The connections

³⁶ L.E. Weinrib, “Learning to Live with the Override” (1990) 35 McGill L.J. 541 at 568. For arguments that s.33 allows the courts to be bolder in their interpretation of rights see P. Weiler, “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights” (1980) Dalhousie Rev. 205; P. Weiler, “Rights and Judges in a Democracy: A New Canadian Version” (1984) 18 U.Mich.J. Law Reform 51; L.E. Weinrib, “Canada’s Constitutional Revolution: From Legislative to Constitutional State” (1999) 33 Is. L.R. 13 at 49.

³⁷ A. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1970) at 91.

³⁸ A. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1974) at 111.

³⁹ This is the subtitle of Bickel’s most famous work: *The Least Dangerous Branch*.

that Bickel drew between constitutional law and statutory interpretation and procedural law reflected legal process concerns.⁴⁰

The structure of the American constitution, which has no limitation or override clauses and since *Marbury v. Madison* was based on judicial supremacy in defining the constitution, led Bickel to conclude that dialogues between the Court and the other branches of government were most easily constructed when the Court found ways, including doctrines of statutory construction and procedural ploys, not to decide constitutional issues.⁴¹ The passive virtues allowed the Court to engage "in a Socratic colloquy with the other institutions of government and with society as a whole concerning the necessity for this or that measure, for this or that compromise. All the while, the issue of principle remains in abeyance and ripens."⁴² For Bickel, the freest and least dangerous form of dialogue under the American constitution occurred when the Court based its decision on non-constitutional grounds. Bickel's insights about the dialogue promoted by passive virtues may, however, apply to judicial review if the structure of the *Charter* is "Bickellian" in the way it promotes dialogues between courts and legislatures under sections 1 and 33.⁴³ It also suggests that there is less need for the use of the passive virtues to avoid or minimize constitutional interpretation if *Charter* judgments are not, even in theory, final.⁴⁴

When the time was ripe and judgment could not be avoided, Bickel believed that the Court should decide constitutional issues and it should decide them on the basis of principle properly crafted and defended. Bickel conceded that the court made policy, but argued that "the search must be for a function....which

⁴⁰ Hart and Sacks never completed a proposed chapter on constitutional law, but had a magnificent chapter on statutory interpretation. See H. Hart and A. Sacks, *The Legal Process* (Westbury: New York, 1994 completed 1958) c.7. Bickel taught the legal process at Yale. On the continued relevance of the legal process and the many legal process ideas found in *Charter* jurisprudence see my "What's New and Old About the Legal Process?" (1997) 47 U.T.L.J. 363.

⁴¹ Thus a decision employing the passive virtues to avoid a constitutional issue "radiates little of general consequences" while a full-blown constitutional decision "can be revised or reversed – at least in theory – only by the Court itself." *The Least Dangerous Branch*, *supra* n. 14 at 202-3.

⁴² *Ibid.* at 70-71.

⁴³ G. Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Avoids)" (1991) 105 Harv.L.Rev. 80 at 124. Calabresi focuses on s. 33 as the vehicle for what he calls judicial enforcement of constitutional accountability. Section 1 of the *Charter* has served many of the "second look" functions that Calabresi, like many others, associates with s. 33.

⁴⁴ But see P. Monahan, "The Supreme Court of Canada in the 21st Century" in this issue for arguments about the attractions of constitutional minimalism. In my view, the avoidance and minimalization of constitutional judgment is more necessary to allow "democratic processes room to manoeuvre" in the context of the judicial supremacy promoted by the American Bill of Rights. Under the *Charter*, even bold and broad constitutional pronouncements of the Court are not necessarily the final word. C. Sunstein, *One Case at a Time* (Cambridge: Harvard University Press, 1999) at 54.

differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it..."⁴⁵ This famous statement is based on classic legal process concerns about differences between institutions and rejects the idea that courts and legislatures should both engage in either the processes of constitutional interpretation or the reflection of majority sentiment. The Court's use of principle also meant that Bickel did not believe the dialogue between courts and legislatures was a conversation between equals. The Court played the role of Socrates while the legislature and society played the role of the sometimes strong-willed students. Unlike proponents of co-ordinate construction or political dialogue, Bickel was sensitive to the fact that the Court spoke through final judgments that should be obeyed while recognizing that they may not be the final word.

Bickel feared that that "political opposition could defeat the Court's decision" in *Brown v. Board of Education*.⁴⁶ This resistance, whether couched in the constitutional language of states' right or the racist cries of a threatened white majority, however, did not justify the Court retreating from its point of principle. The Court's subsequent decision to allow desegregation "in all deliberate speed" was based on dialogue that preserved the Court's point of principle in the face of massive resistance. "The Court placed itself in position to engage in a continual colloquy with the political institutions, leaving it to them to tell the Court what expedients of accommodation and compromise they deemed necessary. The Court would reply in the negative- and did eventually once so reply – only when a suggested expedient amounted to the abandonment of principle."⁴⁷ Unlike dialogic theories based on co-ordinate construction or political interchange between the branches of government, Bickel's account of dialogue made room for a strong judicial voice of principle that would resist opposition from the majority and rival constitutional interpretations from the other branches of government. It shows that dialogic theories need not be based on moral relativism or judicial deference.

Bickel's understanding of the court's role has influenced subsequent theorists who have constructed dialogic theories of both constitutional and statutory interpretation. In 1981, Guido Calabresi proposed that courts should use a variety of Bickellian common law techniques to force legislatures to reconsider statutes that were obsolete or could infringe fundamental values.⁴⁸ Calabresi's work helped rejuvenate interest in both the legal process and

⁴⁵ Bickel, *The Least Dangerous Branch*, *supra* at 24.

⁴⁶ *Ibid.* at 258, 267.

⁴⁷ *Ibid.* at 254. The case where the Court intervened in the name of principle was the famed Little Rock case of *Cooper v. Aaron* 358 U.S. 1 (1958).

⁴⁸ *The Common Law in the Age of Statutes*, (Cambridge: Harvard University Press, 1981) Even in this early work, Calabresi cited the notwithstanding provision of the Canadian Bill of Rights as an example of a clear statement rule that required legislatures "to speak to their constituents in open and candid ways, before actions involving the penumbra of constitutional rights are upheld" by the court. *Ibid* at 18.

statutory interpretation. New legal process scholars William Eskridge and Phillip Frickey subsequently referred to clear statement rules of statutory interpretation as "creating a domain of 'quasi-constitutional law'" that could enhance democracy by requiring legislatures to consider and be clear about their treatment of the important values that the Court identified.⁴⁹ Eskridge proposed a new "meta-canon" of statutory construction that would have the courts decide close cases "in favor of interests that have been subordinated in the political process" and other constitutional values. This would allow "the Court to conduct an illuminating discourse with the legislature about our nation's public values, but without seriously obstructing or intruding into the political system."⁵⁰

Calabresi argued that forms of judicial review that avoided the polar extremes of judicial and legislative supremacy were Bickellian and too often ignored in debates about bills of rights. He proposed intermediate forms of judicial review in which courts would protect "society's outcasts" and promote "constitutional accountability" by not allowing legislatures to hide their attempts to limit a broader range of rights, even if that meant that legislatures had to take a second look at the law.⁵¹ This form of judicial review was democracy reinforcing by promoting deliberation and requiring legislatures to be clear about how they treated rights. Calabresi suggested that the Canadian *Charter* with its "Bickellian" structure promoted this type of constitutional accountability. He focussed on section 33 as the ultimate clear statement rule, but his analysis could well be applied to section 1 of the *Charter* which requires limits on rights to be prescribed by law. The constitutional accountability that Calabresi sought to promote was not one that rendered the court accountable to the legislature's interpretation of the constitution or its expression of majoritarian preferences. Rather it required legislatures to be candid about how they treated rights identified by the Court and allowed the Court to strike down legislation that clearly violated the rights of vulnerable minorities.

Michael Perry followed Bickel in arguing that the unelected and anti-majoritarian Court should serve as an agent of "moral re-evaluation and possible growth" in its dialogues with legislatures and society. The courts have a unique role to play in the dialogue because of their commitments to "self-

⁴⁹ W. Eskridge and P. Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Law-Making" (1992) 45 Vand. L.R. 593 at 597, 631. See also W. Eskridge, "Public Values in Statutory Interpretation" (1989) 137 U.Penn.L.Rev. 1007; C. Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103 Harv.L.Rev. 405 at 468ff.

⁵⁰ W. Eskridge, *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994) at 294,276.

⁵¹ G. Calabresi, "Foreword: Antidiscrimination and Constitutional Accountability (What the Bork Brennan Debates Ignores)" (1991) 105 Harv.L.Rev. 80 at 103, 106.

⁵² M. Perry, *The Constitution, the Courts and Human Rights* (New Haven: Yale University Press, 1982) at 100-102, 111, 142. He argued that "What the majority comes to believe in the long term, after having been rebuffed by the electorally unaccountable Supreme Court in the short-term, is more likely to be morally correct than are established but untested, unreflective moral conventions" relied upon by politicians who must stand for re-election. *Ibid.* at 111.

critical rationality” and “the ‘flesh and blood of the actual case’”.⁵² Legislatures enact legislation in order to solve a social problem, but judges see the actual effect that the measure will have on a particular individual or group. Dialogue will be enriched if legislatures and courts are true to their own institutional identities. Perry recognized, however, that judges are not infallible Platonic guardians and there was a need to reconcile judicial power with democracy. In 1982, he hung his hat on the ability of Congress to restrict the jurisdiction of the federal courts. Attempting to curb or change the Court (or the Constitution) is one of the few means for American legislatures to respond to the constitutional decisions. In more recent work, however, Perry argued that the Canadian *Charter* had devised a better way to reconcile strong forms of judicial review with democracy. “The Canadian innovation represents an effort to have the best of two worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive constitutional issue *and* an opportunity for electorally accountable officials to respond, in the course of ordinary politics.”⁵³ Although Perry contemplates the use of the override, much of his analysis applies equally as well to section 1. He holds out the hope that under the Canadian system “the power of judicial review would then be less fearsome, less threatening, to the politicians and others now so exercised and angered by what they perceive to be the excesses of ‘judicial imperialism’” and that it would not “dwarf the political capacity of the people” and “deadens its sense of moral responsibility”⁵⁴ because of the ability of legislatures to reply to Court decisions.

Both Perry and Calabresi relied on the work of Paul Weiler for their understanding of the dialogic nature of the *Charter*. Weiler’s early work was sceptical about giving the Court the final word in interpreting the constitutional division of powers, but expressed optimism about the role of Courts in requiring legislatures to make clear statements if they wished to infringe civil liberties.⁵⁵ In an 1980 article that is widely seen as providing the intellectual foundation for the section 33 override, Weiler argued that judicial review could be justified in Canada provided that the *Charter* had a notwithstanding clause. The override would result in “a creative compromise between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority over constitutional matters.”⁵⁶ Unlike in the former, aggrieved citizens could use litigation to engage their governments “in a dialogue of principle” and not “be fobbed off as a troublemaker who is raising issues too

⁵³ M. Perry, “The Constitution, the Courts and the Question of Minimalism” (1993) 88 *Northwestern Univ.L.Rev.* 84 at 158; M. Perry, *The Constitution in the Courts* (New York: Oxford University Press, 1994) at 200.

⁵⁴ M. Perry, “The Constitution, the Courts and the Question of Minimalism”, *supra* at 159.

⁵⁵ See P. Weiler, *In the Last Resort* (Toronto: Carswell, 1974). As discussed below, the division of powers is less amenable to the form of dialogic judicial review that Weiler envisioned under the *Charter*.

⁵⁶ P. Weiler, “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights” (1980) *Dal.L. Rev.* 205 at 232.

touchy to be handled by politicians, and who does not represent enough votes to carry political clout anyway". Unlike in the United States, however, governments would not have to accept judicial solutions to complex issues of social policy if they were prepared to enact legislation notwithstanding the *Charter* and "take the flak for such a measure".⁵⁷ Even the use of the section 33 override does not end the dialogue because of its sunset provision which requires a government to re-enact the override every five years – a time period that "requires the legislature, the electorate, and, also, one hopes, the judges to think the problem through again and again."⁵⁸

Dialogic judicial review for Weiler did not mean judicial deference to the legislature's expression of majority sentiment or its interpretation of the constitution. Rather, "a major virtue" of the override was "that it could elicit more vigorous judicial scrutiny of a broad range of civil rights issues, because it would give judges a sense of security from the presence of a legislative safety net beneath them." At the same time, Weiler argued that the strengths of governments produced by the Canadian Parliamentary system would allow them to respond to judicial decisions, and if anything, made strong judicial review more necessary and less dangerous than in the American system of divided government. The "new partnership" the *Charter* created between courts and legislatures "rests on the assumption that the chief threat to rights in Canada comes from legislative thoughtlessness about particular intrusions, a fault that can be cured by thoroughly airing the principle in a judicial forum."⁵⁹ His was a model of constitutional accountability and dialogue in which courts would focus on issues of legal principle and legislatures would respond in those cases where it could not live with the principles the Court declared.

D. *The Supreme Court's Understanding of Dialogue*

The Supreme Court has discussed dialogue between the Court and legislatures in a few cases. These brief discussions suggest some attraction to all theories of dialogue outlined above, but an unequivocal commitment to none. In *Vriend*,⁶⁰ the Court indicated that under the *Charter*, "the work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under section 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it." The idea that the court reviews the work of the legislature and that the legislature can respond by enacting new laws under either sections 1 or 33 contemplates a dialogue that follows the structure of the Constitution and allows each institution to play distinct and complementary roles. The Court must try its

⁵⁷ *Ibid.* at 233-34.

⁵⁸ P. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 U.Mich.J.Law Reform 51 at 82.

⁵⁹ *Ibid.* at 81, 84.

⁶⁰ [1998] 1 S.C.R. 493 at para. 139.

best to understand the legislature's objectives and justifications for limiting rights⁶¹, but consistent with a Bickellian approach, the Court must insist on principles and proportionality even if that means that the legislature must, as would have been the case in *Vriend*, use the override to express a fundamental point of disagreement with the Court. Under this theory, democracy is enhanced when the legislature responds to the Court's decision and is held accountable by the people for that response. The override would be the main vehicle for the legislature to make the Court accountable. Use of the override, however, would not change the Court's judgment and the judgment would still in a moral sense at least hold the legislature to account when the override expired. This understanding of dialogue extrapolated from the discussion in *Vriend* is consistent with a Bickellian theory of dialogue that assigns the Court and the legislature distinct and complementary roles.

In *Mills*,⁶² the Court returned to the theme of dialogue and mutual accountability and drew some analogies with the common law by indicating that "if the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy." This recognizes the important similarities between the relationship of the Court and the legislature under the common law and the *Charter*. *Mills* suggests that democracy is enhanced not so much by requiring the legislature to respond in the ways contemplated in *Vriend*, but rather by the Court adopting "a posture of respect" and leaving room for the legislature to reply to its decisions in that case without the use of the override. This interpretation may indicate some sympathy for the idea that the Court is ultimately accountable to the legislature and society. Under this scenario, the Court may owe the legislature an increased margin of deference when the legislature has found its previous decision to be unacceptable. Taken to the extreme, the notion of the Court's accountability to the legislature may be in tension to judicial independence and the Court's anti-majoritarian role.⁶³

The Court in *Mills* also demonstrated some attraction to a third theory of dialogue, namely that of co-ordinate construction. The Court stated that "courts do not hold a monopoly on the protection and promotion of rights and freedoms" and suggested that the task before it was to define the competing rights of the complainant to equality and privacy with the accused's right to full answer and defence. One reading of *Mills* suggests that the Court was deferring to Parliament's own interpretation of the competing rights even though the majority of the Court had interpreted the rights quite differently in a previous case on the same

⁶¹ *M. v. H.*, [1999] 2 S.C.R. 3 at para. 328, per Bastarache J.

⁶² (1999), 139 C.C.C. (3d) 321 at paras. 56-58.

⁶³ A. Lamer, "The Rule of Law and Judicial Independence" (1996) 45 UNB L.J. 3 at 13; P. Hughes, "Judicial Independence and the Supreme Court of Canada" *supra* 181.

⁶⁴ Namely the Court's prior decision in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1. Another reading discussed below suggests that trial judges, not Parliament, will define the ambit of the competing rights in individual cases.

issue.⁶⁴ The issue of the degree of deference, if any, owed to legislative interpretations of the *Charter* will arise with greater frequency as legislatures become more sophisticated about the *Charter* and include preambles in legislation make claims about constitutional interpretation. As suggested above, undue deference to legislative interpretations of the *Charter* presents some danger of Parliament being a judge in its own majoritarian causes and of favouring the rights of the more popular and politically influential over the rights of the less popular. In any event, the Court has in *Vriend* and *Mills* shown itself attracted to all three theories of dialogue discussed above and has not yet committed itself to any one of the theories.

E. Conclusion

Theories of dialogue which give courts and legislatures distinctive but complementary roles respond to many of the objections of those who argue that the dialogue model does not adequately capture the nature of a judicial process which aspires to render final judgment in cases on the basis of principle. They also explain ordinary dialogue under both the common law and section 1 of the *Charter* in which courts remind legislatures of values that might otherwise be neglected or finessed in the legislative process and legislatures respond by expanding or refining the terms of the debate and by making clear why rights have to be limited in particular contexts. They explain less well the extraordinary dialogues that occur when legislatures and courts engage in shouting matches and show downs over whether a particular decision made by the Court was right or wrong. In these cases, the legislature may be claiming to correct a Court that has wrongly interpreted the constitution or has rendered a decision that is unacceptable to society acting through the legislature. The extraordinary nature of these claims and the conflict they produce between the court and the legislature suggest that they should only be made with the special safeguards of the section 33 override.

III. Dialogue Between Courts and Legislatures Before the Charter

Dialogue between courts and legislatures is not a product of the *Charter*. A decision invalidating a statute under the division of powers was a form of dialogue that indicated that the other level of government could enact the legislation. In 1938, John Willis revealed how courts through the use of common law presumptions or canons of statutory interpretation enforced "a sort

⁶⁵ J. Willis, "Statutory Interpretation in a Nutshell" *supra* note 2 at 17, 23. J.A. Corry also recognized the role of "political and constitutional theory" in statutory interpretation. Like Willis, he was sceptical of the values that the courts embraced in the presumptions outside of the criminal law context. J.A. Corry, "Administrative Law and the Interpretation of Statutes" (1935) 1 U.T.L.J. 286 at 293-6.

of common law 'Bill of Rights' or 'ideal constitution'".⁶⁵ With the exception of presumptions of *mens rea* in criminal law, Willis was quite critical of "ancient presumptions" such as those against expropriation without compensation. As will be seen, however, the "ancient presumptions" have been modernized to reflect concerns about human rights and courts have recognized the ability of legislatures to displace all the presumptions by enacting legislation that clearly departed from their values.

A. *Drastic Dialogues Over the Division of Powers*

Although much is often made of the fact that the invalidation of a law under the division of powers only means that the other level of government can enact the same law, the ability of legislatures to engage in dialogue with the Court under the division of powers is quite limited. The legislature whose law was struck down has a fairly limited range of responses. Amending the law to alter its pith and substance may require drastic changes that will distort the policy that the law is intended to promote. Allowing the other level of government to occupy the field may not result in laws that advance the same policies or any law at all. Federal legislation may not be possible where the invalidated provincial law represents only a local majority and a patchwork of provincial laws may not really replace federal legislation. Intergovernmental negotiation has allowed governments to bargain around many division of power rulings,⁶⁶ but there is otherwise no ability to limit or override the division of powers as interpreted by the Court. This may explain why division of power rulings, not *Charter* rulings, have provoked the drastic and desperate replies of changing the Constitution and the Court.

The Court's very first constitutional decision in 1877 was a factor two years later when a bill was introduced to abolish the Court.⁶⁷ In subsequent years, bills were introduced to deprive the Court of considering the constitutionality of provincial laws. Attempting to abolish the Court or restrict its jurisdiction are particularly drastic forms of dialogue – the ultimate in your face replies – but a form of dialogue nevertheless. The Privy Council's decisions holding that the Canadian version of the New Deal was beyond federal powers was an important

⁶⁶ P. Monahan, *Politics and the Constitution* (Toronto: Carswell, 1987). The federal government's use of the spending power and declaratory power can be used as a dialogic response to Court rulings.

⁶⁷ *Severn v. The Queen*, [1878] S.C.R. 70. This and other of the Court's early division of powers decisions were perceived by many as hostile to the growing provincial rights movement. See I. Bushnell, *The Captive Court* (Montreal: McGill Queens, 1992) at 92; J. Snell and F. Vaughan, *The Supreme Court of Canada* (Toronto: Osg. Society, 1985) at 31-2, 113.

⁶⁸ The cases provoked a good deal of Court bashing. A bill to abolish such appeals received second reading in 1939, but then was referred to the courts and because of the War was not considered by the Privy Council until 1947. Appeals to the Privy Council were not abolished until 1949.

factor leading to the abolition of appeals to that body.⁶⁸ They also provoked a constitutional amendment in 1940 (unfortunately too late for the unemployed of the Great Depression) that reversed a Privy Council decision by giving the federal government the power to implement unemployment insurance. These examples suggest that dialogue between the Court and legislatures over the division of powers may have to take the drastic forms of changing the Constitution and the Court. The closest that the Canadian constitution comes to American-style judicial supremacy is the enforcement of the constitutional division of powers.

Although the division of powers is not the best model for dialogic forms of judicial review, I will examine one more division of power case that, because it hinged on statutory interpretation, foreshadowed *Charter* dialogues including the legal and political controversy over *Bill 101*'s requirements that commercial signs only be in french. The case involved a challenge to a Québec City by-law that prohibited the distribution of pamphlets without the permission of the Chief of Police. Laurier Saumur, a Jehovah's Witness, alleged that the by-law was "discriminatory, vindictive, oppressive, constitutes an abuse of power and is therefore unconstitutional, illegal, null and void".⁶⁹ Both the trial judge and the Québec Court of Appeal upheld the bylaw as a valid "police regulation" governing the streets. In a 5:4 decision, the Supreme Court reversed these decisions. Four judges held that the by-law exceeded provincial powers in its attempt to regulate free speech and free religion. Justice Rand argued that the Witnesses were entitled to their freedom as "citizens...not of this or that province but of Canada".⁷⁰ Four other judges concluded that the by-law was a valid provincial attempt to either regulate streets or religion. Chief Justice Rinfret cited the religious insults made by the Witnesses and concluded that Québec City, which he noted had a 90% Catholic population, had "non seulement le droit, mais le devoir, d'empêcher la dissémination de pareilles infamies".⁷¹ The swing judge, Justice Kerwin, based his decision to strike down the by-law on a pre-Confederation statute that protected freedom of religion.⁷² Striking the by-law down on division of powers grounds may have ended the dialogue. As it did after the Court invalidated *Padlock Act*, the federal Parliament would not likely have used its criminal law power in accordance with the wishes of the majority in Québec.

Unlike the constitutional division of powers, however, the pre-Confederation statute could be amended by an ordinary act of the Québec legislature. The legislation was quickly amended to provide that it did not constitute the free

⁶⁹ As quoted in F. Kaufman, "Case Comment", (1953) 1 McGill L.J. 223 at 223-4.

⁷⁰ *Saumur v. City of Québec*, [1953] 2 S.C.R. 299 at 333.

⁷¹ *Ibid.* at 318.

⁷² He upheld provincial jurisdiction over freedom of speech and religion and dismissed an argument based on the implied bill of rights on the basis that "we have not a Bill of Rights such as is contained in the United States Constitution and decisions on that part of the latter are of no assistance." *Ibid.* at 324.

exercise of religion to distribute pamphlets or to make speeches that contained "abusive or insulting attacks against the practice of a religious profession or the religious beliefs of any portion of the population of the Province". The new legislation did not name the Jehovah Witnesses, but clearly targeted their practices. For good measure, it declared that insulting other religions endangered "the public peace and good order in this Province" and was prohibited.⁷³ The Québec legislation was an "in your face" reply that effectively reversed the Supreme Court's decision.

What would have happened had the by-law been struck down under the *Charter*? Unlike under the division of powers, Québec would have been able to reply either under sections 1 or 33. Under section 1, the legislature could argue that the Court had misunderstood its objective of responding to religious insults and attempt to justify why the particular means had been chosen. Québec could be seen as clarifying and refining the terms of the debate by replacing a by-law that gave the Chief of Police open-ended discretion with a law that more clearly defined what was prohibited. The reply legislation would also signal that Québec found the Court's earlier decision to be unacceptable to its majority and that it believed that it had the constitutional powers to regulate religious insults. Under some theories of dialogue, the Court would for those reasons accord the reply legislation an increased margin of deference. Because Québec's amendment so clearly targeted the Jehovah Witnesses and so clearly reversed the Supreme Court's decision, however, there are stronger arguments that the more candid course would have been to invoke the section 33 override. The section 33 override would have signalled that the Court's ruling was unacceptable to the majority in the province. The override would have ensured sober second thoughts by expiring five years after it was invoked. As the matter stood, this reply legislation remained on the books until it was repealed in 1986.⁷⁴

The *Saumur* case is also instructive because it illustrates that a legislative reply, no less than a judicial decision, may not be the final word in the dialogue. The day after Québec's reply legislation was enacted, Saumur again went to court to challenge the new law on the basis that it was "expressly designed to override the decision of the Supreme Court and is contrary to law and an effort to undermine the constitution of the country and to destroy civil liberties."⁷⁵ This challenge was dismissed by the Supreme Court in 1964 on the basis that Saumur's fear that he might be

⁷³ S.Q. 1953-4 c.15 ss.2a,2b.,2c. The legislation received little press coverage at the time because the government was, at the same time, passing more controversial bills to decertify unions with suspected communists. See "Contentious Québec Labor Bills Approved" *Montreal Gazette* Jan.29, 1954 at A3.

⁷⁴ S.Q. 1986 c.96 s.175.

⁷⁵ Petition for interlocutory relief as quoted in *Saumur and Jehovah's Witnesses v. A.G. of Québec*, (1962) 37 D.L.R. (2d) 703 at 718 (Qué.C.A.).

charged under the new law did not give him a sufficient interest to challenge the law.⁷⁶ Today, it is possible that Saumur would be granted public interest standing to challenge the law and the Court would deal with the constitutionality of the legislative reply. Dialogues can continue and, as will be seen in the next section, the Court is now facing a second generation of cases spawned by reply legislation to its first generation of *Charter* rulings.

Judicial second looks at reply legislation raise some of the most difficult and revealing issues about the nature of the dialogue between courts and legislatures. From a political accountability perspective, they involve a show down between the Court and the legislature with the latter having the most majoritarian clout. From the perspective of theories of co-ordinate construction, they pit the Court's interpretation of the Constitution against the legislature's rival interpretation. From the perspective of courts and legislatures playing distinct roles, they provide an opportunity for the Court to be educated about the practical effects of its prior rulings while also allowing the legislature an opportunity to demonstrate what it has learned from the Court's prior ruling and to refine debate about its own objectives and alternatives. In my view, courts should uphold reply legislation only when the legislature has respected the Court's original ruling while refining the law so that it is justified under section 1 of the *Charter*. The idea that the legislature can assert its interpretation of the constitution or its claim to represent the majority over the Court's previous decision should only justify the use of the override.

Saumur and its legislative aftermath indicates how judicial decisions and legislative replies predate the *Charter*. If a majority of the Court had invalidated the by-law under the division of powers, there likely would have been no legislative reply from either level of government. If the matter had been decided under the *Charter*, however, the province could, as it did in response to Justice Kerwin's interpretation of the statute, enact reply legislation. Legislatures retain a more robust range of reply options when their policies are thwarted by the interpretation of the *Charter* or statutes than the constitutional division of powers.

B. *Dialogues over the Interpretation of Statutes*

The pre-*Charter* model for dialogic forms of judicial review is better found in the interpretation of statutes than the interpretation of the constitutional division of powers. The presumptions of statutory interpretation that Willis identified in 1938 have been modernized to take into account the role of the positive state and the post War concern about human rights. Modern presumptions suggest that statutes should, in the absence of clear statements to the contrary, be interpreted in a manner consistent with the *Charter*, international law,

⁷⁶ *Saumur v. A.G. of Québec*, [1964] S.C.R. 252.

Aboriginal and treaty rights, human rights codes, the rule of law and other constitutional values more than the laissez faire values that Willis identified with the ancient presumptions.⁷⁷ As will be argued in the next section, the *Charter* continues this tradition and constitutes the ultimate presumption that legislatures will respect rights unless they clearly articulate and justify departures and limitations on them.

The dialogic nature of the presumptions of statutory interpretation have also been more widely recognized since Willis wrote. Justice La Forest has explained that various presumptions of statutory interpretation are "designed 'as a protection against interference by the state with the liberty or property of the subject'" and have allowed courts "to exercise an important role in the protection of individual liberties even in the absence of an entrenched Bill of Rights." Unlike Willis, however, Justice La Forest stressed that:

If the legislation is clear, of course, the intent of the Legislation must be respected. But what these presumptions ensure is that a law that appears to transgress our basic political understandings should be clearly expressed so as to invite the debate which is the lifeblood of Parliamentary democracy.⁷⁸ Presumptions of statutory interpretation are not final words in a judicial monologue, but reminders to legislatures about fundamental values that they may be inclined to neglect or finesse. Their use by courts requires legislatures to be candid about their treatment of fundamental values. This hopefully produces conditions conducive to accountability and democracy.

The courts use presumptions to start a conversation about the importance of fundamental values and to require clear statements and democratic debates when the legislature departs from the values that the court deems fundamental. A judicial decision applying the presumptions may frustrate the legislature, but it is not the last word if the legislature is willing to enact reply legislation that makes explicit the need to depart or limit the values identified by the court. The common law presumptions can facilitate a constructive dialogue between courts and legislatures not only about fundamental values that might otherwise

⁷⁷ *R. v. Beaugard*, (1986) 30 D.L.R. (4th) 481 at 492 (S.C.C.); *Slaight Communications v. Davidson*, (1989) 59 D.L.R. (4th) 416 at 444 (S.C.C.); *R. v. Sparrow*, (1990) 70 D.L.R. (4th) 385 at 401; *Morguard Investments Ltd. v. De Savoye*, (1991) 76 D.L.R. (4th) 256 at 271-74 (S.C.C.); *Daniels and White v. The Queen*, [1968] S.C.R. 517 at 541; *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at 275; *Zingre v. The Queen*, [1981] 2 S.C.R. 392 at 410 See R. Sullivan, *Dreidger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 320ff; P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed., (Cowansville: Yvon Blais, 1991) at 369ff; R. Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) c.12. Presumptions protect a wide range of human rights from "facile invasion" and ensure they are only taken away "by direct and unequivocal enactment". N. Lyon, "The Central Fallacy of Canadian Constitutional Law", (1976) 22 McGill L.J. 40 at 60.

⁷⁸ *Re Estabrooks Pontiac Buick* (1982) 44 N.B.R. (2d) 201 at 210-11 (C.A.). The case dealt with presumptions concerning respect for property rights, but La Forest J.A. warned that courts must afford "the Legislature the widest possible scope in the performance of its tasks of adjusting private rights to meet evolving social realities. The courts should not, for example, place themselves in the position of frustrating regulatory schemes or measures obviously intended to reallocate rights and resources simply because they affect vested rights." *Ibid.* at 213-14.

be neglected in the legislative process, but also about the need to limit such values in contexts of which the legislature is particularly familiar. If the legislature believes that the Court has wrongly applied the presumption or ignored a clear intent to depart from the values expressed in the presumption, the answer is simply to use its ordinary powers to enact new legislation.⁷⁹

A constructive dialogue will occur if the courts focus on issues of principle that are liable to be neglected or finessed in the legislature and the legislature is candid about when it believes that such principles should be limited or denied in particular contexts. An interesting counterexample occurred in the early 1900's. In 1903, the Supreme Court interpreted a reform of the Canada Evidence Act that made accused and their spouses competent witnesses to make them compellable witnesses for the prosecution. The majority of the Court refused to consider "the consequences which we may think impolitic or undesirable which follow from adherence to the plain language of the statute."⁸⁰ Justice Mills wrote a strong dissent that stressed the importance of the marital privilege, the accused's right against self-incrimination and the overriding principle that "every accused party who is arrested and put upon his trial has a fair trial – that justice is so administered, that the public confidence in the fairness of its administration be maintained unimpaired."⁸¹ In terms of a dialogic form of statutory interpretation which requires the legislature to address questions of fundamental values, the approach of the dissenters is much to be preferred.

Fortunately, the majority did not have the last word as Parliament amended the legislation three years later to make clear that accused and their spouses

⁷⁹ In a case applying the presumption that "the courts require that, in order to adversely affect a citizen's rights, whether as a taxpayer or otherwise, the Legislature must do so expressly", Estey J. observed that "this principle of construction becomes even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved. The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule." *Morguard Properties Ltd v. Winnipeg*, (1983) 3 D.L.R.(4th) 1 at 13 (S.C.C.) This functional insight about the legislative process does not, however, justify a literally restrictive and non purposive interpretation of taxation statutes or even criminal laws. See *Stubart Investments*, (1984) 10 D.L.R.(4th) 1 at 31-2; *R. v. Golden*, (1986) 25 D.L.R.(4th) 490 at 494 (S.C.C.); *R. v. Pare*, (1987) 38 C.C.C.(3d) 97 (S.C.C.). See generally J. Willis, "Recent Trends in Canadian Income Tax Law" (1951) 9 U.T.L.J. 42 at 44; D. Duff, "Interpreting the Income Tax Act", (1999) 47 Can. Tax J. 464, 741; L. Philipps, "The Supreme Court's Tax Jurisprudence: What's Wrong With the Rule of Law" (2000) 79 Can. Bar Rev. 120.

⁸⁰ *Gosselin v. The King*, [1903] 33 S.C.R. 255 at 273.

⁸¹ *Ibid.* at 291. In another dissent, Justice Girouard concluded that because the accused had been denied access to his wife before she reluctantly testified against him in a murder trial that "Not only was the trial illegal, it was not even fair."

could not be compelled by the prosecution to testify. Minister of Justice (and future Justice) Charles Fitzpatrick was forthright in explaining to Parliament that the amendment was necessary to reverse the Court's decision. He argued that Parliament had never intended the result that the Court had reached and that it went against both Canadian and English law.⁸² This case is an example of dialogue, but the reverse that would be expected between an appointed and independent court committed to fundamental principles of criminal justice and an elected legislature responsible to the concerns of its constituents about crime. In this atypical dialogue, it was Parliament and not the Court that was most concerned about fairness to the accused and the principles of fundamental justice. In any event, this early example of dialogue suggests that judicial mistakes in matters of statutory interpretation can fairly easily be corrected.

C. *Dialogues About Fault in Criminal Law*

A more typical example of dialogue between the Court and Parliament occurred with respect to the constructive murder provisions of the Criminal Code. In 1942, the Supreme Court held that a robber was not guilty of murder when his gun discharged in a struggle with the victim during a robbery because the act of pulling the trigger was not his voluntary act.⁸³ The case drew some critical commentary and pressure for Parliament to act increased when in 1946, a robber who accidentally shot a storekeeper in Toronto, was convicted of manslaughter not murder. The next year, the House of Commons enacted a new provision that expanded constructive murder to cover deaths that resulted from robberies and other serious crimes when the accused used a weapon. The Parliamentary debates were a lot less edifying than in 1906. The amendment, which could have sent an armed robber to the gallows for an accidental death, was enacted without "a line of public discussion."⁸⁴ Dialogic theories of judicial review depend on a well functioning and vigilant democracy.

Faced with a harsh law that violated fundamental principles of fault, the Court had the option of abandoning the values behind the presumption of *mens rea* and becoming complicit in Parliament's action or of interpreting the law in light of the values of the presumption so as to remind Parliament of what it had done; to warn against the dangers of going any farther, and to require clear statements from Parliament if it wanted to go further. In 1951, the Court choose the former course when it applied the new provision to convict a person of

⁸² *Hansard*, April 6, 1906 at 1266.

⁸³ *King v. Hughes*, [1942] S.C.R. 517

⁸⁴ J. Willis, "Case Comment", (1951) 29 Can. Bar Rev. 784 at 792. Willis criticized the law as "savage". He had noted in his earlier work that the common law presumption of *mens rea* was on the decline and some Canadian legislatures "expressly render it inapplicable", as indeed had been done with respect to constructive murder. Willis, "Statutory Interpretation in a Nutshell", *supra* note 2 at 24-25.

murder who, after having made his get away from a robbery, accidentally slipped and shot and killed his taxi driver.⁸⁵ The Court accepted Parliament's ability to overrule its 1942 decision that had set forth a basic principle that someone should not be convicted of murder except for his or her own voluntary action. Even this decision provoked yet another amendment enlarging constructive murder by providing that the accused only need possess a gun, not necessarily use it. Parliament focussed on its objectives of deterring crimes with guns without much consideration of principles or proportionality. Only the Court could be concerned about the effects of the law in individual cases, but unfortunately it did not do so.

In subsequent years, the Court, at times,⁸⁶ took the opportunity to remind Parliament that it had acted in defiance of fundamental principles and to require clear statements for further expansion of constructive murder. In *Swietlinski*,⁸⁷ the Court held that evidence of drunkenness could be considered because the accused was charged with murder even though the underlying offence was one of general intent for which drunkenness was, at the time, not a defence. In *Vasil*,⁸⁸ the Court pushed against Parliament's use of objective fault by holding that because murder was "essentially a crime of intent, of malice aforethought, the result of 'wickedness' and 'heinous conduct'", the accused's subjective knowledge including drunkenness was relevant in determining liability. In these cases, the Court confronted Parliament with the important principle of subjective fault for a murder conviction without asserting the final word should Parliament be prepared to even more clearly indicate its willingness to depart from fundamental principles.

The Court's eventual decisions under the *Charter* to hold that constructive murder was an unjustified violation of section 7 by imposing the stigma and penalty of a murder conviction in the absence of subjective fault may at first blush seem to be a striking example of the Court having the last word.⁸⁹ Part of this may be related to the Court's reluctance to uphold a violation of section 7 of the *Charter* under section 1 of the *Charter*. In any event, Parliament could have replied to the decision with new evidence and a new section 1 justification for why a murder conviction was needed to deter the use of violence and firearms. It could also have invoked section 33 of the *Charter* to re-enact the constructive murder provisions notwithstanding section 7 of the *Charter*.

⁸⁵ *Rowe v. The King*, (1951) 100 C.C.C. 97 at 101 (S.C.C.).

⁸⁶ But see *R. v. Trineer*, [1970] S.C.R. 638 and *R. v. Lajoie*, [1974] S.C.R. 399 where the Court extended constructive murder concepts to accomplice liability and liability for attempted murder when it arguably could have refused to do so and required Parliament to make clear statements authorizing departures from the basic principles of fault. For examples of more principled approaches to these issues see *R. v. Logan*, (1990) 58 C.C.C. (3d) 391 (S.C.C.) and *R. v. Ancio*, (1984) 10 C.C.C. (3d) 385 (S.C.C.).

⁸⁷ (1980) 55 C.C.C. (2d) 481 (S.C.C.).

⁸⁸ (1981) 59 C.C.C. (2d) 97 at 117 (S.C.C.).

⁸⁹ *R. v. Vaillancourt*, (1987) 39 C.C.C. (3d) 118 (S.C.C.); *R. v. Martineau*, (1990) 58 C.C.C. (3d) 353 (S.C.C.).

Parliament did reply to these decisions by imposing mandatory minimum penalties of four years imprisonment for a range of offences committed with a weapon. The Court has recently upheld the mandatory sentence as not constituting cruel and unusual punishment.⁹⁰ The Court also upheld felony first degree murder and Parliament subsequently expanded it to include criminal harassment and some organized crime offences and to restrict faint hope hearings.⁹¹ Even though Parliament has accepted the basic premises of the Court's rulings on the need for subjective fault for murder, the Court has not exactly had the last word.

The Court's principled resistance to constructive murder finds its origins in a series of cases in which the Court strongly affirmed the presumption of subjective *mens rea* in criminal law and fault in all penal law. Fault is a particular concern of judges who must convict and impose sentences in individual cases while legislatures, in their understandable eagerness to respond to the harms caused by crimes, frequently ignore such issues with many criminal offences containing no references to fault. At the same time, however, fault is a contested and evolving concept and it is not clear that courts should impose the final word on legislatures on these matters. This is an area where much may be gained by a constructive dialogue in which the courts strongly and eloquently remind legislatures about the importance of fault while legislatures remind courts about the consequences of their doctrines in particular contexts. Dialogic review, whether conducted through the vehicle of presumptions of statutory interpretation or sections 1 and 33 of the *Charter*, may respond to the dangers of the courts either *Lochnerizing* the principles of criminal liability or of the legislatures disguising the way they treat accused and fundamental principles of criminal liability. Each institution can help the other see its potential blind spots.

The dialogic form of pre-*Charter* judicial review is seen in cases articulating common law presumptions of fault. In 1957, the Court clearly and eloquently articulated its common law presumption of subjective *mens rea* in a famous case in which the Beaver brothers sold what they believed to be powered milk to an undercover police agent, but what in fact turned out to be an illegal drug. The law simply prohibited the possession of the illegal drug without any mention of *mens rea* and imposed a mandatory minimum penalty of six months imprisonment. In his judgment overturning the Beavers' conviction, Chief Justice Cartwright relied on a presumption first articulated by Lord Coke that acts of Parliament should not by a "literal construction" be interpreted to allow an innocent person to be punished. He acknowledged that:

It would, of course, be within the power of Parliament to enact that a person who, without any guilty knowledge, has in his physical possession a package which he honestly believed to contain a harmless substance such as baking soda but which in fact contained heroin, must on proof of such facts be convicted of a crime and sentenced to at least 6 months' imprisonment; but I would refuse to impute such an

⁹⁰ *R. v. Morrisey*, (2000) 148 C.C.C. (3d) 1 (S.C.C.).

⁹¹ *R. v. Luxton*, (1990) 58 C.C.C. (3d) 449. See my "Chief Justice Lamer and Some Myths About Judicial Activism" (2000) 5 Can.Crim.L.Rev. 21 at 30-32 and *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999) at 106-09, 292-96.

intention to Parliament unless words of the statute were clear and admitted of no other interpretation. To borrow the words of Lord Kenyon... 'I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences...'⁹²

The Chief Justice strongly made the point about the injustice of convicting someone in the absence of fault and stopped the legislature from sneaking in doctrines in its war against drugs that could punish the innocent. The Court effectively dared Parliament to declare its willingness to be so unjust.⁹³ The Court's strong presumption about *mens rea* re-enforced democracy by requiring a clear legislative statement and hopefully a debate in Parliament should the government decide that it wished to reverse the Court's decision.

But what about the reality that judges could make mistakes when creating and applying common law presumptions? In *Beaver*, Justice Fauteux dissented on the basis that the presumption of *mens rea* should not apply in the growing field of regulatory offences. Justice Fauteux was wrong given the criminal law context, but he would have been right 13 years later to disagree with Chief Justice Cartwright who argued that a presumption of subjective *mens rea* should be applied to a regulatory offence prohibiting the possession of undersized lobsters. In that case, Parliament was attempting to conserve a natural resource and was not imposing mandatory imprisonment.⁹⁴ Chief Justice Cartwright's was in dissent on this issue, but even if he had commanded a majority, Parliament could have responded with clear legislation to displace his presumption of subjective *mens rea* as it applied to the regulatory offence. Even a wrongly applied common law presumption may re-enforce democracy by requiring the legislature to clearly justify its actions. If we have faith in the democratic process and the clarity of the judicial error, we should not be overly concerned about requiring the legislature to correct judicial mistakes.

The result espoused by the majority in *Pierce Fisheries* was not without its own problems in allowing a conviction for a regulatory offence without proof of any kind of fault. Fortunately, the Court crafted a more principled common law presumption eight years later in *Sault Ste. Marie*. In that landmark case, Justice Dickson articulated strong common law presumptions of subjective fault in criminal cases such as *Beaver* and fault based on negligence in regulatory cases such as *Pierce Fisheries*. The Court explained the reasons for requiring a "vicious will" to be convicted of a true crime and the danger of

⁹² *R. v. Beaver*, [1957] S.C.R. 531 at 537.

⁹³ The same approach is found in decisions requiring the legislature to express a "clear and plain" intention to extinguish Aboriginal rights. See *Calderv. British Columbia*, [1973] S.C.R. 313 at 404, per Hall J.; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099. It also finds support in Paul Weiler's statement in 1974 that "the technique of judicial restraint of the majority is to require a clear and unambiguous legislative statement, sometimes in fact a restatement, of its wish to offend against a fundamental principle of fairness within the society. It is easy to envisage cases where this technique is not effective, but experience suggests that it usually is. When it does succeed, a democracy is richer, not poorer, for it." P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at 212.

⁹⁴ *R. v. Pierce Fisheries*, [1970] 5 C.C.C. (3d) 193 (S.C.C.).

convicting “the morally innocent”⁹⁵ who could have done nothing more to prevent the prohibited act of a regulatory offence. These rationales, unlike Justice Fauteux’s concerns about efficient crime control in *Beaver* or even the Court’s choice of absolute liability in *Pierce Fisheries*, represented concerns about fairness to the accused that were likely to be neglected when the legislature affirmed its concerns about harms by enacting offences. At the same time, legislatures could still enact absolute liability regulatory offences and criminal offences that did not require subjective fault if they clearly expressed their intention to do so. The Court’s decision facilitated democratic accountability for legislative departures from the principles of fault. *Sault Ste Marie* is an excellent example of how the Court can boldly initiate and structure a dialogue with the legislature and how the judiciary can add its distinctive voice and concerns to the dialogue without necessarily having the final word.

To be sure, the common law presumptions in *Sault Ste. Marie* were a strong and decidedly non-minimalist form of judicial law-making. They presumptively moved over 40,000 regulatory offences enacted by municipalities and both levels of governments from the category of absolute liability to the new category of strict liability, giving the accused a new due diligence defence. The Court might well have been reluctant to proclaim this strong presumption as the absolute final word. The beauty of the presumption, however, is that if the legislature found it unworkable, all it had to do was to engage in the democratic process of clearly stating a departure in ordinary legislation. Presumptions do not have to be based on a claim that judges cannot make mistakes and they acknowledge that there may be compelling cases for contextual exceptions. The more presumptive the ruling, the stronger the judicial voice can be because judges need not fear imposing the last word.⁹⁶ Common law dialogues between courts and legislatures are an ideal vehicle to implement Bickel’s insight that “no good society can be unprincipled; and no viable society can be principle-ridden.”⁹⁷

Common law presumptions are an invitation to the legislature to consider important values, but also to respond and explain to both the public and the court about why limits on these values are necessary in particular contexts. The fact that legislatures may not respond does not mean that the dialogue has not been successful. The legislature may have thought through the implications of a possible reply and have discovered other less intrusive alternatives to advance

⁹⁵ *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1303, 1310.

⁹⁶ There is a danger that the Court has diluted some of the common law presumptions of fault as it has created constitutional requirements of fault under s.7 of the Charter. See A. Brudner, “Guilt under the Charter: The Lure of Parliamentary Supremacy” (1998) 40 *Crim.L.Q.* 287; K. Roach, *Criminal Law*, 2nd ed (Toronto: Irwin Law, 2000) at 129-36. Part of the dilution may be because of the reluctance to uphold s.7 violations under s.1. This makes it much more difficult for legislatures to respond to rulings about constitutional fault without using s.33.

⁹⁷ A. Bickel, *The Least Dangerous Branch*, *supra* at 64.

its policies. Sometimes even having to formulate in clear language the transgression of fundamental values will persuade the legislature of the error of its ways.

D. *Dialogues About Police Powers*

Despite triumphs such as *Beaver* and *Sault Ste. Marie*, the Court has not always articulated and applied common law presumptions in a robust fashion. This is unfortunate because presumptions can promote greater transparency and attention to principles in the legislative process while recognizing that the principles are not absolutes and that judges may make mistakes in defining and applying the principles. The value of common law presumptions can be seen in a number of cases in the early 1980s in which Justice Dickson dissented from the decision of the Court to imply into statutes a variety of police powers. Justice Dickson's point was not that the police had gone over absolute limits on their powers, but rather that there should be explicit legal authorization and democratic discussion of their powers. As will be seen in the next section, his vision of partnership and dialogue between courts and legislatures over the ambit of police powers came to fruition under the *Charter*.

In a 1979 dissent, Justice Dickson interpreted the offence of obstruction of justice in light of the presumption that an accused should not be required to assist the police unless there was a clear legal duty to do so. He argued that judicial creation of exceptions to this rule were "unsound in principle and unworkable in practice...the criminal law is no place within which to introduce implied duties, unknown to statute and common law, breach of which subjects a person to arrest and imprisonment."⁹⁸ This presumption did not mean that the legislature could not require such co-operation and Justice Dickson cited numerous examples where legislatures had done so. Nevertheless, he believed that it was for the court to pronounce the general principle and for the legislature to articulate and justify the need for a clear exception to the principle. The result of this institutional division of labour would be greater transparency for the accused and society and greater accountability both for the police and Parliament.

Justice Dickson took a strong stand on the need for explicit statutory authorization of police powers. This was based on the common law value of the rule of law and the presumption that the freedom and property of individuals should be respected in the absence of clear statutory authorization. The majority of the Court followed this approach in the 1981 case of *Colet v. The Queen*⁹⁹

⁹⁸ *Moore v. The Queen*, [1979] 1 S.C.R. 195 at 212-3. In an earlier dissent in *R. v. Biron*, [1976] 2 S.C.R. 56 at 64, Chief Justice Laskin also interpreted the offence of resisting arrest against the "social and legal, and indeed political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise. Only to the extent to which it so provides can a person be detained or his freedom of movement arrested."

⁹⁹ [1981] 2 S.C.R. 2 at 18.

when, in an early echo of its controversial decision in *Feeney*, the Court found that a search warrant to seize a firearm did not implicitly authorize an entry into private premises. Justice Ritchie invoked the common law principle of a man's home being his castle and saw the issue as the "all important question of whether the property rights of the individual can be invaded otherwise than with specific statutory authorization". In subsequent cases, however, the Court held that a wiretap warrant served as implicit authorization for break and enters into private dwellings to install the wiretap. Justice Dickson in dissent invoked the presumption "in favour of vested rights....as well as the presumption that express language must be found to demonstrate that a legislative body intended to authorize an act otherwise unlawful at common law". He also stressed "the traditional legal protection accorded private property and the long-standing refusal of the judiciary to impair that protection where Parliament has not itself done so expressly."¹⁰⁰ His use of these presumptions can be seen as an attempt to enter into a dialogue with Parliament about the implication of allowing police officers to break the law in order to install wiretaps. If Parliament believed that police break and enters were justified, they could explicitly authorize them. This would promote public debate and accountability for an extraordinary police power. The prospect of a democratic debate in the wake of the McDonald Commission on RCMP wrongdoing may, however, also have convinced the government that they did not want to grant police powers to break the law. The approach taken by the majority of the Court unfortunately authorized police law breaking without explicit authorization and regulation by the legislature or democratic debate. The Court's decision failed to promote democracy, discussion or accountability for police powers.

Chief Justice Dickson's use of common law presumptions to promote both democracy and the rule of the law culminated in his dissenting statement in *Dedman*¹⁰¹ that "it is the function of the legislature, not the courts, to authorize the arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law." In that case, he dissented from the majority's judgment that the common law duties of police officers authorized random traffic stops that were designed to deter drunk driving. By the time the

¹⁰⁰ *Reference re Wiretaps*, [1984] 2 S.C.R. 697 at 709, 722. He added "the right to be free from unwanted intrusion is important and fundamental. It leaves no room for casual inference of Parliamentary sanction of illegality. ...It is for Parliament, not the judiciary, still less the police themselves, to fill any gap in the Criminal Code." *Ibid* at 727. See also, *Lyons v. The Queen*, [1984] 2 S.C.R. 633. The Supreme Court of Israel has similarly indicated that both democracy and the rule of law require the legislature to authorize the use of force in interrogations of suspected terrorists. President Barak wrote that "the Rule of Law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect." He added that because the use of physical force in interrogations "raises basic questions of law and society, of ethics and policy, and of the Rule of Law and security", explicit legislative authorization was required. *Public Committee Against Torture in Israel v. Israel*, Sept. 6, 1999.

¹⁰¹ [1985] 2 S.C.R. 2 at 15.

Supreme Court decided the case, Ontario had already amended its *Highway Traffic Act*¹⁰² to authorize the popular anti-drunk driving initiative. Nevertheless, Chief Justice Dickson continued to argue that it was an important principle – ultimately one that spoke to the procedures of democracy more than the substantive content of the law – that the police power be clearly authorized in legislation and not read in by the judiciary.

Chief Justice Dickson's dissents in these cases did not mean that he believed that the police powers he refused to imply could not be justified. Three years after *Dedman*, he joined the Court's judgment holding that the Ontario law authorizing the RIDE programme was a justified limitation under section 1 of the *Charter* on the right against arbitrary detention protected under section 9 of the *Charter*.¹⁰³ Many of the values found in the common law presumptions in the criminal law were now proclaimed as constitutional rights, but not absolute rights of the type found in the American Bill of Rights. The legislature could engage in a process of justifying limits on the right under section 1 of the *Charter* without either having to assert that the right against arbitrary detention was not violated by random traffic stops or attempting to curb a Court that might invalidate a popular initiative against drunk driving. As required under section 1, the legislature prescribed by law and justified the limits it placed on the right. The structure of the *Charter* continued the common law dialogue between courts and legislatures. It meant that a conclusion that a right was violated was, as under the common law, only the start of a conversation about whether legislative limitations on the rights were necessary.

Those who only look at the bottom line will see very little difference between the result reached by the majority in *Dedman* and *Hufsky*. For Chief Justice Dickson, however, there was a world of difference because both democracy and the rule of law had been enhanced by having the legislature speak its lines in the dialogue that culminated in *Hufsky*. The dialogue that Chief Justice Dickson had tried to promote with his earlier common law dissents – a dialogue in which courts and legislatures played distinct and complementary roles – had been achieved under the *Charter*.

IV. *Dialogue Between Courts and Legislatures Under the Charter*

Judicial review under a Bill of Rights with a limitation clause can be seen as a continuation and enrichment of common law dialogues between the Court and the legislature as discussed above. In cases such as *Hufsky*, the legislature can respond to the constitutional decisions of the Court, as it could its common law decisions, with ordinary legislation that prescribes by law and justifies the limit placed on the right. The ability of legislatures to reply to Court decisions explains what my colleague David Dyzenhaus

¹⁰² R.S.O. 1980 c.193 s.189a. This legislation did not apply in the case.

¹⁰³ *R. v. Hufsky*, (1988) 40 C.C.C. (3d) 398 (S.C.C.).

has called the “democratic” character of the *Charter* as opposed to the “liberal” character of the American *Bill of Rights* which is based on judicial supremacy and finality in defining and enforcing the enumerated rights. This insight also opens the possibility that *Charter* review can be seen as “public law writ large”¹⁰⁴. The dialogue promoted by section 1 of the *Charter* suggests that *Charter* is not a revolution that gives unelected judges radically new and problematic powers in our democracy. Rather, it suggests that the *Charter* is a continuation and enrichment of the best of our common law and public law traditions.

In this section, I will examine selected examples of dialogue between the Court and Parliament under the *Charter*. As discussed in section one, dialogue occurs both in the majority of cases in which the Court upholds challenged state activity under the *Charter* and in the one third of cases in which it finds an unjustified *Charter* violation. For our purposes, however, the focus will be on the minority of cases where the Court finds an unjustified violation. These cases result in the greatest tension between the court and the legislature. As will be seen, however, there have been many prompt legislative replies to the Court’s decisions. A constructive dialogue occurs when the legislature accepts the basic tenets of the Court’s ruling while attempting to justify some limits on the rights the Court has found. The tension between Court and Parliament can be increased and a shouting match may ensue when Parliament suggests that the Court was wrong and attempts to reverse its ruling without expanding or refining the terms of the debate. I will argue that the Canadian constitution contemplates such strong forms of dialogue, but only if the safeguards of section 33 are observed.

A. *Charter Dialogues About Search and Seizure Powers*

The Supreme Court has interpreted the right against unreasonable searches and seizures in the criminal law in a more generous fashion than the Warren Court did in the United States. As such, the Court’s jurisprudence has been the target of critics of judicial activism on the left who fear it will impede “the prosecution of business crime” and those on the right who fear it will have “a significant effect on law enforcement practices”.¹⁰⁵ A dialogic approach, however, suggests that the end result of these cases has been the antithesis of the judicial monologue that the critics of judicial activism fear. Parliament has responded to almost every major Court decision striking down search powers in a way that not only made such searches possible, but enhanced democracy,

¹⁰⁴ D. Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture”, (1998) 14 S.A.J.H.R. 11 at 32. Dyzenhaus refers to *Charter* review as “administrative law writ large” and I have suggested in the last section that it also can be seen as “criminal law writ large”.

¹⁰⁵ M. Mandel, *The Charter of Rights and Freedoms and the Legalization of Politics in Canada*, rev ed. (Toronto: Thompson, 1994) at 233; R. Knopff and F.L. Morton, *Charter Politics* (Toronto: Nelson, 1992) at 21.

the rule of law and accountability for the exercise of police powers.¹⁰⁶ A dialogic approach also suggests considerable continuity between the common law approach to police powers manifested by Chief Justice Dickson in the cases examined above and the approach of the Court under the *Charter*.

In *Hunter v. Southam*, the government did not attempt to justify the procedure of internal pre-authorization for searches and seizures as necessary under section 1 to investigate possible anti-competitive behaviour by corporations. This may have been because the investigators relied less on search and seizure powers and more on their powers to demand the production of relevant documents.¹⁰⁷ In any event, Parliament soon introduced new legislation that allowed combines investigators to obtain a warrant on the basis of reasonable grounds that a crime had been committed and the search would find evidence.¹⁰⁸ Professors Manfredi and Kelly describe this as a negative form of dialogue because the act was repealed and replaced, but it seems to fit one of their own descriptions of positive dialogue "in which elected officials reflect on the implications of judicial decisions and revise statutes to advance legislative objectives in a manner that complies with the *Charter*." The real reason that they characterize the legislative response to *Hunter v. Southam* as negative must be because Parliament accepted the Court's ruling on the need for judicial warrants for searches. As discussed above, Manfredi's vision of a positive dialogue is based on a theory of co-ordinate construction in which "legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation."¹⁰⁹

In 1987, the Supreme Court struck down provisions allowing police officers to possess writs of assistance which authorized them to conduct searches and seizures without prior judicial authorization.¹¹⁰ The writs had become so unpopular that a moratorium had been imposed on their issuance in the 1970's and a Minister of Justice who tried to revive them in the early 1980's had concluded that they could not be "rehabilitated in public opinion".¹¹¹ In

¹⁰⁶ P. Hogg and Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osg. Hall L.J. 75 at 88. See also my *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 69-86. This conclusion is subject to the caveat that the warrant process works effectively, something there is unfortunately reason to doubt.

¹⁰⁷ A power that, like many other forms of regulatory searches and inspections without warrants or probable cause, was later upheld by the Court under the *Charter*. *Thomson Newspapers Ltd. v. Canada* (1990) 54 C.C.C.(3d) 417 (S.C.C.).

¹⁰⁸ *Competition Act* S.C. 1986 c.26 s.124.

¹⁰⁹ Manfredi and Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513 at 520-6.

¹¹⁰ *R. v. Sieben*, [1987] 1 S.C.R. 295; *R. v. Hamill*, [1987] 1 S.C.R. 301. The Court had to decide these cases to determine the admissibility of evidence even though the writs had been repealed at the time of the decision. On the myth that the Court can avoid deciding *Charter* issues see the Hon. Beverley McLachlin "Charter Myths" (1999) 33 U.B.C.L.R. 23 at 31-33.

¹¹¹ Roach, *Due Process and Victims' Rights*, *supra* n. 106 at 70.

what Manfredi and Kelly characterized as negative dialogue akin to a judicial monologue, the writs were repealed by Parliament in 1985. At the same time, however, Parliament introduced telewarrants because of a concern that without writs of assistance, drugs might be destroyed before a warrant could be obtained.¹¹² In my view, this is an example of genuine and constructive dialogue as Parliament introduced a new warrant procedure that could serve the same objectives as writs of assistance while complying with the constitutional norms of prior judicial authorization of searches and seizures wherever feasible.

Warrantless searches for drugs can be conducted under the new *Controlled Drugs and Substances Act* if reasonable grounds for obtaining a warrant exist, but "by reason of exigent circumstances it would be impracticable to obtain one"¹¹³. This legislation follows a Supreme Court decision which struck down warrantless drug searches, but indicated that warrantless searches could be justified in exigent circumstances such as the imminent destruction of evidence.¹¹⁴ The *Criminal Code* also now authorizes warrantless searches if the grounds for obtaining a wide variety of warrants exist and if "by reason of exigent circumstances it would be impracticable to obtain a warrant."¹¹⁵ The picture that emerges is one of a dialogue between courts and legislatures that has given the police a wide range of powers to conduct searches both with and without warrants. Instead of police officers exercising their own discretion to conduct warrantless searches, Parliament has explicitly authorized such searches in prescribed and limited contexts. This imposes legal limits and accountability on police powers and hopefully has promoted democratic debate about police powers.

There are many more examples of dialogue between the Court and Parliament over search and seizure powers. In 1990, the Court invalidated a number of warrantless investigative techniques including the use of hidden videotape cameras to record illegal activity.¹¹⁶ In 1993, however, Parliament responded and authorized judges to grant "general warrants" that allow the police to "use any device or investigative technique or procedure or to do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure".¹¹⁷ Although the warrant would only be

¹¹² Criminal Law Amendment Act SC 1985 c.19 s.70. See also Hansard Dec 20, 1984 at 1390.

¹¹³ Controlled Drugs and Substance Act S.C. 1996 c.19 s.11(7).

¹¹⁴ *R. v. Grant*, (1993) 84 C.C.C. (3d) 173 (S.C.C.). Manfredi and Kelly "Six Degrees of Dialogue", *supra* n. 109 at 527 again classify this as a negative form of dialogue on the formalistic basis that the Narcotics Control Act was repealed and replaced. Even Hogg and Bushell "The Charter Dialogue Between Courts and Legislatures", *supra* n. 106 at 122 discount the amount of dialogue by suggesting that all searches conducted under the new Act "are to be conducted pursuant to a warrant".

¹¹⁵ Criminal Code s.487.11 as am S.C. 1997 c.18 s.46 in response to doubts expressed about the legal authority for warrantless exigent circumstances searches in *R. v. Silveira*, (1995) 97 C.C.C.(3d) 450 (S.C.C.).

¹¹⁶ *R. v. Wong*, (1990) 60 C.C.C.(3d) 460 (S.C.C.).

¹¹⁷ Criminal Code s.487.01 as am 1993 s.c.c.40 s.15.

granted on reasonable grounds and could not be used to invade bodily integrity, it is difficult to imagine a broader authorization of search powers. Almost any search that might violate section 8 could now be authorized by a judge under the new general warrant procedure. Parliament effectively was saying to the Court: "anything you are concerned about, we can authorize".

In a 1990 decision which was heavily criticized for placing the police at risk, the Court struck down a provision that provided that the complex procedure for wiretap warrants did not apply when one participant to the conversation – such as a police officer wearing a wire- consented to the intercept. The Court was concerned that this provision allowed the police to short circuit the special safeguards required before a wiretap warrant could be obtained which included provisions requiring the state to demonstrate less intrusive techniques would not be successful and provided that the target be notified in certain circumstances.¹¹⁸ In 1993, Parliament decided not to apply the regular wiretap provisions to consent intercepts, but rather created a simpler warrant procedure that allowed a judge to authorize use of a wire for sixty days on the basis that there were reasonable grounds to believe that an offence had been committed and the wire would discover information. Moreover, the new provisions also authorized warrantless use of wires when the purpose of the wire was to prevent bodily harm or a warrant could not be obtained with reasonable diligence.¹¹⁹ Despite the strong concerns the Court voiced about warrantless use of wires, Parliament authorized them, albeit only in exceptional circumstances. Parliament did not attempt to reverse the Court's decision, but it did not take it as the final word on warrantless searches and tailored the warrant process to its own objectives.

In 1994, the Court excluded illegally seized evidence of a dna match in a sexual assault case.¹²⁰ Less than a year later, Parliament fast-tracked legislation that allowed judges to grant warrants to seize dna samples. With co-operation from all parties, the Bill went through the House in one day.¹²¹ Dialogic theories of judicial review should be sensitive to the mechanics of how the legislature can reply to Court decisions. The Canadian Parliamentary system is particularly amenable to rapid responses to Court decisions, but this may not be so in countries with more divided governments. If, as occurred with respect to the failed reply to *Morgentaler*, party discipline is relaxed and the Senate exercises a more powerful role, there is a greater chance that the Court will have the last word.

In 1997, the Court indicated that taking dental impressions from an unwilling accused was an illegal and particularly intrusive invasion of the sanctity of the body.¹²² The very same year Parliament responded by

¹¹⁸ *R. v. Duarte*, (1990) 53 C.C.C.(3d) 1 (S.C.C.).

¹¹⁹ Criminal Code ss.184.1-184.4 as am S.C. 1990 s.c.c.40 s.4.

¹²⁰ *R. v. Borden*, (1994) 92 C.C.C.(3d) 404.

¹²¹ *Hansard*, June 22, 1995 14489,14497.

¹²² *R. v. Stillman*, (1997) 113 C.C.C.(3d) 321 at 366 (S.C.C.).

enacting a provision that allowed a justice to issue a warrant authorizing police officers to take body impressions including dental impressions.¹²³ Unfortunately, there was little public debate about this new provision. By not giving courts the final word on matters of rights, dialogic theories of judicial review require the public to be vigilant about how the legislature treats rights. The public should not accept as necessary or wise any measure that could survive *Charter* review.

My final example of a prompt legislative reply to a *Charter* search and seizure ruling is the response to the Court's controversial decision in *Feeney*.¹²⁴ In that case, the Court held that the common law power to enter a private dwelling to make an arrest could no longer be justified under the *Charter* and that, except in cases of hot pursuit and perhaps other forms of exigent circumstances, a separate warrant to enter a private dwelling to make an arrest was required. The values articulated in the case were not revolutionary and followed some common law cases discussed above affirming the sanctity of the home. Nevertheless *Feeney* was heavily criticized and widely seen as a sign of judicial activism in protecting due process under the *Charter*. Jeffrey Simpson wrote in the *Globe and Mail* that the case was another example of how the Court's *Charter* rulings "are now more important in determining a range of criminal law matters than anything Parliament decides".¹²⁵ This sort of comment from a normally astute observer is unfortunately typical of our current debates about judicial activism. The implicit assumption is one of American-style judicial supremacy that ignores the common law and dialogic structure of the Canadian constitution.

Contrary to the fears expressed by Simpson and others, the Court did not have the last word in *Feeney*. That very year, Parliament enacted new legislation that allowed warrants to enter dwelling houses to make arrests to be issued. Some might criticize this as a negative reply because it essentially followed the Court's ruling that warrants were required. At the same time, however, Parliament also allowed arrest warrants to authorize home entries and authorized warrantless entries of private dwellings to make arrests in cases where "by reason of exigent circumstances it would be impracticable to obtain a warrant". Parliament defined entries to prevent imminent death or bodily harm and imminent loss or destruction of evidence as exigent circumstances. It broadened the terms of the debate by allowing judges to authorize police officers not to give their traditional warning of a police entry if this might lead to evidence being destroyed or people harmed.¹²⁶ Parliament, not the Court, established the ultimate rules for police conduct.

¹²³ Criminal Code s.487.091 as amended by 1997 S.C. c.18 s.45.

¹²⁴ (1997) 115 C.C.C. (3d) 129 (S.C.C.).

¹²⁵ Jeffrey Simpson "When Things Get Awkward under the Charter of Rights" *Globe and Mail* Aug 24 1997 A14.

¹²⁶ Criminal Code s.529, 529.1-5 as am by S.C. 1997 c.39.

The legislative reply to *Feeney* was backed up with a preamble that explained Parliament's objectives and the alternatives that it considered.¹²⁷ Preambles are a new and interesting feature of the dialogue between courts and legislatures. They often contemplate subsequent *Charter* challenges to reply legislation and raise interesting questions about the nature of the dialogue between the Court and Parliament. Are preambles judgment-like vehicles for Parliament to express their alternative interpretation of the Constitution? Are they political devices for Parliament to tell the Court in polite terms to back off? Or are they a conversational device through which Parliament attempts to clarify its objectives while also demonstrating that it has taken seriously what the Court has said? My preference is for the last scenario which allows courts and legislatures to play distinct and complementary roles, but the first two scenarios can be supported by dialogic theories of co-ordinate construction or political accountability and find some support in recent preambles enacted by Parliament. In any event, judicial second looks at reply statutes enacted with preambles are becoming much more frequent. They will be the crucibles that will reveal much about the ultimate nature of the dialogue between the Court and Parliament.

It is easy to be cynical about the frequent legislative replies to the Court's search and seizure decisions. Critics of the Court's due process decisions will point out that Parliament followed the Court's directions by providing for warrants. For them, due process is still due process even when enacted by Parliament and not the Court. Supporters of the Court's due process decisions will point out that Parliament tailored the warrants to its own interests and authorized warrantless searches. For them, the Court's due process decisions only produced more efficient and legitimate crime control. These are valid points, but it would take a strong faith in legislatures to suggest that Parliament should have ignored or defied Court decisions that were designed to protect those inherently unpopular people who are suspected by the police of crimes. The interests of such groups are likely to be ignored in the legislative process and the courts have special concerns and expertise in promoting fairness in the criminal justice system. On the other hand, it would take a strong faith in courts to suggest that their rulings should be final in defining police powers and procedures. Parliament had a role to play in indicating to the Court the objectives secured by police powers and the contexts in which its principles are not practicable. Legislation can, to the benefit of both the police and the public, promote greater clarity and certainty about the limits of police powers. The legislation enacted in reply to the Court's decisions may not be perfect, but at least there was an opportunity for democratic debate about police powers. These cases and Parliament's frequent replies enhanced both the rule of law and democracy in a way that Chief Justice Dickson in his pre-*Charter* dissents in the implied police powers cases had hoped would occur.

¹²⁷ The preamble recognized the right to a reasonable expectation of privacy in one's house, but asserted the "societal interest" in "effective law enforcement" including the need to respond "to urgent calls for assistance, particularly in the case of domestic violence." S.C. 1997 c.39.

B. *Charter Dialogues About Sexual Assault*

Arguably the most pointed and tense dialogues between the Court and Parliament in the 1990's occurred over sexual assault laws.¹²⁸ The Court issued three controversial decisions – *Seaboyer*, *Daviault*, and *O'Connor* – which all generated quick responses from Parliament sometimes known as “in your face” replies. The replies were all accompanied with preambles which explained Parliament's concern about sexual violence and its harmful effects on women and children and the need to balance the rights of the accused with the rights of victims and potential victims of crime. I have dealt with these new political cases elsewhere¹²⁹ and here will only focus on what they reveal about dialogue between the Court and Parliament under the *Charter*.

In my view all three legislative replies could be justified under the Canadian constitution even though only the first reply seems to fit well within my preferred model of a dialogic partnership between courts and legislatures in which each advances its own complementary concerns. To the extent that the other replies seem intent on telling the majority of the Court that it was wrong about how it interpreted the accused's rights under section 7 of the *Charter* and competing rights, they can, in my view, only be justified by dialogic theories which suggest that Parliament has a co-ordinate authority with the courts to interpret the Constitution or that Parliament as the more majoritarian institution of government should prevail in its dialogue with the Court. When Parliament makes these strong claims, it should employ the section 33 override both to alert the public to its reversal of a *Charter* decision and to require the democracy to re-visit the issue and the Court's point of principle in five years time when the override expires. My point is not that the Court should have the last word, but that there should be more, not less, dialogue over these important and difficult matters.

In *Seaboyer*,¹³⁰ the Court decided in a 7:2 judgment that the so called ‘rape shield’ law restricting the admissibility of a complainant's prior sexual history was an unjustifiable violation of the accused's right to full answer and defence. Parliament had in the Court's view struck “the wrong balance between the rights of complainants and the accused”. The Court, however, established new common law guidelines to balance these rights. As the Court, however, subsequently indicated in *Mills*,¹³¹ if these common law guidelines had been the only permissible response, it would not have been meaningful to speak of a

¹²⁸ For examples of constructive dialogues see *R. v. Hess*, (1990) 59 C.C.C.(3d) 161 (S.C.C.) (replacement of a statutory rape offence that allowed no mistake as to age with new legislation that allowed such mistakes if all reasonable steps had been taken to ascertain the child's age) and *R. v. Heywood*, (1994) 94 C.C.C. (3d) 481 (S.C.C.) (overboard vagrancy offence applying to all sexual offenders replaced by more tailored offence targeting those who present a risk of offending against children).

¹²⁹ See my *Due Process and Victims' Rights*, *supra* n. 106 c.5.

¹³⁰ (1991) 66 C.C.C. (3d) 321 at 403 (S.C.C.).

¹³¹ (1999) 139 C.C.C. (3d) 321 at para. 57 (S.C.C.).

dialogue between the Court and Parliament. Parliament in fact replied with new and less absolute restrictions on the admissibility of evidence of the complainant's prior sexual conduct.

A Parliamentary subcommittee that had anticipated the result in *Seaboyer* had recommended that the old law be re-enacted using the section 33 override. This would have been appropriate had Parliament simply disagreed with the majority's judgment and re-enacted the law that had been struck down without any attempt to broaden or refine the debate. The override would have signalled Parliament's disagreement with how the Court interpreted the relevant rights and its claim to bring the Court into line with the wishes of the majority. Use of the override would not, however, have been the end of the matter. Parliament would have won its argument with the Court by shouting, but would have had an opportunity for sober second thoughts when the override expired in five years time. The Court's decision would have remained a valid interpretation of the *Charter* that would have been a factor in the democratic debate about whether the override should be renewed. It also would have remained a precedent instructing the lower courts to strike down Parliament's "in your face reply" had a new override not been enacted. The wisdom of the override is that it requires continued dialogue in those difficult cases where the conflict between the Court and Parliament is most intractable.

The override was not, however, necessary because after extensive consultation, Parliament decided not to reverse the Court's decision, but to engage in a comprehensive reform of the law of sexual assault. Parliament broadened the debate and recast the issue of when evidence of a complainant's prior sexual conduct would be relevant in a criminal trial by placing new restrictions on the accused's defence of mistaken belief in consent. Parliament also followed the Court's own reasoning on permissible and impermissible uses of prior sexual conduct as evidence and allowed judges to balance a broad range of conflicting factors in deciding whether such evidence was admissible. The Parliamentary response¹³² did not constitute an "in your face" reply because Parliament listened to the Court on the "the rape shield" issue and went well beyond the Court's rulings by using its powers to alter the very legal context in which its decision was made. The Court subsequently upheld the constitutionality of this reply legislation by stressing that the new section 276 was "in essence a codification by Parliament of the Court's guidelines in *Seaboyer*."¹³³ The judgment makes no reference to dialogue and the stress that the Court placed on Parliament's compliance with *Seaboyer* may suggest something closer to a monologue that leaves Parliament relatively little room to respond to the Court's decision. This would be unfortunate because the response to *Seaboyer*

¹³² The assertion of the relevance of s.15 of the *Charter* and the view that the complainant's prior sexual history was "rarely relevant" in the preamble suggest that Parliament may have provided its own interpretation of the *Constitution* and the law to the Court, but the actual text of the law did not reverse the Court's decision or purport to engage in constitutional interpretation.

¹³³ *R. v. Darrach*, (2000) 148 C.C.C.(3rd) 97 para. 20 (S.C.C.).

is an excellent example of how Parliament can use its institutional advantages to broaden the "rape shield" debate by engaging in comprehensive reform of the law of sexual assault in a way that the Court could not. It suggests a dialogue in which the Court and Parliament play distinct and complementary roles and do not clash over issues of constitutional interpretation or who has the support of the majority.

In *Daviault*,¹³⁴ the Supreme Court held 6:3 that the common law denial of the defence of intoxication for general intent offences offended the *Charter* and the accused should have an opportunity to establish a defence of extreme intoxication producing a state akin to automatism. The Court was concerned with exceptional cases that would not have been considered by Parliament which had not even seen fit to codify the defence of intoxication. The Court, however, recognized that the new defence it fashioned was not the only possible response. Again, as the Court recognized in *Mills*, it would not be meaningful to speak of a dialogue, if its common law rule was the only permissible response. The Court hinted that Parliament's response should have traded on its institutional advantage by creating a new crime to punish a severely intoxicated person who involuntarily caused harm. Creating some type of new offence would have broadened the terms of the debate away from whether the majority in *Daviault* was right to be concerned about the possibility of convicting someone of sexual assault because he had become extremely intoxicated to whether a new offence was necessary to protect the public from those who cause harm while extremely intoxicated. Like the legislative response to *Seaboyer*, such a legislative reply would have avoided a direct confrontation with the ruling and allowed the legislature to add something to the debate that the court never could have done. It would have preserved the Court's distinctive concern about exceptional cases in which the application of the traditional rule would make a conviction of sexual assault unjust and Parliament's distinctive concern about social protection from intoxicated persons. It would have produced a dialogue in which both the Court and Parliament acted in a way that the other institution could not have and helped the other institution see its potential blind spots.

In response to concerns about the labelling and plea bargaining effects of a new intoxication-based offence, however, Parliament responded to *Daviault* with legislation that followed the logic of the three dissenting judges by deeming that the fault of becoming extremely intoxicated could be substituted for the fault of assault, sexual assault or other general intent offences interfering with bodily integrity. As a doctrinal matter, it can be argued that a constitutional challenge to the new legislation is distinguishable from *Daviault* because of the deference owed under section 1 to legislation as opposed to the common law and the restriction of substituted fault to violent offences. At the same time, however, it is clear that this legislation constitutes much more of an in your face reply to the Court's decision than the response to *Seaboyer* or the introduction of a new offence. By following the logic of the dissenting judges, Parliament

¹³⁴ (1994) 93 C.C.C. (3d) 21 (S.C.C.).

seems to have suggested that the majority was wrong to interpret sections 7 and 11(d) of the *Charter* as it did and/or that its decision was simply unacceptable to the majority of Canadians. It is not clear that Parliament added something to the debate that had not already been considered by the Court or that the two institutions were engaged in a constructive dialogue in which each learned from the other.

The new legislation, which has already attracted numerous *Charter* challenges, was also accompanied by a nine paragraph preamble that asserted Parliament's concern about drunken violence especially directed at women and children, the close association between intoxication and violence, the dangers of using intoxication socially and legally to excuse such violence and the need to hold accused criminally responsible for their conduct. The relevance of the preamble in subsequent *Charter* challenges will depend on the Court's understanding of the nature of its dialogue with the legislature. The Court could ask itself whether the preamble indicates that Parliament has sufficiently narrowed its objectives to responding to drunken violence and explained the ineffectiveness of less intrusive alternatives so as to make *Daviault* distinguishable and justify the legislation as a reasonable limit on the right recognized in *Daviault*. This would fit into a model of constructive dialogue in which legislatures are more intent on telling the Court their objectives and alternatives than whether they agree with the Court's original decision.

Other aspects of the preamble support dialogic theories based either on the idea that Parliament has as much right to interpret the *Charter* as the Court or that it can legitimately curb the Court when it offends majority sentiment. The preamble asserts the relevance of sections 15 and 28 of the *Charter*, provisions that were not considered by the Court in its original judgment and could be defined relationally with the accused's rights effectively to restrict even further the limited defence recognized in *Daviault*. The preamble also suggests that the Court may have been wrong when it suggested that extreme intoxication could produce involuntary behaviour. When considering the constitutionality of the reply legislation, a Court that accepted the doctrine of co-ordinate construction would ask itself whether it was prepared to defer to Parliament's interpretation of the relevant *Charter* rights over its decision in *Daviault*. There are also aspects of the preamble that may be relevant if the Court is concerned about whether it has gone too far beyond the views of the majority of Canadians. The preamble asserts that Parliament "shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it". A Court that accepted a theory of dialogue as accountability to the majority would seriously consider whether legislative and public outrage at its decision affected its merits and continued commitment to such an unpopular precedent. The Court's ultimate response to an inevitable *Charter* challenge to this provision may do much to clarify what sort of dialogue will occur between the Court and Parliament under the *Charter*.

The last example of a decision affecting sexual assault law that resulted in a prompt legislative reply is the Court's five to four decision in *O'Connor*¹³⁵ to hold that the prosecutor should disclose all records relating to a complainant and that records in possession of counsellors and others should be produced after balancing the accused's right to full answer and defence against the complainant's privacy rights. The dissenting judges would have required that equality rights and the social interest in increased reporting of sexual assault be considered in cases both of production from third parties and disclosure from the Crown. The reply legislation, which subjects all records to a two stage process that balances the accused's rights against the complainant's privacy and equality rights and the social interest in encouraging reporting of sexual assaults, has been described as "a direct, almost point-by-point repudiation of the majority judgment...vindicating the approach taken by the minority."¹³⁶ Parliament's "in your face" reply and reversal of the majority judgment in *O'Connor* was also accompanied by an eight paragraph preamble that asserted Parliament's concern about the prevalence of sexual violence against women and children, the effects of compelled production on privacy and equality rights and the social interest in encouraging the reporting of sexual assault and assistance to complainants.

Although recognizing the "significant differences" between the *O'Connor* regime and the new legislation, the Supreme Court upheld this reply legislation in *Mills*.¹³⁷ As discussed above, the Court expressed a concern that "if the common law were to be taken as establishing the only possible constitutional regime, then we could not speak of a dialogue with the legislature. Such a situation could only undermine rather than enhance democracy."¹³⁸ In this way, the Court equated the constitutional requirements in *O'Connor* with the common law rules created in *Seaboyer* to fill the void after it struck down the "rape shield". In a dialogic approach to judicial review, courts will be cautious about offering its rules as the only or final solutions to difficult problems.

The Court's concern that constitutionalizing the rules in *O'Connor* might undermine democracy ignores the possibility recognized in *Vriend*¹³⁹ that one way in which the legislature could have responded to *O'Connor* was by enacting "overarching laws under section 33 of the *Charter*". The use of the override to support the legislative response to *O'Connor* would have encouraged a more wide ranging debate on what for many in the public must have seemed a complex and technical rule of criminal procedure. To the extent that one of the Court's concerns in *Mills* was to make room for dialogue between itself and Parliament, the section 33 override also would have accomplished this task by

¹³⁵ (1995) 103 C.C.C. (3d) 1 (S.C.C.).

¹³⁶ B. Feldthusen, "Access to the Private Therapeutic Records of Sexual Assault Complainants", (1996) 75 Can. Bar Rev. 537 at 562

¹³⁷ (1999) 139 C.C.C. (3d) 321 at 354 para. 49.

¹³⁸ *Ibid.* at 357 para. 57.

¹³⁹ [1998] 1 S.C.R. 493 at para. 139. See also L. MacDonald, "Promoting Social Equality through the Legislative Override" (1994) 4 N.J.C.L. 1.

preserving the Court's decision in *O'Connor* and ensuring further public discussion of this difficult and evolving subject in five years time when the override would expire. As matters stand, the Court's decision upholding the legislation under the *Charter* may actually inhibit further dialogue on this difficult subject by legitimating the legislation as consistent with the *Charter* even while parts of the judgment seem to suggest that judges in some cases may have to read down some aspects of the legislation in order to protect the accused's right to full answer and defence. As both Thayer and Bickel suggested, upholding legislation as constitutional sends a message to the legislature and society that all is well and may well discourage continued debate and reform of a law that in its breadth may deprive judges and accused of information that is required to ensure that the innocent are not convicted.

The Court's discussion of dialogue in *Mills* also lends some support to the theory of co-ordinate construction discussed in the first part of this essay. The Court states that the "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....this court has an obligation to consider respectfully Parliament's attempt to respond to such voices."¹⁴⁰ This suggests that Parliament can interpret competing *Charter* rights and its interpretation and reconciliation of the rights deserves respect. The issue is framed by the Court not as one of limiting rights under section 1, but of interpreting the extent of conflicting rights in particular contexts to minimize conflicts.¹⁴¹ Framing the issue in this way may require legislatures to offer their own interpretation of the relevant rights instead of defining and refining the objectives and alternatives that make it necessary to limit rights under section 1 in particular contexts. Inviting the legislature to interpret *Charter* rights and enact legislation in accordance with such interpretation is consistent with a theory of co-ordinate construction. In my view, however, the legislature's special expertise and its distinctive contribution to the dialogue is most likely to be on section 1 matters. Legislatures do not have the same expertise as courts in interpreting either *Charter* or common law rights. As elected institutions, they have an interest in maximizing the rights of more popular groups. Women are a vulnerable group who have suffered discrimination in the criminal law especially as complainants in sexual assault cases, but it would be dangerous to ignore the fact that they have more votes than those who are accused of sexual assault. Co-ordinate construction frequently makes the legislature a judge in its own cause.¹⁴²

¹⁴⁰ *R. v. Mills*, (1999) 139 C.C.C. (3d) 321 at 357 at para. 58.

¹⁴¹ *Ibid* at 360 para. 66-67.

¹⁴² Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 142-3. It could be argued that the alternative is to make the Court a judge in its own cause. See Manfredi *Judicial Power and the Charter* (Toronto: McClelland and Stewart, 1993). The independent judiciary, however, has no particular interest in minimizing the rights of the unpopular.

At the same time, it is not clear from *Mills* that the Court has endorsed the idea that legislatures can act on their own interpretations of rights or that the courts are ultimately accountable to the legislature. Judges in individual cases, not the legislature ruling for all cases, may have the responsibility to determine the extent of competing rights. Trial judges may have to read down the legislation especially in order to look at documents that may be necessary to protect the accused's right to full answer and defence in particular cases. Although the Court does not see the balance of competing rights as a matter for section 1 justification, there are also suggestions that it may be listening to the legislature as it refines and clarifies its objectives and alternatives in light of new information available after *O'Connor* while maintaining the judicial commitment in *O'Connor* to the right to full answer and defence. This could fit a dialogic theory in which both courts and legislatures play distinctive roles with the courts interpreting the rights of the unpopular and legislatures articulating and justifying the reasons for limiting rights in particular contexts.

The effective legislative replies to the Court's controversial decisions in *Seaboyer*, *Daviault* and *O'Connor* demonstrate the robust reality of dialogue under the *Charter*. Combined with the search and seizure cases discussed above, they suggest that the Court's *Charter* decisions, like its common law decisions, need not be the final word. The legislative reply to *Seaboyer* demonstrates how legislatures can exercise an institutional advantage by engaging in law reform that is more comprehensive than the Court's decision. The result is a constructive dialogue with both the Court and Parliament making points that the other would not likely consider. The replies to *Daviault* and *O'Connor* do not as obviously draw on Parliament's institutional advantage. They ultimately may have to be supported by radical dialogic theories that accord legislatures the same role in interpreting *Charter* right as courts or allow the legislature to curb and hold accountable a Court that has produced a decision that is unacceptable to the majority. These theories will produce a more confrontational dialogue because they contemplate the Court and the legislatures engaging in the same task and suggest that legislatures can routinely attempt to reverse or minimize court decisions by enacting in your face replies. My position is not that such replies can never be enacted, but rather that legislatures should engage in them only with the special safeguards and sober second thoughts provided by the override. The override does not end the dialogue. Rather, it ensures that the dialogue between the Court, the legislature and society will continue.

V. Conclusions

I have attempted to illustrate that the relationship between courts and legislatures both under the *Charter* and the common law is one of dialogue. In both cases, the Court, assisted by the efforts of aggrieved litigants, starts the conversation by drawing the attention of the legislature to fundamental values

that are likely to be ignored or finessed in the legislative process. The Court, however, does not attempt to end the conversation or conduct a monologue in which its common law or *Charter* rulings are the final word. All of the common law presumptions were premised on the idea that the legislature could clearly authorize departures from them in particular contexts. The underlying assumption was that democracy would be enhanced by requiring the legislature to deliberate and to indicate clearly its desire to depart from the values of the common law constitution.

The structure of the *Charter* contemplates two different forms of dialogue between courts and legislatures, both of which are improvements on the common law dialogues. The commonest form of dialogue is conducted under section 1 of the *Charter* which requires legislatures to prescribe by law the limits they place on *Charter* rights and then justify to the court that such limits are reasonable and necessary to advance their objectives. This dialogue encourages courts and legislatures to be themselves with the courts bringing to the table the importance of fundamental values and procedures that may be inconvenient for the legislature to consider and legislatures bringing to the table a knowledge of its regulatory objectives and obstacles that the court may otherwise have difficulty appreciating. Section 1 is the engine for dialogue in which each institution listens and learns from the other while also being true to its own concerns and institutional identities. It is premised on theories of dialogue which suggest that courts and legislatures have distinctive and complementary roles to play. This in turn allows dialogues between courts and legislatures to be expanded without being bogged down in arguments and conflicts over particular points.

Section 33 provides a carefully structured outlet when the Court and a legislature cannot agree on a particular point and a shouting match or showdown looms. It allows the legislature to reverse a Court decision and is consistent with strong and radical dialogic theories which suggest that the legislature can interpret the Constitution itself or hold accountable a Court that issues a judgment that is unacceptable to the majority. Although section 33 resembles the way that legislatures could clearly displace the common law presumptions of statutory interpretation, it constitutes an improvement both by requiring that the public be more clearly warned about what is being done in its name and by preserving the Court's point of principle to be reconsidered in calmer times when the override expires. Québec's decision not to renew the override used to enact its unilingual signs law is a good example of how a Court decision subject to an override does not go away and may influence democratic debate in calmer times.

A key issue in the future will be when dialogues will be conducted under section 1 and when they will be conducted under section 33. Legislatures have an incentive not to pay the political price for using the override when they should. The Court may have to force the issue by invalidating in your face replies that attempt to reverse Court decisions without invoking the override. This will not end the dialogue. It may produce a shouting match between the

court and the legislature, but section 33 ensures that after a cooling off period, they will keep talking about their disagreement. The override encourages more, not less, dialogue.

The greatest danger to dialogue is not when the Court strikes down legislation, but when it upholds legislation that may clearly and unreasonably violate the *Charter* or the common law constitution. In these cases, the Court does not play its role of alerting the legislature and the public to important values that they are liable to neglect or ignore. The fact that legislation that may infringe the *Charter* or the common law has been upheld by the Court may discourage legislative reconsideration of the matter. It may also encourage the legislature routinely to act on its own interpretation of the constitution or its sense that the majority would find the Court's interpretation unacceptable. This could erode respect for the Court and its anti-majoritarian role. The greatest danger of the current debate about judicial activism is that it may produce excessive deference in the one institution – the independent judiciary – that can turn contented and majoritarian monologues into more self-critical and democratic dialogues.

In both the cases of common law and *Charter* dialogues, the Court reminds the legislatures of important values such as minority rights, fair process and constitutionalism that are liable to be neglected or finessed in the legislative and administrative processes. In both cases, the Court's interventions enhance democracy by requiring the legislature to be explicit when they want to limit or deny the rights that the Court has identified. The ability of legislatures to reply to the Court without, as under the American model of judicial supremacy and sometimes under our division of powers, attempting to curb the Court or change the Constitution, means that the Court need not have the last word. Under a dialogic approach, the dilemma of judicial activism in a democracy diminishes perhaps to the point of evaporation. The answer to what is called judicial activism is legislative activism, not the difficult processes of changing the Court or the Constitution.

Although it is important to recognize the continuity between *Charter* and common law dialogues, the improvements of the *Charter* should not be forgotten. The first is that the values that the courts defend no longer reside in what John Willis referred to as the judge's own ideal constitutions, but in the text of the democratically enacted *Charter*. Even the common law presumptions have moved away from the protection of the laissez faire values that Willis identified towards the protection of a broad range of human rights. The second improvement is that it is no longer sufficient for the legislature simply to indicate its desire to depart from the values of the constitution. To be sure, the clear statement requirements of both sections 1 and 33 enhance democracy by requiring the legislature to be candid about its treatment of the values identified by the Court and they promote the rule of law by requiring legal authority for state action in a way that Chief Justice Dickson tried to achieve under the common law. The *Charter*, however, goes beyond the clear statement rules of the common law by requiring that limits

on rights be justified under section 1 and that denials of rights be subject to the extraordinary signals and sober second thoughts of section 33. These key features of the *Charter* improve, sharpen and prolong the dialogue that has always occurred between the Supreme Court of Canada and Canadian legislatures.