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Abstract

There is a growing consensus that parliamentary systems with recently enacted bills of rights constitute a new model of constitutionalism that serves as a middle ground between parliamentary sovereignty and judicial supremacy. One of the key features often discussed in relation to this 'weak-form' or 'Commonwealth' model of judicial review is the notion of an inter-branch dialogue about rights that permits legislatures to respond to court rulings about the policies at stake. This article develops a framework for empirically assessing whether and how dialogue operates in practice. A systematic examination of legislative responses to Supreme Court rulings affecting legislation in Canada finds that relatively little genuine dialogue occurs in practice because legislatures rarely respond in a manner that departs from the dictates of the Court's rulings. The article then explores the implications this type of empirical assessment might have for other parliamentary systems.

Keywords

judicial review, bills of rights, courts, parliamentary democracy, Canada, Australia, New Zealand, United Kingdom

Introduction

There is a growing consensus among political scientists and legal scholars that the relatively recent enactment of constitutional or statutory bills of rights in countries such as Australia, Canada, New Zealand and the United Kingdom constitutes a new model of constitutionalism. Referred to as the Commonwealth (Gardbaum, 2001), parliamentary (Hiebert, 2004a; 2006) or 'weak-form' (Tushnet, 2003; 2008) model of judicial review, the various modes of rights protection in these countries are presented as an alternative to the 'strong-form' model of judicial review epitomized by the United States, in that they attempt to balance the enforcement of human rights with democratic governance. In effect, they are said to represent a middle ground or 'hybrid' (Goldsworthy, 2003) between systems of parliamentary sovereignty and judicial supremacy.

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A principal conceptual mechanism underpinning weak-form judicial review is that of an inter-branch dialogue between courts and legislatures. This particular understanding of constitutional dialogue¹ finds its origins in Canada, where its developers argue institutional mechanisms in the Charter of Rights and Freedoms, specifically a 'reasonable limitations' clause and a 'legislative override' clause, allow the legislatures to respond to judicial rulings striking down laws that offend its provisions (Hogg and Bushell, 1997; Roach, 2001a). According to proponents of dialogue, these features of the Charter provide the legislatures with avenues for response which, unlike in systems of judicial supremacy, mean that courts do not always have the final word on the permissibility of the policies at stake.

Although Canada's 'Charter dialogue' is facilitated through these particular instruments, the dialogue metaphor has been invoked by public officials in other jurisdictions, such as in relation to the United Kingdom's Human Rights Act and the Australia Capital Territory's Human Rights Act (Hiebert, 2006: 17). Scholars have also examined the potential for a similar dialogic relationship in the context of New Zealand and the United Kingdom (Jackson, 2007), South Africa (Dixon, 2007), Australia (McDonald, 2004) and the state of Victoria, Australia (Debeljak, 2007; Masterman, 2009). Yet commentators remain divided on the utility of conceptualizing judicial review in dialogic terms. This debate has been most exhaustive in the Canadian context, which has had the longest history of judicial enforcement of rights among the Commonwealth countries listed above. One of the principal claims shared by many critics is that dialogue in Canada fails in practice because legislatures routinely treat the Supreme Court's decisions as the final word. Thus, the dialogue is really a judicial 'monologue' about what policy prescriptions the Charter requires (Morton, 2001). At the core of this debate is whether dialogue succeeds in maintaining parliamentary systems as weak-form judicial review, or whether such systems become strong-form in practice. According to Mark Tushnet, despite the relatively short time bills of rights have been enacted in these countries, there is already some evidence in New Zealand, the United Kingdom and especially Canada that legislatures are reticent about diverging from judicial opinions on the rights compatibility of impugned policies (Tushnet, 2008: 47). A number of other scholars express similar concerns (Huscroft, 2007; Allan, 2001; Nagel, 2006).

Despite the voluminous attention the concept of dialogue has been afforded, particularly in the Canadian context, little systematic empirical research has been conducted that evaluates the extent to which dialogic review truly offers a middle road between legislative and judicial supremacy when it comes to rights. The goal of this article is to develop a useful framework for identifying dialogue and for gauging whether parliamentary rights models truly represent an alternative path to strong-form judicial review. The article applies this framework to a case study of the Canadian record with dialogic review. As the parliamentary system with the greatest experience with judicially enforced rights and the one that has been subject to the most exhaustive debate over the suitability of understanding judicial review in dialogic terms, Canada makes for the most fitting starting point for empirically assessing legislative willingness to engage in dialogue.

This article provides a comprehensive review of legislative responses to the Supreme Court's rulings affecting laws under the Charter. It examines all instances in which the Court struck down or altered a piece of legislation on Charter grounds through 2009 and develops a basis for determining whether the relevant legislative body responded in a dialogic manner. What distinguishes this study from earlier attempts to explore dialogue at the Supreme Court level is that in addition to examining the 'type' of legislative response it also assesses the substantive content of the responses. The findings suggest that contrary to the assertions of proponents of dialogue, Canadian legislatures rarely respond to Court rulings in a manner that diverges from the policy prescriptions laid out in judicial reasons. The remainder of the article explores more fully the implications of this

analysis, both for our understanding of Canada as a system of weak-form review and for assessing the practice and impact of judicial review in other parliamentary systems.

Conceptualizing and identifying dialogue

Useful conceptions of dialogue are not necessarily limited to the inter-branch interaction that determines legislative policy outcomes, which is the focus of this article. Even inter-branch dialogue can come in many forms, including the actual arguments government lawyers make before the courts (Clarke, 2006) or the decision to appeal lower court rulings (Hennigar, 2004). Nor must we consider the dialogue over rights as always beginning with a court ruling. Sometimes it is useful to view dialogue as starting with the legislature. This is particularly the case when governments assess the rights-compatibility of new legislation before it passes into law (Kelly, 2005). While acknowledging the potential utility of these alternative forms of dialogue, this article examines a particular conception of dialogue. It is one where dialogue is the central characteristic of weak-form judicial review and courts do not always have the final say on the permissibility of policies that infringe rights.

The most prevalent understanding of this kind of inter-institutional dialogue was first articulated by Hogg and Bushell (1997) and was envisioned as a response to democratic objections to judicial review in Canada. Hogg and Bushell argue that concerns about the democratic legitimacy of judicial review are 'greatly diminished' where a legislature can respond by ordinary means to a judicial decision striking down a law. Legislatures, they point out, are provided substantial latitude to respond to court decisions by virtue of the design of the Charter of Rights. The Charter's section 33 'notwithstanding clause' permits legislatures to temporarily suspend the effect of court rulings relating to many of its provisions.² Under the section 1 'reasonable limits' clause, legislatures are afforded the opportunity to put forward justifications for policy initiatives that might infringe rights. Thus if they can offer new grounds for impugned policies, it is possible for legislatures to enact similar legislation without recourse to the notwithstanding clause or constitutional amendment.

Stating that dialogue 'consists of those cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body,' Hogg and Bushell (1997: 81) find that dialogue occurs in 66 percent of cases. Importantly, they also claim that in most cases only minor amendments are required to respect Charter decisions and that the legislation's original intent is thus rarely compromised. These findings, and follow-up studies in support of the dialogue thesis (Roach, 2001a), sparked significant debate about the implications dialogue has for the democratic critique of judicial review and for the underlying empirical claims. A fundamental undercurrent of the debate is normative. According to critics, dialogue connotes two-way communication in which the parties involved listen to each other, but the dialogue metaphor fails because its proponents defend judicial supremacy in terms of final authority to offer the 'correct' interpretation of the Charter (Manfredi and Kelly, 1999: 523–524; Baker and Knopff, 2002: 348). Defenders maintain that legislatures have no interpretative authority in Canada and that critics invite 'interpretative anarchy' in suggesting they should (Hogg et al., 2007a: 31). They argue that critics attack an 'idealized' conception of dialogue, noting that dialogic review does not involve 'the ridiculous suggestion that courts and legislatures were actually "talking" to each other.' Instead, their principal claim is that 'Canada has only a weak form of judicial review, because Charter decisions usually leave room for a legislative response and usually received legislative response' (Hogg et al., 2007a: 26).

There are two major areas of disagreement regarding the empirical validity of this account of dialogic review. The first concerns whether use of the notwithstanding clause is in fact a practical option for legislative response to judicial rulings. Legislatures can temporarily suspend judicial decisions only in cases involving sections 2 and 7–15 of the Charter (though sexual equality rights are also exempt because of the language of section 28). There are thus many cases where section 33 is not available to legislatures. More significantly, use of the clause is generally viewed as politically infeasible since the government of Quebec invoked it to protect the province's language laws in 1988 amid intense debate over the Meech Lake Accord, a proposed constitutional package that would have, among other things, afforded Quebec recognition as a 'distinct society' (Hiebert, 2004b; Russell, 2007). On those occasions where the notwithstanding mechanism has been employed, its use has almost always been to pre-empt judicial review rather than express disagreement with judicial rulings on the Charter. Kahana (2001) finds that in most cases public reaction was virtually nonexistent because of the inaccessible nature of the cases. Attempts to use the clause in more visible cases is practically impossible from a political perspective because rather than being viewed as an expression of disagreement with a court ruling the clause is viewed as an 'override' of the Charter itself (Waldron, 2004). An analysis of media coverage of public debate surrounding the notwithstanding clause confirms that court rulings are viewed as authoritative and that rather than being viewed as signaling disagreement over interpretation of the Charter, mere mention of section 33 implies that legislatures seek to 'override' the rights themselves (Macfarlane, 2008).

The implication of this analysis is that Charter dialogue is not as robust as the theory suggests from the outset. As Tushnet (2003: 832–833) writes, the 'limited use of section 33 itself suggests that there is little difference between the Canadian system and one in which the Constitutional Court's decisions are final.' Dialogue proponents respond by arguing it is unfair to blame the Supreme Court for the failure of the legislatures to invoke the clause (Roach, 2001a: 193). This retort is fair from a normative perspective, but it does not alter the political reality that legislators generally view themselves as hamstrung, leaving any consideration of invoking section 33 on the sidelines. Put simply, if it is not viewed as an option, then it cannot be considered an avenue through which legislatures take part in dialogue.

The second, more fundamental, empirical disagreement over Canadian judicial review concerns whether all forms of legislative amendment constitute legitimate dialogue. Critics argue that instances where legislatures merely enact into law the Court's policy prescriptions should not count as dialogue, noting that elected officials simply repealing offending sections or replacing entire acts is tantamount to 'Charter ventriloquism' (Manfredi and Kelly, 1999: 521). For meaningful dialogue to occur, legislative responses should reflect some disagreement with Court interpretations of rights (Tushnet, 2008: 44; Hennigar, 2004). One follow-up study to Hogg and Bushell's original article on dialogue takes issue with the broad definition of dialogue as being any action by the relevant legislative body, finding that many of their examples of dialogue constituted 'negative responses' such as the decision to simply repeal the impugned law (Manfredi and Kelly, 1999). Dialogue proponents do not accept that cases in which a 'constitutional defect' was 'properly corrected' by the legislature should be discounted. Hogg and Bushell (1997: 68) contend that precluding instances where legislatures have followed the prescription laid out by the courts invites too narrow a definition of dialogue: 'after all, it is always possible that the outcome of dialogue will be an agreement between the participants!'

Genuine agreement may be possible, but as Hennigar (2004: 8) correctly points out in his study of Canadian federal government responses to lower court rulings, from the perspective of how one identifies dialogue, 'genuine agreement and grudging compliance "look" identical.' One

possible remedy to this problem is to examine parliamentary debates and the minutes of legislative committees to see if there is genuine agreement with court decisions or grudging compliance on the part of legislators. For example, in *Trociuk*, the Supreme Court struck down provisions of British Columbia's Vital Statistics Act that gave biological mothers sole discretion to include or exclude information relating to paternity when registering the birth of a child and to choose the child's last name. Following the ruling, discussion by members of the provincial legislature regarding amendments to the Act makes it clear that one of the main goals was compliance with the mandates of the Court's decision (Province of British Columbia, 2004). A reading of the transcript suggests the members generally viewed the Court's decision as authoritative, but there is no explicit statement regarding agreement or disagreement with the substance of the ruling.

The implications this has for how dialogue is defined and operationalized for empirical study is clear: 'dialogue requires a legislative response which dissents, to some degree, from the court's ruling; that is, it must entail a creative element' (Hennigar, 2004: 8). It is difficult to classify as dialogue, for example, Parliament's response to the Court's 1995 decision *RJR-MacDonald* striking down restrictions on tobacco advertising because, as Huscroft (2009: 60) notes, 'Parliament simply legislated in accordance with the parameters that the Court's majority decision allowed. The Court did not just *influence* the democratic process; it dictated the content of constitutionally permissible legislation.'³

Measuring the frequency of dialogic legislative responses

Measuring instances of dialogue as defined in the preceding discussion means identifying the percentage of cases in which the legislative response is determinative on the policy issue at stake. This does not mean that a system of judicial review like Canada's is only 'dialogic' when the legislatures have the final say in responding to Court rulings that affect particular policies. By its very nature, dialogue focuses on instances of inter-branch disagreement. A system of judicial review in which either the Court or the legislatures have the final say in the vast majority of instances of disagreement obviously does not conform to the 'middle road' that many scholars argue characterizes the parliamentary model of judicial review. To categorize a system as weak-form judicial review, the legislature should succeed in reversing, avoiding or modifying the Court's ruling in a substantial share of cases. Thus the goal of this analysis is to identify how often legislatures successfully respond to Supreme Court decisions in a manner that reflects some independent consideration on their part. This approach makes this the most comprehensive study of legislative responses to statutory invalidations by the Supreme Court on Charter grounds and the first to examine the content of those responses to see how often they depart from the policy prescriptions found in the Court's decisions (for a groundbreaking study at the lower court level, see Hennigar, 2004). This is an empirical question. Determining what level of dialogue or what institutional instruments are necessary to achieve an appropriate balance between systems of judicial supremacy and parliamentary sovereignty is a normative question which, while important, is not the primary focus of this study.

The analysis that follows is developed from a database of all Supreme Court cases that ruled a law (or part of a law) unconstitutional on Charter grounds through the end of 2009. There are 81 relevant Charter cases, and these have been grouped into 69 instances in which a particular law or portion of a law was affected by the Court (i.e. I avoid counting companion cases where the same legislative provision was under scrutiny). The database includes those cases where legislation was subject to judicial amendment (where a law was effectively rewritten by the Court through the techniques of 'reading in,' 'reading down' or severing words in the legislation, discussed more fully below), rather than focusing only on those where the law is simply invalidated.⁴ This study

focuses on responses to Supreme Court decisions because the aim is to identify which branch has the final say, and as the final court of appeal in Canada, the Court is the decisive voice on the judicial side.

Legislative responses are placed into one of four categories: no response, the law is repealed, the law is repealed and replaced, or the law is amended.⁵ There is no dialogue in cases where there is no response or where the legislature simply repeals the impugned law. In contrast to these 'negative responses,' 'positive responses' are those cases where the legislature amends or replaces the legislation affected by the Court. Although some commentators discount as dialogue those cases where the legislative response is to replace entire acts (Manfredi and Kelly, 1999), I do not, as in such cases the legislature might pursue similar policy objectives to the initial law, something that is not analytically distinct from amending the old legislation.

Nevertheless, 'positive responses' (amended or replaced legislation) do not automatically count as dialogue. A further stage of analysis is necessary to determine whether legislation is amended or replaced in a manner that simply adheres to the Court's pronouncement or differs in some way that avoids, reverses or modifies at least part of the judicial decision. These responses are categorized as 'straight compliance' or 'dialogic response' on the part of the legislature. Legislative responses are considered straight compliance where the new law or amendment simply enacts what the Court dictates as constitutionally permissible. As noted above, such legislative responses should not count as dialogue because they amount to the legislature following the Court's orders. Where the new law or amendment differs in some way, by exhibiting some creative element or partial disagreement with the Court ruling, the legislative response is considered dialogic. The cases are listed by category in Table 1.

Out of the 69 total Supreme Court cases (or groups of cases) affecting particular pieces of legislation, the relevant legislature offered no response on 23 occasions. At 33 percent, or one-third of the cases, this is a significant amount of legislative deference and seems to support the claims of critics that a judicial decision 'creates powerful incentives and disincentives to political action that dialogue theory ignores' (Huscroft, 2009: 54). The inability of Parliament to pass new legislation regulating abortion after the Court's decision in *Morgentaler* is a classic example in this regard. Other examples include Parliament's inaction after the failure of its second attempt to prohibit prisoner voting after the 2002 *Sauvé* case and the decision of the Alberta legislature to take no action after the Court read sexual orientation into its Individual Rights Protection Act in *Vriend*. On eight other occasions, the legislative response was to simply repeal the provision. Taken together, these 'negative responses' account for 31 cases, or 45 percent of the total.

The relevant legislature responded by amending the legislation in 29 cases, and replacing it on nine occasions. These 38 positive responses account for 55 percent of the total. Of the positive responses, however, 26 were enactments that merely followed the dictates of the Court and are coded as straight compliance. Cases were classified as straight compliance only when there was no clear attempt on the part of the legislature to modify, avoid or reverse the Court's policy prescription. As noted above, the federal government's response to the Court's ruling striking down an absolute ban on tobacco advertising in *RJR-MacDonald* implements precisely the limits suggested in the majority ruling. The Court's decision lays out a 'variety of less intrusive measures' for the government, including a partial ban which would allow information and brand preference advertising, measures to prohibit advertising aimed at children and adolescents, and labeling requirements. Parliament repealed and replaced the legislation with the Tobacco Act, which instituted a ban on promotion that carved out precisely those provisions.

Other examples illustrate how cases are classified as straight compliance. In the 1991 case *Committee for the Commonwealth of Canada*, the Court declared unconstitutional an absolute

Table 1. Cases by category of legislative responseNo response (N=23)

- R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295
R. v. Morgentaler [1988] 1 S.C.R. 30
R. v. Martineau [1990] 2 S.C.R. 633
R. v. Logan [1990] 2 S.C.R. 731
Osborne v. Canada (Treasury Board) [1991] 2 S.C.R. 69
R. v. Sit [1991] 3 S.C.R. 124
R. v. Zundel [1992] 2 S.C.R. 731
Miron v. Trudel [1995] 2 S.C.R. 418
R. v. Lucas [1998] 1 S.C.R. 439
Vriend v. Alberta [1998] 1 S.C.R. 493
United Food and Commercial Workers Int'l Union, Local 1518 v. Kmart Canada Ltd. [1999] 2 S.C.R. 1083
Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC 69 [2000] 2 S.C.R. 1120
R. v. Sharpe [2001] 1 S.C.R. 45, 2001 SCC 2
United States v. Burns, 2001 SCC 7 [2001] 1 S.C.R. 283
R. v. Ruzic [2001] 1 S.C.R. 687
Sauve v. Canada (Chief Electoral Officer) [2002] 3 S.C.R. 519
Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink [2002] 3 S.C.R. 209
Ruby v. Canada (Solicitor General) [2002] 4 S.C.R. 3
Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur [2003] 2 S.C.R. 504
Solski (Tutor of) v. Quebec (Attorney General) [2005] 1 S.C.R. 201
Canada (Attorney General) v. Hislop [2007] 1 S.C.R. 429, 2007 SCC 10
R. v. D.B. [2008] 2 S.C.R. 3, 2008 SCC 25
Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component, 2009 SCC 31 [2009] 2 S.C.R. 295

Repealed (N=8)

- Reference Re Section 94(2) of the B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486
R. v. Vaillancourt [1987] 2 S.C.R. 636
Black v. Law Society of Alberta [1989] 1 S.C.R. 591
Edmonton Journal v. Alberta (A.G.) [1989] 2 S.C.R. 1326
Tetreault-Gadoury v. Canada (Employment and Immigration Commission) [1991] 2 S.C.R. 22-
R. v. Bain [1992] 1 S.C.R. 91
Provincial Judges Assn. v. Manitoba (Minister of Justice) [1997] 3 S.C.R. 3
Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia [2007] 2 S.C.R. 391, 2007 SCC 27

Amended (N=29)Straight Compliance (N=20):

- Quebec (A.G.) v. Quebec Assn. of Protestant School Boards* [1984] 2 S.C.R. 66
Singh v. Canada (Minister of Employment and Immigration) [1985] 1 S.C.R. 177
R. v. Hess; R. v. Nguyen [1990] 2 S.C.R. 906
Committee for the Commonwealth of Canada v. Canada [1991] 1 S.C.R. 139
R. v. Genereux [1992] 1 S.C.R. 259
Schachter v. Canada [1992] 2 S.C.R. 679
Baron v. Canada [1993] 1 S.C.R. 416; *Kourttessis v. M.N.R.* [1993] 2 S.C.R. 53

(Continued)

Table 1. (Continued)

<i>R. v. Heywood</i> [1994] 3 S.C.R. 761
<i>R. v. Laba</i> [1994] 3 S.C.R. 965
<i>Benner v. Canada (Secretary of State)</i> [1997] 1 S.C.R. 358
<i>Libman v. Quebec (Attorney General)</i> [1997] 3 S.C.R. 569
<i>Reference re Remuneration of Judges</i> [1997] 3 S.C.R. 3
<i>R. v. Campbell</i> ; <i>R. v. Ekmeçic</i> ; <i>R. v. Wickma</i> [1997] 3 S.C.R. 3
<i>M. v. H.</i> [1999] 2 S.C.R. 3
<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> [1999] 2 S.C.R. 203
<i>R. v. Hall</i> [2002] 3 S.C.R. 309
<i>Trociuk v. British Columbia</i> [2003] 1 S.C.R. 835
<i>R. v. Demers</i> [2004] 2 S.C.R. 489
<i>Charkaoui v. Canada (Citizenship and Immigration)</i> [2007] 1 S.C.R. 350, 2007 SCC 9
<i>Nguyen v. Quebec (Education, Recreation and Sports)</i> , 2009 SCC 47 [2009] 3 S.C.R. 208
<u>Dialogic Response (N=9):</u>
<i>Ford v. Quebec (A.G.)</i> [1988] 2 S.C.R. 712
<i>Rocket v. Royal College of Dental Surgeons of Ontario</i> [1990] 2 S.C.R. 232
<i>R. v. Swain</i> [1991] 1 S.C.R. 933
<i>R. v. Seaboyer</i> ; <i>R. v. Gayme</i> [1991] 2 S.C.R. 577
<i>R. v. Morales</i> [1992] 3 S.C.R. 711
<i>Sauve v. Canada (A.G.)</i> [1993] 2 S.C.R. 438
<i>Ramsden v. Peterborough (City of)</i> [1993] 2 S.C.R. 1084
<i>Mackin v. New Brunswick (Minister of Finance)</i> ; <i>Rice v. New Brunswick</i> [2002] 1 S.C.R. 405
<i>Figueroa v. Canada (Attorney General)</i> [2003] 1 S.C.R. 912
<u>Replaced (N=9)</u>
<u>Straight Compliance (N=6)</u>
<i>Hunter v. Southam Inc.</i> [1984] 2 S.C.R. 145
<i>R. v. Oakes</i> [1986] 1 S.C.R. 103; <i>R. v. Smith</i> [1987] 1 S.C.R. 1045
<i>Corporations professionnelles des médecins du Québec v. Thibault</i> [1988] 1 S.C.R. 1033
<i>Andrews v. Law Society of British Columbia</i> [1989] 1 S.C.R. 143
<i>R. v. Grant</i> ; <i>R. v. Wiley</i> ; <i>R. v. Plant</i> [1993] 3 S.C.R. 223; 263; 281
<i>RJR-MacDonald v. Canada (A.G.)</i> [1995] 3 S.C.R. 199
<u>Dialogic Response (N=3):</u>
<i>Thomson Newspapers Co. v. Canada (Attorney General)</i> [1998] 1 S.C.R. 877
<i>Dunmore v. Ontario (Attorney General)</i> [2001] 3 S.C.R. 1016
<i>R. v. Guignard</i> [2002] 1 S.C.R. 472

prohibition on unauthorized solicitation at airports on the basis that the regulation was ‘overbroad’ because it included non-commercial expression. Amendments made in 1995 re-assert the ban but apply it only to commercial activities prohibited without a permit. The Court in *Libman* struck down provisions in the province of Quebec’s Referendum Act that effectively blocked campaign spending by groups or individuals not affiliated with the two recognized organizing committees. In response, the province enacted a \$1,000 spending limit for such groups or individuals that was specifically suggested by the Court (in its reference to a federal election commission report).

Finally, in October 2010, the province of Quebec responded to the Court’s 2009 decision in *Nguyen*, which involved provisions of the Charter of the French Language (requiring that French

be the language of instruction from kindergarten to secondary school). Under section 23 of the Charter of Rights, English- and French-speaking children have the right to continuity of language instruction. In *Nguyen*, the Court struck down provisions that barred the use of ‘bridging schools’ – the enrollment of children in privately funded English-language schools on a short-time basis for admittance to publicly funded schools – to bypass requirements that a major part of a child’s education must have been in English for them to attend English-language schools instead of French ones. In the decision, the Court acknowledged that while an outright ban was unconstitutional, there were legitimate concerns that might warrant limiting their use:

Some of the evidence on the use of bridging schools raises doubts regarding the genuineness of many educational pathways, and regarding the objectives underlying the establishment of certain institutions. In their advertising, some institutions suggested that after a brief period there, their students would be eligible for admission to publicly funded English-language schools ... An approach to reviewing files closer to the one established in [the Court’s earlier decision in] *Solski* would make it possible to conduct a concrete review of each student’s case and of the institutions in question. This review would relate to the duration of the relevant pathway, the nature and history of the institution and the type of instruction given there. For example, it might be thought that an educational pathway of six months or one year spent at the start of elementary school in an institution established to serve as a bridge to the public education system would not be consistent with the purposes of s. 23(2) of the *Canadian Charter* and the interpretation given to that provision in *Solski* (at para. 44).

The province’s new legislation mirrors the specific limitations outlined by the Court. First, private institutions created solely to bypass the language requirements are banned. Second, under the legislation the government has imposed regulations and created eligibility requirements that mean it would take at least three years of English-language instruction at private institutions for children to become eligible for publicly funded minority language education.

In only 12 instances, representing 17.4 percent of cases (nine of the 29 amendments and three of the nine replaced statutes) did legislatures respond with genuine dialogue. In coding amended or replaced legislation as either straight compliance or dialogic response, I erred on the side of dialogue, so that any significant deviation from the Court ruling was taken into consideration. As a result, some commentators, particularly critics of dialogue, might disagree with labeling some of the cases as dialogic responses. For example, in *Seaboyer* the Court struck down the ‘rape shield’ provisions of the Criminal Code, which restricted use of a sexual assault complainant’s sexual history as evidence by the accused. Parliament responded by resurrecting the provisions and putting in place procedures for a closed court examination of whether the evidence is admissible. When the Court upheld the new legislation in 2000,⁶ the justices considered it a codification of their ruling in *Seaboyer*, which would indicate straight compliance. Nonetheless, Roach (2001a: 273) argues that Parliament introduced significant modifications to the Court’s guidelines, including protecting complainants from having to testify at the closed hearings on admissibility and giving directions to judges to consider privacy and equality rights in making determinations. Although Manfredi (2004: 147) contends these differences are ‘arguably so marginal as to stretch the definition of “modification”’, I have chosen to categorize the response as dialogic.

A similar interpretation was made regarding the federal government’s response to *Thomson Newspapers*, where the Court invalidated legislation that prohibited the dissemination of opinion poll information during the last three days of an election campaign. The replacement legislation enacted provisions that corresponded to guidelines by the Court mandating, for example, the publication of methodological information. Yet the new legislation also preserved a publication ban on election day, something not mentioned in the judicial decision. I thus coded the response as dialogic.

These examples underscore that the coding was conducted in such a way that is more likely to overstate, rather than understate, the extent of dialogic responses by legislatures. Further, some government responses are clearly dialogic, such as the Quebec government's response to the Court's decision in *Ford* striking down provisions that required all public signs in the province to be in French. The legislation was initially preserved by use of the notwithstanding clause – the sole instance in which section 33 was invoked – and later amended to permit the use of other languages so long as French is 'predominant.' Another good example is the city of Peterborough's response to the *Ramsden* decision, where the Court struck down a prohibition on posterage on municipal public property. The city amended its by-laws to provide for community bulletin boards within a specified zone and prohibiting posterage elsewhere. The amendments included a four-paragraph-long justificatory preamble explaining the reasonableness of the new rules (Hogg and Bushell, 1997: 122).

The principal finding of this analysis – that fewer than one in five Charter cases in which the Court struck down or altered legislation involved dialogue – refutes earlier assertions that a strong majority of Charter cases are marked by dialogue (Hogg et al., 2007a) and that in Canada dialogue is 'a means of reconciling judicial review with democracy' (Roach, 2006: 348). This also confirms critics' assertions that characterizing the system of judicial review in Canada as weak-form is a mistake, at least in terms of how it operates in practice (Huscroft, 2009; Mathen, 2007; Waldron, 2006).

Proponents of dialogue appear to seriously underestimate the powerful effect of the Court's declarations on rights. Elected representatives face a tremendous rhetorical disadvantage in responding to rulings that claim the Charter has been infringed. Further, as Hennigar (2004: 16–17) points out, 'the government's Charter review process does not occur within a legal vacuum, but typically involves bureaucratic actors attempting to gauge the courts' likely response to legislation, based on existing case law. To this extent, there is usually, if not always, an external judicial influence on internal legislative-executive discussions of constitutional rights.' These dynamics obstruct a lot of dialogue because the impetus from the legislative perspective is for amendments to reflect Court rulings. It is for this reason that dialogue proponents also understate the actual policy impact of legislative amendments. In instances where legislatures enact reply legislation, 'the new legislation cannot accomplish precisely what the earlier one did, because the enhanced protection of constitutional values necessarily reduces the statute's policy-effectiveness relative to the original' (Tushnet, 2003: 835).

It is worth noting that this effect appears to be of similar intensity across different jurisdictions. The federal government had a dialogic response rate of 14 percent and the provincial governments together responded in dialogic terms in 18 percent of cases. Nor is there significant variance in the types of responses by different provinces.⁷ Municipal governments responded with dialogue in two of three cases.

Before turning to the implications this analysis may have for other parliamentary systems, it is worth investigating the circumstances under which dialogue is more or less likely to occur. The following sections briefly examine legislative responses to different types of rights and to different types of remedies used by the Court.

Different types of rights

The extent to which the legislatures attempt to reverse, modify or avoid a Court ruling appears to depend on the type of right at issue in the policy disagreement. There are three different rights areas that have been implicated in a substantial number of instances: legal rights, equality rights, and

Table 2. Legislative response by type of right

	No response	Repealed	Amended	Replaced	Positive responses (amended and replaced)	
					Straight compliance	Dialogic response
Legal rights (N=31)	8	4	15	4	15	4
Equality rights (N=11)	4	1	5	1	6	0
Freedom of expression (N=16)	7	1	5	3	3	5

freedom of expression.⁸ Among these, and as shown in Table 2, there are significant differences in how legislatures tend to respond. Court rulings invalidating or altering legislation that implicated legal rights (which include the right to life, liberty and security of the person, the right to counsel, and a host of other procedural rights enumerated in sections 7 through 14 of the Charter) saw dialogic responses from the legislatures in four of 31 cases (13 percent). This finding is not surprising given that the issues involved in determining the scope of legal rights are generally viewed as the inherent domain of the judiciary.

More surprising, at least at first glance, is that none of the 11 cases implicating equality rights received a dialogic response. By contrast, 31 percent of cases involving freedom of expression spurred dialogue from the relevant legislatures. A consideration of the issues at stake in these cases and the motivations of the legislatures in deciding to defend certain policies helps to explain this difference. Legislators face a particular symbolic difficulty in being seen as infringing equality rights, as evidenced by the fact that from 1999 to 2008 the Court viewed ‘human dignity’ as a central component of its equality jurisprudence.⁹ In these cases the Court has deemed legislation discriminatory on the basis of personal characteristics like sex, citizenship, and sexual orientation. While freedom of expression can be viewed as no less fundamental a right, most of the cases implicating that guarantee have involved regulation of specific kinds of expression that do not necessarily constitute its core aspects, such as political speech. Instead, the legislation at issue in these cases typically involves the prohibition of certain kinds of obscenity or restrictions on advertising or other types of commercial speech. Legislatures have substantial aims in defending these policies, such as protecting children, or Quebec’s goal of preserving the French language in its response to the *Ford* case. It is thus less surprising that dialogic responses are more prevalent in expression cases than they are to protect policies that might infringe equality.

Judicial remedies as encouraging or hindering dialogue

The Court does not always simply declare a law unconstitutional and strike it down. Rather, it has developed a variety of remedies; some are viewed as conducive to dialogue, while others are viewed as preventing dialogue. Table 3 shows the type of legislative response by judicial remedy. Roach (2001a: 200) claims the Court has ‘bent over backward to let the legislature have its say’ by employing the remedy of suspended declaration of invalidity, which delays the effects of the decision, usually for periods of 6 to 18 months. The numbers appear to support the argument that the suspended declaration remedy encourages dialogic response, as 5 out of 14 instances (36 percent) where the remedy was used spurred dialogue from the relevant legislature. By contrast, in the 38

Table 3. Legislative response by judicial remedy

	No response	Repealed	Amended	Replaced	Positive responses (amended and replaced)	
					Straight compliance	Dialogic response
Straight invalidation (N=38)	12	5	15	6	15	6
Read in (N=5)	4	0	1	0	1	0
Read down (N=5)	4	0	0	1	1	0
Severance (N=6)	1	1	4	0	3	1
Suspended (N=15)	3	2	8	2	5	5

instances in which the Court simply invalidated a law, only 6 legislative responses were dialogic (16 percent). Although Roach asserts that the remedy of suspended declaration is used by the Court to facilitate dialogue, a different but compatible explanation is the preservation of the Court's legitimacy. The suspended declaration remedy is most often used in cases where invalidating the law would leave a troubling policy vacuum and the Court knows some type of legislative response is necessary. Not delaying the effects of the decision would only bring criticism to the Court.

The remaining remedies, in which the Court amends legislation itself, are considered more controversial and are thought to hinder the opportunity for dialogue. These are 'reading in' (where the Court inserts words or provisions into the legislation), 'reading down' (where the Court gives a law it considers too broad or 'over inclusive' a more narrow interpretation), and 'severance' (where the Court removes words or whole phrases from the legislation). As shown in Table 3, cases in which these remedies are employed almost never result in dialogic responses from the legislatures. These results reinforce the argument that legislatures are prone to capitulating to the Court's policy intrusions. Where the Court has done their work for them, the legislatures almost always treat the matter as settled.

'Second-look' cases

Seven of the legislative responses coded in this study were subsequently reviewed by the Supreme Court, and in three such instances the new legislative provisions were invalidated in whole or in part. In one sequel,¹⁰ the Court struck down a provision of the Criminal Code which allowed bail to be denied 'on any other just cause being shown,' part of the federal government's response to the 1992 *Morales* case, in which the Court had invalidated a provision permitting the denial of bail in the 'public interest.' (The Court upheld four other, more specific provisions in the new legislation.)

After the Court struck down a provision of the *Canada Elections Act* prohibiting all prison inmates from voting in federal elections in the 1993 *Sauvé* case, the federal government enacted a new provision limiting the prohibition to those inmates serving sentences of more than two years. The Court invalidated this new law in the 2002 sequel. The *Sauvé* sequel is significant in undercutting the dialogue metaphor in another respect, in that the Court's majority judgment cites the unavailability of the notwithstanding clause (which does not apply to voting rights) as a reason for *stricter* scrutiny by the Court. Manfredi (2007: 198) notes that the Court 'could just as easily have interpreted the non-applicability of section 33 as a reason for judicial caution. Indeed,

the dialogue metaphor would seem to support the view that judicial deference should *increase* as the potential for dialogue decreases.’

Finally, in the 2004 *Demers* case, the Court struck down a provision that was part of the federal government’s response to the 1991 *Swain* case, which granted the power to detain accused persons found permanently unfit to stand trial. The government has not responded to either the *Morales* or *Sauvé* sequels, and its response to the *Swain* sequel was to create a new provision adopted directly from the Court’s decision.

Of the other four second-look cases, three involved legislation that was categorized as straight compliance (responses to *B.C. Motor Vehicle Act*, *Libman*, and *RJR-MacDonald*) and the fourth was the legislative response to *Seaboyer*, which the Court interpreted as a codification of its ruling. This suggests that legislative responses challenged again at the Supreme Court will not pass muster unless they toe the judicial line in full. This is not a promising record for those who argue that dialogic review should encourage deference on the part of the Court when assessing legislative responses (see Dixon, 2009). More importantly, these second-look cases illustrate that the ability of legislatures to have the final say in the policies at stake is even weaker than the 17.4 percent dialogic response rate suggests.

Implications for Canada and the parliamentary model

This analysis makes clear that the system of judicial review in Canada is, in practice, fundamentally one of judicial supremacy. Legislatures respond to the Supreme Court’s Charter rulings in a dialogic manner in fewer than one-fifth of the cases implicating legislation. The empirical record is even more meager when we consider that in second-look cases the Court has been unwilling to accept follow-up legislation if it deviates in any substantial way from its previous rulings.

Determining what amount of dialogue is sufficient to classify a system as one of judicial supremacy, parliamentary sovereignty or a hybrid of the two is in some respects a normative question. In that respect, the empirical debate over dialogue mirrors the debate over ‘judicial activism’; measuring its frequency is distinct from deciding whether there is ‘too much’ or ‘too little’ (see Choudhry and Hunter, 2003; Manfredi and Kelly, 2004; Choudhry and Hunter, 2004). One guideline for determining the answer in the case of dialogue is to consider the ‘ideal’ middle road or weak-form system of judicial review as one where the legislature has the final word in 50 percent of the instances of disagreement. However, for purposes of classification there should be a healthy margin on either side. Commentators may quibble on how wide this margin should be, but it is unreasonable to regard systems as dialogic or weak-form where the judicial rulings are determinative in as strong a majority of cases as in Canada.

Critics might argue that this study leaves out instances of dialogue not captured by the case selection. For example, Roach (2001b) views dialogue over judicial rulings on the common law as particularly successful from the legislature’s perspective. Yet these cases do not impinge as directly on the democratic function as judicial review that affects legislation. Even in systems of judicial supremacy legislatures are free to enact legislation following judicial rulings affecting common law rules.

This study also leaves out prominent instances of judicial influence on public policy where *regulatory decisions* were deemed inconsistent with the Charter but the Court rulings did not affect the legislation itself. For example, a 1997 decision required British Columbia to provide sign language interpretation for deaf hospital patients.¹¹ The Court ruled that the relevant legislation was constitutional but that the decision of administrators to not provide interpreters infringed the Charter. Such a policy decision is in many ways as substantial as those that involve the Court altering actual legislation. Nevertheless, the goal of this study has been to assess dialogue’s practical

success in diminishing the democratic objections to judicial review. At the core of that debate are governmental policy objectives and those are most clearly embodied in cases affecting laws passed by elected legislatures. From this perspective, while dialogue is an attractive theory, it fails in practice to an even greater degree than some of its fiercest critics suggest (see, for example, Manfredi and Kelly, 1999, who argue dialogue occurs in one-third of cases).

Despite this rather stark conclusion regarding the state of dialogue in Canada, the comparative significance of dialogue in other countries remains largely untested. Canada is widely considered the model for dialogic review in other parliamentary systems, and the results here suggest that these jurisdictions should approach dialogue theory with an abundance of caution. Even with the particular mechanisms embedded in the Canadian Charter that would seem to support dialogic interaction, the empirical record tells a very different story. Applying a similar notion of dialogue to other contexts is an exercise fraught with difficulty.

Yet there are reasons to think some of the other Commonwealth countries could have more practical success with dialogue than Canada. Of the parliamentary systems, Canada is the only country with a constitutionally entrenched bill of rights and in which the Constitution allows judges the authority to invalidate legislation (made possible under section 52 of the Constitution Act, 1982, and section 24 of the Charter). The bills of rights enacted by other countries often discussed in dialogic terms are only statutory enactments. In other words, of the weak-form systems of review, Canada's is theoretically closer to the strong-form model than the others. It is worth noting that even the widely-held conception of the US system as the benchmark of strong-form review has not been tested in this manner. Although a number of scholars have examined the ways in which Congress and the Supreme Court interact (Quirk, 2008), even in dialogic terms (Fisher, 1988), there is no comprehensive study of legislative responses that makes clear if the American case is fitting as the paradigmatic example of strong-form review (Hogg et al., 2007b: 200). The approach adopted here may have comparative utility in testing whether it is even accurate to view the US system as one of judicial supremacy in practice.

In contrast to Canada, a more meaningful dialogic exchange might take place in a system like the United Kingdom's, where the Appellate Committee of House of Lords (now the UK Supreme Court) only has the power to declare acts incompatible with the Human Rights Act, and such declarations do not render the law inoperable or impose an obligation on Parliament to respond. Despite this, some commentators worry that the British Parliament will still show undue deference to judicial pronouncements (Hiebert, 2004a: 1983–1984). In fact, Masterman (2009: 123) points out that declarations of incompatibility have been made with some frequency by the courts and in all instances the UK government has accepted the rulings and remedied the perceived incompatibility or is in the process of doing so. The framework adopted here might be a useful tool of analysis to determine the extent to which these government responses diverge at all from the judicial rulings. An empirical assessment like the one completed here could tell us whether Parliament is engaging in a dialogue with courts around the Human Rights Act or if judicial pronouncements are taken as supreme.

A similar fear has been expressed with regard to the state of Victoria, Australia's 2006 Charter of Human Rights and Responsibilities, which was modeled largely on the UK's Human Rights Act. Debeljak (2007: 71) warns the legislature 'against simply deferring to judicial perspectives – we do not want to simply Charter-proof their policy and legislative initiatives, which would produce a judicial monologue.' Some commentators contend the Victoria Charter may permit more dialogue than the British Human Rights Act, particularly because the former allows courts to make declarations of 'inconsistent interpretation' rather than incompatibility, which means that the Victoria Parliament may 'label declarations as merely disagreements between the Parliament and the courts over interpretation rather than acknowledging that declarations are evidence of problems with

human rights compliance in the state' (Evans and Evans, 2006: 271 as cited in Masterson, 2009). It may be several more years before a substantial record of declarations and legislative responses develops under the Victoria Charter, but an analysis of dialogue like the one undertaken in this study may lend important insights to the comparative lessons of institutional design as it pertains to constitutional and statutory bills of rights.

The state of dialogue in New Zealand may be worth examining in a manner similar to Canada's but from the opposite end of the dialogic interaction. That is, an examination of legislative responses to judicial rulings might focus on whether the New Zealand Parliament is sufficiently attentive to court rulings because of the degree to which the New Zealand Bill of Rights Act retains parliamentary sovereignty. The Act explicitly preserves parliamentary sovereignty and requires judges to interpret acts as consistent with the Act where possible. The Act does not provide for judges to make declarations of inconsistency. Although courts have suggested this as an implied power, it is one they have yet to use (Jackson, 2007: 99). It could very well be that weak-form models of judicial review are unstable on both sides of the continuum: those that fall into the practice of judicial supremacy because legislatures are unwilling or unable to respond with real dialogue, and those that do not give courts enough of a say in the dialogue over rights to have any more impact than they would in a system of parliamentary sovereignty.

The practice of judicial review in these jurisdictions remains fluid. The United Kingdom has only a decade of judicial experience with the Human Rights Act, and its new Supreme Court only came into existence in 2009. Although New Zealand has had the Bill of Rights Act since 1990, it only recently ended appeals to the Judicial Committee of the Privy Council in Britain, and created its own Supreme Court in 2004. And in the Australia Capital Territory and state of Victoria the bills of rights were enacted in 2004 and 2006, respectively. As a result, more time is needed for a sufficient track record of dialogue to develop in these countries before drawing forceful empirical conclusions. The preceding analysis of Canada's experience might serve as a useful template, however, for examining the patterns of interaction between courts and legislatures and evaluating whether the 'weak form' or parliamentary model of judicial review truly offers a compromise method of enforcing rights.

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Notes

1. The notion of constitutional dialogue in the literature pertaining to judicial review in the United States applies to a conception of dialogue that can occur over varying periods of time and through different mechanisms, including, for example, the appointment of new judges by a dominant coalition, and broader societal forces like social movements and public opinion. For a good discussion on the different conceptions of dialogue in the United States and Canada, see Bateup (2007) and Tushnet (2009).
2. The notwithstanding clause does not apply to voting rights, the requirement that legislative assemblies meet and regular elections be held, mobility rights, minority language education rights, and sexual equality rights.
3. *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199. The Court upheld the new legislation in 2007. See: *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610.

4. The database I developed for this study differs from the list of cases in Hogg and Bushell's original 1997 study and their 2007 follow-up. First, it does not include cases where the Court affected only the common law, even though Hogg and Bushell's original study included *R. v. Daviault* [1994] 3 S.C.R. 63, for example, which struck down a common law rule that self-induced intoxication is not a valid defence for a crime of general intent. Although there are some interesting examples of 'common law dialogues' (see Roach, 2001b), the focus of this study is on the impact the Court has on government legislation. Second, I excluded *R. v. Sieben* [1987] 1 S.C.R. 295, *R. v. Hamill* [1987] 1 S.C.R. 301, and *R. v. Downey* [1992] 2 S.C.R. 10, which appear to have been included in the Hogg and Bushell study and Manfredi and Kelly's response analysis by mistake (the Court did not rule on the constitutional validity of the impugned provisions in *Sieben* or *Hamill* and it upheld the constitutionality of the Criminal Code provisions at issue in *Downey*). Finally, my database includes several cases, including *R. v. Logan* [1990] 2 S.C.R. 731, *R. v. Sir* [1991] 3 S.C.R. 124, and *R. v. Laba* [1994] 3 S.C.R. 965, which were (perhaps mistakenly) not included in previous studies, and it includes all relevant cases through the end of 2009.
5. In their response to the original Hogg and Bushell article, Manfredi and Kelly (1999) examine six categories of legislative response. They include 'judicial amendment,' in which they place only one case, *Miron v. Trudel* [1995] 2 S.C.R. 418. I do not count 'judicial amendment' as a category of legislative response, since it is a judicial action to alter the legislation. Instead, I categorize *Miron* as having no legislative response. The final category is of cases where the legislative 'response' actually preceded the Court's decision. Because these legislative decisions generally pertain to lower court invalidations and, more importantly, still constitute independent legislative intent, I include these cases in the other categories they best fit.
6. *R. v. Darrach* [2000] 2 S.C.R. 44.
7. The number of cases at the individual provincial level is not significant enough to draw conclusions: Alberta (3), British Columbia (5), Manitoba (1), New Brunswick (1 – dialogic), Nova Scotia (1), PEI (1), Ontario (4 – 2 dialogic), Quebec (6 – 1 dialogic).
8. The Court affected legislation in three or fewer instances in each of the other rights areas: freedom of association (2); freedom of religion (1); voting rights (3); mobility rights (1); and minority language education rights (3).
9. See: *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497. The Court backtracked from applying the human dignity standard in its equality jurisprudence in *R. v. Kapp*, 2008 SCC 41 [2008] 2 S.C.R. 483.
10. *R. v. Hall* [2002] 3 S.C.R. 309.
11. *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.

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