Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective

Christine A. Bateup
New York University, christine.bateup@nyu.edu

Follow this and additional works at: https://lsr.nellco.org/nyu_plltpw
Part of the Comparative and Foreign Law Commons, and the Constitutional Law Commons

Recommended Citation
https://lsr.nellco.org/nyu_plltpw/44

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.
EXPANDING THE CONVERSATION: AMERICAN AND CANADIAN EXPERIENCES OF CONSTITUTIONAL DIALOGUE IN COMPARATIVE PERSPECTIVE

Christine Bateup

JSD Candidate
New York University School of Law

Email: christine.bateup@nyu.edu
EXPANDING THE CONVERSATION: AMERICAN AND CANADIAN EXPERIENCES OF CONSTITUTIONAL DIALOGUE IN COMPARATIVE PERSPECTIVE

ABSTRACT

In recent years, theories of constitutional dialogue have become increasingly popular in the United States and Canada as a way of describing the nature of interactions between courts and non-judicial actors in the area of constitutional decision-making. Dialogue theory has been most popular in Canada, due to the unique institutional mechanisms adopted in that country to promote an interactive relationship between courts and legislatures. Despite this, use of the dialogue metaphor has become the subject of increasing criticism in Canada over time, as scholarly critics charge that the Canadian constitutional system is actually evolving into one of judicial supremacy. In contrast, although the United States is widely regarded as the paradigmatic example of a system of judicial supremacy, scholars are increasingly asserting that dialogue exists as an observable feature of strong-form constitutionalism in this country. This Article sheds light on – and ultimately resolves – this paradox in the scholarly literature on constitutional dialogue by revealing critical methodological differences that dialogue theorists in each country employ. Drawing on American approaches to dialogue, the Article also applies a novel methodology to reassess the potential for constitutional dialogue in Canada, and illustrates the explanatory power of this approach by examining recent developments in the area of gay rights and same-sex marriage in Canada. Not only does this innovative approach provide a more accurate description of how judicial review operates in Canada, but it also provides a unique framework for rethinking the possibilities of dialogue in a range of other nations.
I. INTRODUCTION*

When we think about the defining features of the American system of judicial review, the doctrine of judicial supremacy readily comes to mind. Judicial supremacy reflects the idea that the judiciary, in particular the Supreme Court, is the ultimate interpreter of the Constitution, because its decisions setting aside legislation on constitutional grounds cannot be overturned by ordinary legislative action. Support for judicial supremacy remains strong because of the widely held belief that it enables judges to protect the rights of individuals and political minorities against undue encroachment by legislative majorities. However, the doctrine has also prompted great anxiety about the democratic legitimacy of empowering judges to make fundamental decisions about the meaning of constitutional rights.2

Democratic unease about the consequences of American-style judicial supremacy has led a range of nations to develop alternative models of constitutionalism that seek to “decouple judicial review from judicial supremacy.”3 Most notably, constitutional designers in a number of countries with Westminster-style parliamentary systems of government have recently implemented a variety of innovative mechanisms to achieve a balance between the judicial protection of fundamental rights and parliamentary supremacy. The chief means by which this is done is to grant judges the power to interpret fundamental rights, while at the same time empowering legislatures to have the final word about their meaning.

The new “weak-form” model of constitutionalism first emerged in Canada with the enactment of the Canadian Charter of Rights and Freedoms in 1982.4 The most

---

* New York University School of Law; Freda Bage Fellow, Australian Federation of University Women (Qld.). I would like to thank Barry Friedman, James Kelly, Michael Perry, Mark Tushnet and Yair Sagy for thoughtful comments and suggestions.

1 See generally RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

2 See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (famously referring to this problem as the “countermajoritarian difficulty”).


significant structural innovation of the Charter is section 33 – commonly referred to as the “notwithstanding” or “override” provision – which grants power to Canadian legislatures, at both the federal and provincial levels, to deviate from or displace judicial rulings that invalidate legislation for violating Charter rights. Canadian political leaders designed section 33 precisely to avoid the kind of judicial supremacy associated with American-style judicial review, by preserving a “constitutional escape valve” that allows legislatures “to make ultimate social decisions.”

The distinctive structural features of the Charter have prompted Canadian scholars to search for alternative ways of understanding the relationship between courts and legislatures in Charter disputes. One of the most prominent approaches has been to suggest that judicial review in Canada is best conceptualized as an interactive inter-branch dialogue between judges and legislators. On this understanding, when the judiciary speaks it does not simply tell the political branches what to do and expect them to fall into acquiescence. Rather, judicial decisions are part of a more constructive and equal conversation between judges, legislatures and executives about the appropriate balance between fundamental rights and other important interests. This conceptualization of dialogue proposes a forceful and novel answer to concerns about the democratic legitimacy of judicial review – if the political branches of government are able to respond to judicial decisions with which they disagree, the force of the countermajoritarian difficulty is overcome, or at the least, greatly attenuated.

Despite this theoretical potential to resolve countermajoritarian concerns, use of the dialogue metaphor in Canada has become the subject of increasing criticism over time. Dialogue detractors argue that the interactions that occur in practice between Canadian legislatures and the judiciary are often more akin to a monologue than a

---

5 Saskatchewan, Legislative Debates, 2 December 1981 at 134 (Blakeney). See also House of Commons, Legislative Debates, November 20, 1981 (Chretien) (describing section 33 as a “safety valve” that would ensure “that legislatures rather then judges would have the final say on important matters of public policy”).

dialogue, because legislatures commonly acquiesce to judicial perspectives rather than express their own views about the meaning and application of Charter rights.\(^7\) As a result, the detractors suggest that judicial review under the Charter is evolving into precisely what it was designed to avoid – a system of judicial supremacy akin to that which exists in the United States.

The challenge to dialogue theory has taken on increased significance in recent years following assertive judicial action in a number of key policy areas in Canada. The most dramatic developments have taken place in the area of gay rights and same-sex marriage. It is frequently argued that the aggressive actions of Canadian courts in relation to the equality claims of gays and lesbians have forced the federal government to redefine marriage to include same-sex partnerships.\(^8\) If ever there was an example of judges imposing their own views about a controversial question of social policy on the populace, so the critics argue, then same-sex marriage is surely the exemplar.

If dialogue theorists have failed to convince Canadians that the dialogue metaphor accurately describes interactions that occur between the judiciary and the political branches under the Charter, we might expect that the metaphor would hold little appeal as an explanatory theory in other constitutional settings. After all, if the unique structural mechanisms in the Charter have not averted the emergence of judicial supremacy, which they were explicitly designed to do, the chances of a stronger-form system evolving dialogically seem unlikely. Nevertheless, just as doubts about the utility of the dialogue metaphor in Canada are growing, a somewhat reverse narrative is emerging about how judicial review operates under the United States Constitution.

In the United States, political science and legal scholars are challenging the dominant view that judicial supremacy accurately describes the dynamics of judicial decision-making in this country. To the contrary, these scholars claim that decisions of the United States Supreme Court are not necessarily final because of numerous political constraints on the judiciary. Drawing on these positive observations regarding the nature of judicial action, the conclusion that some scholars have reached is that American


\(^8\) See infra Part V.
judicial review is best conceptualized as part of a broader dialogue between the judiciary and other constitutional actors about the meaning of the Constitution.9

These developments represent something of a paradox. On the one hand, the Canadian Charter was designed to avoid the kind of judicial supremacy that is perceived to exist in the United States, and for this very reason, Canadian scholars turned to the dialogue metaphor to differentiate the dynamics of judicial review in that country. Yet it is increasingly being suggested that genuine inter-branch dialogue does not frequently take place in Canada, leading to the gradual emergence of judicial supremacy. In contrast, although the United States is widely regarded the paradigmatic example of a system incorporating judicial supremacy, scholars here assert that dialogue is observable as a positive matter. These developments suggest that dialogue might not regularly take place under the weak-form system of constitutionalism in Canada, whereas it might actually exist as a feature of strong-form constitutionalism in the United States.

This Article aims to make sense of this paradox in the scholarly literature on constitutional dialogue. It claims that the paradox can be resolved once we realize that scholars in these two countries are, in fact, looking at distinct forms of interaction when they refer to the concept of dialogue. While Canadian theorists focus almost exclusively on inter-branch interactions, American theorists understand dialogue in a broader, society-wide sense involving a constitutional conversation between judges, the political branches and the people. Most importantly, there are also critical methodological differences between theories of dialogue across the United States and Canadian border. Theorists in Canada commonly begin by defining dialogue as a particular form of interaction between courts and legislatures that is made possible by the structural features of the Charter, before examining whether such forms of interaction actually occur in practice. American scholarship, in contrast, seeks to provide an empirically grounded explanation of the institutional context in which judicial review operates and then develop dialogic accounts drawing on this positive evidence.

The principal claim of the Article is that valuable lessons can be drawn about the true potential for constitutional dialogues in Canada by adopting a similar methodological approach to that taken in the United States. Reconceptualizing Canadian dialogue in this way will not only lead to a more accurate description of how judicial review operates in that country, but it will also ensure a stronger methodological foundation for dialogue theory in Canada moving forward. More broadly, this positive reconceptualization of dialogue will also provide a framework for rethinking the possibilities of dialogue in a range of other nations.

The Article takes the following form. Part II traces the emergence of dialogue theory in Canada. This Part contends that although dialogue theorists have been able to explain some aspects of judicial-legislative interactions in Canada, dialogic interactions between the branches are rather less common than they generally claim. This conclusion appears to provide some support to the claims of the dialogue detractors who argue that Canada is evolving into a system of judicial supremacy. In light of this, Part III focuses on the paradoxical development that just as many Canadians are becoming more skeptical of dialogue, theorists in the United States are suggesting that American-style judicial review is best described as dialogic in nature. In order to understand this development, this Part examines the positive conception of dialogue that has emerged in the United States in greater detail and explores the critical distinctions between this and prevalent Canadian understandings.

Part IV considers how a positive methodological approach might help to fill in important gaps regarding how judicial review operates in the Canadian constitutional system. Drawing on positive evidence regarding judicial behavior, this Part claims that a broader form of dialogue also appears to be taking place in Canada, particularly in relation to morally contentious issues. The different nature and form of the constraints in the Canadian constitutional system, however, appear to drive dialogue in that country in a slightly different way than in the United States. Part V then explores these issues in a more concrete fashion by focusing on the area of gay rights and same-sex marriage in Canada. Taking a positive approach, it will be shown that developments in these areas are not representative of the wholesale imposition of judicial perspectives, but are instead
best viewed as the result of more complex society-wide dialogue about constitutional meaning.

II. DIALOGUE IN CANADIAN CONSTITUTIONAL THEORY

The introduction of the Charter gave the Canadian judiciary, for the first time, an explicit mandate to engage in rights-based judicial review, including the judicial invalidation of legislation. Critics soon charged that this new power was undemocratic because it invested judges with virtually unchecked power to enforce their own interpretations of Charter rights. Before long, however, dialogue theory emerged as a powerful and persuasive challenge to the claims of the Charter skeptics.

A. The rise of a metaphor

The emergence of the dialogue metaphor can be traced to an influential article published in 1997 by Peter Hogg and Alison Bushell. In response to the claims of the Charter skeptics, Hogg and Bushell contended that judicial rulings do not constitute the final word on the meaning of Charter rights because structural features of the Charter allow Canadian legislatures to reverse, modify or avoid judicial decisions with which they disagree. Following a judicial decision invalidating legislation on Charter grounds, the “legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.” As a result, judicial decisions are best viewed as the beginning of an interactive dialogue in which both courts and legislatures equally share the task of articulating Charter values, culminating in a democratic legislative decision.

---

11 Hogg and Bushell, supra note 6.
12 Id. at 79-80.
13 Id. See also ROACH, SUPREME COURT ON TRIAL, supra note 6, at 293 (“The legislature reminds the courts about the reasons why limits on rights are required in particular contexts and the alternatives that the government has considered and rejected.”).
Hogg and Bushell, together with other Canadian theorists who have subsequently embraced the dialogue metaphor, point to a number of distinctive structural features of the Charter that facilitate an inter-branch conversation. The first provision is the section 33 override, which empowers the federal Parliament and provincial legislatures to declare that legislation shall operate “notwithstanding” the enumerated provisions of the Charter and the rights they protect. Declarations made under section 33 expire after five years, but they can be renewed if the legislature is again prepared to make an express declaration. While such a declaration is in force, further judicial review of the relevant legislation is excluded.

Section 33 is said to be the most clearly dialogic provision of the Charter because it allows legislatures to deviate from or displace most judicial interpretations of Charter rights. In other words, while the judiciary can invalidate legislation when it forms the view that statutory provisions conflict with protected rights, legislatures retain a formal and direct way to articulate and enforce their own views about the interpretation and application of those rights where they disagree with judicial interpretations. Legislatures can therefore engage directly with the judiciary in a discussion about constitutional values, while retaining the formal ability to have the final word if they strongly disagree with judicial perspectives.

The second structural feature of the Charter that is said to facilitate inter-branch dialogue is section 1. This clause provides that Charter rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and


15 Section 33 provides that: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” See Canadian Charter of Rights and Freedoms, §33, Part I of the Constitution Act, 1982, Bring Schedule B to the Canada Act, 1982, ch. 11 (U.K.). Application of the provision is restricted to the rights and freedoms under section 2 (fundamental freedoms) and sections 7 to 15 (due process and equality rights) of the Charter.

In practice, this means that Charter rights can be limited by legislation that meets the standards that have been judicially set for section 1 justification.

A law can only be justified as a “reasonable limit” on Charter rights if it satisfies a proportionality test; that is, the law must pursue an important objective, be rationally connected with that objective, impair Charter rights no more than necessary to accomplish the objective, and not have a disproportionately severe effect on the persons to whom it applies. Dialogue theorists claim that most disputes center on the third part of this test, namely, the minimal impairment requirement. When a law is invalidated using section 1, this tends to be because the court concludes that the relevant legislative objective was not pursued by the least restrictive means available, rather than because that objective was improper or insufficiently important. As a result, legislatures are commonly left with the ability to re-enact legislation afresh that pursues the same objective but by less invasive means.

Dialogue theorists argue that section 1 promotes dialogue because it constructively aids courts and legislatures “to speak in strong but distinct and complementary voices” to one another. This dynamic is said to be facilitated by the space that is generally left for legislative responses when a court invalidates legislation under the least restrictive means requirement. In the course of explaining why this standard has not been met, the court will often explain what kind of less restrictive legislation would have satisfied that standard. If the legislature enacts this alternative law, it is likely to be upheld in future Charter challenges. Alternatively, the legislature may come up with an independent solution, advancing its own views about the reasonableness of a substitute legislative scheme. While this leaves the ultimate decision on validity to the courts – unlike the situation with section 33 –the result of these interactions is also said to involve a dialogic process of to-and-fro in which judiciary and

---

19 Id. at 85.
20 ROACH, THE SUPREME COURT ON TRIAL, supra note 6, at 13.
21 Hogg and Bushell, supra note 6, at 85.
the political branches work together to determine the best way to achieve policy objectives.\textsuperscript{22}

Not only do dialogue theorists assert that the structural features of the Charter allow for inter-branch dialogue, but they also claim that dialogue between courts and legislatures is the “normal situation.”\textsuperscript{23} This empirical assertion requires significant substantiation, however, in light of the dramatic decline of section 33 as a legislative tool. Despite its unambiguous dialogic potential, Canadian legislatures have only employed the override on rare occasions.\textsuperscript{24}

Scholars frequently argue that the desuetude of the override can be explained by the historical circumstances surrounding its early uses. The Quebec government first used the override in 1982, soon after the enactment of the Charter, when it passed a law that invoked the provision in a blanket fashion with respect to all existing Quebec legislation.\textsuperscript{25} The government took this action because it was infuriated that the Charter had been adopted over Quebec’s objections, and therefore sought to opt out of the document to the greatest extent possible.

While Quebec’s use of the override in this instance created significant controversy throughout the rest of Canada, a greater political storm was to follow in 1988,\textsuperscript{26} after the Supreme Court handed down its decision in \textit{Ford v. Quebec}.\textsuperscript{27} In that

\textsuperscript{22} Id. at 87 (arguing that “the democratic process has been influenced by the reviewing court, but it has not been stultified”).
\textsuperscript{23} Id. at 80.
\textsuperscript{25} All existing legislation was repealed and re-enacted with a standard notwithstanding clause. \textit{See} An Act Respecting the Constitution Act, 1982, SQ 1982, c. 21. Comparable clauses were also introduced in all subsequent legislation enacted until a new provincial government in 1985 stopped invoking the provision in every piece of legislation passed. The blanket use of the notwithstanding clause was upheld in \textit{Ford v. Quebec} [1988] 2 S.C.R. 712, despite the plaintiff’s arguments that a valid use of the provision required more specific derogation to be effective.
\textsuperscript{26} In the interim there was a second use of the override, which did not help to increase the popularity of the provision. In January 1986, the Saskatchewan government used section 33 pre-emptively in relation to back-to-work legislation (SGEU Dispute Settlement Act) to prevent government employees from mounting a Charter challenge to the legislation. \textit{See further} MANFREDI, \textit{supra} note 7, at 184-85; Kahana, \textit{supra} note 24.
\textsuperscript{27} [1988] 2 S.C.R. 712. The statute was not struck down on Charter grounds, as a notwithstanding clause was in effect in relation to the legislation. Instead, it was invalidated on the basis of Quebec’s own Charter of Human Rights and Freedoms.
case, the Court invalidated, on non-Charter grounds, a Quebec law that required public
signs, posts and commercial advertising to be in French only. The Court also made it
clear that once the override in relation to that legislation expired, which was in less than
two months from the date of the ruling, the law would be unconstitutional under the
Charter.

In response to *Ford*, the Quebec government rapidly passed new legislation to
prohibit languages other than French on exterior commercial signs, and incorporated an
override into the statute. Negative reaction to this action was immediate among both
Quebec’s English-speaking minority and the population in the rest of Canada, as it was
widely seen as an attempt to subordinate the minority rights of English speakers in
Quebec to the majority-French speakers. In combination with its earlier blanket use of
the override, Quebec’s actions soon led to “a political climate of resistance” against its
use.28

Most dialogue theorists accept that section 33 has become “relatively
unimportant” to Charter dialogue as a result of these developments.29 They nonetheless
assert that dialogue remains quite prevalent, largely due to the operation of section 1. In
their 1997 study, Hogg and Bushell based this empirical claim on a survey of sixty-six
cases in which Canadian courts struck down legislation on Charter grounds. In
examining these cases, they searched for “legislative sequels,” which they defined as
“some action by the competent legislative body.”30 This could range from simple repeals
of the offending provisions and remedial legislation incorporating changes recommended
by reviewing court, to more wholesale and independent legislative revision of impugned
statutes. Hogg and Bushell argued that any legislative sequel is affirmative evidence of
inter-branch dialogue “because legislative action is a conscious response by the
competent legislative body to the words spoken by the courts.”31

28 Hogg and Bushell, *supra* note 6, at 83. See also JANET L. HIEBERT, LIMITING RIGHTS 139 (1996)
(arguing that as a result of these events, the override quickly “assumed the mantle of being constitutionally
illegitimate”).
29 Hogg and Bushell, *supra* note 6, at 83.
30 *Id.* at 97, 82.
31 *Id.*
Operationalizing dialogue in this way, Hogg and Bushell found that dialogue occurred in approximately 80 percent of the cases in their study. They accordingly concluded that dialogue is “quite prevalent” because “decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response.” Furthermore, they contended that in most cases, legislatures only needed to adopt relatively minor amendments in order to achieve their original objective while also complying with the Charter.

Similar conclusions have been drawn by other theorists who have performed qualitative analyses of the Court’s Charter jurisprudence. Kent Roach, for example, has undertaken a range of case studies to determine the prevalence of inter-branch dialogue in Canada, focusing on judicial decisions in such diverse areas as police powers, criminal power and the equality rights of same-sex partners. Roach claims that these examples demonstrate vigorous inter-branch dialogues regularly taking place, commonly centering on section 1 of the Charter, and thus serve to confirm the explanatory potential of inter-branch dialogue theory in the Canadian setting.

B. Doubts about dialogue

Although the concept of dialogue remains highly popular in Canada, it is also the subject of growing scholarly criticism. Some of this criticism has been directed towards the normative merits of the concept. Most problematically, the accuracy of dialogue theorists’ empirical claims has also been the subject of significant critique.

The chief normative criticism of inter-branch dialogue theory centers on the claim that it recognizes a “relationship between equals” that successfully overcomes

---

32 Id. at 98, 105.
33 Id. at 81.
34 ROACH, SUPREME COURT ON TRIAL, supra note 6. Roach considers that a qualitative approach assists in leading to “a better understanding of when and why legislatures accept certain judicial decisions.” Roach, Dialogic Judicial Review, supra note 6, at 52.
35 In addition to section 1, Roach has more recently argued that the judicial use of such remedies as delayed or suspended declarations of invalidity promote dialogue, as they ensure that legislatures have sufficient time and space to propose amendments to legislative schemes, or propose new schemes that will counter the constitutional problems identified by the Court. See Roach, Dialogic Judicial Review, supra note 6; Kent Roach, Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity, 35 UBC L. REV. 218 (2002); Kent Roach, Constitutional, Remedial and Institutional Dialogues About Rights: The Canadian Experience, 40 TEX. INT’L L.J. 537, 546-553 (2005).
36 Hogg and Bushell, supra note 6, at 79.
democratic concerns about judicial review.\textsuperscript{37} The way in which dialogue has been conceptualized by theorists such as Hogg and Bushell, however, is not premised on true equality, but on the assumption that the judiciary should play the leading role in shaping dialogue with the political branches.\textsuperscript{38} Although legislatures are assigned a substantive role in relation to the articulation of appropriate and necessary limits on rights, these theorists are extremely reluctant to acknowledge a legitimate role for the political branches as independent interpreters of Charter rights. Instead, they assume a judicial monopoly on interpretation, resulting in a very unequal and judicial-centric conception of dialogue in which “[t]he judiciary speaks – Parliament listens.”\textsuperscript{39}

This normative critique has paved the way for criticisms of the empirical validity of inter-branch dialogue theory. Some critics have attacked the loose standard Hogg and Bushell employed to test the extent of dialogic interactions in Canada, which focused on cases in which there had been “some action taken by the competent legislative body.”\textsuperscript{40} As we have seen, utilization of this standard led Hogg and Bushell to include simple repeals of impugned statutes and legislative amendments that merely incorporate judicial suggestions as examples of dialogic legislative responses.\textsuperscript{41} It is difficult to describe such “simple compliance” as evidence of a real interactive dialogue between equals, as these forms of response are more akin to legislative acquiescence to, and compliance with,
judicial rulings. Furthermore, such responses also seem to provide evidence of precisely the kind of hierarchical relationship between the judiciary and the legislature in Charter cases that dialogue theory was designed to refute.

This does not mean, of course, that examples of more equal dialogic interactions cannot be found, but that Hogg and Bushell did not use an adequate measure to isolate instances of genuine dialogue. In light of this, Christopher Manfredi and James Kelly have reanalyzed Hogg and Bushell’s data to test the amount of “positive dialogue” between judges and legislators in Canada. According to them, positive dialogue occurs where “elected officials reflect on the implications of judicial decisions, and revise statutes to advance legislative objectives in a manner that complies with the Charter.” Positive dialogue is more genuine dialogue because it involves some form of creative response to judicial nullifications, rather than mere legislative acquiescence to judicial perspectives.

Reanalyzing the data on this basis, Manfredi and Kelly conclude that positive dialogue can be found in only 33 percent of cases in which the Canadian Supreme Court has invalidated legislation. Furthermore, most legislative responses do not simply involve minor amendments, as Hogg and Bushell claimed, but frequently entail major legislative changes. Manfredi and Kelly thus conclude that while the dialogue metaphor may at times accurately characterize the relationship that exists between courts and legislatures, “dialogue … is both more complex and less extensive than Hogg and Bushell suggest.”

Criticism can also been mounted against the empirical claims made by those who have conducted quantitative analyses regarding the existence of inter-branch dialogue. In contrast to the picture painted by dialogue theorists, critics point to a wide range of instances in which governmental responses to judicial invalidations of legislation have

---

42 Manfredi & Kelly, supra note 39, at 520.
43 Id. at 520.
44 Id. at 521.
45 Id. at 524-25.
46 See, e.g., Mark Tushnet, Judicial Activism or Restraint in a Section 33 World, 53 U. TORONTO L.J. 89, 91 (2003) (“To an outsider, effective legislative responses to the Canadian Supreme Court’s most controversial decisions seem as rare as effective responses to equally controversial decisions by the US Supreme Court.”)
been either non-existent or “exceedingly timid.” If we delve deeper into Roach’s analysis, for example, we find that although he identifies a variety of positive legislative responses in specific cases, his case studies also highlight numerous instances in which legislative replies have not been forthcoming. In fact, legislative acquiescence to judicial suggestions, or simple failures to respond, are not uncommon, even in those cases in which section 1 analysis has clearly left space for a legislative response. Roach attempts to explain the absence of dialogue in such cases as the result of a legislative decision “not to risk the ‘political troubles’” that would accompany clear legislative responses to the Court. However, even Roach is correct that a lack of political will is to blame for legislative compliance, the frequent instances in which governments fail to respond to judicial Charter rulings nevertheless confirm that genuine dialogue between courts and legislatures is significantly less common than dialogue theorists assert.

In combination, these criticisms bring the continuing utility of the concept of inter-branch dialogue into increasing question in Canada. Although the evidence that dialogue theorists present indicates that some productive inter-branch interactions do take place between the judiciary and elected officials, it is also apparent that these interactions are less common than is generally claimed. While the concept of dialogue may therefore temper some concerns about the democratic legitimacy of judicial review in select cases, as presently conceived the metaphor has only limited explanatory force in the Canadian setting.

III. A DIFFERENT DIALOGUE?

Due to the present difficulties with the dialogue metaphor, many scholars have reverted to the Charter skeptics’ language of judicial supremacy to describe how the constitutional system is operating in Canada. According to these commentators, the frequent failure of Canadian legislatures to respond to judicial nullifications of legislation

---

47 Janet L. Hiebert, Parliamentary Bills of Rights: An Alternative Model?, 69 MODERN L. REV. 7, 19 (2006). See also id. at 19-20 (examining the general governmental reluctance to respond to judicial Charter rulings, and suggesting that this “reflects deep scepticism about whether representative institutions have a valid role to contribute to constitutional judgment.”).
48 See supra notes 34-35 and accompanying text.
49 ROACH, SUPREME COURT ON TRIAL, supra note 6, at 294-295. For Roach, the greatest danger to dialogue, however, is not legislature failures to respond, but excessive judicial deference. See id. at 295.
50 Cf. JAMES B. KELLY, GOVERNING WITH THE CHARTER (2005) (proposing an account of dialogue of rights within the bureaucracy as a response to the critique of dialogue theory as advanced by Hogg and Bushell).
means that judicial decisions under the Charter tend to be final, and that the Supreme Court is effectively achieving a monopoly over Charter interpretation.51 This description paints an image of a Court that – except in the few instances in which “genuine” dialogue occurs – has a free rein to act in a countermajoritarian fashion by imposing its own views about Charter meaning.52

Such assertions about the rise of judicial supremacy are frequently connected to the claim that the Canadian model of rights protection is progressively evolving so that it is not sharply distinguishable from the strong-form system of judicial review that exists in the United States.53 Scholars in the United States, however, increasingly suggest that concerns about judicial supremacy and the countermajoritarian difficulty are overstated. Particularly within the social sciences, a significant body of work has been produced that emphasizes that judges cannot unilaterally impose their views about constitutional meaning on the political branches and the populace, because they operate within a political environment that places limits on judicial action. Drawing on this literature, the conclusion that some constitutional scholars have reached is that judicial review in the United States is best described not as countermajoritarian in nature, but as one part of a more interactive and interdependent dialogue about constitutional meaning.

It might appear anomalous to argue that “dialogue” is an appropriate way to conceive of judicial review in the United States, given that constitutional decisions of the United States Supreme Court cannot be overturned by ordinary political means.54 In order to understand why American theorists nonetheless assert that constitutional dialogue is a descriptively accurate concept, we must first gain a better understanding of the social science literature on which they rely.

51 See, e.g., Hiebert, Parliamentary Bills of Rights, supra note 47, at 19 (arguing that “the Charter is evolving in a manner that is consistent with a highly juridical orientation to constitutionalism”); MANFREDI, supra note 7 (claiming that the emergence of judicial supremacy has been one of the dominant features of Canadian politics since the adoption of the Charter, despite the potential promises of dialogue theory).
52 See, e.g., MORTON & KNOPFF, supra note 7, at 58 (“The Supreme Court now functions more like a de facto third chamber of the legislature than a Court.”).
53 See Hiebert, Parliamentary Bills of Rights, supra note 47, at 20 (claiming that the way the Canadian system has evolved “negates the significance” of the weak-form model of constitutionalism adopted in Canada); Tushnet, supra note 46 (arguing that the Canadian system of weak-form judicial review seems to have degenerated into strong-form, or US style, judicial review).
54 The only way to directly respond to a Supreme Court decision is by constitutional amendment, which is a notoriously difficult and time-consuming procedure that has only been successfully invoked on four occasions. See DEVINS & FISHER, supra note 9, at 23; FISHER, supra note 9, at 201-206.
A. Political constraints and the judiciary

In contrast to legal scholarship that begins from the premise that the Supreme Court wields immense power in American society, social scientists ask how courts can wield their judicial review powers to limit the activities of the political branches of government. As Alexander Hamilton famously stated, courts are the “least dangerous branch” because they possess neither the power of the “purse” nor of the “sword,” leaving them in a position where they must obtain the cooperation of other political actors if they want to ensure the successful implementation of their decisions. Rather than having complete freedom to decide constitutional cases, judges are instead constrained by the complex environment in which they operate.

Social scientists have highlighted a variety of constraints under which judges, particularly Supreme Court judges, operate. While the constitutional amendment process is the only way in which the political branches can formally revise a judicial interpretation of the Constitution, there are a host of more informal tools they can use to discipline judges. The most blatant form of (in)action is that political actors can simply refuse to comply with judicial rulings. More generally, the political branches have various tools at their disposal to attack the Court and the institution of judicial review when judicial rulings stray too far from politically acceptable positions. Attempts can be made to pack the Court in an effort to alter judicial policy or by reducing or withdrawing the Supreme Court’s jurisdiction in controversial areas. Judges can also be impeached,

---

55 See Bradley Cannon & Charles Johnson, Judicial Policies: Implementation and Impact 1 (1999) (“In virtually all instances, courts that formulate policies must rely on other courts or on nonjudicial actors to translate these policies into action”); William N. Eskridge & Philip P. Frickey, Law as Equilibrium, 108 Harv. L. Rev. 26, 28-29 (1994) (“Each branch seeks to promote its vision of the public interest … within a complex, interactive setting in which each organ of government is both cooperating and competing with the other organs.”).
56 See Lee Epstein & Jack Knight, The Choices Justices Make 17 (1998) (“We cannot fully understand the choices justices make unless we also consider the institutional context in which they operate.”); Keith E. Whittington, Legislative Sanctions and the Strategic Environment of Judicial Review, 1 Int’l J. Const. L. 446, 448 (2003) [hereinafter Whittington, Legislative Sanctions] (“Judges can only remain independent if other political actors can be convinced that it is in their own interest to tolerate judicial independence”).
57 Examples in the United States abound, including Lincoln’s defiance of judicial orders, defiance of the Court’s school prayer rulings and attempts to interfere with the enforcement of judicial orders regarding desegregation in the South during the 1950s and 1960s. See Friedman, Positive, supra note 9, at 1277.
58 The most well-known example in United States history is Roosevelt’s Supreme Court-packing plan. See William E. Leuchtenberg, The Supreme Court Reborn 216 (1995) (“In the spring of 1937 … in the
judicial salaries or funding to the Court can be reduced, and efforts can be made to appoint judges who are more sympathetic to the constitutional positions of the political branches.\(^{59}\)

Tools of judicial sanction are very blunt instruments that tend to attack the Court as an institution, rather than entail a targeted response to specific rulings on the merits.\(^ {60}\) There are also important rule of law concerns with techniques such as direct disobedience and placing sanctions on the Court, as they strike at the very independence of the judiciary itself.\(^ {61}\) Nonetheless, these tools do exist, and they can be used to express disagreement with the judicial rulings. In addition, the fact that these tools are infrequently used does not negate from the fact that they continue to operate as constraints – even if resort to them is rare, the Justices know that they can be employed if they venture too far from the preferred views of the political branches.\(^ {62}\)

In understanding why these tools are effective in constraining the Court even if they are rarely used, it is helpful to refer to the social science concept of “anticipated reaction.”\(^ {63}\) This concept is grounded in the institutional dependence between the judiciary and the political branches and suggests that the mere existence of political sanctioning tools will lead judges to “adjust their decisions in anticipation of the potential responses from the other branches of government.”\(^ {64}\) Judges are patently aware of political attitudes to their decisions, and may think ahead to what kinds of political


\(^{60}\) See Whittington, *Legislative Sanctions, supra* note 56, at 450 (2003) (observing that because these are blunt instruments, the political branches must take a range of factors into account before deciding to deploy them).


\(^{62}\) Contrast the claims of some legal scholars, who suggest that the lack of use of these tools demonstrates their ineffectiveness in keeping the Court in line. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS*, ch.1; JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984).

\(^{63}\) See TerrI Jennings Perretti, *IN DEFENSE OF A POLITICAL COURT* 145-46 (1999) (discussing the “rule of anticipated reaction”); Eskridge and Frickey, *supra* note 55, at 36-39 (discussing how the Supreme Court engages in ‘anticipated response calculations’ in order “to avoid overrides or other political discipline”).

\(^{64}\) Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 610 (2001).
responses are likely, moderating their rulings accordingly. The mere existence of these tools can therefore make the judiciary a responsive “self-regulator, the creator of self-imposed institutional and doctrinal constraints that … keep judges from needlessly stepping on sensitive political toes.” If the Court’s anticipated reactions are successful, an equilibrium will result in which political branches will only infrequently need to employ these weapons, or even threaten to do so.

The existence of these constraints does not mean, of course, that judges can never tackle controversial issues or pursue their own understandings of the Constitution. In particular, there may be circumstances in which political officials “encourage or tacitly support judicial policymaking.” This will most commonly occur when political actors want to avoid responsibility for difficult decisions or when they want to achieve policy goals that are too controversial to pursue by ordinary political means. In the United States, elected officials will commonly maintain strong judicial review for their own purposes, thereby allowing the Court a significant degree of policy latitude with its rulings. At the same time, if the Court traverses too far from politically acceptable positions and imposes, or threatens to impose, substantial political costs on ruling political actors, then the use of constraints on the judiciary may come into play.

Institutional constraints are not, however, the only form of constraint on the judiciary. In addition, the force of popular opinion is a highly important and effective constraint on judicial action. Contrary to the usual countermajoritarian story, social

---

65 Ferejohn & Kramer, supra note 59, at 964.
66 Ferejohn and Kramer note that this equilibrium is “a dynamic one, in which slippages are possible and must be expected occasionally to occur. But if everything works properly – that is, if institutional actors respond rationally to the pressures they face – equilibrium may be restored just as quickly.”). Id. at 995.
68 Id. See also Howard Gillman, How Political Parties can Use the Courts to Advance their Agendas: Federal Court in the United States: 1875-1891, 96 AM. POL. SCI. REV. 511, 512 (2002) (detailing how various judicial decisions during the late 19th century “are best viewed as ‘politically inspired’” as “part of the Republican party’s efforts to restructure national institutions to facilitate national economic development); Keith E. Whittington, ‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005) (arguing that judicial review might be supported by existing power holders when current elected officials are obstructed from fully implementing their own policy agenda).
69 See Whittington, Legislative Sanctions, supra note 56, at 473 (claiming that this means “[t]he U.S. Supreme Court can generally act ‘sincerely’ on its constitutional understandings because the strategic environment for such actions has been generally favorable”).
science studies indicate that the Court does not regularly act against popular opinion. While the precise dynamics by which this connection between the Court’s rulings and popular opinion is achieved remain poorly understood, the evidence strongly suggests that judicial outcomes tend to run in line with popular opinion over the longer term, and if the two are in conflict, they do not stay this way for long.

Although it remains somewhat unclear why popular opinion acts as a constraint on the Court, social scientists have proposed a number of possible reasons. First, judicial responsiveness might be connected to the desire of judges for approval or to enhance their individual reputations. A more convincing, yet indirect, explanation builds on the logic of why the Court is constrained by the political branches of government. Judges are aware that the political branches are subject to elections, and that their preferences will accordingly be linked to popular support for electorally salient issues. As a result, the judges no doubt understand that political actors may be more prepared to act against the Court in circumstances where they stray too far from dominant popular sentiment.

---

70 See, e.g., David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision-making in the Post-New Deal Period*, 47 J. Pol. 652, 662 (1985) (studying the relationship between public opinion and Supreme Court decisions during the post-New Deal period, and concluding that the “countermajoritarian reputation” of the Court during this period is “exaggerated.”); Thomas R. Marshall, *Public Opinion and the Supreme Court* 192 (1989) (“Overall, the modern Court has been an essentially majoritarian institution.”).

71 For example, we cannot know how the Supreme Court ascertains public opinion, or whether it consciously attempts to take this into account. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596 (2003); Barry Friedman, *The Politics of Judicial Review*, 84 Texas L. Rev. 257, 325 (2005) [hereinafter Friedman, *Politics*].

72 See Robert G. McCloskey, *The American Supreme Court 224* (1960) (“It is hard to find a single instance when the Court has stood firm for very long against a really clear wave of public demand.”); Thomas R. Marshall & Joseph Ignani, *The Supreme Court and Public Support for Rights Claims*, 78 Judicature 146, 148 (1994) (“The Court’s record of supporting rights claims often follows public opinion”); Epstein & Knight, supra note 56, at 48 (“Most recent studies indicate that the Court does seem to respond, albeit modestly, to changes in public preferences.”).


74 See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 St. Louis L.J. 569, 628 (2003) (“A strategic Justice will realize that the decisions of the Court will be implemented by the other branches of government only if they do not deviate too far from dominant public opinion.”); Vanberg, supra note 54, at 170 (arguing that “the principal enforcement mechanism for judicial decisions … consists of public support for a court (and its decisions) and the concomitant threat of a public backlash against elected officials who fail to heed judicial rulings.”).
the other hand, popular support for the Court is likely to protect it when it is under political siege.  

This explanation nonetheless raises a different question, which is how to gauge the point at which the Court will be more constrained by the vagaries of public opinion in relation to a particular constitutional issue. After all, just because the public disagrees with one judicial ruling, this does not mean that they will immediately be prepared to support the use of political sanctions against the Court. Although there are immense empirical difficulties involved in answering this question, social scientists have made some progress towards better understanding the issue by separating support for the Court into two components: specific and diffuse support. Specific support refers to support for particular judicial decisions. Diffuse support, in contrast, refers to the more lasting attachments to the Court held by members of the public even when they do not agree with individual rulings.

The general supposition is that specific support is quite variable, whereas diffuse support is deeper and more constant, and insulated to a significant extent from shifting views about particular rulings. This hypothesis finds some backing in studies which reveal consistently high levels of diffuse support for the Supreme Court, even accounting for some oscillation over time. This indicates that the Court has a “reservoir of support” amongst the public that generally transcends views about specific rulings.

---

75 See Friedman, Mediated Popular Constitutionalism, supra note 71, at 2611 (“There is historical evidence that popular opinion can protect a judiciary under siege.”).

76 The principal difficulty relates to determining adequate measures of diffuse support. Scholars have generally used hypotheticals that may not accurately gauge general views about the Court. See, e.g., Gregory A. Caldeira & James L. Gibson, An Etiology of Public Support for the Supreme Court, 36 Am. J. Pol. Sci. 635, 637-38 (1992) (discussing the empirical difficulties involved in capturing enduring public sentiment about the Court).

77 For a detailed analysis of the political science literature concerning the connection between diffuse and specific support, see Friedman, Politics, supra note 71, at 325-28.

78 See David Easton, A Systems Analysis of Public Life 273 (1965) (describing diffuse support as a “reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants”).

79 See, e.g., Caldeira & Gibson, supra note 76; James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, On the Legitimacy of National High Courts, 92 Am. Pol. Sci. Rev. 343 (1998) (comparing the high levels of diffuse support for the United States Supreme Court with levels of diffuse support for national high courts in other countries).

80 Caldeira & Gibson, supra note 76, at 658. (“Diffuse support truly does consist of a reservoir of goodwill and commitment among the mass public.”).
Other studies suggest that the barrier between specific and diffuse support can be ruptured in a range of situations, leading to a significant correlation between specific and diffuse support. One important determinant that appears to affect the relationship between the two levels of support is information about what the Court is doing. Scholars tend to agree that most Supreme Court decisions lack salience for the majority of the public. Although certain groups are more likely to have information about judicial decisions, and certain rulings generate interest for particular groups, very few cases actually make it into the public consciousness. Where people are aware of the Court’s decisions, however, and they care about its rulings, then specific support is more likely to correlate with diffuse support.

Of equal importance, there appears to be a distinction between how positive and negative reactions to specific judicial rulings might affect diffuse support. While both kinds of reaction influence public opinion, negative feelings seem to be more intensely held, yet at the same time they have a “shorter half-life.” This means that although diffuse support can be lost, it takes a great deal of negative reaction to specific decisions, and knowledge of those decisions, for this to occur.

---

81 See Walter F. Murphy, Joseph Tanenhaus & Daniel Kastner, Public Evaluations of Constitutional Courts: Alternative Explanations (1973) (suggesting specific support may be closely correlated to diffuse support); William Daniels, The Supreme Court and its Publics, 37 Albany L. Rev. 632 (1973) (same). Recent work by Gregory Caldeira and James Gibson suggests a contrary conclusion. Although a close connection between specific and diffuse support tends to be true for elected officials, they conclude that, in recent times, diffuse support among members of the public is instead connected to a greater extent to “basic value orientations toward liberty, social order and democracy.” (Caldeira & Gibson, supra note 76, at 653). They speculate that one possible reason why their results differ from earlier findings is due to shifts in the Court’s style over time (Id. at 659-60). Where the Court is more politicized, the Court might risk cutting itself off from its general reservoir of goodwill, such that specific support might be closely tied to diffuse support. When the Court has retreated behind a “veil of restraintism”, however, diffuse support might be tied more to basic political values of the individual than specific support (Id. at 652).


84 Friedman, Mediated Popular Constitutionalism, supra note 71, at 2618.

85 Gibson et al., On the Legitimacy of National High Courts, supra note 78, at 356 (“It appears that satisfactions slowly evolves into institutional legitimacy, and the degree of connection between specific and diffuse support is contingent on the institution’s age.”).
On balance, the available studies suggest that the Supreme Court has managed to build up a significant reservoir of support over time, which is not easily lost as a result of isolated rulings that do not conform to popular preferences. Nonetheless, diffuse support is not endless. The ultimate consequence is that while a single decision is unlikely to lead to a public backlash against the Court, this is more likely to result if a series of decisions over time are significantly out of sync with public opinion.

**B. The positive conception of dialogue**

In recent years, American legal scholars have begun to draw on this social science scholarship regarding political constraints on the judiciary to propose new understandings of judicial review. Their aim in so doing is to articulate theories that more accurately reflect how judicial review, particularly in the Supreme Court, operates in practice. One leading model that has emerged for rethinking the role of judicial review in modern American society is to conceive of it as part of a broader dialogue about constitutional meaning.

One strand of dialogue theory draws on social science insights to propose a theory of dialogue as a predominantly inter-branch conversation between the judiciary and the political branches. On this understanding, the institutional constraints on the judiciary that are inherent in the constitutional system play a key role in how dialogue is generated. The possibility of political checks being placed on the Court means that judicial decisions are not final; “at best, [they] momentarily resolve the dispute before the Court.” At times, this may mean that the judiciary is reluctant to speak in particular policy areas if it considers that the threat of sanctions being imposed is real. In other circumstances, the Court might speak out with a stronger voice, whether because political actors are tacitly supporting judicial policymaking for their own purposes, or because the Court concludes, incorrectly or otherwise, that it has significant freedom of movement in a particular policy area. If the judiciary strays too far from the preferences of the political branches, it will be checked by political forces and brought it back into line. As a result of this dynamic process, judicial review can be viewed as part of a constitutional dialogue, in

---

86 See Neal Devins, Shaping Constitutional Values (1996); Devins & Fisher, supra note 9; Fisher, supra note 9.
which “all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional issues.”

A second and richer strand of scholarship in the United States adds an additional element to this account, which is the constraint of popular opinion. Recognition of the role of popular opinion entails a shift in the precise way in which constitutional dialogue is understood, and a slightly different account of the judiciary’s role in that dialogue. On this understanding, judicial decisions are important not only because of what judges say about the resolution of constitutional issues, but also because when judges decide cases they spark (or continue) a broader societal discussion about constitutional meaning. In declaring its own views about the meaning of the constitutional text and giving reasoned arguments for its decisions, the Court can actively channel and frame the terms of ongoing debate about constitutional values within both the political branches and the populace. The fact that the Court speaks in this way may also serve to enhance broader public consideration of certain controversies, by “increasing popular awareness of particular issues.” The Court’s decisions can then facilitate further debate, either by acting as a catalyst for discussion along particular lines or by prodding other institutions into deliberative action.

While the Court thus sparks a process of national public discussion, dialogue theorists assert that the Court is also affected and shaped by this conversation, due to the possibility of popular disagreement motivating discipline. When a decision is handed down, this tends to prompt discussion and debate of the merits of the ruling within society. Frequently, much of this reaction is critical, allowing those who disagree with the ruling to come together in opposition. Over time, the discussion may lead to shifts

88 DEVINS AND FISHER, supra note 9, at 239.
89 See generally Friedman, Dialogue, supra note 9; Friedman, Positive, supra note 9; Post, supra note 9.
90 See Friedman, Dialogue, supra note 9, at 654 (“The Court may offer an interpretation that is operative for a time, but the Court’s opinions lead debate on a path that ultimately changes that interpretation.”); Post, supra note 9, at 76 (conceiving of the judicial development of constitutional law as “a dialogue with the constitutional culture of the nation”).
92 See Friedman, Dialogue, supra note 9, at 679 (“[This] dynamic tension [is what] moves the system of constitutional interpretation along.”).
93 See Michael J. Klarman, How Brown Changed Race Relations: The Backlash Thesis, 81 J. AM. Hist. 81 (1994) (describing the enormous white “backlash” against Brown, which united those who opposed the
in public attitudes about a particular issue, towards the position that the Court has expressed. Alternatively, if there is enough popular disagreement with the ruling, new legislation may be passed testing the finality of the decision or the Court may face the possibility of a stronger backlash. As a result of this dissent, the Court may, over the long term, come to reconsider and refashion its decisions, with the perspectives of non-judicial actors as much, if not more, of an influence on the Court than the other way around.\textsuperscript{94} Over time, this process of dialogue ultimately produces a relatively enduring constitutional equilibrium that is widely accepted by the different participants in the national discussion.\textsuperscript{95}

To understand this conception of dialogue in the context of a concrete case, we can turn to the abortion controversy in the United States.\textsuperscript{96} The Supreme Court’s original ruling in \textit{Roe} acted as a catalyst for a national debate about abortion, with the Court beginning “a process of requiring the citizenry to think about abortion.”\textsuperscript{97} Rather than leading to agreement and compliance with its ruling, however, the Court’s decision instead prompted the mobilization of groups who were opposed to abortion. This opposition, in turn, led to a range of responses as state governments and Congress sought to test the limits of the ruling. At the same time, popular opinion has also played a key role in the abortion dialogue. In this regard, the Supreme Court’s rulings served to foment a public discussion about abortion which may not otherwise have occurred, and may have led to an overall shift in popular views. Over time, however, while the Court continues to maintain and focus this debate, decisions of the Supreme Court have gradually converged towards mainstream public opinion, which has thus operated as a moderating influence on the Court.

\textsuperscript{94} As Friedman states, the fact that there is some slack between the Supreme Court and popular views means that the Court is not immediate responsive to public opinion, but instead to “a body of opinion that endures over time.” \textit{See} Friedman, \textit{Positive}, supra note 9, at 1297. This ensures that constitutional change will generally only occur after an intense national debate has taken place.

\textsuperscript{95} \textit{See} Post, supra note 9, at 108 (arguing that a “relatively secure equilibrium” develops over time “in which the beliefs and values of the nation … will roughly correspond to the constitutional standards … enforced by the Court.”).

\textsuperscript{96} \textit{See} Friedman, \textit{Dialogue}, supra note 9, at 658-71; \textit{Neal Devins, Shaping Constitutional Values} (1996).

\textsuperscript{97} Friedman, \textit{Dialogue, supra} note 9, at 661 (emphasis in original).
Based as it is on positive evidence regarding the operation of judicial review, the positive account of dialogue has considerable explanatory power in the American setting. Nonetheless, whether it provides a complete explanation of how judicial review operates remains open to debate.\textsuperscript{98} In particular, the theory appears to successfully describe the institutional dynamics in cases of high salience with the public, such as those involving significant moral disagreement. In contrast, in cases involving issues of relatively low political salience, it seems more doubtful that significant dialogue will be generated because such cases are unlikely to engage popular interest or discussion in any meaningful way. As a result, the judiciary may be in a better position in low salience cases to cement its own constitutional interpretations, as the risk of political backlash will be reduced.

Nonetheless, even if it is true that the positive conception of dialogue best explains the dynamics of judicial review in relation to high salience cases, this account provides a forceful challenge to the underlying premises of the countermajoritarian difficulty. This is because the mechanisms of dialogue operate most clearly in those cases in which countermajoritarian anxiety is the strongest. In such cases, and in contrast to the prevailing story about the role of the Supreme Court in American constitutionalism, judicial review does not set the electorally accountable branches against unaccountable judges. Rather, it engages the Court in a more interactive process in which judges do not have the final say about constitutional meaning, though they still make important contributions to our evolving constitutional understandings.

The key strength of the positive account of dialogue is that it provides a persuasive explanation of what judges actually do when they engage in judicial review. At the same time, the account is not without normative significance, because it also provides an attractive picture of judicial review based on the society-wide nature of the dialogue that takes place.\textsuperscript{99} Society-wide dialogue is a democratic strength because it ensures that national discussions and debates are produced in relation to issues of fundamental constitutional importance. The ultimate effect is to preserve popular input

\textsuperscript{98} For further elaboration of this point, see Bateup, \textit{supra} note 38, at 1166-68.

\textsuperscript{99} \textit{See id.} at 1165-66.
into constitutional debate, thereby ensuring that the Constitution is owned by the people, and that society as a whole plays a role in working out its fundamental commitments.100

IV. TOWARDS A POSITIVE RECONCEPTUALIZATION OF DIALOGUE IN CANADA

The examination of Canadian and American dialogic understandings in the previous Part has exposed noticeable differences between the two theories. First, and most obviously, the theories adopt rather different conceptions of what constitutes “dialogue.” As we have seen, Canadian theorists propose an institutional account of dialogue that centers on inter-branch interactions between courts and legislatures. In contrast, the positive account of dialogue in the United States focuses not only on inter-branch communications, but also on broader society-wide interactions between the judiciary and the people. Canadian theories of dialogue also tend to be very court-centered, with dialogue conceived as a form of interaction that is driven or propelled by judges when they strike down the policy choices of the legislature.101 The American approach, on the other hand, is less judicial-centric, due to the fact that it is grounded in an acknowledgment that judicial review is embedded in a broader institutional environment that constrains judicial action.

These terminological and descriptive distinctions emerge from critical differences in the methodology that dialogue theorists in each country employ. As explained previously, the Canadian conception of dialogue emerged as an attempt to explain how the unique structural features of the Charter can facilitate a more equal relationship between the judiciary and the political branches of government than is thought to exist in strong-form systems of judicial review. In light of this, Canadian theorists have tended to utilize a top-down methodology that first defines dialogue as certain ideal forms of interaction between courts and legislatures that are made possible by the Charter, before considering whether such defined forms of interaction take place as a practical matter in the context of specific cases.

100 Friedman, Positive, supra note 9, at 1297 (“This process of constitutional dialogue and constitutional change matters, because this ultimately ensures that the Constitution is owned by all of us.”).
101 Cf. Hiebert, Charter Conflicts, supra note 37, 52–72 (developing a “relational approach” to Charter decision-making, that proposes a more equal relationship between courts and legislatures).
Methodologically speaking, the positive American account of dialogue stands in stark contrast. It challenges prevalent assumptions about the countermajoritarian nature of judicial review by relying on positive evidence, rather than taking such concerns as a starting point for a theory of judicial review. As such, the American account employs a bottom-up approach, building upon positive, or more descriptive, understandings of how judges actually behave when they decide cases.

This positive methodological approach is part of a small, yet slowly growing, body of legal scholarship in the United States that aims to take constitutional politics seriously.102 In contrast to grand constitutional theory, which assumes that political considerations both do not, and should not, influence judicial decision-making, theory that is grounded in constitutional politics accepts the inevitability of political influence on judicial behavior. This insight is then used to propose more empirically sensitive theories of judicial review that can ultimately have greater “normative bite” because they remain connected to how judges operate in the real world.103

These considerations indicate that there is significant benefit to considering what constitutional politics can teach us about better understanding the practice of judicial review in Canada.104 This is particularly true in light of the present limitations of Canadian dialogue theory, which has failed to fully explain the dynamics of judicial decision-making in that country. Drawing attention to the political features of the Canadian constitutional system might simply teach us something valuable about the positive aspects of judicial review in the Canadian constitutional system. In light of the American experience, however, if similar constraints operate on the Canadian judiciary, this suggests that some form of broader society-wide dialogue might also be taking place in that country. To the extent that this is true, this is likely to alleviate concerns that the


104 Cf. Sujit Choudhry & Robert Howse, Constitutional Theory and the Quebec Secession Reference, 13 CAN. J. L. & JURIS. 143, 148 (2000) (observing that “analysis of Canadian constitutional law and jurisprudence based on systematic reflection concerning the relationship between constitutional adjudication and democratic politics has been, for the most part, sorely lacking.”).
Canadian system is evolving into one of judicial supremacy, even if inter-branch interactions do not always function in an ideal way.\textsuperscript{105} It would also mean that the concept of dialogue may have a more positive future in Canada, albeit a more complex form of dialogue with a significantly modified narrative.

\textbf{A. Countermajoritarianism reassessed}

In considering the positive dynamics of judicial decision-making in Canada, the first question to explore is whether the claim that the Canadian judiciary now has a largely free rein to impose its own views about Charter meaning is supported by the available evidence. Statistics that exist regarding the Supreme Court of Canada’s Charter rulings reveal a number of tentative responses. In short, the available evidence cuts against the countermajoritarian thesis.

The first thing the statistics reveal is that challenges to the constitutionality of legislation do not represent the overwhelming majority of the Court’s Charter caseload. In the first 21 years of the Charter’s operation, between 1982 and 2003, 52 percent of cases involved the conduct of public officials, such as the police, rather than challenges to legislation.\textsuperscript{106} This suggests that the Court is more likely to check the discretionary conduct of unelected officials than to challenge the policy decisions of federal and provincial governments. It is nonetheless clear that the Court has decided a substantial number of challenges to legislation on Charter grounds, reviewing 175 statutes over the same period.\textsuperscript{107} The Court held that 39 statutes at the federal level and 25 at the provincial level were unconstitutional, either in whole or in part.\textsuperscript{108} This amounts to roughly three statutes invalidated per year, lending some support to those who are concerned about an activist judiciary.

A more searching analysis of these cases, however, paints a more nuanced picture of judicial behavior over this period. Not only have judicial nullifications of legislation been rather limited in their policy scope, but the number of statutes invalidated by the

\textsuperscript{105} See \textit{supra} notes 36-50 and accompanying text.


\textsuperscript{107} KELLY, GOVERNING WITH THE CHARTER, \textit{supra} note 50, at 148, Table 5.2.

\textsuperscript{108} \textit{Id.}
Court has diminished progressively over time. Turning first to the policy scope of the rulings, 44 percent of Charter cases involving the nullification of statutory provisions have centered on legal rights, or issues of criminal due process.\textsuperscript{109} When combined with the statistics about the principal judicial focus on the discretionary conduct of unelected officials such as the police, nearly two-thirds of the Court’s Charter rulings between 1982 and 2003 involved legal rights.\textsuperscript{110} Judicial activism in this area is commonly regarded as less problematic than under other areas of the Charter, because criminal justice is an area in which common law judges have long played an active policy-making role.\textsuperscript{111} It has also been suggested that although criminal justice is an important area of government policy, it is generally not a high priority for Canadian governments, and the Court has struck down few major policies to which governments have been strongly attached.\textsuperscript{112}

The second largest group of cases involves fundamental freedoms, encompassing the freedoms of association, movement, speech and religion. These cases constitute 27 percent of statutes invalidated by the Court between 1982 and 2003.\textsuperscript{113} Breaking this down further, equality rights were involved in 17 percent of judicial nullifications.\textsuperscript{114} Cases in these areas tend to produce the greatest anxiety about judicial activism because they commonly involve issues of significant moral controversy. Even here, however, it has been suggested that few of the Court’s rulings involved the invalidation of key economic or social policy interests of federal or provincial governments, nor have there been many nullifications in core areas of provincial responsibility.\textsuperscript{115} The Court has also

\textsuperscript{109} \textit{Id.} at 144. Legal rights are contained in sections 7 to 14 of the Charter, and include such rights as the right to life, liberty and security of the person and the right to be secure against unreasonable search and seizure.

\textsuperscript{110} \textit{Id.} at 107. This is consistent with Russell’s claims that 80 percent of cases between 1982 and 1992 have involved legal rights. \textit{See} Peter H. Russell, \textit{Canadian Constraints on Judicialization from Without}, 15 INT. POL. SCI. REV. 165, 168 (1994).

\textsuperscript{111} Russell, \textit{supra} note 110, at 168.

\textsuperscript{112} \textit{Id.} at 168, 170.

\textsuperscript{113} This equates to 17 out of 64 cases. \textit{See} KELLY, GOVERNING WITH THE CHARTER, \textit{supra} note 50, at 145-46.

\textsuperscript{114} This equates to 11 out of 64 cases. \textit{See id.} at 146.

\textsuperscript{115} See James B. Kelly, \textit{Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999}, 34 CAN. J. POL. SCI. 321 (2001) [hereinafter Kelly, \textit{Reconciling Rights and Federalism}]. \textit{See also} KELLY, GOVERNING WITH THE CHARTER, \textit{supra} note 50, at 195-200 (observing that statutes touching on core areas of provincial responsibility, such as labor policy, education policy, social policy, elections, and motor vehicle acts regulating public safety, have been found constitutional by the Supreme Court, and concluding that
not favored attempts by rights claimants to achieve an increase in governmental social policy spending. 116 Minority-language and education rights cases, which also generate much controversy, particularly in the provinces, resulted in the invalidation of legislation on only four occasions. 117

To the extent that the Court has struck down the policy choices of federal and provincial legislatures, the available evidence also suggests that government success rates have risen steadily over the years. 118 For example, the government success rate in Charter challenges between 1984 and 1989 was 62 percent. 119 Between 1984 and 1992, this figure rose to 66 percent, 120 while between 1993 and 1997, the figure rose yet again to 70 percent. 121 In addition, with the important exception of equality and democratic rights, rates of judicial invalidation in relation to all Charter rights have steadily declined over time. 122

Focusing on the year of enactment of legislation further reinforces this conclusion. Of the 64 statutes that the Court invalidated in whole or in part between 1982 and 2003, twenty of these were enacted prior to the introduction of the Charter. 123
This high rate of nullification is unsurprising, as these statutes were enacted in the pre-
Charter policy environment that placed less emphasis on whether legislation conformed
to fundamental rights.\textsuperscript{124} Judicial invalidation of these statutes can therefore be viewed as
an effort to tidy up existing legislation to conform to the new constitutional standards
introduced by the Charter. Of the remaining statutes invalidated by the Court, 32 were
proclaimed between 1983 and 1990, the early years of the Charter’s existence when
legislatures were still adapting to the new constitutional environment to ensure that
Charter values were properly taken into account when drafting legislation.\textsuperscript{125} In contrast,
the Court has ruled that only twelve statutes enacted after 1990 are inconsistent with the
Charter.\textsuperscript{126}

The empirical evidence further indicates that the Court frequently acts in a
manner that is designed to leave space for legislative responses. As the work of inter-
branch dialogue theorists recognizes, a not-insignificant number of cases involving the
invalidation of legislation involve government losses on section 1 grounds. An analysis
of judicial remedies also shows an increasing tendency to use suspended declarations of
invalidity when striking down legislation. Use of this remedy has increased from six
percent of cases between 1982 and 1992, to 33 percent of cases between 1993 and 2003,
often in sensitive policy areas.\textsuperscript{127}

This statistical sketch of what the Supreme Court has been doing when
adjudicating Charter conflicts indicates that fears about the Court routinely invalidating
legislative policy and the gradual emergence of judicial supremacy are greatly
exaggerated. The available evidence instead suggests that the Court has taken a
reasonably restrained approach to Charter interpretation in the majority of its rulings,
with judicial invalidations of legislation declining over time in relation to most areas of
Charter jurisprudence. In addition, the Court more recently seems to be making greater
use of techniques designed to enhance the possibilities for legislative response. This

\textsuperscript{124} \textit{Id.} at 144. \textit{See also id.} at 149 (“[J]udicial activism may be an irrelevant empirical consideration if the
Court simply invalidates statutes enacted in a pre-rights policy context or those in the immediate aftermath
of the Charter’s entrenchment.”)

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.} at 148.

\textsuperscript{127} \textit{Id.} at 175 (describing the use of suspended declarations increasing from two out of 31 cases between
restraint is, nonetheless, punctuated by specific incidents of moderate activism, as the Court has actively struck down the policy preferences of federal and provincial legislatures at fairly regular intervals, often with little inter-branch response. In general, however, “the Court has not been wielding the Charter as a broad sword.”

B. Political constraints and the Canadian judiciary

In light of the evidence indicating a relatively restrained Court punctuated by episodes of activism, how might this behavior best be explained? Drawing on the positive social science scholarship from the United States, one plausible hypothesis is that the Canadian judiciary, including the Supreme Court of Canada, operates under a range of political constraints that are effective in tempering its behavior. If correct, this hypothesis would explain the significant degree of restraint exercised by the Supreme Court in relation to Charter challenges, which could be reinterpreted as the Court successfully adjusting its rulings in anticipation so as to avoid the possibility of conflict and the imposition of sanctions by the political branches. It would also explain why the Court often leaves room for legislative responses when it does invalidate legislation, either through the application of section 1 analysis or the use of remedies such as suspended declarations, in order to avert more drastic institutional confrontations. At the same time, the Court would retain the ability to act more assertively in policy areas where the risk of reprisals is lower. This would explain why more activist rulings in relation to specific, less controversial, areas of the Charter.

128 See Christopher P. Manfredi and James B. Kelly, Misrepresenting the Supreme Court’s Record?, 49 McGill L.J. 741, 752 (2004) (concluding that “judicial activism … is only a small, though highly visible, part of the picture.”).
129 Frederick Vaughan, Judicial Politics in Canada: Patterns and Trends, in JUDICIAL POWER AND CANADIAN DEMOCRACY, supra note 39, at 3, 15.
130 Cf. Kelly, who argues that judicial restraint, or deference, in Canada is the direct result of the emergence of a rights culture in the legislative process. See KELLY, GOVERNING WITH THE CHARTER, supra note 50, at 262.
131 See supra notes 63-66 and accompanying text.
132 See, e.g., Ferejohn & Kramer, supra note 59, at 996-97 (describing “the judiciary’s self-policing devices”).
133 See, e.g., GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 33 (2005) (“[O]bserved compliance with judicial rulings does not necessarily imply that courts are powerful actors able to constrain legislative majorities at will. Perhaps judges are simply astute at avoiding confrontations they cannot reasonably hope to win.”).
To determine the plausibility of this hypothesis, we need to examine the nature of potential constraints on the Supreme Court in light of the broader political environment in which it operates. Unlike the United States, Canada does not have a notable history of direct challenges to judicial authority or refusals to comply with judicial decisions. Nevertheless, Canadian legislatures do have available to them a very effective way to respond directly to Charter rulings, which is the section 33 override.

As discussed previously, however, section 33 has fallen into disuse since the late 1980s following Quebec’s response to the *Ford* decision. As a result, it has been argued that even though the override holds the formal potential to constrain judicial behavior, it has subsequently evolved into an ineffective constraint due to the apparent convention that has developed against its use. On this view, although the override may have operated as an effective constraint on the judiciary during the early years of the Charter, growing resistance to the provision following *Ford* has successfully shifted the balance of power in Canada towards judges. The conclusion that some scholars therefore reach is that the Canadian judiciary, particularly the Supreme Court, now operates

---

134 There are nonetheless isolated examples of defiance or failure to comply with judicial decisions throughout Canada’s history. For example, in 1890 Manitoba passed legislation reducing the rights of its French Catholic minority and making English the official language, thus violating Manitoba’s constitutional terms of union: see Manitoba Act, s.23. Early challenges to this legislation that were successful in the lower courts were ignored, with the Manitoba government neither complying with nor appealing the rulings. See Peter H. Russell, *Constitutional Odyssey* 45 n.36 (3rd ed., 2004); Peter H. Russell et al., *Federalism and the Charter* 693, 703 (1989); Nelson Wiseman, *The Questionable Relevance of the Constitution in Advancing Minority Cultural Rights in Manitoba*, 25 Can. J. Pol. Sci. 697 (1992). More recently, in 1985, the Supreme Court ruled that Manitoba’s restriction of statutes to the English language was unconstitutional (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (Can.)). The Manitoba government failed to meet the Court’s ordered timetable for compliance and subsequently managed to evade complete implementation of the Court’s decision, though without open defiance, by claiming that “the overwhelming majority of its acts are now spent and are not in need of translation or reenactment.” See Report of the Minister of Justice to the Manitoba Legislative Assembly regarding the validation of Manitoba Laws, *Tabled Sessional Paper* Number 102, 4 (November 27, 1990), cited in Wiseman, * supra* note 134, at 698.

135 *See supra* notes 27-28 and accompanying text.

without any effective institutional constraints and is relatively free to impose its own views about Charter meaning on the political branches of government.\textsuperscript{137}

While it is true that section 33 is now infrequently used, this does not necessarily lead to the conclusion that the judiciary presently operates without any effective constraints on its power. Notably, this conclusion is inconsistent with the empirical evidence that indicates that the Supreme Court has become more restrained in many areas of its jurisprudence over time. In addition, there are alternative constraints that are likely to influence judicial behavior in Canada. The first of these constraints is popular opinion, while the second is the fractious nature of federal system in Canada, particularly the secessionist impulses of Quebec. Not only does the available evidence indicate that these constraints are effective in restraining the Court, but it also suggests that if judges do not successfully gauge these factors in anticipation of their decisions, new life may eventually be breathed into the override.

1. Popular opinion as a constraint

Although there is dearth of positive scholarship about judicial behavior in Canada, there is an emerging body of literature that examines public support for Canadian courts. This literature, while still in its relative infancy,\textsuperscript{138} bolsters the claim that popular opinion is likely to be one of the most important and effective constraints on the judiciary in Canada, just as it is across the border.

Joseph Fletcher and Paul Howe recently conducted two comprehensive studies examining the nature and levels of diffuse support for the Supreme Court of Canada and its relationship to specific support.\textsuperscript{139} Their findings confirm previous studies that indicated that popular support for the Court has remained consistently high since the

\textsuperscript{137} Id. at 166 (“The rhetoric of democratic humility so prevalent in many of the … Court’s recent judgments masks the reality of an institution whose growing control over constitutional interpretation means that public policy will always be set closer to judicial than to legislative preferences.”).


Charter’s enactment. Despite this, their findings also suggest that Canadians are not completely opposed to the idea of reducing the Supreme Court’s power. On the one hand, roughly 60 percent prefer that courts, rather than legislatures, have the final say about whether legislation conflicts with the Charter. Furthermore, only 36 percent of Canadians agree with the proposition that if the Court began to consistently make decisions with which people disagreed, it should be done away with altogether. Yet, when asked whether “the right of the Supreme Court to decide controversial cases should be reduced,” there is an even split.

These figures tend to suggest that the Court has a smaller reservoir of diffuse support amongst the public than does the United States Supreme Court. When public opinion data in the two nations is compared, not only is there much deeper opposition to the idea of abolishing the United States Supreme Court, but there is also slightly less support for reducing that Court’s power. On the basis of these results, Fletcher and Howe appear correct in their assertion that “[a]s a relatively young institution still establishing its presence and authority, Canada’s Supreme Court more than its American counterpart, must produce results satisfactory to the Canadian public or face some erosion of its institutional legitimacy.” In turn, we can expect that the political branches will be in a stronger position to resist judicial rulings in Canada, and that the Court is therefore likely to anticipate negative reactions to its decisions and allow this to shape its jurisprudence.

This still leaves us with the question of precisely when the Supreme Court of Canada is likely to be most constrained or affected by popular opinion in relation to specific issues, which turns on the connection between specific and diffuse support. In order to test whether the two measures of support are connected, Fletcher and Howe focused on popular reactions to three decisions in different areas of its constitutional jurisprudence. The first was the 1997 decision of R v. Feeney. In this case, which concerned the freedom from unreasonable search and seizure, the Court excluded

---

140 See, e.g., Fletcher & Howe, Canadian Attitudes, supra note 139, at 16.
141 Id. at 11. Support does fluctuate, however, between provinces: see id. at 13.
142 Id. at 17, 18 (42 percent agreeing and 43 percent disagreeing with the proposition).
143 Id. at 18.
144 Id. at 22.
evidence pointing to the guilt of the accused that had been illegally obtained. The second decision was the 1998 decision in Vriend v. Alberta, which centered on whether the failure of Alberta’s human rights code, the Individual Rights Protection Act (“IRPA”), to include sexual orientation as a prohibited ground of discrimination violated the Charter’s guarantee of equality. The third ruling was the 1998 Quebec Secession Reference, a complex non-Charter decision in which the Court held that Quebec cannot unilaterally secede, but that the federal government also has an obligation to negotiate should there be a clear referendum vote in Quebec in favor of secession.

Fletcher and Howe found that specific support for the Court’s rulings varied significantly depending on the issue involved in each case. A sizeable majority disagreed with the Court’s conclusion in Feeney, with two-thirds saying that illegally obtained evidence of that kind should be allowed in judicial proceedings. In contrast, a substantial majority supported Vriend. Attitudes towards the Quebec Secession Reference were more complex, with Quebecers rather ambivalent about the first part of the ruling, and more supportive of the second, with the opposite being true for other Canadians. On the whole, however, there was substantial, though not overwhelming, support for the overall ruling in this case.

Fletcher and Howe next measured the correlation, if any, between popular views about these cases and more general support for the Court. First, they found that attitudes about Feeney were not strongly linked to diffuse support for the Court, whereas popular attitudes regarding the other cases did reveal stronger connections. While it is difficult to draw firm conclusions from such isolated examples, these results appear to support the claim that rulings that cut against popular opinion may have less impact on diffuse support than rulings in other areas that are favorably received by the public. Consistent with studies in the United States, this suggests that negative reactions to judicial decisions, while potentially more intense, might have a shorter life-span than positive

148 Fletcher and Howe, Canadian Public Opinion, supra note 139, at 34.
149 Id. at 43–48.
150 Id. at 50. See also id. at 48 (“None of the differences observed between supporters and opponents of the Feeney ruling is large or achieves statistical significance.”). The only exception was among Reform party supporters, where negative views about the ruling did affect diffuse support. See id.
reactions, meaning that a great deal of negative reaction to judicial rulings is required for diffuse support to be lost. 151

This hypothesis appears to be confirmed by Fletcher and Howe’s analysis of combined attitudes towards the three decisions. According to their figures, roughly 10 percent of respondents disagreed with all three decisions, while approximately the same number agreed with all of the rulings. Comparing these respondents’ levels of diffuse support, Fletcher and Howe find that “[t]he cumulative effect of consistent disagreement with Court rulings is markedly greater than the impact of single decisions in isolation.” 152 They accordingly propose that even though “recent controversial decisions have not significantly dented public confidence in the Charter and the courts, it also indicates that public opinion on Court rulings can affect more general attitudes.” 153 Thus, if the Court were to hand down a series of rulings over time with which a significant proportion of the public disagreed, this may be accompanied by a distinct drop in diffuse support. 154

Consistent with the American literature, Fletcher and Howe’s results also indicate that the relationship between specific and diffuse support might also be affected by levels of public awareness of specific decisions, and their saliency for particular groups. For example, in addition to testing levels of specific support in relation to Vriend, Fletcher and Howe asked respondents about their level of awareness of the ruling. Although large numbers had heard nothing about the judgment, among those who had heard a lot or a little, the connection between specific support and more general attitudes toward the Court was “considerably stronger than it is among those who have heard nothing of the case.” 155

Fletcher and Howe did not ask respondents how much they had heard about Feeney, so it is impossible to determine whether the minimal connection between specific support for that decision and diffuse support for the Court might be connected to low

151 See id. at 53 (“This helps explain continued high levels of support for the Charter and Canada’s courts: the judicial decisions of which Canadians approve have greater leverage over their general feelings toward the Charter and courts than do those they oppose.”).
152 Id. at 52 (though noting that relative high levels of support nonetheless remain).
153 Id.
154 See also Hausegger & Riddell, supra note 138 (finding some support for the hypothesis that the connection between specific and diffuse support has increased as the Court has become more politicized).
155 Fletcher & Howe, Canadian Public Opinion, supra note 139, at 49, 50.
levels of awareness. What is clear, however, is that among conservative Reform party members, for whom law and order issues are particularly salient, views about Feeney did significantly affect measures of diffuse support. At the very least, therefore, the results support the view that if a specific Charter issue is salient to a particular group, the linkage between specific and diffuse support is likely to be stronger. At the same time, the apparent low levels of awareness of decisions amongst the Canadian public suggests that there will be few cases in which people know a great deal about the Court’s actions, or care enough about its decisions to act against it.

In sum, Fletcher and Howe’s research strongly indicates that similar dynamics between specific and diffuse support exist in Canada and the United States. While support for the Canadian Court is somewhat lower than for its American counterpart, it does have a significant reservoir of support amongst its public. In addition, as is the case in the United States, this diffuse support is not easily lost amongst the public as a whole. It may, however, be adversely affected when people have knowledge of the Court’s rulings and consistently disagree with those rulings over time. Accordingly, although the Court has substantial room for movement in its Charter jurisprudence, this is not unlimited. If the Court consistently strays from public opinion over time, the evidence strongly suggests that the public will be more likely to support a strong response against the Court.

There is also broader significance to these conclusions, because they point to the possibility that the override might not have been completely delegitimized in Canada. On the contrary, the Court might simply have been successfully calibrated its rulings in advance and responding strategically to public attitudes so as to avoid the potential for discipline or confrontation with the political branches. In contrast, if the Court fails to successfully gauge popular opinion over time and produces a range of rulings that conflict significantly with popular preferences, it may find itself more susceptible to

---

156 Id. See also id. at 49 (regarding some problems with their sample size).
157 Id. at 49.
158 See id. at 39 (noting that even in relation to Vriend, 60% had heard nothing about the decision).
159 See Choudhry & Hunter, supra note 118, at 155 (similarly suggesting that positive evidence might indicate that the override has not been delegitimized, or that the override might have been replaced by other constraints on the judiciary).
legislative overrides. In either case, section 33 may not yet be the dead letter as is generally assumed, and may in fact be actively serving as an effective judicial constraint due to the effects of anticipated reaction.

2. Federalism dynamics as a constraint

The American literature on judicial constraints principally focuses on actions that Congress or the President can take to punish the Supreme Court when judicial rulings stray too far from politically acceptable positions. State legislatures, in contrast, are regarded as less important players in the complex institutional environment in which judicial review operates because they have few institutional means at their disposal to harm the Court. As a result, it is unsurprising to find that the Court tends to be less deferential when it comes to the states, striking down greater numbers of state statutes on constitutional grounds than federal statutes.

The Canadian statistics suggest that the dynamics between the Supreme Court of Canada and provincial legislatures operate rather different. In Canada, more federal than provincial legislation has been invalidated by the Court on Charter grounds, and the numbers of provincial statutes invalidated has been decreasing over time. Not only are provincial invalidations more isolated than federal nullifications, but these invalidations “have not taken place in core areas of provincial responsibilities.” Furthermore, in a range of important rulings, the Court has recognized the importance of policy variation

---

160 See Hausegger & Riddell, supra note 138, at 43 (proposing that public “opposition might encourage calls for changes to the appointment process and make it more difficult for the Court to legitimize the policy choices it makes. The latter consequence … might make judicial decisions more susceptible to the use of the Charter’s ‘notwithstanding clause.’”).

161 See, e.g., Eskridge & Frickey, supra note 55, at 44 (attributing “the Court’s greater willingness to invalidate state legislation than comparable national legislation, because state legislatures cannot hurt the Court the way Congress can.”).

162 Id. at 49-53 (observing that during the 1993 Term, the Supreme Court upheld virtually all challenged federal policies, but struck down local laws or policies in eleven out of nineteen cases, and announced new constitutional restrictions on state action in two cases).

163 See supra notes 106-29 and accompanying text. There are also significant lapses in time between invalidations of provincial legislation, varying from three to four years at different points in the 1980s and 1990s. See Kelly, Reconciling Rights and Federalism, supra note 115, at 338.

164 Id. at 354.
amongst provinces given the different social contexts in which policy problems arise in the regions.\textsuperscript{165}

This evidence indicates that the Supreme Court of Canada may be subject to greater political constraints at the regional level that keep it from frequently challenging key areas of provincial policy. The most obvious constraint, once again, is section 33, which can be used by both federal and provincial governments to override judicial decisions. Indeed, on the few occasions when the override has in fact been used, this has been limited to provincial governments.\textsuperscript{166} The fact that provincial uses of the override have diminished over time provides some additional support for the claim that the Court might simply have learnt to adjust its rulings in anticipation to minimize use of the override, particularly by the provinces. Section 33 may therefore continue to operate as an effective judicial constraint even if we cannot always see this happening.\textsuperscript{167}

In light of the present unpopularity of section 33, however, it does seem likely that there are additional constraints operating at the provincial level that are influencing judicial behavior.\textsuperscript{168} Recent history indicates that the most important of these could be connected to the volatile federalism dynamics that exist in Canada, principally in relation to Quebec-Canada relations. We can gain a better understanding of these dynamics by turning to the political origins of the Charter and its subsequent role in Canada’s “protracted national unity crisis.”\textsuperscript{169}

The passage of the Constitution Act 1982, which patriated the Canadian Constitution and enacted the Charter, can be traced, in large part, to the rise of Quebec nationalism in the 1960s.\textsuperscript{170} Although Quebec had always been seen as “the geographical

\textsuperscript{165} Id. at 346-50; Hiebert, Limiting Rights, supra note 28, at 133-37. Based on these actions, Kelly has argued that the Supreme Court has “advanced federal diversity because [it] has demonstrated a sensitivity to policy variation by the provinces and the structural requirements of a federal system.” Kelly, Reconciling Rights and Federalism, supra note 115, at 324. See also Hiebert, Limiting Rights, supra note 28, ch.6 (1996); Katherine E. Swinton, The Supreme Court and Canadian Federalism (1990).

\textsuperscript{166} See generally Kahana, supra note 24.

\textsuperscript{167} See Friedman, Politics, supra note 71, at 312 (“The implication of anticipated reaction is that institutions may be responding to constraint, even if this is unobservable.”).

\textsuperscript{168} In addition, the section 33 override is not available in minority-language and education rights cases. The Court has nonetheless remained reluctant to get involved in these issues.

\textsuperscript{169} Kelly, Reconciling Rights and Federalism, supra note 115, at 322.

\textsuperscript{170} See, e.g., Russell, Constitutional Odyssey, supra note 134, at 72-126 (outlining the growth of Quebec nationalism); Ran Hirschl, Towards Juristocracy 75-77 (2004) (same).
and political expression of the French-Canadian nationality, as a French-Catholic province and the French-Canadian homeland." only in the 1960s did the threat of Quebec separatism emerge as the province began to seek special arrangements with the aim of increasing its power within the federation. Prompted by these developments, Justice Minister and later Prime Minister Pierre Trudeau became one of the most prominent advocates of a constitutional bill of rights in Canada. His principal goal in pursuing constitutional reform was to promote national unity and counter the growing threat of regional discontent. In Trudeau’s mind, constitutionalizing rights would help to divert national political debate away from regional concerns toward the more universal (and national) issue of individual rights. In addition, the entrenchment of the Charter would assist in ensuring the subordination of provincial legislation to the core national standards contained in that document.

While these developments were important in getting Trudeau’s proposal off the ground, the immediate catalyst to the passage of the constitutional reforms was a referendum held in Quebec in 1980 that proposed sovereign political status for the province. When Quebec’s citizens rejected this proposal, Trudeau finally gained the necessary political momentum to patriate the Constitution. Against convention, Trudeau initiated this process unilaterally. Following detailed negotiations, however, all the provinces, with the notable exception of Quebec, accepted the proposed changes before they were enacted into law.

The failure to obtain Quebec’s consent to the new constitutional arrangements left many Quebecers feeling embittered and betrayed. The paradoxical result was that rather than increasing national unity, passage of the Charter instead strengthened Quebec’s demands for greater political, linguistic and cultural autonomy. These tensions

171 Silver, French-Canadian Federation, quoted in RUSSELL, CONSTITUTIONAL ODYSSEY, supra note 134, at 35.
172 See Alain G. Gagnon, Quebec-Canada Relations: The Engineering of Constitutional Arrangements, in CANADIAN FEDERALISM 95 (Burgess ed., 1990).
173 PIERRE ELLIOT TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS 54 (1968) (“Essentially we will be testing – and hopefully, establishing – the unity of Canada.”).
174 See RUSSELL, CONSTITUTIONAL ODYSSEY, supra note 134, at 107-09 (examining the Quebec referendum).
resurfaced dramatically on the national level in the 1980s with Quebec’s uses of the override, particularly following the *Ford* decision, and the failure of the Meech Lake Accord to renew Canadian confederation. The failed Meech Lake Accord also revealed that provincial disharmony was becoming more widespread, as the Western and Atlantic provinces also expressed dissatisfaction with central Canadian domination.

These developments reached a dramatic climax in 1995 when a second provincial referendum on Quebec secession was held, which the secessionist movement lost by only the slimmest of margins. These events later prompted the federal government’s controversial reference to the Supreme Court in the *Quebec Secession Reference*, regarding the legality of secession in Quebec, which placed the Court squarely at the center of this controversial political question.

Although the threat of secession has subsided somewhat in recent years, the continued force of Quebec nationalism means that the possibility remains ever-present. In addition, Canadians in the Western provinces continue to express discontent that they do not have a greater say in national affairs. In light of these potential threats to Canadian federation, it is readily conceivable that the Supreme Court might be acting with significant restraint in Charter challenges to provincial legislation in order to help minimize these threats. Although secession would not directly challenge the Court as an institution or its authority to decide cases, it is clearly in the Court’s institutional interests, as part of the federal governmental system, to ensure that the federation remains intact. Furthermore, if the Court were seen as complicit in the breakdown of federation for any reason, its continued institutional integrity and its high degree of general support amongst the public may also be at risk.

Commentators have suggested that these delicate federalism dynamics can account for the Court’s rulings in foundational cases such as the *Quebec Secession Reference*, which resulted in a rather skilful balancing of the concerns of Quebec and the

---

176 See *supra* notes 25-28 and accompanying text.
179 49.4 percent voted in favor of secession, while 50.6 percent voted against.
180 For a recent discussion, see ROGER GIBBONS & LOLEEN BERDAHL, WESTERN VISIONS, WESTERN FUTURES (2003).
rest of Canada, while at the same time making it more difficult for Quebec to secede unilaterally.\textsuperscript{181} It is also likely to provide some explanation for the Court’s frequent avoidance of invalidations in key areas of provincial responsibilities, particularly in the contentious policy areas as minority-language and education rights. Particularly in these areas, if the Court handed down too many rulings that conflicted with key policy preferences of the provinces, it would be at risk of a strong provincial backlash for endangering regional identities. Indeed, this tension between federalism and the Charter is clearly borne out by historical experience, with the only uses or threatened uses of section 33 relating to those infrequent occasions in which the Court has overturned important areas of provincial policy.\textsuperscript{182}

While it is difficult to test whether federalism dynamics do operate as an effective constraint on the Court due to a dearth of positive evidence, some support for this hypothesis is found in attitudes of the Quebec public towards the Supreme Court. Overall satisfaction with the Court is high in Quebec, though slightly lower than in the rest of Canada.\textsuperscript{183} Quebecers, however, are much less opposed to the idea of reducing the Court’s power than other Canadians.\textsuperscript{184} Quebecers are also significantly more likely to support the proposition that the Supreme Court should be done away with completely if it began to consistently make decisions with which people disagreed.\textsuperscript{185}

These dynamics are replicated amongst other Canadians with strong provincial attachments. On the one hand, people who regard themselves as having strong provincial attachments are just as likely as others to choose courts, rather than legislatures, to have the final say about whether legislation conflicts with the Charter.\textsuperscript{186} These attachments do, however, make a significant difference to other levels of support for the Court. For

\begin{footnotes}
\footnote{See, e.g., Choudhry & Howse, supra note 104, at 144 (noting that discussion has tended to center on “the political context in which the Court was asked to decide and the obviously high stakes in Canadian constitutional politics”); Robin Elliot, References, Structural Argumentation and the Organizing Principles of Canada’s Constitution, 80 CAN. BAR REV. 67, 97 n.115 (2001) (“From the perspective of constitutional politics, the Court’s reasons for judgment can fairly be said to be a remarkable act of judicial statecraft”); supranote 166 and accompanying text.}
\footnote{See supra note 166 and accompanying text.}
\footnote{See supra note 139 and accompanying text; id. at 16.}
\footnote{While only 36 percent of Canadians agreed with this proposition, 55 percent of Quebecers were open to doing away with the Court if it began making many decisions which ran counter to popular opinion. Id. at 17, 19.}
\footnote{Id. at 21.}
\end{footnotes}
example, 64 percent of those with strong provincial attachments agree that the Court’s power to decide controversial cases should be reduced, and the same percentage agree that it might be best to do away with the Court altogether if it started making a large number of decisions with which people disagreed.\footnote{id. 187}

These results are not specific to the Court’s role in Charter cases, but concern its constitutional role more generally. As a result, it is possible that many favor a reduced role for the Court because of its contentious role in division of powers and reference cases.\footnote{Id. at 20 (“Federal authority and the Supreme Court’s role in division of power cases are contentious issues in Quebec. Many Quebecers likely oppose the Supreme Court not because it sometimes strikes down legislation passed by elected bodies, but because they reject federal authority.”).} At the very least, however, the available data does support the proposition that the Court needs to be particularly careful in relation to decisions that affect key areas of provincial policy and autonomy, which may in turn temper the rulings it hands down in such cases.

Conversely, federalism dynamics could also help to explain why the Court appears to more readily strike down certain aspects of federal policy. As the \textit{Quebec Secession Reference} clearly demonstrates, the federal government relies on the Court to promote national unity and to calm provincial tensions, particularly in contentious division of powers cases.\footnote{See also \textit{Re Resolution to Amend the Constitution}, [1981] 1 S.C.R. 753. Reliance by the federal government on the Court for this purpose is enhanced by the reference power, which allows it to refer to constitutional questions to the Court prior to the enactment of legislation. See \textit{Supreme Court Act}, R.S.C. 1985, c. S-26, § 53.} This is particularly important because it gives the federal government a way of shifting responsibility for controversial policy goals to the Court, thereby reducing the potential risks faced by federal political actors for those decisions.\footnote{See Graber, supra note 66; HIRSCHL, supra note 170, at 39-40 (describing the circumstances in which the political branches might profit from an expansion of judicial power).}

Although diverting such matters to judges can offer an attractive political solution, the trade-off is that the federal government will be more limited in its ability to bring the Court back into line in other areas if it wants to retain a powerful judiciary for federal purposes. As a result, while the Court has more limited freedom of movement in relation

\footnote{id. 188}

\footnote{id. 189}

\footnote{id. 190}
to the provinces, its ability to speak with a stronger voice in relation to federal policy is likely to be somewhat stronger given the reduced risk of reprisals at that level.191

**C. The potential for broader constitutional dialogue in Canada**

The foregoing analysis contends that the Supreme Court of Canada, similar to its American counterpart, operates under a range of political constraints that can be expected to limit the sphere of judicial action. Some further explanation is required, however, to explain why the Canadian judiciary continues to step out and strike down legislation in certain policy areas at regular intervals, often involving controversial policy issues such as the meaning of equality rights. This is particularly important as it is precisely these cases that dialogue detractors point to as evidence that the Charter is evolving into an instrument of judicial supremacy. In this regard, the insights arising from the political environment in which the judiciary operates also indicate that a society-wide dialogue is likely to be occurring about such controversial policy issues, which are highly salient in Canadian society. Just as in the United States, institutional constraints on judges appear central to generating a broader public discussion about constitutional meaning.

When the Court speaks out in a strong voice and invalidates legislation in a contentious and highly salient policy area, its actions are likely to have been prompted by one of two factors. First, the Court might anticipate that the political branches tacitly support its actions, yet prefer to pass the issue to the judiciary to resolve because it presents a policy goal that is too controversial to pursue through the ordinary political process.192 The Court might also conclude that popular sentiment in the nation is such that the populace will support strong judicial action in a particular area, thereby protecting it from political reprisals.193

Whether the Court has correctly gauged these dynamics or not, judicial rulings in such cases are likely to foster a broader society-wide discussion about the Charter rights at issue. Although this discussion may already be taking place within the political branches and society, prominent judicial decisions will serve to intensify and focus the

---

191 Cf. Ferejohn & Kramer, supra note 59, at 1036 (“If [the] threat [of sanctions] grows faint … the Court’s ambitions can be expected to swell.”).
192 See supra note 67.
193 See supra notes 74-75 and accompanying text.
debate. In addition, although legislatures can respond to decisions of the Court in a variety of ways, the fact that positive action is required to do so means that the Court’s immediate ruling will inevitably shape the key terms of the public debate.

While the Court’s role in catalyzing society-wide dialogue is crucial, the way in which the dialogue progresses can be expected to vary in different kinds of cases. Rulings in morally contentious areas, even if widely received as a favorable development, will inevitably prompt critical reactions from those who disagree with the Court’s perspective. These ‘backlash’ reactions, particularly if they are very intense, are important to the process of dialogue as they can lead to greater popular and political discussion of the issue, often focusing on the constitutional terms framed by the Court. If the Court has incorrectly gauged broader popular and political sentiment, it may find itself subject to more widespread attack, including threats to use, or actual use of, formal mechanisms of response. In some cases, the Court might try to diffuse such reactions by ruling in a way that leaves space for a range of less drastic legislative responses, such as by leaving space for a legislative response through the use of section 1 analysis, or through the use of suspended declarations of invalidity. In other cases, if a significant risk emerges that the Court might be subject to more forceful responses, such as use of the override, we could expect the Court to adapt its rulings over time. As these dynamics play out in the long term, a relatively stable equilibrium about the meaning of Charter values should result that all participants in the national discussion are content to accept.

The way in which this dialogue will play out is also likely to be affected by the rulings of courts lower in the judicial hierarchy. As in the United States, Canada has a decentralized system of judicial review in which provincial and lower federal courts can rule on the constitutionality of legislation and executive acts. This system, which

---


195 Section 1 can therefore operate as a kind of judicial self-policing device, because it enables the Court to avoid harsher forms of backlash against its rulings by leaving space for less confrontational institutional replies. For a discussion of judicial self-policing devices in the United States, see Ferejohn & Kramer, supra note 59, at 994-1037.

196 Section 33 can therefore operate as an important anticipatory constraint on judicial behavior. See supra notes 181-82 and accompanying text.
encourages a multiplicity of judgments in different regions of the country, can alert the Supreme Court to the importance of issues that come before it, and to the range of constitutional perspectives and the strength of views in particular areas. Of critical importance to the process of constitutional dialogue, lower court decisions can also serve to kick-start the society-wide discussion, if the issues being decided are of sufficient salience with the public.

Thus far, this description of dialogue, based on the positive features of the system of judicial review in Canada, is similar to the positive account of dialogue developed in the United States. The precise dynamics by which dialogue takes place in Canada will also be affected, however, by the specific nature of the federal constraints that operate in that country. In particular, the fact that the Court seems more inclined to defer to the policy preferences of provincial governments in relation to core areas of provincial responsibilities suggests that it will less commonly speak out and promote a society-wide dialogue in relation to such issues. Conversely, the Court may be expected to speak out to a greater extent in relation to areas of more national concern.

This story of society-wide dialogue is clearly different to the dominant inter-branch account that is prevalent in Canada. It does not, however, completely negate inter-branch theory, but instead adds additional layers of complexity to our understanding of Canadian constitutional conversations. Broader society-wide dialogue will principally center on high saliency policy issues, particularly those which are the subject of significant moral controversy. In these cases, the specific forms of inter-branch interactions that are facilitated by sections 1 and 33 of the Charter can form part of the broader dialogue about Charter values over time. In particular, if legislative responses are forthcoming under these provisions, they will form yet another part of the ongoing process of dialogue about Charter values, because these responses will in turn lead to further public discussion and, potentially, further judicial challenge.

In cases centering on low saliency issues, in contrast, broader society-wide discussion is somewhat less likely to occur, because these issues are unlikely to engage

197 See Bateup, supra note 38, at 1167.
198 There is a five-year time limit in relation to uses of section 33. When this time limit has expired, the potential for broader constitutional dialogue is renewed.
popular discussion in any meaningful way.\textsuperscript{199} In such cases, the formal mechanisms for legislative replies that exist under the Charter provide distinct advantages over the American system precisely because they preserve the possibility of legislative responses on the merits to judicial rulings. Although such responses may not always be forthcoming, and further investigation is required of the precise dynamics in which legislatures take advantage of these mechanisms in low salience cases, it is in precisely these cases that inter-branch theory may retain the greatest explanatory potential.

\section*{V. POSITIVE CONSTITUTIONAL DIALOGUE IN ACTION: GAY RIGHTS AND SAME-SEX MARRIAGE IN CANADA}

Confirmation of the descriptive force of the positive account of dialogue can be found by examining controversial areas of social policy and debate in which the Canadian courts have been involved. In this regard, the issue of equality rights for gays and lesbians, including same-sex marriage, is a particularly fertile area of analysis, as it has been one of the most contentious areas of social policy to have emerged in Canada since the introduction of the Charter. This is also an area that has prompted commentators to argue that the judiciary is regularly having the final say about the meaning of Charter rights, supporting the claims of those who assert that the Charter has evolved into an instrument of judicial supremacy.\textsuperscript{200}

This Part argues that the positive conception of Canadian dialogue, incorporating both inter-branch and society-wide aspects, provides a more complete and complex explanation of the nature and function of judicial review in this contentious area of social policy that other contemporary theory of judicial review, including theories of inter-branch dialogue. In particular, the positive account both brings into view and is able to account for the multifaceted interdependencies between judicial and legislative action and emerging popular opinion that have been central to constitutional change in this area. The Part focuses on two aspects of the gay rights debate in Canada in order to explore

\textsuperscript{199} See supra note 98 and accompanying text.
these ideas in greater detail: first, the decision of the Supreme Court in *Vriend* and the aftermath of the ruling; and second, more recent legal developments on the question of same-sex marriage.

**A. Dialogue surrounding Vriend v. Alberta**

The plaintiff in *Vriend* was a teacher at a private religious school who had been fired after telling his employer that he was gay. As discussed previously, Alberta’s human rights code, the IRPA, did not include sexual orientation as a prohibited ground of discrimination. In a challenge to the constitutionality of this legislation, the Supreme Court unanimously held that the failure of the IRPA to include sexual orientation as a ground of discrimination violated the guarantee of equality contained in section 15 of the Charter. In order to remedy this violation, rather than striking down the provision, the Court read-in sexual orientation as a prohibited ground of discrimination under the statute.

*Vriend* was not the first judicial foray into the equal protection claims of gays and lesbians. It did, however, represent a sharp departure from the Supreme Court’s earlier jurisprudence. Following the enactment of the Charter, it was unclear for many years whether it would offer gays and lesbians much protection because the document’s framers decided not to include sexual orientation as a prohibited ground of discrimination in the Charter’s equality guarantee. Beginning in the early 1990s, a range of lower court and tribunal decisions indicated that judges might nonetheless begin to interpret that provision to protect against sexual orientation discrimination.

It was not until 1995, however, in *Egan v. Canada*, that the Supreme Court definitively ruled that equality rights protection under section 15 should be extended to

202 *See supra* notes 146 and accompanying text.
203 Major J., who is from Alberta, dissented on this point. Kelly notes that the Court tempered some of the force of its activism in *Vriend* by rendering a decision that did not place fiscal obligations on the states. *See Kelly, Governing with the Charter, supra* note 50, at 36.
204 Hiebert, Charter Conflicts, *supra* note 37, at 168. The grounds of discrimination in s.15(1) are not exclusive: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”
gays and lesbians. Yet even in Egan, the Court continued to send an equivocal message about the equality rights of gays and lesbians. This case concerned the constitutionality of denying spousal pension benefits to same-sex couples. Although four judges found that the legislation violated section 15 and did not constitute a reasonable limitation on the right, the constitutionality of the statute was determined by Sopinka J., who concluded that this infringement should be upheld as a reasonable limit under section 1. Vriend was thus the first case in which the Court took the further step of recognizing that same-sex couples should receive the same benefits and protections as heterosexual couples in order to satisfy the Charter’s equality guarantee.

The Vriend ruling resulted in significant public and political outcry, particularly in Alberta. While there was disagreement in some quarters with the substance of the ruling, above all the Court was accused of using the Charter to encroach on provincial autonomy and values. This vehement reaction led the Alberta government to explore a range of options to respond to the ruling, including use of the override. It also appeared that there was considerable support for the override amongst sections of the citizenry, who reportedly inundated members of Parliament with requests for its use. In the end, however, although many members of the Conservative caucus also favored a strong response, the government allowed the decision to stand.

For many commentators, Vriend represented the latest and most dramatic example of the judiciary imposing its own views about Charter meaning on Canadian society. In particular, it bolstered the claims of the dialogue detractors who argued that the ruling starkly revealed the Charter’s evolution from system of legislative to judicial supremacy. Inter-branch dialogue theorists have tried to respond by placing Vriend...

207 Four judges concluded that the spousal benefits provisions did not amount to discrimination under s.15(1), while five judges concluded that they did. However, one of those five, Sopinka J., concluded that this infringement should be upheld under s.1, with the result that a narrow majority upheld the provisions. See, e.g., Ted Byfield, Albertans Don’t Like Being Governed by Judges, FINANCIAL POST, 11 April 1998, 22; Daniel Frum, Alberta Can Say No to Vriend Decision, FINANCIAL POST, 7 April 1998, 19.
210 See MANFREDI, supra note 7, at 5 (“Vriend represented the boldest step in a sequence of institutional interactions that promotes the transition from legislative to judicial supremacy in Canada.”); MORTON &
within their analytical framework, but they have struggled mightily to do so in light of the Alberta government’s failure to respond to the decision, despite the apparent popular and political support for use of the override. 212

Taking an expanded view of dialogue, however, it becomes clear that inter-branch theorists are looking for dialogue in the wrong place. Rather than representing a failure of inter-branch dialogue, Vriend can be reconceived as one part of a broader society-wide dialogue about the equality rights of gays and lesbians. When the Court ruled in Vriend, this acted as a catalyst for a more expansive popular debate about gay rights, particularly in Alberta, but also throughout the rest of Canada. 213 In relation to the debate that ensued, vigorous conversations took place amongst both politicians and the public about the ruling and whether provincial human rights legislation should guarantee equal protection for gays and lesbians, as the Court had framed the issue. 214 In the political arena, for example, the government consulted with a range of groups in society before deciding how to respond to the ruling. 215 It was in the public arena, however, that some of the most heated debate took place, with widespread discussion in the media about the merits of Vriend and the proper role of the judiciary in Charter cases. 216 Religious conservatives also protested loudly against the ruling, both bombarding the government with their views, and undertaking a prominent campaign against the ruling in the broadcast and print media. 217

---

212 See, e.g., ROACH, SUPREME COURT ON TRIAL, supra note 6, at 67 (“When the Alberta government did nothing in response to the Vriend decision extending gay rights, it was because the people’s elected representatives were not sufficiently concerned about the Court’s decision to enact reply legislation that limits or overrides the rights declared by the Court.”).

213 The ruling also prompted legislative action in the provinces of Newfoundland and Prince Edward Island, which soon amended their human rights codes to also include sexual orientation as a prohibited ground of discrimination. See Fletcher & Howe, Canadian Public Opinion, supra note 139, at 40.

214 KELLY, GOVERNING WITH THE CHARTER, supra note 50, at 192 (there was “an extensive rights dialogue within the Progressive Conservative caucus and society at large after the Vriend decision.”).

215 HIEBERT, CHARTER CONFLICTS, supra note 37, at 182.


It is clear that the Court’s decision energized this debate, particularly because the level of public and political discussion that took place about gay rights under the Charter was rather stultified before the Vriend ruling.218 Indeed, the Alberta government had previously done its best to ensure that the question of law reform was not widely considered. In late 1992, the Alberta Human Rights Commission decided to investigate discrimination complaints based on sexual orientation, but was soon directed by ministerial order to cease its investigation. A subsequent review of the legislation in 1994 by the Commission led to a recommendation that sexual orientation be included as a prohibited ground of discrimination under the IRPA.219 Although the government introduced some amendments to the Act in line with the Commission’s findings, a response to its recommendations on sexual orientation remained conspicuously absent.220

While we cannot be certain why the Court stepped ahead on the issue of gay equality rights when it did, this development was in line with emerging popular sentiment. Prior to the Court’s ruling, democratic reform efforts had taken place in a range of provinces to include sexual orientation as a prohibited ground of discrimination.221 Furthermore, despite the vociferous outcry by a range of groups following the ruling, opinion surveys clearly indicate that citizens in both Alberta and the rest of Canada were supportive of the position taken by the Court in 1998. In relation to the specific issue involved in Vriend, namely the right of gays and lesbians to be protected from discrimination in employment, specifically in the field of teaching, these surveys show that there was a significant increase in popular support on this issue between 1987 and 1999.222 While just under 50 percent of Canadians approved of “allowing homosexuals to teach in schools” in 1987, by 1999 that figure had jumped to

218 Lower court decisions also prompted some discussion. See, e.g., David Bowson & Barry Cooper, Should Judges Make the Rules when Lawmakers Refuse to Act?, GLOBE AND MAIL, 15 February 1997, D2; Margaret Bateman, The Right of Gay Albertans, GLOBE AND MAIL, 13 November 1997, A27.
220 HIEBERT, CHARTER CONFLICTS, supra note 37, at 181 n.91.
221 Seven out of ten provinces had already amended their human rights codes to include sexual orientation as a protected ground prior to Vriend, demonstrating widespread support across the nation for the Court’s stance. See KELLY, GOVERNING WITH THE CHARTER, supra note 50, at 99; Donna Greschner, The Right to Belong: The Promise of Vriend, 9 NAT. J. CONST. L. 417 (1999).
222 Fletcher and Howe, Canadian Public Opinion, supra note 139, at 40-41.
almost 72 percent.\textsuperscript{223} Breaking this support down into regions, support in the Prairies, of which Alberta forms a part, was slightly lower than in the rest of Canada. Nonetheless, a clear majority of more than 68 percent still supported the proposition.\textsuperscript{224} Furthermore, an opinion poll conducted in Alberta approximately one year after \textit{Vriend} revealed slightly higher levels of support, with 76 percent of Albertans expressing agreement with the Court’s ruling.\textsuperscript{225}

This convergence between popular opinion and judicial action, in combination with the legislative reforms undertaken in other provinces, clearly suggests that the Court was responding dialogically to developing public opinion at both the national and provincial levels in \textit{Vriend}, which in turn fed a broader nation-wide debate about the equality rights of gay and lesbians. Of course, the fact of this convergence does not prove that the Court’s ruling was based on a conscious calculation that the result would conform to popular preferences. Nonetheless, it does strongly indicate that some “coordination mechanism” exists to keep the two closely connected to one another.\textsuperscript{226} It is therefore fair to conclude popular support for gay rights likely played a central role in the \textit{Vriend} decision, as it left the Court in a position where there was a reduced risk that the Alberta government would act against it by employing the override. Not only does this dialogic story accord with the empirical evidence, it also does so much better than any other prevailing theory of judicial review.

\textbf{B. Dialogue about same-sex marriage}

More than any other development involving the equality claims of gays and lesbians, the question of gay marriage has consumed critics of the Charter. Following a number of judicial decisions holding that the heterosexual definition of marriage violated the Charter’s equality guarantee, critics charged that judges had unilaterally imposed their own views about gay marriage on the Canadian populace. Canadian dialogue theorists

\textsuperscript{223} While other variables might account for these changes over time, holding these constant, Fletcher and Howe conclude that roughly three-quarters of this change in support is attributable to individual level attitude change. \textit{Id.} at 40-41.
\textsuperscript{224} \textit{Id.} at 42.
\textsuperscript{226} See Friedman, \textit{Mediated Popular Constitutionalism}, \textit{supra} note 71, at 2609 (“It would be an awfully large and felicitous coincidence to find such convergence in the absence of a coordination mechanism.”).
have sought to diffuse this criticism by explaining various aspects of the controversy in terms of an inter-branch dialogue between legislatures and the courts about Charter meaning. They have, however, been largely unsuccessful in showing how the totality of developments in this area represent inter-branch dialogue in action. The positive account of dialogue, in contrast, provides a more complete explanation of what has occurred. Not only have judicial decisions acted as the catalyst for widespread political and popular debate on the issue of same-sex marriage, but the bold moves of the judiciary in this area appear to be connected to emerging popular support.

The debate about same-sex marriage began in earnest following the Supreme Court’s ruling in *M v. H*, decided just a year after *Vriend*. *M v. H* concerned the exclusion of gay and lesbian couples from the processes set up by the Ontario Family Law Act to determine property rights and financial support following the dissolution of family relationships. Setting aside its precedent in *Egan*, the Court now held, by an 8:1 majority, that the heterosexual definition of spouse in the legislation violated the Charter’s equality guarantee and could not be justified as a reasonable limit under section 1. As a remedy, the Court declared the offending legislative provision invalid, subject to a six-month delay, in order to give the legislature “some latitude in order to address these issues in a more comprehensive fashion.”

The Court’s unambiguous declaration in *M v. H* that same-sex couples must be treated equally marked a legal and political turning point in the protection of gay rights in Canada. In particular, the ruling had significant policy implications for all levels of government because it cast doubt on a wide range of legislative and social policy measures that reflected the traditional norm of the heterosexual couple. In light of this, the ruling rapidly led to a process of legislative revision at both the federal and provincial

---


229 Id. at [147].
levels. In the three years following \textit{M v. H}, all Canadian jurisdictions enacted legislation that extended social policy benefits to same-sex couples, though there were varying degrees of defiance and controversy in different provinces regarding how far these amendments should go in order to respect equality. By far the greatest controversy, however, concerned the prospect that eliminating discrimination against same-sex couples would require the redefinition of marriage.

Although the Court did not address the question of same-sex marriage in \textit{M v. H}, it did take the cautious step of stating that its ruling did not affect the common law definition of marriage. Despite this, the nature of the Court’s ruling, couched in the language of equality and human dignity, suggested that the issues were closely connected. The decision accordingly provoked a cacophonous and heated public and political dialogue about the question of same-sex marriage, in particular mobilizing those who were opposed to this development. As inter-branch dialogue theorists have recognized, it also served as a catalyst for political and legislative action regarding same-sex unions. In combination, these diverse voices all contributed to a rich tapestry of constitutional conversations about marriage rights for gays and lesbians.

The definition of marriage is principally one of federal jurisdiction in Canada, as the federal government has constitutional power over the legal capacity to marry. The government had never legislated, however, to define eligibility for marriage, meaning that the common law definition of marriage remained operative. In light of this, some of the most heated political debate immediately following \textit{M v. H} occurred at the federal level as consideration was given to whether there should be legislative reform of the

\footnotesize

---

230 Murphy, \textit{supra} note 227. \textit{See also} HIEBERT, \textit{CHARTER CONFLICTS}, \textit{supra} note 37, at 184-96 (focusing on the intersections between \textit{M v. H} and subsequent legislative reforms).

231 Inter-branch scholars have pointed to the diversity of legislative responses to the decision as examples of dialogue. \textit{See} Murphy, \textit{supra} note 227; ROACH, \textit{SUPREME COURT ON TRIAL}, \textit{supra} note 6, at 196-200.

232 \textit{M v. H} [1999] 2 S.C.R. 3 at [57] (Iacobucci J.) (“This appeal has nothing to do with marriage \textit{per se}… the FLA draws a distinction by specifically according rights to individual members of unmarried cohabiting opposite sex couples, which by omission it fails to accord to individual members of same sex couples who are living together. It is this distinction that lies at the heart of the s. 15 analysis. The rights and obligations that exist between married persons play no part in this analysis.”).


234 \textit{See} Murphy, \textit{supra} note 227; Roach, \textit{Dialogic Judicial Review}, \textit{supra} note 6, at 78-79.

235 The provinces, in contrast, retain power over the solemnization of marriages.
traditional definition. The federal Liberal government was reluctant to pursue this path at that time, however, and instead supported a Reform Party motion providing that “marriage is and should remain the union of one man and one woman to the exclusion of all others” and that Parliament would “take all necessary steps” to preserve this definition of marriage.236

The political debate continued into early 2000, when the federal government introduced legislation directly responding to M v. H, amending 68 federal statutes by extending benefits and obligations to same-sex spouses.237 Known as Bill C-23, this legislation reserved the term “spouse” for married couples only, but introduced a new term – “common law partner” – that would include gay and lesbian partners. Aware of continued political and popular dissent on the question of same-sex marriage, the government was careful to stress that these changes did not affect the existing common law definition of marriage.238 It nonetheless encountered significant opposition from within its Liberal caucus, conservative MPs, interest groups and the media, who argued that the proposed legislation would indeed affect the existing definition of marriage, despite the government’s claims to the contrary.239 In the result, the government eventually bowed to this political pressure and agreed to include an interpretive preamble in the legislation to remove any doubt that the changes did not alter the existing law.240

Provincial governments also played an active role in the debate about gay marriage during early 2000. Responses in different regions of the country varied widely. In March of that year, the Alberta government explicitly affirmed the traditional heterosexual definition of marriage and preemptively invoked the override clause to

---

236 HOUSE OF COMMONS, PARLIAMENTARY DEBATES 15960 (8 June 1999). The motion passed by a vote of 216 to 55, with a large majority of Liberal MPs voting in favor of the motion.

237 Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations, 2nd Sess., 36th Parl. (Can.).

238 See HOUSE OF COMMONS, PARLIAMENTARY DEBATES 3537 (February 15, 2000), at 3537 (Justice Minister McClellan) (arguing that the government was “preserving the existing legal definition and societal consensus that marriage is the union of one man and one woman to the exclusion of all others.”).

239 See HIEBERT, CHARTER CONFLICTS, supra note 37, at 194-95; MIRIAM SMITH, LESBIAN AND GAY RIGHTS IN CANADA 14 (1999).

240 Bill C-23, supra note 241, at clause 1.1 (“For greater certainty, the amendments made by this Act do not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others.”).
protect this definition from any future court challenge.\textsuperscript{241} While this was principally a symbolic gesture, given that provincial governments do not have the power to define marriage, it was nonetheless a strong rhetorical statement about the strength of political opposition to same-sex marriage in the province. This can be compared to the approach taken in British Columbia where, in May 2000, the Attorney-General announced that the government supported the right of same-sex couples to marry.\textsuperscript{242} He later indicated that the government would ask the Supreme Court of British Columbia to rule on the question of whether federal law preventing same-sex couples from applying for marriage licenses violated the equality provisions of the Charter, indicating that his government “would ‘argue strongly in favour of legalized, same-sex marriages.’”\textsuperscript{243}

To a significant extent, however, developments in the legislative arena came to a standstill after the federal government’s passage of Bill C-23, largely due to the deep political divisions that remained on gay marriage.\textsuperscript{244} As a result, members of the gay and lesbian community, who were mobilized by the federal government’s efforts to reaffirm marriage as a heterosexual institution, returned to the courts to try to achieve further policy change. Canadian courts soon accepted this invitation to weigh in on the issue.

Beginning in 2001, the prominent activist group, EGALE Canada, initiated judicial challenges to the heterosexual definition of marriage in British Columbia, Ontario and Quebec. In the first ruling on the matter, in \textit{EGALE v. Canada}, the Supreme Court of British Columbia deferred to political decision-making and held that the question of whether same-sex marriage should be legalized was one for Parliament to decide.\textsuperscript{245} In contrast, in \textit{Halpern v. Canada}, the Ontario Divisional Court rejected a deferential approach and held that the common law definition of marriage was

\footnotesize{\textsuperscript{241} Marriage Amendment Act, 2000, S.A. 2000, c.3, §5 (Alta.).
\textsuperscript{243} Rod Mickleburgh, \textit{B.C. to fight for same-sex marriage rights}, GLOBE AND MAIL, 21 July 2000, A4. The government later joined a lawsuit aiming to challenge the federal marriage policy. When the Liberal government came into power following an election, governmental support for the challenge ended, but the case continued. \textit{See Jason Pierceson, Courts, Liberalism and Rights} 181 (2005).
\textsuperscript{244} A private member’s bill was introduced in federal Parliament in February 2001 to change the definition of marriage to include same-sex couples, but this was not passed. \textit{See, e.g., James Baxter, Robinson Tables Same-Sex Marriage Bill}, VANCOUVER SUN, February 15, 2001, A4.
\textsuperscript{245} \textit{EGALE Canada Inc. v. Canada (A.G.)}, (2001) 95 B.C.L.R. (3d) 122.}
inconsistent with the equality provisions of the Charter.\textsuperscript{246} As a remedy, the Court amended the common law to allow for same-sex marriages, but suspended this to give the federal government time to fashion a constitutionally appropriate remedy. A similar result was reached by the Quebec Superior Court.\textsuperscript{247}

In late 2002, after the British Columbia and Ontario rulings were appealed to higher courts in those provinces, the federal government announced that the lower court rulings had prompted it to investigate the issues surrounding the recognition of same-sex unions.\textsuperscript{248} The Justice Minister asked the parliamentary Standing Committee on Justice and Human Rights to consider whether and how the government should address the issue. Four different paths were to be considered: keeping the status quo, establishing civil unions, legalizing same-sex marriage, or eliminating the federal government’s role in marriage altogether. After the Committee had conducted public hearings around the country, but before it had completed its deliberations, the results of the appeals in \textit{Halpern} and \textit{EGALE} significantly altered the trajectory of the debate.

First, in May 2003, the Court of Appeal of British Columbia ruled in \textit{EGALE} that the prohibition on same-sex marriage was unconstitutional.\textsuperscript{249} As a remedy, the Court amended the common law to allow gay and lesbian couples to marry, but suspended its remedy until July 2004 to give Parliament time to legislate on the issue. The following month, the Ontario Court of Appeal also unanimously found in favor of same-sex marriage in the \textit{Halpern} appeal.\textsuperscript{250} The Ontario Court, however, did not suspend its remedy, thereby allowing same-sex partners to marry immediately in the province. This in turn prompted the British Columbia Court to revoke its suspended declaration of invalidity in order to avoid differing applications of law in the two provinces.\textsuperscript{251}

The pace of change from this point was extremely rapid. Within hours of \textit{Halpern}, gay and lesbian couples were marrying in Ontario, and more than 1000 same-

\textsuperscript{249} \textit{EGALE Canada Inc. v. Canada (Attorney General)}, (2003) 225 DLR (4th) 472 (“\textit{EGALE}”).
\textsuperscript{250} \textit{Halpern v. Canada (Attorney General)} (2003), 225 D.L.R. (4th) 529 (“\textit{Halpern}”).
\textsuperscript{251} \textit{EGALE Canada Inc. v. Canada (Attorney General)} (2003), 228 D.L.R. (4th).
sex marriages had taken place by the end of the year.\textsuperscript{252} Quebec’s Court of Appeals affirmed that province’s lower court decision in favor of gay marriage in March 2004.\textsuperscript{253} Throughout the course of 2004, courts in the Yukon, Manitoba, Nova Scotia and Saskatchewan also found in favor of same-sex marriage claims.\textsuperscript{254}

The appeals court rulings created a great deal of controversy in Canada, not only for their recognition of same-sex marriage, but particularly as a result of the remedy granted in \textit{Halpern}. Those who claim that judicial supremacy is emerging in Canada point to the ruling as clear evidence of the judiciary aggressively imposing its views on Canadian society.\textsuperscript{255} Inter-branch dialogue theorists have also been critical of the Ontario Court’s ruling, arguing that it altered the di alogic balance between the courts and the federal Parliament by imposing an immediate and mandatory remedy.\textsuperscript{256} Previous decisions of Canadian courts employing suspended declarations of invalidity had allowed Parliament greater latitude to deliberate about how the Charter values at issue could best be protected, including consideration of possible alternatives to gay marriage. Dialogue theorists argue, however, that the immediate declaration in \textit{Halpern} made inter-branch dialogue more difficult, not only because it pre-empted the work of the federal parliamentary committee that was examining the issue, but also because it would now be more difficult for the government to continue to explore alternative perspectives on same-sex unions. The remedy granted also left the federal government with a more limited set of options if it wanted to respond to the judicial rulings; namely it could appeal the decisions to the Supreme Court or it could employ the override.\textsuperscript{257}

In the result, and in marked contrast to its earlier express opposition to same-sex marriage, the government decided not to appeal the decisions. Instead, it quickly moved to draft legislation to change the civil definition of marriage in Canada to “the lawful


\textsuperscript{255} See, e.g., Morton, \textit{supra} note 200.

\textsuperscript{256} See Roach, \textit{Dialogic Judicial Review}, \textit{supra} note 6, at 83-84 (criticizing the immediate declaration of incompatibility in \textit{Halpern}); Van Kralingen, \textit{supra} note 227 (same).

\textsuperscript{257} In addition, use of the override would not have invalidated same-sex marriages that had already occurred, as the provision is not retrospective in nature. Roach, \textit{Dialogic Judicial Review}, \textit{supra} note 6, at 83.
union of two persons to the exclusion of all others.”\textsuperscript{258} Following a period of significant political controversy, the legislation was ultimately enacted on June 28, 2005, over the lingering objections of conservatives and some members of the Liberal party.\textsuperscript{259}

Concerns that the judiciary succeeded in imposing its own views about same-sex marriage in Canada are revealed to be greatly exaggerated, however, if we again take a broader, more positive view of constitutional dialogue. Reconceiving dialogue in this way, the judicial decisions in this area, including \textit{Halpern}, can be redescribed as part of a wider societal dialogue about same-sex marriage. One aspect of this dialogue is that the judicial rulings, from \textit{M v. H} to \textit{Halpern}, all played an important role in provoking a broader debate of the equality issues at stake, and in prodding public and political discussion about these issues forward. The fact that the judiciary facilitated this discussion is particularly important, given that governments have tended to be reluctant to act as the leading agents for change in this contentious area of social policy.\textsuperscript{260}

Of equal importance, in addition to being an important force in intensifying and focusing societal debate on same-sex marriage, the fact that assertive judicial action was taken at this juncture can also be viewed as a dialogic response to developing popular sentiment on gay marriage.\textsuperscript{261} As the saga has played out over time, this seems to have produced an equilibrium on the question of same-sex unions that the majority of Canadians are now content to accept. In order to explain the various dialogic connections


\textsuperscript{259} The passage of the legislation followed a controversial reference to the Supreme Court regarding the constitutionality of the statute. \textit{See Reference re Same-Sex Marriage}, [2004] 3 S.C.R. 698. The Court ruled that the federal Parliament had the authority to extend civil marriage to same-sex partners, and that the Charter protects religious officials from being compelled to perform same-sex marriages if it is against their religious beliefs. The Court, however, declined to rule on the question of whether an opposite-sex definition of marriage is in violation of the Charter, stating that there was “no precedent for answering a reference question” that has already been answered by the lower courts and relied on by “thousands of people.” \textit{Id.} at [68], [67]. This ruling is a further aspect of the continuing constitutional dialogue on same-sex marriage, though one in which the Court refrained from speaking with as strong a voice as the lower courts. This may have been due to a calculation made by the Court to preserve its institutional legitimacy, given the controversy still surrounding the issue. There was also less need for the Court to enter the fray about the constitutionality of the heterosexual definition of marriage at the time of the Reference, because the government had already decided not to appeal the lower court rulings.

\textsuperscript{260} \textit{See HIEBERT, CHARTER CONFLICTS, supra} note 37, at 168 (“The tendency of political actors to wait for judicial rulings before acknowledging that the Charter’s principles do or should prohibit discrimination on the basis of sexual orientation has become a pattern of political behaviour.”).

\textsuperscript{261} Unsurprisingly, this also seems to be true of Canadian legislatures. \textit{See infra} notes 273-76 and accompanying text.
at play, we again need examine the available public opinion data on same-sex marriage in
Canada.

The empirical evidence suggests that popular opinion about gay rights in Canada,
and particularly views about same-sex marriage, has shifted markedly since the early
1990s. In 1993, for example, polls showed that only 37 percent of Canadians supported
gay marriage.262 Levels of support remained low throughout the 1990s. From 2000
onwards, however, a discernible shift in public approval of same-sex marriage is
apparent. By 2000 (and after the decision in M v. H), polls indicated that popular support
on the issue had jumped to over 50 percent.263 By October 2002, 53 percent of Canadians
backed same-sex marriage,264 a figure that remained steady to June 2003, just as the
appeal court rulings in EGALE and Halpern were handed down.265 There was also a
significant increase in acceptance of homosexuality over the same period.266

It has been suggested that this increase in popular support for gay marriage can be
attributed to the role of courts in the formation of public opinion. According to this
argument, the judiciary has played a positive educative role that has resulted in a shift in
popular views over time.267 Further examination of the data reveals, however, that the
situation is more complex than this argument suggests, because judicial rulings
supporting same-sex marriage were, in fact, followed by an immediate drop in public
support. Opinion polls taken immediately after Halpern show that support for same-sex
marriage dropped to 48 percent in the months following the decision.268 Other studies
conducted during the same period support these findings.269 It was not until further

262 CANADA, NATIONAL ELECTION STUDIES (1993), discussed in J. Scott Matthews, The Political
263 CANADA, NATIONAL ELECTION STUDIES (2000), discussed in id.
264 Centre for Research and Information Canada, Press Release (October 28, 2003), available at
265 Ipsos-Reid, Slim Majority (54%) Support Same-Sex Marriages, June 13, 2003, available at www.ipsos-
reid.com.
266 See Andrew Parkin, A Country Evenly Divided on Gay Marriage, POLICY OPTIONS 39, 40-41 (October
2003) (citing studies showing a significant increase in acceptance of homosexuality since the early 1990s).
267 Scott Matthews, supra note 262, at 842-43 (arguing both that the judiciary framed the issue of gay
marriage as one of equal rights, and judicial (and legislative) activity had a “direct, persuasive impact on
Canadians.”).
268 Centre for Research and Information Canada, Press Release (October 28, 2003), supra note 264.
269 See Ipsos-Reid, Same-Sex Marriage: The Debate Enjoined (suggesting that support for same-sex
marriage dropped from 54 percent to 49 percent between June 2003 to August 2003); Leger Marketing,
Canadians and their Tolerance Towards Homosexuality (April 2004), available at
public and political debate took place that popular support began to shift upwards once more. By July 2004, polls showed that support for same-sex marriage had risen to 57%, with the figure rising again to 71 percent by the end of that year.270

The positive account of dialogue is able to provide a convincing explanation of the significant correlation between the judicial rulings and popular support at the time the decisions were rendered, while also accounting for the dip in support immediately following Halpern. On this view, emerging public support likely played a key role in the judiciary’s decision to move forward when it did in favor of same-sex marriage rights. Given the rapidly growing support that was emerging prior to the rulings, particularly in those provinces where the cases were commenced, the courts were in a strong position to take assertive action without significant risk that the override would be used by the federal government to overcome the result.

At the same time, the clear dip in support following Halpern suggests that any educative effect the judicial decisions may have had was much less important than the palpable backlash that the rulings produced.271 This conclusion is supported by additional public opinion data showing that following Halpern, those who opposed the recognition of gay marriage were more likely to express support for the override than those who agreed with the decision.272 In this regard, in February 2002, only 28 percent of Canadians agreed that the government should use its power to override a judicial decision legalizing same-sex marriage. By September 2003, however, in the wake of Halpern and the other appeal court rulings, the percentage supporting legislative use of the override to respond to a judicial decision on this issue rose to 40 percent, while the

http://www.legermarketing.com/documents/spclm/040525eng.pdf (suggesting that the percentage of Canadians in favor of same-sex marriage dropped to 43 percent by early 2004).
270 In a survey released July 1, 2004, the Centre for Research and Information on Canada found that 57 percent of respondents now agreed that gays and lesbians should be allowed to marry, an increase of 9 percent since first asked, and up from 48 percent in September 2003. See Centre for Research and Information Canada, Press Release, supra note 264; Centre for Research and Information Canada, Press Release (July 1, 2004), available at http://www.cric.ca/pdf_re/new_canadaRedux/new_canada Redux_summary.pdf. See also Parkin, supra note 270, at 39; Ipsos-Reid, As the Supreme Court Prepares for Bill c-23, the Public Holds Court on Gay-Marriage (October 7, 2004), available at http://www.ipsos-na.com/news/pressrelease.cfm?id=2394 (showing that 54% of Canadians supported gay marriage on this date, though there were strong regional differences).
271 See supra notes 194-96 and accompanying text.
272 See Parkin, supra note 266, at 40-41.
percentage disagreeing fell to 51 percent. These figures provide further confirmation of the hypothesis that if the public has sufficient information about judicial decisions and cares enough about the results, then support for the override is likely to grow.

This phenomenon of backlash is central to the dynamics of constitutional dialogue because it can fuel further popular and political conversations about the issues at stake. Furthermore, if courts do not accurately predict the extent of potential backlash, they may find themselves in a position where there is substantial support for political branch attacks against them. In the case of same-sex marriage, however, the courts might also have judged that the possibility of political attack was reduced not only because of emerging popular support, but also because the federal government was reaching a point where it seemed likely to support gay marriage law reform.

While significant political divisions existed regarding whether gays and lesbians should be allowed to marry, there is clear evidence that key players in the federal government were forming the view that reform of the law was required. As previously discussed, prior to Halpern and the other lower court rulings, the government had initiated a parliamentary Standing Committee investigation of same-sex unions. This, in turn, appears to have been prompted by political realization of the strong support on the issue amongst the Canadian public. Government polls conducted during 2002 reveal that the federal government was aware of the emergence of a supportive public on the issue of same-sex marriage, with the Liberal Party’s own polls revealing that support for gay marriage had risen to 49 percent. Furthermore, the fact that the federal government decided not to appeal the rulings to the Supreme Court, but instead introduced and ultimately enacted legislation redefining marriage, strongly indicates that the government agreed that the law should be reformed to protect gays and lesbians from this form of discrimination.

273 See supra notes 248 and accompanying text.
274 PIERCESON, supra note 243, at 183.
276 See Janet L. Hiebert, From Equality Rights to Same-Sex Marriage, POLICY OPTIONS, October 2003, 10, 16.
This account of the same-sex marriage saga successfully refutes the claims of critics who argue that these developments are a prime example of the emergence of judicial supremacy in Canada. Rather than involving the imposition of judicial perspectives on the Canadian people, this is instead a story of judicial decisions forming part of a broader society-wide dialogue about the rights of gays and lesbians. The case study also provides strong confirmation of the explanatory power of the positive account of dialogue in the Canadian setting, as this story of society-wide dialogue fits with the available empirical evidence better than any other prevailing theory of judicial review.

One thing that the positive story has not done, however, is to answer the concerns expressed by inter-branch dialogue theorists about whether the Ontario court should have issued an immediate and mandatory remedy in *Halpern*. To some, this might appear to be a failing of the positive account of dialogue, because it does not provide a normative basis for critiquing specific actions taken by courts and legislatures in the broader constitutional dialogue. This criticism, however, misconstrues both the aims and the value of positive theories of judicial review.

As we have seen throughout this Article, the goal of positive theory is to explain how judges behave when they decide cases and to account for the various influences on judicial decision-making. Normative scholarship, in contrast, is more concerned with prescribing how judges should decide cases. This is not to say that positive theory does not have normative implications. For example, the way in which societal dialogue takes place can be regarded as a democratic virtue, because it enables us to understand how more enduring and widely accepted answers can emerge through the process of society-wide constitutional discussion.

Perhaps most importantly, the positive account of constitutional dialogue also provides an empirically grounded basis for developing normative theories in the future.

---

277 See supra notes 249-50 and accompanying text.
278 FALLON, supra note 102, at 2 (“In light of the well-known distinction between “positive” (or “descriptive”) and “normative” theories, the questions of what the Court does and what it should do might appear sharply distinct.”).
279 See, e.g., Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 CAL. L. REV. 535, 540-41 (1999) (suggesting that constitutional theories are resistant to strict classification along descriptive and normative lines).
280 See Bateup, supra note 38, at 1165-67.
Taking account of the insights of positive scholarship and the politics of judicial review will enable us to develop more useful prescriptions about judicial and legislative behavior, because these prescriptions will be connected to how judicial review actually operates in the real world. \footnote{281} It will also enable us to think about how existing institutional arrangements might be altered in ways that help us to pursue our normative goals. \footnote{282} Accordingly, while the positive account of dialogue may not, by itself, provide explicit normative guidance about how courts and legislatures should behave in relation to specific constitutional issues, it does significantly enhance our ability to pursue more realistic normative critiques that remain “in the realm of the possible.” \footnote{283}

\section*{VI. THE PARADOX RESOLVED}

Having taken an extended theoretical journey through the United States and Canada, we can now see that the paradox posed at the beginning of this Article is, in fact, illusory. While it is true that inter-branch dialogue theory has come under increasing criticism in Canada in recent years, it is not correct to say that Canada has evolved into a system of judicial supremacy. Instead, in both Canada and the United States, constitutional dialogue is observable as a positive matter, though this is a different form of dialogue than Canadians generally expect. Rather than solely an inter-branch phenomenon, dialogue is a broader form of society-wide interaction involving a constitutional conversation between judges, the political branches, and the people.

This Article has focused on developing the positive account of dialogue in the Canadian context, drawing on the available empirical evidence regarding how judicial review operates in that country. This methodological approach has more wide-reaching potential, however, as it could also help to explain the dynamics of judicial decision-making in other nations. In light of the Canadian example, we might expect that the precise nature of dialogue in different countries will vary depending on the specific institutional constraints that operate in a particular constitutional system. Continuing the

\footnote{281} \textit{See} Friedman, \textit{Politics, supra} note 71, at 329-337 (discussing how positive scholarship can help to produce new theories of judicial review).
\footnote{282} \textit{See}, \textit{e.g.}, Adrian Vermeule, Judicial Review and Institutional Choice, 43 WM. & MARY L. REV. 1557, 1558 (2002) (arguing that one of the dilemmas of institutional choice is that “we can’t assess judicial review without answering questions we lack the information to answer”).
\footnote{283} Friedman, \textit{Politics, supra} note 71, at 331.
positive project in other nations is an important challenge for comparative constitutional scholars, as not only will this lead to more descriptively accurate understandings of judicial review, but it will also strengthen our ability to pursue realistic normative scholarship. Ultimately, this may also lead constitutional scholars towards ways of designing constitutional systems that better fit with our normative commitments.