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Collateral Thoughts on Dialogue's Legacy as Metaphor and Theory: A Favourite from Canada

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Abstract:

"Collateral Thoughts" is part of a special issue edited by Professor James Allan, who invited and challenged a group of scholars to select and discuss a favourite law review article. I chose "The Charter Dialogue Between Courts and Legislatures" because it is the most influential article to date in the Charter of Rights and Freedom's relatively short history (since 1982). I call this reflection "Collateral Thoughts" because my interest is less in the merits of dialogue theory than in its remarkable impact, at home in Canada as well as abroad, in the broader reaches of comparative constitutionalism and constitutional theory. In the main, this reflection asks how and why "dialogue" became a runaway concept, and considers what that tells us about the nature and formation of constitutional theory. It shows that Dialogue was fundamentally connected to Canada's catharsis of rights, in 1982 and in the early years of Charter interpretation. That is why its claim that the legitimacy battles which define American judicial review are irrelevant – because Canada's system of rights protection is based on "dialogue" – was so explosive. Not only did this article command attention in Canada, the concept of dialogue would be "reified", castigated and deeply analyzed by scholars and Commonwealth jurisdictions who wondered whether weaker or weak-form judicial review was institutionally possible. Much like other theories in the US constitutional tradition, Dialogue responded to controversy by theorizing and attempting to legitimize review. Despite failing in its objective to eliminate legitimacy concerns about review, Dialogue catalyzed a national and international movement in constitutional thought.

Keywords:

Charter dialogue, dialogue and the legitimacy of review, dialogue's legacy as metaphor and theory, how and why dialogue became a runaway concept, theories of review and their roots in controversy about constitutional rights and interpretation

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COLLATERAL THOUGHTS ON DIALOGUE'S LEGACY AS METAPHOR AND THEORY: A FAVOURITE FROM CANADA

JAMIE CAMERON*

James Allan's challenge to select and discuss a favourite law review article was daunting at first. With constitutional law across time as the field of choice, impossibility and instinct directed a choice close to home, in the literature on Canada's 1982 *Charter of Rights and Freedoms*.¹ During the selection process two prospects were entertained and then set aside in favour of an obvious choice, the article that sparked a scholarship of its own: 'The *Charter* Dialogue Between Courts and Legislatures'.²

'*Charter* Dialogue' entered the fray in 1997, when Canadian debate about the follies of judicial activism had reached an apex.³ In that setting, the authors advanced the calming proposition that review is not a threat after all because the judiciary does not exercise a veto on constitutional rights; hence the article's subtitle, 'Perhaps the *Charter* Isn't Such a Bad Thing After All'. 'Dialogue' revealed that indignant huffing on judicial activism had overlooked a vital point, namely that review simply marks the beginning of a dialogue between the courts and legislatures on how best to reconcile rights and democratic interests.⁴ By reconstituting review as a process in which the courts and legislatures share authority, 'Dialogue' had magnetic appeal, not least because it addressed and claimed to eliminate profound concerns about judicial activism under the *Charter*.

'*Charter* Dialogue' began a movement in constitutional thought which, albeit with less intensity today, intrigues us still, some twenty years later.⁵ Choosing it as the 'favourite' is not an endorsement but a matter of intellectual curiosity about a phenomenon that came, unexpectedly, to dominate discourse.⁶ In reification as in castigation, dialogue has been persistent and resilient; it has been a force in Canada

* Professor, Osgoode Hall Law School, York University. I thank James Allan for inviting me to join this special issue of law review favourites, and acknowledge the valuable research assistance of Mr. John Wilson (JD 2016) and Mr Tanner Stanley (JD 2018).

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982m c.11.

² P Hogg and A Bushell Thornton, 'The *Charter* Dialogue Between Courts and Legislatures – or Perhaps the *Charter* Isn't Such a Bad Thing After All' (1997) 35 *Osgoode Hall Law Journal* 75 ('*Charter* Dialogue' or 'Dialogue'). Also considered were Madame Justice Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507 (sparking a firestorm of controversy); and S Choudhry, 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1 (providing a deep and scholarly approach to comparative Canadian and American constitutionalism).

³ See, eg, below nn 11, 12.

⁴ Hogg and Thornton, above n 2, 105.

⁵ Most recently, see A Kavanaugh, 'The Lure and the Limits of Dialogue' ('The Lure and the Limits') (2015) *University of Toronto Law Journal* 83 and A Young, 'Exporting Dialogue: Critical Reflections on Canada's 'Commonwealth' Model of Human Rights Protections' in R Albert and D Cameron (eds) *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press, forthcoming 2017). Note that in this article, 'Dialogue' refers to the law review article and 'dialogue' to the theoretical concept that emerged in the follow-up scholarship.

⁶ My engagement with '*Charter* Dialogue' has been limited. See J Cameron, 'Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R v Mills*' (2001) 38 *Alberta Law Review* 1051; see also '*Charter* Dialogue: Ten Years Later' (2007) 45 *Osgoode Hall Law Journal* ('Ten Years Later') (special issue on dialogue as editor-in-chief of the *Osgoode Hall Law Journal*).

and the broader discipline of comparative constitutionalism. Explaining that phenomenon – why it attracted and polarized in Canada, but also how the article and its concept of dialogue became a ‘thought leader’ in constitutional law – is what interests me here.⁷

This reflection does not rehearse or choose sides between dialogue’s innumerable advocates, opponents and ambivalents, or catalogue the unwieldy literature on the point. In sketching its legacy, the discussion also steers away from engaging with well-known lines of debate on whether dialogue achieved closure on legitimacy, or has salience as an explanation, concept or theory of review. In exploring the phenomenon, the discussion turns in a more tangential direction to collateral aspects of its legacy: how dialogue became a runaway concept, and what that tells us about how theory and its roots in conflicts about constitutional interpretation. Quite apart from ‘Dialogue’’s merits these points have significance, and if this discussion is unlikely to alter views about dialogue perhaps it can enrich understanding of the concept, and how an article which claimed modest descriptive findings became a constitutional blockbuster.

I CONSTITUTIONAL PHENOMENON

Constitutional theories – and metaphors too – invariably emerge from cathartic events or shifts in the life of a constitution. If the objective of theory is in principle to foster the search for abstract, timeless truth, discourse on what a constitution means and who has the authority to interpret meaning follows the pattern. In addition, constitutional theory is notably grounded in the cycles of crisis and controversy around interpretation and review.⁸ Footnote 4, neutral principles, and democracy and distrust are among the leading examples of theory that was forged in the crucible of transformative change.⁹ With less drama, ‘*Charter Dialogue*’ follows a similar pattern, though with one difference: while the US scholarship counts multiple review theories, ‘Dialogue’ is a singular theory – or phenomenon – in the comparatively recent literature on the *Charter*.

‘Dialogue’’s surprising magnetism, which would attain global proportions in constitutional law, has been attributed to the ‘lure of the metaphor’ and its ‘seductively simple rejoinder’ to the dilemma of review.¹⁰ The phenomenon may owe its fame in part to a concept that was ‘impossible to resist’, but more poignantly ‘Dialogue’ was fundamentally connected to Canada’s catharsis of rights: enactment of the *Charter* in 1982 and the ‘activist’ course of decision-making in the *Charter*’s early years. The article channelled foundational divisions about the wisdom of adopting constitutional

⁷ P Hogg, A Bushell Thornton and W Wright, ‘*Charter Dialogue Revisited – Or “Much Ado About Metaphors”*’ (2007) 45 *Osgoode Hall Law Journal* 1 (‘*Charter Dialogue Revisited*’) in ‘Ten Years Later’ at 54 (addressing complaints about the metaphor and replying that ‘our critics should deal with ... the *phenomenon*, rather than making “too much ado about metaphors”’; emphasis added). I agree that dialogue is aptly described as a phenomenon and have adopted it here.

⁸ B Friedman, ‘The Cycles of Constitutional Theory’ (2004) 67 *Law and Contemporary Problems* 149 (claiming that constitutional theory necessarily reacts to critical events in constitutional interpretation).

⁹ Footnote 4 followed the court-packing crisis of 1937; see *U.S. v Carolene Products Ltd.* (1938); neutral principles followed *Brown v Board of Education*, the Court’s 1954 desegregation decision; see H Wechsler, ‘Toward Neutral Principles of Constitutional Law’ (1959-60) 73 *Harvard Law Review* 1; and John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) emerged from the 1973 abortion decision in *Roe v Wade*.

¹⁰ A Kavanaugh, above n 5, 84.

rights, and re-directed primal beliefs on that threshold question to a concept of dialogue aimed at confirming that the *Charter* was not, and is not, a threat to Canadian democracy.

'*Charter Dialogue*' appeared at a time of ongoing hectoring about Supreme Court decision-making and support for the override as a check on judicial activism.¹¹ The stakes were not quite as high as they had been in 1982, but almost. Opponents of the *Charter* who maintained that constitutional rights would fundamentally alter Canadian democracy for the worse had not changed their minds. If anything, the jurisprudence in the early years confirmed and even exacerbated some of their worst fears about the *Charter*'s impact on legal and political culture. Over-wrought rhetoric about the rise of the judiciary and the loss of democratic function was commonplace.¹² To some, the *Charter* was quite simply a juggernaut.

'*Charter Dialogue*' drew on two strategies to defend the *Charter* from damaging charges of judicial activism. In the first instance, the authors appealed to patriotic instinct in a masterful way. The authors understood that to be persuasive 'Dialogue' had to create distance between *Charter* review and the much-maligned US culture of judicial activism. To place that in perspective, it is a longstanding article of faith in Canadian culture that 'we the north' are different.¹³ That belief trades on a strain of anti-Americanism which forms part of the bedrock in Canadian constitutionalism, and dates from Confederation. In 1867, Canada distinguished its model of federalism from what was seen as the flawed US example, which had caused a civil war, and claimed a distinctive aptitude for compromise in doing so.¹⁴ In an echo from that past, Canada needed to make its form of rights protection different from that in the US Bill of Rights, on which the *Charter* was unarguably modelled.

Against a backdrop of concerns about the *Charter*'s Americanizing impact, it is no coincidence that '*Charter Dialogue*' opened with a précis of judicial review in the US, one which pointed to the intransigence of an anti-majoritarian objection that could neither be resolved nor ignored.¹⁵ Readers were quickly told that fatal objections to the legitimacy of review in the US had been averted in Canada, where 'Dialogue's data showed that legislatures could respond to judicial decisions and thereby engage in a

¹¹ Critiques of the *Charter* and the Supreme Court of Canada were constant and insistent, both before and after '*Charter Dialogue*'; among abundant examples, see F L Morton and Rainer Knopff, *The Charter Revolution & The Court Party* (Broadview Press, 2000) (stating, at 13, that the 1980s and 1990s will be remembered as the period of Canada's '*Charter Revolution*', when a long tradition of parliamentary supremacy was 'replaced by a regime of constitutional supremacy verging on judicial supremacy'); see also K Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law Inc., 2001) (quoting the remarks of Vic Toews in 2001, at 3, that the Supreme Court of Canada has 'engaged in a frenzy of constitutional experimentation that resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives of the people').

¹² See Morton and Knopff, above n 11, 58 (stating that '[j]udicial intervention in the policymaking process is no longer *ad hoc* and sporadic ... it has become systematic and continuous'); see also Roach, above n 11, 69-96 (chronicling the activism debate in Canada under the *Charter*).

¹³ This is a Canadian sports team motto, used here with a cringe because the appeal to Canadian identity is on point and unwittingly plays off the 'we the people' preamble to the US Constitution.

¹⁴ See J Cameron, 'The *Charter*'s Legislative Override: Feat or Figment of the Constitutional Imagination' in I Brodie and G Huscroft (eds) *Constitutionalism in the Charter Era* (LexisNexis Canada, 2004) 135, 137 (explaining how the Fathers of Confederation believed that the Constitution achieved a compromise that avoided the flaws of the US Constitution).

¹⁵ Hogg and Thornton, above n 2, 78 (stating that the academic commentary advanced 'ingenious theories to justify judicial review, and each new theory provoked a further round of criticism and new theories until the literature reached avalanche proportions').

form of dialogue between institutions.¹⁶ In a compelling but unassuming way, the article's evidence of statutory sequels demonstrated that the legislatures could and usually did respond to constitutional decisions.

Styled that way, 'Dialogue' hardly threatened to upset conceptions of review in Canada, much less approach the lofty precincts of review theory and comparative constitutionalism.¹⁷ Ironically, though, given the emergence of weak- and strong-form review, 'Dialogue' itself had weak and strong versions. The weak version, favoured by the authors, was that 'Dialogue' was descriptive rather than prescriptive.¹⁸ The attempt to minimize it that way could not obscure the article's ambitious and unconditional claims about review. The pronouncement that the democratic critique of judicial power could not be sustained under a concept of dialogue marked 'Dialogue's' critical juncture, because it amounted to an assertion that *Charter* review was presumptively and pre-emptively legitimate.¹⁹ That pronouncement is 'Dialogue's' 'strong' version, and it rested on a conceit that the authors had overcome previously unresolvable doubts about the legitimacy of review. Coupled with its sharp critique of American constitutionalism, the article read as a boast that Canada had created a superior model of rights protection.

Courtesy of 'Dialogue', Canada could indulge a measure of smugness in knowing that the *Charter* had brought the legitimacy debate to an end. *Charter* review was on course because dialogue between institutions replaced the characteristic battle lines that define relations between US courts and legislatures.²⁰ In substance as well as in tone, 'Dialogue' was an understated but unmistakable exercise in constitutional self-congratulation.

Having boldly sidelined the US debate on review, the authors proceeded to their second strategy of disarming the central objection to the *Charter* – the emasculation of the legislatures – by showing that the legislatures are directly involved in questions of rights protection. On first impression, courts and legislatures look like equal winners under 'Dialogue', because each is in principle liberated from the other in exercising its respective function. As long as legislatures can respond to their decisions, judges in principle can be intrepid in enforcing constitutional rights, because the availability of legislative correctives will eliminate perennial, pervasive concerns about the exercise of power by an unelected judiciary.²¹ This aspect of Dialogue proved a boon to

¹⁶ Hogg, Thornton, and Wright, above n 7, 26 (stating that 'Dialogue's' essential point was that '*Charter* decisions usually leave room for a legislative response, and usually receive a legislative response').

¹⁷ See A Petter, 'Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue is Not Such a Good Thing After All)' in 'Ten Years Later' above n 6, 166 (commenting on the 'banality' of the 'unremarkable insight' that legislatures have the capacity to re-enact legislation after *Charter* decisions).

¹⁸ Hogg, Thornton, and Wright, above n 7, 26 (stating that '*Charter* Dialogue's' notion of dialogue was descriptive rather than normative).

¹⁹ Hogg and Thornton, above n 2, 105. See P Hogg and A Thornton, 'Reply to "Six Degrees of Dialogue"' (1999) 37 *Osgoode Hall Law Journal* 529 (describing dialogue as a 'helpful' concept and adding, at 534, that '[w]e probably should not have said' that the democratic critique of review cannot be sustained); see also *ibid* 4 (admitting that '[w]e perhaps went too far in suggesting that our study was "an answer" to the anti-majoritarian objection to judicial review').

²⁰ Kent Roach has been the keenest advocate of this view (claiming, in a book on the point, above n 11, 7, that the *Charter* broke new ground and that Canadians can lose sight of its genius by engaging in a debate on judicial activism that 'remains mired in the deep tracks and dead ends of the American debate').

²¹ In other words, the answer to 'objectionable' judicial activism is legislative activism. *Ibid* (stating that all governments need to do is take responsibility for enacting legislation that justifiably limits or overrides rights).

Charter advocates, as well as to the Supreme Court itself.²² Yet the authors' more essential point was that review does not diminish parliamentary tradition after all, because the process of dialogue gives legislatures the institutional room to advance and protect democratic preferences. In making that argument, Dialogue focused on s 1 and a data set which disclosed that legislatures were 'almost always' able to retool measures which – according to the courts – had miscalculated the balance between rights and democratic limits.²³ As the authors explained, their evidence made it 'hard to claim that an unelected court is thwarting the wishes of the people'.²⁴

On the surface, the article appealed to an idealized conception of institutional relations in which courts and legislatures shared power amicably under the *Charter*. At the time, the judiciary did not require much encouragement to enforce the *Charter*, and review got a boost because 'Dialogue' placed the onus on legislatures to claim and exercise their authority. In this, the article meant to convey the welcome news to those with concerns about judicial power that the legislature could and had been doing just that. In strategic terms, validating the legislature's powers and opportunities to influence and even determine questions of rights protection was Dialogue's central takeaway. Legitimizing that role was designed to deflect the arguments of the *Charter*'s critics for, as the authors later noted, '[t]hose who would prefer Canada to revert to a simple parliamentary democracy can take some comfort' in the concept of dialogue.²⁵

In a context of, at times, profound controversy about the *Charter*, Dialogue's claims were too powerful to be taken at face value. At first, commentators focused on the details of the article's data set and methodology.²⁶ In addition, the idea of 'dialogue' was sceptically received by those who questioned whether legislatures are the equals of courts, and have sufficient legitimacy to participate in meaningful institutional dialogue on constitutionally protected entitlements.²⁷ Moreover, not only was it 'self-serving' to describe the relationship between institutions as a dialogue, the concept 'soft-peddle[d] the impact of judicial power on the democratic political processes'.²⁸

Before long, debate would move from analysis of 'Dialogue's' descriptive findings, or weak claim, to its strong views about the legitimacy of review. There, the article's overstatement could not be easily defended and, as early as 1999, the authors retreated from the assertion that the democratic critique of review could not be sustained.²⁹ Their follow-up strategy was an alternative position that *Charter* review

²² The Supreme Court explicitly invoked dialogue a number of times in this period. See, eg *Vriend v Alberta*, [1998] 1 S.C.R. 493 (Iacobucci J.).

²³ Hogg and Thornton, above n 2, 105.

²⁴ *Ibid* 87.

²⁵ Hogg, Thornton, and Wright above n 7, 29.

²⁶ See, eg, C Manfredi and J Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 *Osgoode Hall Law Journal* 513 ('Six Degrees') (addressing the empirical methodology and data).

²⁷ *Ibid* 525 (stating, after questioning whether the relationship is equal or hierarchical, that '[t]he ability to manufacture and sustain a relationship between equals is critical to a genuine *Charter* dialogue').

²⁸ F L Morton, 'Dialogue or Monologue?' (April 1999) *Policy Options* 23; G Huscroft, 'Constitutionalism from the Top Down' in 'Ten Years After' above n 6, 103.

²⁹ P Hogg and A Thornton, 'Reply to "Six Degrees of Dialogue"', above n 19 (describing dialogue as a 'helpful' concept and adding, at 534, that '[w]e probably should not have said' that the democratic critique of review cannot be sustained); see also Hogg, Thornton, and Wright, above n 7, 4 (admitting that '[w]e perhaps went too far in suggesting that our study was "an answer" to the anti-majoritarian objection to judicial review').

was at least weaker than judicial review in the US.³⁰ Legitimacy concerns might not be eliminated but are less pronounced because of dialogue, and the authors – especially Hogg – continued to demonize American review. Due to dialogue, they claimed, the unsavoury court-packing and court-bashing of the US does not occur in Canada, because ‘[o]ur Court’s decisions do not matter as much’.³¹

Significantly, ‘Dialogue’ was primarily concerned with s 1’s flexibility and how it enabled legislatures to respond; the override played little or no role in the initial conception of dialogue, having been dismissed by the authors as ‘relatively unimportant’.³² But s 1 could not take ‘Dialogue’'s lightning-rod claim about the presumptive legitimacy of review the distance, because democracy only has the last word when s 33 is engaged. Predictably, dialogue began to evolve in a different direction when the override emerged as ‘the big difference’ between review in Canada and the US.³³ That shifted attention from whether legislatures have qualitative opportunities to respond to decisions, to a focus on this provision and whether it made the *Charter* fundamentally different by granting legislatures the power of the ‘last word’. That, of course, was the putative function of the override when it was adopted in 1982.

Prior to 1982, fears that constitutional rights would Americanize Canada’s legal and political culture were widespread and powerful enough to defeat the *Charter*. In testy negotiations to resolve the standoff between rights-based and parliamentary supremacies, the override was ultimately what set Canada apart and saved the *Charter*. Section 33 was unquestionably a pawn in constitutional negotiations, but was also theorized at the time as a form of partnership or dialogue between institutions, and an antidote to predictions about the inevitability of importing US-style judicial activism. Paul Weiler provided the early leadership on this issue, maintaining that Canada had created a ‘distinctive constitutional partnership’ that offered an ‘intrinsically sound solution to the dilemma of rights and courts’.³⁴ Specifically, he claimed that by adopting ‘a special form of dialogue between judge and legislator’, Canada would avoid the perils of a ‘full-blown judicial supremacy’.³⁵ Meantime, Peter Russell

³⁰ Ibid 29 (stating that ‘*Charter* Dialogue’ did not demonstrate that judicial review was good, but that judicial review under the *Charter* is weaker than generally supposed); Hogg, Thornton and Wright, above n 6, 201 (stating that ‘[w]hether judicial review in Canada is weak or strong is a matter on which wordsmiths may argue, but our conclusion is that judicial review in Canada is weaker than it is in the United States’).

³¹ Hogg, Thornton and Wright, above n 6, 202; P Hogg, ‘Constitutional Dialogue Under a Bill of Rights’ (2007) 23 *National Journal of Constitutional Law* 127, 136 (‘Constitutional Dialogue’) (stating that the Court’s decisions in Canada do not matter as much because that is the effect of dialogue).

³² Section 1 is the ‘reasonable limits’ provision, which allows legislatures to justify infringements of the *Charter*’s rights and freedoms; ‘Dialogue’ maintained that s 1’s flexibility both enabled and promoted legislative responses to decisions. Section 33 allows the legislatures to opt out and protect legislation from the *Charter* for a period of up to five years; that it is why it is called the ‘override’ or ‘notwithstanding’ clause. Notably, certain guarantees are not subject to the s 33 override: democratic rights (s 3); mobility rights (s 6); and language rights (ss 16-23). See above n 1.

³³ Hogg, Thornton, and Wright, above n 6, 200 (pointing again to s 1’s flexibility in enabling legislative sequels and then stating that s 33 is ‘the big difference’ which changes the balance of power between the judicial and legislative branches); Hogg, ‘Constitutional Dialogue’, above n 31, 134 (stating also that the existence of an override in the US would have ‘changed everything’).

³⁴ ‘Rights and Judges in a Democracy: A New Canadian Vision’ (1984) 18 *University of Michigan Journal of Law Reform* 51, 86, 80.

³⁵ P Weiler, ‘The Evolution of the Charter: A View From the Outside’ in Weiler and Elliot (eds) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 56.

acknowledged that while Canada 'still teetered uncertainly between British and American models of government', s 33 allowed for 'shared responsibility' through a 'prudent system of checks and balances that recognizes the fallibility of both courts and legislatures and gives closure to neither'.³⁶ Moreover, even before 'Charter Dialogue' was written, Peter Hogg had praised the override as a remarkable innovation that rendered judicial review 'suspensory'; he promised that 'as long as the last word remains with the competent legislative body', there could be 'no acute or longstanding conflict between the judicial and legislative branches'.³⁷ Revisiting this literature provides a stark reminder of Canada's profound obsession with rights constitutionalism in this period.

Section 33 was a polarizing concept and a way out: Canada would have constitutional rights, but there would be an asterisk. From one perspective, the override was presented as a passive safeguard that would not be used to diminish rights, and if at all would only be invoked in exceptional circumstances.³⁸ From another perspective, the override was conceived of as a device that would be pressed into service, when needed, to preserve the democratic prerogative.³⁹ In 1982, it was unknown how the override might affect the *Charter's* evolution. To the extent legislatures became comfortable with it, s 33 might tip the balance away from courts and back toward the tradition of parliamentary supremacy. But if the override lacked political legitimacy and could only be used sparingly, that would redound to the benefit of judicial power. It was understood that the override was a pivot and that movement in either direction could set the *Charter* on a course that might be difficult to reverse. With relative institutional power in the balance, the enforcement of rights gained in the early years while the override's prospects – although volubly discussed – seemed to dim. In this way the override served to temper but not vanquish an opposition to rights which continued to flare with regularity in the *Charter's* early years.⁴⁰

The parallels between the theory of the override and dialogue's claim – that the final decision under the *Charter* is democratic – is no accident.⁴¹ Yet as noted, 'Dialogue's' strong claim about the legitimacy of review did not depend so much on s 1 or the data set of sequels but on the override, and whether s 33 set the *Charter* apart from the villainized US example.⁴² Not surprisingly, the override's status as a

³⁶ P Russell, 'The Effect of a Charter of Rights on the Policymaking Role of the Canadian Courts' (1982) 25 *Canadian Public Administration* 1, 32; P Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293 ('Notwithstanding'), 301, 303.

³⁷ P Hogg, *Constitutional Law of Canada* (4th ed, 1997), 916-7.

³⁸ Repeatedly, at the time of adoption and for years afterward, the override was described as a stroke of genius, remarkable invention, and 'honourable compromise' that meets a 'real democratic need in an age of constitutional charters and judicial activism'. That said, it was seen as a 'wonderful safety valve – as long as it is rarely used'. 'Reconciling Rights and Democracy' *Globe and Mail Editorial* (4 February 1999); 'A Clause That Refreshes' *Globe and Mail Editorial* (18 September 2003).

³⁹ Among countless examples of this view see, for instance, A Petter, 'Canada's shield against despotic courts' *The Toronto Star* (25 July 1989); A Hutchinson and A Petter, 'Going Into Override' in A Hutchinson (ed) *Dwelling on the Threshold* (1988) 233 (defending the override as a central pillar and encouraging legislatures to rely on it without apology); Russell, 'Notwithstanding', above n 36, 298, 303 (endorsing the override's merits, when properly used, as a way of countering the *Charter's* flight from democratic politics).

⁴⁰ See, eg, R Fulford, 'Charter of Wrongs' (December 1986) *Saturday Night*, 7 (stating that the *Charter* is 'absolutely and intrinsically American' and imports the principle that 'judges know better than politicians what is good for everyone').

⁴¹ Hogg and Bushell Thornton claimed in 'Charter Dialogue' that although the *Charter* placed constraints on the democratic process, 'the final decision is the democratic one'. Above n 2, 80.

⁴² Kent Roach was a strong proponent of the view that s 1 is the 'real engine' of dialogue. Above n 11, 293.

transformative design feature that weakened or even eliminated legitimacy concerns depended on one's point of view. For some, its formal existence necessarily weakened *Charter* review, because the legislatures could invoke the override at their option.⁴³ Others argued that the *Charter* would only be a system of weak-form review if the override, beyond existential presence in the text, actively checked the exercise of judicial power.⁴⁴ *Charter* advocates maintained that the *de jure* availability of the override was sufficient – and conclusive of dialogue's claims – regardless whether it was *de facto* available to legislatures. Yet in fact, if not in principle, the override was a 'paper tiger', functionally incapable of setting up a counterpoint to the judiciary's powers under the *Charter*.⁴⁵

'Dialogue's heyday in Canada extended from 1997, the year of publication, to about 2007, when the *Osgoode Hall Law Journal* published a ten-year anniversary issue.⁴⁶ The article marked a eureka moment in Canadian constitutionalism on arrival, because the authors made a daring and fairly convincing argument that it was not necessary to fear or oppose the judiciary's enforcement of *Charter* rights. As noted earlier, it is and remains the first conception of *Charter* review to engage serious and sustained interest. In doing so, 'Dialogue' focussed the wrought emotions of the *Charter's* founding generation on the pivotal question of whether Canada's system of constitutional rights truly were different. The article revealed profound divisions about the *Charter* that were present from the outset, and manoeuvred them into a framework for debate based on the user-friendly concept of dialogue and its legitimacy-conferring properties.

It seems safe to say that 'Dialogue's descriptive account of legislative sequels would not have attracted wider interest or acclaim, without more. The rather astonishing claim that dialogue had eliminated legitimacy concerns invited theorists in and outside Canada to consider the plausibility of an institutional compromise between legislative and judicial supremacies.⁴⁷ The central question was whether the override achieved a successful remit of legislative authority. As the discussion proceeded, the coining of terminology to differentiate strong- and weak-form review set Canada up as an example and pioneer of an alternative model of rights protection. Though it still bore too close a resemblance to US rights constitutionalism, Commonwealth jurisdictions looked to the *Charter*, attracted by the prospect of protecting rights without undue sacrifice to parliamentary tradition.⁴⁸

⁴³ Hogg, 'Constitutional Dialogue', above n 31, 135 (stating that 'there is no reason to suppose that the current political reluctance to use s 33 is a permanent feature of the Canadian legal system' and that s 33 was included 'for the very purpose of preserving parliamentary sovereignty on rights issues').

⁴⁴ A Petter, 'Taking Dialogue Theory Much Too Seriously', above n 17, 160 (stating that although legislatures have *de jure* power under s 33, their inability to use that power results in courts having *de facto* the final say).

⁴⁵ See, eg, H Leeson, 'Section 33, the Notwithstanding Clause: A Paper Tiger?' in Russell and Howe, (eds), 'Choices: Courts and Legislatures' (vol. 6, No. 2, 2000) 1.

⁴⁶ 'Ten Years After' above n 6.

⁴⁷ As promoted in Canada, 'nothing in our constitution is so distinctively Canadian as this manner of reconciling the British tradition of responsible democratic government with the American tradition of judicially enforced constitutional rights'; P Russell and P Weiler, 'Don't scrap override clause – it's a very Canadian solution', *The Toronto Star* (4 June 1989).

⁴⁸ See generally S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 49 and S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013 (original article and book by the leading discussant of this idea)).

In due course it was almost beside the point whether Canada had successfully established weak or even weaker-form review.⁴⁹ Regardless of how the override worked in practice, it opened constitutional vistas and made other forms of weak-form review possible. It is surprising that this insight came as such a revelation: that it was possible to re-conceptualize review, to sidestep the monolith of strong-form US-style review, and to customize review by plotting arrangements along a sliding scale which re-mixed institutional powers in different ways. Systems that aimed to preserve a greater role for parliamentary supremacy could breathe more easily by placing themselves at a distance from the US and even Canada, toward the weak end of the review spectrum.

Without question, 'Dialogue' radically exceeded expectations, including its own. How that happened is not only a matter of marvel, but also a source of insight on Canada's experience of constitutional rights and on the enterprise of comparative constitutionalism *writ large*. Almost immediately, the concept of dialogue became the 'dominant paradigm' in Canada and went on to achieve 'reified' status in the wider constitutional literature.⁵⁰ The article's modest set of data and initial dismissal of the override nonetheless set off a complex and sophisticated cottage-industry scholarship; in this way, 'dialogue' would serve as a proxy for alternative models which attenuate review powers to retain elements of parliamentary supremacy.

Dialogue was not a runaway concept because the metaphor or rejoinder to review was particularly compelling.⁵¹ Moreover, as the authors acknowledge, it was not even original in the constitutional vocabulary.⁵² It is well imaginable that the concept could have incubated in another system of constitutional law, in a different time and place. It is curious and instructive that the concept of dialogue emerged in Canada instead.

A transformative moment can occur when there is a point of constitutional ignition which fires the connection between an idea or concept and the prevailing constitutional angsts. 'Charter Dialogue' and 'dialogue' were constitutional phenomena for reasons which, in retrospect, are both obvious and fortuitous. Under the guise of modest observations resting on a limited data set, 'Dialogue' delivered a double knockout punch to the *Charter's* foes. It appealed to constitutional patriotism, claiming that the dreaded US review saga was over in Canada, and introduced an attractive metaphor to prove that the parliamentary tradition, while altered, was safe under the *Charter*. Against the intense conflict that described the *Charter's* origins, and the ongoing commiseration about how Canada had succumbed to judicial activism, it might have been more surprising if reaction to 'Dialogue' had not been so strong and reflexive.⁵³ Much in the way of US theories and their goal of making sense of shifts in

⁴⁹ Most are sceptical that the *Charter* represents weak-form review. See, M Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813 (questioning whether weak-form review is robust or will necessarily degenerate either into strong-form review or parliamentary supremacy); Huscroft, 'Constitutionalism From the Top Down', above n 28, and C Mathen, 'Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on 'Charter Dialogue Revisited' in 'Ten Years After' above n 7 (both concluding that the *Charter* is not a system of weak-form review).

⁵⁰ C Manfredi and J Kelly, 'Six Degrees', above n 26, 524; A Kavanaugh, 'The Lure and the Limits', above n 5, 84.

⁵¹ Kavanaugh, above n 5.

⁵² 'Charter Dialogue' acknowledges as much; Hogg and Thornton, above n 2, n 12. See generally, Brian Slattery, 'A Theory of the *Charter*' (1987) 25 *Osgoode Hall Law Journal* 701 (proposing a 'Co-ordinate Model' of continuing dialogue between the courts and the legislatures); Barry Friedman, 'Dialogue and Judicial Review' (1993) 92 *Michigan Law Review* 577.

⁵³ Dialogue's credibility owes much to the reputation of its lead author, Peter Hogg, who was and remains Canada's foremost constitutional scholar.

the scope and substance of review, ‘Dialogue’ finds its roots and *raison d’être* in the deep controversy surrounding the *Charter* rights and the early activism of review.

Nor was it predictable that ‘Dialogue’ would travel so widely in scholarly circles outside Canada. There, as well, the article’s unexpected celebrity can be traced to two elements: the claim that the legitimacy riddle had been solved, which challenged the then current orthodoxy; and the creation of a textual mechanism which – and albeit in disuse – appeared to move the institutional goalposts back toward democratic authority. The override’s genius, as so many Canadian scholars have described it, was to make an argument for weak-form review possible and cultivate the movement toward alternative conceptions of rights protection.

In all this, ‘*Charter* Dialogue’ served the purposes of Canadian constitutional patriotism rather well.⁵⁴ How it served theory’s purposes may be another matter.

II THEORY AND METAPHOR

There is much constitutional theory in the literature, and much theory about constitutional theory. Over the years the theory of constitutional theory has fretted in the main about the academic integrity of the enterprise. Specifically, the dilemma has been one of ‘struggling for theoretical consistency’ and seeking ‘transcendent perspectives’ which may be impossible, because ‘the grist for the constitutional scholarship mill’ is simply and unavoidably ‘too political to sustain enduring theory’.⁵⁵ In the face of a legitimacy debate that was pronounced ‘essentially incoherent and irresolvable’ some years ago,⁵⁶ noted scholars have opted out and declared themselves to be against theory and in favour of non-theoretical approaches.⁵⁷ Under a view that recognizes the renunciation of theory as theory, the standard for determining what is and is not theory has become minimal.⁵⁸ The slide to relativism may be unavoidable in a discourse that has had to accept that, despite best efforts, there might not be ‘one best constitutional theory for all time’.⁵⁹

Thus far, there is little of grand theory in Canadian constitutional scholarship. Though the source of that diffidence is unclear, exploring it further is beyond the scope of this exercise. At the least it is instructive here that the authors of ‘Dialogue’ were careful to issue a disclaimer that its central concept was not a theory, and commentators were quick to agree that dialogue should not be mistaken for theory.⁶⁰ Despite generating a theoretical scholarship, the *Charter* – as yet and apart from what

⁵⁴ See D Law and M Versteeg, ‘The Declining Influence of the United States Constitution’ (2012) *New York University Law Review*, 87:3, 762-858, 801-23 (asking, ‘Is Canada a Constitutional Superpower’ and discussing Canada’s status as a ‘constitutional trendsetter’ among common law or Commonwealth countries).

⁵⁵ Friedman, ‘The Cycles of Constitutional Theory’, above n 8, 150.

⁵⁶ P Brest, ‘The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship’ (1981) 90 *Yale Law Journal* 1063 (also concluding, at 1065, that ‘no defensible criteria’ exist to assess theories of judicial review).

⁵⁷ Best known among them is R Posner, ‘Against Constitutional Theory’ (1998) 73 *New York University Law Review* 1.

⁵⁸ In addition to Friedman and Posner, see generally R Fallon Jr., ‘How to Choose a Constitutional Theory’ (1999) 87 *California Law Review* 535; M. Dorf, ‘Create Your Own Constitutional Theory’ (1999) 87 *California Law Review* 593; and D Strauss, ‘What is Constitutional Theory?’ (1999) 87 *California Law Review* 581 (1999)

⁵⁹ Fallon, *ibid* 569.

⁶⁰ Hogg, Thornton, and Wright, ‘*Charter* Dialogue Revisited’, above n 7, 27-8 (agreeing that dialogue is not a justification or theory of review); Petter, ‘Much Too Seriously’ above n 17, 166 (stating that dialogue does not ‘tell us much of anything about the legitimacy of review’).

dialogue offers – has not developed other theories of review that have had substantial take-up in rights discourse.

There is also the matter of the metaphor, which gave the authors' underlying argument a magnetic image and substantially helped in establishing the concept of metaphor as a constitutional phenomenon. Perhaps for that reason, the metaphor provoked significant backlash, mainly on grounds that it was substantively meaningless and distorts the judiciary's influence on the policy-making process of democratic decision-making.⁶¹ Even so, the first amendment's pyrotechnics and Canada's living tree doctrine attest that metaphors are not unknown to constitutional discourse and are a familiar part of the vocabulary.⁶² It is recognized, as well, that a metaphor can be 'suggestive', 'evocative', and 'evaluatively loaded', and can provide a 'useful shortcut to understanding complex phenomena'.⁶³

In dialogue's case, divergent points of view start from different points of departure. A framing question is whether the concept of dialogue should be taken, in more or less literal terms, to mean no more than the existence of any kind of exchange. The other view is that the concept must incorporate a qualitative element, such as the relative equality of the parties, to count as a true dialogue between institutions.⁶⁴ That said, it is unclear why some metaphors fare better than others and is not self evident, for instance, why the 'living tree' – which seems equally open to wildly varying interpretations – might provide a better shortcut to complex phenomena.⁶⁵ This kind of selectivity sounds in much the same register as debate about theory, and may represent a similar predisposition for or against the underlying prescriptive idea at stake.⁶⁶

At this point helpful advice can be taken: '[f]orget for the moment what side you are on, assuming you are sure of that', and '[j]ust sit back and think about what all this means for constitutional scholarship and theory'.⁶⁷ A few simple propositions are reasonably well-founded. One is that no theory has resolved the legitimacy debate, and that includes 'Dialogue' as well as the collective efforts of generations of US review theorists. Second, there is little consensus on what constitutes theory, much less on

⁶¹ See Petter, 'Much Too Seriously', above n 17; Kavanaugh, 'The Lure and the Limits', above n 5.

⁶² See, eg, R Tsai, 'Fire, Metaphor and Constitutional Myth-Making' (2004) 93 *Georgetown Law Journal* 183 (exploring the role of metaphor in the free speech context). On the living tree, see generally V Jackson, 'Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors' 75 *Fordham Law Review* (2006) 921, 941-60 (thoughtfully discussing the living tree's possibilities and drawbacks); W Waluchow, 'Constitutions as Living Trees: An Idiot Defends' (2005) 18 *Canadian Journal of Law and Jurisprudence* 207 (defending a living-tree conception of the *Charter* informed by a common law model and partnership with other government bodies); A Kavanaugh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence* 55 (providing a 'sensible account' of the living tree, and making the metaphor 'more intelligible').

⁶³ Kavanaugh, 'The Lure and the Limits', above n 5, 88, 89.

⁶⁴ Hogg, Thornton, and Wright, 'Charter Dialogue Revisited', above n 7, 7 (stating that 'we are not interested in debating the critics' on whether dialogue is the proper word to use) and 26 (repeating that anyone could disagree with the choice and since no one has suggested a better word there is no reason to agonize over the original choice).

⁶⁵ See Kavanaugh, 'The Lure and the Limits', above n 5, 88. Kavanaugh states that while the living tree is sometimes invoked to describe the nature of interpretation, it is more often used to endorse creative decision-making and to provide an 'attractive underpinning' to a normative argument about how judges should engage in constitutional interpretation. Without fully elaborating the comparison, dialogue's distorting properties, discussed in full, are the metaphor's death-knell for Kavanaugh.

⁶⁶ Posner, 'Against Constitutional Theory', above n 57, 3 (claiming that constitutional theory only works for those who are predisposed to agree with its prescriptions).

⁶⁷ Friedman, above n 8, 164.

what criteria should be used to separate good and bad theory. Third, these impasses support an approach that is more relative, outcome-neutral, and modest in aspiration. Specifically, and as suggested above, a good question is simply to ask what any theory has done to animate, provoke, or generate a scholarly discourse that deepens understanding of constitutional interpretation, judicial review, and institutional relations.

From that perspective, it is not necessary to make extravagant claims about Dialogue or raise the threshold for determining what is theory. It can be agreed that the concept failed to deliver an authoritative account of institutional relations in self-styled weak-form systems of review, and did not resolve age-old issues about the legitimacy of review. A deeper analysis might also reveal that it falls short on other measures, and whether or how much it distorts is a matter for scholarly disagreement. Despite those limits, ‘Dialogue’ hotwired an idea that attracted sustained scholarly treatment, in Canada, the US and the Commonwealth. Timely and important, it animated, provoked and generated an impressive scholarship of engagement with its landmark metaphor. In that it has served theory’s purposes rather well.⁶⁸

III DIALOGUE’S LEGACY

Today, dialogue is for the most part a muted concept in Canada. Despite the Supreme Court’s far-reaching *Charter* decisions in recent years and an at times stormy relationship with the last federal government, the anti-review rhetoric of Dialogue’s heyday is largely absent in current Canadian discourse. For reasons that are unclear and are in any case beyond the scope of this reflection, the legitimacy issue is in partial remission at present.⁶⁹

Though it would be unwise to attribute too much to dialogue, it is possible that the concept has helped to stabilize the *Charter* and smooth its passage in recent years. Though perceived by its detractors as a rationalization of judicial activism, the concept of dialogue is bi-directional and the last word belongs to legislatures, even if dormant, at their option. As well, it is difficult to know how much the Court was bruised by the brouhaha on activism in the late 1990s. Since then, the Court and current Chief Justice have been careful to manage institutional relations in a way that – at least in their perception – fulfills the *Charter* mandate without unnecessarily irritating democratically elected bodies.⁷⁰ Even if not in balance, each side in this

⁶⁸ As Tushnet quipped, ‘[p]erhaps weak-form systems of judicial review provide more in the way of academic interest than they contribute to solving practical problems of governance’, in which case, he added, ‘[a]n academic will not take that as a criticism of weak-form judicial review’. ‘New Forms of Judicial Review’, above n 49, 838.

⁶⁹ A political culture that has become ‘increasingly hostile’ to the idea that ‘political disagreements with judicial interpretations of the *Charter* represent appropriate constitutional options’ is one possibility. J Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *Modern Law Review* 7, 27 (also stating that Canadians are ‘remarkably insensitive’ about alternatives to American-style review, and that Canada’s response to the *Charter* has been ‘largely shaped by prevailing assumptions’ at the time of its creation, which accepted ‘the logic of judicial supremacy’).

⁷⁰ For instance, the Chief Justice has stated that ‘[t]he courts have to be respectful of Parliament’s role and the executive’s role’, and added that ‘I think you can see this in our decisions’. She continued, commenting that ‘[w]e’re often giving a measure of deference to ministerial decisions’ and we often say ‘and it’s not just lip service – that Parliament has a right to make these and other choices’. In her view, the respect should flow in both directions: ‘I think the people in government have to treat the courts with respect, otherwise we will undermine our system and it won’t work very well’. Quoted in J Brean, “‘Conscious Objectivity’: That’s how

dialogue shadows the other: just as the override stands in the paramount shadow of review, the power of review stands in the ever-present shadow of the legislature's last word.

The recent interplay between the Supreme Court of Canada and Parliament on assisted dying is reminiscent of episodes in the history of dialogue from the late 1990s and early 2000s.⁷¹ In its 2015 decision invalidating the *Criminal Code*'s prohibition on assisted dying, the Supreme Court granted Parliament a grace period of one year, and then an extension, for responding with new legislation.⁷² Bill C-14, which was enacted in June 2016 appears, on its face, more restrictive of the *Charter* right to choose death than the Court's decision indicated. Armchair constitutionalists were quick to pronounce Bill C-14 unconstitutional because it did not adopt the Court's language; the claim, in other words, was that Parliament was under constitutional orders from the Court.⁷³ Others regarded this as an instance of dialogue, in which the legislature's prerogative to respond differently, with a regime that shines its own best lights on the issue, should be respected.⁷⁴ Whether Parliament has the last word will be up to the Court, and in that process the dialogue between institutions will remain under debate. At least in cultural terms, an organic process, in which an unformed concept of dialogue invisibly shapes perceptions and expectations about institutional relations is largely accepted.

What led me to choose this law review article as my favourite was its discussion of dialogue and how it came to represent a new and important cycle in Canadian constitutional thought. The genesis and movement of perceptions about rights and review, from 1982 to 1997 when 'Dialogue' appeared, are formative in the *Charter*'s history and a foundational part of Canadian constitutionalism. 'Dialogue' might not be Canada's 'best constitutional theory for all time', but it set a baseline for cycles of constitutional theory under the *Charter* and had a critical impact on review theory and comparative constitutionalism. The discourse on review is quiet at present but that will change, and dialogue will be followed by the next cycle of *Charter* theory.

the chief justice defines the top court's role. Harper might beg to differ', *National Post* (23 May 2015).

⁷¹ See C Manfredi, 'The Day Dialogue Died: A Comment on *Sauvé v Canada*' in 'Ten Years Later', above n 6.

⁷² *Carter v Canada (Attorney General)*, [2-15] 1 S.C.R. 331; *Carter v Canada*, 2016 SCC 4 (granting Parliament an extension on the suspended declaration of invalidity).

⁷³ Bill C-14, *An Act to Amend the Criminal Code and Make Related Amendments to Other Acts (medical assistance in dying)* 1st Sess, 42nd Parl, 2016 (assented to 16 June 2016).

⁷⁴ J Simpson, 'How Not to Make a Law', *Globe & Mail* (2 June 2016, online), A13: <<http://www.theglobeandmail.com/news/politics/globe-politics-insider/jeffrey-simpson-medically-assisted-dying-how-not-to-make-a-law/article30239186/>>; S Grammond, 'Parliament isn't bound to "cut and paste" court rulings into law', *Globe & Mail*, (30 June 2016): <<http://www.theglobeandmail.com/opinion/parliament-isnt-bound-to-copy-and-paste-rulings-into-law/article30687631/>>.