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*Guest Editors: Kimberly Krawiec, Poonam Puri and  
Mitu Gulati*

## Dialogue: Clarified and Reconsidered

Rainer Knopff  
*University of Calgary*

Rhonda Evans  
*The University of Texas at Austin*

Dennis Baker  
*University of Guelph*

Dave Snow  
*University of Guelph*

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# Dialogue: Clarified and Reconsidered

## **Abstract**

Controversies about constitutional “dialogue” often stem from disagreement over the concept itself. The metaphor’s meaning and attendant consequences differ depending on whether it reflects the assumptions of judicial interpretive supremacy or coordinate interpretation. By combining that distinction with the contrast between weak-form and strong-form rights review, this article creates an integrated framework for clarifying dialogic variation across such jurisdictions as the United States, Canada, the United Kingdom, New Zealand, and Australia. We apply this framework most intensely to the Canadian case and bring differences between several dialogic forms—especially the difference between “clarification dialogue” and “reconsideration dialogue”—into sharper relief than is common in the literature. The classification of dialogic types revealed by the Canadian experience can, we suggest, illuminate analysis in other jurisdictions.

## Dialogue: Clarified and Reconsidered

RAINER KNOPFF\*, RHONDA EVANS<sup>†</sup>, DENNIS BAKER<sup>‡</sup>, &  
DAVE SNOW<sup>§</sup>

Controversies about constitutional “dialogue” often stem from disagreement over the concept itself. The metaphor’s meaning and attendant consequences differ depending on whether it reflects the assumptions of judicial interpretive supremacy or coordinate interpretation. By combining that distinction with the contrast between weak-form and strong-form rights review, this article creates an integrated framework for clarifying dialogic variation across such jurisdictions as the United States, Canada, the United Kingdom, New Zealand, and Australia. We apply this framework most intensely to the Canadian case and bring differences between several dialogic forms—especially the difference between “clarification dialogue” and “reconsideration dialogue”—into sharper relief than is common in the literature. The classification of dialogic types revealed by the Canadian experience can, we suggest, illuminate analysis in other jurisdictions.

Les controverses soulevées par le « dialogue » constitutionnel émanent souvent d’un désaccord sur le concept qu’il recouvre. La métaphore présente une signification et des conséquences qui diffèrent selon qu’elle s’appuie sur les hypothèses de la primauté de l’interprétation judiciaire ou celles de l’interprétation coordonnée. En tenant compte de cette distinction, et en opposant la forme faible et la forme forte de l’examen de la situation des droits, le présent article pose un cadre intégré visant à préciser les variations dialogiques entre différents pays comme les États-Unis, le Canada, le Royaume-Uni, la Nouvelle-Zélande et l’Australie. Nous appliquons ce cadre plus particulièrement au cas canadien et faisons ressortir les différences entre plusieurs formes dialogiques – notamment la différence entre le « dialogue de clarification » et le « dialogue de réexamen » – avec plus d’acuité que c’est habituellement le cas dans ce type d’études. Nous suggérons ainsi que la classification des types dialogiques qui ressort de l’exemple canadien peut éclairer l’analyse dans d’autres pays.

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\* Professor Emeritus of Political Science and Senior Fellow at the School of Public Policy, University of Calgary.

† Director, Edward A. Clark Centre for Australian and New Zealand Studies; Senior Lecturer, Department of Government, The University of Texas at Austin.

‡ Associate Professor, Department of Political Science, University of Guelph.

§ Assistant Professor, Department of Political Science, University of Guelph.

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**THE IDEA OF “DIALOGUE”** between the judiciary and the more obviously political branches of government has generated much discussion and controversy around the liberal democratic world. The dialogue metaphor has a long history in the United States and was for a time something of an obsession in Canada. Canadian proponents of the metaphor see it as a democratic defence of judicial power,<sup>1</sup> while critics maintain that so-called dialogue is often little more than legislative obedience to judicial command.<sup>2</sup> Discussion of the metaphor has been broadened and further energized by the adoption of statutory bills of rights in New Zealand, the United Kingdom, and at the state and territory level in Australia. These new ‘Commonwealth’ initiatives explicitly seek better inter-institutional dialogue than their designers discern in the American and Canadian models.

The controversies about dialogue involve different understandings of the concept. These differences make the term somewhat imprecise and subject to “shifting and sometimes contradictory definitions.”<sup>3</sup> Nevertheless, the metaphor remains entrenched in the literature, perhaps because of its attractive implication that constitutional law is best understood as the product of inter-institutional interactions. Indeed, the attractiveness of the metaphor might be related to its ability to encompass radically different understandings of the judicial role in a constitutional democracy. In particular, the dialogue metaphor differs in meaning and consequence depending on whether it reflects the assumptions of judicial

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1. See Peter W Hogg & Allison A Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such A Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*].
  2. See F L Morton, “Dialogue or Monologue?” (1999) April Pol’y Options 23; Christopher Manfredi & James Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 Osgoode Hall LJ 513.
  3. Emmett Macfarlane, “Conceptual Precision and Parliamentary Systems of Rights: Disambiguating ‘Dialogue’” (2012) 17:2 Rev Const Stud 73 at 97.

interpretive supremacy (in which case we will call it “court-centric dialogue”<sup>4</sup>) or the perspective of “coordinate interpretation” (“coordinate dialogue”). As its name suggests, coordinate dialogue envisages a legitimate interpretive role for the non-judicial branches of government.<sup>5</sup>

Whether court-centric or coordinate dialogue prevails is in turn affected, though not determined, by whether the relevant regime exhibits “strong-form” or “weak-form” judicial review.<sup>6</sup> Coordinate dialogue is fostered by weak-form systems but can occur in the less hospitable environment of strong-form systems. Similarly, the assumptions of judicial interpretive supremacy may become powerful enough in apparently weak-form systems to cause an evolution—or “escalation”<sup>7</sup>—in the direction of judicial supremacy and court-centric dialogue.

This article explores the clash between court-centric and coordinate perspectives on dialogue under weak-form and strong-form rights documents. Through a comparison of the United States and four Commonwealth regimes (Canada, the United Kingdom, New Zealand, and Australia), Part I fleshes out our interrelated analytical distinctions: strong-form versus weak-form review, and court-centric versus coordinate dialogue. These are not new distinctions, but combining them into an explicitly integrated framework enables the clarification and reconsideration promised by the article’s title. When the rest of the article then applies this framework to the Canadian case, variation among kinds of dialogue comes into sharper relief than is common in the literature. Especially important is the difference between “clarification dialogue” and “reconsideration dialogue” that gives our title its second meaning. The classification of dialogic types revealed by the Canadian experience can, we suggest, illuminate analysis in other jurisdictions.

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4. A term we adapt from Janet Hiebert’s description of “judicial-centric” review. See Janet L. Hiebert, “Parliamentary Bills of Rights: An Alternative Model?” (2006) 69:1 Mod L Rev 7.
  5. While we accept Aileen Kavanagh’s claim that some aspects of the dialogue metaphor may encourage “distortions,” we reject her characterization of those favouring a robust, coordinate version of dialogue as “Charter haters.” See Aileen Kavanagh, “The lure and limits of dialogue” (2016) 66:1 UTLJ 83 at 111-20.
  6. Mark Tushnet, “Alternative Forms of Judicial Review” (2002) 101 Mich L Rev 2781 [Tushnet, “Alternative Forms”]; “New Forms of Judicial Review and the Perspective of Rights- and Democracy-Based Worries” (2003) 38 Wake Forest L Rev 813-14 [Tushnet, “New Forms of Judicial Review”]; “Dialogic Judicial Review” (2009) 61 Ark L Rev 205 [Tushnet, “Dialogic Judicial Review”].
  7. Tushnet, “New Forms of Judicial Review,” *supra* note 6 at 824.

## I. COURT-CENTRIC VERSUS COORDINATE DIALOGUE UNDER STRONG-FORM AND WEAK-FORM JUDICIAL REVIEW

We begin with Mark Tushnet's distinction between strong-form and weak-form systems of judicial review, which differentiates how lawmaking majorities can displace judicial interpretations. In strong-form systems, judicial interpretations can be displaced only through protracted or extraordinary political processes.<sup>8</sup> Most obviously, the constitutional text can be amended, but amendment usually entails a super-majoritarian process, which is politically difficult to complete. Alternatively, the electoral ascendancy of a new political coalition can over time appoint a bench that subscribes to a different constitutional vision;<sup>9</sup> or a successful social movement may persuade judges to change their views.<sup>10</sup> Finally, a court may expediently depart from its constitutional convictions in order to mollify political opposition that threatens retaliatory action.<sup>11</sup> Weak-form judicial review systems, by contrast, provide mechanisms through which ordinary legislative majorities can displace judicial decisions and act according to contrary constitutional understandings.<sup>12</sup> Accordingly, while both strong-form and weak-form systems allow the other branches of government to challenge and change judicial interpretations, they do so over different time frames. "Strong-form systems," writes Tushnet, "allow the political branches to revise judicial interpretations in the longish run [through extraordinary processes], weak-form ones in the short run [via ordinary legislative majorities]."<sup>13</sup>

Figure 1 provides a schematic representation of the varieties of strong-form and weak-form judicial review and arrays several common-law regimes across the weak- versus strong-form continuum. The classic instance of strong-form review exists in the United States (depicted at the right of Figure 1), where judicial

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8. Mark Tushnet, *Weak Courts, Strong Rights* (Princeton, NJ: Princeton University Press, 2008) at 34-35 [Tushnet, *Weak Courts*].
  9. See Robert A Dahl, "The Concept of Power" (1957) 2:3 Behav Sci 201; Barry Friedman, "Dialogue and Judicial Review" (1993) 91 Mich L Rev 577; Barry Friedman, "The Politics of Judicial Review" (2005) 84:2 Texas L Rev 257.
  10. See Robert C Post, "Fashioning the Legal Constitution: Culture, Courts, and Law" (2003) 117 Harv L Rev 4; Reva B Siegel, "Text in Contest: Gender and the Constitution from a Social Movement Perspective" (2001) 150 U Pa L Rev 297.
  11. Bruce Ackerman, *We the People, vol 1: Foundations* (Cambridge, Mass: Harvard University Press, 1991).
  12. Tushnet, *Weak Courts*, *supra* note 8 at 22-23.
  13. *Ibid* at 34.

interpretation of the national constitution, including the Bill of Rights,<sup>14</sup> can generally be revised by the other branches only “in the longish run.”<sup>15</sup>

Canada, for reasons we shall explore below, has some of the formal features of weak-form review with respect to rights review under its *Charter of Rights and Freedoms*<sup>16</sup> but generally behaves like a strong-form system; hence it is portrayed as bridging the two categories. New Zealand, the United Kingdom, and the Australian sub-national jurisdictions of Victoria and the Australian Capital Territory (ACT) have statutory bills of rights that allow weak-form judicial review, which can more readily be revised by ordinary legislative majorities in the short run. The rest of Australia has no explicit rights documents and thus occupies the weak-form pole of the continuum in Figure 1.

FIGURE 1: STRONG- AND WEAK-FORM REVIEW

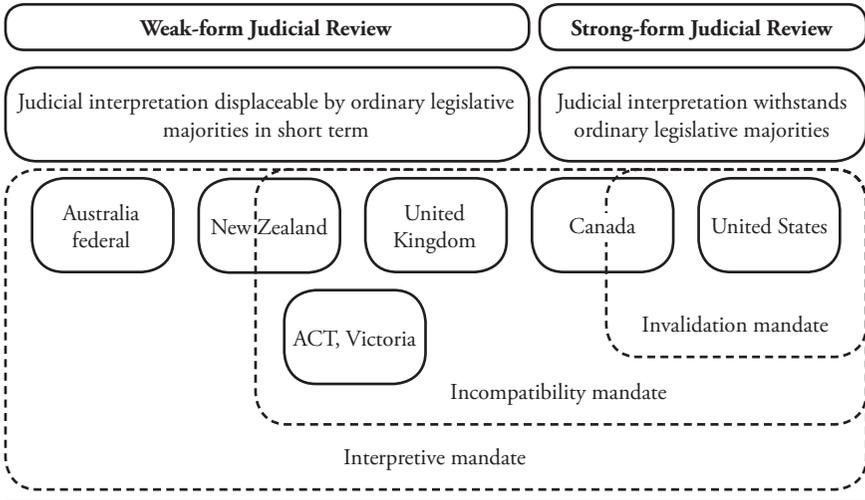


Figure 1 helps us flesh out the differences (and commonalities) between and among weak-form and strong-form systems. The lower part of the Figure depicts

14. US Const amend I-X.

15. Note, however, that the constitutions of US states are all much easier to amend, often through legislatively referred or popularly initiated referendums. That is, state constitutions are arguably weak form in the sense of being revisable in the relative short run by majoritarian processes. Tushnet, *Weak Courts*, *supra* note 8 at 34.

16. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

three categories of judicial mandate. The foundational *interpretive mandate* is enjoyed by all courts in common-law liberal democracies and spans the continuum of weak- and strong-form systems. We include in this category the traditional judicial powers both to revise judge-made common law and to choose between plausibly available interpretations of statutes. Although statutory interpretation gets most of the attention in discussions of inter-institutional dialogue about rights, common-law development, as we shall see, is also important.

The interpretive mandate exists with respect to rights issues whether or not there is a bill of rights. Judges employed this mandate to protect rights well before explicit bills of rights existed. As Claudia Geiringer observes with respect to statutory interpretation, “[w]here fundamental values are perceived to be threatened, the common law courts have long utilized the traditional common law presumptions to promote literal or even strained meanings in disregard of statutory purpose.”<sup>17</sup> Courts have also modified judge-made common law to better reflect rights. This was a central mode of judicial rights protection in countries like Canada, New Zealand, and the United Kingdom before their relatively recent adoption of statutory or constitutional rights documents.

Jurisdictions without explicit bills of rights—including most of Australia today and other Commonwealth regimes in the past—are often excluded from discussions of rights-based judicial review; instead, they are associated with “parliamentary supremacy.”<sup>18</sup> At least from the perspective of dialogue between the courts and other branches of government, we consider this an unhelpful exclusion. Inter-institutional dialogue, based on interpretive choices by judges, is independent of the existence of formal rights documents,<sup>19</sup> and judicial interpretations can have considerable staying power without being grounded in such documents.<sup>20</sup> Even where courts clearly have much stronger mandates, as they do in Canada and the United States, they share the basic interpretive

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17. Claudia Geiringer, “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*” (2008) 6:1 NZJPIL 59 at 63.

18. Tushnet, “New Forms of Judicial Review,” *supra* note 6 at 830.

19. For example, although Australia lacks a bill of rights, its High Court has nevertheless employed in its approach to statutory interpretation a presumption against the violation of fundamental rights by the legislature. See *Potter v Minaham* (1908), 7 CLR 277, 14 ALR 635 (HCA); *Coco v The Queen* (1994), 179 CLR 427, 20 ALR 415 (HCA).

20. Thomas Flanagan “The Staying Power of the Legislative Status Quo: Collective Choice in Canada’s Parliament after *Morgentaler*” (1997) 30:1 Can J of Poli Sci 31 at 53; Roach, *Supreme Court on Trial*, *supra* note 1 at 65-68, 254-63; Tushnet “New Forms of Judicial Review,” *supra* note 6 at 833-34.

mandate of developing the common law and giving ambiguous statutes a rights-compatible interpretation when possible and appropriate.<sup>21</sup>

Some of the jurisdictions in Figure 1 have adopted bills of rights that expressly formalize and promote the kind of interpretive mandate that had previously been implicit. In other words, these documents serve as a compendium of norms to guide the traditional interpretive mandate. For example, section 6 of the *New Zealand Bill of Rights Act 1990 (BORA)* provides that “[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms obtained in this Bill of Rights, that meaning shall be preferred to any other meaning.”<sup>22</sup> Similarly, section 3 of the United Kingdom’s *Human Rights Act 1998* provides that primary and subordinate legislation must “be read and given effect in a way which is compatible with [protected] rights” whenever “it is possible to do so.”<sup>23</sup> In Australia, the ACT and Victorian bills of rights use the same approach.<sup>24</sup> In Canada, the Supreme Court will, in circumstances of “genuine ambiguity”—that is, where the relevant statute “is subject to differing, but equally plausible, interpretations”—read the statute in a *Charter*-compliant manner.<sup>25</sup>

But just when is a rights-compatible interpretation possible and appropriate? Recall Geiringer’s statement that judges can use the interpretive mandate to promote “even strained meanings in disregard of statutory purpose.”<sup>26</sup> Such strained interpretations arouse controversy across the weak- versus strong-form continuum. In the weak-form UK system, the case *R v A*<sup>27</sup> generated such controversy. In that case, say Janet Hiebert and James Kelly, “the Law Lords altered parliament’s clear intention about how the rules of evidence are interpreted in the context of sexual assault trials”<sup>28</sup>—that is, the Lords essentially rewrote the law, something that can be described as “interpretation” only if one adds the adjective “strained.” In relatively strong-form Canada, the famous 1992 censorship case *R v Butler* raises similar issues. In *Butler*, the Supreme Court of Canada upheld the *Criminal Code*’s prohibition of “obscenity,”<sup>29</sup> but only after interpretively finding

21. *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler*]; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*].

22. *New Zealand Bill of Rights Act 1990*, NZ No 109, s 6 [*BORA*].

23. 1998 (UK), c 42, s 3(1) [*UK Human Rights Act*].

24. *Human Rights Act 2004* (ACT) [*ACT Human Rights Act*]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) [*Victoria Charter of Human Rights*].

25. *Bell ExpressVu*, *supra* note 21 at para 62.

26. Geiringer, *supra* note 17 at 63.

27. *R v A*, [2001] UKHL 25, [2002] 1 AC 45 [*R v A*].

28. Janet L Hiebert & James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge, UK: Cambridge University Press, 2015) at 267-68.

29. *Criminal Code*, RSC, 1985, c C-46, s 163(8).

that a law clearly written to prohibit most explicit erotica on moralistic grounds criminalized just pornography involving harm to women and children. For Kent Roach, this judicial rewriting of the law exemplifies the judiciary's attempt "under the Charter to fix laws through creative and strained interpretations."<sup>30</sup> In Roach's view, this "spurious technique of statutory interpretation" involves the "fiction that the court is not departing from the words and intent of the legislature."<sup>31</sup> Because it is a fiction, moreover, this claim fails "the test of judicial candour."<sup>32</sup>

What happens when judges, resisting strained interpretation, find it impossible to give a law a rights-compatible interpretation? In those circumstances, most bills of rights give judges the *incompatibility mandate* depicted in Figure 1. In many weak-form systems this incompatibility mandate goes no further than what Tushnet calls an "augmented interpretive mandate."<sup>33</sup> Thus, when UK courts cannot come to a compatible interpretation, they have the augmented authority to issue explicit statements of incompatibility.<sup>34</sup> The same is true in the ACT.<sup>35</sup> The terminology differs slightly in the Australian State of Victoria where courts may issue statements of "inconsistent interpretation."<sup>36</sup> Such incompatibility statements merely augment the interpretive mandate because they leave the law in place and fully applicable, meaning that the ruling does not affect the parties' legal rights. Incompatible laws are not judicially invalidated under these weak-form bills of rights.

The New Zealand *BORA* appears on its face to establish only the basic, un-augmented interpretive mandate. Section 4 obligates judges to give effect to legislation that they have concluded is incapable of being interpreted consistently with the *BORA*, but the document does not explicitly provide for the kind of incompatibility statements found in other weak-form bills.<sup>37</sup> Nevertheless, the incompatibility mandate may be implied. After all, when judges explicitly *recognize* inconsistency in the course of applying the law, have they not implicitly *declared* inconsistency? In a series of decisions, New Zealand judges have acknowledged

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30. "Common Law Bills of Rights as Dialogue between Courts and Legislatures" (2005) 55:3 UTLJ 733 at 735.

31. *Ibid.*

32. *Ibid.*

33. Tushnet, *Weak Courts*, *supra* note 8 at 27.

34. UK *Human Rights Act*, *supra* note 23, s 4.

35. ACT *Human Rights Act*, *supra* note 24, s 32.

36. Victoria *Charter of Human Rights*, *supra* note 24, s 36.

37. *BORA*, *supra* note 22, s 4.

this implication.<sup>38</sup> In 2000, the New Zealand Court of Appeal even asserted the power to make an explicit declaration that legislation is inconsistent with the *BORA* despite the absence of a formal provision to that effect in the *BORA*.<sup>39</sup> Subsequent decisions, however, have mostly avoided explicit declarations of inconsistency.<sup>40</sup> As a separate but related development, in 2001 the New Zealand Parliament amended the *Human Rights Act 1993* to empower the Human Rights Review Tribunal to declare legislation to be inconsistent with section 19 of the *BORA*, which prohibits discrimination on various specified grounds.<sup>41</sup> Because New Zealand's situation remains ambiguous in this respect, however, it straddles the "interpretive mandate" and "incompatibility mandate" categories in Figure 1.

The incompatibility mandate remains weak-form review in jurisdictions like the United Kingdom, where ordinary legislative majorities can choose to leave the pre-existing legal status quo intact despite a judicial declaration of incompatibility.<sup>42</sup> This raises the question of why judges would choose

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38. *Quilter v Attorney-General*, [1998] 1 NZLR 523 (CA); *R v Hansen*, [2007] 3 NZLR 1 (CA); *Belcher v Chief Executive of the Department of Corrections*, [2007] NZSC 54.

39. *Moonen v Film & Literature Board of Review*, [2000] 2 NZLR 9, 19 (CA) [*Moonen*].

40. *Moonen* did not itself make an explicit declaration of inconsistency. *Supra* note 39. The first such declaration did not occur until 2015. See *Taylor v Attorney-General*, [2015] NZHC 1706 [*Taylor*]. At the time of writing the New Zealand Supreme Court has not pronounced on the legitimacy of the approach in *Taylor*. See also The Hon Justice Matthew Palmer, "Constitutional Dialogue and the Rule of Law" (Key Note Address delivered at the Constitutional Dialogue Conference, Faculty of Law, Hong Kong University, 9 December 2016) <[www.courtsofnz.govt.nz/speechpapers/CDRL.pdf](http://www.courtsofnz.govt.nz/speechpapers/CDRL.pdf)>.

41. *Human Rights Act 1993* (NZ), 1993/82, Part 1A [NZ *Human Rights Act*]. The Human Rights Review Tribunal serves as the first forum for the adjudication of complaints that are initiated under the *Human Rights Act*.

42. The UK situation is complicated by the fact that courts in Scotland and Northern Ireland have the power to invalidate incompatible statutes enacted by the devolved legislative assemblies in these two jurisdictions. With respect to such legislation, these courts enjoy the strong-form "invalidation mandate" discussed below. As Stephen Gardbaum puts it, "The [UK *Human Rights Act*] sets up a separate system of strong-form judicial review of legislative acts of these two devolved assemblies alongside the weak-form review of acts of the UK Parliament at Westminster." Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge, UK: Cambridge University Press, 2013) at 158.

a declaration of incompatibility over a strained interpretation.<sup>43</sup> Finding inconsistency seems more dramatic, but it leaves the inconsistent law in place. By contrast, interpretive fixing seems less dramatic but can in practice be difficult for unhappy legislators to change. To the extent that Thomas Flanagan is right about the “staying power” of a policy status quo,<sup>44</sup> interpretive fixing may turn out to be more activist than finding or declaring inconsistency. For example, with respect to the aforementioned strained interpretation in *R v A*,<sup>45</sup> the UK Parliament could have changed the new, judicially created policy status quo and restored the original intention, but it did not—as Flanagan, among others, might have predicted.

To be sure, the strategic considerations affecting the choice between strained interpretation and declaring incompatibility in weak-form systems is affected by the extent to which declarations of incompatibility are politically potent rather than impotent. Under some conditions, a declaration of incompatibility may be effectively exploited to pressure the legislature to amend the impugned law; it may even make the amendment easier than it otherwise would be. The UK *Human Rights Act* facilitates easy amendment by expressly providing for a fast-track procedure that the relevant government minister may employ to amend impugned legislation. In instances where the minister deems the need for an amendment to be urgent the law may even be amended by ministerial order, subject to Parliament’s subsequent ratification.<sup>46</sup> Such amendments might sometimes be undertaken reluctantly, but they may also occur when the legislature prefers the judicial approach—perhaps because the inconsistent legislation is clearly out of step with contemporary norms, or because it has an effect the legislature did not anticipate.

In strong-form systems, a finding of incompatibility goes well beyond an augmented interpretive mandate; it often entails the more dramatic *invalidation mandate* displayed in Figure 1. When American and Canadian judges choose to

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43. Though we do not engage this question here, we note that the discipline of Political Science offers various theories that seek to explain judicial behavior in such circumstances. According to a strategic account of judicial decision-making, judges would consider the preferences of other actors (i.e., the legislature, executive, and civil society actors as well as public opinion) in choosing their course of action, whereas an attitudinal approach would expect judges to act according to their sincerely held ideological preferences. For a strategic account, see Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); for an attitudinal approach, see Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993).

44. Flanagan, *supra* note 20.

45. *R v A*, *supra* note 27.

46. UK *Human Rights Act*, *supra* note 23, s 10.

find incompatibility instead of interpretively fixing an impugned law, they do not risk leaving in place what they consider to be a rights violation. To the contrary: they strike the law down.

Invalidation mandates, of course, exist not only with respect to constitutionally entrenched rights documents but also with respect to other, structural features of entrenched constitutions. Federalism review, for example, exists in the United States, Canada, and Australia. Such structural review can sometimes raise the kinds of “matters of moral or political significance” that characterize explicit rights jurisprudence,<sup>47</sup> particularly when constitutions lack many entrenched rights. In other words, regimes that are formally weak-form with respect to rights can sometimes use structural review to achieve strong-form rights protection. In both Australia and pre-*Charter* Canada, federalism review sometimes provided an indirect way of invalidating rights violations.<sup>48</sup> In both countries, moreover, judges have argued that the constitutionally prescribed parliamentary form of government implies freedom of expression and have sometimes—though not often—used that right to invalidate legislation.<sup>49</sup> Although such indirect routes to the judicial invalidation of rights violations are important and interesting, they lie beyond the scope of this paper, which focuses on explicit rights documents.

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47. Adrienne Stone, “Judicial Review without Rights” (2008) 28 *Oxford J Leg Stud* 1; “Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law” (2010) 60 *UTLJ* 109 at 134.
48. For example, in 1951 the High Court of Australia struck down legislation that banned the Communist Party and placed restrictions on persons declared to be communists or members of the Party, but it did so on grounds that the Commonwealth lacked the legislative authority to enact such a law under the Federal Constitution—not because the law breached constitutionally protected civil liberties; *Australian Communist Party v Commonwealth*, [1951] HCA 5, 83 CLR 1. Similarly, in 1957, the Supreme Court of Canada relied on federalism to strike down a Quebec law enabling police to shut down premises used to propagate communism; *Switzman v Elbling and AG Quebec*, [1957] SCR 285, 1957 CanLII 2 (SCC). Because such use of federalism to protect civil liberties resulted in the civil liberty at stake remaining under the threat of direct infringement by another level of government, it cannot be simply described as an aspect of strong-form rights protection.
49. In Canada, implied rights were never used by more than a minority of Supreme Court justices to support any constitutional invalidation; see *Reference re Alberta Statutes*, [1938] SCR 100, 1938 CanLII 1 (SCC). In Australia, High Court majorities have occasionally used implied rights as the main ground of invalidation. See e.g. *Australian Capital Television Pty Ltd v Commonwealth*, [1992] HCA 1, 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd*, [1994] HCA 46, 182 CLR 104; *Stephens v West Australian Newspaper Ltd*, [1994] HCA 45, 182 CLR 211. Such jurisprudence was controversial, however, and subsequent decisions rejected implied rights: *Langer v Commonwealth*, [1996] HCA 43, 186 CLR 302; *McGinty v State of Western Australia*, (1996), 186 CLR 140.

The judicial conclusion that a law must be invalidated under an entrenched rights document may involve more than just the infringement of protected rights or freedoms. In Canada, for example, section 1 of the *Charter* subjects the document's protected rights and freedoms "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>50</sup> Thus, only unreasonable and unjustified infringements are sufficiently incompatible with the *Charter* to require invalidation. Canadian judges will seek legal interpretations—sometimes including strained interpretations—to bring laws within the reasonable limits standard. This is what Canada's Supreme Court achieved in *Butler*<sup>51</sup> by rewriting the censorship law to embrace a much narrower range of materials. Had the law continued to prohibit most erotica on moral grounds, it could not be justified as a reasonable limit on freedom of expression. Having been given a narrower, harm-based reading to protect women and children, however, the law became justified as a reasonable limit. In many other cases, however, Canadian judges invalidate what they consider unreasonable limits on rights.

New Zealand's *Bill of Rights Act* copied Canada's "reasonable limits" provision. As in Canada, the New Zealand provision can save laws from ultimate inconsistency or incompatibility with the rights document. On the other hand, a finding of "unreasonable limits" in weak-form New Zealand leaves the law in place, while the same finding in strong-form Canada leads to invalidation.

But just how strong-form is the Canadian system? Invalidation can have different consequences depending on whether or not it can be reversed by ordinary legislative majorities. While such reversal is not possible under the US Constitution, it is in Canada where section 33 of the *Charter* allows legislatures to immunize legislation against challenge for renewable five-year periods by including in the act a clause stating that it shall operate "notwithstanding" certain *Charter* rights and freedoms.<sup>52</sup> Under the US Constitution, by contrast, a judicial

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50. *Charter*, *supra* note 16, s 1.

51. *Butler*, *supra* note 21.

52. *Charter*, *supra* note 16, s 33. This paper is concerned with section 33 only as a legislative way of disagreeing with and reversing a judicial decision, what Tsvi Kahana calls the "remedial" use of the notwithstanding mechanism. The clause can also be used in a "pre-emptive sense" to immunize legislation from judicial review altogether—i.e., to prevent inter-institutional dialogue from the outset. Early in the *Charter's* history, Quebec used section 33 in this fashion to protect its entire statute book (*An Act respecting the Constitution Act*, 1982, SQ 1982, c 21, ss 1, 7). Demonstrating that most uses of s 33 fall into the pre-emptive category, Kahana thinks it should be invoked only to remedy judicial decisions—not just any judicial decisions, moreover, but only those "of the highest court possible," usually the Supreme Court. Tsvi Kahana, "The notwithstanding mechanism and public discussion:

invalidation of legislation can generally be overcome only by constitutional amendment or “packing” the court to promote a judicial change of mind. The latter are long-term strategies, whereas section 33 allows “ordinary legislative majorities [to] displace judicial interpretation of the constitution in the relatively short run.”<sup>53</sup>

Short run displacement of judicial interpretation by ordinary legislative majorities is central to what Tushnet calls weak-form judicial review. If this feature exists in Canada by virtue of section 33, it is obviously present in regimes with only the interpretive mandate where legislatures can simply reverse a judicial interpretation by enacting new and clearer contrary legislation. It is also present where legislatures can effectively ignore a finding of inconsistency (New Zealand) or an explicit declaration of incompatibility (the UK). This is why all of these regimes fall into the category of weak-form review in Figure 1 while the United States at the federal level most clearly represents strong-form review, which has greater power to withstand disagreement by ordinary legislative majorities.

As previously noted, the weak-form zone in Figure 1 extends only part way into Canada, which also occupies some of the strong-form zone. This is so for two reasons. First, section 33 can be used to immunize legislation only against sections 2 and 7-15 of the *Charter*. Other sections—*e.g.*, section 3 “democratic rights,”<sup>54</sup> including the right to vote—are subject to strong-form judicial review. Thus, the narrowly (and passionately) divided five-four decision in *Sauvé v Canada*,<sup>55</sup> ruling all forms of prisoner voting disqualification unconstitutional, can be displaced only by constitutional amendment or a future change of the collective judicial mind. Second, for reasons we will explore further below, section 33 has become so politically difficult to use that most observers, including us, now treat Canada as a regime of judicial review that works mostly in strong-form ways. We say *mostly* strong-form because of the occasional instances in which legislatures reject a *Charter*-based judicial decision without using the notwithstanding clause. Such legislation rejects judicial interpretive supremacy and is now the chief vehicle for coordinate interpretation in the Canadian system.

This brings us to our second distinction, court-centric versus coordinate dialogue, which interacts in important ways with the weak-form versus

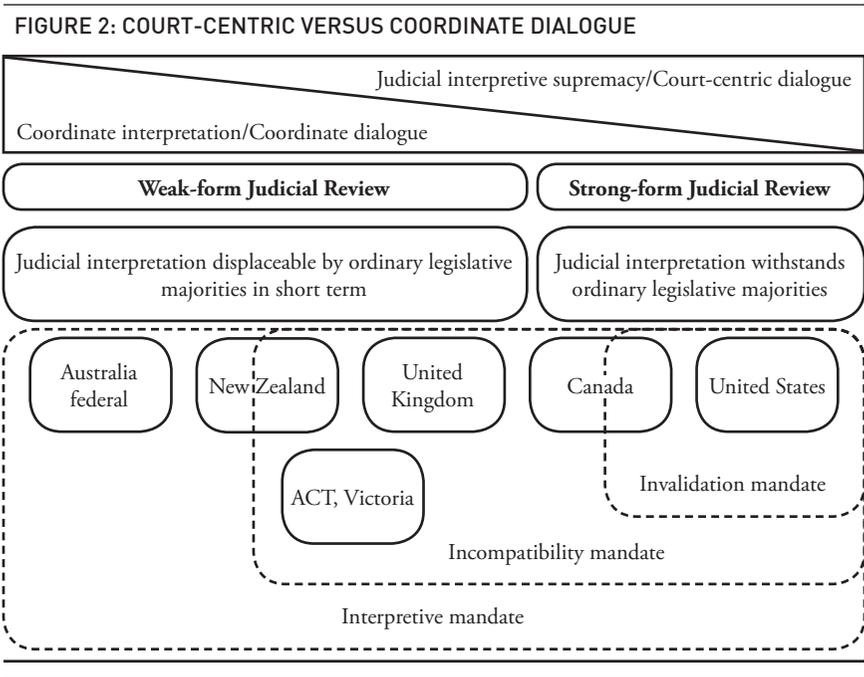
Lessons from the ignored practice of section 33 of the *Charter*” (2001) 44:3 Can Pub Admin 255 at 276; see also “Understanding the Notwithstanding Mechanism” (2002) 52 UTLJ 221.

53. Tushnet, “Alternative Forms,” *supra* note 6 at 2786.

54. *Charter*, *supra* note 16, s 3.

55. *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé II*].

strong-form distinction. Figure 2 adds a layer to Figure 1 to facilitate discussion of the differences and connections between the two distinctions.



Beginning with the assumption that most issues of constitutional interpretation are open to reasonable disagreement, coordinate interpretation maintains that legislatures and executives can contribute their own ‘reasonable’ views to the interpretive process. Judicial interpretations, in this view, should certainly settle the dispute between the immediate parties to a case but not necessarily the broader policy questions at stake.<sup>56</sup> Under this “case and controversy” constraint, legislatures can legitimately disagree with high-court constitutional interpretations and test judicial commitment by acting on their

56. Dennis Baker, *Not Quite Supreme: The Supreme Court of Canada and Coordinate Constitutional Interpretation* (Montreal, Que/Kingston, Ont: McGill-Queen’s University Press, 2010) at 92-96 [Baker, *Not Quite Supreme*].

contrary constitutional understandings.<sup>57</sup> This is coordinate dialogue. Tushnet takes this coordinate view when he explains dialogue as “interactions ... among the branches about which of the competing reasonable interpretations of constitutional provisions is correct.”<sup>58</sup> Similarly, Christopher Manfredi and James Kelly assert that “[g]enuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an *effective* means to assert that interpretation.”<sup>59</sup>

By contrast, the chief founders of dialogue theory in Canada, Peter Hogg and Allison Thornton, have (together with Wade Wright) called into question the legitimacy of coordinate dialogue in the Canadian context: “If ‘genuine’ dialogue can only occur where legislatures share coordinate authority with the courts to interpret the constitution,” they wrote in 2007, “then *by definition it cannot exist in Canada*, where legislatures have no such authority.”<sup>60</sup> This perspective envisions court-centric dialogue in which legislative response is permitted only *within* the bounds of judicially established interpretations and does not extend to challenging the judicial interpretations themselves.<sup>61</sup> In this view, the rules offered by the majority (or plurality) of a court are non-negotiable and open to only as much flexibility as the controlling judgment itself allows. Coordinate theorists respond that such dialogue is really “a monologue, with judges doing most of the talking and legislatures most of the listening.”<sup>62</sup>

The diagonal line separating the two interpretive theories (and their associated forms of dialogue) in Figure 2 indicates how they are affected by the strong-form/weak-form distinction. On the one hand, allowing ordinary legislative majorities to displace judicial interpretations suggests equal (or coordinate) interpretive authority for courts and legislatures and thus makes weak-form systems particularly hospitable to coordinate dialogue. Indeed, the weak-form systems

57. Dennis Baker & Rainer Knopff, “Minority Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases” (2002) 21 Windsor YB Access Just 347 [Baker & Knopff, “Minority Retort”].

58. Tushnet, “Dialogic Judicial Review,” *supra* note 6 at 209.

59. Manfredi & Kelly, *supra* note 2 at 523-24.

60. Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “Dialogue Revisited – Or ‘Much Ado about Metaphors’” (2007) 45:1 Osgoode Hall LJ 1 at 31 [emphasis added].

61. Later in the same article, Hogg, Thornton & Wright hedge this outright rejection of coordinate interpretation somewhat to allow “the legislative and executive branches [to] act on a conflicting interpretation of the *Charter* where, due to a material change in the circumstance or the discovery of new evidence, they are convinced that a measure that did not constitute a justifiable limit on a *Charter* right at the time the judicial decision was issued now constitutes a justifiable limit on a *Charter* right” (*ibid* at 34).

62. Morton, *supra* note 2 at 26.

of the “Commonwealth model” were designed to protect coordinate interpretive authority. Hence the sizeable space for coordinate dialogue toward the left-hand portion of Figure 2. In not compartmentalizing court-centric dialogue into the strong-form side of Figure 2, we capture Tushnet’s argument that judicial interpretive supremacy may emerge in otherwise weak-form regimes. On the other hand, the key feature of strong-form judicial review—that ordinary legislative majorities cannot displace judicial interpretation—suggests notions of judicial interpretive superiority or supremacy and thus tilts those systems in the direction of court-centric dialogue. Here again, by not limiting coordinate dialogue to the weak-form portion of Figure 2, we indicate that such dialogue can find a place—though usually a more contentious (and thus smaller) place—even in systems of strong-form judicial review. Canada’s (now mostly) strong-form system of judicial review effectively illustrates the relationships represented by Figure 2.

## II. COURT-CENTRIC VERSUS COORDINATE DIALOGUE IN (MOSTLY) STRONG-FORM CANADA

Figure 2 suggests that, while coordinate interpretation may survive in strong-form systems of judicial review, court-centric dialogue will predominate. Certainly Canada has tilted substantially in the direction of court-centric dialogue because of its similar tilt toward strong-form judicial review. This is evident with respect to the two major forms of dialogue identified by Hogg, Thornton, and Wright: section 33 dialogue and reasonable limits dialogue.<sup>63</sup> Nevertheless, coordinate dialogue persists to some extent, especially in a variant of so-called second-look cases that we will call “reconsideration” cases.

### A. SECTION 33 DIALOGUE

Although the formally weak-form “notwithstanding” clause might be thought to provide legislatures with the opportunity to engage in what coordinate theorists consider “genuine”<sup>64</sup> dialogue about the meaning of *Charter* provisions, this coordinate perspective has essentially lost its battle with the court-centric perspective on section 33 dialogue, according to which use of the notwithstanding clause *overrides* the *Charter* as judicially interpreted. Indeed, this court-centric perspective accounts for the widespread description of section 33 as the legislative

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63. Hogg, Thornton & Wright, *supra* note 60.

64. *Ibid* at 31.

“override.”<sup>65</sup> Overriding the *Charter* is clearly not the same as engaging in legitimate dialogue about its proper interpretation. Overriding the *Charter* is so politically fraught, moreover, that most observers no longer consider section 33 an effective dialogic response to judicial decisions.<sup>66</sup> When the Supreme Court of Canada struck down Canada’s ban on tobacco advertising in *RJR-MacDonald* by a narrow five-four majority,<sup>67</sup> long-time opponents of section 33, such as Ed Broadbent (former leader of the federal New Democratic Party), became its enthusiastic champions and urged that it be used to reverse the decision.<sup>68</sup> However, the stigma of overriding rights prevented the government from acting in this way. The perception of the notwithstanding clause as contrary to the *Charter* has led some academics<sup>69</sup> to suggest it has been essentially written-out of the *Charter* and its use inhibited by an emerging constitutional convention or through the operation of the legal doctrine of desuetude.<sup>70</sup> Even strictly procedural uses of section 33 are seemingly off the table: During an oral hearing asking the Supreme Court to extend a delayed declaration of invalidity, Justice Russell Brown shocked some observers by noting that the Government could readily obtain a five-year

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65. See Lorraine Weinrib, “Learning to Live with the Override” (1990) 35:3 McGill LJ 541; Roach, Supreme Court of Trial, *supra* note 1 at 186; Peter H Russell, “The Notwithstanding Clause: The Charter’s Homage to Parliamentary Democracy” (February 2007) Pol’y Options 65 at 66. Rainer Knopff has fallen prey to the ubiquitous “override” metaphor in his previous writings. See e.g. Rainer Knopff and F L Morton, *Charter Politics* (Scarborough, ON: Nelson, 1992) at 18, 29-30, 75, 78, 84, 137, 151, 161, 228, 229, 380, 383. That book does, however, express reservations about this language at 179-80. Similarly, Dennis Baker uses the override terminology but explicitly notes the problem this usage creates: Baker, *Not Quite Supreme*, *supra* note 56 at 40.
66. Despite its technical availability, the notwithstanding clause has never been used by the federal government and has been used only once by any government—Quebec—in direct response to a Supreme Court decision, *Ford v Quebec (AG)*, [1988] 2 SCR 712, 54 DLR (4th) 577. This has led one scholar to argue that the clause is a “paper tiger”—available in theory but not used in practice; see Howard Leeson, “Section 33, the Notwithstanding Clause: A Paper Tiger?” (2000) 6:4 IRPP Choices 1 at 14, 20.
67. *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1 [*RJR-MacDonald*].
68. Rainer Knopff & Andrew Banfield, “It’s the *Charter* Stupid’: The *Charter* and the Courts in Federal Partisan Politics” in Joseph Magnet & Bernard Adell, eds, *The Canadian Charter of Rights and Freedoms at Twenty Five Years* (Toronto: LexisNexis Butterworths, 2009).
69. See e.g. Jamie Cameron, “The *Charter*’s Legislative Override: Feat or Figment of the Constitutional Imagination?” in *Constitutionalism in the Charter Era*, Grant Huscroft & Ian Brodie, eds, (Markham, ON: LexisNexis Canada Inc, 2004).
70. Richard Albert, “Constitutional Amendment by Constitutional Desuetude” (2014) 62 Am J Comp Law 641.

extension by using the notwithstanding clause.<sup>71</sup> In Canada, for all practical purposes, the invocation of the clause transforms any narrow discussion of the substance of any rights-limitation into a debate about the precariousness of rights in general. Since no government wants to be seen as opposed to rights in general, the mechanism is ill-suited to be a vehicle for dialogue in any *particular* case. Tushnet's thesis about how a weak-form institutional design can "escalate" into a strong-form reality is exemplified by the fate of section 33.<sup>72</sup>

## B. REASONABLE LIMITS DIALOGUE

Strong-form assumptions about Canadian judicial review have not only contributed to the demise of section 33 as an avenue of coordinate dialogue, they have also strengthened the court-centric perspective on the second widely discussed dialogic opportunity under the *Charter*, namely "reasonable limits" dialogue. Such dialogue arises especially under section 1 of the *Charter*.<sup>73</sup> The Supreme Court established the framework for applying section 1 in *Oakes*.<sup>74</sup> To qualify as a reasonable limit on *Charter* rights under the *Oakes* test, a law must have a "pressing and substantial objective" and legislative means must be proportional to that objective.<sup>75</sup> Proportional means must be "rationally connected" to the pressing and substantial objective in the sense of actually achieving it.<sup>76</sup> Even means that achieve the objective will fail the *Oakes* test unless their impairment of *Charter* rights is plausibly minimal.<sup>77</sup> Finally, the benefits of even a "minimal impairment" of rights must outweigh the costs in lost rights.<sup>78</sup>

It is under the proportional means component of the *Oakes* test, and especially under its minimal impairment standard, that most section 1 dialogue occurs. In other words, a judgment striking down a law for exceeding minimal impairment of a *Charter* right or freedom will often leave room for legislative

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71. Todd MacCharles, "Ottawa surprises top court judges by allowing assisted suicide to proceed in Quebec", *Toronto Star* (11 January 2016), online: <[www.thestar.com/news/canada/2016/01/11/ottawa-surprises-top-court-judges-by-asking-for-more-time-on-assisted-suicide.html](http://www.thestar.com/news/canada/2016/01/11/ottawa-surprises-top-court-judges-by-asking-for-more-time-on-assisted-suicide.html)>.

72. Tushnet, "New Forms of Judicial Review," *supra* note 6 at 824.

73. *Charter*, *supra* note 16, s 1.

74. *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

75. *Ibid* at paras 69, 70.

76. *Ibid* at para 70.

77. *Ibid*.

78. *Ibid* at para 71.

fine tuning to achieve the same policy end with less rights impairment.<sup>79</sup> In the aforementioned case on tobacco advertising, for example, while the legislature could no longer ban all commercial advertising because of the *Charter's* guarantee of freedom of expression, the majority's ruling indicated that a ban limited to "lifestyle advertising" would be a reasonable limit on that freedom.<sup>80</sup>

As in the case of section 33 dialogue, the dialogue about reasonable limits generates debates between the court-centric and coordinate perspectives. From the court-centric perspective, the dialogic room for legislative maneuver occurs *within* the bounds of *judicially established* standards of section 1 minimal impairment, or section 7 "fundamental justice," or section 8 "reasonable search and seizure," etc. Thus, when the Canadian government responded to the tobacco advertising ruling in *RJR-MacDonald* by enacting a more limited ban on lifestyle advertising—essentially what the Court's majority had suggested—court-centric theorists considered this dialogue. We will call this "implementation dialogue"—*i.e.* a legislative or governmental sequel that essentially implements a specific suggestion by a court. For coordinate theorists, such implementation dialogue is like asking a waiter for a sandwich and getting what one had ordered.<sup>81</sup> In Grant Huscroft's view, for example, Parliament's response to *RJR-MacDonald* "simply legislated in accordance with the parameters that the Court's majority decision allowed. The Court did not just influence the democratic process; it dictated the content of constitutionally permissible legislation."<sup>82</sup> Agreeing with Huscroft, Emmett Macfarlane does not treat the sequel to *RJR-MacDonald* as genuine dialogue.<sup>83</sup> True or "genuine"<sup>84</sup> dialogue, from this coordinate

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79. Similar dialogic fine-tuning sometimes occurs with respect not to section 1 but to a "reasonableness" standard incorporated directly within a *Charter* right or freedom. Thus, section 8 of the *Charter* allows searches and seizures but only reasonable ones; section 12 permits punishment but not if it is "cruel and unusual"; and section 7 permits infringements of "life, liberty, and security of the person" but only in accordance with "the principles of fundamental justice." We leave to one side the vexed question whether, say, an unreasonable search and seizure or a violation of "fundamental justice" can be a reasonable limit under section 1 of the *Charter*. *Charter*, *supra* note 16.

80. *RJR-MacDonald*, *supra* note 67 at para 95; *Charter*, *supra* note 16, s 2(b).

81. Morton, *supra* note 2.

82. Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 60.

83. Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 32:1 Int'l Poli Sci Rev 39 at 43 [Macfarlane, "Dialogue or Compliance"].

84. Hogg, Thornton & Wright, *supra* note 60 at 31.

perspective, would enable the legislature to disagree with the court's interpretation of what constitutes a reasonable limit on freedom of expression.

But, say Canadian theorists of court-centric dialogue, legislatures can reverse judicial decisions by using section 33 to override the courts. We have already noted the court-centric assumptions embodied in portraying section 33 as an override of the *Charter* and the practical difficulties that ensue. At any rate, the coordinate perspective insists there should be some dialogic opportunity for legislatures to express their disagreement with the judicial interpretation of reasonable limits—and to test the judiciary's commitment to that interpretation—through legislative sequels that do not immediately invoke section 33.<sup>85</sup>

In fact, Canadian governments sometimes act as though they can engage in coordinate disagreement with the Supreme Court without immediately resorting to the notwithstanding clause in a legislative sequel that rejects the Court's ruling. While some characterize these responses as “notwithstanding-by-stealth,”<sup>86</sup> this term implies an element of deception that unfairly describes a public statute. We prefer the term “reconsideration dialogue,” which is one of the two forms of “second-look dialogue” discussed in the next section.

### III. SECOND-LOOK DIALOGUE

We borrow the name for this form of dialogue from the discussion of “second look” cases by Hogg, Thornton, and Wright.<sup>87</sup> They define second-look cases in the Canadian context as those “where the Court reviews the validity of legislation enacted to replace a law struck down in a previous *Charter* decision.”<sup>88</sup> Second-looks also occur to review the validity of legislative sequels to *Charter*-based modification of judge-made common law. Second-looks at legislative sequels to rights-based judgments occur in the United States as well, of course. Judicial second-looks are not, however, limited to strong-form regimes in which courts enjoy the invalidation mandate; they are also possible in such weak-form systems as New Zealand and the United Kingdom when legislatures choose to modify laws found to be inconsistent or incompatible with the relevant

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85. Baker, Not Quite Supreme, *supra* note 56 at 116-17.

86. James B Kelly & Matthew Hennigar, “The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review Within a Constitutional Charter of Rights” (2012) 10:1 *Int'l J Const L* 35.

87. Hogg, Thornton & Wright, *supra* note 60 at 19-24.

88. *Ibid* at 19.

rights document in a first-look case.<sup>89</sup> In other words, the opportunity for a second-look exists whenever the legislature enacts new legislation in response to a judicial interpretation challenging the rights compatibility of an existing statute or modifying judge-made common law to make it more rights compatible. The second-look question is always whether the legislative sequel is consistent with the first-look judicial interpretation—that is, whether the new law resolves the rights issues identified in the first look case, or whether it still falls short of rights compatibility. In most cases, the judiciary will apply the same level of scrutiny to the legislative sequel as it did to the original law, but Rosalind Dixon argues that legislative sequels are entitled to “ex post deference” in the second-look.<sup>90</sup>

While judicial second-looks cannot be prevented in the United States, they can be in the other regimes under consideration. In New Zealand and the United Kingdom, the legislature can simply ignore the finding or declaration of incompatibility. In those circumstances there is no legislative sequel for courts to assess in a second-look case, and the existing law remains in place and fully applicable. In Canada, including a section 33 notwithstanding clause in a legislative sequel similarly forecloses any second-look opportunity by the courts, at least for the five-year duration of the clause.

Canadian sequels that lack a section 33 notwithstanding clause—*i.e.*, virtually all legislative sequels—invite judicial second-looks in two main ways. The first and most common kind of second-look invitation occurs when it is not clear whether the legislative sequel falls within the policy leeway established by the judicial first look. For example, the legislative sequel may come from an array of alternatives that all involve less infringement of rights than the invalidated policy but that arguably still violate those rights to varying degrees. The courts do not treat the minimal impairment or “least restrictive means” standard of the *Oakes* test as a literal absolute. That is, legislatures will be given some room for maneuver and are not required to choose the truly *least* restrictive means.<sup>91</sup> But how much room for maneuver? Can the legislature choose the available policy

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89. The UK Parliament generally modifies laws declared to be incompatible with the *Human Rights Act*, thereby providing second-look opportunities; Gardbaum, *supra* note 42 at 174-76. Gardbaum reports, however, that at his time of writing there had “as yet been no ‘second-look’ case in which a court has issued a declaration with respect to legislation enacted to remedy a prior declaration,” although one case came close, and Parliament’s joint committee on human right had rendered a negative opinion in a non-judicial second-look at legislation purporting to remedy a declaration of incompatibility.

90. Rosalind Dixon, “The Supreme Court of Canada, Charter Dialogue, and Deference” (2009) 47 *Osgoode Hall LJ* 235.

91. *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 183, 35 DLR (4th) 1.

alternative that comes closest to the level of rights impairment represented by the invalidated law? If not, how much further along the impairment continuum must it go? Such questions arise when the judicial opinion is itself ambiguous and open to interpretation. If the government tests the ambiguity in a judicial ruling by choosing an option close to the invalidated one, it clearly invites a subsequent challenge alleging that the government has continued to err on the side of too much rights restriction. Such second-look invitations essentially invite the courts to clarify and refine their earlier ruling. Accordingly, we shall call such inter-institutional interaction “clarification dialogue.”

Motivated litigants will launch second-look cases even when they have little prospect of success because the legislative sequel represents implementation dialogue and thus poses few if any questions in need of clarification. Thus, Canadian litigants mounted a second-look challenge to Parliament’s narrower ban on the lifestyle advertising of tobacco even though this is precisely the kind of policy the Court had suggested in *RJR-Macdonald*. Not surprisingly, the Court turned aside the new challenge and confirmed the constitutionality of the legislative sequel.<sup>92</sup> In other cases, as we shall see, the scope for serious clarification dialogue is much greater, and controversy arises about whether the legislative sequel oversteps the bounds of legitimate policy maneuver left by the first look decision. Whether that has occurred is the question for clarification in a second-look case.

The second kind of second-look invitation occurs when a legislative sequel openly disagrees with a prevailing judicial interpretation and clearly enacts what had been declared unconstitutional. In such cases, the court, rather than being asked to *clarify* its prior interpretation, is invited to *reconsider* and perhaps reverse it. When this happens, we have the dramatic kind of “reconsideration dialogue” mentioned above—*i.e.*, legislation that clearly disagrees with the court without using the section 33 notwithstanding clause. We consider each kind of second-look dialogue in more detail below.

#### A. CLARIFICATION DIALOGUE

A telling example of clarification dialogue occurred with respect to the previously mentioned *Sauvé* litigation concerning prisoner voting rights. As noted, the Supreme Court decided in 2002 that no limits on prisoner voting could be constitutionally justified. This was the second of two prisoner voting cases

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92. *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at paras 114-15, [2007] 2 SCR 610 [*JTI-MacDonald*].

involving the same litigant, Richard Sauvé. In *Sauvé I*<sup>93</sup> the Court had struck down a blanket disqualification of prisoner voting that disenfranchised anyone who happened to be in jail on voting day, whether it was for murder or for inability to pay a minor fine. By the time Sauvé's first case reached the Supreme Court, Parliament had already modified the law to disenfranchise only prisoners serving a sentence of two or more years. Nonetheless, the Court refused to comment on the new law since it had not been part of the proceedings in the lower courts. The modified legislation—more a legislative prequel than a sequel in this instance—clearly invited a judicial second-look to clarify its constitutionality. Richard Sauvé launched the second-look litigation because his own sentence for murder far exceeded the new two-year threshold for voting disqualification. Although he had successfully challenged the blanket disqualification in his first case, he could still not vote under its legislative replacement.

*Sauvé I* had struck down the blanket voting disqualification in a unanimous but exceedingly brief decision (barely over a hundred words in total). The full extent of the substantive judgment is found in a single sentence, which indicates that the impugned law cannot be justified under section 1 of the *Charter* as a reasonable limit on the section 3 right to vote. Legislation imposing a blanket disqualification, said Justice Iacobucci on behalf of the full Court, “is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the section 1 jurisprudence of the Court.”<sup>94</sup> The clause emphasizing “the minimal impairment component” of the *Oakes* test seems to suggest that at least some kind of carefully tailored prisoner disqualification might be justified—if not the two-year sentencing threshold chosen by Parliament, then perhaps the somewhat higher thresholds used by some other countries (*e.g.*, three or five years<sup>95</sup>) or even something approaching the ten-year threshold advocated in 1991 by the Lortie Commission on Electoral Reform and Party Financing.<sup>96</sup> Or perhaps prisoner disqualifications of any kind also contravene the rational connection component of section 1's proportionality test, meaning that they must be struck down for failing to achieve the law's “pressing and substantial” objective.<sup>97</sup> The key sentence of the Court's *Sauvé I* opinion can be read both ways, and it is this ambiguity that was clarified

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93. *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438, 15 CRR (2d) [*Sauvé I*].

94. *Ibid.*

95. *Sauvé II*, *supra* note 55 at para 131.

96. Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, vol 1 (Ottawa: Communication Group, 1991) [Lortie Commission]; *Sauvé II*, *supra* note 55 at 164.

97. *Oakes*, *supra* note 74 at para 69.

in the second-look of *Sauvé II*. In fact, the way in which the Court reached its clarification highlighted the underlying ambiguity of its first-look judgment: The four-judge minority in *Sauvé II* (including three judges who had participated in *Sauvé I*) voted to uphold the two-year threshold as meeting the minimal impairment standard, while the five-judge majority (including two judges who had participated in *Sauvé I*) invalidated all possible prisoner disqualifications as failing to meet the rational connection criterion.

A more recent legislative sequel that tests judicial interpretive ambiguity in ways inviting a clarification second-look occurred with respect to the Supreme Court's 2011 decision in *Canada (Attorney General) v PHS Community Services Society*.<sup>98</sup> The case concerned Insite, Vancouver's supervised safe injection site. Opened in 2003, the facility offers drug users a place to inject their own drugs (typically heroin and cocaine) under the supervision of clinical staff. The staff provides clean needles for users, who also have access through Insite to other (non-mandatory) services such as counseling and addiction treatment. Insite is part of the "harm reduction" approach to drug addiction, which seeks to minimize the harm associated with drug use rather than change the behaviour itself.

Under section 4(1) of the *Controlled Drugs and Substances Act (CDSA)*, the possession of narcotics is prohibited. However, in order to facilitate such activities as medical research, section 56 of the *CDSA* permits the federal Minister of Health to grant exemptions. In 2003, Jean Chrétien's Liberal government granted Insite an exemption for a three-year pilot project. In September 2006, the Conservatives extended Insite's exemption until the end of 2007 and later by an additional six months, to mid-2008. Despite these extensions, it was clear that the Conservative government did not want Insite to continue. "If you remain a drug addict," Prime Minister Harper said in 2007, "I don't care how much harm you reduce, you are going to have a short and miserable life."<sup>99</sup> After its earlier extensions ran out, the Harper Government denied the application for the exemption in 2008, over the objections of the municipal and provincial governments, which strongly supported the clinic. The Court ruled that the Minister's denial was arbitrary (since it was inconsistent with the legislative purpose of the exemption) and grossly disproportional (since Insite was proven to save lives with no negative impact on public safety and public health). In addition, the judgment paid homage to the "cooperative federalism"

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98. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community*].

99. Gloria Galloway, "Harper Takes Aim at Drug Culture", *The Globe and Mail* (5 October 2007) A4.

that led to Insite's creation, emphasizing the very broad consensus of state and non-state actors working for its establishment.<sup>100</sup> The Court ordered the Minister of Health, Leona Aglukkaq, to reverse previous Minister Tony Clement's decision and grant Insite the exemption it sought.

While insisting on an exemption for Insite, the Court went out of its way to indicate that its judgment was not "an invitation for anyone who so chooses to open a facility for drug use under the banner of a 'safe injection facility'."<sup>101</sup> The Minister, it said, should continue to "strike the appropriate balance between achieving the public health and public safety goals."<sup>102</sup> In the case of the desperate community of Downtown Eastside Vancouver, the balance clearly favoured an exemption for Insite, but the "appropriate balance" might tilt against safe injection sites in other circumstances.<sup>103</sup>

The key, for the Court, was that the Minister's discretion in striking the balance be guided by the consideration of appropriate and relevant criteria; the decision should not be unconstrained and thus arbitrary. The Court listed several factors the Minister should consider: "evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition."<sup>104</sup>

The Government's legislative sequel to *PHS* took seriously (for some, much too seriously) the Court's requirement of guided, non-arbitrary discretion. Bill C-2, the "Respect for Communities Act" (or, more properly, *An Act to Amend the Controlled Drug and Substances Act*),<sup>105</sup> required future applications for an exemption to be accompanied by twenty-six supporting documents, including letters of consent from various stakeholders (including the health officials from the other two levels of government and the local police chief), a report on the "consultations held with a broad range of community groups," a financing plan, crime statistics, and an assurance that none of the key staff had a criminal record for the past ten years.

This lengthy list of required documents could be read to fulfill the Court's requirement for guided discretion. Moreover, many of the documents seem

100. *PHS Community*, *supra* note 98 at para 19.

101. *Ibid* at para 140.

102. *Ibid* at para 152.

103. *Ibid*.

104. *Ibid* at para 153.

105. Bill C-2, *An Act to Amend the Controlled Drug and Substances Act*, 2d Sess, 41st Parl [Bill C-2].

designed to ensure that the same kind of broad public and private consensus that the Court found praiseworthy with respect to Insite exists for safe-injection sites in other communities. That is not the only way to understand the new law, however. For critics, the law amounted to a subversion of the Court's decision. After all, the Court had suggested that the Minister should generally grant the exemption when "the evidence indicates that a supervised injection site will decrease the risks of death and disease, and where there is little or no negative impact on public safety."<sup>106</sup> Dr. Perry Kendall, the Provincial Health Officer of British Columbia, and two other public health experts viewed the requirements in Bill C-2 as "unnecessary and excessively onerous" and "oriented to building a case for *denying* exemptions rather than *approving* them."<sup>107</sup> For them, the "law [was] a thinly veiled attempt to end supervised injection services. Period."<sup>108</sup> The Canadian Nurses Association viewed the legislation as essentially prohibitory as well, with the requirements imposing "unnecessary and excessive barriers" contrary to the "direction given by the Supreme Court."<sup>109</sup>

Whether this legislative sequel fulfilled or violated the *PHS* judgment presented an obvious opportunity for judicial clarification in a second-look case. Had the Harper government remained in power, such a case would no doubt have been launched by those who failed to secure an exemption for a new safe injection site. That could still have occurred under the new Trudeau government (elected in 2015) if it had treated the onerous process as an escape hatch from the conflicting pressures of injection site enthusiasts and property owners irate at the prospect of such a facility in their neighbourhood. The Trudeau government was more inclined to grant exemptions, however, and in December 2017 it introduced Bill C-37 to repeal Bill C-2's criteria and replace them with five less onerous requirements.<sup>110</sup>

The Harper Government's legislative sequel to the Court's 2013 *Bedford*<sup>111</sup> decision on prostitution is likely also to trigger a clarifying judicial second-look

106. *PHS Community*, *supra* note 98 at para 152.

107. Perry Kendall, Patty Daly & John Carsley, "Vancouver's Drug Users Need Compassion, not Tories' Contempt", *Globe and Mail* (31 March 2015), online: < <http://www.theglobeandmail.com/opinion/vancouver-drug-users-need-compassion-not-tories-contempt/article23701851/>>.

108. *Ibid.*

109. Canadian Press, "Safe injection site law 'whips up' Tory base, may block new facilities", *CBC News* (23 June 2015), online: < [www.cbc.ca/m/touch/politics/story/1.3123962](http://www.cbc.ca/m/touch/politics/story/1.3123962)>.

110. Peter Zimonjic & Matthew Kupfer, "Liberals to make safe injection sites easier to open and fentanyl harder to smuggle into Canada" *CBC News* (12 December 2016), online: < [www.cbc.ca/news/politics/safe-injection-sites-goodale-philpott-1.3892687](http://www.cbc.ca/news/politics/safe-injection-sites-goodale-philpott-1.3892687)>.

111. *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

(again unless the Trudeau government repeals or revises the law first). In *Bedford*, the Court addressed *Criminal Code* provisions that outlawed activities associated with the otherwise legal activity of prostitution. In the Court's view, the provisions against "bawdy-houses" and "living off the avails"<sup>112</sup> (*i.e.*, pimping) infringed sex workers' section 7 rights to "life, liberty, and security of the person" by jeopardizing their safety.<sup>113</sup> The prohibition of "living off the avails" meant they could not hire protection, and the ban on "bawdy houses" prevented them from working in safe, off-the-street environments. There was no justification, in the Court's view, for trying to deter a perfectly legal activity by making it unsafe.

But could Parliament criminalize prostitution itself? The Court explicitly refused to address this question and declared early in its judgment that the case, on its facts, was "not about whether prostitution should be legal or not."<sup>114</sup> In its legislative sequel to *Bedford*, the Harper government exploited this unanswered question by making prostitution explicitly illegal.

Following the so-called Nordic model for criminalizing prostitution, the new *Criminal Code* provisions (sections 286.1 to 286.4), passed as Bill C-36<sup>115</sup> by the Harper government in 2014, target the buyers rather than the sellers involved in prostitution. That is, instead of prosecuting sex workers themselves, for the defensible reason that they constitute an already vulnerable population, the law criminalizes the activity of the "johns" or customers. The obtaining (rather than the provision) of sexual services is illegal regardless of where the activity takes place.<sup>116</sup> Related sections criminalize procurement<sup>117</sup> and prohibit advertisement of sexual services.<sup>118</sup> Section 286.2 specifically criminalizes prostitution for "financial or other material benefit" but, by virtue of section 286.5, sex workers are immune from prosecution if the benefit "is derived from their own sexual services" (they are also immune from prosecution of the advertising offence if it is in relation to their own sexual services). It is clear from the drafting of the *Act* that the activity of prostitution is surely criminal, even if one party—presumed to be a vulnerable person—is shielded from criminal consequences. This legislative sequel clearly invites a second-look case to clarify the Court's views on precisely the question it

112. *Criminal Code*, *supra* note 29, ss 197(1), 210, 212(1)(j), 213(1)(c).

113. *Charter*, *supra* note 16, s 7.

114. *Bedford*, *supra* note 111 at para 2.

115. Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v Bedford and to make consequential amendments to other Acts*, 2d Sess, 41st Parl, c 25 [Bill C-36].

116. *Criminal Code*, *supra* note 29, s 286.1.

117. *Ibid*, s 286.3.

118. *Ibid*, s 286.4.

left open in *Bedford*: whether, constitutionally speaking, “prostitution should be legal or not.”<sup>119</sup>

## B. RECONSIDERATION DIALOGUE

Reconsideration dialogue occurs when, in contrast to the forgoing sequences, there is no plausible room within a controlling judicial opinion for Parliament’s legislative response to that opinion. This was certainly true of the legislative sequel to *Daviault*.<sup>120</sup> *Daviault* is an example of how the development of judge-made common law—as opposed to statutory interpretation or invalidation—can generate inter-institutional dialogue under an entrenched rights document. In *Daviault*, the Supreme Court used its interpretive mandate to change a common-law rule prohibiting drunkenness as a permissible defence to the charge of sexual assault. The majority maintained that both the principles of fundamental justice enshrined in section 7 of the *Charter* and the presumption of innocence in section 11(d) required that a defence of extreme drunkenness—so extreme that it created a state of automatism—be available to someone accused of sexual assault.<sup>121</sup> A three-judge minority dissented. Parliament generally has the power to alter and even reverse judge-made common law, but in this case the common-law modification was explicitly based on constitutional provisions, thus raising the same dialogic question that is posed by the invalidation of a statute: how much room for maneuver did the ruling leave for a legislative sequel? As Roach observes, a dialogic response that worked *within* the parameters established by the *Daviault* majority’s opinion was arguably open to Parliament. The majority’s opinion “invited” Parliament to create the new crime of “causing harm while extremely intoxicated,”<sup>122</sup> which would cover *Daviault*’s situation without charging him with an offence for which he could not have formed the requisite intent. Instead of exploiting the opening plausibly left by the majority’s constitutional interpretation, Parliament, responding to public outrage, legislated the pre-*Daviault* status quo and sided with the *Daviault* dissent, thereby “suggesting that the majority . . . was wrong to interpret the Charter as it did.”<sup>123</sup> Clearly, this legislative sequel posed no issues of clarification in a second-look case. In effect, the legislature had challenged the Court to reconsider and reverse its original judgment.

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119. *Bedford*, *supra* note 111 at para 2.

120. *R v Daviault*, [1994] 3 SCR 63, [1994] SCJ No 77 [*Daviault*].

121. *Charter*, *supra* note 16, ss 7, 11(d).

122. Roach, *Supreme Court on Trial*, *supra* note 1 at 275.

123. *Ibid* at 276.

Reconsideration dialogue must be distinguished not only from clarification dialogue but also from what happens when a government appeals a lower court decision. In appealing, the government certainly disagrees with a judicial interpretation and asks for that interpretation to be reconsidered. For this reason, some scholars claim that appeals constitute another form of dialogue.<sup>124</sup> However, by appealing, the government merely asks another higher court to reconsider the interpretation of a lower court rather than expressing interpretive disagreement through new legislation based on an alternative interpretation. Indeed, such legislation is unnecessary until the appeal process has been exhausted and the Supreme Court's interpretation remains unpalatable to the government. If the government then accepts the ruling, it bows to judicial interpretive supremacy and thus to the premise of court-centric dialogue. It is only when new legislation clearly challenges the Supreme Court to reconsider its initial interpretation that we have true reconsideration dialogue.

While only a Supreme Court ruling can trigger reconsideration dialogue, rulings at any level of court can lead to clarification dialogue. We have already noted that the Supreme Court's judgment in *Sauvé I* launched a round of clarification dialogue. But, of course, legislatures do not have to wait for a Supreme Court ruling before enacting legislation that tests the interpretive ambiguity of judicial decisions. They can enact such legislation in response to lower court rulings as well. If it loses a subsequent round of lower court clarification, the legislature might try again or appeal. If it loses at a level of intermediate appeal, it might make another legislative attempt without seeking or getting a Supreme Court ruling.<sup>125</sup>

Even if the new legislation reaches the Supreme Court, enough interpretive ambiguity might remain to permit another round of clarification dialogue. Only when the legislature directly and clearly disagrees with a Supreme Court interpretation without using the section 33 notwithstanding clause,

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124. Matthew E Hennigar, "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions" (2004) 37:1 Can J Poli Sci 3.

125. Such iterative clarification dialogue at lower court levels occurred for years with respect to the question of medicinal marijuana. See *R v Parker* (2000), 49 OR (3d) 481, 188 DLR (4th) 385 (ONCA); *Hitzig v Canada* (2003), 231 DLR (4th) 104, 14 CR (6th) 1 (ONCA); *R v Long* (2007), 88 OR (3d) 146, 226 CCC (3d) 66 (ONCJ); *Sfetkopoulos v Canada (Attorney General)*, [2008] 3 FCR 399, 78 Admin LR (4th) 171 (FC); *R v Mernagh*, 2013 ONCA 67, [2013] OJ No 440 (QL) [*Mernagh*]. Paragraphs 2 through 7 of *Mernagh* describe the iterative legislative tailoring undertaken in response to judicial invalidations on section 1 grounds. Note that a legislative response might not be subject to a Supreme Court ruling if the Court does not grant leave to appeal.

as Parliament did in response to *Daviault*, does clarification dialogue give way to reconsideration dialogue.

And only *Daviault*-style reconsideration dialogue qualifies unambiguously as coordinate dialogue. Such dialogue, Roach notes, depends on the theory of “coordinate construction” because it assumes “that Parliament is entitled to act on its own interpretation of the constitution, even when it is at odds with that of the Court”<sup>126</sup>—an entitlement coordinate theorists would defend. Moreover, Roach underlines the legislature’s assumption that it can engage in such coordinate dialogue without resorting to the section 33 notwithstanding clause. In Roach’s view, “the inevitable Charter challenge” to Parliament’s “in your face” response to *Daviault* will give the Court an opportunity “to clarify what sort of dialogue from Parliament [it] is willing to accept without the use of the override.”<sup>127</sup>

Parliament engaged in a similar round of coordinate reconsideration dialogue with the Supreme Court’s majority judgment in *O’Connor*,<sup>128</sup> another instance of common-law development. The case concerned how much access defendants in sexual assault cases should have to the complainant’s counseling records. Members of the Supreme Court divided sharply (five to four) on this question, with the majority insisting on more liberal access than the dissenters considered appropriate. Here again Parliament provided the Court with a reconsideration opportunity by essentially enacting the dissenting judgment.<sup>129</sup> In accepting the minority judgment, the legislative sequel could be seen as still deferring to judicial authority, but Parliament was certainly rejecting what it considered a mistaken-but-controlling majority judgment and thereby inviting the Court to reconsider. There was no room within the controlling judgment for Parliament’s response. Critics of the *O’Connor* sequel, moreover, displayed court-centric views when they called it another “in your face” response, undertaken without recourse to section 33.<sup>130</sup>

Parliament’s legislative sequel to *R v Morales*<sup>131</sup> provided the Court with a third reconsideration opportunity. Maximo Morales had challenged a *Criminal Code* provision allowing judges to deny bail when it was “necessary in the public

126. Roach, *Supreme Court on Trial*, *supra* note 1 at 276.

127. *Ibid.*

128. *R v O’Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235 [*O’Connor*].

129. Bill C-36, *supra* note 115.

130. Roach, *Supreme Court on Trial*, *supra* note 1 at 278, 287-88; Jamie Cameron argues that the response to Mills should have been “channeled through s.33’s mechanism for overriding the Charter.” Jamie Cameron, “Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*,” 31 *Alta L Rev* (2000) 1051 at 1057 [Cameron, “Dialogue and Hierarchy”].

131. *R v Morales* [1992] 3 SCR 711, 17 CR (4th) 74 [*Morales*].

interest or for the protection or safety of the public.”<sup>132</sup> The Court’s majority invalidated this provision for infringing the *Charter*’s section 11(e) right “not to be denied reasonable bail without just cause.”<sup>133</sup> Writing for the majority, Chief Justice Lamer found the “public interest” criterion to be unconstitutionally vague. Bail could be reasonably denied in only two circumstances, argued Lamer: (1) to ensure the accused would appear for trial, and (2) to prevent the accused from committing another serious offence. Under the “standardless sweep” of the public interest provision, by contrast, a court could “order imprisonment whenever it sees fit.”<sup>134</sup>

Parliament’s legislative response to *Morales* included a clause allowing bail to be denied “in order to maintain the confidence in the administration of justice.”<sup>135</sup> As several commentators have noted, this new “confidence” provision is arguably just as vague (or “standardless”) as the public interest wording it replaced.<sup>136</sup> It was certainly intended to extend beyond Lamer’s two bail-denying circumstances, which were explicitly covered by other clauses in Parliament’s legislative sequel.<sup>137</sup> Insofar as it had enacted, without a section 33 notwithstanding clause, what had previously been judicially invalidated, Parliament had extended another reconsideration invitation to the Court.

Although the much anticipated reconsideration challenge to Parliament’s *Daviault* sequel has yet to materialize before the Supreme Court,<sup>138</sup> challenges to

132. *Criminal Code*, *supra* note 29, s 515(10)(b).

133. *Charter*, *supra* note 16, s 11(e).

134. *Morales*, *supra* note 131 at 732.

135. The new legislation, s 515(10)(c) of the *Criminal Code of Canada*, as amended in 1997, would have allowed the denial of bail for any “just cause being shown” (using the wording of the *Charter* itself) and “without limiting the generality of the foregoing, where the detention is necessary in order to maintain the confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.” *Criminal Code*, *supra* note 29, s 515(10)(c).

136. Stephen G Coughlan, “Half-Full Glasses, Pendulums and Individual Rights: The First Twenty Years of the Charter” (2003) 53 UNBLJ 299 at 310; Baker, *Not Quite Supreme*, *supra* note 56 at 31-33.

137. *Criminal Code*, *supra* note 29, s 515(10)(a) (“where the detention is necessary to ensure attendance in court in order to be dealt with according to law”) and (b) (“where the detention is necessary for the protection or safety of the public ... including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interference with the administration of justice”).

138. Dennis Baker & Rainer Knopff, “Daviault Dialogue: The Strange Journey of Canada’s Intoxication Defence” (2014) 19:1 Rev Const Stud 35 [Baker & Knopff, “Daviault Dialogue”].

its *O'Connor* and *Morales* sequels came more quickly. In *Mills*, the Court essentially accepted the legislative response to *O'Connor*, calling it legitimate “dialogue.”<sup>139</sup> In *Hall*, the Court upheld the *Morales* sequel denying bail “in order to maintain the confidence in the administration of justice.”<sup>140</sup> Hall, a suspected murderer, was denied bail because of the “highly charged aftermath of the murder” even though the bail judge had no worries that Hall would appear for trial or commit a further offence (the two kinds of bail denial that Lamer’s *Morales* judgment would allow). A sharply divided Court upheld the additional criterion,<sup>141</sup> with the four-judge minority declaring that the majority had “transformed dialogue into abdication.”<sup>142</sup> We might more generously suggest that the statutory amendment, even absent a section 33 invocation, simply provided the occasion for the Court to reconsider the constitutional interpretation it had made in *Morales*.

Together, *Mills* and *Hall* stand for the legitimacy of coordinate legislative disagreement with the Court’s constitutional interpretations without *immediate* resort to section 33. We emphasize the term “immediate” because the Court can, if it so chooses, always force governments to use section 33. Had the Court in *Mills* or *Hall* wanted to stick by its earlier precedents, it could have done so by striking down the new legislation. The Court could conceivably do the same thing if and when a clear constitutional challenge of the legislative sequel to *Daviault* ever reaches it.<sup>143</sup> Moreover, in areas where the judiciary is part of the legal enforcement regime, as it clearly is in the criminal justice area, it can back up its invalidation of a law by refusing to apply it. In such circumstances, the legislature could ultimately prevail only by resorting to section 33.

Keeping the judiciary’s strong-form trump in mind, legislation that disagrees with judicial interpretations without using section 33 is really a dialogic test of the Court’s commitment to its initial determination of the issue at hand. Such tests seem especially sensible where the Court was significantly divided on the

139. *R v Mills* [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

140. *R v Hall* [2002] 3 SCR 309, 217 DLR (4th) 536 [*Hall*].

141. While the Court upheld the “necessary in order to maintain the confidence in the administration of justice” language, it invalidated the other elements of s 515(10)(c), including the constitutional language of “just cause”; *Ibid*. An analysis of the Court’s reasoning can be found by Dennis Baker, who argues that the surviving portion of the section achieved the “primary aim” of legislators and “succeeded in modifying a constitutional ruling of the Court.” Baker, *Not Quite Supreme*, *supra* note 56 at 35.

142. *Hall*, *supra* note 140 at para 127.

143. Baker & Knopff explain why explicit constitutional second-looks have thus far stalled in the lower courts, but argue that the Supreme Court has taken “a strategically camouflaged” second-look in a statutory-interpretation case; “*Daviault* Dialogue,” *supra* note 138 at 48. See also *R v Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 SCR 575.

interpretive issue.<sup>144</sup> From the coordinate perspective, in other words, legislative disagreements that do not use section 33 are a respectable intermediate stage of dialogue, asking no more than the Court reconsider. Proponents of court-centric dialogue disagree, often arguing that the legislature should have the courage of its convictions by explicitly overriding the Court.<sup>145</sup> A plausible coordinate reply is that, facing a reconsideration test, the Court can express the courage of *its* convictions and invalidate the new legislation. From the coordinate perspective, if the convictions of the (often divided) Court do not withstand the second-look test, this is a perfectly legitimate consequence of the “reasonable disagreement” that tends to characterize constitutional controversies. Given that the legislative sequel is a current expression of democratic preferences with the right consciously in mind (something that could not be guaranteed with respect to the original invalidated statute), it may sometimes be advisable in the context of a reasonable disagreement for the Court to exercise the *ex post* deference that Dixon suggests—but that is, at this stage of the dialogue, ultimately a question for the Court.

The claim by Hogg, Thornton, and Wright that coordinate dialogue “cannot exist” in Canada because legislatures do not share interpretive authority with the courts is mistaken.<sup>146</sup> Constitutional supremacy need not mean judicial interpretive supremacy; in fact, the text of the Canadian Constitution is “silent on the issue of which institution is charged with the interpretation of its provisions.”<sup>147</sup> We have seen legislatures express their disagreement with the Supreme Court through ordinary legislation, unprotected by section 33. And we have seen the Court change its mind and accept the new legislation, as in *Mills* and *Hall*. Hogg, Thornton, and Wright’s position is stronger if it is read as a claim about general trends. The court-centric view they defend is certainly predominant in Canadian constitutional discourse,<sup>148</sup> and *Mills* and *Hall* remain the only (and much criticized) instances in which the Court has clearly acquiesced in coordinate legislative responses. This is why the area of coordinate dialogue in Figure 2 narrows substantially as it moves into the region of strong-form judicial review. That it is not completely foreclosed, however, remains significant. Strong-form systems tilt toward court-centric dialogue but do not require it.

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144. Baker & Knopff, “Minority Retort,” *supra* note 57.

145. Roach *Supreme Court on Trial*, *supra* note 1 at 276-78; Cameron, “Dialogue and Hierarchy,” *supra* note 130 at 1062-63; Hogg, Thornton & Wright, “Dialogue Revisited,” *supra* note 60 at 40 (“the legislature could have had the last word if the political will to restore the old law had been stronger”).

146. Hogg, Thornton & Wright, *supra* note 60 at 31.

147. Baker, *Not Quite Supreme*, *supra* note 56 at 39.

148. *Ibid* at 39-52.

## IV. CONCLUSION

The international debate about dialogue theory is conducted partly in terms of the distinction between dialogue that assumes judicial interpretive supremacy (court-centric dialogue) and dialogue based on a legitimate interpretive role for the other branches of government (coordinate dialogue). In strong-form systems of judicial review, court-centric dialogue tends to predominate, though coordinate dialogue emerges from time to time.<sup>149</sup> Similarly, strong-form assumptions and practices can emerge within a weak-form institutional design.

From the coordinate-dialogue perspective, the court-centric version is frequently described as a monologue in which the courts speak and the political branches follow orders, much as a waiter delivers an ordered sandwich. To the friends of coordinate interpretation, such implementation of judicial instructions cannot be considered dialogue in any genuine sense. But dialogue between courts and the other branches of government comes in many shapes and sizes, and the category of court-centric dialogue is not exhausted by the simple implementation of judicial instructions. Often it remains unclear precisely what those instructions require. For example, when the Supreme Court in *Bedford* explicitly left open the question of whether prostitution could be directly criminalized, did that mean Parliament could constitutionally enact the Nordic model of criminalization, or was that contrary to the spirit of the *Bedford* ruling? In such situations, the second-look dialogue prompted by a legislative sequel is better described in terms of clarification than implementation. The line between these two versions of court-centric dialogue may not always be bright (even apparently clear judicial instructions often leave at least *some* room for interpretation); still, it represents a meaningful and useful distinction. Although we have emphasized Canadian examples of clarification dialogue, legislative sequels to findings or declarations of incompatibility (or to rights-based common-law development) may offer clarification opportunities to courts in the weaker-form contexts of the United Kingdom, New Zealand, and the Australian sub-national jurisdictions with statutory bills of rights. The concept of clarification dialogue, in other words, provides an interesting avenue for further research in weak-form contexts.

Clarification dialogue remains court-centric because the non-judicial participants in such interaction exploit the ambiguities, or unanswered questions, within judicial interpretations rather than expressing open disagreement with

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149. In one empirical account, only 17.4 percent of SCC invalidations from 1982 to 2009 began a “genuine dialogue” (a standard that is broader than our reconsideration dialogue). Macfarlane, “Dialogue or Compliance,” *supra* note 83 at 47.

those interpretations. Willingness to engage in open interpretive disagreement is the hallmark of coordinate dialogue. Although interpretive disagreement is a necessary feature of coordinate dialogue, it is not sufficient. Government can express interpretive disagreement with *a particular court* by appealing to a higher one. This form of dialogue remains court-centric inasmuch as it does not challenge the interpretive supremacy of the judicial hierarchy as a whole. Only when the more political branches of government clearly reject a high-court judicial interpretation do we arrive at true coordinate dialogue.

In weak-form systems without an invalidation mandate, coordinate disagreement with a high-court decision takes two main forms. First, if the court has relied on its interpretive mandate to undertake rights-based modifications of common law or an impugned statute, legislatures can enact a new statute clearly implementing a policy option rejected by the court. Perhaps such legislation could induce the court's reconsideration in a second-look case, but it is also possible that the court would now find the statute incompatible with its first-look understanding of protected rights. Second, governments and legislatures can express coordinate disagreement by ignoring an incompatibility finding or declaration (whether issued in a first-look or second-look case). This leaves the challenged statute fully in place. A rich classification of possible interactions exists to illuminate analysis of coordinate dialogue in such weak-form jurisdictions as New Zealand and the United Kingdom.

In stronger-form Canada, legislatures can also enact statutes expressing coordinate disagreement with *Charter*-based statutory interpretation or common-law development. They cannot, however, express coordinate disagreement by ignoring the judicial invalidation of legislation; only a contrary statute will suffice. Whether Canadian legislation disagrees with common-law development, statutory interpretation, or the invalidation of a statute, the issue that divides the court-centric and coordinate perspectives is whether a section 33 notwithstanding clause must be included in the first statutory attempt to register disagreement. Coordinate theorists might be tempted to answer this question in the affirmative were it not for the fact that the notwithstanding clause is so strongly understood as overriding *Charter* rights. To disagree about the proper interpretation of a right is quite different from overriding that right. It is precisely because of the dominance of the override metaphor in Canada that section 33 has declined as a realistic option for expressing interpretive disagreement in Canada. This decline, moreover, reflects Canada's "escalation"<sup>150</sup> into a strong-form system of judicial review.

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150. Tushnet, "New Forms of Judicial Review," *supra* note 6 at 824.

And yet, Canadian legislatures sometimes express clear disagreement with a judicial interpretation through legislation that does not include a section 33 notwithstanding clause. In such cases—derided by proponents of judicial interpretive supremacy as “in your face”<sup>151</sup> challenges to judicial authority that *should* include a section 33 override—the legislature essentially invites the Court to reconsider and modify its original interpretation, as Parliament did in its legislative responses to *Daviault*, *O’Connor*, and *Morales*. It is important to note that the outcome of the Court’s reconsideration in such cases may well reconfirm the original interpretation and holding, in which case the new law would be struck down and the legislature could re-establish its preference only through a section 33 notwithstanding clause. If we are right about the immense and growing difficulty of using that clause, the Court ultimately retains the upper hand in the institutional dialogue. The real issue between the court-centric and coordinate perspectives in the Canadian context concerns the legitimacy of an intermediate reconsideration phase in some second-look cases. Time will tell whether this coordinate-interpretation vestige of weak-form design survives Canada’s escalation toward a court-centric system of strong-form judicial review.

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151. Roach, *Supreme Court on Trial*, *supra* note 1 at 276.