DIALOGUE THEORY: DESCRIPTIVE, NORMATIVE OR CAUSAL?

Jean-Christophe Bédard-Rubin*

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The theory of the dialogue between courts and legislatures has been very successful since its first formulation in the Canadian context by Hogg & Bushell in 1997. Picked up both by judges and academics in Canada and elsewhere, it has become one of the main defining features of the Canadian model of judicial review. The literature is sometimes unclear, however, as to what kind of theory dialogue theory actually is. Is it a causal theory and, if so, is dialogue a cause or a consequence? And what is it a cause (or consequence) of? What kinds of empirical claims does it take for granted? Is it simply a descriptive theory? All of these questions are often entangled with one another. This paper reviews the Canadian literature on constitutional dialogue and critically assesses its success from a normative, descriptive and causal perspective. The paper then goes on to discuss the specific problems associated with the causal version of the dialogue theory. Then, the paper critically examines the empirical evidence for dialogues causal claims regarding public support for the judiciary from a comparative perspective and discusses the failure of dialogue theory to engage with questions of mega-constitutionalism. Finally, the paper provides potential alternative explanations for the relative success and stability of the Canadian model of judicial review that could be used as rival or complementary hypotheses to the causal theory of constitutional dialogue.

Summary

* LL.B., LL.M., S.J.D. Candidate, Faculty of Law, University of Toronto. Contact: john.bedardrubin@mail.utoronto.ca

I. INTRODUCTION

The dialogue theory of judicial review has become an industry of its own in the Canadian and comparative constitutional literature. Famously advocated by Peter Hogg, Alison Bushel (Hogg & Bushell, 1998) and Kent Roach (Roach, 2001) at the turn of the century in the Canadian context, its origins can be traced back to earlier defenders of judicial review in the United States (Bickel, 1962;Perry 1982; Fisher, 1988; Friedman, 1993)[1]. As Alison L. Young puts it in a recent book on dialogic constitutionalism, "[a]lthough dialogue had previously been referred to in American scholarship in political science, and in the legal literature, its gain in popularity appears to have been triggered by the seminal article of Hogg and Bushell (now Thornton) in relation to the Canadian Charter of Fundamental Rights and Freedoms" (Young, 2017). Thus, despite its American pedigree, the dialogue theory of judicial review has now acquired a strong institutional dimension that has been used to describe the relationship between courts and legislatures in other domestic contexts (e.g. Gardbaum, 2013; Yen, 2015; Stephenson, 2016, Young 2017). It is closely associated with "weak-form judicial review" (Tushnet, 2002; Tushnet, 2008) or the "commonwealth model of constitutionalism" (Gardbaum, 2013). Even if the two notions are distinct from dialogue theory (Knopff *et al.*, 2017), they all form attempts to understand and flesh out a third way out of the alternative between judicial and legislative supremacy that uses institutional mechanisms. Perhaps because of its conceptual fuzziness or because its participation in a broader "deliberative turn" in democratic theory, the idea of dialogue as justification for constitutional judicial review has become a major theme of contemporary constitutional scholarship.

This paper briefly presents the descriptive account and normative arguments put forth by different strands of dialogue theories (**II**). It then presents the more resolutely causal claims explicit and implicit in different versions of dialogue theory and zooms in on its specifically Canadian version (**III**). The paper then moves on to provide two criticisms of Canadian dialogue. First, by using data from the World Values Survey, the paper shows that the implicit counter-factual claim about judicial supremacy is not supported by comparative evidence (**IV**). Second, the paper criticizes dialogue theory for its failure to address the challenge of the institutionalization of the constitutional bargain by focusing on the one hand on Quebec's reaction to language rights judicial rulings and on the other hand on the turmoil that have ensued high profile cases such as the *Multani* decision (**V**). The paper concludes by providing alternative explanations for the relative success of the Canadian model of judicial review in light of the experience of other jurisdictions by focusing on the impact of court structures on entry barriers, timing, and geographical reach of judicial decisions and the strategic incentives structure created by the Canadian electoral system and the notwithstanding mechanism (**VI**).

The general claim of the paper is that dialogue theory fails to provide a satisfactory causal explanation for the relative success of the Canadian model of judicial review. Other factors that have nothing to do with the institutional forms of constitutional judicial review might be more important, such as the generational shift in Western countries towards post-materialist values (Inglehart, 1989; Nevitte 1997) or a general civic culture congenial to constitutionalism and the protection of minorities (Almond & Verba 1962) that pre-date the adoption of the *Canadian Charter of Rights and Freedoms*. Even we grant the limited claim that dialogue provides a somewhat satisfactory institutional explanation for the success of Canadian courts in adjudicating post-materialist values, other aspects of the Canadian experience suggest that we should be careful before praising the stability of the Canadian constitutional model for other functions such as fostering the institutionalization of the

[1] For a comprehensive literature review of different forms of "dialogue theories", see Meuwese & Snirel, 2013.

constitutional bargain or promoting militant democracy. To address these limitations, dialogue theory should broaden its scope and take into consideration the impact of other institutional features and address more explicitly the possible impact of cultural factors on constitutional stability more generally.

II. NORMATIVE MOTIVATION OF DIALOGUE THEORY

The idea of constitutional dialogue has been used both descriptively to provide a metaphor for a host of interactions between courts and elected branches of the state and prescriptively to justify rights-based constitutional judicial review when it occurs through specific institutional arrangements. In addition to these descriptive and normative dimensions, dialogical constitutionalism rests in many respects on implicit institutionally-driven causal claims about the working of specific constitutional systems. In this section I briefly present the descriptive and normative parts of constitutional dialogue theory before moving, in the next section, to a critical assessment of its implicit causal claims.

Dialogue theory can be summarized as an attempt to find a middle ground between judicial supremacy about constitutional interpretation and parliamentary sovereignty. From a normative perspective, it seeks to provide a model that balances two conflicting goods and ideas of justice, i.e. the idea of political self-government and its instantiation through majoritarian mechanisms meant to approximate the expression of the "general will" or the "will of the people" and, on the other hand, the idea of constitutionalism, i.e. the idea that political power must be exercised in accordance with pre-established rules. However, some aspects of democratic constitutionalism seem less problematic from a normative perspective than others. For example, when legal sovereignty is divided between different levels of government as is the case in federal systems, courts are asked to police the boundaries of the constitutional division of powers to insure that both levels of government have their respective policy space to maneuver. This challenge is normatively less problematic (contra, see Stone, 2008) since it does not reduce the people's ability to govern itself but rather determines though which institutional mechanisms this self-government must occur (federated or central entity) (Goldsworthy, 2010). By contrast, the enforcement of constitutional rights and freedoms reduces the policy space in which parliamentary majorities can maneuver and withdraws certain issues from collective self-government.

Dialogue theories are supposed to transcend this dialectical alternative and to "embod[y] neither a failure to entrench rights absolutely nor a trap door out of rights protection. Instead, it marks a dialectic. But it is a special sort of compromise for it does not merely juxtapose contradictory elements of opposing positions. Instead, it melds the best of the contending views into something new and better"(Weinrib 1990, 564).

The defense of constitutional dialogue rests mostly on a normative reconstruction of actual interactions occurring between courts and elected branches (Manfredi & Kelly, 1999). From a descriptive perspective, dialogists argue that the interaction between elected institutions and courts is much more complicated than a simple respect paid to their "oracular legalism" by the elected branches. Instead, courts and legislatures exchange reasons and react to one another's considerations about the merits and problems associated with specific legislative schemes that infringe on individual rights and freedoms. First, under specific rights regime and methodologies such as proportionality analysis, the Government is asked to present principled arguments to explain the reasons behind the specific legislative scheme that it has adopted and explain why there are no less restrictive alternatives to fulfill its policy objectives. Second, in some instances elected branches can override court decisions by re-enacting a piece of legislation "notwithstanding" constitutional rights and thus have the final

word on public policies. Third, courts generally can provide deferential remedies, avoid simple dichotomous decisions and thus allow legislatures to react and craft their own remedies that takes into account the complexities of rights issues.

For dialogue theorists, all of these elements have positive normative valence. The reason-giving aspect of proportionality requires governments to justify to the citizens most affected by its legislative scheme and provide an explanation as to why it was impossible to avoid infringing their rights and that it was done as marginally as possible. This form of dialogue provides a deliberative justification for judicial review (Tremblay, 2003). Moreover, giving elected branches the last word with the possibility of using a legislative override provides ultimate accountability for policy outcomes in the elected branch instead of unelected judges. In the Canadian context, the legislative override, rather than foreclosing political reactions to judicial rulings, simply displaces the benefits of the status quo in favour of rights claimants (Roach 2001). Finally, remedial deference allows the court to avoid crafting remedies for cases that are complex and that require consideration of multiple and conflicting interests for which legislatures are better equipped and more likely to reach balanced decisions (Horowitz, 1977; Fuller, 1978; Hiebert, 2002).

III. DIALOGUE'S CAUSAL CLAIMS

Most dialogues theories make at least implicit causal claims. Some are arguably trivial – say, that judges reflect the cultural context and values of the society in which they operate – but others are of crucial importance despite the fact that they are often left unspecified (Elster, 1989). For example, in his book on the history of the US Supreme Court, Barry Friedman claims that the Supreme Court of the United States has followed the "well-considered judgement" of the American people by adapting by trial and error throughout American history. After periods of expansion and shrinkage, the Court has acquired a central place in the American political system (Friedman, 2009). Through which mechanisms this has happened is left unspecified (Solum, 2010).

The kind of causal claims that are central to most dialogue theories, Friedman's included, and which makes it normatively appealing is that dialogic constitutional review promotes vigorous judicial decisions while preserving political stability and avoiding political backlash and constitutional crisis. This causal claim about the impact of dialogue theory on political stability and democratic legitimacy can take at least three forms: the ideational, the socio-cultural and the institutional.

Under the ideational model, the judiciary is conceptualized as a deliberative partner in the on-going dialogue about human rights. Their special input makes the whole democratic discussion more enlightened (Bickel, 1962; Perry 1982, Mendes, 2014). Judges are seen as "the forum of principle" (Dworkin, 1981) in the whole policy-making process and, ultimately, judicial decisions provide a focal point for the convergence of public opinion after an informed public "dialogue" about the merits of the decision has taken place in which both partners provide complementary viewpoints. Despite the fact that this claim is difficult to measure empirically, complaints about the spread of "rights-talk" in politics (Glendon 1991, MacFarlane 2013), the "judicialization of politics" (Mandel 1994, Kelly 2006) and the increasing importance of legislative overrides in electoral strategies (Weinrib, 2016) seem to lend credit to this thesis. It seems indeed that constitutional rights "raise awareness" *ex ante* in the political process and that politicians do indeed adapt their policies, at least to a certain extent, to their constitutional rights regime (Tushnet, 1995; Kelly, 2006). Instead of seeing political elites and interest groups as having fixed policy preferences, ideational dialogists think that the engagement with reasoned judicial decisions changes the preferences of

political groups, thus reducing the possible conflict between otherwise divergent political interests or between dominant political interests and judicial decisions.

By contrast, what I call socio-cultural dialogists – and sometimes loosely labelled "popular" constitutionalists - see judges as naturally following the dominant elite (Powe, 2009; Friedman, 2009; McCloskey, 1977; Dahl, 1957). This can occur either because of acculturation (Post, 2001; Siegel, 2006; Morton & Knopff, 2001), elite control of judicial institutions through such mechanisms as appointment procedures (Dahl 1954, Funston 1975, Solum, 2010; Gerhardt, 2006; Farganis & Wedeking, 2014) or simply because judges are themselves part of the dominant national ruling coalition (Hirschl, 2004; Powe, 2009). Similar to the ideational version, the key to judicial legitimacy and stability under the socio-cultural dialogue is that there will be ultimately convergence of popular opinion or elite opinion and judicial outcomes. Unlike the ideational version of the dialogue theory, however, socio-cultural dialogists do not rely on the effect of judicialization to alter pre-existing policy preferences. If there is convergence between judicial rulings and political forces, it is not because political forces change their preferences in response to judicial decisions but rather because extra-judicial forces can alter the content of those decisions. Given that judges political elites ultimately get the kind of judicial outcomes that they want, it is not surprising to see in the arguments of many socio-cultural (popular) dialogists a strong scepticism towards the merits of constitutional rights-based judicial review as a counter-majoritarian force.

Finally, institutional dialogists argue that there are institutional features that explain the dialogue between courts and legislature. Unlike the ideational and the socio-cultural models of dialogue, institutional dialogists do not think that dialogue means convergence between judicial decisions and the interest of political groups by changing neither the former nor the latter. Instead, a series of institutional mechanisms provides for some disagreement to remain between the different actors despite leaving enough room for each of them to exercise their constitutional function. These institutional mechanisms can include the proportionality analysis, Parliamentarianism, remedial humility and flexibility and the legislative override (Roach, 2001; Roach, 2007; Roach, 2016; Hogg & Bushell, 1997; Hogg, Bushell & Thornton, 2007). According to institutional dialogists, resolution of political disputes does not need to mean convergence on outcomes that are satisfactory for judicial and political elites alike. Rather, institutional dialogue allows judges and elected representatives to reach an equilibrium instead of a consensus because the political game is structured in such a way as to provide multiple equilibriums. For current purposes, I will focus on this latter version of dialogue. Institutional dialogists build in part on the work of ideational dialogists in that they see the potential for judicial decisions to alter political preferences but they argue that the legitimacy of courts is maintained because they cannot act as veto players and they leave open possibilities for political groups to react to judicial decisions when the reasoned judicial decision does not succeed in changing policy preferences. As Kent Roach puts it, for dialogue theorists "[t]he answer to reasonable disagreement about Charter decisions is not to prevent the Charter decision from being made, to pack the Court, or to allow Parliament or the executive to ignore the decision" (Roach 2016 374). In other words, a dialogue framework diffuses the tension inherent in constitutional rights-based judicial review and avoids stand-offs between courts and elected officials like those that have punctuated American history and that have now become part of the recurring practices of unyielding politicians worldwide.

In the specific Canadian context, there are good reasons to see the Canadian legal system as being indeed successful: public confidence in the judiciary is among the highest in the world (Garoupa & Ginsburg 2015) and remained high despite the decline of public support for other political institutions (Hausegger & Riddell 2004), the Supreme Court of Canada is one of the

most respected and cited court in the world (Law & Versteeg 2013) and, perhaps more importantly, the judiciary has not been victim of attacks by elected branches like elsewhere, for example in Latin America (Helmke 2015) or, more recently, in Eastern Europe (Scheppele 2018), despite playing an ever increasingly important policy-making role.

Taking these elements into consideration, the reconstruction of the full causal claim of dialogue theory, including its implicit counter-factual claim, can be stated thus: liberal constitutionalism, in its strong-form judicial review version, creates constitutional instability because it frustrates majorities in giving the power to unelected judges that have the mandate to make difficult political decisions for the whole polity. This frustration causes attacks on the judiciary that can take many forms such as jurisdiction stripping, court packing, constitutional amendment or outright disrespect of judicial decisions. These forms of retaliation diminish the legitimacy of the courts. Thus, so the argument goes, weak-form judicial review enables judges to perform their role while providing for an escape route when the majority of the population disagrees with them, thus reducing the likelihood of destabilizing confrontations. Dialogic review is thus the best way to maximize *both* (1) the enforcement of constitutional provisions, especially the rights of minorities that the majority has no incentive to protect and (2) the legitimacy of the Court that performs this function, thus reducing the risks that the Court becomes under attack by the elected branches.

There are many empirical assumptions about both of these claims. For my purpose, leaving aside the question of the optimal protection of minority rights, I will focus on the second one. First, it assumes that the legitimacy of the judiciary as a whole is driven first and foremost by the public perception of its apex court, which, as recurrent controversies emerging from high-profile criminal cases shows, is far from obvious. Second, it assumes that the legitimacy of the judiciary is less damaged when the Supreme Court releases an unpopular ruling in an institutional setting where it can be overridden than in an institutional setting where it cannot. Third, it assumes that in a dialogical institutional setting the backlash against an unpopular ruling is more likely to be fought in the political arena and to be framed as conflict between different answers to the ruling than whether or not to respect the judicial decision. I will come back to this argument in the last section when discussing the override mechanism. Finally, the combination of all the above mentioned elements diminishes the risks that the Apex Court undergoes an attack, i.e. either a "court-packing" plan, a stripping of jurisdiction, a refusal to appoint new justices to increase its workload, a cut the in overall budget of the Court and the like.

The most important uncertainty in this reconstructed version is the direction of the causal arrow between public support and attacks on the judiciary. As Helmke finds out in her writings on Latin America, low public support for the judiciary increases the likelihood that an attack will be carried out against the apex court (Helmke, 2010) but, at the same time, such an attack itself diminishes public support for the Court while public support for the executive or the legislative remains intact. This pattern in turn creates an incentive for politicians to attack the judiciary in the first place, especially when it is unpopular (Helmke, 2015). Even if there is some truth to the implicit causal assumption of dialogue theorists that high levels of confidence in the judiciary protects courts against political retaliation, how dialogic constitutionalism achieves high levels of public support in the first place is left unexplained. I now turn more specifically to this question.

IV. EXPLAINING PUBLIC SUPPORT FOR DIALOGIC COURTS

The first question that dialogue theories undergo is whether or not public support for the judicial system in charge of upholding the new constitutional order – in the Canadian case, the

Constitution Act 1982 - was already present before its adoption. One way to assess the impact of a new constitutional order is to see whether different jurisdictions that have similar models of rights protection experienced an increase in their levels of trust in the justice system after the transition. For example, when comparing Canada, New Zealand and the United Kingdom, other models of "weak-form" or dialogic judicial review that have adopted bills of rights in 1990 and 1998 respectively[2], one is forced to realize that there has been very little variation in levels of trust for the justice system as shown in the World Values Survey (WVS) in all three countries between 1981 and today except for a slight decrease in New Zealand in the 2010-2014 period. On the one hand, not only did the level of public confidence in the judiciary in all three countries not increase but, moreover, it remained stable before and after their transition to a dialogic model of judicial review. It seems more likely that these levels of trust in the justice system reflect broader trends that have little to do with domestic institutions. For example, other developed countries that do not have judicial review such as Norway and the Netherlands had similar or higher levels of trust in their justice system during the same period. Thus, at least when contrasted with other constitutional models, it seems highly implausible that dialogic constitutionalism *caused* public support for the judicial system even if it might have, more narrowly, prevented its decline. However, these comparative examples seem to suggest that other factors than the specific rights-model might come into play in the success of a new constitutional order entrenching rights and constitutional rights-based judicial review.

TABLE 1: LEVELS OF TRUST IN THE JUSTICE SYSTEM, ("A GREAT DEAL" AND "QUITE A LOT") WORLD VALUES SURVEY, 1981-2014

	1981-1984	**1989-1993**	**1994-1998**	**1999-2004**	**2005-2009**	**2010-2014**
CANADA	14% 49%	NA	10% 44%	NA	16% 49%	NA
UNITED KINGDOM	20% 46%	13% 40%	NA	10% 38%	13% 40%	NA
NEW ZEALAND	NA	NA	5% 39%	NA	5% 39%	17% 47%
SOUTH AFRICA	25% 38%	27% 43%	23% 35%	NA	23% 41%	16% 33%
NETHERLANDS	11%	10%	NA	5%	4%	10%

[2] For present purposes, I gloss over important differences between the three rights models.

	52%	53%		43%	46%	52%
NORWAY	29% 55%	15% 59%	10% 60%	NA	18% 63%	NA

The counter-argument that dialogue theorists could make is that even if constitutional dialogue did not create public support for the judiciary in general, at least it prevented it from declining after courts acquired a much more controversial and policy-oriented role in the constitutional architecture. This second modified version is arguably much weaker than the bolder claim that dialogical constitutionalism *creates* public support for courts. It is also very important in that it pre-supposes that dialogic judicial review could work only in settings where there is public support in the justice system in the first place and that dialogic judicial review might not be suited for newer democracies (contra, Gardbaum, 2015). However, it is again based on the counter-factual causal assumption that courts generally suffer from being endowed with the power of rights-based judicial review. While plausible, this assumption does not seem more supported by the data either. The contrast with another Westminster democracy that praised until recently the values of parliamentary supremacy is revealing. South Africa adopted a stronger version of a constitutional bill of rights in its Constitution of 1996. Despite a small decline in the 2010-2014 wave of the WVS, there was no significant variation in levels of trust in the judiciary before and after the transition from Apartheid. Entrusting the judges with the power of judicial review was part of a broader cultural shift and an example of transitional constitutionalism.

Finally, it seems also that levels of public support for the judicial system were already high before the adoption of the *Charter* in the 1981-1984 wave of the WVS and that Patriation and the entrenchment of a dialogic model of judicial review can hardly explain a phenomenon that existed already beforehand (Nevitte & Brodie, 1992). In fact, as Hirschl points out, the transfer of the duty of rights implementation to the judiciary in a mature democracy is highly facilitated by "the existence of widespread public trust in the political impartiality on the judiciary" in the first place (Hirschl 2004, 68). In a slightly different vein, as Epp shows, "the development of a vibrant support structure for legal mobilization helps to explain the origins of the Canadian rights revolution in the seventies, the passage and nature of the Charter itself, and the strength of the rights revolution in the eighties" (Epp, 1998 171). Bridging Epp's and Hirschl's analysis of the strategic adoption of the Charter, F.L. Morton writes "the Charter itself is not so much the cause of the revolution as the means through which it is carried out" (Morton 1991 181). There seems thus to have been already before the adoption of the Charter a strong support for constitutional rights and their implementation through judicial review among certain specific groups of the political elite.

In light of these studies, it is difficult to disentangle the impact of constitutional mechanisms from a more general cultural shift towards rights-friendly values and the development of political networks and organizations that have been crucial in developing the policy potential latent in the constitutionalization of rights and freedoms. This being said, the adjudication of postmaterialist values can only explain part of the stability of the constitutional order. It can require much more of the courts which is what I now turn to.

V. ADOPTING AND MAINTAINING A CONSTITUTIONAL BARGAIN: THE PROBLEM OF INSTITUTIONALIZATION

Another weakness of dialogue theory has to do with what I call the problem of the institutionalization of the constitutional bargain. Again here, like in the previous section, constitutional dialogism can plausibly be said to *maintain* adherence to a constitutional order already seen as legitimate. It is a different matter when one wants to understand the adherence to an altogether new constitutional bargain, especially from those that have been unable to entrench their political preferences in the constitution itself (Russell, 1992). What I mean by this is to understand how constitutional "losers" move from seeing themselves as pre-constitutional entities bargaining and arriving at an agreement about the ways in which political power is exercised to a political group *constituted* by the constitution which provides them with the legal resources for their claims to legal validity (Kahn 2002).

For a starter, the context in which the dialogue metaphor emerged in Canada is revealing of a deeper change in Canadian constitutional studies. The dialogue metaphor emerged more than fifteen years after the adoption of the Charter and after more than two decades of constitutional scholarship consumed by the existential question of the future of the Canadian federation (Bernatchez, 2005). While the complete dislocation of dialogue theorists from the broader discussion about the "Canadian model" in constitutional thought and political theory (Choudhry, 2007) is somewhat disconcerting, upon closer examination it seems that this oblivion was necessary for the dialogue metaphor to make sense, at least causally speaking. A simple counterfactual scenario brings doubt as to the institutionalizing power of the Canadian *Charter*: had the 1995 referendum ended with a majority in favour of Quebec's separation, would the defenders of the dialogic rights model entrenched in the *Charter* be as certain about its inherent merits? Healthy scepticism towards the institutionalizing power of the Charter can take one of two forms: either one can surmise that the Charter did not manage to keep the country together until it got to the very edge of the precipice or one can argue that the Charter actually *brought the country there*. While the former is easier to defend, despite it being rooted in perhaps too strong a belief in the power of human rights instruments, the latter is practically impossible to demonstrate. This being said, it seems obvious that the impetus for the second 1995 referendum came at least in part from the failure to institutionalize the constitutional bargain and to "bring Quebec back in" during the "Quebec round" (Cairns 1995) and the increasing perception in Quebec that the Canadian Charter was an iron cage. The *Ford* decision is the most vivid example of the failure of dialogue theorists to engage seriously with the question of institutionalization.

When discussing the *Ford* decision, dialogue theorists point correctly, it seems to me, to the ultimate *legal* conclusion of the struggle to support their claims about dialogue between courts and legislatures. In *Ford*, the Supreme Court recognized Quebec's constitutional right to make use of a general notwithstanding clause but nonetheless invalidated part of Quebec's language legislation, Bill 101. The Bourassa Government decided to re-enact the legislation notwithstanding the Supreme Court decision and was re-elected a couple of months later. Five years later, after the initial override had expired and the situation had attracted the attention of the UN Human Rights Committee, the Bourassa Government decided not to renew the notwithstanding and ended up adopting a statutory scheme very close in substance to the kind of compromise that the Supreme Court had suggested, namely allowing public signs in both French and English provided that French was pre-dominant. However, the broader *constitutional* impact of the decision was at least as important as its legal resolution. Many commentators (Monahan, 1992, Cairns, 1995, Russell 1992) have pointed out that the use of the notwithstanding clause by Quebec right in the middle of the process of ratification of the

Meech Lake Accord at the moment when eight provinces and the House of Commons had already ratified it was instrumental in prompting Canadians from the other provinces to think of the Accord as one-sided and offering little protection for the Anglophones in Quebec. The Accord ultimately failed to be ratified by the required provinces and Quebec, still opposing the new post-1982 constitutional bargain, did not "reintegrate" the Constitution. This failure ultimately led to the election of the *Parti Québécois* in 1994 and the 1995 Referendum on Quebec Secession that ended by a margin of little more than one percent. Thus seen, even if Roach is right to point out that the dialogue between Quebec and the Supreme Court ultimately provided some protection for the rights of Quebec's Anglophone minority, it simply cannot account for the fact that it also endangered the constitutional bargain that it was supposed to stabilize. To summarize, when looked from the perspective of the protection of the rights of minorities and the adjudication of post-materialist values, dialogue did indeed "work". However, when looked from the perspective of its capacity to secure the viability of the constitutional bargain, especially for those who were its "losers" (Russell, 1992), the *Ford* decision is much more a testament to the failure of dialogue than its success. Judicialization of these sensitive constitutional issues "rather than removing [them] from the political realm, returned them to political contention recast in less compromising and more strident terms-making consensual resolution of the issues more difficult than before." (Russell 1994, 173).

Likewise, the failure on the part of dialogue theorists to address the backlash in Quebec in the last decade against Supreme Court decisions such as *Multani* that were seen by some as endangering Quebec's distinct collective identity and that led to the Bouchard-Taylor Commission is also a little disconcerting (Bouchard & Taylor, 2008). The same is ture for dialogists' failure to engage with the Commission's conclusion that "a sound harmonization practices policy must reduce as much as possible the judicialization of interpersonal relations" (Bouchard & Taylor 2008, 167). In fact, dialogue theory offers little in terms of understanding the reception, reaction and general relation to the Canadian Charter in Quebec. This simply shows that dialogue theory might provide a normatively or even causally sound theory when it comes to understanding the cultivation of public support for courts that must adjudicate post-materialist values in well-established democracies but it has little to offer, for example, for ethnically divided societies trying to cement their fragile constitutional bargain (McCrudden & O'Leary, 2013).

The question of the institutionalization of a new constitutional order is a crucial one that has deep ramification in legal theory. When the new constitutional order has been framed by declining political elites that seek insurance from rising political forces by entrenching rights and promoting judicial review (Ginsburg 2003, Hirschl 2004) it is crucial to understand how these new forces accept the constitutional order left by their predecessors. The failure of dialogue theorists to engage seriously with the meaning of the constitutional turmoil in Canada between 1982 and 1995 is at best disappointing and at worst an almost fatal flaw in the causal version of dialogue. By words of consolation, there is hardly any empirically grounded theory of constitutional institutionalization on offer (Elkins *et al*. 2009). To do so, constitutional theorists have to broaden their perspective and bring comparative considerations to bear on their understanding of national experiences of constitutionalism. I now turn to some dimensions that could be brought to bear on the Canadian model and contribute to the explanation of its relative success.

VI. RIVAL HYPOTHESIS

The following elements ought to be taken into consideration as potentially important factors for the explanation of the relative success of the Canadian Supreme Court. The discussion

here relies admittedly on anecdotal evidence, cherry-picked examples and theoretical arguments. This being said, insofar as they can be operationalized, they could be used to build an alternative explanatory model of constitutional success in Canada or expand the dialogue theory to situate it in its broader political context.

a) Mobilizing the support structure

In his work, Charles Epp (1998) has shown how the development of a support structure has been crucial in the extent of the success of "rights revolution" in the United States, United Kingdom, Canada and India. In light of Epp's study, the structure of the judiciary can have important impacts in mobilizing the support structure to build the legitimacy of the courts.

When it is particularly costly, litigation of a specific issue is important because it signals to the court that the parties are able to mobilize important resources, that they are well organized, sometimes all across a given jurisdiction and that they have the necessary resources to mobilize in the public sphere as a dominant group. Independently of their impact on the judges' decisions, the simple fact that litigation costs are high provides a useful screening mechanism that prevents capture of the court's agenda and policy-making influence by marginal and ill-organized groups. This important entry barrier has an effect on the cases that wander their way up to the Supreme Court. On the one hand, it can signal to the Court the state of public opinion or, at least, elite public opinion on cases of high political importance. This information can then be used strategically by the Court to decide cases in a way that they think maximizes their institutional legitimacy.

In a nutshell, the court system performs a large part of the "passive virtues" that Alexander Bickel praised (Bickel 1962). By screening litigants and allowing only those that are well organized and well funded to get access to the highest court, the integrated court structure already exercises an important constraint on politically marginal or unpopular groups that try to use the courts to foster their political agendas.

Finally, granting intervener status to a large number of groups also enables the courts to assess the level of support for a specific issue and the organizational capacities of the interest groups ready to mobilize in support of this specific issue. In other words, wherever the chips fall, the court knows that there are groups ready to mobilize in the political arena in support of its decision.

The contrast between a Supreme Court and a Constitutional Court could be potentially enlightening. In many civilian systems, constitutional courts are accessible either directly by citizens through action of *amparo* or almost directly when a lower court refers them a *question préliminaire de constitutionalité*. Thus, because accessing constitutional jurisdiction is much cheaper and much more rapid, the need to form coalitions that can advocate for change can have important and far reaching effects on the legitimacy of Constitutional Court rulings. Further research is needed to understand how these structural differences matter in fostering public support for the judicial system.

b) The time and space of the decision

The second element has to do with the timing of the decision. As Jeremy Waldron has pointed out (Waldron, 2013), the different institutional structures of courts, executives and legislatures have also their own temporality, an insight shared by constitutional thinkers at least as far back as Benjamin Constant (Constant, 1823, see also Rosanvallon, 2010). This being said, the specific temporal structure of the Canadian justice system is far from universal. Many civilian countries have a constitutional court that can review legislation either before enactment or

after its enactment when they are petitioned by any individual. Courts are thus confronted with cases while they are still very much on the political radar. There is no "cool-off" period between the emergence of a constitutional question and its final resolution by a constitutional court.

This timing can have important consequences since courts are directly put under the spotlight and asked to make a decision, generally unreviewable, about a topic that is of public concern and possibly very sensitive at the very moment when the decision is being made. By contrast, when the Supreme Court of Canada reviews a piece of legislation adopted three, four or five years before - sometimes by a Government that has already been defeated in the mean time - and that there has been two rounds of appeals during which each party has had the chance to review and reconsider its arguments, the decision that the Supreme Court is asked to make is simply very different and likely to yield different consequences in terms of its institutional legitimacy. Moreover, the time lapse between the emergence of the case and the moment when the Supreme Court is asked to make a decision makes it possible for the case to become moot and gives room for the Court to exercise its "passive virtues" (Bickel 1962). These arguments are often understudied when considering actual models of judicial review where the accent is put on the wording of the provisions and the ability of the elected branches to override the decisions of the courts. For example, the fact that Poland and Romania had a legislative override tells us little about the interaction between the constitutional courts and the legislatures when one does not also consider this structural feature and the fact that their constitutional court could be directly petitioned by individual citizens (Gardbaum, 2015).

Moreover, the federal structure of the Canadian judiciary limits the geographical reach of constitutional litigation. Judicial decisions acquire a national dimension only once they have been decided by the Supreme Court of Canada. Thus, some cases that might have otherwise been controversial in some part of the country but not in others remain contained in the geographic area where they were decided.

By contrast, in unitary states, regional disputes become centralized by the decision of a central court. Thus, when regional differences could warrant decisions to remain limited to a certain geographical area, the fact that a central decision-maker is seized of case and has to reach a decision that will be binding for the whole polity might politicize and bring to a national level issues that would have warranted regional variation. Some issues that are only of regional importance can be limited in their scope, thus reducing the level of entanglement of courts in political issues that, despite being of regional nature, could have nationwide impacts.

c) Strong electoral counter-majoritarianism

Political scientists and legal academics often fail to share their insights (Hirschl, 2014) and as a consequence we have little understanding of the interaction between electoral systems and models of judicial review. Most dialogue theorists generally fend off accusations that courts perform a counter-majoritarian function by underscoring the reality that parliaments are not especially representative either. However, as Andrew Petter has shown, arguing that parliaments are not really representative does not help the dialogists' cause since they, too, rely on democratic parliaments to answer court rulings (Petter, 2006). Two wrongs do not make a right. This being said, the Canadian electoral system is special to other countries in that "false electoral majorities" (Russell, 2006) or "manufactured majorities" (Lijphart, 1999) are the norm rather than exception. Given Canada's first-past-the-post electoral system, most Governments get a majority of MPs elected despite receiving only a plurality of casted ballots when they do not arrive simply in second position. However, this specific electoral system can be beneficial for courts. Imagine that a court is faced with the situation where a

government enacts a controversial policy to please its electoral basis that the majority of the electorate disagrees with. Likewise, a reform supported by a majority of the population can be blocked by well-organized electoral minorities that can manage to get a parliamentary majority. In an electoral system as little representative as the Canadian one, judges faced with these situations can more easily "clear the channels of political change" (Ely, 1980) against well-entrenched electoral minorities. Likewise, they can block unpopular reforms that seem motivated by narrowly partisan interests that fail to appeal to constituencies beyond those of the governing party. Even if the evidence is admittedly little more than anecdotal, three of the most controversial cases of the past decade illustrate this point.

In the *Chaoulli* case, the Supreme Court addressed one of the most sensitive issue in Canadian politics, namely the place of the private sector in the provision of medical services and the conflict of "two national symbols" (Maioni & Manfredi, 2005). Even if the decision attracted some considerable level of attention from the media and academia, it seems that a majority of Canadians agreed that recurring problems in their health care system needed to be changed, though there was much more disagreement about what should be done about it (Quesnel-Vallée et al., 2006). By releasing its decision, the Court could upset a political status quo that was sub-optimal but that no ruling party wanted to address out of fear of losing electoral support on either side of the debate.

In the *Bedford* case, the Supreme Court had to examine the validity of certain provisions of the Criminal Code relating to the provision of sexual services. By then, after the highly publicized horror story of Robert Pickton that had killed 49 prostitutes in British Columbia, public opinion polls showed that there was strong support for a change in the way in which Canadian Governments should regulate prostitution (Lowman & Louie 2012). However, the Conservative Government had already made clear that it would not change the current prohibitions and defended the Criminal Code's attacked provisions in the courts. When the Supreme Court of Canada released its decision striking down the impugned provision, it was giving a majority of Canadians the kind of change that an electoral minority was blocking.

Finally, in the *Carter* case on assisted suicide, the first instance judge Lynn Smith herself cited public opinion polls to highlight that there was a growing consensus that there should be a reform of the Criminal Code to allow assisted suicide in certain circumstances. The Harper Government had again clearly indicated that it would not do anything about it, its Conservative Party even entrenching its opposition to physician assisted dying in its policy platform during their 2013 convention (MacCharles 2013). The decision of the Supreme Court, again in this case, seems to have upset the status quo by siding with a majority of Canadians against an elected minority that could have otherwise blocked the channels of political change.

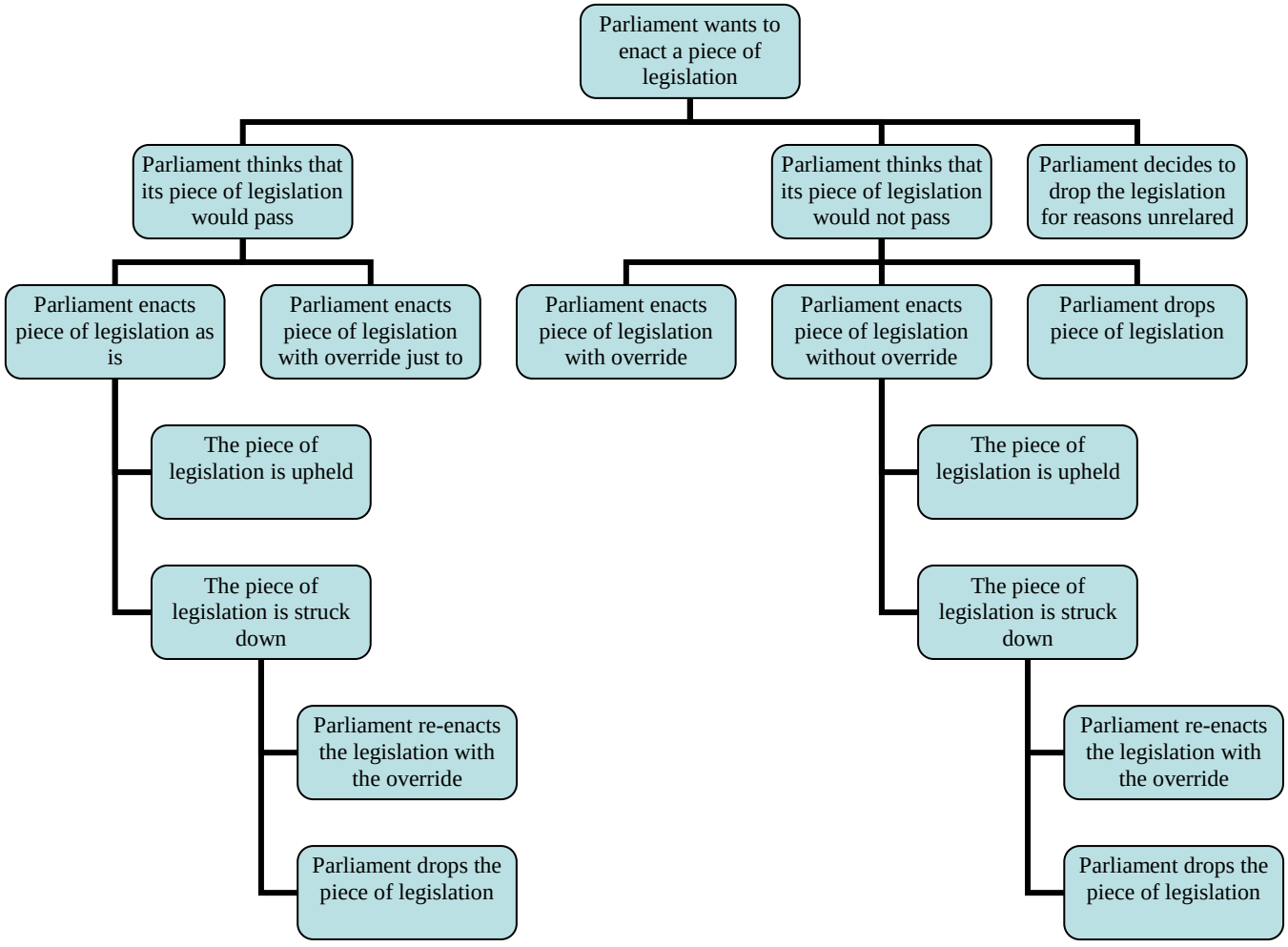
There are two possible ways of understanding this pattern; either they are punctuated equilibria and the Court simply clears the channels of political change to achieve a result that maximizes preferences among the polity or, from a complementary perspective, the Court uses these cases for strategic legitimacy cultivation (Radmilovic 2010). Either way, under the specific conditions of the Canadian electoral system, it seems that the Court can play a majoritarian function in a counter-majoritarian electoral system.

d) Pre-emptive non-use of the notwithstanding clause

The final element as to do with the way in which the "notwithstanding" mechanism actually works. While its normative desirability has been disputed among legal academics and political scientists (Weinrib 1990, Whyte 1990, Russell 1991,), its causal effect has been little

studied despite some in depth descriptive account (Kahana, 2001). Again, the causal work that the legislative override plays in the dialogue theory is unclear. Roach (2001), for example, claims that the override takes off the heat of the Court and replaces the focus on the political arena. The question is not whether or not one should abide by the Court's ruling but rather how best to respond to the Court's decision. By leaving the option open for the elected branches to override a court decision, the legislative override weakens judicial supremacy since it gives courts the final word only when politicians implicitly acquiesce to their decisions. As a descriptive matter, there is probably some truth to it. What is more dubious is that a decision of the Court that is overridden yields more support for the Court than a decision that could not be so overridden. In other words, it is highly possible that once a highly controversial decision has been issued, the damage has already been done. The fact that the political branches can undo what the Court has done does not dispel the fact that the Court has done it nonetheless.

Leaving aside the question of public support, dialogue theorists fail to capture the game theoretic nature of the relationship between the Courts and legislatures when it comes to the use of the notwithstanding clause. The use or non-use of the notwithstanding clause has been variously described as stemming from institutional constraints (Morton & Knopff, 2000), ideational respect for the court's well-balanced judgment (Roach, 2001) or the path-dependent nature of its increasing desuetude (Snow, 2008). All these theories conceptualize the override as a mechanism meant to insulate the expression of policy preferences in legislation from judicial oversight. A decision tree can be sketched thus:



The problem with such understanding is that it conceptualizes of the relationship between the courts and the legislatures as a game of coordination. In other words, if the notwithstanding clause were used simply in anticipation of or in reaction to the Court's decisions, the clause would we be used every time that the ruling does not correspond to the preferences and the interests of the party in power. It is too common of a mistake to see courts as simple arbiters of legal disputes with a fixed set of preferences that legislators simply have to deal with. In fact, as students of judicial behavior have shown in many contexts, the opposite is probably closer to the truth (Epstein & Knight, 1998) and courts and legislatures should be seen rather as strategic actors entangled in a game with asymmetric information and limited possibilities for communication.

In this light, the relationship between courts and legislatures should be conceptualized as a form of bargaining where the behavior of one actor actually influences the win set of the other. In other words, if one considers the decision of the court as being strategically motivated by what it can get away with, then legislatures have an incentive to commit in advance not to use the notwithstanding clause. This can explain why legislatures are unwilling to shield their legislation from judicial review *ex ante* or that they do so in rather unconsequential cases. Moreover, since they are repeat players in the courts, legislatures can rationally decide not to override the courts' decision *ex post* in order to signal to them that they must be willing to accept the political consequences of their decisions. In this kind political dynamic one actor strengthens its position by making its position more fragile.

There are many ways in which legislatures can influence judicial decisions; choosing strategic language when crafting legislation, appointing judges that they know are sympathetic to their policy agenda and so on. The non-use of the notwithstanding clause is one such mechanism. By committing not to use the notwithstanding clause, either *ex ante* or *ex post*, the legislature tries to credibly commit to the outcome that the Court will reach in this or future cases (Elster, 1984). If the Court thinks that its decision will stand given that there is no escape route for the government, it might be less assertive in its rulings. In his dissent in the case of *Mounted Police*, Justice Rothstein made this very point perhaps as explicitly as his position allows:

> In a constitutional democracy, the judicial branch of government is entrusted to rule on whether laws enacted by the legislature pass constitutional muster. But this Court's rulings are not subject to review. Its rulings are binding on the legislative branch, unless that branch invokes the rarely resorted-to s. 33 of the *Canadian Charter of Rights and Freedoms* to provide that its legislation will operate notwithstanding breaches of certain constitutional rights. This means that constitutional decisions of this Court have the power to freeze matters in time and restrict Parliament's ability to change course in the future, where facts and policy imperatives may suggest or require a different approach. (emphasis added)[3]

Thus, the pre-emptive non-use of the legislative override is perhaps less a sign of the success of constitutional dialogue than the result of a bargaining equilibrium. If this equilibrium is reached because the Court has refrained from overreaching out of fear of extra-legal retaliation, the non-use of the notwithstanding clause is rather a sign of judicial timidity and, thus, of the failure of constitutional dialogue than the other way around. It is an instance in which one player, by limiting its possible course of action, can actually prevent the other player from attacking. Like the army backing a river that decides to burn down the only bridge that would have provided it with an escape route simply in order to signal to its enemy that their only option available is fighting to death might escape a bloody battle (Schelling,

[3] *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1, at para 159.

1960), so politicians worried that their political agendas will be chipped away by courts might decide to credibly commit to not using the legislative override to avoid judicial defeats.

VII. CONCLUSION

The theory of constitutional dialogue has remained so far, mostly, the premise of constitutional theorists. While they have provided normatively appealing description of the working of the Canadian judicial system and prompted a reconsideration of the traditional debate about the democratic legitimacy of judicial review, much of the appeal lies in implicit causal claims that remain underspecified and unexplored. Putting dialogue theory in a broader institutional light might help foster the debate about the efficiency of courts in fostering democratic constitutionalism in different contexts. However, to do so, dialogue theory will need both to recognize the importance of cultural factors in the stability of the Canadian model of judicial review, the impact of other institutional factors such as the interaction between judicial politics and the electoral system or the structure of the Court in terms of access, agenda-setting, timing and geographical reach. Moreover, if dialogue theory is to provide a sound model of democratic constitutionalism in other political contexts, it should be acknowledged that it provides little answer for other challenges that courts face, especially in newer democracies, such as the promotion of militant democracy or the institutionalization of the constitutional bargain (Daly, 2017). As the example of the *Ford* decision reminds us, it is far from clear whether institutional dialogue has played a stabilizing or destabilizing role in the rounds of mega-constitutional politics that have followed Patriation in Canada.

Increasing recognition that Canadian dialogue takes place in a specific institutional and cultural context is salutary both to determine its causal plausibility and to understand its possible application elsewhere. As Roach writes, "politics also influences dialogue. Canada has a parliamentary system characterized by tight party discipline, an unelected senate that does not generally exercise much power, and a first-past-the-post electoral system that often produces majority governments. A change in any of these judicial or political features may alter the dialogic balance between courts and legislatures." (Roach 2016, 337; also Roach 2007). Regardless of one's optimism (Gardbaum, 2015) or caution (Roach, 2016) about to the applicability of the dialogical model of rights-based judicial review in other contexts, much more work is decidedly in order.

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