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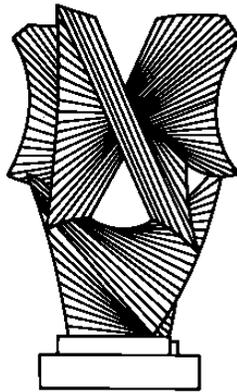
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WEAK-FORM JUDICIAL REVIEW AND AMERICAN EXCEPTIONALISM

ROSALIND DIXON*

Recent Commonwealth rights charters, various scholars have argued, represent a new “weaker” model of constitutional rights protection than the U.S. constitutional model: unlike the U.S. Bill of Rights, they give legislatures broad formal power to override rights, and therefore also court decisions. The article argues, however, that in practice such powers have rarely if ever been used by Commonwealth legislatures, and therefore, that if judicial review is in fact weaker in Commonwealth countries, compared to the U.S., it is only because Commonwealth courts have been more willing than the U.S. Supreme Court to uphold ordinary legislative attempts to override court decisions. While this may be connected to the greater availability of a formal power of legislative override in the Commonwealth, it also far from given response by Commonwealth courts to the existence of such powers. This more limited – and contingent – view of the difference between Commonwealth and U.S. constitutionalism in this context also has clear practical implications for processes of constitutional “borrowing” across countries.

INTRODUCTION

In recent years, comparative constitutional scholars have noted the rise in countries such as Canada, New Zealand, the UK and Australia (at a state level) of what they describe as a new, distinctive model of judicial review in which courts have broad authority to interpret constitutional rights provisions, but national legislatures can override courts’ interpretations of rights by ordinary majority vote.¹ Mark Tushnet has labeled this the rise of a new “weak-form” model of judicial review; while Stephen Gardbaum has labeled it a “new model of Commonwealth constitutionalism”.²

In describing this new model of judicial review, most scholars suggest that it can be directly contrasted, within the Anglo-American world, with the model of “strong-form” review that prevails in the U.S. The key

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¹ Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); Rosalind Dixon, *Partial Constitutional Amendments*, U. PA. J. CONST. L. (forthcoming 2010); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

² *Id.*

reason for this, these scholars argue, is that in the relevant Commonwealth countries legislatures retain formal authority to override court decisions by ordinary majority vote.³ In the U.S., of course, neither Congress nor state legislatures has this authority under either Art V, Art III or §5 of the Fourteenth Amendment.⁴

The key benefit to this weakening in the finality of judicial review, compared to in the U.S., is said to be that it helps “transfor[m] constitutional rights discourse from a judicial monologue into a richer and more balanced inter-institutional dialogue” thereby “reducing, if not eliminating, the tension between judicial protection of fundamental rights and democratic decisionmaking”.⁵

This article, however, re-examines this claim of Commonwealth-U.S. difference, and argues that is in fact far more limited and nuanced than the existing literature implies. To date, the article shows, the relevant Commonwealth legislatures have made almost no actual use of their formal powers of legislative override in respect of court decisions. To date, therefore, there has been no *direct* constraint on Commonwealth, as compared to U.S., courts when it comes to the finality – or strength – of their decisions.

This does not necessarily mean that the attempt to create a weak-form of judicial review in Commonwealth countries has failed. In a number of cases, Commonwealth legislatures have attempted to use ordinary legislative means in order to override aspects of court decisions, and in most cases, have succeeded in doing so. One reason for this is the relatively low rate at which such “dialogic legislative sequels” have been actively reconsidered by courts in countries such as the UK and Canada. Another reason is that, in Canada in particular, courts have consistently deferred to dialogic legislative sequels, whereas in the U.S., the Supreme Court has tended to take a far more uneven approach to assessing the constitutionality of such sequels.⁶

There are also two quite logical explanations for this pattern of increased deference in a country such as Canada, as compared to the U.S.:

³ *Id.*

⁴ For a differing view of section 5, see e.g., Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003).

⁵ See Stephen Gardbaum, *The New Commonwealth Constitutionalism*, 49 AM. J. COMP. L. 707, 745 (2001). Gardbaum, like others, also notes the potential advantages of the model in addressing democratic “debilitation” and in enhancing courts’ legitimacy. Compare JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT’S ROLE? (2001) (Hereinafter HIEBERT, CHARTER CONFLICTS).

⁶ Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L. J. 235 (2009) (Hereinafter *Charter Dialogue*)

one, that a broad power of formal override creates greater pressure on judges to defer to dialogic legislative sequels; and second, that it provides courts with additional legal authorization for showing such deference.

At the same time, the article suggests, it is also important not to overstate the strength of any such indirect connection between a formal power of override and judicial deference to dialogic legislative sequels. No Commonwealth court has explicitly endorsed the existence of such a connection, and thus, Commonwealth courts could quite easily decide in the future to adopt a different understanding of the significance of a potential legislative override. If they did so, given the political costs involved for legislatures, there would also be no guarantee that Commonwealth legislatures would increase their actual use of a formal override power.

This more limited – and contingent – view of the difference between Commonwealth and U.S. constitutionalism also has potential practical consequences. In the U.S., it draws attention to the range of ways in which constitutional actors could potentially learn from Commonwealth experience, assuming they wished to create a weaker model of judicial review, domestically. In other countries, such as Australia, it also helps clarify the complex nature of attempts to “borrow” from other Commonwealth, as compared to U.S., constitutional models in the design of a possible future national rights charter.

The article is divided into four parts. Part I.A briefly sets out the existing literature and orthodoxy on weak-form judicial review as a distinct constitutional model, opposed to the model that operates in the U.S., that allow legislatures broad scope to override court decisions with which they disagree. Part I.B then examines the actual record to date of weak-form review in Canada, the UK, New Zealand, Australia (at a state level), and shows how in those countries, there has been no actual greater use of formal mechanisms of legislative override than in the U.S. Part II explores the possibility that a weaker form of judicial review has nonetheless been created in some of these countries, relative to the U.S., by reason of more consistent deference, by courts, to legislative attempts at override via more ordinary, informal means. Part III also considers the potential connection between this pattern and the availability of a formal power of legislative override in the two sets of countries. Part IV concludes by exploring the potential practical implications of this form of constitutional commonality for forms of constitutional learning or “borrowing” by constitutional decision-makers in these various countries, including the U.S and Australia.

I. THE NEW COMMONWEALTH CONSTITUTIONAL MODEL AND ACTUAL LEGISLATIVE OVERRIDE

A. *Formal Powers of Override*

In identifying the new Commonwealth model of rights protection, scholars such as Stephen Gardbaum generally point to five constitutional or quasi-constitutional rights charters: the Canadian *Charter of Rights and Freedoms* 1982; the New Zealand Bill of Rights 1990 (NZBOR); the UK Human Rights Act 1998 (HRA), and the two state-level charters in Australia, the ACT *Human Rights Act* 2004 (ACT HRA) and Victorian *Charter of Rights and Responsibilities* 2006 (Victorian *Charter*). The defining feature of these charters, Gardbaum suggests, is that they all preserve “formal legislative power to have the final word on what the law of the land is by ordinary majority vote”.⁷

In Canada, the key provision that ensures this is s. 33 of the Canadian *Charter*, or the so-called “notwithstanding clause”.⁸ Section 33(1) provides that the Canadian “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature...that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of [the] Charter”. Such a declaration may be passed by ordinary majority vote and has the effect that, for a five-year renewable period, the legislation in question operates “as it would *have*” but for the relevant provisions of the *Charter*. It can also be used retrospectively as well as prospectively.⁹

In New Zealand, the UK and Australia, a similar source of override power derives from the fact that legislatures may either expressly or impliedly repeal the operation of rights norms, by ordinary majority vote. The NZBOR, HRA and Australian state charter were all enacted as ordinary

⁷ Gardbaum, *supra* note 5 at 707. Tushnet likewise suggests that strong-form review only really exists, or at least raises democratic difficulties, “in systems where constitutional amendment is significantly more difficult than is the enactment of ordinary legislation”: Mark Tushnet, *The Rise of Weak-Form Judicial Review*, in *THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW* 5 (Rosalind Dixon and Tom Ginsburg, eds., forthcoming 2011); *see also id* at 4 (The ease or difficulty of amending a constitution should affect the choice between strong-form and weak-form constitutional review. One could also argue that these charters constitute a distinct model of constitutional rights protection in that, in contrast to the position in many newer democracies and civil law countries, the reason they adopt such a power of legislative override is in order to address the potential democratic or “counter-majoritarian” difficulty associated with the practice of judicial review by ordinary judges (rather than political and academic leaders) in a stable two-party democracy – rather than for other reasons).

⁸ Amendment is more onerous. *Compare* Gardbaum, *supra* note 5 at 723.

⁹ *Ford v. Canada*, [1988] 2 S.C.R. 712

statutes, and such a power of repeal is a traditional incident of the doctrine of parliamentary sovereignty.¹⁰ Such a power is also expressly confirmed, in Victoria, by the provision in s. 31 of the *Charter* that “[p]arliament may expressly declare in an Act that that Act ...has effect despite being incompatible with one or more of the human rights”; and in all three contexts by express limitations on the power of courts to invalidate laws for inconsistency with protected.

In the UK, s. 4 of the HRA provides that where it is not possible for a court to “read and giv[e] effect” to legislation “in a way which is compatible with the Convention rights”, a court may make a “declaration of incompatibility.” Such a declaration, however, does not “affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceedings in which it is made.”¹¹ Similarly, in New Zealand, the New Zealand Court of Appeal has found that this is the logical effect of the combined provision in the NZBOR that rights recognized by the BOR “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, but also that no court could “[h]old any provision” of another statute “to be impliedly repealed or revoked, or to be in any way invalid or ineffective” by reason of the BOR.¹² Parallel provisions, regarding the making of a declaration of incompatibility, are also found in s 32 of the ACT HRA and s 28 of the Victorian *Charter*.¹³ In each case, the net effect is that the legislature has power to suspend the effect of courts’ interpretation of particular rights, simply by the use of sufficiently clear language. In the Victorian *Charter*, this power is also expressly confirmed by the provision in s. 31 of the *Charter* that “Parliament may expressly declare in an Act that that Act ...has effect despite being incompatible with one or more of the human rights”.

A second source of override power, in the UK, New Zealand and under Australian state charters, is the power legislatures have to amend the scope of written rights guarantees. Except in Australia, legislatures in these jurisdictions have a general power to amend all constitutional norms, by ordinary majority vote.¹⁴ Because the HRA and NZBOR and Australian

¹⁰ See e.g., Julie Taylor, *Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy*, 32 FED. L. REV. 57 (2004). For a different view of the power of these parliaments, and particularly the Westminster Parliament, to rely on a power of implied as opposed to express repeal, compare Gardbaum, *supra* note 5 at 735-36.

¹¹ *Human Rights Act (HRA)* s. 4(6).

¹² *Moonen v Film and Literature Board of Review*, [2000] 2 NZLR 9.

¹³ *Id.*

¹⁴ On the federalism difference in Australia, see Chief Justice Murray Gleeson AC, Chief Justice of Australia, Boyer Lecture Series, Aspects of the Commonwealth

state charters were all enacted by way of ordinary statute, this power also extends with equal force, at least as a matter of domestic law, to the substantive provisions of the HRA, NZBOR and Australian state charters.

In the UK, a third, more indirect source of override power is also the power of the executive to derogate from various provisions of the *European Convention*, which are otherwise incorporated by s. 1 of the HRA.¹⁵ Derogations of this kind must comply with the requirements of Art 15(1) of the *Convention*, which require that derogations be made only “[i]n time of war or other public emergency threatening the life of the nation” and only “to the extent strictly required by the exigencies of the situation”, and cannot be made in respect of certain rights. However, they may be made retrospectively, as well as prospectively, and thus give the legislative majority in a parliamentary system another broad source of potential override power.

These formal features of the new Commonwealth rights charters also stand in quite clear contrast to parallel features of the U.S. Constitution, such as Art V, Art III and §5 of the Fourteenth Amendment.¹⁶ Because of this, scholars such as Gardbaum suggest, when compared to new Commonwealth constitutional models the U.S. is widely understood as “the paradigmatic regime of judicial supremacy”.¹⁷

When it comes to constitutional amendment in the U.S., for example, Art V provides that for an amendment to the Constitution to succeed, it must obtain the support of both two thirds of the House and Senate and also the legislature (or a convention) in three quarters of the states.¹⁸ This makes any override of the Supreme Court by formal constitutional amendment extremely difficult—in fact, on one measure, more difficult than in any other country in the world.¹⁹

Art III, in turn, confers both broad power on U.S. courts to invalidate legislation for inconsistency with the Constitution,²⁰ and limited power on Congress to override such decisions by removing cases from the

Constitution – Part One, Transcript available at:

<http://www.abc.net.au/rn/boyerlectures/stories/2000/219789.htm>.

¹⁵ HRA, ss. 1(2), 14.

¹⁶ Gardbaum, *supra* note 5; TUSHNET, *supra* note 1; Geoffrey Marshall, *Taking Rights for an Override, Free Speech and Commercial Expression*, PUB. L. 4, 11 (1989).

¹⁷ Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism* (Working Paper 2010) (available online at: <http://www.law.uchicago.edu/files/files/Gardbaum%204%208%2010.pdf>) *5.

¹⁸ There is, of course, also the possibility for amendments to be proposed by convention, but this method has never been used: *see* note 19 *infra*.

¹⁹ Donald S. Lutz, *Toward a Theory of Constitutional Amendment*. in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237 (Sanford Levinson, ed. 1995)

²⁰ *See Marbury v. Madison*, 5 U.S. 137 (1803).

jurisdiction of the courts.²¹ While the outer bounds on Congress' power under Art III remain somewhat uncertain, existing Supreme Court decisions in this area suggest that the Court will hesitate to recognize a power on the part of Congress to deprive *all* courts of jurisdiction over constitutional controversies.²² Without a comprehensive power of this kind, it will also be extremely difficult for Congress effectively to override a decision of the Court by means of Art III, because lower courts will continue to be bound by the Court's prior decisions in exercising their ongoing jurisdiction in a particular area.

Some scholars also point to §5 of the Fourteenth Amendment, and the power Congress has "to enforce, by appropriate legislation" the substantive provisions of the Amendment, as an additional source of potential override power. On this view, the power to enforce includes the power to prefer a different interpretation of the Amendment than that favored by the Court.²³ The Supreme Court, however, has explicitly rejected this argument, holding that Congress does "not enforce a constitutional right by changing what the right is". Rather, the Court has held, for any use by Congress of its power under §5 to be given effect by the Court, it must be "congruent and proportional" to remedying or preventing a constitutional injury as defined by the Court itself.²⁴

B. *The Actual Record of Legislative Override to Date*

In order to be meaningful, however, this characterization of the new Commonwealth model of judicial review as distinctly weaker than the U.S. model must to some degree be supported by the actual record of legislative override in countries such as Canada, New Zealand, the UK and Australia.

Without this, as scholars such as Gardbaum and Tushnet themselves note, there can be no suggestion that the model of judicial review in these countries represents a new way of "balanc[ing] or reconcil[ing]" the perceived tension between individual rights protection by courts and

²¹ Compare Gardbaum, *supra* note 5 at 752 (noting the logical possibility that it might offer an avenue for legislative override).

²² See e.g., *Cary v. Curtis*, 44 U.S. 236 (1845) (upholding the preclusion of all forms of post-deprivation relief in a judicial setting against the Collector of Customs, but emphasizing the importance in this context of the existence of a pre-deprivation remedy); *Battaglia v. Gen Motors Corp.*, 169 F. 2d 254 (2d Cir. 1948) (suggesting that Congress cannot invoke its power under Art III to deny any and all judicial remedies for a past constitutional violation [as defined by the Court]). For further discussion see generally RICHARD H. FALLON, JR. AND JOHN F. MANNING, ET AL. HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 6th ed. 300-12 (2009).

²³ See Post and Siegel, *supra* note 4.

²⁴ *City of Boerne v. Flores*, 521 U.S. 507 (1997)

democratic self-government which, as Gardbaum notes, “[i]s often thought to create the counter-majoritarian difficulty”.²⁵ Instead, given the willingness of Commonwealth courts actively to enforce such rights-based commitments,²⁶ the form these Commonwealth constitutions take will be little more than a formal, historical curiosity, related to these countries’ long history of parliamentary sovereignty.²⁷

While comparative constitutional scholars have made a number of attempts to assess the pattern of actual legislative response to court decisions in these countries, for the most part they have also failed directly to address this question. Instead, they have focused on the rate at which legislatures formally repeal, amend or re-enact legislation in response to courts decisions,²⁸ when all of these responses can potentially be consistent with a decision by the both to comply with and override a court.²⁹

If one focuses on the specific question of legislative override, it also turns out that there have been relatively few instances to date under the new Commonwealth constitutions in which legislatures have sought to override courts; and almost none in which they have done so by use of a formal power of override.

In New Zealand, between 1990 and 2005 there were only 13 cases in which New Zealand courts found some form of inconsistency between the NZBOR and specific legislation,³⁰ and in only one of these, *Refugee Council of New Zealand Inc v. Attorney-General*,³¹ was the response of the New Zealand Parliament to attempt to override even part of the effect of a court decision. After a subsequent successful appeal by the New Zealand government, this was also a case in which the New Zealand courts

²⁵ Gardbaum, *supra* note 5 at 709.

²⁶ See Gardbaum, *supra* note 17; Sujit Choudry and Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE*, 48 MCGILL L.J. 525 (2003)

²⁷ On the historical role played by notions of parliamentary sovereignty, see e.g., Roger Tassé and Louis Tassé, *Application de la Charte canadienne des droits de liberté*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Gérald-A Beaudoin and Errole Mendes eds, 3d ed. 1996).

²⁸ The most famous example of this is a study by Peter Hogg and Alison Bushell (now Thornton) of the rate of legislative response to decisions of the Supreme Court of Canada (SCC) invalidating legislation for inconsistency with the Canadian *Charter*, which found a response rate of approximately eighty per cent: see Peter W. Hogg and Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L. J. 75, 96-8 (1997)

²⁹ For similar arguments, and an early attempt to address this deficit in the literature, see Christopher P. Manfredi and James Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell* 37 OSGOODE HALL L. J. 513, 521 (1999).

³⁰ The relevant cut-off date I used was the end of 2004. This time-frame was designed in large part to allow for the possibility of legislative delay in response to court decisions.

³¹ [2002] NZAR 769.

themselves narrowed their interpretation of the right at stake, so that there was little ultimate conflict between the courts and parliament. Out of the remaining 12 cases, there were two instances where Parliament responded with a highly “compliant” form of legislative amendment,³² and 10 where Parliament did not respond in any way, and thus simply deferred to courts’ existing interpretation of a statute based on the NZBOR.³³ During this period, therefore, there was no instance in which Parliament sought, either by way of amendment, express or implied repeal or non-implementation, to make use of its formal power of legislative override.

In the UK, between 1999 and 2004, there were 18 cases in which English courts relied on either s. 3 or s. 4 of the HRA in order to identify a *prima facie* incompatibility between legislation and Convention rights and that finding was upheld on appeal. Out of these 18 cases, there were two cases involving s. 4 (i.e. *International Transport Roth GmbH v. Secretary of State for the Home Department*³⁴ and *R (Anderson) v. Secretary of State for the Home Department*,³⁵) and one involving s. 3 (*R v. A (No 2)*) where Westminster responded by seeking to override any part of the court’s interpretation of the Convention. In none of these three cases, however, did the Parliament place any direct reliance on its formal powers of legislative override.³⁶ Instead, it chose simply to rely on ordinary legislative mechanisms in order to enact the relevant legislative sequels.

Out of the remaining eight cases involving s. 4 in the UK, in five cases Westminster responded by passing legislative amendments or delegated “remedial orders” directly removing the incompatibility identified by the courts,³⁷ and in another case, by adopting legislative changes that went well

³² *Knight v. Commissioner of Inland Revenue*, [1991] 2 N.Z.L.R. 30; *Ministry of Transport v. Noort*, [1992] 3 NZLR 260; *Police v. Curran* [1992] 3 N.Z.L.R. 260

³³ *R v. Rangī* [1992] 1 N.Z.L.R. 385; *Television New Zealand Ltd v. Attorney-General* [1995] 2 N.Z.L.R. 641 (NZ CA); *B v. M* [1997] 3 N.Z.L.R. 202 (NZHC); *Police v. Wellington Newspapers Ltd.* [1998] DCR 440 (NZ DC, Wellington); *Mnikam v. Chief Executive Department of Labour*, [1999] NZAR 542 (NZ HC); *Newspapers Publishers Association of New Zealand (Inc) v. Family Court*, [1999] 2 N.Z.L.R. 344 (NZHC); *Ngati Apa Ki Te Waipounamu Trust v. R.*, [2000] 2 N.Z.L.R. 659 (NZCA); *Police v. Beggs*, [1999] 3 N.Z.L.R. 615 (HC, FC); *Hopkinson v. Police*, [2004] 3 N.Z.L.R. 704 (NZ HC); *Moonen v. Film and Literature Board of Review*, [2000] 2 N.Z.L.R. 9 (NZ CA).

³⁴ [2003] QB 728.

³⁵ [2003] 1 AC 837.

³⁶ The only explicit use of such a power has made has been the decision by the British government formally to derogate from its obligations under Art 5(3) of the European Convention following 9/11, and this was in no way a direct response to particular court decisions under Art 5.

³⁷ See *R. (H.) v. London North and East Region Mental Health Review Tribunal*, [2002] EWCA Civ 92; *R v. McR.*, [2002] NIQB 58; *R (D) v. Secretary of State for the Home Department*, [2003] 1 W.L.R. 1315 (Eng. CA); *Blood and Tarbuck v. Secretary of State for Health English*, [2003] EWHC; and *R (on the application of M) v. Secretary of*

beyond those required by the House of Lords itself.³⁸ In the remaining case, the reason Parliament did not respond to the Court of Appeal's decision was also far from dialogic: it had, in the relevant case, already removed the infringing tax deduction prospectively,³⁹ and there would have distinct potential rights-based objections to any law seeking retrospectively to remove the relevant deduction.⁴⁰ As to cases under s. 3 of the HRA, six out of the remaining eight cases were met with legislative silence,⁴¹ or re-enactment of the same legislative provisions in un-amended form,⁴² which, in the context of s. 3, amounted to a decision by Parliament simply to defer to the court's resolution of the particular question. In the two other cases, Parliament further responded either by passing broad legislative change, beyond that required by the decision of the courts themselves,⁴³ or by removing the precise incompatibility identified by the courts.⁴⁴

In Australia, there are still relatively few cases "first look" cases involving the application of either the ACT HRA or Victorian *Charter* by superior courts. In the ACT, the ACT Supreme Court is yet to issue even one declaration of incompatibility under s. 32 of the ACT HRA;⁴⁵ and has relied on its power of reading down under the charter on only four separate occasions.⁴⁶ In Victoria, the Supreme Court of Victoria and Victorian Court of Appeal have issued only one 'declaration of inconsistent interpretation'

State for Health [2003] A.C.D 389; [2003] EWHC 1094 (HC Admin Div) and *Mental Capacity Act 2004*.

³⁸ *Bellinger v. Bellinger*, [2003] 2 A.C. 467 (HL)

³⁹ *See R (Wilkinson) v. Commissioners of Inland Revenue*, [2003] 1 W.L.R. 2683 (Eng. CA) and Finance Act 1999, s. 34 (abolishing relevant deduction found to be in breach of Arts 8 and 14, for all deaths occurring after April 6, 2000).

⁴⁰ *See* discussion in Rosalind Dixon, *A Minimalist Charter of Rights for Australia: The UK or Canada as a Model*, 37 FED. L. REV. 335 (2009).

⁴¹ *Cachia v. Faluyi*, [2001] 1 W.L.R. 1966 (Eng. CA); *R v. Lambert* [2001] UKHL 37 (HL); *R v. Carass*, [2002] 1 W.L.R. 1714 (Eng. CA); *R (Middleton) v Her Majesty's Coroner for the Western District of Somerset*, [2004] 2 W.L.R. 800; Attorney General's Reference No. 4 of 2002, [2004] UKHL 43.

⁴² *See R (Sim) v. Parole Board*, [2003] 1 W.L.R. 1374 and Criminal Justice Act 2003 s. 247(3)).

⁴³ *See Ghaidan v. Godin- Mendoza* (FC) [2004] UKHL 30 (HL) and Civil Partnerships Act 2004.

⁴⁴ *R v Offen* [2001] 1 W.L.R. 25 and Criminal Justice Act 2003, s. 225

⁴⁵ Another case in which the Court suggested the possibility that such a declaration might be required, but did not ultimately reach the issue, was *Pappas v. Noble*, [2006] ACTSC 39.

⁴⁶ *See e.g., In the matter of an application for bail by Richard Donald Breen*, [2009] ACTSC 172; *Richard John Travini v. Wojtek Starczewski*, [2009] ACTSC 123; *Re An Application for Bail by Chris Merritt*, [2009] ACTSC 56 and *R v. Kristiansen*, [2008] ACTSC 83 (both considering the same provisions of 43 of Bail Act 1992 (ACT)); and *SI bhmf CC v KS bhmf IS, (SI bhmf)* (2005) 34 Fam LR 468.

under s. 36 of the Victorian *Charter*,⁴⁷ and one decision involving direct reliance on its power of reading down under s. 32 of the *Charter*.⁴⁸ While a legislative response may still eventuate in some of these cases, to date there has also been only one legislative response arising from these cases.⁴⁹ The response in question was also fully compliant with the ACT Supreme Court's insistence, in *SI bhnf*, that judges should retain discretion to refuse to make a final, as opposed to interim, protection order in domestic violence cases.⁵⁰

In Canada, there have been a much larger number of cases in which the SCC has struck down legislation for inconsistency with the *Charter*: between 1982 and the end of 2004, for example, there were 54 cases in this category. Out of these, 14 were also followed by an attempt by the Canadian Parliament or a provincial legislature to override at least part of the SCC's decision. Even in this context, however, there has been almost no use by the legislature of a formal power of legislative override – because out of these 14 cases of legislative dialogue, only one involved the actual use of s. 33.

In this case, *Ford v. Québec (A.G.)*,⁵¹ the SCC invalidated certain provisions of Québec *Charter of the French Language* prohibiting the use of English on public signs, and the Québec legislature responded by re-enacting the same provisions by reliance on s. 33 of the *Charter*.⁵² Even this use of a formal power of override, however, was quite short-lived, because after a five year period, the Québec legislature amended the relevant law to allow bilingual signage, providing French was the 'present and predominant' language used. This was also exactly the approach advocated by the SCC itself in *Ford*, as the most appropriate way to balance competing constitutional interests at in this area.⁵³ Beyond this, s. 33 of the *Charter* has been used only 15 times in Canada, and each of these instances

⁴⁷ See *R v. Momcilovic*, [2010] VSCA 50 (17 March 2010) (making declaration in respect of reverse burden of proof in s 5 of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) ('DPCS Act'))

⁴⁸ *Re an application under the Major Crime (Investigative Powers) Act 2004*, [2009] VSC 381. For a case in which one member of the Court of Appeal would have relied on s. 32, see also *RJE v. Secretary to the Department of Justice*, [2008] VSCA 131 (18 December 2008).

⁴⁹ It often takes some time for legislatures to respond to court decisions, and several of these cases are very recent. Compare e.g., Manfredi and Kelly, *supra* note 29, on this issue in the Canadian context.

⁵⁰ Domestic Violence and Protection Orders Act 2008, Pt VI.

⁵¹ [1988] 2 S.C.R. 712,

⁵² An Act to Amend the Charter of the French Language, S.Q. 1988, c. 54, s. 10 ("Bill 178")

⁵³ An Act to Amend the Charter of the French Language, S.Q. 1993, c. 40, s. 18. Compare *Ford*, [1988] 2 S.C.R. 712 at par. 73.

has involved an attempt by a provincial legislature prospectively to suspend the operation of particular rights – rather than directly to override any particular court decision.⁵⁴

Thus far, therefore, Commonwealth legislatures have used their formal powers of override in response to specific court decisions on only one occasion since new Commonwealth constitutions were enacted. In Canada in particular, this also implies a rate of formal override roughly equivalent to that in the U.S. in the first hundred years of the Constitution's existence.⁵⁵

This low rate of formal override in Commonwealth countries is also not simply the product, I have suggested elsewhere, of greater public disagreement with court decisions.⁵⁶ Certainly, no Commonwealth decision has been *as* controversial as decisions of the Supreme Court such as *Lochner v. New York*,⁵⁷ or *Roe v. Wade*,⁵⁸ but many Commonwealth decisions have still attracted significant controversy.

In the UK, for example, in the criminal justice context there has been strong public support in recent years for a “law and order” agenda,⁵⁹ yet also numerous cases under the HRA in which English courts have given a broad reading to the rights of criminal defendants.⁶⁰ In Canada, there

⁵⁴ See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. J. 255 (2001).

⁵⁵ From 1789 to 1895, Congress and state legislatures used Art V three times – or roughly every thirty five years on average – to override the decisions of the Supreme Court in *Chisolm v. Georgia*, 2 U.S. 419 (1793); *Dred Scott v. Sanford*, 60 U.S. 393 (1857); and *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895). In Canada, by comparison, there has been one formal override in roughly 30 years. (The one other instance of such formal override by Art V in the U.S. occurred in 1971 in response to *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

⁵⁶ See e.g., Dixon, *Charter Dialogue*, *supra* note 6.

⁵⁷ 198 U.S. 45 (1905).

⁵⁸ 410 U.S. 113 (1973).

⁵⁹ See John Darnton, *British Labor Party Sheds Marx for Middle Class*, N.Y. TIMES (Oct. 5, 1994) (detailing future Prime Minister Tony Blair's law and order priorities at time of assuming leadership of British Labor); *The Blair Story*, BBC.Com, May 10, 2007, online at: http://news.bbc.co.uk/2/hi/in_depth/uk_politics/2007/blair_years/default.stm (on the broad priorities of the Blair government, and legislative majority, from 1997-2007).

⁶⁰ See e.g., *Anderson* (issuing a declaration of incompatibility in respect of certain provisions of the *Crime (Sentences) Act 1997* conferring discretion on the Home Secretary to decline to release persons serving a life sentence on parole); *R v. A (No2)* (“reading down” apparently codified rape-shield provisions so as to create a residual discretion on the part of trial judges to admit any potentially exculpatory evidence); *Offen* (narrowing the range of cases in which an automatic life sentence would apply, by reading the “exceptional *circumstances*” necessary to avoid such a result very broadly, as referring to all cases in which a person did not pose a “significant risk to members of the public”); *Sim* (narrowing the circumstances in which a prisoner recalled from release on license could be

have also been several cases, in addition to *Ford*, where there has been strong public opposition to decisions of the SCC. *R. v. Seaboyer*,⁶¹ for example, was a case in which the SCC struck down certain “rape-shield” laws under the *Criminal Code*, which met with very strong opposition from both women’s groups, and the Canadian public at large.⁶² *RJR-MacDonald Inc. v. Canada (A.G.)*,⁶³ in which the SCC struck down certain restrictions on tobacco advertising, was also another case that was met with extremely broad public disapproval.⁶⁴

II. THE NEW COMMONWEALTH CONSTITUTIONAL MODEL AND JUDICIAL DEFERENCE

A. *Judicial Deference and Legislative Dialogic Success in Canada*

This does not mean that Commonwealth legislatures have necessarily failed in their attempt to override court decisions other than in this one case, or that there is no difference between the strength of judicial review in Commonwealth countries and the U.S.⁶⁵

On the contrary, there is good evidence that, in Canada in particular, legislatures have had a high rate of success in enacting partial forms of override, by ordinary legislative means.⁶⁶ It is simply that the reason for this has not been the existence of any *direct* legal constraint on courts – but rather a more voluntary decision by courts both to avoid consideration of and actively defer to dialogic legislative sequels.

In both Canada and the UK, there has been a relative scarcity of “second look” cases involving a challenge to legislative attempts at override (or dialogue). In the UK, there has in fact been no direct judicial challenge heard to date involving the legislative sequel to cases such as *Roth*, *Anderson* and *R v. A (No 2)*.

held in custody, by “reading-down” the apparent presumption in favor of continued detention, so as to create a presumption in favor of release).

⁶¹ [1991] 2 S.C.R. 577 [*Seaboyer*].

⁶² See HIEBERT, CHARTER CONFLICTS, *supra* note 5 at 85, 93..

⁶³ [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

⁶⁴ For arguments to this effect, see *e.g.*, HIEBERT, CHARTER CONFLICTS, *supra* note 5 at 80-82.

⁶⁵ Tushnet raises the possibility that there is in fact no meaningful difference, given the tendency of weak-form systems of judicial review to converge toward either strong-form review, or legislative supremacy: compare Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2782 (2003); TUSHNET, *supra* note 1.

⁶⁶ Contrast Gardbaum, *supra* note 5 at 727 (suggesting that, given the pattern of non-use of s. 33, “it seems fair to say that the Canadian experience has probably done little to undermine Marshall’s claim that no possible middle ground [between legislative and parliamentary supremacy] exists”).

In Canada, 9 out of the 14 cases involving an attempt at (partial) legislative override of a SCC decision;⁶⁷ and 3 out of 9 the nine cases involving an attempt at legislative override of a provincial court decision,⁶⁸ are also yet to attract any subsequent judicial consideration. And while in some cases, this has been the product of pure accident, or a costs-rule that requires losing parties to bear the winner's legal costs, in others, it has been the clear product of a strategy of avoidance on the part of the SCC in relation to second look cases.⁶⁹

Take *Canada (Human Rights Commission) v. Canadian Liberty Net*,⁷⁰ in which the SCC was asked to consider the validity of anti-discrimination legislation targeting the transmission of "hate messages".⁷¹ This legislation had been enacted by the Canadian Parliament in response to an earlier decision of the SCC, in *R v. Zundel*, striking down the prohibition in the *Criminal Code* against "willfully publishing false news". The Court in *Zundel* had held that, given parallel prohibitions on the *willful* incitement of racial hatred upheld by the Court in *R v. Keegstra*, [1990] 3 S.C.R. 697, such a prohibition was an unjustified infringement of the right to freedom of expression in s. 2(b) of the *Charter*. Parliament, however, had clearly disagreed. While repealing criminal penalties for non-intentional forms of hate speech, it had also introduced substantial civil penalties for such speech, under the relevant provisions of the anti-discrimination code. In *Liberty Net*, the SCC was also being asked to consider the validity of such a dialogic legislative sequel, in the same year in which it was enacted. The response of the SCC was simply to defer the constitutional question, by considering only the issue of whether the lower court in the case had jurisdiction to issue an injunctive order of the kind it made.⁷²

In Canada in particular, another important factor in the success of ordinary forms of legislative override has been the willingness of the SCC –

⁶⁷ See e.g., the legislative responses to *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Daviault*, [1994] 3 S.C.R. 63; *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Figueroa v. Canada (A.G.)*, [2003] 1 S.C.R. 912 and *R. v. Zundel*, [1992] 2 S.C.R. 731.

⁶⁸ See e.g., the responses to *MacLean v. Nova Scotia (A.G.)*, (1987) 76 N.S.R. (2d) 296; *R. v. Chief*, (1989) 51 C.C.C. (3d) 265; and *R. v. Music Explosion Ltd.*, (1990), 68 Man. R. (2d) 203.

⁶⁹ On the concept of second look cases, see Dixon, *Charter Dialogue*, *supra* note 6.

⁷⁰ *Canadian (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626.

⁷¹ Canadian Human Rights Act, R.S. 1985, c. H-6, ss. 13, 53, 54, as am. 1998, c. 9, ss. 27, 28.

⁷² *Liberty Net*, [1998] 1 S.C.R. 626.

in the context of legislative sequels to decisions such as *R. v. Seaboyer*,⁷³ *R. v. Swain*,⁷⁴ *R. v. Morales*,⁷⁵ and *RJR-MacDonald*⁷⁶ – actively to defer to the legislature’s constitutional judgments at the expense of its own prior reasoning.

In *Seaboyer*, the SCC initially struck down as incompatible with the *Charter* certain “rape-shield” provisions of the Canadian *Criminal Code*, but Parliament responded by passing what was a clear dialogic legislative sequel: the new regime it enacted gave discretion to judges to admit evidence of the kind considered in *Seaboyer*, but only where it was “relevant, specific in nature, and [had] significant probative value which [was] not substantially outweighed by the danger of prejudice to the administration of justice”, when the SCC in *Seaboyer* had strongly emphasized the danger of Parliament preventing the admission of any relevant and potentially exculpatory evidence.⁷⁷ In *R v. Darrach*⁷⁸, the SCC nonetheless upheld this new law as consistent with the *Charter*, on the basis that it was open to Parliament to conclude that excluding evidence of a complainant’s sexual history furthered the “proper administration of justice”;⁷⁹ and to “direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties to these cases”.⁸⁰ Both of these findings were also directly inconsistent with the Court’s own prior reasoning, in *Seaboyer*, about the irrelevance of particular legislative objectives (such as increasing the willingness of complainants to report sexual assault) and the need to give absolute priority to the accused’s right of full answer and defense by admitting *all* potentially relevant and probative evidence that did not have the potential to cause substantial prejudice.⁸¹

In *Swain*, the SCC struck down various provisions of the *Criminal Code* providing for the indefinite committal of persons acquitted of a crime on grounds of insanity.⁸² In response, Parliament sought to give narrow effect to the reasoning of the SCC: it preserved the system of indefinite committal, but enacted new legislation limiting the right of the prosecution to put the question of insanity at issue, and introducing a separate system

⁷³ [1991] 2 S.C.R. 577.

⁷⁴ [1991] 1 S.C.R. 933.

⁷⁵ [1992] 3 S.C.R. 711.

⁷⁶ [1995] 3 S.C.R. 199.

⁷⁷ An Act to Amend the Criminal Code (sexual assault), S.C. 1992, c 38, s. 2. (Bill C-49).

⁷⁸ [2000] 2 S.C.R. 443

⁷⁹ *R v. Darrach*, [2000] 2 S.C.R. 443 at par. 41.

⁸⁰ *Id.* at par. 40.

⁸¹ See e.g., *R. v. O’Connor*, [1995] 4 S.C.R. 411 at pars. 36, 53-55.

⁸² [1991] 1 S.C.R. 933.

for administrative committal for persons found unfit to stand trial or not guilty on grounds of mental illness.⁸³ Despite this, in *Winko*,⁸⁴ the SCC upheld this new legislation almost in its entirety,⁸⁵ implicitly holding that it was open to Parliament to conclude that, as *Charter* values, individual bodily security and integrity should take greater priority, over individual liberty and security of the person, than the Court itself had suggested in *Swain*.⁸⁶

In *Morales*, the SCC held that the denial of bail “in the public interest” constituted a denial of the right to a fair trial provided by section 11(e) of the *Charter*, in part because other, more specific grounds for the denial of bail made such a provision unnecessary,⁸⁷ but again Parliament disagreed with the Court. While it repealed the particular ground for denying bail struck down in *Morales*, it simultaneously introduced a new, extremely similar ground for denying bail, based on the need “to maintain confidence in the administration of justice”,⁸⁸ which the SCC in *Hall* upheld as consistent with the *Charter*.⁸⁹ Implicitly, in doing so, it also gave clear priority to the judgment of Parliament about the importance of this kind of public confidence in the judicial system, relative to its own prior judgment about the importance of protecting individual liberty and security in the context of decisions about bail.⁹⁰

Finally, in *RJR-MacDonald*, the precursor to *JTI*, the SCC held that various provisions of *Tobacco Products Control Act* of 1988 prohibiting tobacco-advertising in Canadian media and requiring mandatory, unattributed package warnings on tobacco products constituted an unreasonable limitation of the right to freedom of expression under the *Charter*, but Parliament again responded in a dialogic manner, this time by enacting legislation that allowed informational and brand-advertising only in “adult-only” places and in printed matter, delivered by direct mail, having an 85% or higher adult readership place. In *Canada (A.G.) v. JTI-Macdonald Corp.*,⁹¹ the SCC then upheld this legislation against a facial

⁸³ Criminal Code, 1985, c. C-46, Part XX.1; *An Act to Amend the Criminal Code* (mental disorder), S.C. 1991, c. 43, c. 4,

⁸⁴ [1999] 2 S.C.R. 625.

⁸⁵ *Id.* at paras. 92-93. In 2004, in *R. v. Demers*, [2004] 2 S.C.R. 489, the Court also retreated from this position slightly, by holding that the new scheme was inconsistent with s. 7 as applied to persons permanently unfit and who do not pose a significant threat to the safety of the public.

⁸⁶ See *Swain*, [1991] 1 S.C.R. 933; *Morales*, [1992] 3 S.C.R. 711 par 40-41.

⁸⁷ *Morales*, [1992] 3 S.C.R. 711 at paras. 40-41.

⁸⁸ Criminal Law Improvement Act, 1996, S.C. 1997, c. 18, s. 59.

⁸⁹ *Id.* at paras. 40-41.

⁹⁰ See *Swain*, [1991] 1 S.C.R. 933; *Morales*, [1992] 3 S.C.R. 711 par 40-41

⁹¹ [2007] 2 S.C.R. 610.

challenge by tobacco manufacturers by a margin of 9-0.⁹²

In some of these cases, several of the justices on the SCC also gave quite explicit endorsement to the idea of deference to dialogic legislative sequels, suggesting that:⁹³

[t]o insist on slavish conformity' by Parliament to judicial pronouncements [regarding the meaning of the *Charter*] 'would belie the mutual respect that underpins the relationship' between the two institutions.

To date, there has also been only one case in which the SCC has refused to show such deference to a dialogic legislative sequel.⁹⁴ In *Sauvé I*, the SCC struck down provisions of the *Canada Election Act* 1985 that disqualified prison inmates from voting in federal election, on the grounds that they constitute an unjustified limitation on the right to vote in section 3 of the *Charter*. While the Canadian Parliament responded by introducing legislation which limited the disqualification of prisoners to those serving a sentence of two years or more, in *Sauvé II*, the SCC struck down this legislation based on reasoning that was even less deferential to Parliament than that in *Sauvé I*.⁹⁵

B. *The U.S. Record on Deference and Dialogue*

In the U.S., in cases involving Constitutional as opposed to statutory norms (or a mixture of Constitutional and statutory reasoning),⁹⁶ the Supreme Court has shown a far more uneven – or inconsistent – approach to assessing the constitutionality of legislative attempts at override of this kind.⁹⁷

⁹² *Id* at para. 93.

⁹³ See e.g., *Darrach*, [2000] 2 S.C.R. 443 at para. 34.

⁹⁴ In *Sauvé I*, the SCC struck down provisions of the *Canada Election Act* 1985 that disqualified prison inmates from voting in federal election as an unjustified limitation on the right to vote in section 3 of the *Charter*. Parliament responded by introducing legislation which limited the disqualification of prisoners to those serving a sentence of two years or more, but in *Sauvé II*, the SCC again struck down the relevant limitation.

⁹⁵ See *Canada Election Act*, R.S.C. 1985, c. E-2 (as am. by An Act to Amend the *Canada Elections Act*, S.C. 1993, c. 19, s. 23(2)); *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

⁹⁶ On the importance of “sub-constitutional” review of this kind in promoting weak-form review in certain contexts in the U.S., compare e.g., Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. AND MARY L. REV. 1575 (2000-2001); WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994).

⁹⁷ For broader studies of the Court’s response to democratic pressures, or push-back, see also, ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND*

A good illustration of this involves the Court's response to various attempts to narrow, or override, the effect of various different aspects of its decision in *Roe v. Wade*,⁹⁸ and also indirectly, *Planned Parenthood of Pennsylvania v. Casey*.⁹⁹

In *Sternberg v. Carhart*,¹⁰⁰ by a vote of 6-3, struck down a Nebraska law prohibiting all "partial birth" abortions, except those necessary to save the life of a woman, on two separate grounds: first, that the prohibition on D&X procedures lacked an exception for the "preservation of the health of the mother", as required by its decisions in *Roe* and *Casey*; and second, that by its vague drafting, it imposed an undue burden the right, recognized in *Roe* and affirmed in *Casey*, of women to choose a D&E abortion prior to viability. The decision, however, was met with strong opposition in many parts of the country;¹⁰¹ and Congress responded by passing the Partial-Birth Abortion Ban Act of 2003, which again prohibited the knowing performance ("in or affecting interstate or foreign commerce") of a "partial-birth abortion", except in order to save the life of a woman.¹⁰²

In *Gonzales v. Carhart*,¹⁰³ by a 5-to-4 vote, the Court nonetheless upheld this attempt at dialogue,¹⁰⁴ holding that there was insufficient evidence that the Act created "significant health risks" to women to sustain a facial challenge against the Act's general prohibition on the use of D&X procedures, post-viability.¹⁰⁵ One reason for this was that D&E procedures "were a commonly used and generally accepted" alternative method of late-term abortion, which the Act clearly permitted. Another was the existence

PERFORMANCE 154-56 (1981); NEAL DEVINS AND LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 354 (2009)

⁹⁸ 410 U.S. 113 (1973).

⁹⁹ 505 U.S. 833 (1992).

¹⁰⁰ 530 U.S. 914 (2000).

¹⁰¹ See e.g., Julie Ray, *Gallup Brain: Opinions on Partial Birth Abortion* (Gallup Poll, July 8, 2003), available at: <http://www.gallup.com/poll/8791/gallup-brain-opinions-partialbirth-abortions.aspx> (noting that public support for laws banning late-term abortions have been consistently over fifty percent since Gallup began polling on the issue in 1996, and that in three polls taken from January-October of 2000, public support in favor of such a law ranged from 63-66%).

¹⁰² The statute referred to: the "deliberat[e] and intentiona[l] vagina[l] delivery of a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus". See *Gonzales*, 550 U.S. 124, 141-42.

¹⁰³ 550 U.S. 124 (2007).

¹⁰⁴ 550 U.S. 124, 164.

¹⁰⁵ *Id.*

of significant medical disagreement (and thus uncertainty) over the relative safety of D&X as compared to D&E procedures, which the Court suggested, gave Congress “wide discretion” in regulating particular procedures.¹⁰⁶ While the first of these reasons was entirely consistent with *Carhart I*, the latter was also far less so.¹⁰⁷ Implicitly, therefore, the Court showed exactly the same kind of deference to ordinary attempts at legislative override as the SCC, in cases such as *Darrach*, *Winko* and *Hall*.

In cases such as *Akron v. Akron Center for Reproductive Health*¹⁰⁸ and *Thornburgh v. United States*,¹⁰⁹ by contrast, the Supreme Court has taken exactly the opposite approach to attempts by state legislatures to override aspects of *Roe*.

In *Roe*, the Court announced what were clearly a broad set of restrictions on the government’s power to limit access to abortion during the first and second trimesters of pregnancy, whereby the state could regulate abortion safety only after the second trimester of pregnancy, and attempt to promote fetal life only after the end of the second trimester (roughly, the then point of fetal viability). Much this reasoning was also directly at odds with the attitudes of a majority of Americans who believed that, even early in pregnancy, abortion should be “legal only under certain circumstances”.¹¹⁰ The response of state legislatures was, therefore, to pass a series of laws seeking sharply to narrow the effect of the decision in *Roe* – without necessarily calling into question its “core” holding, that (at least prior to viability) the right to terminate a pregnancy is a fundamental right protected by the Fourteenth Amendment.¹¹¹

The Court, however, repeatedly declined to defer to these dialogic legislative sequels, over a period of at least 16 years.¹¹² In *Akron*, it, first, reaffirmed the trimester framework established in *Roe*, and, then, relied on this framework to strike-down requirements relating to informed consent, waiting periods, parental notification requirements and hospitalization requirements for second-trimester abortions, on the basis that they were not

¹⁰⁶ *Id.* at 163.

¹⁰⁷ Effectively, by approaching the existence of medical uncertainty in this way, the Court rejected a “zero tolerance” approach toward the assessment of health risks, whereas in *Carhart I* it had treated the comparative health risks of various procedures as determinative.

¹⁰⁸ 462 U.S. 416 (1983),

¹⁰⁹ 476 U.S. 747 (1986).

¹¹⁰ In the first Gallup poll on the question in 1975, 54% of Americans gave this answer, as compared to only 21% who believed it should be legal in all circumstances: *see Abortion* (Gallup), available at: <http://www.gallup.com/poll/1576/Abortion.aspx>

¹¹¹ *Compare Casey*, 505 U.S. 833 (1992)..

¹¹² The first instance of at least partial deference of this kind occurred in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

“reasonably designed to further that state interest” in furthering women’s health in the second trimester of pregnancy.¹¹³ Similarly in *Thornburgh*, it “reaffirm[e] the general principles laid down in *Roe* and in *Akron*” and applied those principles to invalidate various state counseling and reporting requirements in respect to second-trimester abortions.

In each case, it also quite explicitly rejected the idea that it should be prepared to engage in dialogue with state legislatures. In *Akron*, for example, it emphasized that in the face of democratic opposition to the decision in *Roe*, “rule of law” considerations favored reaffirming, rather than reconsidering, *Roe*’s trimester framework.¹¹⁴ Likewise, in *Thornburgh*, the Court stressed that the vitality of the principles announced in *Roe* “[could not] be allowed to yield simply because of disagreement with them”.¹¹⁵

Even in *Casey*, where the Court did finally overrule the trimester framework set out in *Roe*, the Court again formally rejected the idea of dialogue—stressing that, where public opposition to a decision means that a decision to overrule a prior precedent could be interpreted by the public as “surrendering to political pressure,” it was more, not less, important for the Court to adhere to the prior decision.¹¹⁶

III. JUDICIAL DEFERENCE AND FORMAL OVERRIDE POWERS

A. *A Positive Connection*

It is also quite plausible that there is a connection, in this context, between the greater willingness of the SCC, compared to the U.S. Supreme Court, to defer to dialogic legislative sequels and the broader availability, in Canada, of a formal power of legislative override.

Given such a power, if courts strike-down attempts at legislative dialogue it is at least possible that legislators will respond by relying on a formal power of override to “trump” the court’s decision.¹¹⁷ This will have

¹¹³ 462 U.S. at 438.

¹¹⁴ *Id.* at 420, 428-31.

¹¹⁵ *Thornburgh*, 476 U.S. at 759.

¹¹⁶ *Id.* at 867 (suggesting that where departing from the doctrine of stare decisis could be interpreted by the public as “surrendering to political pressure,” it was more, not less, important for the Court to adhere to the doctrine). See also NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* (1996)

¹¹⁷ On the trumping function of legal mechanisms, such as amendment rules, compare Rosalind Dixon, *Constitutional Amendment Rules: a Comparative Perspective*, in *THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW* (Rosalind Dixon and Tom Ginsburg, eds.) (forthcoming 2011)

two potential costs for courts: it will reduce the chance that they have any ultimate influence on a particular area of constitutional law; and also the chance that the public perceives them as influential in shaping constitutional meaning. Where it is used, a formal power of override almost always gives legislators broader scope to override courts than ordinary legislation, because, in the face of such an override, courts generally have a very clear textual directive to change the course of common law constitutional interpretation, and are also not constrained in doing so by prior precedent, or the doctrine of *stare decisis*.¹¹⁸ At least where such an override is express, rather than implied, it is also more likely to attract media and public attention as an instance in which the legislature decides to override the court.¹¹⁹ For some judges, at least, both these possibilities may also be a source of pressure to defer to dialogic legislative sequels.

By expressly allowing legislatures to override courts by ordinary majority vote, for some judges, formal override mechanisms may also provide additional legal support – or authorization – for a decision to defer to dialogic legislative sequels. On this view, formal override clauses do not simply provide a mechanism for legislative override. They also provide a source of explicit textual support for a dialogic model of constitutionalism, according to which courts have broad freedom to interpret the constitution in first, but not second, look cases.¹²⁰

In Canada in particular, there is also some evidence to support the existence of a connection of this kind.

At SCC level, all four cases in which the SCC has actively deferred to legislative attempts at dialogue have involved provisions that fall within the scope of s. 33.¹²¹ *Darrach*, *Winko* and *Hall*, for example, were all cases involving the right to freedom and security of the person (s. 7) and/or the right to a fair trial (s. 11(d)),¹²² while *JTI-Macdonald* involved the guarantee of freedom of expression in s. 2(a) of the *Charter*. Both these sets of rights are within the scope of s. 33.¹²³ *Sauvé II*, by contrast, was a case involving the right to vote under s. 3 of the *Charter*, which is one of

¹¹⁸ Compare e.g., *The Slaughterhouse Cases*, 83 U.S. 36 (1873)

¹¹⁹ For arguments to this effect in the Canadian context, though with a more critical valence, see e.g., Kahana, *supra* note 54 at 256-58.

¹²⁰ For a normative defense of such a model, see Dixon, *Charter Dialogue*, *supra* note 6.

¹²¹ Dixon, *Charter Dialogue*, *supra* note 6. For an earlier observation to similar effect, see also Kent Roach, *Dialogue or Defiance: Legislative Reversal of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347, 368-69 (2006).

¹²² Section 11(d) of the *Charter* provides, that any person charged with an offense has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”

¹²³ Section 33 applies to s. 2 and ss. 7-15.

the few provisions expressly excluded from the scope of s. 33.¹²⁴

At a lower court level, there has been a similar pattern. For example, there were 9 cases prior to 2005 in which lower courts struck-down legislation for inconsistency with the *Charter* and the Canadian Parliament or a provincial legislature then sought to override part of the court's decision; and of these 9, 7 have subsequently met with either *de facto* success or actual judicial deference.¹²⁵ Again, in this context, there has also been a near to one-to-one connection between the willingness of courts actively to defer to such legislative attempts at dialogue and the availability of a formal power of override.

Of the four cases at this level in which courts actively deferred to the legislature, three involved the right to fair trial in s. 11(d) of the *Charter*; and one the guarantee of freedom of expression in s. 2(a).¹²⁶ By contrast, in at least one of the two cases in which courts refused to show such deference, the legislation at issue touched so closely on the right to vote under s. 3 of the *Charter* – as well as rights to freedom of expression – that it would have been questionable whether any use of s. 33 could have been fully effective in the circumstances.¹²⁷

B. *A Contingent Connection?*

At the same time, it is also important not to overstate the strength of this potential indirection connection between the availability of a formal power of legislative override and dialogic forms of deference by courts.

While far from the only explanation for the approach of the SCC in this area, one important contributor

In Canada, another potentially important contributor to the SCC's willingness to engage in dialogue with Parliament, and provincial legislatures, has been the relatively high rate of turnover on the SCC. Turnover of this kind is not, by itself, sufficient to explain the pattern of second look decisions in Canada: there has been sufficient continuity in the membership of the SCC over the last few decades to mean that, in each second look case, there was at least one justice who opted to defer to the constitutional judgments of Parliament at the expense of his or her own

¹²⁴ See *supra* note 94 and accompanying text.

¹²⁵ See e.g., the responses to *MacLean v. Nova Scotia (A.G.)*, (1987), 76 N.S.R. (2d) 296; *R. v. Chief*, (1989), 51 C.C.C. (3d) 265, and *R. v. Music Explosion Ltd.*, (1990), 68 Man. R. (2d) 203.

¹²⁶ *Vann Niagara Ltd. v. Oakville (Town)*, [2003] 3 S.C.R. 158

¹²⁷ See *Reform Party of Canada v. A.G. (Canada)*. The other case, which involved a very narrow disagreement between the court and the legislature about the need for residual discretion on the part of courts to refuse to grant a warrant in revenue cases, is *Minister of National Revenue v. Kruger Inc.*, [2001] 1 S.C.R. 911.

prior reasoning, not simply that of the Court as a whole.¹²⁸ Turnover, however, has clearly contributed to the willingness of the SCC overall to adopt a different position in second, as opposed to first, look cases; and turnover of this kind is a direct product of Canada's system of mandatory judicial retirement.

Another potentially important contributor to the SCC's approach in second look cases has been the court's more general approach to determining the justifiability of limitations on *Charter* rights, under s. 1 of the *Charter*. The SCC has come, over time, to apply a quite flexible approach to "proportionality" analysis, which is far more fluid and contextual than a U.S.-style test of strict (or even intermediate) scrutiny.¹²⁹ Compared to in the U.S. in particular, this also means that Canadian justices enjoy much greater scope to defer to legislative constitutional judgments, while still acting consistently with their own prior precedents.¹³⁰

Whatever the role played by s. 33 in helping create weak-form review in Canada, to date, it is also important to note that no Commonwealth court to date – including the SCC – has expressly endorsed the idea that they should show greater deference in the shadow of such a power. Rather, as a formal matter, even courts such as the SCC have tended to suggest that it will be irrelevant to their approach that legislation represents an attempt at dialogue over the meaning of provisions covered by s. 33.¹³¹

¹²⁸ The relevant justices in *Darrach* were McLachlin C.J. and Iacobucci; in *Winko* Lamer CJ and Cory; and in *Hall* and *JTI* McLachlin CJ. It is, of course, also important to note that there was some real degree of turnover on the SCC during this period, in a way that was not the case on the U.S. Supreme Court, and that this may provide part of the explanation – distinct from the role played by s. 33 – for why the SCC has generally been more deferential to legislative sequels than the U.S. Court, in the recent era.

¹²⁹ See e.g., JANET HIEBERT, *LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW* 61-71 (1995).

¹³⁰ For the suggestion that this has contributed to the existence of dialogue in Canada (albeit in a somewhat different form to that explained in this article), see e.g. Hogg and Bushell, *supra* note 28; Kent Roach, *Dialogic Judicial Review and its Critics*, 23 S.C.L.R. (2d) 49, 54 (2004); Peter W. Hogg, Allison A. Bushell Thornton and Wade K. Wright, *Charter Dialogue Revisited—Or 'Much Ado About Metaphors'*, 45 OSGOODE HALL L.J. 2 (2007). For a more skeptical account, compare also Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 52 U.T.L.J. 89, 93 (2003); Jeremy Webber, *Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)*, in *CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* 61 (Wojciech Sadurski, ed. 2002). See also Andrew S. Butler, *Limiting Rights*, 33 V.U.W.L.R. 113, 116 (2002); Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 805 (2006-2007).

¹³¹ *JTI*, [2007] 2 S.C.R. 610 at para. 11 (rejected the idea that the legislation represented some form of dialogue, or legislative sequel, which should "militate for or

Some commentators have even argued that the availability of such power should be treated by courts as weighing *against*, rather than in favor, of a decision in second look cases to defer to ordinary forms of legislative dialogue. Lorraine Weinrib, for example, has suggested that because s. 33 “frees Canada from the crisis of judicial legitimacy that mars other rights-protecting systems”, it is unnecessary for courts in Canada to defer to Parliament and state legislatures in other contexts.¹³² In certain first look cases, the SCC itself has also shown some sympathy for this view.¹³³

Even in the shadow of a formal power of override, therefore, Commonwealth courts could in the future quite easily decide to take a less deferential approach in second look cases. If they were to do so, there would also be no guarantee that Commonwealth legislatures would then increase their actual use of formal powers of override.

Even where the public itself disagrees with a court decision, it will often be extremely costly for legislators to use a formal power of override, because doing so often requires them to exaggerate the scope of their disagreement with courts. As Jeremy Waldron has noted, there are two potential reasons why legislators may disagree with courts about the application of particular charter rights.¹³⁴ One reason is that they believe that the rights in question have no proper application to a particular context— i.e. they have “misgivings” about the application of rights.¹³⁵ Another is that they may disagree with judges about the exact content or priority to be given to the relevant rights in given context (“rights disagreements”).¹³⁶ A legislative power of override, however, necessarily implies that legislators wish to avoid the application of rights in a particular context, or have rights misgivings. For legislators to use such a power in order to express rights disagreement, therefore, they must be willing quite radically to over-state the breadth of their disagreement with courts.

In many cases, the political costs to such overstatement will also be far higher than the costs of not responding to public disagreement with a court. This is also especially true in the relevant Commonwealth countries, given that, to date, none of these countries has experienced the kind of constitutional crisis the U.S. experienced during the New Deal, in which the

against deference” by the Court).

¹³² Lorraine E. Weinrib, *Canada’s Charter: Comparative Influences, International Stature*, in *THE CHARTER AT TWENTY: LAW AND PRACTICE* 571 (Debra M. McAllister and Adam M. Dodek, eds., 2002)

¹³³ [1999] 2 S.C.R. 3 at paras. 78-79.

¹³⁴ Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, in *CONSTITUTIONALISM IN THE CHARTER ERA* 7 (Grant Huscroft and Ian Brodie, eds, 2004) 7.

¹³⁵ *Id.*

¹³⁶ *Id.*

Supreme Court consistently refused to uphold the most central aspects of national legislative policy.¹³⁷

IV. CONCLUSION

To be tractable, most forms of constitutional comparison require some form of simplification in how they treat foreign constitutional practices. When engaging in comparison, it can also often be useful to classify foreign constitutional practices in terms of certain broad constitutional archetypes.

When it comes to “reflective” forms of constitutional comparison in particular, the value of comparison will often be enhanced by treating foreign constitutional practices in this kind of broadly archetypal way.¹³⁸ The clearer the reaction constitutional decision-makers have to foreign constitutional practices, the more likely it is that processes of comparison will prompt either a sense of recognition, or form of “aversive” reaction, that can help clarify domestic constitutional commitments.¹³⁹ The precise details of foreign constitutional arrangements will also be largely irrelevant to the reliability of these insights. Any device that can enhance the clarity of comparison, therefore, will also tend to enhance, rather than detract, from the usefulness of comparison itself.

In many contexts, this further suggests that there will be clear advantages to treating the new Commonwealth constitutional model in somewhat archetypal terms – i.e. as a model of formally revisable judicial review. In the U.S. in particular, it seems clear that, to date, such an approach has in fact helped prompt deeper reflection about what about what (if anything) in our constitutional tradition justifies the existence of such formally strong-form judicial review, under Art III.¹⁴⁰

¹³⁷ See generally Michael Comiskey, *Can a President Pack – or Draft – the Supreme Court? FDR and the Court in the Great Depression and World War II*, in *THE SUPREME COURT IN AMERICAN SOCIETY: THE LEAST DANGEROUS BRANCH* 117 (Kermit L. Hall, ed.) (2000); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, in *THE SUPREME COURT IN AMERICAN SOCIETY*, *supra* at 263.

¹³⁸ See, e.g., Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L. J.* 819 (1999); Vicki C. Jackson, *Foreword – Comment: Constitutional Comparisons, Convergence, Resistance, Engagement*, 119 *HARV. L. REV.* 109 (2005); Anne-Marie Slaughter, *A Global Community of Courts*, 44 *HARV. INT. L. J.* 192 (2003); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L. J.* 1225 (1999).

¹³⁹ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 *INT’L J. CONST. L.* 296 (2003). *Cf. also* Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *YALE L. J.* 423 (1996).

¹⁴⁰ See e.g., Gardbaum, *supra* note 5 at 745 (suggesting that reflecting on the new

At the same time, not all forms of comparison necessarily have this same reflective focus. Some forms of comparison may be more empirical in focus, and directed toward understanding how certain constitutional choices do, or do not work, in practice.¹⁴¹

In the U.S. to date, the potential benefits to this kind of more empirically-oriented Commonwealth-U.S. comparison also largely remain unexplored.

In writing, for example, about the potential to “borrow” from the new Commonwealth constitutional model, American constitutional scholars often suggest that quite radical forms of constitutional change would first need to occur. A good example of this is the suggestion, by Robert Bork, that the U.S. should borrow the mechanism of formal legislative override that exists in countries such as Canada and the UK, and either make “decisions of [U.S.] courts ... subject to modification or reversal by majority vote of the Senate and House of Representatives [or]” or deprive courts “of the power of constitutional review”.¹⁴² Both these changes would clearly require some of amendment under Art V,¹⁴³ and therefore also a fairly radical shift in political circumstances before constitutional comparison would likely have any practical pay-off.¹⁴⁴

This analysis, however, largely overlooks the potential for far more modest – and realistic – forms of empirically-oriented borrowing from countries such as Canada. A good example of this involves the potential for the Supreme Court to borrow certain aspects of the SCC’s approach to second look cases, as a means of addressing the concern, of some justices, that a decision to defer to a legislative sequel could be perceived by the public as simply a decision to “to overrule under fire”.¹⁴⁵

Take the SCC’s approach in *Darrach*. Before deciding to uphold the relevant rape-shield law, the SCC first considered whether the legislation was at least minimally reasonable in light of the right to a “fair trial” in s. 11(d) of the *Charter*. Next, the Court considered the degree to which, in

Commonwealth model could cause Americans to “reopen and complicate... in a healthy way” existing choices regarding judicial supremacy).

¹⁴¹ For arguments in favor of this kind of empirical or functionally-oriented forms of comparison, see e.g., Sanford Levinson, *Looking Abroad When Interpreting the US Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 364 (2004); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999).

¹⁴² Robert Bork, in *END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS: THE CELEBRATED FIRST THINGS DEBATE WITH ARGUMENTS PRO AND CON AND “THE ANATOMY OF A CONTROVERSY”* 17 (Mitchell S. Muncy and Richard Neuhaus, eds. 1997).

¹⁴³ *Id.*

¹⁴⁴ See JANE MANSBRIDGE, *WHY WE LOST THE ERA* (1986) on ERA and difficulty of amendment absent bipartisan consensus.

¹⁴⁵ *Casey*, 505 U.S. at 867

adopting the relevant sequel, Parliament had responded to its own reasoning in *Seaboyer* about when evidence of prior sexual experience will be irrelevant to the question of guilt. By applying these criteria— of minimal reasonableness and responsiveness, both in *Darrach*, and subsequent second look cases, the SCC thus made it clear to the Canadian public that it would not simply defer to *any* and all attempts at legislative override.

If the Supreme Court were to “borrow” this approach from Canada,¹⁴⁶ it too could also provide reassurance to the American public that deference in second look cases need not lead to outright freedom on the part of Congress, or state legislatures, to override the Court simply by ordinary legislative means.

Similar arguments exist for a turn to a more fine-grained, empirically-oriented comparison in countries such as Australia. In Australia in recent years, there has been a vigorous debate about whether to adopt a rights charter at a national level, and specifically whether to *borrow* the new Commonwealth model of rights protection at a national level.¹⁴⁷

The focus of comparison, however, has also largely been on formal differences between the new Commonwealth constitutional model and the U.S. constitutional model, rather than on more fine-grained, contextual differences between Commonwealth courts and the U.S. Court in their approach to second look cases. There has been almost no acknowledgement of the way in which, to date, the weak-form status of judicial review in Commonwealth countries has depended on non-consideration of, or else active deference, by courts to dialogic legislative sequels.¹⁴⁸

The danger this creates, for proponents of weak-form review in

¹⁴⁶ On the idea of this kind of borrowing, compare Jackson, *supra* note 138.

¹⁴⁷ See e.g., *National Human Rights Consultation Report*, Sept. 2009, online at: [http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Prelims\).pdf/\\$file/NHRC+Report+\(Prelims\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Prelims).pdf/$file/NHRC+Report+(Prelims).pdf)

¹⁴⁸ See e.g., ACT Bill of Rights Consultative Committee, *Towards An ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (May 2003) [4.5] (arguing in the context of the ACT Human Rights Act that the key to achieving weak-form judicial review under the Act was the decision to “assign the ‘last say’ in relation to human rights issues” to the legislature); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Mr Hulls, Attorney-General) (arguing, in his second reading speech introducing the Victorian *Charter*, that the Victorian *Charter of Rights and Responsibilities* 2006 was “nothing like the United States Bill of Rights” was that it gave “Parliament the final say” in any dialogue over the meaning of rights protected by the *Charter*); National Human Rights Consultation Committee Par no (arguing in favor of a UK-style human rights charter for Australia, on the basis that by “giv[ing] distinct roles to each arm of government”, and in particular, by “giv[ing] the final say on laws” to parliament, and that such a charter would help facilitate greater ‘dialogue’ between the three arms of government).

Australia, is that in the future the members of the High Court might conclude that the framers of a national rights charter did not in fact intend that they should show Canadian-style avoidance, or deference, in second look cases,¹⁴⁹ when in fact, this is exactly what is required in order for proponents of weak-form review to achieve their aims.¹⁵⁰ To avoid the Court reaching this conclusion, on the other hand, all that would likely be required is for constitutional decision-makers in Australia to give *some* explicit, and favorable, mention of this more informal, empirical aspect to the new Commonwealth constitutional experience.

In both the U.S. and a broader comparative context, the key aim of the article, therefore, the key aim of the article is not in fact to criticize existing scholarship on the new Commonwealth constitutional model, on its own terms. Rather, it is to encourage scholars working in this area to reorient their focus toward a new, more empirically– rather than reflective – oriented Commonwealth-U.S. comparative paradigm.

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¹⁴⁹ At a state level, the drafting history behind the ACT HRA and Victorian *Charter* has certainly had a clear influence on the interpretation of those charters by state courts. See e.g. *R v. Momcilovic*, [2010] VSCA 50 pars 93-94 (17 March 2010) (endorsing a declaration of inconsistent interpretation as the preferred remedy in the case, in part because it was more consistent with “th[e] conception of dialogue, and in particular ...the avowed purpose of ‘giving Parliament the final say’” evidenced in both the Attorney’s Second-Speech introducing the *Charter* and the Victorian Consultation Committee’s Report leading up to the adoption of the *Charter*).

¹⁵⁰ Compare Dixon, *Charter Dialogue*, *supra* note 6; JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). Of course, not all supporters of the idea of weak-form review actually do endorse this idea of deference: see e.g., Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR REV. 481 (2001); KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (2001); Kent Roach, *Dialogic Judicial Review and its Critics*, 23 S.C.L.R. 49, 54 (2004); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT’L L.J. 537 (2004-2005); Kent Roach, *A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci’s Substantive Approach to Dialogue*, 57 U.T.L.J. 449 (2007). I have argued elsewhere, however, that to some degree this makes them actual supporters of strong-form review: Dixon, *Charter Dialogue*, *supra* note 6.

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