

## I Introduction

In 1987, Patrick Monahan concluded that American theories of judicial review were the 'product of the American constitutional experience' and, as such, of 'rather limited utility in the Canadian context.'<sup>1</sup> He colourfully argued that 'General Motors may be able to ignore the Canadian-American border, but Ronald Dworkin cannot; approaches to judicial review in Canada must necessarily differ from those in the United States.'<sup>2</sup> The ability of legislatures to limit and override rights with ordinary legislation under ss. 1 and 33 of the *Canadian Charter of Rights and Freedoms* does indeed distinguish the *Charter* from the American *Bill of Rights*. The same is true for other liberal democracies, including New Zealand and the United Kingdom, which, like Canada, allow ordinary legislation to limit and even derogate from rights as interpreted by their courts. At the same time, however, Canadians and others cannot afford to ignore the great volume of literature produced to justify judicial review in the United States. The Americans have the franchise on judicial review under a constitutional Bill of Rights, and the influence of their views is inescapable. Indeed, Monahan's own conclusions suggest that it may be difficult to escape the long reach of American constitutional theory. Despite his preference for a made-in-Canada approach, he ended up expressing a preference for John Hart Ely's democracy-re-enforcing theory of judicial review and arguing that it was a better fit with the Canadian than with the American constitution.<sup>3</sup>

Writing in 1987, Monahan saw democracy-re-enforcing theories, textualism or originalism as represented by Robert Bork, and fundamental rights theory as represented by Ronald Dworkin as the main contenders

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† A review of Frank I. Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999) 145 pp., US\$25.95; and Terri Jennings Peretti, *In Defence of a Political Court* (Princeton, NJ: Princeton University Press, 1999) 371 pp., US\$28.95 hardcover, US\$19.95 paper. Subsequent references appear parenthetically in the text of the review.

1 P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at 15.

2 *Ibid* at 95.

3 *Ibid* at 99.

in the high-stakes American theoretical contest to justify not only judicial review but also the judicial supremacy that the US Supreme Court often exercises under the American *Bill of Rights*.<sup>4</sup> In the last fifteen years, however, more nuanced theories reconciling judicial review with American democracy have emerged or been reclaimed. Many of these new theories conceive judicial review by the courts as part of a larger dialogue with legislatures and society,<sup>5</sup> an idea that has captured the imagination of Canadian commentators<sup>6</sup> and the Supreme Court of Canada<sup>7</sup> and seems to better fit a Bill of Rights that allows the legislature to enact ordinary legislation that limits or overrides rights as interpreted by the courts. The purpose of this review is to examine some recent efforts in American constitutional theory to see if they are helpful to Canadians (and others) struggling to reconcile judicial review with democracy.

## II *Michelman's liberal judicial review*

One such effort is Frank Michelman's *Brennan and Democracy*. His quest is to reconcile the judgments of Justice William Brennan, in his thirty-four years on the US Supreme Court, with democracy. Brennan was a key member of the Warren Court, renowned for its liberal activism for racial desegregation, due process rights of the accused, free speech, privacy

4 See also P. Hogg, 'The Charter of Rights and American Theories of Interpretation' (1987) 25 Osgoode Hall L.J. 87 for another survey of the state of American constitutional theory in the 1980s.

5 P. Dimond, *The Supreme Court and Judicial Choice: The Role of Provisional Review in a Democracy* (Ann Arbor: University of Michigan Press, 1989) [hereinafter *Judicial Choice*]; G. Calabresi, 'Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)' (1991) 105 Harv.L.Rev. 80 [hereinafter 'Foreword']; M. Perry, *The Constitution in the Courts: Law or Politics* (New York: Oxford University Press, 1994) [hereinafter *Constitution*]; B. Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1997) [hereinafter *We the People*]; M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999) [hereinafter *Taking the Constitution*]; C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999) [hereinafter *One Case*].

6 P. Hogg & A. Bushell, 'The Charter Dialogue Between Courts and Legislatures' (1997) 35 Osgoode Hall L.J. 529; K. Roach, 'Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures' (2001) 80 Can.Bar Rev. 481 [hereinafter 'Constitutional and Common Law Dialogues']. Critics argue that dialogue under the Charter is closer to judicial supremacy under the American *Bill of Rights*. See C. Manfredi & J. Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 Osgoode Hall L.J. 513; F.L. Morton, 'Dialogue or Monologue?' in P. Howe & P. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001) 111.

7 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 139; *R. v. Mills* (1999), 139 C.C.C. (3d) 321 at paras. 56-8.

rights (including rights to early abortions), and the separation of church and state. Justice Brennan subsequently did battle with his more conservative colleagues during the Chief Justiceships of Warren Burger and William Rehnquist. In Michelman's words, the question is 'Brennan and democracy – how to have both?' (5). This is an important and provocative project. If Michelman can convince readers that Brennan's legacy is consistent with democracy, then Americans will be able to have robust and anti-majoritarian judicial review, but also democracy. Michelman will have escaped the constant American dilemma of having either an underactive judiciary that leaves important rights unprotected or an overactive one that dictates important policy to the people.<sup>8</sup>

Michelman's book is mainly composed of two previously published essays<sup>9</sup> and, as a result, lacks coherence. The first chapter is theoretical and contrasts foundational and process-based understandings of judicial review. The former is epitomized by Ronald Dworkin's theories and the quest for the 'establishment of some a priori fixed, non-negotiable, non-debateable set of concretely intelligible normative first principles' (50). The other is based on the idea that the courts have a more limited obligation to guarantee only the existence of a 'responsive democracy.' Surprisingly, Michelman does not acknowledge or discuss the democracy-re-enforcing theory of John Hart Ely.<sup>10</sup> This omission is even more curious given that Michelman simply inverts the title of Ely's famous work, 'distrust and democracy,' to describe his own view of 'responsive democracy' (57).

Michelman's failure to examine Ely's work is more than a matter of his not situating his work within the proper intellectual tradition. It also renders Michelman vulnerable to a familiar criticism directed at Ely's work itself, namely that Ely's (and now Michelman's) views of democracy are so thick or substantive that they require a foundational account of fundamental rights.<sup>11</sup> To his credit, Michelman is more alive to the substantive nature of his understanding of democracy than is Ely. Michelman admits that 'Brennan believed that constitutionalism presupposes procedure-independent standards of basic legal rightness.' (60) Moreover, he concedes that in a pluralistic and divided society, agreement on

8 M. Tushnet, *Red, White and Blue* (Cambridge, MA: Harvard University Press, 1988) at 16.

9 F. Michelman, 'Super Liberal' (1991) 77 Va.L.Rev. 1261; F. Michelman 'Brennan and Democracy' (1998) 86 Cal.L.Rev. 399.

10 J.H. Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980) [hereinafter *Democracy*].

11 L. Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale L.J. 1063; M. Tushnet 'Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory' (1980) 89 Yale L.J. 1037; P. Brest, 'The Substance of Process' (1981) 42 Ohio St.L.J. 131; R. Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1986) at 57–71.

normative standards will be difficult if not impossible to achieve. In the end, Michelman settles on a more limited argument that citizens could agree to give the Court the robust powers on matters such as abortion, police powers, and school prayer that Brennan exercised, on the conditions that (a) judges make a 'maximum feasible effort' to find the right answer and (b) judges be exposed 'to the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations of interests, ... including your own' (59-60). In other words, people should accept judicial review provided the courts try to get it right and the people can criticize and represent their views to the courts.

Michelman's approach to judicial review is more robust than that proposed by Ely.<sup>12</sup> If anything, Michelman runs the danger of allowing judges to do almost anything so long as they can stand 'the full blast of ... democratic critical interaction' (61), something that is not so difficult when you have tenure, power, and police protection. The argument seems to be that as long as everyone can protest in front of the United States Supreme Court, write learned articles dumping on it, or pay to engage in litigation before it,<sup>13</sup> citizens should all agree to rule by that Court. This leaves Michelman open to Jeremy Waldron's argument that speculation by the chattering classes about what 'a few black-robed celebrities' will 'do next on abortion or some similar issue'<sup>14</sup> is not really democracy and that even if we could somehow rely on judges to get the right answers, something would be lost by not working them out for ourselves.

Michelman's second chapter moves on to understanding and celebrating Justice Brennan as an admirable black-robed celebrity. Brennan's decisions are said to have been united by a 'democratic liberalism' and a 'romantic regard for personality.' Michelman's assumption seems to be that all of his decisions striking down state action were united by such qualities. This is questionable and Michelman's argument would have been

12 Perhaps because Ely dedicated *Democracy and Distrust* to Earl Warren, the thinness of his view of the role of courts in a democracy has often gone unnoticed. For example, Ely argued that courts had little or no role on matters affecting abortion or discrimination against women or gays and lesbians. See Ely, *Democracy*, supra note 10 at 169, 256, 162.

13 The American practice of allowing interest groups to submit amicus briefs and the Canadian practice of allowing interest groups to act as intervenors can both be seen as a form of participation before the Court.

14 J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 291. Kathleen Sullivan, in a commentary on Michelman's early article, expressed similar concerns about the idea that 'it is sufficient that participation in constitutional self-government take the form of intellectual enlightenment of Justice Brennan, rather than any actual control (however slight) we might have over his decisions.' K. Sullivan, 'Epistemic Democracy and Minority Rights' (1998) 86 Cal.L.Rev. 445 at 448.

strengthened by an example of decisions striking down state action that did not advance 'democratic liberalism.' Adding the prefix 'democratic' to 'liberalism' does not answer the charge that Michelman, as much as Ely or Dworkin, requires a full foundationalist justification of liberalism to justify the robust and often final role assigned to judicial review.

It is strange that Michelman devotes a book to democracy and judicial review without any real discussion of legislation or of legislative responses to the Court's decisions. For example, Justice Brennan's decision that flag burning is a constitutional right is mentioned a number of times, without any mention of Congress's unsuccessful attempt to reverse that decision a year later. Michelman seems to be satisfied by the fact that Americans retained their First Amendment rights to criticize the Court about its highly unpopular decision. Any understanding of democracy that disregards the fact that the Court usurped the ability of citizens to reverse its decision (except through the almost impossible process of constitutional amendment) must be impoverished. The idea that one is free to shout and rail against the decisions of the United States Supreme Court hardly satisfies any understanding of democracy as self-rule.<sup>15</sup>

A shortcoming of Michelman's work, especially for Canadians and others who live with a modern Bill of Rights that allows legislatures both to limit and to override rights as interpreted by the court, is its implicit assumption of judicial supremacy. Like Ely,<sup>16</sup> Michelman assumes that the decisions of the United States Supreme Court in interpreting the Constitution will be supreme and final, except as a result of the difficult process of changing either the Constitution or the Court. The assumption of judicial supremacy means that effort must be focused on arguing that the Court's constitutional decisions are themselves consistent with democracy, as opposed to examining the options that legislatures retain to reply to that Court's decisions. Judicial supremacy increases the stakes of the normative project of justifying the Court's work.

15 Michelman does recognize the coercion of judicial law-making and seems somewhat uneasy about it, but suggests that 'it is plausibly answerable that, in a fallen world, judicial policing of the ground rules helps provide for people generally a surer (if compromised) change or "participation in change" than the next best alternative' (136). To the extent that this provides an answer, the policing-the-ground-rules argument follows Ely and is subject to the objections noted *supra* note 11.

16 Ely defines judicial review in a manner that assumes judicial supremacy and rejects the idea of a dialogic response by legislatures or of analogies between constitutional and common law. He argues that 'the question is whether the court is to overrule [the legislature] in a way that can be undone only by the cumbersome process of constitutional amendment' and that "'remanding" the question to the political processes for a "second look" would not be acceptable: we don't give a case back to a rigged jury.' Ely, *Democracy*, *supra* note 10 at 68, 169.

The Brennan that Michelman portrays is far more liberal than democratic. Those such as Michelman, who find much of Brennan's liberalism to be tolerant, generous, and admirable, should still question whether the benefits of judicial supremacy '[w]hen Brennan had the votes, [and] his word was law' (137) are worth the costs of judicial supremacy when Brennan did not and his words were mere dissents. Michelman's failure to do this is particularly striking given the fact that Brennan spent much of his career dissenting from his more conservative colleagues. Because of Michelman's focus on liberal as opposed to democratic constitutionalism,<sup>17</sup> readers in Canada, the United Kingdom, New Zealand, and elsewhere will find that Michelman's book does not address issues of central importance under their bills of rights, namely the ability of elected governments to enact ordinary legislation that reverses or revises decisions of their courts interpreting their bills of rights. Michelman's democratic defence of judicial supremacy and the Brennan legacy in American constitutional law are not likely to persuade those who do not believe that Ely or Dworkin have justified judicial supremacy in a democracy.

### III *Peretti's political judicial review*

If Michelman gives activist judges like Brennan too much power to impose their values and philosophy on elected governments in the name of controversial visions of democracy, political scientist Terri Peretti, in her provocative book, *In Defence of a Political Court*, goes to the opposite extreme. She urges the courts in a democracy to be so political and strategic in their attempts to ensure the political acceptability and popularity of their decisions, that the legitimacy of even limited judicial participation in a dialogue with legislatures and society is undermined. While Michelman privileges liberal values over democracy, Peretti privileges democracy over the courts' role in reminding the people about liberal and other fundamental values – a role that is most vital at times when the people are not in a mood to listen.

Peretti follows in the majoritarian traditions of Robert Dahl, who in 1957 argued that the 'policy views dominant on the Court are never for long out of line with the policy views dominant among the law-making

17 For further explanation of a liberal model of judicial review, based on judicial supremacy in enforcing liberal rights under the American *Bill of Rights*, on the one hand, and a democratic and common law model of judicial review under modern bills of rights, such as the Charter, that allow legislatures to justify limits and override rights as declared by the Court, on the other, see David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 15 S.A.J.H.R. 11 at 31ff; also my *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [hereinafter *The Supreme Court on Trial*].

majorities of the United States.<sup>18</sup> This was an important empirical observation, one that continues to be supported by political scientists, who, with justification, argue that academic lawyers often overestimate the counter-majoritarian potential of the Court and underestimate the need for judicial decisions to be supported by political majorities and effective lobbies.<sup>19</sup> Dahl, however, ventured beyond the empirical and also asserted that if the Court supported 'minority preferences against majorities,' it would deny that 'popular sovereignty and political equality, at least in the traditional sense, exist in the United States.'<sup>20</sup> Written in the wake of democratic resistance by southern legislatures and majorities to *Brown v. Board of Education*, this was an incredibly provocative statement that suggested that the Court not only follows the election returns but, for reasons of democracy, should follow them.

Dahl's defence of such a majoritarian approach to judicial review was largely implicit. He did not take on his Yale colleague, Alexander Bickel, who shared Dahl's views about the vulnerability of the Court in a democracy but not Dahl's sense that anti-majoritarian judicial review was inherently inconsistent with democracy. Bickel was well aware of resistance to *Brown v. Board of Education* but believed that the Court should still move ahead in the name of equality, albeit in a cautious and dialogic manner. Peretti's book takes up Dahl's implicit but neglected normative project of justifying majoritarian and politically sensitive judicial review.

The first part of Peretti's book is an examination and critique of normative theories of judicial review. She groups together the three theories that Monahan examined, namely textualism, fundamental rights, and democracy-re-enforcing approaches, under the label of conventional or neutralist approaches to judicial review. All of these approaches are united by their common quest for a neutral theory that creates a legitimate and self-executing role for the United States Supreme Court but avoids the problem of an unelected court's restraining legitimate expressions of the democratic will (13). This is an important observation that has significance for Canadians and others living under a modern Bill of Rights. Much traditional constitutional theory in the United States has been about ensuring that courts get the right answers and that the right answers are consistent with democracy because the Court's answers will often be the final word. Under the *Charter*, theorists face somewhat less

18 R. Dahl, 'Decision-Making in a Democracy: The Supreme Court as National Policy-Maker' (1957) 6 *J. of Publ. Law* 279 at 285 [hereinafter 'Decision-Making'].

19 See, e.g., G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991); C. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998).

20 Dahl, 'Decision-Making,' *supra* at 291.

pressure to convince their readers that there is a theory that can ensure that the courts always get it right, precisely because the legislature can respond with legislation that limits, perhaps, overbroad rights as interpreted by the Supreme Court of Canada or, if all else fails, that overrides the rights that the Court has interpreted. This does not mean that Canadian judges can abandon the search for constitutional theory or the right answers – flipping coins will not do. It does, however, lower the stakes of the quest for a foolproof theory of judicial review. As will be seen, there is even an argument that Canadian judges can be bolder in searching for the right or best answers precisely because they do not necessarily have the final word.

Peretti then examines 'Critical Legal Studies' in a separate chapter, which acknowledges that group's ability to deconstruct all neutralist approaches but points out their inability to build their own theory of judicial review. Monahan similarly employed the tools of Critical Legal Studies to demonstrate the weaknesses of fundamental-rights approaches that falsely claimed to be based on neutral criteria as opposed to particular value choices. Critical Legal Studies and before it Legal Realism continue to rain on the American parade of finding a theory to justify judicial review and Peretti is correct to give the critics their due. Indeed, she takes this critical tradition more to heart than either Monahan or Michelman, who despite their bows to the deconstructive powers of the critics, end up defending judicial review in the indeterminate name of democracy.

Peretti's third chapter is the most interesting for Canadians because it examines a variety of theorists who see judicial review as a provisional or dialogic exercise that invites responses from legislatures and other political actors. Theorists of dialogic judicial review, such as John Agresto, Guido Calabresi, Paul Dimond, Michael Perry, and Harry Wellington, all suggest that the Court 'does not have the final say' (56) but is only one player in an ongoing dialogue. Peretti clearly finds such dialogic theories of judicial review to be the most sophisticated of all existing theories of judicial review. They accord best with existing political-science knowledge about the constraints on the Court's actual power in a democracy. Ultimately, however, she rejects such approaches, on the basis that 'judicial review that is premised on the moral superiority of its practitioners can never be successfully reconciled with democratic values' (71). It will be suggested below that Peretti is too quick to dismiss dialogic approaches and, despite herself, she may share some of these theorists' belief that judicial review is, if not morally superior, at least a valuable contribution to democratic dialogue.

Peretti then switches gears from normative to positive analysis in the second half of the book, which provocatively argues 'in defence of a political court.' There are several strands in her argument. One is that



the United States Supreme Court is not as detached from popular politics as many legal scholars believe. In Chapter 4 on the 'virtues of political motive in constitutional decision-making' (80), she draws on quantitative studies, such as Dahl's path-breaking 1957 article, to argue that presidents generally appoint justices with the same ideology and that most justices follow these ideological agendas. There have been, however, a few noteworthy surprises, such as the conservative Dwight Eisenhower's appointment of liberal activists, Earl Warren and William Brennan, decisions that Eisenhower lived to regret. Peretti's argument about the importance of a judge's ideology to his or her judging certainly explains the American political sport of confirmation hearings for judges, but is unlikely to impress those in other common law countries, where the appointment of judges is a more closed and less overtly ideological process. Attempting to change the Court through ideological appointments is a particularly American practice that is not likely to save judicial review from charges that it is undemocratic in other countries.

The next chapter, on the 'Constrained and Consensus-Seeking Courts,' argues that the United States Supreme Court is not free to impose its will on the polity but is constrained by the ability of legislatures to respond to its decisions and to hinder their implementation. Even without a limitation clause or an override, Peretti argues, American legislatures frequently revise the constitutional decisions of courts. More detail here would be helpful, as would discussion of the difference between distinction and reversal of a court's decisions. Peretti's argument about the constrained court, however, nicely complements that of the theorists who see the Court's decisions as a provisional part of a larger dialogue with legislatures and society. Indeed an important contribution of Peretti's book is its ability to situate the Court in its complex and dynamic political context and its recognition that dialogic theories of judicial review are the most politically sophisticated of all theories of judicial review.

In Chapter 6, Peretti argues that the Court's legitimacy depends not, as many law professors believe, on the quality of its reasoning but on its political bottom line. The public focuses on the headlines and forms its views about the United States Supreme Court on the basis of its overall policies and not the legal or logical fine points of its judgments (177). Peretti then examines American democracy to suggest that most theorists of judicial review have an overly simplistic view of democracy that posits a thoroughly majoritarian legislature against an unrepresentative judiciary. Drawing on pluralist political theory and the American system of checks and balances, Peretti makes a convincing case that the matter is not that simple. Legislatures imperfectly reflect majority preferences, while the democratic appointment of the United States Supreme Court gives it more representativeness than is commonly assumed. For Canadians, this

raises the question of whether the prime minister's unchecked power to decide who sits on the Supreme Court of Canada should be reformed.<sup>21</sup>

Peretti's approach also raises broader issues about the difference that the centralized Canadian parliamentary system should make to theories of judicial review. Unlike the United States, Canada has a system that centralizes power in the governing party, the Cabinet, and the first minister,<sup>22</sup> something that is also true to some extent in the United Kingdom and New Zealand. The centralized powers of Parliament may well justify a stronger judicial presence as one of the few checks on power. It may also make legislative reversals or revisions of the courts' controversial decisions more politically viable.<sup>23</sup> In any event, Peretti is certainly right to examine the broader mechanisms of governance, a question that is totally ignored in Michelman's work.

Peretti does an admirable job of situating the Court in the context of what is known about positive political theory. She is on shakier ground in the final chapter of her book, when she leaps from her empirical conclusions that the Court is constrained by politics to a normative conclusion that this is what the Court ought to be. Many lawyers will find Peretti's arguments in favour of politicized judicial appointments and politicized motivations of the Court to be jarring, even if they concede that Peretti is sometimes right about what happens. Following Dahl, Peretti argues that 'the Court inevitably changes, and in a democracy should change, in accordance with the political views of the people and their elected representatives' (232). The justices of the Court should be guided by their 'personal prudential judgments ... as to when judicial intervention is desirable and politically feasible' (233) and 'should be regarded as politicians ...' (254). Peretti has an arguable case that judges do, in fact, at times, act this way. That, however, is not the same as establishing that judges *should* act this way and her normative arguments in favour of a political court are far less compelling. If judges are just politicians, it makes little sense to appoint them (even with democratic input) with guaranteed tenure. On her reasoning, the Supreme Court should be replaced by a committee of elected Senators.

21 See generally D. Beatty, *Talking Heads and the Supremes* (Toronto: Carswell, 1990).

22 See D. Savoie, *Governing from the Centre* (Toronto: University of Toronto Press, 1999).

23 Attempts to revise and reverse controversial decisions of the United States Supreme Court on the *Bill of Rights* have frequently been stalled by the congressional system of checks and balances that allows the Senate to check the House of Representatives and the president to check both elected houses. See J. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980); G. McDowell, *Curbing the Courts* (Baton Rouge: Louisiana State University Press, 1988).

IV *Showdowns between the Court and the Legislature*

Much about constitutional theory can be revealed by examining what should happen in those rare cases in which the Court and the legislature find themselves on a collision course. The type of political court that Peretti defends would be eager to back down if its constitutional decision were unpopular enough to merit an attempt at legislative reversal. In some important high profile cases, however, the United States Supreme Court has not acted in this manner. Even the present conservative Court has struck down legislative attempts to reverse its controversial decision declaring flag burning to be a constitutional right and attempts to repeal the Court's *Miranda* rules governing police interrogations. Such judicial decisions do not accord well with Peretti's advice that courts should act in a politically astute manner that is sensitive to opposition to their decisions. Decisions made in the face of legislative and public opposition affirming the American Court's commitment to free speech and due process could, however, be supported by Michelman's defence of liberal judicial review. The Court would have been exposed to the 'full blast' of criticism but have decided that it was still right and should not change its mind. At a minimum, one would have to have Michelman's faith that personal heroes like Brennan will be on the bench (and in the majority) to support such a casual dismissal of a legislative reply. As discussed above, something is lost when the Court looks at legislative replies to its decisions as just so much background noise. In a democracy committed to representative self-government, there should be a difference between a legislative reply to the Court's decision and a protest on the steps of the Court.

Peretti would counsel judicial deference towards legislative attempts to reverse the Court's constitutional decisions. She would defend a 'tactical retreat' (146) on issues like *Miranda* and flag burning, as part of the give and take of pluralist politics and democracy. A politically astute Court would be quick to retreat when it had offended law-making majorities enough to merit a legislative reversal of its constitutional decision. Peretti would suggest that even though the judges are independent, they will act strategically to preserve the popularity of the United States Supreme Court as an institution. It would not matter to her whether the legislative reply to the Court's decision was couched in the language of constitutional right or that of pure majoritarian politics.

Mark Tushnet, in his recent and important contribution to dialogic constitutional theory,<sup>24</sup> has proposed another approach that would also

24 M. Tushnet, *Taking the Constitution*, supra note 5. Christopher Manfredi has similarly argued in the Canadian context that legislatures should be able to act on their own

suggest that the American Court should back off when the legislature reverses its constitutional decisions. His approach is somewhat different than Peretti's because it suggests that the Court should defer not only to the democratic weight of the legislature but also to the claims of that legislature to be acting on its own interpretation of the Constitution. Reclaiming a tradition of coordinate construction that goes back to Thomas Jefferson's refusal to accept the Court as the exclusive and final interpreter of the Constitution, Tushnet argues that a legislative reversal of controversial Court decisions should be accepted and celebrated as 'populist constitutional law.' For different reasons, Tushnet and Peretti both subscribe to a strong theory of dialogue, which would allow legislatures to reverse the constitutional decisions of the United States Supreme Court with ordinary legislation. In the context of American traditions of judicial supremacy, they both hold radical positions. In countries such as Canada and the United Kingdom, where ordinary legislation can derogate from most rights, their positions are not so radical. The difference, however, is that the legislatures in Canada or the United Kingdom must clearly state and debate their intent to reverse decisions of their highest courts interpreting bills of rights.

Whether legislatures will bother with populist constitutional law or not,<sup>25</sup> there are reasons not to be romantic about either Tushnet's defence of coordinate construction or Peretti's defence of tactical retreats by the Court from unpopular decisions. Tushnet is, surprisingly, not deterred by the dubious historical record of populist constitutional law. This history includes President Andrew Jackson's refusal to enforce a Supreme Court decision restricting state jurisdiction over Cherokee lands, on the principle that the Chief Justice, having made the decision, would have to enforce it; or the southern states' proclamation that *Brown v. Board of Education* was constitutionally wrong in not respecting the rights of the states. The tactical retreats by the Court that Peretti defends are likely to deprive society of a strong expression of important values, such as freedom of dissent and due process, precisely when society is most likely to neglect those values because of a real or perceived crisis. Tactical retreats by the courts may also impoverish democratic debate by allowing legislatures to finesse issues of fundamental values in a manner that makes wide-ranging democratic debate about proposed legislative reversals of the Court less likely.

interpretation of the Constitution. See C. Manfredi, *Judicial Power and the Charter*, 2d ed. (Toronto: Oxford University Press, 2001).

25 For arguments that legislatures will not bother to justify their decisions in the language of constitutional law see M. Mandel, 'Against Constitutional Law (Populist or Otherwise)' (2000) 34 U.Rich.L.Rev. 443.

In short, much is lost when legislatures are allowed to reverse constitutional decisions as casually as Peretti and Tushnet would allow.<sup>26</sup> The policies of an unelected institution with an obligation to listen to the claims of minorities and the unpopular and to justify its decisions on the basis of legal principles are casually cast aside by the policies of an elected institution with no such obligations. The courts have a unique institutional obligation to listen respectfully to claims made by minorities and the unpopular and to respond to them in a principled manner. This probably does not justify judicial supremacy, but it does mean that the Court's decisions should only be cast aside in a manner that clearly signals what is being done. The mechanism and the trigger for such acts in Canada should in most cases be the override.

There are signs in her conclusion that even Peretti has some trouble stomaching a crassly political Court that backs down at the slightest sign of democratic resistance. She suggests that one of the roles of the Court in a pluralist democracy may be to 'guard against the development of a class of permanent political losers who may then threaten the stability of the system' (238). This is, of course, classic Ely. She then notes that another of the Court's strengths is its ability to see in individual cases the human effects of under- or over-inclusion in legislative and administrative policies (240-2). This is a traditional judicial role that is today associated with both Dworkin and Ely. At first glance, this suggests that the dilemma for Peretti is that she either goes too far in politicizing the Court, thus sacrificing many of its virtues, or stops short and is left with many of the traditional dilemmas that confront Dworkin, Ely, and Michelman in their attempts to justify anti-majoritarian and principled judicial review. Is there no middle ground between arrogant judicial supremacy and timid judicial deference?

V *Back to Bickel: The dialogic middle ground of  
American constitutional theory*

Fortunately, there is a fruitful middle ground between the judicial supremacy defended by Dworkin and Ely and strong dialogic theories of the type defended by Tushnet and Peretti. This middle ground is found in the dialogic theories of judicial review that Peretti too quickly dismisses.<sup>27</sup> Her examination of dialogic theories pays insufficient attention

26 For arguments that under the Charter, the legislature should be able to reverse the Court's decision by invoking the notwithstanding clause, which requires both clear statements and a review of the decision after five years time, see P. Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 U.Mich.J.Law Reform 51.

27 Tushnet, for his part, suggests that either weaker dialogic theories run the danger of, in fact, resulting in the courts' having the final word or they support his case for a

to Alexander Bickel's role as arguably the most sophisticated modern scholar of dialogic review<sup>28</sup> and the theorist who, in the 1960s and early 1970s, set the agenda for contemporary American constitutional theory as it has been practised in its many guises for the last quarter of a century.

Bickel was a firm believer in the importance of reason and principle in the work of the Court. Dworkin and Ely owe an important debt to Bickel, who pointed in the direction of the need to justify principled and anti-majoritarian judicial review. Dworkin and Ely depart from Bickel, however, in assuming that judicial supremacy is inevitable and desirable. Bickel wrote at a time when it was impossible to ignore the ability of legislatures, executives, and society to refuse to obey controversial judicial decisions, such as *Brown v. Board of Education* and other unpopular Warren Court decisions prohibiting school prayer and restricting police powers. In this way, Bickel influenced theorists of strong forms of dialogue, such as Tushnet and Peretti, who have developed Bickel's insight that the United States Supreme Court is the least dangerous and the most vulnerable branch of government. At the same time, Tushnet and Peretti depart from Bickel in their enthusiasm for legislative reversals of the Court's controversial decisions. Bickel was aware that such reversals could occur, but he sought ways to save the Court from such confrontations. For Bickel, a legislative reversal of *Brown v. Board of Education* would not have been part of a fair system of pluralist politics or a noble legislative practice of populist constitutional law. It would have been a tragedy that allowed the passions and intolerance of law-making majorities to prevail over reason and principle.

The true heirs of Bickel today are not theorists of either principled judicial supremacy, such as Dworkin or Ely, or theorists of strong dialogical review, such as Peretti and Tushnet. The true heirs are an impressive group of New Bickellians, who include constitutional theorists such as Bruce Ackerman, Guido Calabresi, William Eskridge, Michael Perry, and Cass Sunstein, who all, in their own ways, attempt not only to justify principled judicial review but to structure and promote dialogue between the United States Supreme Court and American legislatures and society. The Bickellian middle ground between judicial supremacy and judicial capitulation is undergoing a renaissance in American constitutional theory.

stronger dialogic theory in which the legislature can override the court. See M. Tushnet, 'Subconstitutional Constitutional Law: Supplement, Sham or Substitute?' (2001) 42 W.M.L.R. 1871 [hereinafter 'Subconstitutional'].

28 Bickel wrote that the Court 'interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation.... And it is a conversation, not a monologue.' A. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1974) at 111. See also A. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1970) at 91; A. Bickel, *The Least Dangerous Branch*, 2d ed. (New Haven: Yale University Press, 1986).

The dialogical revival in American constitutional theory is promising for Canadians and others who live under modern bills of rights that are 'Bickellian'<sup>29</sup> in their promotion of dialogue through ordinary legislation that can limit or even override rights as interpreted by the courts.

The New Bickellians follow Bickel (and Dworkin and Ely) in attempting to justify robustly principled and anti-majoritarian judicial review. They differ from Dworkin and Ely because they are uneasy with judicial supremacy<sup>30</sup> and they struggle in different ways to make the constitutional decisions of the United States Supreme Court non-final. Dialogic theory in its many stripes now constitutes the new mainstream of American constitutional theory. The growing numbers who live under the *Charter* and other modern bills of rights that encourage dialogue between courts and legislatures are fortunate that some of the brightest lights of American constitutional theory are dedicating themselves to dialogic theories of judicial review.

Although the dialogic turn in American constitutional theory makes it more relevant to Canadians and others, some problems in translation remain. The main one is that American theorists must struggle to find space for considered and deliberate legislative replies to the Court's decisions under the American *Bill of Rights*. American legislatures are not allowed either to place explicit limits on or to override rights as interpreted by the Court. This is especially true with respect to the First Amendment ('Congress shall make no law ...'), but its absolutist vision of rights and judicial supremacy influences other aspects of Bill of Rights jurisprudence.<sup>31</sup> The judicial supremacy promoted by the American *Bill of Rights* forced Bickel to urge the American Supreme Court to avoid constitutional decisions whenever possible and practise the passive virtues of deciding cases on non-constitutional grounds, while sending hints to legislatures that they should reconsider and revise their policies in light of constitutional values.

Many New Bickellians have followed Bickel by urging courts to use a variety of 'second look' doctrines to remand issues to legislatures,<sup>32</sup> to practise 'quasi-constitutional law' by interpreting statutes with respect for the presumption of conformity with the Constitution,<sup>33</sup> to make decisions

29 G. Calabresi, 'Foreword,' *supra* note 5 at 124.

30 Michelman might also be added to this group, but, at least in *Brennan and Democracy*, he does not seem as uneasy about judicial supremacy.

31 M.A. Glendon, *Rights Talk* (New York: Free Press, 1991).

32 G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1981); D. Coenen, 'A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue' (2001) 42 W.M.L.R. 1575.

33 W. Eskridge, *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1997).

provisional and subject to a legislative reply,<sup>34</sup> and to practise 'constitutional minimalism' by deciding constitutional issues on narrow grounds, in order to leave space for democratic responses.<sup>35</sup> A common feature of all these dialogic techniques is that they urge American judges to shy away from a full blown search for the right or the best answers to constitutional issues, in order to ensure that their decisions leave space for democratic responses and do not constitute the type of final answers that can occur under the American system of judicial supremacy.

A different dialogic response is Bruce Ackerman's interesting theory of 'constitutional moments.'<sup>36</sup> Unlike the above theories, Ackerman does not shy away from full judicial review or even judicial supremacy as the day-to-day approach to judicial review in the United States. His theory is only dialogic because he maintains that the American people, as opposed to simply their governments, can, in rare constitutional moments, reverse unacceptable constitutional decisions of the Court. These constitutional moments can be quite traumatic. They include a civil war that culminated in constitutional amendments reversing the constitutionalization of slavery in *Dred Scott* and a Court-packing plan that encouraged the Supreme Court to abandon *Lochner* and resistance to the New Deal.<sup>37</sup> Ackerman's theory demonstrates that, in the United States, the only effective means to reverse a full constitutional decision of the Court is to amend the Constitution or pack the Court. Canadians may well be wary of duplicating such constitutional moments. Not only are they too exciting for the moderate tastes of many Canadians; they may also be impossible to achieve, given the difficulties of amending our Constitution or ensuring a public and democratic airing of the views of those whom the prime minister appoints to the Supreme Court of Canada. Fortunately, however, the *Charter* allows legislative revision and reversal of the Court's decisions without the travails of changing the Court or the Constitution.

Canadians and others who live under a modern Bill of Rights that encourages legislative responses to the Court's constitutional decisions need not struggle as much as Americans to find outlets for dialogue between legislatures and the Court. Canadian judges can boldly search for the best answers to constitutional issues, secure in their knowledge that their answers need not be final and that their decisions can be reversed without changing the Constitution or the Court. All that is necessary is ordinary legislation that can be justified under s. 1 of the *Charter* or if that fails, enacted for a renewable five-year period under the

34 J. Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca, NY: Cornell University Press, 1984); P. Dimond, *Judicial Choice*, supra note 5.

35 C. Sunstein, *One Case*, supra note 5.

36 B. Ackerman, *We the People*, supra note 5.

37 Ibid. at 13.



s. 33 override. The Canadian parliamentary system means that a legislative reply to a controversial court decision can generally be quickly enacted, once the Cabinet decides to do so. The relative ease of legislative replies has implications for the way Canadian judges can approach judicial review. Bold and broad judicial decisions can inform society about the implications of its decisions and bring the insights of reason and constitutional theory to the attention of politicians and society, without the awesome burden of finality and the risk of error that generally accompanies the constitutional decisions of the United States Supreme Court. The Canadian Court can be strong, clear, and bold, in no small part because the countervailing power of Canadian governments and their cabinets is so strong. The practice of American-style 'quasi constitutional law,' 'passive virtues,' or 'constitutional minimalism' is not necessary to avoid judicial supremacy, given the ability of strong parliamentary governments to revise and reverse full constitutional decisions of the Canadian Court.<sup>38</sup> This is likely true not only in Canada but also in the United Kingdom and New Zealand, which also have strong parliamentary governments that can limit or even derogate from rights as interpreted by their highest courts. Strong judicial review can be practised without the risk of constitutional moments in which the people are forced to change the Constitution and the Court in order to reject a constitutional decision that they find unacceptable.

Dialogic American constitutional theory has correctly sought to respond to the dangers of judicial supremacy, but the routes to this destination are not the same in the United States and in Canada. In Canada, there is less need for the fudging, ducking, and weaving of quasi-constitutional law or the grand confrontations and blow-ups of constitutional moments. American constitutional theorists with a comparative sensibility are alive to the dialogic limitations of their eighteenth-century *Bill of Rights* and to the dialogic potential of modern bills of rights such as the Canadian *Charter*. Both Guido Calabresi<sup>39</sup> and Michael Perry<sup>40</sup> have praised the *Charter* (and presumably other modern bills of rights that allow explicit legislative limitations and override of rights) for combining the virtues of strong judicial review with deliberate and democratic legislative review of judicial review. By dint of an overt comparativism that unfortunately remains rare in American constitutional theory, Calabresi and Perry have been able to formulate dialogic theories that allow for

38 The Supreme Court of Canada seems to be increasingly attracted to constitutional minimalism, but this minimalism is not necessary to prevent judicial supremacy and may be a vehicle for a more minimalist definition of various rights. For further argument of these points, see my *The Supreme Court on Trial*, supra note 17 at ch. 8.

39 G. Calabresi, 'Foreword,' supra note 5.

40 M. Perry, *Constitution*, supra note 5 at 200.

strong judicial review and for explicit legislative review of judicial review. Both defend a more robust form of judicial review<sup>41</sup> than that promoted by quasi-constitutional theorists, such as William Eskridge, or defenders of passive virtues and constitutional minimalism, such as Cass Sunstein. Calabresi and Perry's brand of American constitutional theory and robust judicial review travels well. It should find a home in Canada, the United Kingdom, New Zealand, and other countries with modern bills of rights.

A final issue of translation for American dialogic theory is that the American system, with elected upper houses, presidential vetoes, and weak party discipline, often makes it much more difficult for the legislature to formulate an effective reply to a court decision than under parliamentary systems of government, in which the Cabinet or the prime minister calls the shots. It is easier, sometimes too easy,<sup>42</sup> for concentrated Canadian governments to enact legislation reversing a court's decision than it is for more diffuse American governments. If Peretti had adopted an overtly comparative approach, she might have adverted to the relative difficulties that American legislatures have, compared to governments under a centralized parliamentary system, in responding to controversial constitutional decisions.<sup>43</sup> This would help complete her important project of situating the American Court in the context of governance systems as a whole.

## VI Conclusion

Contemporary American dialogic constitutional theory contains much of interest for Canadians and others who live under a modern Bill of Rights. At the same time, it is still necessary to make adjustments for the diffi-

41 Calabresi defends not only constitutional review to promote legislative second looks but also to defend minorities and some fundamental values. Perry defends an even more robust role for judicial review.

42 For arguments that Canadian governments should only override, as opposed to limit, Charter decisions with the safeguards and sober second thoughts of the override, see my 'Constitutional and Common Law Dialogues,' *supra* note 6 at 524ff.

43 Mark Tushnet uses the lack of parliamentary response to the Supreme Court's decision in *R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449 (S.C.C.) as an example of how even a Court's provisional decision may be the final word. See M. Tushnet, 'Subconstitutional,' *supra* note 27 at 18735. The legislative response to *Morgentaler* was in fact highly atypical of the Canadian experience because full party discipline was not imposed and the reply legislation was defeated by a tied vote in our unelected Senate, something that had never happened in Canada before and is not likely to happen again so long as the Senate remains an appointed body with little democratic legitimacy and party discipline remains strong. The legislative response to *Morgentaler*, however, may be more typical of the American system, with elected upper houses and loose party discipline. See my *The Supreme Court on Trial*, *supra* note 17 at 193-5 for further discussion of why Parliament's failure to reply to *Morgentaler* was exceptional.

culty, under the American *Bill of Rights*, of finding space for dialogue between the Court and the legislatures and for the difficulties of formulating legislative replies to the Court, given the relative weakness of the American congressional system of government compared to the cabinet government of the Canadian parliamentary system. Even in the context of the American *Bill of Rights*, Michelman and Peretti could have more fruitfully explored the middle ground of principled dialogic judicial review pioneered by Bickel and kept alive by his many followers. Such an approach might have allowed Michelman to avoid the criticism that, like Ely, he had not fully justified judicial supremacy in the name of democracy and that he did not make enough room for democratic responses to the Court's decisions. The Bickellian middle ground would also have allowed Peretti to escape the charge that she had neglected the principles and anti-majoritarian premises that legitimate the Court's contribution to an ongoing dialogue with legislatures and society.