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Articles

This paper argues that Canadian constitutional culture relies on a general narrative, that the Canadian Constitution is unfinished; a series of conceptual metaphors instantiate this narrative. Each conceptual metaphor frames different conditions — which may or may not be consistent — to justify constitutional practices. Understanding the justifying logic at play gives us the key to a more meaningful comparison between Canadian judicial constitution-making and other forms of constitution-making, both within Canada or in other constitutional orders.

In 1994, the Supreme Court of Canada found that Henri Daviault had unconstitutionally been denied the defence of being so intoxicated that he could not form the minimal intent necessary to commit sexual assault. In response, Parliament swiftly amended the Criminal Code to disallow the defence of extreme intoxication for violent crimes. It did so without using the Charter's section 33 notwithstanding clause. This set the stage for a subsequent, "second look" case pitting the Court's Daviault judgment against Parliament's modification of it by ordinary statutory means. That two decades have gone by without this issue being clearly addressed by the Supreme Court has puzzled many observers. One explanation for the puzzle is that direct second looks have, for a variety of reasons, thus far stalled in the lower courts. A second explanation may lie in strategic behaviour by the Supreme Court, which has arguably decided the constitutional issue indirectly (and with little fanfare) under the guise of statutory interpretation.

Based on past survey research exploring the views of fifty scholars, advisors, journalists, and senior parliamentary staff, this paper argues two separate and sequentially distinct debates surrounding the 2008 prorogation. The first considers the role (if any) of the Governor General when a request for prorogation is made while a confidence vote is pending. The second assumes a role for the Governor General in these rare circumstances and focuses on the use of the reserve power to refuse prime ministerial advice. I propose a new model of debate and dialogue to ensure that more Canadians can define the concepts and relevant constitutional principles that remain contested. I use this model to illuminate the four main views and assess the strengths and weaknesses of each school of thought.

This paper addresses the long-standing international debate over whether the publication of dissenting opinions should be permitted in constitutional courts of last resort. It argues in response to this debate that a conclusion of general application is futile. Courts are not identical: their jurisdictions have unique legal histories, traditions, and cultures; they serve different functions and speak to different audiences; and, they are composed of members with fundamentally dissimilar training and backgrounds. This paper contributes to the debate by setting out a context-specific analysis for assessing the value of dissent in constitutional adjudication. It considers several contextual factors including: the jurisdiction's tradition, legal history, and culture; the credibility, function, and procedure of its court; and the background and training of its court's members. Applying this contextual analysis to Canada, this paper concludes that presently the publication of dissenting opinions is a valuable component of constitutional adjudication in the Supreme Court of Canada.