can, within limits, prohibit behavior that the Court has found not to violate the 14th amendment—can be seen as devices to engage legislatures in a dialogue with courts over the meaning of the Constitution. These approaches can thus be understood as efforts to mediate the problems of "entrenchment," problems that appear particularly acute as the polity moves further away in time from a consensus on how constitutional provisions should be interpreted to govern particular situations.

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1. DIALOGUE AND LEGISLATIVE OVERRIDE IN CANADA

Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)*, 35 Osgoode Hall L.J. 75 (1997)

Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded. . . .

B. *How Dialogue Works*

Where a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished. To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have to deal with. And, of course, the precise terms of any new law would have been powerfully influenced by the Court's decision. The legislative body would have been forced to give greater weight to the *Charter* values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are constraints on the democratic process, no doubt, but the final decision is the democratic one.

The dialogue that culminates in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process. . . . There is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be substantially carried out, albeit by somewhat different means. Moreover, when the Court strikes down a law, it frequently offers a suggestion as to how the law could be modified to solve the constitutional problems. The legislative body often follows that suggestion, or devises a different law that also skirts the constitutional barriers. Indeed, our research, which surveyed sixty-five cases where legislation was invalidated for a breach of the *Charter*, found that in forty-four cases (two-

thirds), the competent legislative body amended the impugned law. In most cases, relatively minor amendments were all that was required in order to respect the *Charter*, without compromising the objective of the original legislation.

Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose, and what is required is a narrower law. Sometimes a broader law is needed, because an invalid law confers a benefit, but excludes people who have a constitutional equality right to be included. Sometimes what is needed is a fairer procedure. But it is rare indeed that the constitutional defect cannot be remedied. Hence, as the subtitle of this article suggests, "perhaps the *Charter of Rights* isn't such a bad thing after all." The *Charter* can act as a catalyst for a two-way exchange between the judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions.

C. *Our Definition of Dialogue* . . .

[T]he "dialogue" to which this article refers consists of those cases in which a judicial decision striking down a law on *Charter* grounds is followed by some action by the competent legislative body. In all of these cases, there must have been consideration of the judicial decision by government, and a decision must have been made as to how to react to it. . . .

III. FEATURES OF THE *CHARTER* THAT FACILITATE DIALOGUE

A. *The Four Features That Facilitate Dialogue*

Why is it usually possible for a legislature to overcome a judicial decision striking down a law for breach of the *Charter*? The answer lies in four features of the *Charter*: (1) section 33, which is the power of legislative override; (2) section 1, which allows for "reasonable limits" on guaranteed *Charter* rights; (3) the "qualified rights," in sections 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and (4) the guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures. Each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the *Charter* as articulated by the courts.

1. Section 33 of the *Charter* . . .

2. Section 1 of the *Charter*

Section 1 of the *Charter* subjects the rights guaranteed by the *Charter* to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In principle, all the guaranteed rights, and certainly all those couched in unqualified terms, can be limited by a law that meets the standards judicially prescribed for section 1 justification. Those standards, which were laid down in 1986 in *R.* v.

Oakes,[31] are as follows: (1) the law must pursue an important objective; (2) the law must be rationally connected with the objective; (3) the law must impair the objective no more than necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on the persons to whom it applies. Experience with section 1 indicates that nearly all laws meet standards (1), (2), and (4). The dispute nearly always centres on standard (3)—the minimal impairment or least restrictive means requirement. Therefore, when a law is struck down for breach of the *Charter*, it nearly always means only that the law did not pursue its objective by the means that would be the least restrictive of a *Charter* right. If it had done so, then the breach of the *Charter* right would have been justified under section 1.

When a law that impairs a *Charter* right fails to satisfy the least restrictive means standard of section 1 justification, the law is, of course, struck down. But the reviewing court will explain why the section 1 standard was not met, which will involve explaining the less restrictive alternative law that *would* have satisfied the section 1 standard. That alternative law is available to the enacting body and will generally be upheld. Even if the court has a weak grasp of the practicalities of the particular field of regulation, so that the court's alternative is not really workable, it will usually be possible for the policymakers to devise a less restrictive alternative that is practicable. With appropriate recitals in the legislation, and with appropriate evidence available if necessary to support the legislative choice, one can usually be confident that a carefully drafted "second attempt" will be upheld against any future *Charter* challenges....

... [F]reedom of expression cases afford ... examples. In *Rocket* v. *Royal College of Dental Surgeons of Ontario* (1990),[35] the Supreme Court of Canada struck down an Ontario prohibition on advertising by dentists. However, the Court made it clear that restrictions on advertising by professionals would be upheld if they were narrower and directed to the maintenance of professional standards and the presentation of accurate information to the public. In response to the judgment, new guidelines on dental advertising were enacted. These regulations proscribe misleading advertising, advertising that is meant to "appeal to the public's fears," and advertising which suggests that one dentist is superior to others, but within the new guidelines dentists are left free to promote their practices through "factual advertisements." The same type of advertising restrictions now apply to professionals in many different fields....

The common elements of these cases are: (1) the law impaired a *Charter* right; (2) the law pursued an important purpose; and (3) the law was more restrictive of the *Charter* right than was necessary to accomplish the purpose. In each case, the invalidity of the law could be corrected by the enactment of a new law that was more respectful of the *Charter* right while still substantially accomplishing the important purpose. The form of the new law would have to take account of the way in which the Court analyzed the least restrictive means standard of section 1 justification.

31. [1986] 1 S.C.R. 103 at 138–39.

35. [1990] 2 S.C.R. 232.

dialogue seems an apt description of the relationship between courts and legislative bodies. Certainly, it is hard to claim that an unelected court is thwarting the wishes of the people. In each case, the democratic process has been influenced by the reviewing court, but it has not been stultified.

3. Qualified *Charter* rights

Several of the guaranteed rights under the *Charter* are framed in qualified terms. Section 7 guarantees the right to life, liberty, and security of the person, but only if a deprivation violates "the principles of fundamental justice." Section 8 guarantees the right to be secure against "unreasonable" search or seizure. Section 9 guarantees the right not to be "arbitrarily" detained or imprisoned. Section 12 guarantees against "cruel and unusual" punishment. There is some uncertainty in the case law as to whether the qualified rights are subject to section 1, although the dominant view is that they are. But, even if section 1 has no application to the qualified rights, by their own terms they admit of the possibility of corrective legislative action after a judicial decision has struck down a law for breach of one of the rights.

For example, section 8 does not prohibit search and seizure, but only "unreasonable" search and seizure. A judicial decision that a law authorizing a search and seizure is unreasonable can always be followed by a new law that satisfies the Court's standards of reasonableness. In fact, section 8 has led to the striking down of many laws (as well as many particular searches and seizures), but each decision striking down a law (as opposed to a particular search or seizure) has invariably been followed by legislative action to correct the constitutional defect and restore a power of search and seizure, albeit one hedged with more civil libertarian safeguards than the original invalid version. The notion of a dialogue is easy to defend in this field, as legislative bodies have reframed their search and seizure powers to build in civil libertarian safeguards that meet the requirements of the *Charter* as set out by the Supreme Court of Canada.

The first decision of the Supreme Court of Canada on section 8 was *Hunter* (1984),[50] in which the Court struck down the provisions of the federal *Combines Investigation Act* that authorized searches and seizures as part of the investigatory procedures of the *Act*. The provisions authorized the director of the Combines Investigation Branch to enter premises, conduct searches and seize evidence on the basis of a warrant issued by a member of the Restrictive Trade Practices Commission. The Court held that any searches or seizures conducted under the *Act* would be "unreasonable" within section 8, because there was no requirement that the warrant for the searches or seizures be issued by a judge, nor was there any requirement that reasonable and probable cause be established to support the issue of the warrant. Parliament immediately amended the *Combines Investigation Act* to meet the Court's requirements.

Shortly after the decision in *Hunter*, the search and seizure provisions of the *Income Tax Act* were also found wanting.[52] They called for the

50. [1984] 2 S.C.R. 145.

52. M.N.R. v. Kroger, [1984] 2 F.C. 535 (C.A.), and [Reference re Print Three Inc. (1985) 51 O.R. (2d) 321, n.32 (C.A.)].

warrant to be issued by the Minister of National Revenue, rather than a judge, and the grounds that would justify the issuance of a warrant were not adequately spelled out. The *Act* was immediately amended to cure this and several other constitutional defects. However, the new law was then found wanting on the ground that, although it required that a warrant be issued by a judge and stipulated the grounds upon which the judge should act, the law did not give to the judge any discretion to deny the warrant in exceptional circumstances where the statutory grounds were satisfied. The absence of any discretion invalidated the power.[54] The *Act* was immediately amended for a second time to cure this defect. . . .

4. Equality rights

Section 15(1) of the *Charter* prohibits laws which discriminate on the basis of nine listed grounds, namely race, national or ethnic origin, colour, religion, sex, age or "mental or physical disability," or laws which discriminate on the basis of any ground that is analogous to the listed grounds. Typically, where a law is declared to be unconstitutional for a violation of section 15(1), the problem is that the law is underinclusive, such that persons in the applicant's position, who have a constitutional right to be included, suffer the disadvantage of being excluded. A judicial decision under section 15(1) does force the legislature to accommodate the individual or group that has been excluded. Nevertheless, there are a number of different ways of complying with section 15(1) that allow the competent legislative bodies to set their own priorities.

The most obvious solution is to extend the benefit of the underinclusive law to the excluded group. For example, when the Nova Scotia Court of Appeal held that a law extending family benefits to single mothers, but not to single fathers, was unconstitutional,[63] the Family Benefits regulations of that province were promptly modified to allow equal access to family benefits for single parents of both genders. The Nova Scotia legislature obviously considered that the provision of family benefits was of sufficient importance that the program should be extended rather than eliminated. However eliminating (or reducing) a government benefit is another option which is open to a legislature where a law has been held to be underinclusive. After all, it is not the applicant's right to a government cheque, but rather his or her right to equality, that the Court has affirmed.

Not surprisingly, legislatures generally choose to extend underinclusive laws rather than eliminate them outright. However this reflects a policy choice on the part of the competent legislative body. If the objective of the legislation is of substantial importance, this will usually justify the added expense or administrative burden (if any) that is required to eliminate discrimination. Sometimes, the legislature may instead opt to provide somewhat reduced benefits to all of those who have a constitutional right to be included. Section 15(1) leaves room for different legislative choices of this kind, such that democratically elected bodies are still ultimately

54. Baron v. Canada, [1993] 1 S.C.R. 416.

63. Phillips v. Social Assistance Appeal Board (N.S.) (1986), 76 N.S.R. (2d) 240 (C.A.).

sponsible for setting their own budgetary priorities, albeit in a way that es not discriminate against disadvantaged groups. Section 15(1) decisions erefore leave a door open for dialogue between the courts and legisla-res.

BARRIERS TO DIALOGUE: SOME *CHARTER* DECISIONS MAY NOT BE "OPEN FOR DISCUSSION"

Three Situations Where Dialogue is Precluded

While it is generally the case that *Charter* decisions leave some options en to the competent legislative body, and allow a dialogue to take place tween the courts and legislatures, we must acknowledge that there may some circumstances where the court will, by necessity, have the last rd. There appear to be three situations where this will be the case: (1) here section 1 of the *Charter* does not apply; (2) where a court declares at the *objective* of the impugned legislation is unconstitutional; and (3) here political forces make it impossible for the legislature to fashion a sponse to the court's *Charter* decision.

Where section 1 does not apply

It is possible that some of the rights protected under the *Charter* are amed in such specific terms that there is no room for Parliament or a ovincial legislature to impose "reasonable limits" on those rights. This as the position taken by the Supreme Court of Canada, with respect to inority language education rights, in the very first *Charter* case consid-ed by the Court. That case was *Quebec (A.G.)* v. *Quebec Protestant School oards* (1984).[67] It concerned provisions in Quebec's *Charter of the French anguage*, which restricted admission to English-language schools in Que-ec to those children whose parents had been educated in the English anguage *in Quebec*. By the express terms of section 23(1)(b) of the *Charter*, l parents who were Canadian citizens and Quebec residents, and who had ceived their primary education in English *anywhere* in Canada, had the ght to have their children educated in the English language in Quebec. In iking down the Quebec law, the Court refused to consider the argument, dvanced by the attorney general of Quebec, that the Quebec law could be stified under section 1 of the *Charter* as a measure for the protection of rench language and culture. According to the Court, since the law was a irect contradiction of the terms of the *Charter*, section 1 justification was t a possibility. . . .

The Court has not refused to consider the possibility of section 1 stification in any other case, and it may be that the *Quebec School Boards* se was wrongly decided. Nevertheless, the *Quebec School Boards* case es provide an example of a situation in which it was not possible for the gislature to overcome the decision of the Court. Since neither a section 1 stification nor a section 33 override[72] was available, Quebec was forced to andon its original legislative objective and to comply with the Court's rections.

67. [1984] 2 S.C.R. 66.

72. Section 33 is only available with respect to s. 2 and ss. 7–15 of the Charter.

2. Where the objective of the law is unconstitutional

Even where a court has been willing to entertain arguments under section 1 of the *Charter*, a decision striking down a law for a breach of the *Charter* will be virtually impossible to overcome if the court determines that the law fails the first test of section 1 justification: the requirement that the law have a "pressing and substantial purpose" that justifies limiting a *Charter* right. In practice, the courts have rarely declared that a law does not meet this initial threshold. However, there are a few exceptions in the case law, particularly for laws in which the *purpose* of the law, as opposed to the law's *effects*, are found to violate the *Charter*.

The first example is *R.* v. *Big M Drug Mart Ltd.* (1985),[74] in which the Supreme Court of Canada struck down the federal *Lord's Day Act*. In that case, the Court determined that the purpose of the *Act* was "to compel the observance of the Christian Sabbath." This was a violation of the guarantee of freedom of religion under section 2(a) of the *Charter*. . . .

3. Where political forces preclude legislative action

A third situation that may obstruct dialogue between courts and legislatures is where an issue is so controversial that it seems to preclude a legislative response to a judicial decision striking down a law for a breach of the *Charter*. An example of this is the situation which arose after the decision in *R.* v. *Morgentaler* (1988) [Chapter I above]. In *Morgentaler*, the restrictions on abortion in the *Criminal Code* were struck down as unduly depriving pregnant women of liberty or security of the person, contrary to section 7 of the *Charter*. In *obiter*, the Court added that a less restrictive abortion law could possibly be upheld. In 1990, a bill which would have implemented a less restrictive abortion law was introduced into Parliament. However that law was defeated on a tied vote in the Senate, and the divisive issue of abortion has never been revisited, either in terms of a new law, or even in terms of the formal repeal of the law that was declared unconstitutional in 1988. While neither the *Charter* nor the Court precluded a legislative response to the *Morgentaler* decision, the abortion issue is so politically explosive that it eludes democratic consensus. Accordingly, the Court's decision, striking down Canada's old abortion law, remains the last word on this issue.

Where political forces, as opposed to the judicial decision itself, are the reason for a lack of response from the competent legislative body after a law is struck down on *Charter* grounds, it can hardly be said that unelected judges are stifling the democratic process. Quite the opposite is true, in fact; the *Charter* decision forces a difficult issue into the public arena that might otherwise have remained dormant, and compels Parliament or a legislature to address old laws that had probably lost much of their original public support. If a new law is slow to materialize, that is just one of the consequences of a democratic system of government, not a failing of judicial review under the *Charter*.

74. [1985] 1 S.C.R. 295.

V. THE NATURE OF DIALOGUE BETWEEN CANADIAN COURTS AND LEGISLATURES

A. *Most Decisions Have Legislative Sequels* . . .

Legislative action of some kind has followed all but thirteen of the sixty-five cases we surveyed; fully 80 per cent of the decisions in this survey have generated a legislative response. . . .

Are all legislative sequels examples of dialogue? We have taken the position that any legislation is dialogue, because legislative action is a conscious response from the competent legislative body to the words spoken by the courts. However, there may be room for debate about exactly what counts as dialogue. For example, in seven of the cases we surveyed, Parliament or a provincial legislature simply repealed the provision that was found to violate the *Charter*. In those cases, the competent legislative body simply acquiesced in the decision of the court, and it might be argued that no true "dialogue" took place. Similarly, in several cases where competent legislative bodies amended their laws, the remedial legislation merely implemented the changes the reviewing court had suggested. No effort was made to avoid the result reached by the court, and in at least one case there was no possibility of doing so. Consequently, those cases, too, might be excluded from the meaning of dialogue.

But it is probably casting the notion of dialogue too narrowly to discount those remedial measures that have merely followed the directions of the Court, either by repealing or amending an unconstitutional law. After all, it is always possible that the outcome of a dialogue will be an agreement between the participants! And even if we did exclude those cases, there would still be a significant majority of cases in which the competent legislative body has responded to a *Charter* decision by changing the outcome in a substantive way. Obviously, on any definition, dialogue is quite prevalent as between Canadian courts and legislatures. . . .

C. *Legislators Are Engaging in "Charter–Speak"*

The nature of the *Charter* dialogue between Canadian courts and legislatures is not reflected in numbers alone. The language of post-Charter laws themselves, particularly in statutory preambles and purpose clauses, suggests that Canadian legislators are engaging in a self-conscious dialogue with the judiciary. Where laws closely skirt the boundaries of the *Charter*, and particularly where new laws are enacted to replace those that have been struck down on *Charter* grounds, it is not uncommon for the preamble to a statute to explain how the measures taken in the legislation are directed at a "pressing and substantial" objective, and are intended to "reasonably limit" rights and freedoms. Several of the legislative sequels to the cases considered in our survey provide ready examples of this trend. . . .

[An] example of a government engaging in "Charter-speak" when enacting new laws is Parliament's response to the decision in *R.* v. *Daviault* (1994).[105] In that case, counsel for Mr. Daviault, who had been convicted of

105. [1994] 3 S.C.R. 63.

sexual assault, successfully argued in the Supreme Court of Canada that sections 7 and 11(d) of the *Charter* required that an accused person be permitted to advance the defence that he was in a state of "drunkenness akin to automatism," and lacked the requisite *mens rea* for the crime. Prior to the *Daviault* judgment, the common law rule had been that a drunkenness defence was not open to a person accused of a "general intent" crime such as sexual assault. The Supreme Court of Canada accepted Mr. Daviault's argument that extreme drunkenness was a defence, and the Court granted him a new trial.

There was a significant public outcry, particularly by victims' groups and women's groups, after the *Daviault* decision. Parliament responded with legislation providing that self-induced intoxication would no longer be a defence to a criminal offence involving "an assault or any other interference or threat of interference by a person with the bodily integrity of another person." The legislation explained that criminal responsibility would attach to persons who committed violent "general intent" crimes while intoxicated, because the state of self-induced intoxication is a marked departure "from the standard of reasonable care generally recognized in Canadian society." What is remarkable about the post-Daviault legislation is that Parliament has basically enacted without modification the very propositions of law that the Supreme Court of Canada rejected in the *Daviault* case. However, the statute also includes a lengthy preamble offering justifications for the new law, including the association between intoxication and violence against women and children. Parliament's part in the dialogue on this issue reads like a rebuttal of the majority's position in *Daviault*, and it will be interesting to see how the courts will respond when the issue comes before them for a second time. . . .

VI. CONCLUSION

Our conclusion is that the critique of the *Charter* based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.

[The appendix of "legislative sequels to laws nullified for breach of the Charter" is omitted, but interested readers should consult it for details on Hogg and Bushell's classification of cases and responses.]

Christopher P. Manfredi and James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 Osgoode Hall L.J. 513 (1999)

The empirical demonstration of dialogue in the Hogg/Bushell study is open to criticism on at least four points. The first is its use of judicial nullification as the sole indicator of judicial interference with the democratic will. In fact, judicial nullification is the selected remedy in a minority of successful *Charter* claims (46 per cent between 1984 and 1997), and is becoming increasingly less important. Indeed, the proportion of successful *Charter* claims involving the remedy of judicial nullification declined from 63 per cent (41/65) during the 1984–1992 period, to 25 per cent (13/52) during 1993–1997. To be sure, one might argue that the shift in focus from statutes to executive conduct minimizes the anti-democratic impact of *Charter*-based judicial review. Nevertheless, if legislatures are unable to respond effectively to decisions outside the narrow category of judicial nullification, this undermines the dialogue metaphor. This is particularly true where the Court chooses a device other than nullification, such as "reading in," to remedy an unconstitutional statute. Despite claims to the contrary, such judicial impositions of policy certainly raise democratic concerns. However, the empirical component of the Hogg/Bushell study simply does not capture this phenomenon. . . .

[W]e reanalyzed Hogg and Bushell's universe of judicial nullifications by the Supreme Court. Our findings suggest that two of Hogg and Bushell's most important qualitative claims—that every legislative sequel is evidence of dialogue, and that most sequels involved only minor legislative amendments to correct the constitutional violation—are problematic. On the one hand, many of the legislative sequels arguably could be characterized as simple compliance with judicial decisions rather than as a real dialogue about the meaning of *Charter* rights. On the other hand, we found that most legislative sequels involved major amendments rather than minor changes. In sum, the dialogue between courts and legislatures is both more complex and less extensive than Hogg and Bushell suggest.

. . . [T]here are a wide variety of legislative responses to judicial nullification, which we call the six degrees of dialogue. These responses range from no legislative sequel at all, to the amendment of offending sections of impugned statutes by elected officials. These six degrees of dialogue can be further classified as either positive or negative. Positive dialogue is characterized by legislative actors amending sections, while negative dialogue involves elected officials repealing Acts and sections of impugned laws, engaging in legislative "prequels" before the Supreme Court of Canada decides a case, judicial amendment of laws, and finally, the absence of a legislative sequel.

It is our contention that legislative sequels must be a positive exercise to constitute genuine dialogue and to facilitate an equal relationship between judges and legislators. Specifically, amending sections of impugned statutes represents dialogue because this is a positive response in which elected officials reflect on the implications of judicial decisions, and revise statutes to advance legislative objectives in a manner that complies with

the *Charter*. In this regard, *R.* v. *Daviault*[50] and its legislative sequel[51] is an excellent example of genuine dialogue, since Parliament amended the *Criminal Code* to include a preamble that discussed the constitutionality of the new section. Further, cases such as *Baron* v. *Canada*[52] and *Libman*[53] also represent genuine dialogue, because the invalidations were based on narrow procedural grounds that required minor legislative amendments to ensure their constitutionality. However, *Charter* dialogue does not characterize the process whereby elected officials simply repeal offending sections or replace entire Acts. Such responses do not represent minor legislative replies, but border on *Charter* ventriloquism because elected officials are simply expunging sections or whole laws found to be offensive to judicial actors, and thus are simply complying with judicial decisions. This negative approach to legislative sequels undermines the establishment of an equal relationship between judges and legislators, and instead facilitates a hierarchical relationship that limits genuine dialogue.

Categorizing judicial nullifications by the Supreme Court of Canada in terms of these six degrees of dialogue reveals the presence of an institutional dialogue, but one not as extensive as first reported by Hogg and Bushell. In particular, genuine *Charter* dialogue between judges and legislators arguably constitutes only 33 per cent (12/36) of cases where the Supreme Court of Canada has nullified legislation. In effect, the six degrees of dialogue suggest the opposite of the Hogg/Bushell study, namely, that two-thirds of cases involve negative legislative responses, and thus do not qualify as *Charter* dialogue. Other important empirical findings based on this classification system reveal that most legislative sequels do not involve minor amendments, but require major legislative responses on the part of elected officials, such as repealing sections or replacing entire Acts. In addition to these important findings, the six degrees of dialogue demonstrate that *Charter* dialogue is less representative of the Supreme Court than it is of lower courts, as a significant number of cases do not have legislative sequels (7/36), or were amended before the Supreme Court decided the appeal (5/36). Although dialogue may at times characterize the relationship between elected officials and judicial actors, it is a far more complex phenomenon than the one described by Hogg and Bushell....

The ... most crucial flaw in the normative argument is its assumption of a judicial monopoly on correct interpretation.... Contrary to what Hogg and Bushell assert, legislatures are never subordinating themselves to the *Charter per se*, but to the Court's interpretation of the *Charter's* language. Hogg and Bushell acknowledge that dialogue requires "a relationship between equals," but then gloss over the implications of that requirement by uncritically equating judicial interpretation of the *Charter* with the document itself.... [L]egislative sequels that merely incorporate a judicial

50. [1994] 3 S.C.R. 63.

51. See *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, s. 1, adding section 33.1 to the *Criminal Code, supra* note 47.

52. [1993] 1 S.C.R. 416.

53. [1997] 3 S.C.R. 569.

interpretation into new law do not challenge the judicial interpretive monopoly. . . .

Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 Mich. L. Rev. 245 (1995)

[One problem with entrenching constitutional provisions, addressed by Mark Tushnet in this essay, is that of "democratic debilitation"—that is, "when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems." This, in turn, may diminish public attachment to constitutional norms and may deprive courts of the benefit of public and legislative views on constitutional matters. Tushnet argues that the Section 33 override provisions of the Canadian Charter, despite their apparent appeal, have not provided a solution to the debilitative effects of entrenchment.

The origins of Section 33, quoted in note a above, lay in Prime Minister Pierre Trudeau's effort to fully "patriate" the Canadian Constitution—that is, to have a system in which all questions concerning Canada's constitution would be finally resolved in Canada, without the need to obtain review or agreement by Britain. In response to provincial opposition to what was seen as a plan for aggrandizing national authority, the Supreme Court of Canada concluded that "as a matter of law the national government could request patriation without the consent of the provinces," but it also found that "doing so without a substantial—though not unanimous—measure of provincial consent would violate an apparently nonlegal constitutional convention."

Provincial leaders, concerned about whether amendments to the proposed Constitution would require unanimous consent from the provinces, were also reluctant to endorse the proposed bill of rights until, as Tushnet describes, "Saskatchewan's premier, a social democrat influenced by the traditional hostility toward entrenched bills of rights in the European and especially British left," suggested a legislative override provision. Trudeau accepted this, subject to a 5 year limit, thus "allaying enough concerns so that the Charter was adopted in 1982, although Quebec refused to accede to it at least in part because section 33 did not apply to language rights. . . . [T]he political setting in which section 33 developed meant that its theoretical underpinnings were not well-developed."]

. . .

As a textual matter, section 33 lent itself to a narrow reading. Two limitations immediately suggest themselves. First, in a system in which judicial review is routine, one might naturally read the clause to require that legislative overrides be retrospective. That is, the clause could be read to allow an override only with respect to a legislative provision that the courts had already held to be inconsistent with the Charter's rights-