Osgoode Hall Law Journal

Volume 45, Number 1 (Spring 2007)
Charter Dialogue: Ten Years Later

Article 4

Constitutionalism from the Top Down

Grant Huscroft

Constitutionalism from the Top Down

Abstract
Dialogue theory regards judicial interpretation of the Charter as authoritative, and, as a result, denies that continuing disagreement with the courts is legitimate. There is little scope, in other words, for dialogue with the courts in any meaningful sense. The Charter is best understood as establishing strong-form judicial review rather than weak, and legislatures have only as much room to respond to judicial decisions as the courts are prepared to allow.

Keywords
Canada; Canada. Canadian Charter of Rights and Freedoms; Judicial review; Constitutionalism

Commentary

CONSTITUTIONALISM FROM THE TOP DOWN©

GRANT HUSCROFT*

Dialogue theory regards judicial interpretation of the *Charter* as authoritative, and, as a result, denies that continuing disagreement with the courts is legitimate. There is little scope, in other words, for dialogue with the courts in any meaningful sense. The *Charter* is best understood as establishing strong-form judicial review rather than weak, and legislatures have only as much room to respond to judicial decisions as the courts are prepared to allow.

Selon la théorie du dialogue, l'interprétation judiciaire de *la Charte* fait autorité, et conteste donc qu'un désaccord permanent avec les tribunaux soit légitime. En d'autres termes, il y a peu de place pour un dialogue avec les tribunaux, qui soit réfléchi. *La Charte* est comprise comme établissant une révision judiciaire sous une forme forte plutôt que faible. Pour répondre aux décisions judiciaires, les législatures disposent uniquement de la liberté que les tribunaux sont prêts à céder.

Dialogue theory has been enormously influential in defending the practice of judicial review under the *Charter*.[1] It has done so,

---

* Professor Grant Huscroft, University of Western Ontario Faculty of Law. Thanks to my research assistants Meghan Butler and Cameron MacDonald, and to James Allan, James Kelly, Bradley Miller, and Paul Rishworth, all of whom read the commentary in draft and provided helpful comments.

however, not by establishing the merits of judicial review, but instead by downplaying the significance of judicial power. Dialogue theory says that you *can* have your cake and eat it too: judges can strike down laws passed by elected legislatures with no loss to democracy, since it is usually possible for new legislation to be passed that accomplishes the same purpose.

With characteristic modesty, Peter Hogg, Allison A. Bushell Thornton, and Wade K. Wright ("the authors") write that they "did not anticipate that [their] observations of the dialogue phenomenon would be of any interest to judges,"[2] but they were bound to be. After all, in their original article Hogg and Bushell announced that dialogue theory was a complete answer to the anti-majoritarian objection to judicial review.[3] This was a godsend for a judiciary concerned with complaints about judicial power, and it is no wonder that the Supreme Court of Canada embraced the theory.

The authors acknowledge that "*Charter* Dialogue" went too far in claiming to have resolved the anti-majoritarian difficulty,[4] but the core finding of "*Charter* Dialogue"—that judicial decisions usually leave room for a legislative response, and usually receive one—remains intact.[5] How significant is this? In my view, it is less significant than has been supposed. In particular, the existence of legislative sequels does not mean that Canada has a weak form of judicial review. The basic premise underlying the authors' analysis—the notion that the judiciary is the authoritative interpreter of the *Charter*—precludes any interaction between the legislature and the judiciary that can meaningfully be called

---

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] Peter Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited—Or 'Much Ado about Metaphors'" (2007) 45 Osgoode Hall L.J. 1 at 7.

[3] "[T]he critique of the *Charter* based on democratic legitimacy cannot be sustained." 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)" (1997) 35 Osgoode Hall L.J. 75 at 105 ["*Charter* Dialogue"].

[4] They state: "We perhaps went too far in suggesting that our study was 'an answer' to the anti-majoritarian objection to judicial review, but the findings certainly made the anti-majoritarian objection difficult to sustain" [footnotes omitted]. *Supra* note 2 at 4. Hogg acknowledged as much in "Discovering Dialogue" in Grant Huscroft & Ian Brodie, eds., *Constitutionalism in the Charter Era* (Toronto: LexisNexis-Butterworths, 2004) 3 at 5; (2004) 23 Sup. Ct. L. Rev. (2d) 3 at 5.

[5] *Supra* note 2 at 53.

dialogue. Canada has strong-form judicial review and the authors are wrong to suggest otherwise.

I. THE SIGNIFICANCE OF THE DIALOGUE PHENOMENON

Let me begin with the core finding from "*Charter* Dialogue." There is no doubt that a legislative response of some sort usually follows a judicial decision to strike down legislation. But this should come as no surprise; a decision not to pass replacement legislation would suggest that there was no good reason for the passage of the legislation in the first place. Not only is the decision to pass replacement legislation not unusual, the phenomenon of legislative sequels is not unique to Canada. They occur in the United States, despite the features of the U.S. Bill of Rights[6] that lead the authors to characterize it as establishing strong-form judicial review.[7]

The important question is not the frequency of legislative sequels, but rather the circumstances in which they occur—and in which they do not. The authors consider disparate cases in aggregate, and conclude: "the *Charter* decisions of Canadian Courts usually operate at the margins of legislative policy, affecting issues of process, enforcement, and standards... ."[8] But this point turns out to be telling in a different way. The phenomenon identified by the authors is, for the most part, limited to cases in which the disagreement between the legislature and the court centres on legislative means to particular ends—questions that must be resolved under section 1. Different means may well resolve a majority of these cases, but they will not resolve all of them. Indeed, there will be cases in which courts will not countenance the establishment of *any* limits on a right.[9] There will also be cases in

---

[6] U.S. Const. amends. I-X [U.S. Bill of Rights].

[7] See *e.g.* Neal Devins & Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004). See also the discussion of examples in Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1996).

[8] *Supra* note 2 at 39.

[9] See *e.g. Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 517. Writing for the majority, McLachlin C.J.C. suggests that it should be more difficult to establish limits on rights not subject to the notwithstanding clause (at 536-37). Gonthier J. contests this in his dissenting opinion (at 571). In any case, it is clear that it is more difficult to limit some rights than others. In some cases this is because section 1 considerations are implicit in the relevant right or freedom, such that there is little for section 1 to do after the right or freedom has been defined. Section 7 is a good

which the disagreement concerns the interpretation of the *Charter* itself—cases in which the legislature and the court disagree about the meaning of particular *Charter* rights and freedoms rather than the justifiability of particular limits on them. These are the cases that must be analyzed in order to understand the impact of judicial review on the democratic process.[10]

II. IS JUDICIAL REVIEW DEMOCRATIC?

The authors regard the debate about judicial review as academic because the constitution authorizes Canadian judges to perform their adjudicative role. "[I]f that role is 'undemocratic,'" they write, "there is little judges can do about it."[11]

This response is inadequate because the constitutional authorization of judicial review is not in issue. Plainly, the constitution authorizes the courts to engage in judicial review of legislation under the *Charter* and was intended to do so. This says nothing, however, about how judges should go about the practice of judicial review in particular cases—that is, how they should exercise the power the constitution gives them. There are few, if any, cases in which inconsistency with the *Charter* is self-evident. The *Charter* is set out in vague terms, and the courts must give meaning to concepts like freedom of expression, equality, fundamental justice, and so on, in order to apply it. Hogg and Bushell acknowledged this in their original article, and were sanguine about the consequence. Judges, they wrote, "have a great deal of discretion in 'interpreting' the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges."[12]

---

example. Nevertheless, the Court continues to insist that all rights are subject to reasonable limits. See *R. v. Sharpe*, [2001] 1 S.C.R. 45 at 95.

[10] It is important to add that the impact of judicial review cannot be assessed simply by the study of judicial decisions and legislative sequels in any event. The influence of particular judicial decisions extends beyond the context of the impugned legislation. Judicial decisions influence future legislative agendas in various ways that cannot be measured empirically. They may dissuade governments from introducing legislation, for example, or may determine the policy choices made and hence the shape of legislation that is promulgated. See the discussion in Part V, below.

[11] *Supra* note 2 at 8.

[12] *Supra* note 3 at 77.

There is a tendency to celebrate broad and generous judicial interpretations of rights and freedoms as though this demonstrates a commitment to the *Charter* itself. But the corollary of broadly interpreted rights is diminished scope for democratic law-making, and this is almost always overlooked. The more generously the Court defines a right or freedom, the more it limits the scope of legislative power, thus requiring governments to defend inconsistency with the *Charter* more often. Ultimately, constitutionality depends upon how easy or difficult the Court chooses to make it for the government to meet the tests it has established under section 1.

In all of this, the decision to empower the courts to conduct judicial review under the *Charter* is simply beside the point. What matters is *how* the power of judicial review is exercised. The approach the Supreme Court of Canada takes to interpreting the *Charter* determines the shape of our democratic constitutional order and, in particular, how majoritarian it will be.

I emphasize this point because the *Charter* does not compel the Court to adopt any particular theory of judicial review—narrow or expansive—and dialogue theory has nothing to say about the matter. The authors never claimed that it did. They argued, instead, that it does not matter how expansive the Court's approach to interpretation is since there is usually room for a legislative response to a judicial decision.

III. DOES THE *CHARTER* ESTABLISH WEAK-FORM JUDICIAL REVIEW?

The observation that there is usually room for a legislative response following a judicial decision interpreting the *Charter* led Hogg and Bushell to conclude that the *Charter* establishes only a weak form of judicial review. Weak is a relative term, and their purpose in using it was to differentiate Canadian judicial review from American. The U.S. Bill of Rights does not contain a reasonable limits clause analogous to section 1, nor does it include a notwithstanding clause, two of the key features of the *Charter* on which the authors' theory is based. The assumption is that decisions of the U.S. Supreme Court are final; they

can be overcome only by constitutional amendment. This is the paradigmatic case of strong-form judicial review.[13]

In my view, the differences between judicial review in the United States and Canada are not as great as is usually supposed. Both models involve the tasks of defining rights and considering whether or not limits on those rights are justified. Under the U.S. Bill of Rights these tasks are collapsed into a single step, rather than treated as analytically distinct as they are under the *Charter*.[14] There is no question, however, that the rights and freedoms protected by the U.S. Bill of Rights are subject to reasonable limits, as the First Amendment freedom of speech cases demonstrate.[15]

The main difference between the U.S. Bill of Rights and the Canadian *Charter* is the notwithstanding clause—section 33 of the *Charter*—but this is a difference that comes to little: the notwithstanding clause is unused, and all but unusable. Hogg and Bushell acknowledged in 1997 that the notwithstanding clause had become relatively unimportant, and noted the development of a political culture resistant to its use.[16] Ten years on, it is time to go further and acknowledge that the notwithstanding clause is simply irrelevant. There have been no significant uses of the clause outside of Quebec, nor are there likely to be in the future. Successive prime ministers and premiers in most provinces have disavowed its use.

---

[13] Kent Roach makes this sort of argument at length. See Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001) at 29-33, 290. See also the critical reviews by Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 53 U.T.L.J. 89; and James Allan, "The Author Doth Protest Too Much, Methinks" (2003) 20 N.Z.U.L.R. 519.

[14] Mark Tushnet puts the point this way:

> [I]n the United States the Supreme Court *defines* the rights in question by referring to the justifications the government has for its action. Social interests are accommodated in the process of defining constitutional rights, and no right exists to be infringed if the government's justifications are good enough. In that sense only are rights in the United States absolute: Because government justifications have been taken into account at step one, nothing remains to be done by taking a second step.

Tushnet, *ibid.* at 92 [emphasis in original].

[15] The U.S. Supreme Court's approach to the regulation of commercial law is a good example. The test in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) is essentially the same as the general approach to limiting rights the Supreme Court of Canada set out several years later in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

[16] *Supra* note 3 at 83.

It makes little sense, then, to regard judicial review under the *Charter* as weak-form judicial review. Canadian courts have the power to strike down legislation, and this power can only be understood as establishing strong-form judicial review. Canadian constitutional theory is in denial about this, and about the extraordinary nature of this power. We like to talk about how influential the *Charter* has been internationally, but it is revealing that no similar countries have empowered judges to do what Canadian judges can do under the *Charter*. The *New Zealand Bill of Rights Act* was passed in ordinary statute form,[17] as was the U.K. *Human Rights Act*[18] and, most recently, bills of rights at the state level in Australia.[19] In all of these common law countries, judicial power is limited to granting declarations of inconsistency in the event that a court concludes that legislation infringes human rights without justification. If the concept of weak-form judicial review has any relevance, it is as a description of judicial review under the statutory bills of rights in these countries.[20]

Not only can the Supreme Court of Canada strike down legislation, it has the power to make its decisions stick—to preclude any legislative response other than enactment of the Court's decision—if it chooses to do so. It can do this, for example, by holding that legislation pursues an end that is not sufficiently important to warrant the establishment of *any* limit on rights, thus failing at the pressing and substantial objective branch of the *Oakes* test.[21] The Court does not

---

[17] *1990* (N.Z.), 1990/109. See generally Paul Rishworth, Grant Huscroft, Scott Optican & Richard Mahoney, *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003).

[18] *1998* (U.K.), 1998, c. 42 [U.K. *Human Rights Act*].

[19] *Charter of Human Rights and Responsibilities Act 2006* (Vic.). The Australian Capital Territory also has a bill of rights, the *Human Rights Act 2004* (A.C.T.), which denies judges the authority to strike down legislation.

[20] Even here, the term may be misleading. Where judges are limited to the power to issue declarations of inconsistency or incompatibility with a bill of rights, the important question is the extent to which such declarations are heeded by the legislature. Experience under the U.K. *Human Rights Act*, *supra* note 18, to this point demonstrates that declarations are invariably accepted by the legislature. See Francesca Klug & Keir Starmer, "Standing Back for the Human Rights Act: How Effective Is It Five Years On?" [2005] P.L. 716 at 721. This being so, the distinction between strong and weak-form judicial review collapses: all judicial review can be characterized as strong-form. An analogous point can be made about the Supreme Court of Canada's advisory power on reference questions.

[21] *Oakes*, *supra* note 15.

often do this, of course, but the point is that it can.[22] Another way in which the Court can make its decisions stick is to refuse to suspend a declaration of unconstitutionality.[23] This establishes a new status quo that cannot be unwound, even in theory, since the notwithstanding clause can only be applied prospectively.[24] Beyond this, the Court can structure its section 1 analysis in such a way as to dictate the terms pursuant to which a legislative response will be permitted. These are just some of the tools at the Court's disposal. A court with this sort of discretionary power is not engaged in weak-form judicial review in any meaningful sense.

IV. THE IMPACT OF A DECISION TO STRIKE DOWN LEGISLATION

The authors note that the purpose of Hogg and Bushell's article was to "challenge the anti-majoritarian objection to the legitimacy of judicial review" under the *Charter*.[25] They acknowledge that dialogue theory is not a complete answer to this objection, as was claimed in 1997, but maintain that it makes the objection more difficult to sustain.[26]

Again, I think that the numbers do not tell the full story. To say that it is usually possible for legislatures to respond to judicial decisions by passing new legislation is to understate the impact of a decision that strikes down legislation. The authors convey the impression that it is easy to legislate, but it is not. Although a simple majority in the legislature suffices to pass legislation, judicial decisions interpreting the *Charter* are never politically neutral in their effect. They create powerful incentives and disincentives to political action, and no account of judicial review is complete without taking this into account. A government that wishes to pass replacement legislation must revisit a

---

[22] Hogg and Bushell acknowledged this. *Supra* note 3 at 93-95.

[23] Even the decisions of lower courts can have this effect. The Ontario Court of Appeal's decision not to suspend the declaration of unconstitutionality in *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161 (C.A.) resulted in same-sex marriages occurring immediately. See Grant Huscroft, "Thank God We're Here: Judicial Exclusivity in Interpreting the *Charter* and its Consequences" (2004) 25 Sup. Ct. L. Rev. 241; Grant Huscroft, "Political Litigation and the Role of the Court" (2006) 34 Sup. Ct. L. Rev. 35 [Huscroft, "Political Litigation"].

[24] *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712.

[25] *Supra* note 2 at 2.

[26] *Ibid.* at 4.

political problem that had been regarded as settled. The price of doing so may be high—so high, in fact, that as a practical matter it cannot be paid. Even if a government favours the passage of replacement legislation, there are significant opportunity costs involved. Something else on the government's agenda must be delayed or set aside in order to make room for the replacement legislation. Government time, energy, and political capital must be expended. Even a government committed to legislating may find it impossible to do so. A decision to strike down legislation under the *Charter* may unravel political compromises that cannot be recreated in new and different circumstances.

R. v. Morgentaler[27] is a prime example. The Court's decision striking down the therapeutic abortion law left room for new legislation and the government had the will to act, but the Court's decision had so altered the political landscape that passage of new legislation to regulate abortion proved impossible. The authors acknowledge the political force of judicial decisions, but ask "whether it is a bad thing that some judicial decisions striking down legislation for unjustifiably infringing a *Charter* right or freedom bring about a form of legislative inertia that hinders the ability of legislatures to respond."[28]

This is a rhetorical question for the authors, but in my view there is an answer. Legislative inertia in the face of a judicial decision *is* a bad thing if the Court's interpretation of the *Charter* is worse than the legislature's, and that is always a real possibility. The authors acknowledge that the Court's decisions may be wrong, but they insist that the paramount consideration is the finality of judicial decisions as a legal matter, and, as a result, are unconcerned with the impact of judicial decisions on the political process.

V. INTERPRETIVE AUTHORITY AND THE LEGITIMACY OF DISAGREEMENT

The authors argue that judicial interpretation of the *Charter* is authoritative. They do not concede a judicial monopoly on correctness—they acknowledge that incorrect decisions may be made from time to time. They insist, however, that there is—and must be—a

---

[27] [1988] 1 S.C.R. 30.

[28] *Supra* note 2 at 41.

judicial monopoly on finality.[29] Their position is, in essence, captured in Justice Robert H. Jackson's famous aphorism about the U.S. Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final."[30]

The authors accept that the executive and legislatures have the authority to interpret the *Charter*, but insist that their ability to act is circumscribed by the case law:

> [W]here the interpretive task takes place against the backdrop of a prior relevant judicial decision, the legislature and the executive may not act on an interpretation of the *Charter* which conflicts with an interpretation provided by the courts. Why? Because, in doing so, they would be doing (or refraining from doing) something that the courts have said would unjustifiably infringe the *Charter*, and under our system of constitutional democracy, that is impermissible.[31]

The authors acknowledge only two exceptions. First, the executive and legislature may act on conflicting interpretations of the *Charter* where there is a material change in circumstances or new evidence is discovered, and, as a result, it is plausible to believe that a measure may now be understood as constituting a reasonable limit on a *Charter* right. Secondly, the legislature may act on a conflicting interpretation of the *Charter* by invoking the notwithstanding clause.

From what I can see, this is a counsel of duty to the Court and its decisions rather than the *Charter* and its provisions, something neither required by the constitution nor desirable in normative terms. To say that the Court's decisions are final is to bind future legislatures to the opinion of passing majorities of the Court. Once it is acknowledged that decisions of the Court may be wrong, it is incumbent upon the authors to make the case for the requirement that the other branches of government must follow the Court's decisions, but they fail to do so. They assert that the decisions of the executive and legislature have no claim to finality, but this is a response to an argument that no one makes. The question is not whether or not the executive and legislature may make final decisions, but instead whether or not the executive and legislature must accept the finality of judicial interpretations of the *Charter*.

---

[29] *Ibid.* at 32.

[30] *Brown v. Allen*, 344 U.S. 443 (1953) at 540.

[31] *Supra* note 2 at 33.

Why should the meaning of the *Charter* become fixed once a majority of the Court has spoken? Any meaningful conception of the rule of law requires the outcome in *particular cases* to be accepted and enforced by the government, but what claim do judicial interpretations of the *Charter* have beyond this?

The question is important in Canada because the Court does more than simply decide cases brought before it. The Court may, for example, decide to hear moot cases and hypothetical disputes; it may enter the fray before a matter is ripe for resolution; and it may engage in lengthy *obiter* discussions if it thinks it important to do so.[32] From the Court's perspective, all of these things count as law. Indeed, sometimes the Court is so immodest as to assert that far-reaching decisions are required, as though chaos would ensue in the absence of judicial direction as to the meaning of the *Charter*. The Court is free to do all of this, of course, however unwise it may be. The question is: why should the other branches of government be bound to act in accordance with the Court's interpretation of the *Charter*?

The government can, of course, be counted on to be respectful of the Court's interpretation of the *Charter*. Few governments have the stature to pick a fight with the Court, let alone win one. But there should be no doubt that it is appropriate for the government to disagree with the Court's interpretation of the *Charter*, and to act accordingly. The executive and the legislature are duty bound to act in accordance with the constitution, and the constitution is not simply whatever the Court says it is.

The true position is more nuanced than the authors suggest. The law of the *Charter*, as with the law of the constitution generally, is not the product of judicial declaration or fiat; the law of the *Charter* develops with the input of all of the branches of government on an ongoing basis. Other branches of government may accept the judiciary's interpretation of the *Charter*, but they are under no obligation to do so. On the contrary, as I argue below, the executive and the legislature can and should challenge the Court's interpretation of the *Charter* whenever they think the Court has erred.

---

[32] The Court's conduct in reference cases is particularly problematic. It may answer questions it has not been asked—even questions that are political rather than legal—while refusing to answer legal questions that governments have the right to ask. See Huscroft, "Political Litigation," *supra* note 23.

VI. THE SECOND LOOK CASES

On the authors' account, there should not be any "second look" cases—cases in which the Court is asked to review the constitutionality of legislation enacted to replace a law struck down in a previous *Charter* case—that involve disagreement about the interpretation of *Charter* rights and freedoms. Judicial interpretation of the *Charter* is authoritative, according to the authors, and legislatures must legislate in accordance with it:

> [I]f the second law has been enacted on the premise of a legislative disagreement with the court's interpretation of a *Charter* right or freedom (as opposed to a more convincing demonstration of a section 1 justification), then the second look case will have to be decided against the legislation, unless a notwithstanding clause has been used.[33]

Thus, *R. v. Mills*[34] proves to be a difficult case for the authors. *Mills* concerned the constitutionality of a legislative scheme that overturned a common law right to the production of records in sexual assault cases, a right that had been established in a 5:4 decision in *R. v. O'Connor*.[35] The legislation impugned in *Mills* was based on a different conception of the *Charter* rights at stake, rather than simply a disagreement as to the appropriate scope of a limitation under section 1. Indeed, the legislation impugned in *Mills* basically enacted the dissenting opinion from *O'Connor*. Nevertheless, Parliament's view was vindicated: the Court upheld the constitutionality of the legislation by a majority of eight to one, and invoked the dialogue concept in doing so.

The authors describe *Mills* as "most difficult to rationalize," and acknowledge disagreements amongst themselves as to whether it can be rationalized at all.[36] But *Mills* poses no problems for me. On the contrary, it exemplifies what I consider to be a dialogue in a meaningful sense. Parliament's replacement legislation tested the Court's commitment to its decision in *O'Connor*, and that commitment was found wanting. That seems to me to be a good thing, especially when the alternatives are considered.

---

[33] *Supra* note 2 at 49.

[34] [1999] 3 S.C.R. 309 [*Mills*].

[35] [1995] 4 S.C.R. 411 [*O'Connor*].

[36] *Supra* note 2 at 50. Hogg recants the view, expressed in 2004, that when it comes to second look cases, deference should be the order of the day. See *ibid.* at 42.

One alternative would have been obedience to the narrow majority decision of the Court in *O'Connor*, now and forever—unless the Court later changed its mind. How this might occur is not clear, of course, if future legislation were required to be drafted so as to respect the Court's prior decisions. The other alternative would have been for Parliament to do the politically impossible: to invoke the notwithstanding clause, ensuring that the legislature's opinion would prevail for a renewable five-year period. The authors suppose that because the notwithstanding clause exists, it is the only means of expressing disagreement with judicial interpretations of the *Charter*.[37]

The result is ironic: a clause designed to ensure that legislatures have the power to overturn the decisions of the courts turns out to preclude them from doing anything *short* of overturning those decisions. All things considered, we might be better off if the notwithstanding clause had not been included in the *Charter*.

VII. CONCLUSION

The authors consider the idea that courts and legislatures actually "talk" with each other ridiculous,[38] and I agree. They think that the dialogue metaphor does not matter much in the scheme of things, however, and I disagree. The name they gave to the phenomenon of the legislative sequel is the thing that makes it so useful for the Court. To describe the relationship between the legislature and the Court as a dialogue is to soft-peddle the impact of judicial power on the democratic political processes.

As I have argued, Canada has strong-form judicial review. It does not follow, however, that the role of the executive and the legislature is to submit to the Court's will. On the contrary, if the *Charter* is to be more than a top-down instrument, the other branches of government must challenge the Court's interpretation of the *Charter* from time to time. Judicial decisions matter, but the constitution

---

[37] What then is the role of the notwithstanding clause? It is on my account a fail-safe—a last resort where the Court is committed to an interpretation of the *Charter* that the legislature cannot accept. It is not something that precludes the legislature from testing the Court's commitment to an interpretation in the first place.

[38] *Supra* note 2 at 26.

requires neither judicial finality nor judicial exclusivity in interpreting the *Charter*.