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Christopher P. Manfredi

James B. Kelly

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FORUM

SIX DEGREES OF DIALOGUE: A RESPONSE TO HOGG AND BUSHELL[©]

BY CHRISTOPHER P. MANFREDI* AND JAMES B. KELLY**

I. INTRODUCTION

In *Vriend v. Alberta*,¹ Justice Frank Iacobucci devoted several paragraphs of his judgment to defending the democratic character of the Supreme Court of Canada's judicial review function under the *Canadian Charter of Rights and Freedoms*.² Justice Iacobucci defended the Court's role as the product of a "deliberate choice of our provincial and federal legislatures"³ that "promotes democratic values."⁴ In his view, the Court's contemporary function is to serve as the "trustee" of the *Charter* and to "scrutinize the work of the legislature and the executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen."⁵ At the core of this conscious redefinition of Canadian democracy, according to Iacobucci J., is the creation of a "more dynamic interaction among the branches of governance."⁶ For Iacobucci J., and the Court as a whole, the growth of this interactive dynamic demands more active participation by the judiciary in a dialogue with legislatures and executives about the proper balance

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* Professor, Department of Political Science, McGill University.

** Lecturer, Department of Political Science, McGill University.

¹ [1998] 1 S.C.R. 493 at 562-67 [hereinafter *Vriend*].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³ *Vriend*, *supra* note 1 at 563.

⁴ *Ibid.* at 566.

⁵ *Ibid.* at 564.

⁶ *Ibid.* at 565.

between individual rights and common purposes. From this perspective, *Charter*-based judicial review becomes an integral component of a more comprehensive and sophisticated democratic discourse.

The principal source for the dialogue metaphor used by Iacobucci J. to describe the Court's function under the *Charter* was a 1997 article published by Peter Hogg and Allison Bushell (now Thornton) in the *Osgoode Hall Law Journal*.⁷ According to Hogg and Bushell, judicial review is best understood as "part of a 'dialogue' between the judges and the legislatures."⁸ The functional essence of this dialogue is the ability of legislatures to reverse, modify, or avoid judicial nullification through the enactment of alternative statutes. The *Charter* facilitates this dialogue in four ways.⁹ First, section 33 gives legislatures the ultimate power of override. Second, section 1 allows legislatures to implement alternative means of achieving important objectives. Third, some rights are internally qualified and therefore do not constitute an absolute prohibition on certain actions. Finally, the *Charter* contemplates a variety of remedial measures short of nullification. Taken as a whole, these features of the *Charter* mean that it "can act as a catalyst for a two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions."¹⁰

The Hogg/Bushell article was particularly attractive to the Court because of its empirical claim that the potential for dialogue under the *Charter* had, in fact, been realized. The basis for this claim was their analysis of "legislative sequels," which they defined operationally as "some action by the competent legislative body" following judicial nullification.¹¹ Examining 65 cases in which a court struck down legislation on *Charter* grounds, Hogg and Bushell found that 80 per cent of those decisions had evoked a legislative sequel.¹² In a majority of cases, the response occurred either before the appellate process concluded (11 cases) or within two years of nullification (28 cases). On only four occasions did it take more than five years for a legislature to

⁷ See P.W. Hogg & A.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.

⁸ *Ibid.* at 79.

⁹ *Ibid.* at 82-91.

¹⁰ *Ibid.* at 81.

¹¹ *Ibid.* at 82, 98.

¹² *Ibid.* at 97.

respond to a judicial decision.¹³ In addition, the exercise of judicial review encouraged legislatures to engage in what Hogg and Bushell called “*Charter*-speak.” In particular, either when writing new legislation or responding legislatively to judicial decisions, legislatures increasingly incorporate the language of *Charter* review (“pressing and substantial objectives;” “reasonable limit”) into statutory preambles.¹⁴ Finally, dialogue may occur even when legislation is upheld, as when the legislature identifies flaws in statutes that merit correction through the process of defending them before the courts, even in the absence of a constitutional violation.¹⁵ In sum, Hogg and Bushell concluded that the empirical evidence refutes “the critique of the *Charter* based on democratic legitimacy,” since “the decisions of the Court almost always leave room for a legislative response.”¹⁶

The dialogue metaphor undeniably constitutes a powerful account of judicial review as an instrument of democratic governance. However, as defined and applied by Hogg and Bushell, the metaphor is problematic in at least two important respects. First, the empirical demonstration on which the metaphor depends suffers from several flaws. Second, even without these flaws, the metaphor as constructed in the Hogg/Bushell study provides only a weak response to the normative issues implicit in the democratic critique of *Charter*-based judicial review. In this short response, we elaborate on these two problems.

II. EMPIRICAL ISSUES

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

¹³ *Ibid.* at 99.

¹⁴ *Ibid.* at 101-04.

¹⁵ *Ibid.* at 104-05. See, for example, *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, and the subsequent repeal, in the *Income Tax Budget Amendments Act, 1996*, S.C. 1997, c. 25, of the provisions of the *Income Tax Act* upheld by the Court.

¹⁶ Hogg & Bushell, *supra* note 7 at 105.

period, to 25 per cent (13/52) during 1993-1997.¹⁷ 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.¹⁸ 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.

A second criticism concerns the selection of cases on which the study is based. The 65 cases analyzed in the article include all Supreme Court decisions involving judicial nullification, as well as “important” trial and appellate court decisions that did not reach the Supreme Court.¹⁹ The problem here is that the method used to identify non-Supreme Court cases for analysis violates a fundamental principle of social science, which is that sampling techniques should be designed to reduce the probability of selection bias.²⁰ In this instance, however, the study does not provide any objective operational definition of “importance,” and the sample of non-Supreme Court cases is based entirely on the subjective judgement of one of the study’s authors.²¹ Moreover, there is no indication that the sample is representative with respect to factors like jurisdictional origin or level of court. Finally, the small size of the sample of non-Supreme Court cases raises important questions of reliability. As a result of these methodological flaws, it is

¹⁷ See J.B. Kelly, *Charter Activism and Canadian Federalism: Rebalancing Liberal Constitutionalism in Canada, 1982-1997* (Ph.D. Thesis, McGill University, 1998) at 82, 98 [unpublished] [hereinafter *Charter Activism and Canadian Federalism*]. See also J.B. Kelly, “The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997” (1999) 37 *Osgoode Hall L.J.* 625.

¹⁸ See *Charter Activism and Canadian Federalism*, *supra* note 17 at 132-34.

¹⁹ Hogg & Bushell, *supra* note 7 at 81-82.

²⁰ See G. King, R.O. Keohane & S. Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, N.J.: Princeton University Press, 1994) at 128-35.

²¹ According to Hogg and Bushell, the criterion for selecting lower court cases was “to examine every case referred to in P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), in which a law was struck down for breach of the *Charter*”: Hogg & Bushell, *supra* note 7 at 82, n. 20. Hogg and Bushell also added “a few recent cases” that did not appear in Hogg’s text without providing any indication of what made these additional cases sufficiently important to be added to the analysis.

impossible to draw any meaningful conclusions about *Charter* dialogue from the data on non-Supreme Court cases examined in the study.²²

A third criticism is that, even if one could be confident that selection bias is absent from the analysis of lower court decisions—either because it includes the universe of such cases or a large, weighted random sample of them—the inclusion of these cases remains problematic. By treating lower court and Supreme Court nullifications as equivalent, the Hogg/Bushell study obscures an important aspect of *Charter* dialogue, which is the *Supreme Court's* willingness to engage in an institutional dialogue with the other branches of government. It is important to know, in other words, whether dialogue becomes more one-sided as cases progress through the judicial hierarchy. Lower court decisions are simply too unstable to provide unequivocal evidence of dialogue. For example, a number of lower court cases with legislative sequels in the study were later appealed, with the higher courts reversing the lower court decision,²³ thus making the legislative sequel redundant and questioning whether such a case should be considered as an example of *Charter* dialogue. Indeed, the progression of cases through the judicial system has produced a scenario where legislative sequels have been challenged, and despite the modifications implemented by legislative actors, are still found to be unconstitutional by the courts. This occurred in *Canadian Civil Liberties Association v. Ontario (Minister of Education)*,²⁴ where amendments made in response to the invalidation of sections of Ontario's *Education Act*²⁵ in *Zylberberg v. Sudbury Board of Education (Director)*²⁶ were nullified and required major amendments before the impugned sections satisfied judicial actors. Based on the Hogg/Bushell approach, the nullification of legislative sequels is taken as evidence of *Charter* dialogue, but this clearly illustrates how temporary dialogue can be when judicial decisions and legislative sequels are exposed to further judicial review.

Indeed, legislative sequels in the areas of campaign spending, prisoners' voting rights, and abortion have not fared well in the courts.

²² Rulings by lower courts, and legislative sequels to those rulings, have been omitted from consideration in Table 1 in the Appendix, below.

²³ See, for example, *Re RWDSU v. Saskatchewan* (1985), 19 D.L.R. (4th) 609 (Sask. C.A.), rev'd [1987] 1 S.C.R. 460.

²⁴ (1990), 71 O.R. (2d) 341 (C.A.).

²⁵ R.S.O. 1990, c. E-2.

²⁶ (1988), 65 O.R. (2d) 641 (C.A.).

Libman v. Quebec (A.G.),²⁷ for example, is the most recent manifestation of the gradual weakening of public control over independent campaign expenditures.²⁸ This process began in 1984,²⁹ and after two federal elections (1984 and 1988) with unregulated independent expenditures the federal government imposed a one thousand dollar spending ceiling for the 1993 election. However, in 1996, the Alberta Court of Appeal declared in *Somerville v. Canada (A.G.)* that this ceiling violated the freedom of expression, the freedom of association, and the right to vote.³⁰ The federal government has also been fighting a difficult battle to preserve limitations on prisoners' right to vote. In 1993, the Supreme Court in *Sauvé v. Canada (A.G.)*³¹ nullified a provision of the *Canada Elections Act*, which disqualified from voting "every person undergoing punishment as an inmate in any penal institution for the commission of any offence."³² Parliament responded by re-drafting the *Canada Elections Act* to impose disenfranchisement only on individuals "imprisoned in a correctional institution serving a sentence of two years or more."³³ In 1995, the Federal Court (Trial Division) nullified this legislative sequel,³⁴ a decision that was only recently overturned by the Federal Court of Appeal.³⁵ Finally, although most attention has focused on the federal government's inability to pass new abortion legislation after *R. v. Morgentaler*,³⁶ various courts

²⁷ [1997] 3 S.C.R. 569 [hereinafter *Libman*].

²⁸ See J.L. Hiebert, "Money and Elections: Can Citizens Participate on Fair Terms Amidst Unrestricted Spending?" (1998) 31 Can. J. Pol. Sci. 91 at 92, n. 5.

²⁹ See *National Citizens' Coalition Inc. v. Canada (A.G.)* (1984), 11 D.L.R. (4th) 481 (Alta. Q.B.).

³⁰ (1996), 136 D.L.R. (4th) 205 (Alta. C.A.). The National Citizens' Coalition was also behind this constitutional challenge.

³¹ [1993] 2 S.C.R. 438.

³² R.S.C. 1985, c. E-2, s. 51(e).

³³ *Ibid.*, as amended by S.C. 1993, c. 19, s. 23. In effect, this meant that only inmates of federal penitentiaries would be affected by the voting restriction, since sentences of less than two years are served in provincial prisons and/or jails.

³⁴ See *Sauvé v. Canada (Chief Electoral Officer)* (1995), 132 D.L.R. (4th) 136 (F.C. T.D.). Christopher Manfredi served as an expert witness for the Government of Canada in this case.

³⁵ See *Sauvé v. Canada (Chief Electoral Officer)*, [1999] F.C.J. No. 1577 (C.A.), online: QL (FCJ).

³⁶ [1988] 1 S.C.R. 30.

(including the Supreme Court) have been singularly unreceptive to *provincial* legislative sequels to the 1988 decision.³⁷

A final criticism concerns Hogg and Bushell's decision to include as evidence of *Charter* dialogue cases where several judicial nullifications were addressed through one legislative sequel. For example, in *R. v. Stanger*,³⁸ *R. v. Oakes*,³⁹ *R. v. Smith*,⁴⁰ *R. v. Grant*,⁴¹ *R. v. Wiley*,⁴² and *R. v. Plant*,⁴³ courts nullified several sections of the *Narcotic Control Act*,⁴⁴ and the legislative sequel involved repeal of the *Act* and its replacement with the *Controlled Drugs and Substances Act*.⁴⁵ Similarly, in *R. v. Hess*; *R. v. Nguyen*,⁴⁶ a single amendment to the *Criminal Code*⁴⁷ substituted "sexual assault" for "statutory rape" and addressed the constitutional violations in these two cases. These cases are each counted as examples of *Charter* dialogue when, in fact, they only produced two legislative sequels. Adjusting the data to treat groups of cases that generated a single legislative sequel as one sequel would significantly reduce the incidence of *Charter* dialogue from the 66 per cent (44/65) reported by Hogg and Bushell. Even accepting their case selection as unproblematic, close examination of the cases weakens their conclusion.

Although these four criticisms are serious, they are not necessarily fatal to the empirical argument for the dialogue metaphor. Consequently, in order to evaluate that argument free from the complications implicit in the four criticisms discussed above, we re-analyzed 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

³⁷ See *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (nullifying provincial law designed to prohibit the establishment of freestanding abortion clinics by requiring that abortions be performed in hospitals).

³⁸ (1983), 46 A.R. 241 (C.A.) [hereinafter *Stanger*].

³⁹ [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

⁴⁰ [1987] 1 S.C.R. 1045 [hereinafter *Smith*].

⁴¹ [1993] 3 S.C.R. 223.

⁴² [1993] 3 S.C.R. 263.

⁴³ [1993] 3 S.C.R. 281.

⁴⁴ R.S.C. 1985, c. N-1. In *Stanger*, *Oakes*, and *Smith*, the Supreme Court considered the 1970 version of the *Narcotic Control Act*.

⁴⁵ S.C. 1996, c. 19.

⁴⁶ [1990] 2 S.C.R. 906.

⁴⁷ R.S.C. 1985, c. C-46.

legislative amendments to correct the constitutional violation⁴⁸—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.

As Table 1⁴⁹ indicates, there 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 sequel⁵¹ 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

⁴⁸ See Hogg & Bushell, *supra* note 7 at 81.

⁴⁹ See Appendix, Table 1, below.

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 *Supra* note 27.

constitutionality.⁵⁴ 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.⁵⁵ 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).⁵⁶ 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.

⁵⁴ One is tempted to ask why the Court bothers to invalidate statutes if constitutional violations are so minor. *Libman* raises this question most clearly, since the Court's judgment implied that the difference between a constitutional and unconstitutional law was merely a matter of four hundred dollars. Viewed in this light, the *Libman* judgment looks less like a discussion of grand constitutional principles than judicial micro-management of public policy.

⁵⁵ See Appendix, Table 1, below. This figure was arrived at by dividing cases that were followed by positive legislative responses (12) by the total number of cases involving laws that were nullified by the Supreme Court (36). The total number of legislative responses (positive and negative) involving laws nullified by the Supreme Court is 36, despite the 41 cases listed in Table 1. This is because several nullifications had the same legislative response, and have been coded as one case. Rulings by lower courts included in the Hogg/Bushell study (24) and legislative sequels, if any, have been omitted from Table 1: see notes 19-22, *supra*, and accompanying text. The 41 cases listed correspond to the Supreme Court decisions considered in the Hogg/Bushell study.

⁵⁶ See Appendix, Table 1, below.

III. NORMATIVE ISSUES

It is unclear, however, that even uncritical acceptance of the dialogue metaphor as operationalized by Hogg and Bushell would answer the democratic critique of *Charter*-based judicial review. As Mark Tushnet points out, "more than minimal" judicial review is problematic for democratic theory because it both distorts policy and debilitates democracy itself.⁵⁷ According to Tushnet, judicial review distorts policy when "legislators choose policies that are less effective but more easily defensible than other constitutionally acceptable alternatives."⁵⁸ Indeed, policy distortion is most likely to occur under two conditions that closely resemble the Hogg/Bushell definition of dialogue. On the one hand, policy distortion occurs when legislators tailor statutes to "judicially articulated norms" of constitutional meaning, even where those norms conflict with the legislature's own understanding of constitutional norms.⁵⁹ In a sense, this is precisely what occurs when legislatures simply adopt statutes that mirror judicial decisions. On the other hand, "policy distortion occurs when the legislature acts within the range of policies it believes is available to it, mistakenly believing that the policy [it prefers] is outside the available range."⁶⁰ In the Hogg/Bushell definition of dialogue, this would be an example of the *Charter's* influence beyond "the boundaries of what judges define as compulsory."⁶¹ In sum, policy distortion occurs whenever a legislature must subordinate its understanding of constitutionally permissible policy to that articulated by a court, even when legislative objectives are not at issue.

A second weakness of the dialogue metaphor as a normative response to the democratic critique is evident in the fact that a not insignificant proportion (11 of 65 cases, or 17 per cent) of what Hogg and Bushell describe as legislative sequels actually occurred *before* a final appellate court decision.⁶² This is important because it suggests that courts are at least as interested in asserting their supremacy over constitutional interpretation as in engaging in a dialogue about constitutional norms. As a general rule, a judicial body that recognizes

⁵⁷ See M. Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty" (1995) 94 Mich. L. Rev. 245.

⁵⁸ *Ibid.* at 250.

⁵⁹ *Ibid.* at 265.

⁶⁰ *Ibid.* at 270.

⁶¹ Hogg & Bushell, *supra* note 7 at 105.

⁶² *Ibid.* at 97.

limits to its function and decisionmaking capacity would declare any dispute moot in which the legislature had already remedied an alleged constitutional violation. Indeed, the Supreme Court, in *Borowski v. Canada (A.G.)*,⁶³ demonstrated its ability to invoke the mootness doctrine where issues concerning a statute's constitutionality had already been resolved. The decision to decide a constitutional issue where it is no longer necessary to do so can reasonably be interpreted as a gratuitous assertion of authority designed to affirm that only judicial decisions are dispositive of constitutional meaning. Moreover, the presence of so many legislative "prequels" in the Hogg/Bushell data supports Tushnet's argument that even the *threat* of constitutional reversal may distort policy.

The third, and most crucial, flaw in the normative argument is its assumption of a judicial monopoly on correct interpretation. This assumption is evident at several places in the 1997 article:

[T]he 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* ...⁶⁴

The legislative body [may be] forced to give greater weight to the *Charter* values *identified by the Court* ...⁶⁵

[T]he ... competent legislative body ... advances its objectives, while ... respecting the requirements of the *Charter as articulated by the courts*.⁶⁶

[L]egislative bodies ... meet the requirements of the *Charter as set out by the Supreme Court of Canada*.⁶⁷

Each of these statements indicates that there is no independent source for the norms that are the basis for judicial reversal of legislative or executive policy choices. 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,"⁶⁸ but then gloss over the implications of that requirement by uncritically equating judicial interpretation of the *Charter* with the document itself. The study's assumption that only judicial interpretation of the *Charter* is

⁶³ [1989] 1 S.C.R. 342.

⁶⁴ Hogg & Bushell, *supra* note 7 at 79 [emphasis added].

⁶⁵ *Ibid.* at 80 [emphasis added].

⁶⁶ *Ibid.* at 82 [emphasis added].

⁶⁷ *Ibid.* at 88 [emphasis added].

⁶⁸ *Ibid.* at 79.

authoritative is reflected in the curious decision not to consider decisions to appeal as a form of legislative response that promotes dialogue. An appeal explicitly communicates a democratic actor's judgement that a judicial decision is wrong in some sense. By contrast, legislative sequels that merely incorporate a judicial interpretation into new law do not challenge the judicial interpretive monopoly. However, as Tushnet notes, the "misplaced allocation of sole constitutional responsibility to the courts" debilitates democracy, even if legislatures can absorb judicially created constitutional norms into new statutes.⁶⁹ Genuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an *effective* means to assert that interpretation.

IV. CONCLUSION

The dialogue metaphor has rapidly become the dominant paradigm for understanding the relationship between *Charter*-based judicial review and democratic governance. The emergence and acceptance of this metaphor is to a large extent attributable to the Hogg/Bushell study of legislative sequels. Our purpose in this response has been to examine critically some of the more important empirical claims and normative assumptions of that study. In our judgement, there are enough weaknesses in these claims and assumptions to cast doubt on the study's unequivocal conclusion "that the critique of the *Charter* based on democratic legitimacy cannot be sustained."⁷⁰ There are weaknesses in both the operationalization of the dialogue concept and the evidence marshalled to support its existence. Moreover, even without these weaknesses, the study would at most refute the most simplistic and unsophisticated version of the democratic legitimacy critique. In the final analysis, the real value of the Hogg/Bushell study is not the establishment of a new paradigm, but the incremental contribution to the ongoing debate about democracy and the *Charter*.

Our concern in this short response has been to engage in a dialogue with Hogg and Bushell and to question their interpretation of what constitutes genuine *Charter* dialogue. While we agree that courts and legislators can engage in a constructive dialogue that allows for an equal exchange over the meaning of protected rights and freedoms, we have attempted to show that *Charter* dialogue is far more complex and

⁶⁹ Tushnet, *supra* note 57 at 261, n. 60.

⁷⁰ Hogg & Bushell, *supra* note 7 at 105.

less extensive than reported by Hogg and Bushell. For instance, not all legislative sequels are evidence of *Charter* dialogue, but only those that represent a positive response by legislative actors to judicial nullifications. This is an important distinction absent in Hogg and Bushell's conceptualization of dialogue. One criticism of our approach to the six degrees of dialogue would be to suggest that we have constructed a very narrow definition that excludes true dialogue. A narrow definition is required in this context, however, simply because our study has revealed that much of the evidence presented by Hogg and Bushell happens to be negative legislative sequels masquerading as *Charter* dialogue. The ability to manufacture and sustain a relationship between equals is critical to a genuine *Charter* dialogue between the Supreme Court and legislators. While negative legislative sequels are independent actions on the part of democratic actors, they ensure a hierarchical relationship between judges and legislators because legislative compliance through legislative sequels allows the judiciary's interpretation of the *Charter* to go unchallenged.

APPENDIX

TABLE 1
SIX DEGREES OF CHARTER DIALOGUE*

POSITIVE LEGISLATIVE RESPONSES

1. Section(s) amended (n=12)

Quebec (A.G.) v. Quebec Assn. of Protestant School Boards, [1984] 2 S.C.R. 66
Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177
Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712
Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232
R. v. Hess; R. v. Nguyen, [1990] 2 S.C.R. 906[†]
Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139
R. v. Swain, [1991] 1 S.C.R. 933
R. v. Seaboyer, [1991] 2 S.C.R. 577
Baron v. Canada, [1993] 1 S.C.R. 416
Sauvé v. Canada (A.G.), [1993] 2 S.C.R. 438
Ramsden v. Peterborough (City of), [1993] 2 S.C.R. 1084
R. v. Daviault, [1994] 3 S.C.R. 63

NEGATIVE LEGISLATIVE RESPONSES

2. Section(s) amended before Supreme Court of Canada decision (n=5)

R. v. Sieben, [1987] 1 S.C.R. 295; *R. v. Hamill*, [1987] 1 S.C.R. 301[†]
Tétreault-Gadoury v. Canada (Employment and Immigration Commission),
 [1991] 2 S.C.R. 22
R. v. Généreux, [1992] 1 S.C.R. 259
Schachter v. Canada, [1992] 2 S.C.R. 679
R. v. Heywood, [1994] 3 S.C.R. 761

3. Section(s) repealed (n=5)

Reference Re s. 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486
R. v. Vaillancourt, [1987] 2 S.C.R. 636
Black v. Law Society of Alberta, [1989] 1 S.C.R. 591
Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326
R. v. Bain, [1992] 1 S.C.R. 91

4. Act repealed and replaced (n=6)

Hunter v. Southam Inc., [1984] 2 S.C.R. 145
R. v. Oakes, [1986] 1 S.C.R. 103; *R. v. Smith*, [1987] 1 S.C.R. 1045[†]

Corporation professionnelle des médecins du Québec v. Thibault, [1988] 1 S.C.R. 1033

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

R. v. Grant, [1993] 3 S.C.R. 223; *R. v. Wiley*, [1993] 3 S.C.R. 263; *R. v. Plant*, [1993] 3 S.C.R. 281[†]

RJR-MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199

5. Judicial Amendment of Legislation (n=1)

Miron v. Trudel, [1995] 2 S.C.R. 418

6. No Legislative Sequel (n=7)

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295

R. v. Morgentaler, [1988] 1 S.C.R. 30

R. v. Martineau, [1990] 2 S.C.R. 633

Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69

R. v. Downey, [1992] 2 S.C.R. 10

R. v. Zundel, [1992] 2 S.C.R. 731

R. v. Morales, [1992] 3 S.C.R. 711

[‡] For the statutes affected in the legislative sequels to laws nullified for breach of the *Charter* in each of these cases, see the Appendix in P.W. Hogg & A.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 107-24.

[†] The total number of legislative responses involving laws nullified by the Supreme Court of Canada is 36, despite the 41 cases listed in Table 1. This is because several nullifications had the same legislative response, and have been coded as one case.

