Theory as Therapy

Review of Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*

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Dennis Baker, a political scientist at the University of Guelph, has produced a provocative and subtle argument on judicial review in Canada. He proposes "coordinate constitutional interpretation" as a more democratically legitimate alternative to judicial interpretive supremacy. Under co-ordinate interpretation, courts remain able to issue interpretations of the constitution and they retain an institutional advantage in applying constitutional provisions to the cases that come before them.[1] The difference, compared with current Canadian practice, is that the other branches of government are not bound to obey the courts' interpretations of the constitution: "elected actors" are free to "disagree with and even overcome the decisions of appointed judges."[2] Each of the three branches of government remains "entitled and obligated to exercise its constitutional powers in accordance with its own interpretation of what the constitution entails."[3] Judicial activism continues, but it loses its anti-democratic sting. Parliamentary supremacy is reconciled with constitutional supremacy.

Professor Baker's book is timely in two ways. It offers constitutional theorists a Canadian alternative to "*Charter* dialogue" theory—a line of inquiry that, as Baker argues, offers diminishing returns for scholars. Whether they are sympathetic or hostile to Baker's conclusions, constitutionalists will benefit from exposure to his views. But more than this, his book casts new light on Canadian orthodoxies about the interaction of the legislature with both the judiciary and the executive. As Canadians settle into the idea that minority parliaments are no longer anomalous—indeed, that they may be the "new normal"—constitutionalists need to examine their preconceptions on

* BA (UBC), LLB (Queen's), MA (Carleton). Comments from Ben Berger, Greg Clarke and Sarah Hamill saved me many embarrassments. A great teacher, the late George Neuspiel, led me to this subject.

1 Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 5.

2 *Ibid* at 3.

3 *Ibid* at 4.

the separation of powers. For this reason, *Not Quite Supreme* is provocative in exactly the way that the times demand.

Not Quite Supreme may not win many converts to co-ordinate interpretation. Nonetheless, Professor Baker has produced an admirable piece of interdisciplinary scholarship. His book deserves curious and open-minded readers in the field of constitutional studies. And he deserves a patient and precise counter-argument. I do not have the space to provide such an argument here, but I offer some thoughts as a skeptical reader.

This review begins with three sections that present a sketch of the public and academic conversation to which Professor Baker's book contributes. A longer section offers a rough précis of the book itself. I then discuss some contemporary developments that the book helps to illuminate. Finally, I try to describe my own misgivings about Baker's thesis.

The symptoms: constitutional fever, paralysis and neurosis

The first decade of *Charter*[4] decisions (1982–1992) coincided with two ambitious, contentious and unsuccessful attempts at multilateral constitutional amendment: the Meech Lake and Charlottetown accords. By the early 1990s, Canadian constitutionalists had absorbed three lessons. First, the *Charter* had "become the country's most important symbol."[5] Second, the new amending formula all but precluded alteration to the text by legislative means: it would be practically impossible to reword the *Charter* to deal with any regrets, or to reflect the evolution of Canadian values, priorities or identity. And finally, the judiciary was not treating constitutional rights with kid gloves: the Supreme Court endorsed a "large and liberal" view of the *Charter*, in contrast to its treatment of the 1960 *Bill of Rights*.[6]

In short, constitutional rights mattered to Canadians and had transformed Canadian political culture. Canadians couldn't hope to alter their new, symbolically potent rights by the mechanisms of representative democracy. But

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 Jeffrey Simpson, "Rights Talk: The Effect of the *Charter* on Canadian Political Discourse" in Philip Bryden, Steven Davis & John Russell, eds, *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994) 52 at 53.

6 Patrick J Monahan, "The *Charter* Then and Now" in Philip Bryden, Steven Davis & John Russell, *ibid,* 105.

this did not mean their rights were static: on the contrary, the courts were busy telling Canadians what specific changes their new rights entailed, and what specific limits on the exercise of these rights could be tolerated. This new order involved something like paralysis in constitutional politics, and something like a fever dream in constitutional law. It was increasingly obvious that the courts—whether one was disposed to view them as the least dangerous or most dangerous branch of government[7]—were suddenly the *only* branch that *actually functioned* in producing constitutional change. A new constitutional game was afoot, and it did not follow the familiar rules of democratic practice in a federation.

Already in the 1980s, a democratic critique of the *Charter* and the case law it spawned was emerging from some Canadian scholars of the constitution,[8] though it did not find an echo in practical politics. *Charter* enthusiasts were unable to offer a fully persuasive response to this democratic critique.[9] It seems that the community of Canadian constitutional scholars who preoccupied themselves with questions of legitimacy fell prey to a kind of collective neurosis—an unspoken fear that the constitutional order was brittle, perhaps increasingly so as the courts continued to wield the *Charter* against the handiwork of legislatures. Inevitably—or so it seems in retrospect—the next hot Canadian academic theme was going to be the antidemocratic spectre of judicial activism[10] and the perils of judicial supremacy.

7 See Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2003).

8 See e.g. Andrew Petter, "The Politics of the *Charter*" (1986) 8 Sup Ct L Rev 473; Allan C Hutchinson & Andrew Petter, "Private Rights / Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 UTLJ 278; Andrew Petter & Allan C Hutchinson, "Rights in Conflict: The Dilemma of *Charter* Legitimacy" (1989) 23:3 UBC L Rev 531; Joel C Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall LJ 123 (especially at 179–85); and Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989).

9 "Within constitutional argument we see appeals to both truth and trust, without sufficient *reason* for either. Constitutional arguments do not even attempt to deal with the facts about the practice they seek to legitimate. Quite the contrary, they proceed by obscuring and marginalizing concerns—such as the indeterminacy of purposive reasoning, or the partiality of judicial perspective—which should be central to their analyses. Notwithstanding the pretensions of intellectual rigour and analytical depth, constitutional arguments are really just appeals for faith in the institution of judicial review and, correspondingly, obedience to the outcomes of that institution. They do not provide good reasons for the authority of judicial power." Bakan, *supra* note 8 at 193.

10 Sanjeev Anand offers a definition of the phenomenon: judicial activism is "the tendency for judges to make, as opposed to simply interpret, the law; the willingness of courts to issue rulings reversing or altering the legislative enactments of Parliament and the provincial legislatures; and the inability of legislatures to effectively respond to such rulings, thereby giving judges the last word

The diagnosis: "*Charter* Revolution"

The theme found its voice in Rainer Knopff and Ted Morton, political scientists at the University of Calgary. Beginning with a conference paper in 1991[11] and culminating with a book-length treatise in 2000,[12] they mounted an energetic critique of Canadian judicial activism under the *Charter*. Inspired by U.S. constitutional theory, brandishing ready-made slogans ("the *Charter* Revolution," "the oracular courtroom," "the Court Party"), and hinting at an elitist lawyerly conspiracy, they produced the Canadian academic version of a blockbuster. This time there was a populist echo: on-the-rise politicians dabbled in court-bashing.[13] Members of the "Court Party" wrote detailed rebuttals to charges of covert social engineering.[14] Some constitutional lawyers—leery, perhaps, of reinforcing the "Court Party" caricature—conceded parts of the Knopff and Morton argument.[15] There is even some room to believe that Canadian courts recognized the threat to their public legitimacy and adopted a more deferential posture in some high-profile cases.[16]

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over matters involving rights and freedoms." Sanjeev Anand, "The Truth About Canadian Judicial Activism" (2006) 15:2 Const Forum Const 87 at 87.

11 FL Morton & Rainer Knopff, "The Supreme Court as Vanguard of the Intelligentsia: The *Charter* Movement as Postmaterialist Politics" in Janet Ajzenstat, ed, *Canadian Constitutionalism: 1791–1991* (Ottawa: Canadian Study of Parliament Group, 1992) 54. See also FL Morton, "The *Charter* Revolution and the Court Party" (1992) 30 Osgoode Hall LJ 627; and Rainer Knopff & FL Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992).

12 FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

13 In opposition in 2001, a few years before becoming Attorney General of Canada, Vic Toews accused the Supreme Court of Canada of "a frenzy of constitutional experimentation that resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives of the people . . . [producing] legal and constitutional anarchy," cited in Anand, *supra* note 10 at 87.

14 See e.g. Robin Elliot, "'The *Charter* Revolution and the Court Party': Sound Critical Analysis or Blinkered Political Polemic?" (2001–02) 35:2 UBC L Rev 271; Robin Elliot, "Morton and Knopff's *The Charter Revolution and the Court Party*: A Legal Critique" in Gerald Kernerman and Philip Resnick, eds, *Insiders & Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship* (Vancouver: UBC Press, 2005) 117.

15 See e.g. Peter W Hogg, "The *Charter* Revolution: Is It Undemocratic?" (2001–02) 12:1 Const Forum Const 1.

16 James B Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982–1997" (1999) 37 Osgoode Hall LJ 625; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 89–90, 94 [Roach, *The Supreme Court on Trial*]. See also Vuk Radmilovic, "A Strategic Approach to Judicial Legitimacy: Supreme Court of Canada and the *Marshall* Case" (2010) 15:1 Rev Const Stud 77 and Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec *Secession Reference* and Beyond" (2010) 43:4 Canadian Journal of Political Science 843.

It was all great fun while it lasted. But after the shock of the first generation of *Charter* decisions, the exponents of the "*Charter* Revolution" critique had less and less material to work with—and the defenders of judicial supremacy had less to defend. *Charter* decisions with public shock value became infrequent.[17] The courts grew more willing to issue suspended declarations of invalidity, giving governments and legislatures the opportunity to repair *Charter*-violating laws at comparative leisure.[18]

Over time, the concern with judicial activism became more abstract and distant: a matter for theorists—of various political persuasions—and an occasional political bugbear for some social conservatives and law-and-order enthusiasts. And, as of 1997, there was a new and influential theory to calm the nerves.

The talking cure: "*Charter* dialogue"

Peter Hogg and Allison Bushell (now Allison Thornton) were the first to articulate the "dialogue" perspective on judicial review on *Charter* grounds.[19] They began by conceding that "there is something a bit hollow and unsatisfactory" in the view that the rule of law requires legislative bodies to obey the courts' interpretation of the constitution in a democratic state.[20] They acknowledged that "the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges."[21]

But they found the reality of judicial interpretive supremacy in Canada much less troubling democratically. The courts do not dictate, they engage in dialogue: "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."[22] This,

17 Kelly, *supra* note 16 at 635, 654–55: "The judicialization of politics declined during the 1993–1997 period. . . . [T]he Court has improved its relationship with the legislative branch of government by curbing its tendency to challenge the substantive policy choices of Parliament and the provincial legislatures. This shift in focus by the Court reduces the salience of the anti-democratic critique of judicial review under the *Charter* that grew louder during the first decade of *Charter* decisions."

18 Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1 at 14–18 [Hogg, Thornton & Wright]. See also Bruce Ryder, "Suspending the *Charter*" (2003) 21 Sup Ct L Rev 267, especially at 277–82.

19 Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75.

20 *Ibid* at 77.

21 *Ibid*.

22 *Ibid* at 79.

in Canada, is "the normal situation."[23] Therefore: "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."[24]

The *Charter*, in their view, has four features that allow for dialogue between the courts and legislature, of which the most broadly applicable are the section 33 "legislative override" and the section 1 "reasonable limits" clauses.[25] Section 33 allows legislatures to re-enact a law that has been struck down on *Charter* grounds for a renewable period of five years, notwithstanding the law's infringement of a right or freedom. (This override is not available, however, to cancel democratic rights, mobility rights, or rights relating to official languages.) Section 1 offers legislatures another choice: they can re-enact the offending legislative provisions with a less rights-impairing approach and a better rationale for the restriction of the right.[26]

Hogg and Bushell pointed out a few situations where "dialogue is precluded"[27] but found that 80 percent of the time, when laws were struck down on *Charter* grounds, there was ensuing "legislative action" that amounted to inter-branch "dialogue" of one kind or another.[28] They concluded that "the critique of the *Charter* based on democratic legitimacy cannot be sustained. . . . 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."[29]

Reflecting on their study ten years later, they saw it as establishing that "in Canada we had a weaker form of judicial review that rarely had the effect of actually defeating the purpose of the legislative body. 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."[30]

23 *Ibid* at 80.
24 *Ibid* at 81.
25 *Ibid* at 82–91. The two more narrowly applicable features are "qualified terms" in some *Charter* rights and the ability of legislatures to respond to a finding of "underinclusiveness" under section 15 with *either* an expansion or contraction of a government program. *Ibid* at 87–91.
26 *Ibid* at 84–87.
27 *Ibid* at 92–96.
28 *Ibid* at 96–97.
29 *Ibid* at 105, citing R Dworkin, "The Forum of Principle" (1981) 56 NYUL Rev 469 at 469.
30 Hogg, Thornton & Wright, *supra* note 18 at 4.

Hogg and Bushell's dialogue theory elicited a spate of well-argued responses, both supportive and critical,[31] which in turn elicited careful elaborations and modifications to their original argument.[32] But ultimately Hogg and Bushell, for all the reassurance they offered, had banished neither the abstract concern about democratic legitimacy, nor the more concrete worry that post-1982 judicial supremacy had brought a brittleness to the legitimacy of the constitutional order.

31 See Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513 ("[T]he study would at most refute the most simplistic and unsophisticated version of the democratic legitimacy critique" at 524); Roach, *The Supreme Court on Trial, supra* note 16, especially at 175–204, 239–96 ("When the Court does have the last word, the reason is usually more a failure of governmental and public will than a failure of the Court or the *Charter*" at 175); Andrew Petter, "Look Who's Talking Now: Dialogue Theory and the Return to Democracy" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 519 ("[T]he theory lacks normative content and provides no moral justification for judges' involvement in *Charter* decision making" at 524); Grant Huscroft, "Constitutionalism from the Top Down" (2007) 45 Osgoode Hall LJ 91 ("Canada has strong-form judicial review and the authors are wrong to suggest otherwise" at 93); Christopher P Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45 Osgoode Hall LJ 105 ("What we need to encourage is real dialogue about what rights mean, rather than automatic deference to the meaning offered by a single political institution" at 123); Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on '*Charter* Dialogue Revisited'" (2007) 45 Osgoode Hall LJ 125 ("I wonder whether the notion of dialogue has accomplished much more than provide the courts with a convenient catch-all word within which to situate its own discussions of judicial review . . . I do not see how courts in Canada can be described as exercising anything other than extraordinarily strong powers of review" at 131, 144); Andrew Petter, "Taking Dialogue Theory Much Too Seriously (or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)" (2007) 45 Osgoode Hall LJ 147 ("Far from supporting the claim that Canada has a weaker form of judicial review . . . section 33 provides further grounds for doubting this proposition" at 162); Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169 ("I am somewhat uneasy with the great reliance . . . on the entrenchment of the *Charter* as the main justification for judicial review . . . I think it is necessary to explain the rationales for giving unelected courts greater powers" at 179); Richard Haigh & Michael Sobkin, "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts" (2007) 45 Osgoode Hall LJ 67 ("[R]elying on a dialogue metaphor may lead litigants to wonder whether their rights are being protected by an independent judiciary or sacrificed by a cooperative partner of government in an ongoing process of metaphysical confabulation" at 71); Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: University of British Columbia Press, 2009) 50 [Huscroft, "Rationalizing Judicial Power"].

32 See Peter W Hogg & Allison A Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall LJ 529; Hogg, Thornton & Wright, *supra* note 18; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "A Reply on '*Charter* Dialogue Revisited'" (2007) 45 Osgoode Hall LJ 193.

Dennis Baker's prescription

Dennis Baker offers an unconventional cure to the undemocratic quality of judicial review on *Charter* grounds. He begins by asserting that the idea that "a constitutional court possesses an exclusive and authoritative power to interpret the constitutional text is a relatively recent innovation in the Western liberal-democratic tradition."[33] Baker emphasizes that co-ordinate interpretation would not entail "legislative finality"—as *Charter* dialogue enthusiasts have suggested.[34] The co-ordinate interpretation perspective sees "the interpretive power . . . shared between institutions in the course of an unfolding process of constitutional interpretation. . . . For the coordinate theorist, it is only through repeated inter-institutional exchanges that enduring constitutional principles emerge."[35]

Reviewing a series of objections to co-ordinate interpretation,[36] Baker settles on the perceived lack of Canadian "checks and balances" as the most pervasive. Citing Kent Roach, he describes the image of Canadian legislatures in the constitutional orthodoxy: "executive-dominated, willing to appeal to special interests, susceptible to the tyranny of the majority, and, now, simply unwilling to provide minimum constitutional standards. It is easy to see the appeal of a judicial check in such a dysfunctional political system."[37] In the established understanding, Baker explains, there is no separation of powers between the executive and legislature in Canada:[38]

> In sum, the prevailing orthodoxy holds that, there being no separation of powers, and thus no effective checks and balances, between the executive and legislative branches of government, we should welcome the strong judicial check that comes from a separate judiciary armed with the trumping powers established in the *Charter* of Rights; an unchecked executive warrants an unchecked judiciary.[39]

Contrary to the prevailing view, Baker insists that to deny a Canadian separation of powers is to caricature Canada and comparable Anglo-American systems. He sees a kind of straw-man argument—in Baker's words, a "red

33 Baker, *supra* note 1 at 4.
34 *Ibid*.
35 *Ibid* at 4–5. See also Huscroft, "Rationalizing Judicial Power," *supra* note 31 at 64–65.
36 Baker, *supra* note 1 at 39–52.
37 *Ibid* at 51, citing Roach, *The Supreme Court on Trial, supra* note 16 at 182.
38 Baker, *supra* note 1 at 8–10, 52. James B Kelly argues that the *Charter* has caused a "further decline of Parliament and provincial legislatures as policy actors at the hands of the political executive." James B Kelly, "Governing with the *Charter of Rights and Freedoms*" (2003) 21 Sup Ct L Rev 299 at 299.
39 Baker, *supra* note 1 at 10.

herring"—in mainstream Canadian thinking.[40] The misconception is that, if there is no strict or "watertight" separation of powers, then there is no separation at all. Baker responds that no "pure" separation of powers has ever been realized or even attempted.[41] Instead, the "essential requirement for a viable separation of powers is . . . that that legislative, executive, and judicial power not be wholly vested in a single individual or single body."[42] The three branches are by nature interdependent and their roles are mixed, but their *interdependence entails a degree of independent power* in each branch—an inability of any branch to fully subordinate another:

> The important aspect of this coordinacy is therefore not a strict equality or strict separation of constitution *power*, but, rather, an equality of constitutional *status* amongst the branches. Branches can be unequal in power—indeed, one branch may be clearly dominant—but all branches must be able both to maintain their *status* as legitimate constitutional agents and to exercise some limited (though not determinative) influence over the others.[43]

Thus, to say that the Canadian system of responsible government precludes a true separation of powers is exactly wrong: "the executive-legislative separation is logically necessary for responsible government to work."[44]

Admittedly, it is rare in Canada for the legislature to overrule the executive.[45] Baker views this objection as misplaced. Citing Harvey Mansfield, he points out that "social science models frequently miss (and misunderstand) the very real significance of rarely invoked or rarely infringed constitutional limits and powers. In particular, they tend to miss the fact that a formal power may be rarely exercised precisely because . . . it is sufficiently clear and powerful that those subject to its constraints generally prefer to avoid its actual implementation by *limiting themselves*."[46] The interactions of Canadian institutions are characterized by *ambivalence*:

> [W]e find broad informal powers matched with formal but often rarely exercised checks. The advantage of such arrangements is that they accommodate the powerful

40 *Ibid* at 55.
41 *Ibid*.
42 *Ibid*.
43 *Ibid* at 59 [emphasis in original].
44 *Ibid* at 61, citing Janet Ajzenstat, "Canada's First Constitution: Pierre Bédard on Toleration and Dissent" (1990) 23:1 Canadian Journal of Political Science 39 at 46.
45 *Ibid* at 72.
46 *Ibid* at 72–73 [emphasis in original], citing Harvey Mansfield, *America's Constitutional Soul* (Baltimore, Md: John Hopkins University Press, 1991). See also Dennis Baker & Rainer Knopff, "*Charter* Checks and Parliamentary Balances" (2007) 16:2 Const Forum Const 71.

> institutions that are often necessary to ensure effective governance but also provide an opportunity for other, seemingly weaker institutions to check the powerful should they fall prey to the temptations of immoderation.[47]

Professor Baker goes on to incorporate the courts in this understanding of inter-branch power relationships. The familiar view is that legislatures make laws, leaving it to the executive and judicial branches to apply and interpret the laws. The judicial power is separated from the executive so that those who execute the laws do not hold the power to judge whether they have been properly applied.[48] Without independent supervision, an executive agency cannot be expected to treat like cases alike in applying the law.[49] "The executive's subordination to judicial command therefore allows the courts to play a moderating role . . . by blunting executive discretion."[50] Applying the law entails interpreting it, so courts are inevitably engaged in "a kind of law*making*,"[51] a task that involves an interdependence with the legislature. Laws—and especially constitutions—are inescapably ambiguous; to apply law is to make law.[52]

Still, judicial law-making is "partial": it is limited in each case to the elaboration of existing law, and dependent on concrete cases reaching the courts and requiring resolution. "If the legislature has its power restricted by a requirement of generality, then judicial lawmaking is restricted by a corresponding requirement of particularity."[53] In the constitutional sphere, "[a] court's power to declare laws void . . . is coterminous with its power to settle the case before it."[54]

It is here that Baker's co-ordinate constitutional interpretation parts ways with judicial interpretive supremacy. The judicial supremacist "talks of 'striking down' the law [whereas] a coordinate judge would simply 'disregard' the offending law in the course of exercising his or her judicial duties."[55] Judicial review is necessary to both models, but unlike co-ordinate interpretation, judicial supremacy "unhing[es] judicial power from its case-specific application."[56] The contrast is apparent after a trial court makes a declaration of unconstitutionality, but before appeals have been exhausted. According to Baker, the

47 Baker, *supra* note 1 at 81–82.
48 *Ibid* at 84.
49 *Ibid* at 87–88.
50 *Ibid* at 88.
51 *Ibid* at 89 [emphasis in original].
52 *Ibid* at 90–91.
53 *Ibid* at 92–93.
54 *Ibid* at 95.
55 *Ibid* at 96.
56 *Ibid*.

executive should remain free to enforce the impugned law on other individuals (not the parties to the case) pending a final appeal. (Indeed, Baker argues that other trial courts are not necessarily bound by the decision of a trial judge unless or until it is upheld on appeal.[57]) The judicial supremacist, by contrast, demands that the executive cease applying the impugned law, pending appeal. This position—unreasonable in Baker's view—follows from the premise that the judiciary is the *exclusive* interpreter of the constitution.[58]

The more difficult question arises after the final court of appeal declares a law constitutionally invalid. Can the non-judicial branches disregard a declaration of constitutional invalidity after all appeals of the case are exhausted? Judicial supremacists seem to rest on a very sound premise here: unless every part of the state complies with the courts' interpretation, "the constitution becomes dangerously indeterminate."[59]

Professor Baker disagrees. What if the courts are wrong? Why shouldn't the legislature try again?

> While legal scholars might decry "relitigation" of the same issue as a waste of judicial resources, the fact that the original case and any potential sequels are separated by a period of time means that it is possible that some of the practical (that is, non-legal) elements of the issue have changed. Such changes might include turnover in the Court's membership, shifting public opinion, additional information, and/or simply changes in circumstance. By requiring the judicial interpretation to be supported by more than a single panel in a single case, a recalcitrant legislature helps separate enduring legal-constitutional principle from what might be transitory preferences of personality. In this fashion, the legislature can play a limited but important role in the interpretive process even when its interpretation is not adopted as constitutional canon.[60]

If the legislature is unwilling to accept a final judicial ruling in a constitutional case, then the legislature can require the judiciary to *persist* in its constitutional interpretation before all branches of government comply with it. In the meantime, the precedent will bind lower courts faced with similar cases. But when one of these similar cases reaches the final court of appeal,

57 *Ibid* at 97: "The fact that judges at the same level in the judicial hierarchy are bound only by precedents set by higher courts and not by rulings of other courts at the same level (or different jurisdictions) means that the rule-of-law principle of like cases being treated alike will be violated in any jurisdiction *for a time*—that is, until it is restored by the unifying precedent of a higher court" [emphasis in original].

58 *Ibid* at 96–101.

59 *Ibid* at 102.

60 *Ibid* at 103–04.

that court will have the opportunity to reconsider and perhaps overturn its previous decision.[61] "In other words, the authority of the Court is dependent upon its particular ruling and not upon an abstract rule of institutional supremacy."[62]

Returning to the Canadian situation, shouldn't the legislature express its disagreement by means of the *Charter* override or constitutional amendment? Amendment is not a realistic alternative: "Although formal amendments remain technically possible, they hardly pose a threat to even the most imaginative acts of judicial interpretation."[63] The notwithstanding clause is also unfit for use in many circumstances: the clause itself requires the legislature to concede that it is overriding a right or freedom, not an *interpretation* of the right by another, fallible, branch of government. The stigma attached to the override—and its inapplicability to parts of the *Charter*—make it an unrealistic option in most circumstances.[64]

Professor Baker concludes that "statutory interference with the interpretive power of the judiciary is consistent with the separation of powers" as long as:

> (1) the legislative response does not interfere with the formal judicial power of settling the case before the bench, (2) it preserves the Court's leading (but informal) role in settling constitutional controversies, and (3) there is a compelling reason to believe that legislative participation will enhance the outcome of constitutional settlements.[65]

The separation of powers doctrine depends, in Baker's view, on the judiciary exercising limited remedial powers. Following Alexander Hamilton, he insists that courts should have no access to the executive "sword" or the legislative "purse." His objection to judicial supremacy is that it allows the judiciary to "seize" these powers from the other branches.[66] He devotes a chapter to showing how the Supreme Court of Canada, in ordering remedies for *Charter* breaches, has exercised powers that belong—under the doctrine of the separation of powers—to the other branches.

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61 *Ibid* at 111–12.

62 *Ibid* at 112.

63 *Ibid* at 116. See also Huscroft, "Rationalizing Judicial Power," *supra* note 31 at 70.

64 Baker, *supra* note 1 at 44–45, 116–17.

65 *Ibid* at 117–18.

66 *Ibid* at 124, citing Alexander Hamilton, "The Federalist #79" in Alexander Hamilton, John Jay & James Madison, *The Federalist: A Commentary on the Constitution of the United States*, ed by Robert Scigliano (New York: Modern Library, 2001) 496.

Professor Baker considers the two remedial sections in the 1982 Constitution—sections 24(1) and 52(1). From his co-ordinate interpretation perspective, "[t]he cumulative result of sections 24 and 52 . . . is a grant of formal power to the courts with respect to the individual litigants before them but only an informal power to declare laws unconstitutional for all branches."[67] Section 52, the constitutional "supremacy clause," does not explicitly assign to the judiciary the duty of ensuring that laws conform to the constitution: on its face it asserts constitutional supremacy but does not require judicial supremacy.[68] As a result, the other branches of government have *their own* section 52(1) powers, which they can exercise according to *their own* understanding of the constitution—informed, of course, by the wisdom of the judiciary.

Turning to more specific concerns about constitutional remedies, Baker details several instances of the Supreme Court exercising—"usurping"—powers that properly belong to the other branches. He views the remedy of "reading in"—that is, adding text to legislation to cure its constitutional deficiency—as a clearly improper exercise of legislative power by the judiciary.[69] He also considers the remedies for "underinclusiveness" of ameliorative programs under the *Charter*'s equality-rights section.[70] Here, he sees constitutional remedies that entail increased public spending as an intrusion on the roles of both the executive and the legislature: the former as the only body that may propose public spending, and the latter (in the form of the House of Commons) as the only body with the power to reject public spending proposals.[71] Finally, he considers courts that grant themselves the power of continuing jurisdiction to supervise compliance with their orders.[72] Here, Baker's view is that "the retention of jurisdiction by the judicial branch subverts the constitutional design by denying the executive its chance to moderate policy through its own exercise of power."[73]

Professor Baker concludes by reiterating that the form of constitutional supremacy Canada adopted in 1982 "cannot simply be translated as judicial supremacy. . . . Only the coordinate approach, with its incorporation of formal

67 Baker, *supra* note 1 at 127.
68 *Ibid* at 40, 127–28.
69 *Ibid* at 128–32.
70 *Ibid* at 132–39.
71 *Ibid* at 136, citing the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 53–54.
72 *Ibid* at 139–44.
73 *Ibid* at 143. Baker draws especially on the work of Janet Ajzenstat: *ibid* at 61–62, 175–77 nn 55–70.

and informal power, allows for constitutional supremacy *with no concomitant institutional supremacy*."[74]

The state of Canada's separation of powers

Professor Baker presents a compelling argument about Canada's post-1982 separation of powers. It is the best part of *Not Quite Supreme*. These thirty pages deserve to become a classic in Canadian constitutional studies.[75] Baker takes issue with Peter Hogg, Patrick Monahan, Barry Strayer, Tom Flanagan, Kent Roach and Eugene Forsey, among others.[76] He challenges decades' worth of under-examined assumptions in Canadian constitutional studies: that responsible government requires a *fusion* of powers—not a separation—and that this fusion deprives the system of government of checks and balances. He leaves these assumptions badly mauled, if not demolished.

This part of Baker's argument benefits from its timeliness. In a period of restive minority parliaments, Baker's vindication is arriving in regular instalments. Here are a few examples since his book was published:

- On April 27, 2010, the Speaker of the House of Commons ruled on a *prima facie* question of privilege, "asserting the privileges of Parliament against an overweening Crown prerogative."[77] On grounds of national security, the government had defied a House of Commons motion ordering it to produce uncensored documents on the treatment of detainees in Afghanistan.[78] This episode—which realistically could not have occurred in a majority parliament—showed precisely the "broad informal powers matched with formal but . . . rarely exercised checks" that allow "seemingly weaker institutions to check the powerful should they fall prey to the temptations of immoderation."[79]

- On June 17, 2010, opposition MP (and former Justice Minister) Irwin Cotler introduced a private member's bill, the *Protecting Canadians Abroad Act*,[80] that would restrict the Royal Prerogative over foreign relations by

74 *Ibid* at 148, 151 [emphasis in original].
75 *Ibid*, "The Separation of Powers in Canada: 'Partial Agency' or 'Watertight Compartments'?," ch 3 at 53, and "The Separation of Powers in Canada: 'Fusion' or 'Ambivalence'?," ch 4 at 64.
76 *Ibid* at 8–10, 53–55.
77 Heather MacIvor, "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?" (2010) 19:1 Const Forum Const 11 at 16.
78 *Ibid* at 12–13.
79 Baker, *supra* note 1 at 81–82.
80 Bill C-554, 3rd Sess, 40th Parl, 2010 (first reading 17 June 2010).

requiring the government to provide various consular services. The bill includes an obligation on the Minister of Foreign Affairs to formally request repatriation of Canadian citizens in specified circumstances.[81] If the bill should pass—unlikely, considering the government's majority in the Senate—the prerogative powers of the Canadian executive will be limited in an unprecedented way by Parliament, over the objections of the government of the day. The bill responds directly to the Supreme Court's unwillingness to order the government to request Omar Khadr's repatriation as a *Charter* remedy.[82]

- On March 1, 2011, opposition members of the Commons Public Safety Committee voted to renew two controversial anti-terrorism measures for a period of two years—not the five years the government proposed.[83] Here, Parliament sought to check the government on the critical question of the legislative timetable.

Incidents like these illustrate the "very real significance of rarely invoked or rarely infringed constitutional limits and powers"[84] on which Baker insists. He is right to say that Canadian constitutional orthodoxy is ill-equipped to explain them, and perhaps wilfully blind to the way that the executive routinely limits itself to avoid legislative checks. Canadian constitutionalists need to stop assuming away the constitutional separation of powers. Baker explains why in two chapters that every Canadian constitutionalist should read.

Towards a cure?

Dennis Baker's thoughts on the separation of powers stand on their own merits, but they do not necessarily accomplish what he asks of them. The weakest part of Baker's argument is when he tries to account for the prevailing hostility

81 *Ibid,* s 9.

82 See Adam Badari, "Canada (Prime Minister) v. Omar Khadr—the Crown Prerogative and *Charter* Rights (2010)" (11 May 2010), online: Centre for Constitutional Studies <http://www.law.ualberta.ca/centres/ccs/rulings/Canada_v._Khadr_2010.php>; Ken Dickerson, "Omar Khadr's Rights, Prerogative Powers and Canadian Diplomacy after the Supreme Court Decision" (8 February 2010), online: Centre for Constitutional Studies <http://www.law.ualberta.ca/centres/ccs/issues/Khadr_Supreme_Court_Decison.php>; James Gotowiec, "Khadr, Khadr, He's Our Man, If He Can't Do it . . . oh" *The Court* (1 February 2010), online: The Court <http://www.thecourt.ca/2010/02/01/khadr-khadr-hes-our-man-if-he-cant-do-it%e2%80%a6-oh/>.

83 Jim Bronskill, "Committee votes to revive anti-terror measures—for two years" *The Globe and Mail* (1 March 2011), online: *The Globe and Mail* <http://www.theglobeandmail.com/news/politics/committee-votes-to-revive-anti-terror-measures-for-two-years/article1926113/>.

84 Baker, *supra* note 1 at 72.

to the tradition of co-ordinate constitutional interpretation.[85] As mentioned above, he attributes this hostility to a misguided Canadian consensus: that our constitutional structure lacks checks and balances. He arrives at this conclusion after canvassing possible objections that might be found in the text of the constitution, in a concern for legal stability, or in a distrust of majoritarianism. Baker sets himself a difficult task in this chapter because Canadian scholars who have dismissed co-ordinate interpretation have not done him the favour of presenting detailed reasons for their hostility. In the result, Baker has to ghost-write for his own critics. Even accepting this limitation, though, he seems to give short shrift to the textual, rule-of-law and majoritarian objections to his preferred model—a haste that perhaps arises from his eagerness to elaborate his separation-of-powers thesis.

In the later chapter on *Charter* remedies, Baker again seems to be in too much of a hurry. In particular, he never explains why his objection to constitutional remedies with cost implications is confined to "underinclusiveness" findings under the equality rights section. He concedes that "[c]ourts have always been able to direct public funds by awarding damages when the government is the defendant"[86]—so he clearly admits some exceptions to the legislative/executive power of the purse. But he neglects to compare a costly equality rights ruling with, for example, a ruling on legal rights that radically increase the costs-per-conviction in the form of police and prosecutorial working time. In short, Baker does not finish this part of his argument.

A broader concern about *Not Quite Supreme* is that Baker never quite tells the reader if he is presenting a lament or a call for change. Almost three decades into *Charter* jurisprudence, is he arguing for a course correction? If so, he provides no guidance on how Canada could shift from a misguided acceptance of judicial supremacy to an embrace of co-ordinate constitutional interpretation. On the other hand, if the tradition of co-ordinate interpretation is a dead cause, he does not give it a decent burial.

Professor Baker is in good company when he calls for a better theory than "*Charter* dialogue." Perhaps the most curious quality of dialogue theorists is their enthusiasm—in principle—for the notwithstanding clause. To put it as kindly as possible, the claim that the non-use of section 33 establishes the democratic legitimacy of every *Charter* decision that did *not* provoke its use is *faux-naïve*.

85 *Ibid* at 39–52.
86 *Ibid* at 136.

My own view is that dialogue theory is at a dead end as long as there is such a poverty of dialogue *practice* to theorize about. A court–legislature dialogue that is only about how to minimize impairment of *Charter* rights is cold comfort to anyone who is actually concerned about the democratic legitimacy of judicial review. But the dialogue model has some lingering potential.[87] In my opinion, it could be revived if the three branches of government entered into a kind of tacit agreement. In broad outline, their bargain could be as follows:

- The courts would make a concerted effort to develop a clear doctrine of judicial restraint: case by case, they would make the effort to enunciate when, why and how it may be appropriate to defer to the legislature or the executive. (In time, a Canadian "political questions" doctrine might emerge.[88])

- In return, the executive would make a more constructive and proactive use of the constitutional reference procedure—more often bringing proposed legislation before the courts for advisory opinions.[89]

87 Grégoire Webber also sees potential in the dialogue metaphor: "[D]ialogue is contingent on a certain political culture; that is, a disposition by the court to forego arrogating to itself sole responsibility for constitutional review and a disposition by the legislature to assume, affirm, and undertake responsibility for developing constitutional meaning. . . . The idea of a final decisional authority is foreign to dialogue, which is not to say that dialogue could not be defeated in pursuit of some other end such as stability. But dialogue assists us in appreciating the contingent nature of finality where constitutional meaning is indeterminate. The role of the constitution is not to withdraw democratic debate in favour of judicial debate, but rather to diversify the sites for such debate between court and legislature. Dialogue here reveals a different role for the constitution: it is a subject matter for dialogic exchange, not a fixed point for constraining legislative action." Grégoire CN Webber, "The Unfulfilled Potential of the Court and Legislature Dialogue" (2009) 42:2 Canadian Journal of Political Science 443 at 455, 461.

88 See Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999), especially at 145–200 ("Limiting the types of disputes which will be subject to adjudication both bolsters the legitimacy of courts deciding matters within their expertise and protects the integrity of the democratic process" at 200). See also Robert E Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill LJ 1 ("The political questions doctrine holds that certain issues, because of their relation to public policy, raise moral and political questions beyond the purview of the courts. . . . The concept of non-justiciability is not restricted simply to the idea that our courts are institutionally incapable of dealing with certain issues because of difficulties of evidence and proof. . . . Non-justiciability, in wider sense, suggests that it is institutionally inappropriate for courts to deal with certain issues of a political nature" at 18 and n 60). See also Grant Huscroft, "Political Litigation and the Role of the Court" (2006) 34 Sup Ct L Rev (2d) 35 at 54; Jim Young, "Operation Dismantle v. The Queen: *Charter* Rights, Government Decisions, and the Risk of War (1985)" (28 May 2010), online: Centre for Constitutional Studies: <http://www.law.ualberta.ca/centres/ccs/rulings/OperationDismantlev.TheQueen_1985.php#_ednref16>.

89 The reference power is itself open to criticism on separation-of-powers grounds, but is an established part of Canadian constitutional practice. See John P McEvoy, "Separation of Powers and the Reference Power: Is There a Right to Refuse?" (1988) 10 Sup Ct L Rev (2d) 429; John P

- The legislature, for its part, would experiment with a wider variety of "reasonable limits." In principle, there is much more to reasonable limits than the narrow questions of minimal impairment that courts and legislatures supposedly "dialogue" about. In particular, the element of *time* could be a bigger factor in limiting infringements of *Charter* rights. (Sunset clauses for rights-infringing provisions could be employed much more often. Allegedly unaffordable program enhancements could be deferred pending independent advice on their affordability.)

This tacit bargain would give constitutionalists much more to chew on, and it has the potential to transform dialogue theory into a full normative justification for the Canadian model of judicial review.

Baker and his fellow dialogue sceptics may have given up too early, and they might yet challenge the three branches of government—not just the courts—to rescue the *Charter* from its democratic shortcomings. This treatment might not be a panacea, but it seems more feasible than a sudden embrace of the co-ordinate model.

It is worth remembering where we started with the *Charter*. Patriation gave Canadians constitutional rights, and it gave them a very high amendment threshold for their new *Charter*. There is practically no way—by democratic means—for Canadians to enhance, particularize, or otherwise reconsider their *Charter* rights in the light of experience.[90] The obvious way to justify the courts' monopoly on *Charter* interpretation is to point to the possibility of amending the *Charter*. If you don't like how the courts interpret the *Charter*, try to change it; if you can't persuade enough legislators, you don't deserve to get your way.

No Canadian constitutionalist is prepared to make this simple, impeccably democratic and superficially compelling argument. Amendment paralysis has stifled the prospect of a democratic rights culture. Any alternative to legislative amendment is a poor substitute. The dialogue theorists deserve some sympathy, as do the "*Charter* Revolution" dissidents and scholars like Dennis Baker who seek another way. We all suffer from the same collective constitutional neurosis.

McEvoy, "Refusing to Answer: The Supreme Court and the Reference Power Revisited" (2005) 54 UNBLJ 29.

90 See Huscroft, "Rationalizing Judicial Power," *supra* note 31 at 71–74.