Dialogue, Finality and Legality

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The metaphor of ‘democratic dialogue’ suggests a process of iterative exchange between courts and legislatures, in which both help to define the scope of rights and hence specify the political arrangements required to secure them. Beyond this, however, the metaphor is understood in various ways. In an earlier piece, I suggested that we should not be distracted by the metaphor of dialogue and the debates about its accuracy and significance. My thought was that we should dig beneath the terminological issue, and absorb whatever insights stem from the rich literature on the subject. In doing so, however, it has become increasingly apparent that the dialogue metaphor is open to such divergent views about the judicial and legislative roles, and is in competition with a more well weathered set of theories on this relationship, that the question of its precise meaning must be answered squarely.

The paper hence has three tasks. The first is to clarify different senses of the term ‘dialogue’. I will explore whether it implies an egalitarian relationship between institutions, whether it justifies judicial review, who has the last word under the metaphor, and how, importantly, it relates to the ‘passive virtues’ tradition of judicial restraint associated with Alexander Bickel, John Hart Ely and Cass Sunstein. The second task is to point out certain problems with the dialogue metaphor. I argue that the equivocation over who has the last word in rights-disputes puts rights at substantial risk; that the dialogue metaphor pays insufficient attention to the need for finality and authoritative resolutions of law; and that the separation of powers is put in doubt where legislatures are invited to reject the constitutional interpretations of the judicial branch, at least where those interpretations are put forward as interpretations of law. Agreeing with these criticisms does not commit one to a robust view of judicial supremacy, one that makes no room for judicial restraint. To the contrary, the passive virtues tradition that it seeks to replace or compete with has none or at any rate fewer of these problems.

I. Dialogue: Its Meaning and Evolution (in Canada)

There has been a significant amount written about constitutional or democratic dialogue, notably in Canada, in respect of the UK Human Rights Act, 1998 and in


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* Professor of Law, UCL. This paper is an early draft and meant for discussion purposes. It will be contributed to Rosalind Dixon, Jeffrey Sigalet and Gregoire Webber (Eds), Constitutional Dialogue: Democracy, Rights, Institutions (Cambridge University Press, 2018). Any comments are very welcome at jeff.king@ucl.ac.uk.
at times unfairly neglected earlier work on this theme by Barry Friedman in the United States. The basic idea as outlined in the seminal article by Hogg and Bushell (now Bushell Thornton), is as follows: ‘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.’

The authors argue that where dialogue occurs ‘any concern about the legitimacy of judicial review is greatly diminished.’ They later appear to back down from this normative claim, however. Within this version, we see most of the initial promise of the dialogue metaphor. It had two key aspects. The first is the idea that a judicial ruling is not final, in the sense of the court having the last word. The legislature could reverse, modify or avoid the decision. That is an empirical claim. It suggests the power of the legislature to disagree with the court, and offers examples of ‘legislative sequels’ in which it is claimed the Canadian federal parliament did just that. As Justice Gonthier put it in his dissent in the Canadian Sauve II case, ‘the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values.’ In Justice Gonthier’s formulation, however, the idea is not offered as a description. He invokes it as a normative principle of deference. The court spoke in Sauve I, finding that a blanket ban on prisoner voting was unconstitutional. The legislature modified the ban to limit it to prisoners sentenced to more than two years’ imprisonment. It came up for consideration in Sauve II. At that point, Justice Gonthier invoked the idea, in dissent, of ‘no monopoly’ to mean that the court had said its bit earlier and ought now to defer. So, the ‘not having the last word’ claim can be advanced as an empirical description, or a normative prescription about judicial deference to legislative reconsiderations.

The second claim evident in the original statement of dialogue theory is a somewhat mixed message about the normative significance of the metaphor. The original article was clearly offered as a riposte to the counter-majoritarian objection to judicial review. It was received that way by judges, other scholars and critics in Canada and abroad, and developed in that fashion by Kent Roach. Since the authors of the original article sent mixed messages about this, we need to idealise for a

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4 B Friedman, ‘Dialogue and Judicial Review’ (1993) 91 Michigan L Rev 577. At 653, for instance, he states ‘The Constitution is not interpreted by aloof judges imposing their will on the people. Rather, constitutional interpretation is an elaborate discussion between judges and the body politic.’

5 PW Hogg and AA Bushell, ‘Charter Dialogue between Courts and Legislatures, The (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35 Osgoode Hall LJ 75, 79.

6 Ibid. 80.

7 PW Hogg, AAB Thornton, and WK Wright, ‘Charter Dialogue Revisited-or Much Ado about Metaphors’ (2007) 45 Osgoode Hall LJ 1, 30: (‘Dialogue theory does not provide a justification for judicial review.’)

8 Sauve v Canada (Chief Electtoral Officer) [2002] 3 SCR 519 [104]. Cf the majority judgment of McLachlin CJ at [17]
moment what the metaphor at first looks to promise. It is this: that there is a relationship of approximate equality between courts and legislatures in the task of defining rights. For that reason, dialogical constitutional judicial review does not result in outright judicial supremacy of the sort familiar in the US *Lochner* era. It at the very least leads to joint authorship of rights determinations, or even a complex determination more reflective of legislative than judicial input. Hence those who decry the counter-majoritarian aspect of judicial review are mistaken in fact about what happens in rights litigation, in the long run. And perhaps that factual mistake means the political, normative critique is also misguided.

So much for the idealized version. Hogg, Bushell Thornton and Wade clarify their initial intentions with the metaphor in a piece published in 2007: ‘What “Charter Dialogue” demonstrated was not that judicial review was good, but that judicial review under the Charter was weaker than is generally supposed.’ Putting aside for a moment the question of whether the concept was meant to justify judicial review, we now can receive the thesis as a straightforward empirical claim about the attenuated impact of judicial review. Hogg and Bushell Thornton, as well as Kent Roach, locate their substantive justification for judicial review elsewhere. Dialogue is a comment on how the practice unfolds.

But this defense of the idea, taken alone, gives rise to further problems. It simply is not true that the legislature ordinarily reaffirms the original policy. If this were the case, there would obviously be no case for judicial enforcement in the first place. Judges rule out certain policies, and legislatures comply. The thesis that the legislature attains its original objective in the legislative sequel holds true only on the assumption that we define the objective very widely and assume that the means the legislature initially chose were not themselves part of the actual policy choice. That is untenable. Advocates of judicial review must squarely confront the challenge here, and justify the role of courts.

Some authors point to the ‘second look’ cases as examples of where legislatures have reaffirmed the original policy and offered new evidence to support it, all of which ultimately is accepted by the courts on reconsideration. A good example is the 1995 judgment of the Supreme Court of Canada that a plain packaging and vigorous health warning requirement for cigarettes would violate a constitutionally recognized corporate freedom of expression. In 2007, it laudably reversed course and accepted that the health case for the legislation made it Charter compliant. One might celebrate this as a case of dialogue in action, even though the Court in the later case explicitly rejected any contention that it was ceding to the legislature’s voice in the conversation. But the important point is rather about what opportunity was lost in

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13 Ibid. [11]: “None of these developments remove the burden on the Crown to show that limitations on free expression imposed by the legislation are demonstrably justified in a free and democratic society, as required by s. 1 of the *Charter*. The mere fact that the legislation represents Parliament’s response to a decision of this Court does not militate for or against deference: P. W. Hogg, A. A. Bushell Thornton and W. K. Wright, “Charter Dialogue Revisited — Or ‘Much Ado About
the interceding fifteen years (because the litigation and attendant regulatory uncertainty began well before the Supreme Court gave its final ruling). Accepting the wisdom of the policy in the later case is an admission of that lost opportunity at least as much as it is a celebration of the virtues of constitutional dialogue.

At any rate, second look cases are in any case quite exotic. There have been four in the history of the Canadian Supreme Court, and I have counted over 62 federal and provincial statutes struck down on Charter grounds between 2000-2012 alone, excluding those struck down by courts in the province of Quebec. There are some nuances to the data, however, which must be taken into account here. In addition to those second look cases, we must look at examples of legislative sequels that are claimed to modify or narrow the original judicial finding but are not followed by subsequent litigation. Rosalind Dixon has compiled data showing cases where the federal parliament of Canada narrowed a Supreme Court Charter interpretation in its legislative sequel. Dixon identifies twelve such cases, between 1982-2005. Four of these led to second look cases in the Supreme Court, only one of them (Sauve II) not affirming the legislative sequel. The remaining eight were not followed up in litigation. Furthermore there are the provincial courts’ decisions. In that same time period, forty-seven statutes were struck down by such courts, and on Dixon’s calculation eight of these were followed by legislative sequels that rejected the judicial interpretation, with six ultimately being upheld in second look cases. These figures are admittedly very interesting, and belie to some extent the image of outright judicial domination. However, even accepting the classifications as presented, the substantial majority of strike downs are not followed by a contradictory legislative sequel, and it is also not clear how much distortion of legislative choice was contained in those legislative sequels that did push back. So it is hard to derive any strong conclusion about dialogue from this data. In the United Kingdom, furthermore, Parliament has amended the law in response to all but one declarations of incompatibility that called for legislative response, though there is evidence of minimalist compliance in a number of cases.

Such is the experience in these two of the most ‘dialogical’ systems. Even here, the norm is that after the court rules, the policy is brought into line. If it is not, then further litigation will follow – lawyers aren’t stupid. And legislators have good legal

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14 Even the procedural aspects of the legal challenges made their way up for substantive judgment in the Supreme Court: RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311


16 Dixon (2009), above note 2 at 273.

17 For example, there were 17 laws struck down by the Supreme Court alone between 2000-2012 alone. [This data is not contained in King, note 15 above, but is drawn from the dataset used to generate the figures in that publication].
advice. If the point of dialogue theory is that this process results in far less policy distortion than it would in a non-dialogical system of judicial review, it is hard to see how that answers the counter-majoritarian objection. According to that objection, any is too much. And there are anyway a number cases in which the ‘distortion’ is more than marginal.

The answer from dialogue theorists, again, is that the theory is not meant to answer the counter-majoritarian objection. They believe in strong judicial review at the end of the day. All the leading Canadian proponents of the original dialogue metaphor themselves are unequivocal about saying that in second look cases as well, the courts should have the final word. To critics of the metaphor, of course, this gives the game away – it is according to them a fraudulent use of the term ‘dialogue.’

To be fair, we would do well to consider the comments of Hogg and Bushell Thornton on the equality of input issue in their original piece:

Is it possible to have a dialogue between two institutions when one is so clearly subordinate to the other? Does dialogue not require a relationship between equals? The answer, we suggest, is this. Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.

In this initial understanding of dialogue, the possibility of legislative power to disagree (reverse, modify, avoid) seems intrinsic to the idea. That is incompatible with the idea of courts having the last word in second look cases. The reasons they offer in their later, 2007 piece, for assigning interpretive finality to courts are in my view sound. Without it, there would be ‘interpretive anarchy’ and we would need to assign different legal status to different areas of the constitution. But then, what are we to make of the original metaphor?

The dialogue thesis might thus best be understood as an empirical claim that the actual democratic distortion (if one prefers to regard it that way) is less significant in Canada than what was evident in the American experience, and that this might count significantly if one is conducting some sort of cost-benefit analysis in assessing the institutional design implications of Charter litigation. So understood, the thesis is

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18 Admittedly Dixon’s data points to cases where the legislative sequel is unanswered in further litigation. She helpfully summarises each case at 276-277 of the article. However, in my view these legislative sequels are not examples of legislative pushback – they do not appear to me to depart from the holdings they respond to. In some cases they are minimal compliance at best.

19 Hogg, Bushell Thornton, Wright (2007), above note 7 at 31.


21 Hogg & Bushell (1997), above note 1 at 79-80.

neither a legitimating device, nor a deep truth about constitutional judicial review. It is an empirical snapshot of a moment in time in Canadian constitutional adjudication, coupled with an admonition to critics not to exaggerate the scope of the counter-majoritarian difficulty. In that sense, perhaps the metaphor can’t really say much about whether the Charter of Rights is such a bad thing after all.

This type of attenuated role for dialogue theory might be defended, but it does seem quite out of line with the original ambitions for the idea. Indeed, the court-sceptical critics of dialogue theory were critical for a reason – they thought the expression shored up the legitimacy of judicial review. And it was taught that way in Canadian law schools. If dialogue theorists decouple the ‘dialogue’ phenomenon from a substantive theory that justifies judicial review – whether Dworkinian or based on representation reinforcement – then perhaps they too should be critical of the observed phenomenon they call dialogue. If constitutional rights do not impede policy, their counter-majoritarian (in the beneficial sense) impact is slight – and this metaphor might be seen to legitimize if not indeed call for that.

II. Dialogue Theories and the Passive Virtues

An important unresolved issue is what is the relationship exists between dialogue theory and what might be called the constitutional theories that emphasise the ‘passive virtues.’ The expression ‘passive virtues’ is drawn from Alexander Bickel’s famous book, *The Least Dangerous Branch* (1962), which emphasized a modest but affirmed role for constitutional judicial review in the post-*Lochner* era. John Hart Ely’s *Democracy and Distrust* (1981) sought to meet the counter-majoritarian objection by showing that the US constitution was best understood as reinforcing democratic choices. His representation reinforcing view meant the court should ensure channels are open for political action, and that minorities are adequately represented in the process. Cass Sunstein’s varieties of civic republicanism and judicial minimalism set out in the 1990s and 2000s offer a sophisticated contemporary contributions in the same vein, now emphasizing the connection to political pluralism and reasonable disagreement as well as the epistemic limitations of judging under uncertainty. In the UK, a range of scholars who embrace constitutional judicial review, myself included, also offer a prominent role for judicial restraint within their recommended approaches.

Hogg and Bushell draw some inspiration from Bickel. Kent Roach originally argued that the ‘passive virtues’ were misplaced in a properly dialogical system, because ‘robust dialogue’ would be sensible having regard to the other features of Canadian constitutionalism, namely, section 1 (limitations clause), 33...
(notwithstanding clause) and the suspended declaration of invalidity.26 However, Roach has later ‘revised [his] opposition’ to these views, after contemplating some of the more recent Canadian experience. My own view is that much of his work on the whole fits congenially within that tradition. The fit depends on the extent of judicial restraint within the given theory, and this can vary widely between the theories that all recognize limitations of the judicial role.

Rosalind Dixon also acknowledges that her approach ‘inherits’ many of the insights within the ‘passive virtues’ tradition, when she offers a restatement that she dubs ‘new dialogue theory.’27 More than any other writer on dialogue, she sets out the contrasting implications of the two ideas. For Dixon, there are two options for the judicial response to a constitutional rights claim. One is *ex ante deference*, which she associates with the ‘passive virtues’ and judicial minimalism tradition.28 In this model, the judges limit themselves to a ‘narrow statement’ of the law, in the effort to ‘leave things undecided’ as Cass Sunstein famously put it. In new dialogue theory, by contrast, judges show no deference *ex ante*, but do defer *ex post* - that is to say, in a second look case that returns to them. There is a rationale for this assertiveness in the first instance. In exercising this role, the court can help unblock aspects of the process: it can help legislatures overcome ‘blind spots’ (inability to see the nefarious consequences of a choice) or ‘burdens of inertia’ (political difficulties for groups to put their issue on the political agenda). In Dixon’s contention, *ex ante* deference does not counteract these pressures sufficiently because it is too circumscribed. New dialogue theory, on the other hand, ‘preserves the maximum scope possible for review ex ante—thereby countering blockages in the legislative process—and adopts a more deferential position ex post.’29 Yet *ex post* deference is quite strong in her approach. Where the legislature has had another go at defining the same law and it returns to court for reconsideration, the court should show strong (presumptive) deference, only rejecting it if the law is not ‘reasonable’ in a minimal sense. By that she presumably means it must amount to a ‘clear mistake’ in the tradition of James Bradley Thayer’s classic article advocating judicial deference to legislative determinations.30 As she makes clear, her view is that ‘a court […] cannot legitimately seek to enforce a wholly freestanding historical or moral conception of Charter rights.’31 Essentially, it holds out the promise of strong judicial review to get the issue on the agenda, but strong, Thayerian deference after that has occurred.

I see three problems with this strategy. First, it probably underestimates how many legislative rights determinations were settled in plain understanding of how it would disadvantage a rights claimant. I have elsewhere called this issue ‘legislative

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27 Dixon (2009) above note 2 at, 257 (n.100) (considering it an inheritor to Ely’s representation reinforcing judicial review).


29 Ibid. 262.

30 James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law” (1893) 7 Harv. L. Rev. 129. In fact Dixon says it must be ‘patently unreasonable’ (256) and not be ‘reasonable, according to any plausible interpretive theory[…]’ Later in the article she mentions it must be reasonable according to the basic commitment to freedom and democracy, and that it agrees with the court’s prior judgments (269). I equate these here with Thayer’s idea since it has fairly wide currency and any more robust an idea of reasonableness might weaken her theory.

focus on rights issues and investigated it in the UK context. I define absence of legislative focus as being either (1) the legislative failure to consider either explicitly or implicitly the key rights-issue that the court identifies, or (2) the adoption of the statute at a time when the conception of rights was significantly different than now legally applicable in the country (for example, in a nineteenth century anti-sodomy statute). In examining twenty-four declarations of incompatibility in the UK experience, I determined roughly that thirty-seven percent of those eliciting legislative response concerned cases in which legislative focus had not occurred. While that means there is a lot to Dixon’s claims about the importance of blockages and blind spots (as I credit to her in my analysis), it also means that in the majority of cases the rights-issue was in relatively plain view. This is the normal situation in laws concerning anti-terrorism, torture, political advertising and campaign finance, cigarette packaging, compulsory health insurance, the restriction of religious symbols and dress, banning political parties, affirmative action, and many other leading issues.

The second problem is that the approach gives insufficient weight to the likelihood that a legislature would feel pressure not be seen to push back against a judicial finding. This means that robust judicial review might translate into legislative deference that the theories of dialogue and of the passive virtues want to reject. This problem or likelihood might explain why there are few second look cases in Canada. It suggests that courts should consider anticipating this problem and perhaps consider being open to restraint in first look cases.

The third problem is that if the second problem were somehow corrected by affirming the legislative capacity to disagree, then the substantive protection of minority rights would become significantly weakened. Notably, John Hart Ely’s theory fully accepted that the court could intervene with hard remedies to protect minorities and keep open the channels for political change. That’s part of the reason why his ‘flight from substance must end in substance,’ in Dworkin’s damning verdict. But this is not an option available in Dixon’s theory (assuming counter-factually that issues of substance aren’t significantly present in the first look cases). In a second look case, Dixon’s theory becomes Thayerian. Whether or not the case for the judicial protection of minority interests is rebutted effectively by critics of judicial review is a matter of debate. But it is not open to a dialogue theorist to say minorities deserve judicial protection from political marginalization and then abandon them when that marginalization is predictably given direct legislative imprimatur.

III. The Problem of Finality, Legal Certainty and the Authority of Law

Dixon’s view on the court’s role in showing ex post deference in fact mirrors the

32 King, Judging Social Rights, 164-165;
33 King, ‘The Role of Parliament following Declarations of Incompatibility’ 177-178. A further nineteen percent could not be judged, and forty four percent did involve statutes having legislative focus. However, the overall numbers are low and hence these percentages could easily change over time.
35 In Judging Social Rights, ch.6. I consider and defend this rationale for judicial review and in my review of Gardbaum, I point out at 117-120 why I feel Gardbaum’s approach admits the problem of minority vulnerability but offers a defective solution.
views of Stephen Gardbaum, and, in the UK, Francesca Klug and Danny Nicol. Each believes that courts should be what Gardbaum calls ‘unapologetic’ about judicial review in the first instance, but defer to the legislature’s final view in the resulting exchange.

Each of these theories in my view is vulnerable to the critique offered above, but Gardbaum, Klug and Nicol consider it a peculiar democratic virtue that the legislature can simply disregard the court judgment in this way. For Klug and Nicol it is inherent in the legislative scheme contained in the Human Rights act 1998. For Gardbaum, it is a deep normative argument about how a ‘third way’ constitutional theory of weak form review ought to operate. In his contention, a legislature should decline to follow judicial decisions – as a presumption – provided that members of the legislature abide by two conditions that Gardbaum prescribees. The first is that legislators engage meaningfully with the judgment; the second is that they only decline to follow the judgment if they believe their own disagreement with the court to be reasonable. In a review of Gardbaum’s book, I argued that this second requirement is plainly implausible as any form of constraint. No one resolves in real time that his own view is unreasonable, let alone a majority of a chamber of representatives who take the whip and have to face the tabloids in the morning.

A different and more refined legal problem is that it is hard to see on what legal theory the court would exercise authority in the first look cases to offer judgment. The court’s key function is to offer judgment on the law. It is not a parliamentary or specialist committee. Tom Hickman, an active barrister as well as scholar, recognized this problem early on. He calls it the ‘principle proposing’ version of dialogue and shows how it is incompatible with the current role for judges in the British and indeed most constitutions. To be clear, the court can find that the law requires a legislature to give formal, due consideration to people’s rights when it enacts laws that infringe those rights. But all existing bills of rights promise more than just that. Beyond enforcing such a procedural right, this theory seems committed to a role for the judge as seeking to ‘persuade’ or impose a ‘practical constraint’ on the legislature. The theory envisages judges offering, within contentious litigation, a view that is extra-legal and non-binding – one to be taken up and pondered at the legislative stage, without more. That would require a significant reconfiguration of our understanding of the judicial role, as well as an odd if not incomprehensible basis

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37 Gardbaum, above note 1. Gardbaum does not regard this as a dialogue theory, and he is critical of the term for the reasons alluded to above. But in the form I recast it in here, he is arguing along similar lines. His view is broadly similar to Dixon’s new dialogue theory.


39 I commend this approach in Judging Social Rights, 171-173. Yet it is only one aspect of a broader approach.

40 Dixon (2009), above note 2 at 262-263 (arguing that the rejection of narrow ex ante deference offers a ‘greater ability to use persuasion as a tool for promoting the enjoyment of rights.’)

41 Gardbaum, above note 1 at 44.
for striking down a statute in the first place. It would require developing a separate theory for interpreting rights provisions and other provisions of the constitution. Much of constitutional adjudication concerns issues and provisions of the constitution other than those concerned with constitutional rights. For instance, one of the two chambers of the Federal Constitutional Court of Germany is concerned with disputes between branches of government.

But it seems that Gardbaum, Klug and Nicol, and possibly Dixon, are bidding for that type of reconfigured understanding. I feel that such a reform would create significant problems for the role of legal authority. First, there is the distinctly legal issue of the real time need for legal certainty — what politicians and jobbing lawyers alike refer to as the need for ‘clarity.’ Dialogue theorists at times write as though courts and legislatures have the luxury of time in resolving constitutional disputes. But in fact, in many cases claimants and the public at large need resolution fairly quickly, and at any rate clearly and with finality. A statute under constitutional challenge will in all likelihood not be enforced vigorously. A prolonged dialogue in that case means regulatory inaction. From a different perspective, a suspected terrorist or person denied the right to marry her female partner could grow old waiting for the dialogue to run its course. While in both cases there are at times virtues to not deciding the entire issue upon first impression, it is often also the case that cases are preceded by years of discussion or have the dimension of urgency that does not befit a dialogical approach. The experience in the United Kingdom concerning whether the UK executive branch had the discretionary authority to give notice to the European Union of the UK’s intent to leave, or required an Act of Parliament to authorize it to do so, is a case in point. Such a politically controversial issue at a particularly urgent time could not helpfully be resolved by the political branches, which were committed to an opportunistic view and displayed no sophisticated understanding of the relevant legal materials. A ruling on the law was needed.

The second problem with proactive reconfiguration is that such a practice would undermine the constitutional position of the courts. Without a norm requiring the legislature to not depart from judicial findings lightly, the courts will know that to issue judgments that will be ignored will undermine their credibility and thus institutional integrity. It will ultimately result in an exercise of brinksmanship in which one of the two sides will back down — presumably the courts. That would undermine the very benefits of judicial review in the first place, and make ‘unapologetic’ judicial review, which is the opposite of ex ante deference in Dixon’s scheme, rather unlikely in the long run.

A third problem is that the ordinary operation of constitutional government is based in part on some notion of the separation of powers, or of comity between institutions: that each institution accept and work with the determinations of other branches of government. There is clearly room for checks and balances, of course. But an important principle of comity is that political bodies do not attack the integrity of the accountability institutions established to monitor them. If local councils rejected ombudsman and auditor reports whenever they reasonably disagreed

42 This is less an issue in the United Kingdom model, where the statute remains in force, but the legal incongruence is no less striking: see my review of Gardbaum, above note 1 at 124-125 for comment.

43 Some feared that this would occur in the UK, since the UK Parliament can not only ignore judicial decisions but must act affirmatively to remedy the incompatibility. It is not clear that it happened, has but the point is arguable.
(according to their own lights), the system would collapse. In the case of judges, the issue is particularly acute. Judges are responsible for maintaining the rule of law throughout the entire political order, including in the interpretation of statutes, regulations, bylaws as well as applicable international law and of course the constitution itself. That is a job of the highest political order. To secure it, there are already a range of constitutional conventions that separate judges from politics, and limit the kinds of criticisms of judicial conduct that can be made in Parliament. For instance, the Supreme Court judges who still sit in the House of Lords are bound by a constitutional convention, not always observed, that they do not express views on controversial political matters in debates. Parliamentarians, for their part, are (subject to some exceptions) not permitted to refer to cases in which proceedings are active in United Kingdom courts in any motion, debate, question or supplementary question: the sub judice rule. And furthermore, any statements interpreted as impugning the integrity of a judge of a superior court will be ruled out of order by the Speaker of the House of Commons. The full rule governing criticism of judicial rulings after they are rendered does in fact permit polite disagreement with, and criticism of, judicial findings “within certain limits”. There is therefore no hard constitutional impediment forbidding critical discussion of judicial rulings in Parliament – nor should there be. However, the collective weight of the tradition of judicial independence and the importance of the rule of law has made the practice of criticizing judgments rather rare in the UK Parliament. In all of the Hansard I examined for cases following section 4 declaration of incompatibility under the Human Rights Act 1998, only one involved any heated disagreement with a UK court ruling – the one concerning the possibility for persons on the sex offenders register to obtain a right to appeal their inclusion and make representations for why they should be removed from it. While there is in principle a recognizable dividing line between criticizing a judge personally and impugning the soundness of her or his reasoning, it will arguably become frayed quickly if parliamentarians are invited to directly engage with and reject the reasoning of the courts on a regular basis. The consequences are hard to know, but they are at any rate not likely to be good.

IV. Conclusion: The Comparative Virtues Of The Passive Virtues

The aim of this essay is not to deliver any condemnation of the dialogue metaphor. It is rather to point out various problems with some versions of it. Part of them relate to how definitional authority over constitutional rights determinations is and should be

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46 (1973-74) HC Deb. Vol. 865, Col.1092, 1144, 1199: The Speaker: ‘Any Act of Parliament which the courts have to operate can be criticised as strongly as hon. or right hon. Members desire. It can be argued that a judge has made a mistake, that he was wrong, and the reasons for those contentions can be given, within certain limits.’ The limits are cited to a speech of Lord Atkin as follows: ‘provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune.’

47 This is the response to the case of R (Thompson) v SSHD [2010] UKSC 17, which I discuss in King (2014), above note 15, at 185-186. A similar attitude of non-confictual cooperation is found in Aruna Sathanapally, Beyond Disagreement: Open Remedies in Human Rights Adjudication (Oxford, Oxford University Press, 2012) 172-180.
distributed. The original dialogue theory implied that it should be distributed, but not in a way that detracts from a potent constitutional role for courts. The empirical claim that dialogue in fact allowed legislatures to modify or reject most Supreme Court decisions seems unsubstantiated, but if we downgrade that claim to the view that there is a far greater legislative role than often assumed, the metaphor can play some useful function as a description of that iterative phenomenon. Yet it leaves unanswered two important questions: whether such legislative pushback is too little or too much.

Another, and related ambiguity was how judges should respond in second look cases. The ambiguity is resolved for the old dialogue theories – but in asserting judicial interpretive finality they put the dialogue metaphor under yet further strain. When we move on to new dialogue theory, or the views of a not insubstantial minority of the Canadian Supreme Court, deference in second look cases is not only appropriate but the only correct approach that is true to the dialogue metaphor. I argued that several constitutional problems followed from this type of approach. It is incompatible with the current judicial role; it offers too little to persons that are vulnerable to majoritarian bias or neglect; and it would create an instability that would undermine the position of courts and the traditions of comity and judicial independence that are integral to the court-legislature relationship.

I close by emphasizing that in my view, the passive virtue theories can acknowledge many of the advantages of dialogue theory without calling for any reconfiguration at all of the judicial role in the contemporary constitution. These theories recognize that courts perform the role of constitutional judicial review, but affirm grounds for pursuing that role with a measure of humility. This is in view of the chequered political history of judicial review, the epistemic limitations of the judicial process, and the inflexibility of political reversals of significant political changes. To the extent that Charter dialogue has worked in Canada, and the Human Rights Act 1998 in Britain, my sense is that it is because the judicial temperament in both countries is largely attuned to these facts already. Yet since this approach affirms a cautious but distinctly legal role for the courts, the issues of finality, legal certainty and the rule of law that I draw to attention to in the analysis above are to a significant extent addressed or manageable.\(^48\) The need for clarity and authoritative ruling, where pressing, can be considered and weighed against the risks arising from epistemic and political uncertainty. This is part of the ordinary craft of judging, including under conditions of uncertainty. The need to show deference to the political branches is a present but not a mandatory feature of this vision of judging. Ultimately, the judge decides what the law is.

\(^{48}\) Admittedly, the issue is not so easily dispatched: see O. Fiss. ‘The Perils of Minimalism’ (2008) 9 Theoretical Inquiries in Law 643 for a similar critique of the timidity of minimalism.