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Introduction

The 'What' and 'Why' of Constitutional Dialogue

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What is 'constitutional dialogue' and why should it interest constitutional and political scholars and actors? The metaphor of dialogue has been appealed to in describing various aspects of constitutional interactions between the judicial and legislative (and, to a lesser extent, executive) branches in a wide range of constitutional democracies. In addition to its appeal for describing institutional practices of constitutional interaction, the metaphor of dialogue has also been used to evaluate, justify, and criticise interactions or their absence. The metaphor's appeal has not been limited to scholars. Constitutional actors – judges, legislators, and members of the executive branch – have employed the metaphor to describe and to justify their constitutional acts and reactions. This raises the stakes for understanding whether the 'what' and 'why' of constitutional dialogue help illuminate constitutional debates or whether, as the Canadian scholars largely responsible for popularising the idea of 'dialogue' once put it, all of this talk is 'much ado about metaphors'.[1]

Since the question of 'what' constitutional dialogue is involves understanding the content of a metaphorical concept, answering the question invites an analysis of the uses of the metaphor. Metaphors transfer a name or descriptive word to objects or actions distinct from, but also in some way related to, 'that which it is literally applicable'.[2] A metaphor is always like *and unlike* what it is used to describe. From the Greek *metapherein*, meaning 'to transfer', a metaphor is a comparison

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[1] Peter W. Hogg, Allison A. Bushell Thornton, and Wade K. Wright, 'Charter dialogue revisited: or "much ado about metaphors"' (2007) 45 *Osgoode Hall Law Journal* 1.

[2] *Oxford English Dictionary* (Oxford: Oxford University Press, 2017), 'metaphor'.

by analogy. The analogy is imperfect; dialogue between institutions is both like and unlike dialogue between persons. The transfer of meaning is incomplete, but sufficient to capture some truth to make it apposite. In this way, understanding *what* the uses of a metaphor mean will always involve asking *why* a word has been transferred to an object or act that is both like and unlike, related and unrelated, to its comparator. Objections to dialogue as being *literally untrue* of the relationship between constitutional institutions miss their mark; metaphors are symbolic, not literal. More promising have been scholarly inquiries into the different ways in which inter-institutional dialogue is like and unlike interpersonal dialogue, evaluating the ways in which constitutional dialogue is akin to dialogue as 'conversation' or 'deliberation' or 'a dialectic'.[3] These investigations seek to explore the ways in which the metaphor can illuminate or dim our constitutional understandings.

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Answering the question 'what is constitutional dialogue?' invites one of two inquires: how and why it has been used in particular contexts (for example, 'what is constitutional dialogue *in Canada today*?') or, more generally, how and why it warrants a place, if any, in constitutional and political theory.[4] These inquiries, though separable, inform each other insofar as a survey of the reasons for the metaphor's particular uses helps situate the theoretical debate regarding the general reasons for and against applying the metaphor to the idea of a constitution.

We begin, in this section, with a survey of the metaphor's uses in select constitutional systems, notably those of the United States, Canada, the United Kingdom, Australia, and New Zealand. Is the same metaphor in play in each of these jurisdictions or is the extension of the metaphor to a variety of institutional contexts and interactions itself an exercise in analogy, such that different metaphorical appeals to 'dialogue' are in play from one context and interaction to the next? As we will review, the appeal to the metaphor can be said to channel some of the underlying

[3] See Luc B. Tremblay, 'The legitimacy of judicial review: the limits of dialogue between courts and legislatures' (2005) 3 *International Journal of Constitutional Law* 617 and Grégoire Webber, 'The unfulfilled potential of the court and legislature dialogue' (2009) 42 *Canadian Journal of Political Science* 452.

[4] See Grégoire Webber, 'Asking why in the study of human affairs' (2015) 60 *American Journal of Jurisprudence* 51.

constitutional debates alive in each of these constitutional systems, such that the singular word 'dialogue' may capture a plurality of *different* metaphors across institutional contexts and interactions. In addition, whereas the term 'dialogue' emerged to describe and evaluate patterns of institutional organisation and interaction between the branches of *domestic* constitutions, it has also, over time, become an increasingly popular term to describe and evaluate the interactions between federal, transnational, international, and even extra-institutional popular layers of constitutional government. What about the metaphor lends its use to these different constitutional contexts?

At a sufficient level of abstraction, it may be said that one general feature is a constant across almost all appeals to 'dialogue': the simple idea that the institutions interact. Yet this common feature does little to distinguish the notion of dialogue from other accounts of constitutionalism, or the constitutional separation of powers, and fails to track differences between the uses of the metaphor. As Aileen Kavanagh among others has recently noted, institutions interact in a myriad of ways and lest 'dialogue' be no more than a synonym for terms already available to the constitutional and political theorist and actor, its special contribution should be discerned by interrogating the reasons why institutions interact and by identifying which of those reasons warrant the introduction of a new concept in constitutional and political thought.[5]

One prominent, albeit controverted, use of the dialogue metaphor, then, involves debating whether judicial conclusions on the constitutionality of legislative or executive action are *the final word* on these matters. In Peter W. Hogg and Allison A. Bushell's classical formulation, 'dialogue . . . consists of those cases in which a judicial decision striking down a law on *Charter* grounds is followed by some action by the competent legislative body'.[6] That 'action' could include, on their account, both legislative action that 'chang[es] the outcome in a substantive way' or action that simply 'repeal[s] or amend[s] an unconstitutional law'.[7] On this view, the court does not have the final

[5] Aileen Kavanagh, 'The lure and the limits of dialogue' (2016) 66 *University of Toronto Law Journal* 83. See also Swati Jhaveri and Anne Scully-Hill, 'Executive and legislative reactions to judicial declarations of constitutional invalidity in Hong Kong: engagement, acceptance or avoidance?' (2015) 13 *International Journal of Constitutional Law* 507.

[6] Peter W. Hogg and Allison A. Bushell, 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35 *Osgoode Hall Law Journal* 75, 82.

[7] Hogg and Bushell, 'The Charter dialogue', 98.

word if the legislature replies, even if the legislative reply is to repeal the unconstitutional statute or statutory provisions. As the subtitle of the Hogg and Bushell's article made clear – 'Perhaps the Charter of Rights Isn't Such a Bad Thing after All' – their claim that, in Canada, '*Charter* decisions usually leave room for, and usually receive, a legislative response' was intended to push back against claims of the anti-democratic nature of judicial review under the Canadian Charter of Rights and Freedoms. Even in those cases where the legislature merely implemented a court's ruling, that legislative action could be read as substantive agreement with, rather than acquiescence in, judicial reasoning if it was open to the legislature to legislate differently.[8] And, as Hogg and Bushell were right to emphasise, the Charter affords legislatures with opportunities to dissent from judicial conclusions regarding rights.

Those opportunities draw primarily on two textual references in the Canadian Charter: first, the 'limitations clause' in s. 1, which provides that 'reasonable limits' may be 'prescribed by law' subject to being 'demonstrably justified in a free and democratic society'; and second, the 'notwithstanding clause' in s. 33, which provides that the legislature 'may expressly declare in an Act . . . that the Act or a provision thereof shall operate notwithstanding' select guarantees in the Charter.[9] These textual references empower a legislature to challenge a constitutional conclusion by a court without the need to have recourse to the constitution's amendment formula and, so, without changing the text of the constitution.

Although the Canadian debate over 'dialogue' began with Hogg and Bushell's avowedly *descriptive* appeal to the idea of dialogue, the Canadian debate now involves the explicit development of 'dialogue theory', which is rooted in a deeper set of normative concerns for the democratic legitimacy of judicial decisions striking down or

[8] Hogg and Bushell, 'The Charter dialogue', 98: 'After all, it is always possible that the outcome of a dialogue will be an agreement between the participants! And even if we did exclude those cases [of repeal or amendment in line with judicial rulings], there would still be a significant majority of cases in which the competent legislative body has responded to a Charter decision by changing the outcome in a substantive way.'

[9] Hogg and Bushell added the 'internal qualification' of some rights (e.g., *unreasonable* search and seizure; *arbitrary* arrest and detention) and the equality provision, although these aspects of their analysis have not generally been taken up by others working on constitutional dialogue.

altering political decisions made by elected legislatures.[10] Many advocates of dialogue theory endorse some version of the claim that the existence of legislative sequels responding to judicial decisions qualifies, even if it does not wholly answer, the democratic objection to judicial review. Some dialogue theorists claim that the possibility of ordinary statutes setting 'reasonable limits' to judicial interpretations of Charter rights or invoking s. 33 to override such interpretations creates a more democratically legitimate, conversational relationship between the judiciary and the other branches – one distinct from a model of judicial interpretive supremacy where the constitution is what the courts say it is.[11] Some critics of dialogue theory have expressed the worry that, at least with any legislative recourse to s. 33, the legislature's price of admission to inter-institutional dialogue is to express *misgivings* about rights.[12] Such critics of dialogue theory have often taken the view that the Charter's legislative override is not an effective tool for legislatures engaging in dialogue with courts, and that true dialogue should proceed via a judicial appreciation that the legislature, no less than the court, takes rights seriously and that, in evaluating legislation against the requirements of the Charter, the court should recall that

[10] See Christopher P. Manfredi and James B. Kelly, 'Six degrees of dialogue: a response to Hogg and Bushell' (1999) 37 *Osgoode Hall Law Journal* 513; Tremblay, 'The legitimacy of judicial review'; Grant Huscroft, 'Rationalizing judicial power: the mischief of dialogue theory', in James B. Kelly and Christopher P. Manfredi (eds.), *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009), p. 50; Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010).

[11] One of the most prominent and articulate defenders of this dialogue theory is Kent Roach. See Kent Roach, 'Dialogue or defiance: legislative reversals of Supreme Court decisions in Canada and the United States' (2006) 4 *International Journal of Constitutional Law* 347; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Kent Roach, 'Dialogue in Canada and the Dangers of Simplified Law and Populism' in this volume. Some authors maintain the distinctiveness of the Canadian model of judicial review from judicial supremacy while rejecting dialogue theory: Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013), pp. 15–16.

[12] F. L. Morton, 'Dialogue or monologue?', in Paul Howe and Peter Russell (eds.), *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001), p. 111; Andrew Petter, *The Politics of the Charter* (Toronto: University of Toronto Press, 2010).

reasonable institutions may reasonably disagree on the scope, content, and requirements of constitutional rights.[13]

The Supreme Court of Canada has on occasion recognised that the legislature has authority to develop an alternative interpretation of constitutional rights. The high-water mark of its endorsement of dialogue came in *R* v. *Mills* (1999), in which the Court confronted the Parliament of Canada's legislative reply to *R* v. *O'Connor* (1995), a split Supreme Court decision on access to the private records of complainants and witnesses in sexual assault trials. In upholding the legislative reply, the majority of the Supreme Court wrote that:

> . . . this Court has previously addressed the issue of disclosure of third party records in sexual assault proceedings: see *O'Connor, supra*. However, it is important to keep in mind that the decision in *O'Connor* is not necessarily the last word on the subject. The law develops through dialogue between courts and legislatures . . . Against the backdrop of *O'Connor*, Parliament was free to craft its own solution to the problem consistent with the *Charter*.[14]

On this view, the relevant standard for assessing the constitutionality of legislation is the Charter, not the Court's interpretation of the Charter.

This high-water mark of judicial endorsement of dialogue and the promise of coordinate constitutional interpretation was short lived. A few years later, a majority of the Supreme Court dismissed the idea that a court and legislature dialogue allows for legislative dissent from judicial constitutional rulings: 'The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".'[15] This quip prompted one scholar to describe the judgment as 'the day dialogue died'.[16]

In the United States, the metaphor of dialogue has been used in the context of debates between, on the one hand, defenders of 'departmentalist' and 'co-ordinate construction' accounts of constitutional meaning, who deny that any single institutional interpreter is supreme and final, and, on the other hand, proponents of the view that the judiciary is the

[13] Rosalind Dixon, 'The Supreme Court of Canada, Charter dialogue, and deference' (2009) 47 *Osgoode Hall Law Journal* 235; Jeremy Waldron, 'Some models of dialogue between judges and legislators' (2004) 23 *The Supreme Court Law Review* 7.
[14] *R* v. *Mills* [1999] 3 S.C.R. 668, para. 20.
[15] *Sauvé* v. *Canada (no. 2)* [2002] 3 SCR 519, para. 17.
[16] Christopher P. Manfredi, 'The day the dialogue died: a comment on *Sauvé* v. *Canada*' (2007) 45 *Osgoode Hall Law Journal* 105.

only or the supreme constitutional interpreter.[17] In this context, the metaphor has thus been used in a debate regarding constitutional authority. Departmentalists see a wider set of circumstances for extra-judicial institutions to co-ordinate their interpretative activities to respond to, and even to resist, the presumed finality of judicial interpretations. In turn, judicial supremacists contend that the set of circumstances in which a judicial determination of constitutional meaning could be contested by another constitutional actor is highly limited at best and, in most cases, would constitute interpretive insubordination.[18]

These more or less explicit uses of the metaphor in the United States touch not only on potentially confrontational constitutional exchanges between the main branches of the federal government, but also on intra-branch dialogues between different courts, and extra-institutional dialogues where the citizenry itself complements interpretive conflicts between the branches with their own expressions of popular constitutional reasoning and contestation.[19] This expansive, extra-institutional use of the

[17] Departmentalism is also variously referred to as 'co-ordinate construction', 'co-ordinate interpretation', and 'constitutional supremacy'. For a modern classic articulation see Walter Murphy, 'Who shall interpret? The quest for the ultimate constitutional interpreter' (1986) 48 *The Review of Politics* 401.

[18] The view of legislative or executive supremacy has not been prominent in recent debates involving dialogue, nor has the Calhounian view that the US states are the supreme interpreters (a view that has become unpopular since the Civil War): see Keith Whittington, 'Extrajudicial constitutional interpretation: three objections and replies' (2002) 80 *North Carolina Law Review* 773; Ming-Sung Kuo, 'In the shadow of judicial supremacy: putting the idea of judicial dialogue in its place' (2016) 29 *Ratio Juris* 90; Louise Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 2014); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Strauss and Giroux, 2009); Christine Bateup, 'The dialogic promise: assessing the normative potential of theories of constitutional dialogue' (2006) 71 *Brooklyn Law Review* 1109; Neal Devins and Louis Fisher, 'Judicial exclusivity and political instability' (1998) 84 *Virginia Law Review* 83.

[19] See Robert Post and Reva Siegel, 'Popular constitutionalism, departmentalism, and judicial supremacy' (2004) 92 *California Law Review* 1027; Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004), pp. 106–27; Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999), pp. 110–52. Discussions of the relationship between popular sovereignty and US constitutionalism often focus on the ninth and tenth amendments of the US Constitution. The ninth amendment explicitly maintains that the rights entrenched do not 'deny or disparage' other rights of 'the people'. The tenth amendment guarantees that all non-enumerated powers of government are *denied* to the federal government, and left to the states and 'the people'.

metaphor often implies a more abstract sense of dialogue. This is disclosed by the use of synonyms such as Alexander Bickel's description of the 'continuing colloquy' between courts, political institutions, and the wider society they serve, in which constitutional principle is 'evolved conversationally not perfected unilaterally'.[20] The expansive American use of the metaphor can perhaps be traced to the influence of the idea of the sovereignty of the extra-institutional 'people' over their constitutional institutions. The more implicit and abstract use of *dia-logue* – which can be traced to the Greek *dia-logoi*: 'through voices/reasoning speeches' – may reflect the fact that the debate between departmentalists and judicial supremacists is about the shape institutional exchanges should take between the US Constitution's greater separation of the executive and legislative branches, such that their voices are more distinguishable in interactions between the three branches of government. The American reasons for appealing to the metaphor in this institutionally expansive fashion may be related to underlying normative concerns animating strands of popular constitutionalist thought, whereby popular sovereignty is challenged by judicial control over constitutional interpretation.

In Canada and the United States, the appeal to dialogue has been especially related to the question of which branch's interpretation of the constitution has authority (final or otherwise) and in which circumstances. But what of the place of dialogue in jurisdictions without an entrenched bill of rights?

The United Kingdom, some Australian jurisdictions and New Zealand have all adopted some form of *statutory* bill of rights over the last three decades. In the United Kingdom, the Human Rights Act 1998 gives legal effect in British law to 'Convention rights', defined as select rights from the European Convention on Human Rights and its Protocols. The Human Rights Act remains the locus of the debate about dialogue in Britain in large part because it adopts a novel set of remedies: it tasks courts with interpreting legislation, 'so far as it is possible to do so', in a manner that is compatible with Convention rights (s. 3) and empowers courts to declare statutes incompatible with Convention rights, but specifies that such declarations do not affect the validity of the impugned statutes (s. 4). Interestingly, the fact that Parliament retains the authority

[20] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill Company, 1962), p. 70.

to amend or repeal the Act has not been an area of focus for dialogue scholars.[21]

Numerous scholars have also suggested that the Human Rights Act's distinctive remedial architecture creates important opportunities for 'dialogue' between British courts and Parliament: by limiting the immediate *domestic* effect of a declaration of incompatibility, s. 4 of the Act gives Parliament an opportunity to amend relevant legislation to make it more consistent with judicial understandings of Convention rights.[22] Parliament may, in this context, face practical pressures to respond to a declaration, due to public opinion in favour of the court's ruling or to the prospect of a further challenge to the law before the European Court. But Parliament is under no legal duty to do so and has the option of engaging in a kind of dialogue simply via inaction. This, as one of us has suggested previously, can also be important: legislative 'burdens of inertia' can mean that it is much easier for legislators to engage in dialogue through inaction rather than action.[23]

Constitutional scholars in the United Kingdom, as in Canada, disagree as to the scope for and desirability of dialogue of this kind.[24] In general, approval for rights dialogues involving the Human Rights Act has come from British proponents of 'legal constitutionalism', who take the constitution to feature a more prominent role for courts in holding political power to account and reject the traditional conception of parliamentary sovereignty in favour of 'shared sovereignty' between the judiciary and Parliament.[25] In turn, disapproval of the idea of rights dialogues has been

[21] See T. R. S. Allan, 'Constitutional dialogue and the justification of judicial review' (2003) 23 *Oxford Journal of Legal Studies* 563. See also Rosalind Dixon, 'A minimalist charter of rights for Australia: the UK or Canada as a model?' (2009) 37 *Federal Law Review* 335. But see Rivka Weill, 'The new commonwealth model of constitutionalism notwithstanding: on judicial review and constitution-making' (2014) 62 *American Journal of Comparative Law* 127.

[22] See Tom R. Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' [2002] *Public Law* 306 and *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), pp. 57–97

[23] See Dixon, 'The Supreme Court of Canada'; Rosalind Dixon, 'The core case for weak-form judicial review' (2017) 38 *Cardozo Law Review* 2193; Manfredi and Kelly, 'Six degrees of dialogue'; Morton, 'Dialogue or monologue'.

[24] See e.g., Kavanagh, 'The lure and limits'; James Allan, 'Statutory bills of rights: you read words in, you read words out, you take Parliament's clear intention and you shake it all about – doin' the Sankey hanky panky", in Tom Campbell, K. D. Ewing, and Adam Tompkins (eds.), *The Legal Protection of Human Rights: Sceptical Essays* (New York: Oxford University Press, 2011).

[25] See Allan, 'Constitutional dialogue and the justification'.

voiced by scholars favouring 'political constitutionalism', who emphasise and approve of the way the constitution holds political power to account through political processes and institutions, and who usually defend the Westminster tradition of parliamentary sovereignty.[26] Alternatively, some authors have sought to justify dialogues between courts and legislatures by arguing for a 'third way' or dynamic model of constitutional dialogue drawing on the values of political and legal constitutionalism.[27]

But the empirical assessment of the reality of dialogue between courts and legislatures sometimes cuts across these normative commitments. For example, at least one legal constitutionalist proponent of the judicial invigilation of political power has argued that the introduction of the judicial power of declaring statutory rights violations and 'reading in' clearly unintended legislative intentions, and the fact of parliamentary acquiescence to most examples of such judicial declarations and interpretations, has de facto created a form of judicial supremacy and control over rights questions which cannot be characterised as democratically legitimate dialogue.[28]

The metaphor has been put to similar uses and criticisms in recent constitutional debates in New Zealand and Australia. In New Zealand, the concept of dialogue has primarily been used in similar ways to that in the United Kingdom, i.e., to analyse rather than to motivate the relationship between courts and legislators under the Bill of Rights Act 1990. Like the United Kingdom's Human Rights Act, the New Zealand Bill of Rights Act lacks any formal degree of entrenchment, and judicial decisions giving effect to it are thus formally subject to broad legislative override.[29]

[26] See James Allan, 'Portia, Bassano or Dick the Butcher? Constraining judges in the twenty-first century' (2006) 17 *King's College Law Journal* 1. For discussion of political constitutionalism, see Graham Gee and Grégoire Webber, 'What is a political constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273.

[27] See Gardbaum, *The New Commonwealth Model of Constitutionalism*, pp. 156–203 (although Gardbaum used the metaphor in his earlier work, he rejected its usefulness in his exploration of the kinds of interactions and dynamics created by reforms to many of the commonwealth constitutions); Alison L. Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017), pp. 173–254.

[28] See Aileen Kavanagh, 'What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998' (2015) 13 *International Journal of Constitutional Law* 1008; for criticism of this view, which rejects the metaphor but argues against characterising the United Kingdom as having rejected the form of political constitution, see Stephen Gardbaum, 'What's so weak about "weak-form review"? A reply to Aileen Kavanagh' (2015) 13 *International Journal of Constitutional Law* 1008.

[29] See Dixon, 'A minimalist charter'; Petra Butler, '15 years of the NZ Bill of Rights: time to celebrate, time to reflect, time to work harder?' (2006) 4 *Human Rights Research Journal* 1;