On Dialogue and Domination

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I. Introduction:

Metaphors can play many different roles in constitutional theories, especially theories which seek to evaluate how different constitutional arrangements and practices enable or restrict freedom. This chapter is concerned with the normative role played by the metaphor of dialogue in constitutional theory, that is, the reason why dialogue between courts and legislatures about rights, and the constitutional structures designed to promote it, might in truth be desirable. One of the most important dynamics which the metaphor of dialogue has been used to evaluate and describe is the inter-institutional relationship between courts and legislatures regarding the specification of rights. ‘Dialogue’ does not signify any one constitutional theory, nor one prescribed pattern of interaction between courts and legislatures concerning rights. Perhaps ‘dialogue’ rings with the ideal of equality in the ears of some political and legal theorists, but this is doubtlessly related to specific

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normative commitments contingently filtering what they hear. Metaphors are not theories, and they do not search for theories to explain their hidden import. Instead, dialogue is a metaphor that has been given different normative meanings in different constitutional contexts and in distinctive theories of how the ideals of constitutionalism and freedom are related to interactions between courts and legislatures. When we sift particular uses of the metaphor concerning interactions between courts and legislatures for a better sense of why dialogue between these institutions might be a good thing, three general reasons and corresponding norms of dialogue emerge.

The first reason for favouring dialogue is tied to the view that dialogue involves the principled judicial interrogation of legislative reasons for infringing rights. On this view, the reason for valuing dialogue is that it offers a chance for the judiciary to interrogatively distinguish justifiable reasons for legislatures to infringe rights from the unjustifiable legislative pursuit of objectives that are simply “symbolic articulations of disgust, anxiety, national solidarity, animus, or other strong emotions.” Interrogative dialogue, as I shall call it, does not involve much concern for legislative participation in determining the meaning of rights, as it presupposes that the exchange of reasons regarding rights will concentrate on whether different infringements might be reasonably justifiable under certain circumstances.

A second reason for valuing dialogue takes the commitment to both constitutional rights and democracy to justify the judicial interruption of democratic legislative processes implicating rights, provided that these interruptions are ‘non-final’ and can be overridden or ignored. Where courts interrupt legislative processes afflicted with “burdens of inertia”, i.e. where legislatures fail to pass or consider legislation in the face of political gridlock, or where courts simply interrupt the

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1 Aileen Kavanagh “The lure and the limits of dialogue” (2016) 66 University of Toronto Law Journal 120.
2 Kent Roach “Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism” in this volume pp. […]
application of statutes which could be thought to threaten minority rights, they help protect against unjustifiable infringements of rights. There are two prominent theories of interruptive dialogue, as I shall call this norm of dialogue, and both take the purpose of judicial interruptions to be the protection of rights and the provocation of legislative responses to judicial decisions that can help promote democratic responsibility and a measure of control over rights.

A third reason why dialogue might be taken to be good is that it allows courts and legislatures to co-ordinately construct the meaning of rights in a way that protects both rights and the democratic legitimacy of political decisions implicating rights. Like the interruptive reason for favouring dialogue, this constructive reason involves the possibility that legislatures can help specify the meaning of rights and what it means for them to be violated. Yet unlike the interruptive norm, constructive dialogue is incompatible with the idea that legislatures can justifiably infringe the rights of citizens. If the value of dialogue is the constructive specification of what rights mean given certain conditions and circumstances, then it would seem that legislative replies to judicial decisions cannot be about their justified or unjustified violation. Evaluating the justified or unjustified infringement of rights involves, at least in the current practice of courts, assessing the ends and means of legislative schemes, according to which the specified meaning of rights falls from view. The constructive value of dialogue lies in the possibility that courts and legislatures can learn from one another in co-ordinately specifying the legal meaning of the rights, and that

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such learning will protect the democratic legitimacy of decisions involving rights as much as rights themselves.4

Which of these reasons for valuing dialogue between courts and legislatures should guide constitutional design and practice? In this chapter I evaluate the interrogative, interruptive, and constructive reasons for favouring dialogue and their corresponding norms in light of the contemporary republican political theory of the relationship between freedom and constitutionalism. Republican freedom is best conceptualized as non-domination, or freedom from exposure to the arbitrary will of another. I argue that the conception of freedom as non-domination justifies constitutional construction as the ideal republican value of dialogue between courts and legislatures concerning rights. Freedom from domination requires that the law of the state is maximally open to the equal control of the citizenry, such that its pattern of interference or potential interference in their lives is politically just (section II). Different institutions and constitutional arrangements will promote and protect this conception of freedom from domination in distinctive ways depending on the norms of the institutional practices and the civic virtues they rely on to function. The institutional features and practices of modern courts and legislatures will secure citizens from domination in a fashion that is distinct from that of the institutions and practices of ancient courts and legislatures.

While this conception of freedom can justify the judicial review of statutes for their compliance with rights by institutionally independent and professional modern courts, it is also threatened by the risk that courts will use this power to unjustly usurp rather than enforce the equal control of the citizenry over the law (section III). The risk is that modern courts will misuse their

institutional independence and professional techniques of reasoning to enforce changes to legal rights in pursuit of the political purposes of ancient courts, thereby presenting the vice of misusing their unequal power to change the law under the guise of modern adjudicative virtue. On the conception of freedom from domination, the fact that judicial interference with the legislative function is often negative in character does not render the risk judicial review poses to political justice any less morally significant than the risk entailed by the more active form of interference attending legislative changes to the law. This suggests that insofar as the risks courts and legislatures pose to political justice are of equal moral significance, just forms of judicial review must mitigate the risk it poses to political justice by allowing legislatures to correct unjust exercises of adjudication.

Of the three reasons for favouring dialogue between courts and legislatures and their corresponding norms of inter-institutional interaction, interrogative and interruptive dialogues jar with the institutional features and practices of modern courts, and only the norm of co-ordinating rights constructions will animate politically just forms of interference between courts and legislatures (section IV). The interrogative norm of dialogue increases the risk of political injustice by exhorting courts to pursue the political purposes of ancient courts under the cover of modern judicial independence and professionalism, and by delegitimizing legislative responsibility for rights. Interrogations exclude legislatures from sharing in the interruptive role, treating them as suspects rather than equal partners in specifying the meaning of indeterminate rights. The interruptive norm of dialogue is more promising than the interrogative norm, and it comes in two influential varieties. But both versions of the interruptive norm of dialogue encourage aggressive judicial review on the ‘first look’ that minimizes the probability of legislative responses to unjust forms of adjudication. Interruptions stifle the very dialogues they are supposed to provoke. In
contrast, the norm of constructive dialogue will encourage courts to minimize the risk judicial review poses to political justice by using their institutional independence and professionalism to enforce the determinate meaning of rights, while recognizing and respecting prospective legislative rights constructions, and promoting the legislative responsibility to correct unjust adjudicative constructions.

II. Republican Freedom

The republican conception of freedom from domination is primarily opposed to the understanding of freedom as non-interference, which was historically popularized in the works of writers such as Jeremey Bentham and William Paley, and in more recent intellectual history by Isaiah Berlin.\(^5\) The ideal of non-domination is a conception of freedom as a status in which norms and laws secure citizens from arbitrary interference by other persons.\(^6\) In contrast, the ideal of freedom as non-interference is a conception of freedom as a state-of-affairs in which there is an absence of interference with the choices of an agent. The ideal of freedom as non-interference includes the thesis that the interference of others in the choices of an agent is always a violation of their freedom.\(^7\) It also entails the thesis that only the actual interference of others in the choices of an agent will violate their freedom.\(^8\) The philosophical thrust of the republican theory of freedom from domination rests on the rejection of these theses. The thesis that freedom is only violated by actual interference in the choices of an agent is compatible with the possibility of an alien will invigilating the choices of an agent without actively interfering in its choices. The paradigm case

\(^5\) It is also opposed to the Hobbesian concept of freedom as non-frustration, that is, freedom understood as the absence of invasive obstruction to the choices actually preferred by individuals, see P. Pettit, “The Instability of Freedom as Non-Interference: The Case of Isaiah Berlin” (2011) 121(4) Ethics 693.


\(^8\) Ibid, p. 44.
for demonstrating the distinction between freedom as non-domination and freedom as non-interference is the case of the master and the slave. If interference alone can violate freedom, then relations of ingratiating, intimidation, and beneficent invigilation are compatible with freedom. Thus the central reason republicans take non-domination to be a superior evaluative conception of freedom is that, unlike freedom as non-interference, non-domination is incompatible with the idea that ingratiating or placating the demands of an arbitrary power can provide a just state of freedom.

The second reason republicans take non-domination to be a superior evaluative conception of freedom is that, insofar as freedom as non-interference entails the thesis that interference always violates the freedom of individuals, it opposes freedom to the exercise of all coercive political power. The problem with this is that political communities of every variety necessarily employ different forms of interference, and coercive interference in particular, to achieve the justifiable common aims of their community. Such political interference is exercised for the common good at the expense of individual discretion. Freedom as non-interference thereby opposes freedom to a defining element of all political life, politically expedient interference. The upshot of this opposition between freedom and political interference is the Benthamite thesis that all governmental interference in the lives of citizens threatens their freedom. The republican theory of freedom as non-domination rejects this thesis in favour of the view that government interference channelled by the democratic rule of law is legitimate. To use James Harrington’s words, unlike the “empire of men”, a democratic “empire of law” is not necessarily a dominating regime. The central concept at work in the republican rejection of the interference-always thesis is that of control. Where an agent A’s freedom to choose from choices x, y, and z is not subject to the alien control of another agent B, agent A can be said to be free. This formulation leaves room for the

9 Ibid, p. 45.
possibility that agent B might interfere with the choices of agent A, and yet this interference not be a case of domination if that interference is traceable to the control of agent A. On the view of freedom as non-domination, it is possible for laws subject to the control of agents to interfere with such controlling agents as free subjects of the law. To the extent that interference is subject to the robust control of the interferee, it will constitute a case of self-control and the exercise of freedom as non-domination.

Freedom from domination also better captures the evaluative allure of freedom than its rival because it provides a more plausible conceptual map of the connections between freedom and justice. Freedom as non-interference’s connection to justice is always negative; that is, insofar as freedom is just, justice is the absence of some form of interference in the affairs of individuals, and it will have the same negative character regardless of whether unjust interference is carried out by individuals, gangs, or agents of the state. But the connection between justice and freedom seems intuitively present in both the absence of unjust forms of interference, and just forms of interference protecting individuals from forms of interference that threaten choices they conclude to be just. Insofar as this is true, and state institutions are constituted by specialized groups of individuals who promulgate and enforce standards and rules regulating the behaviour of individuals in their community on behalf of that community, the interference and potential interference of such institutions will have a special effect on the freedom of individuals depending on whether or not the institutions are just. Freedom as non-domination can map this special effect because it is divisible into two kinds of relations of justice: the freedom of politically just relations of non-arbitrary interference between citizens and the state, and the freedom of socially just relations of non-arbitrary interference between citizens.10 Although early modern republicanism

10 Pettit, above n 6, p.76.
was intertwined with the commonwealthman natural rights tradition, a tradition which featured elements of deontological thinking, contemporary republican rights can be reconceptualised as the just political rights of citizens against arbitrary interference by the state and just social rights against the arbitrary interference of citizens against each other.11

While there are clashing theories of the patterns of inter-personal relationships that will characterize socially just freedom from domination, it seems clear that relations of politically just rule between a state and its citizenry demand robustly democratic institutions. The political justice of non-domination requires the kinds of institutions necessary to achieve a form of popular control over the state and its laws.12 Such democratic institutions must operate according to norms and laws that all members of a community can affirm as treating their practical reasoning about the direction of the state’s interference in their individual and collective choices on equal terms with the practical reasoning of their fellow citizens.13 However just or unjust the order of social relations citizens develop between one another, the ideal of non-domination requires that any state imposing and promoting such patterns of social relations must do so according to public laws and norms that effectively open up state coercion to the equal and minimally conditioned control of the citizenry.14

While there is an array of potential decision-making institutions to choose from, modern republicanism favours electorally responsive and representative legislatures as the primary type of institution for changing the law.15 Republican representative legislatures will only allow for the

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11 The role of rights in modern republican political theory is somewhat undertheorized. The role of rights on the view of the connection between justice and freedom developed here, is consistent with rights as absolute specifications of just constraints on state or individual actions to realize the goal of freedom insofar as they are necessary for this goal. P. Pettit, *Republicanism* (Oxford: Oxford University Press, 1997), pp. 102-103; P. Pettit “The Consequentialist Can Recognize Rights” (1988) 38 The Philosophical Quarterly 42, 49.
12 Pettit above n 6, p.131.
14 Ibid, pp. 130-132.
15 Ibid, pp. 201-205; Of course, there are contemporary republican theorists who dissent, reject electorally representative democracy and independent professional courts, and call for a return to the ancient contestatory, plebian-friendly, lottery based form of republicanism, see John McCormick, *Machiavellian Democracy* (Cambridge:
equal control of citizens’ practical reasoning if the equal votes of the assembly make decisions to change the law that are sufficiently deliberative and coherently responsive to the equal votes of citizens. The modern republican approach to constitutional design has given rise to rival schools of thought on the potential for federal divisions of power and the judicial review of statutes for compliance with legal rights to protect citizens from domination.

While modern republican constitutional theory offers an alternative to liberal approaches tied to the ideal of freedom as non-interference, it faces its own criticisms regarding the ideal of freedom from domination. For some critics, the modern republican adoption of this conception of freedom is philosophically mistaken because it requires a commitment either to the thesis that states alone must ensure the non-arbitrary equal control of citizens over their choices, or to the thesis that only coalitions of citizens can collectively ensure non-arbitrary equal control over the state by maintaining the power of individuals participating in a coalition to resist the unequally controlled interference of the state in their choices. This philosophical critique holds that for citizens to be free from domination by one another, the state must be powerful enough to protect citizens from coalitions of their fellow citizens, but this will grant the officials of the state dominating powers of arbitrary interference in the lives of citizens. In turn, for citizens to be free from the domination of the state, extra-institutional coalitions of the citizenry must have the power

Cambridge University Press, 2011). I take it that the modern republican view must be willing to reject aspects of its heritage by directly arguing that this ancient form of government may have been more directly responsive, but was often incoherent in it interstitial decision-making such that its responsiveness was less controlled.


Thomas Simpson “The Impossibility of Republican Freedom” (2017) 45(1) Philosophy and Public Affairs 27; a related critique of non-domination focused on the thesis that only coalitions can provide non-domination from the state is found in Keith Dowding “Republican Freedom, Rights, and the Coalition Problem” (2011) 10(3) Politics, Philosophy, and Economics 301.
to resist the state, and the problem arises that any such coalition might have the power to arbitrarily interfere in the choices of other coalitions and individual citizens in exactly the manner which republicans take to justify the state’s power of interference. The dilemma is summarized pithily by Thomas Simpson: “the citizens must be powerful, but they must also not be.” The significance of this critique for republican constitutional theory is that it has been taken to signal that the ideal of non-domination entails the abandonment of the traditional republican emphasis on civic virtue, and the embrace of the Humean view that strong government institutions will provide the status of freedom, independently of the civic virtues of the citizenry.

The republican response to these criticisms helps clarify the philosophical nature of freedom from domination and its relevance to constitutional theory. The philosophical critique misses the irreducibly political character of non-domination by presupposing that it is an ‘on-or-off’ binary state-of-affairs, that is either fully attained, or not at all. The philosophical critique presupposes that non-domination is a state-of-affairs where every citizen \( X \) is dominated or not-dominated by either every other individual citizen \( Y \) (dyadic) or set of citizens \( A, B, C \ldots \) (polyadic), and \( X \) might be dominated by any one individual citizen \( Y \), but not another, or as a member of one set by another set, and yet not by others. This is incompatible with the ideal of freedom from domination as a set of political norms and laws reducing the arbitrariness of the state’s interference in the lives of citizens as they come to inform the practical reasoning of citizens. Political norms are nothing less than regularities of behavior that can be expected to inform the lives of citizens as

\[19\] Ibid, Simpson, at 27.
\[20\] David Hume took it as a “political maxim” that “every man must be supposed a knave” from “Of the Independency of Parliament” (I.VI.1) in E. Miller (ed) Essays: Moral, Political, Literary (Indianapolis: Liberty Fund, Inc. 1987).
\[21\] Polyadic domination is defined as “the relation that holds between some group of people, G, and A, when, by acting in a coordinated way, the members of G have the uncontrolled power to interfere with A.” Ibid, p. 36.
a result of the judgement that they will draw approval of others in relation to some judgements they share with others.22

This can be demonstrated by using a hypothetical example. Imagine that an adult citizen $X$ follows the laws specifying the proper exercise of the right of every adult citizen to vote, at least insofar other citizens $A, BC...$ also respect laws protecting this right, with the expectation that this behavior will be met with the approval of most of her fellow citizens who share the judgement that protecting and exercising this right is essential to directing state interference in a less arbitrary fashion. Insofar as this norm of exercising and respecting the legal right to vote is widespread, and complemented by norms guiding free and fair elections for sufficiently deliberative representatives with equal votes, it should go some way towards reducing the domination of the set of individuals who share the expectations which make it a common norm. The imaginary citizen’s expectation that any one citizen or group of citizens will dominate her will be reduced in proportion to the inclusion of that citizen or group in the number of individuals participating in these norms and the depth of their participation.23 This does not resolve the problem of explaining what these norms and laws should be, nor which institutionally distinctive norms might help secure different state institutions from capture by a coalition, but it does explain the sense in which the citizenry secured from domination must at once be powerful and subject to state power. The citizenry must be powerful in the sense that they share norms ensuring the protection of their equal control over the state with their elected representatives, judges, and bureaucrats, and yet subject to the just

22 Pettit, above n 6, p. 128; Norms are not merely regularities of behavior, like eating three times a day, but are patterns of behavior related to the expected approval or disapproval of a social group. They can be evil, as is the case with racist norms of discriminatory behavior towards one group of people based on their skin colour, or obviously good, as is the case with the norm that one should apologize profusely when one has unintentionally run into an innocent person with a grocery cart.
23 It’s worth keeping in mind the concern that too many citizens, or too many representatives given the number of citizens in a polity, could lead to the frustration of legislative deliberation and responsiveness, which runs against norms of non-domination. See Ekins, The Nature of Legislative Intent, pp. 146-154.
interference of the state provided it follows such norms and laws. Democracies are always vulnerable to the informal collapse of the shared norms animating the political justice of formal laws, and so the threat of domination cannot be eliminated, but must instead be securely minimized. Yet the more such republican norms and laws take root in the practical reasoning of ordinary citizens and their representatives, the less dominated they will be as a political community.24

The significance of the ideal for constitutional theory is not a commitment to the Humean view that institutions alone can secure the freedom of individuals independently of civic virtue. On the contrary, constitutional institutions cannot secure citizens against domination if specific republican norms are not engrained in the practical reasoning of citizens and public officials alike. The philosophically virtue-oriented dimension of freedom from domination signals that, in order to be effective and to minimally condition the reasoned choices of the citizenry, republican laws must inculcate norms of civility and participation that enable citizens to expect their fellow citizens and agents of the state to disapprove of vices that threaten the conditions commonly judged necessary to treat citizens’ practical reasoning about the direction of state interference equally.25

The freedom of modern citizens from domination thus crucially depends not only on specifics of constitutional design and widespread democratic norms among the citizenry, but also on the constitutional practices and virtues of state officials who are elected and appointed to office. This includes norms regarding interactions between courts and legislatures as they exercise their

24 In other words, non-domination must be normatively transitive in relation to the breadth and depth of norms reinforcing laws protecting citizen’s equal control over state interference. The virtuous republican citizen cannot be free without virtuous company. Pace Simpson, above n 18, at 41.

distinctively modern, but sometimes overlapping, legal functions. There are specific institutional features and virtuous practices that distinguish modern republican courts and legislatures from their ancient predecessors in terms of the way in which they secure citizens from politically unjust domination. Outlining the reasons for the general differences in the design of modern and ancient institutions as they relate to their distinctive functions will allow us to discern the limitations such modern institutions and practices place on the republican justification of judicial review and the kind of dialogue between courts and legislatures that will prove virtuous in the circumstances of modern politics.

Modern courts exist primarily to remedy the inefficient lack of determinacy and uncertain validity of the application of laws to particular circumstances by adjudicating whether or not legal rules admitted in the past have been violated in particular cases. Courts may be institutionally granted a higher political profile by extending their power to allow them to refuse to apply laws in relation to still more fundamental laws, but they will remain institutionally wedded to the general legal purposes of discovering what the law means and whether it has been violated, and applying just remedies for violations according their legal system’s norms. These legal purposes justify designing modern republican courts such that they enjoy a measure of independence from legislative institutions designed to change the law and are staffed by specialists trained in the techniques of reasoning required to distinguish valid laws from the conclusions of unrestricted moral reasoning or raw preferences.

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26 Properly understood, the modern republican approach cannot be simply categorized as either a primarily “principle-oriented” or “virtue-oriented” theory, for it is necessarily concerned with both the principles and virtues of just institutions. Colin Farrelly, “Civic Liberalism and the ‘Dialogical Model’ of Judicial Review” (2006) 25(5) Law and Philosophy 489.


This combination of institutional independence and legal professionalization can be achieved in a variety of ways. Both aims can be reinforced by creating a political system for appointing judges that is insulated from direct elections, entrenching difficult standards of impeachment, granting judges immunity from legal actions related to their judgements, providing judges with salaries adequate to render bribes ineffective, and instituting procedures requiring parties to legal disputes (including the representatives of state) to treat tribunals as independent arbiters of legal questions. Modern legal systems demand very different institutional arrangements from the judicial arrangements that were characteristic of the classical republics. Ancient courts were composed of hundreds of ordinary citizens selected by lot, and governed by procedural rules that often allowed for individuals to contest the legal validity or democratic purpose of laws and to prosecute the citizens responsible for them, thereby encouraging the use of law as an alternative political channel for individuals or coalitions to challenge the law-making of legislative assemblies. While modern courts can include elements of popular participation and accountability, such as publishing signed judicial opinions explaining judge’s reasons for supporting or dissenting from a legal holding, their institutional independence and professionalism are meant to constrain their decision-making in a way that stands starkly opposed to the political

29 Other innovations serving this purpose include promulgating rules disallowing judges and lawyers alike from participating in cases where they have a conflict of interest, creating legal societies to enforce norms of behavior reinforcing the special responsibilities of judges and other roles in the legal system, limiting the number of judges on appellate courts to maintain coherent decision-making outcomes, etc. For a helpful analysis of the ways in which various elements in the institutional design and practices of modern courts can contribute to the virtuous pursuit of the judicial function see G. Webber, “Past, Present, and Justice in the Exercise of Judicial Responsibility” in this volume at [8-12].

30 M. Hansen, The Athenian Democracy in the Age of Demosthenes (Oxford: Basil Blackwell Ltd. 1991), pp. 178-180; For example, in ancient Athens it was assumed that most private legal quarrels would be dealt with by arbitration; yet the “People’s Court” (dikasteron) had the power to challenge the validity or democratic credentials of laws, conduct political trials, and make administrative decisions controlling the Assembly (ekklesia), and other magistrates and political leaders. In fact, the ancient idea of the judicial function, in the modern sense of deciding particular legal disputes and remedies, was so explicitly bent to the political purpose of ensuring that the resolution of legal disputes was not controlled by the arbitrary will of one faction of society that judicial powers were sometimes distributed beyond institutional courts to roving elected magistrates with the ability to obstruct the application of valid legislation. For an interesting discussion of the democratic role of Roman tribunes see Andrew Lintott, The Constitution of the Roman Republic (Oxford: Oxford University Press, 1999), pp. 121-128.
purpose of the Athenian practice of having trials judged by several hundred ordinary political citizens selected by lot.31

Modern legislatures exist as a matter of law to remedy the defect of static rules by deliberately changing and updating their meaning for shifting normative and empirical reasons related to the path a political community will take, both in the present and the future.32 Modern democratic legislatures harness the legal purpose of remedying the defect of static rules to the political purpose of responsively representing and incorporating the reasoning of the citizenry in the deliberate changes it makes to the law as a result of its collective reasoning.33 As with modern courts, modern republican legislatures differ significantly from their ancient predecessors. Their difference is primarily between their ways of representing citizens in the changes they make to the law. Ancient legislatures often incorporated the reasoning of citizens into different decision-making assemblies by using lotteries to directly select their members from pools of citizens with specific personal characteristics such as wealth, poverty, area of residence, military service, etc.34 The idea was that with different segments of the population directly represented in distinct decision-making bodies, the character of the various legal functions allocated to the assemblies would reflect their distinctive interests and balance them against those reflected in other assemblies.35 While modern republican legislatures are sometimes organized according to

32 Webber, above n29 at [5-8]; Hart, above n 27, pp. 95-96.
33 Richard Ekins, “How to Be a Free People” (2013) 58(2) The American Journal of Jurisprudence 163, 174-179; Interesting disagreements exist between contemporary republican constitutional theorists regarding questions such as the advantages or pitfalls of federally dividing the representative power to change the law between multiple legislatures, or whether to internally divide decision-making into superior and inferior separate chambers with different forms of accountability, or whether to organize assemblies to be more responsive to the electorate as a whole or for individual legislators to be more responsive to their specific constituents.
35 For an illuminating contrast between this more ancient idea of ‘balancing’ power and the modern idea of ‘separating’ it, see Bellamy, Political Constitutionalism, pp. 195-208.
indicative modes of representation for special purposes, they are primarily structured to have their members selected by competitive elections in which political parties link prospective members to programs of political action.\textsuperscript{36} Their central legal function of allowing deliberative changes to be enacted into the law is usually governed by procedural rules, such as subjecting bills to multiple readings and allowing opportunities for private members to introduce bills, that are meant to guarantee that actual changes to the law are subject to deliberations reflecting actual disagreements among the citizenry while remaining coherent.\textsuperscript{37} The ancient legislature was more of an assembly offering a segment of a community the opportunity to influence the law; the modern legislature is primarily a means of equally incorporating the practical reasoning of every citizen into changes to the law. This sketch of how modern courts and legislatures relate to the ideal of freedom from domination will help inform the following section’s explanation of the risk of political domination entailed by judicial review.

\textbf{III. Republican Judicial Review}

This section provides both a principled justification for the judicial review of statutes for rights compliance and a principled limitation on the justifiable forms such judicial review can take. It draws both of these lessons from the manner in which distinctive legal and political functions inform the institutional designs and practices of modern republican legislatures and courts. These lessons will help guide the subsequent section’s inquiry into the ideal republican reasons and forms of dialogue between courts and legislatures. On the one hand, judicial review is \textit{prima facie} justifiable, though not strictly necessary, as a means of allowing the modern adjudicative function

\textsuperscript{36} Ekins, \textit{The Nature of Legislative Intent}, pp. 146-154.

\textsuperscript{37} The modern legislature remains distinct from its ancient relatives in that elected legislators are, as individuals, members of a political party, members of a particular legislative chamber, and members of the legislature as a whole, causally responsive to the practical reasoning of citizens about how well they are serving the common good of the community in their contributions to reasoning and voting on changes to the law. Pettit, \textit{On the People’s Terms}, pp. 197-207.
of courts to indirectly reinforce the modern legal and political functions of republican legislatures. This lesson does not constitute a systematic or conclusive republican justification of judicial review, but demonstrates how judicial review can theoretically help secure citizens from domination by addressing the legal defects of the uncertain validity and the inefficient resolution of indeterminacies afflicting legislative changes to the law that enable or restrict future changes to the law meant to protect citizens from domination. On the other hand, the ideal of non-domination is incompatible with norms of interaction between modern courts and legislatures that restrict the legislature’s ability to respond to unjust judicial invalidations of statutes. This is because the theory of non-domination provides grounds for rejecting the liberal prejudice in favour of negative state action. If unjust legislative interference with the negative task of adjudication is prima facie as much a risk and threat to freedom as unjust judicial interference in the active task of legislation, then norms governing interactions between courts and legislatures must allow for courts to correct unjust legislation and for legislatures to rectify unjust adjudication.

Taken together, the distinctive legal and political republican purposes of modern courts and legislatures are compatible with many different constitutional arrangements. But the institutional independence and professionalism that allows modern courts to realize their adjudicative function can be used to indirectly reinforce the link between modern legislatures’ legal and political functions. From this it can be inferred that allowing courts to review statutes for compliance with legally specified rights is one justifiable way of securing citizens from domination by reinforcing the ability of modern legislatures to enact deliberative changes to the law that equally incorporate the practical reasoning of citizens. The modern political function of republican legislatures is to equally incorporate the reasoning of every citizen into coherent and electorally responsive changes to the law. This political function is achieved by the procedures enabling the legal function of
modern legislatures: deliberatively enacting changes into the law. Although some of the procedural rules enabling these legal and political functions will be customary political norms, many will themselves be legal rules of legislative process, and therefore prone to the same kinds of disputes and positive defects as other legal rules.38 These defects include the same static quality of many legal rules that it is the legislature’s legal function to address, but also the validity and indeterminacy of the application of laws to particular circumstances, which it is the role of adjudication to address by determining what the law means, whether it has been violated, and what remedies it demands in particular circumstances. Because legal rules of legislative process are themselves prey to the defect of stasis in the face of changing normative and empirical circumstances, it is possible for even more fundamental laws to be established governing such procedural rules. An example of such fundamental rules might be constitutionally entrenched rights restricting the kinds of changes ordinary legislative procedures can make to the law with the purpose of protecting the political community’s future ability to equally influence changes to static rules in circumstances that threaten this possibility. But any set of such fundamental rules will themselves face the threat of stasis, especially if they are subject to a difficult amending formula. This does not eliminate such fundamental rules as a valid legislative choice for a political community, but it does raise the possibility that the stasis of rules restricting legislative changes may themselves require legislative changes or adjudicative determinations left legally unspecified by the community. The political community must accordingly enact such rules with great care, as they may prove to be a kind of beginning that can never begin in the very same fashion again.39

It seems plausible that both legislative changes to the laws of legislative process, and even legislative changes restricting the future changes the legislative process can enact, could coherently

38 Lovett, above n 28, p.187.
and equally reflect the practical reasoning of citizens about the need for basic liberties against the state, such that these changes could help secure citizens’ freedom from domination. 40 Insofar as republican constitutional theorists recognize (as most do) that the modern legal function of legislation can politically help secure citizens from domination, the institutional independence and professional practices which help courts exercise their general adjudicative function well could also have the secondary effect of minimizing domination. 41 This secondary effect of protecting citizens from domination would result from the judicial resolution of disputes regarding the validity or indeterminate implications of legislative changes to the law as they relate to past changes specifying rules and rights of legislative process, or to restrictions on changes to the law meant to protect individual rights. The institutions and practices of modern courts can thus indirectly help secure citizens from domination by resolving the defects of uncertain validity and the inefficient resolution of indeterminacies of legal rules that can interfere with the legislatures’ legal capacity to change the law in a way which incorporates the citizenry’s practical reasoning about the just direction of state interference. The judicial review of statutory changes to the law involving legal rights can have this indirect effect.

The lesson is not that the power of modern courts to conduct the judicial review of statutes for rights compliance is justified by the direct adjudicative pursuit of a “system of individualized contestation” allowing “openings for particular individuals and subgroups to test the laws or proposals for how far the process in which they are generated respects the value of equal access to influence and, more generally, the value of equal status.” 42 This was the political purpose that guided the institutional design and practices of ancient courts, and the independent institutional

40 Pettit, above n 6, pp. 92-107.
41 I am grateful to Philip Pettit for helping me see this point.
42 Pettit, above n 6, p. 213.
design and professional practices of modern courts are ill-suited to the direct judicial pursuit of this purpose. The institutional independence of modern courts is achieved by features of curial design discussed above, such as the political appointment rather than election of judges, high thresholds for the impeachment of judges, etc. This political independence will help reinforce the ability of judges to resolve legal disputes as disputes about legal rules rather than disputes about moral values such as “equal access to influence” and “equal status”, because it will reduce any incentive to favour certain legal outcomes in order to avoid popular sanctions and to maintain their office. While institutional independence promotes virtuous legal decision-making, it magnifies the adjudicative vice of resolving legal disputes as though they were open-textured disputes about moral values because it will shield such moral decision-making from the equal contestatory control of the citizenry.

The legal professionalism of modern adjudicative institutions and practices is also inimical to the modern pursuit of ancient adjudicative purposes. Judicial professionalization can be reinforced by forms of institutional independence that reduce the extent to which a judge’s knowledge of artificial forms of legal reasoning will be directly evaluated in terms of their moral or political significance, creating special codes of conduct to help ensure a commitment to judicially appropriate techniques of legal reasoning, etc. Moral reasoning might play some part in the legal direction of adjudication, but as a part of virtuous modern adjudicative reasoning it will always be restricted by considerations of “fit” such as the constitutional text, inferences about constitutional structure, historical materials bearing on its meaning, and applicable precedents set in the past by courts or legislatures.43 It may be that certain types of law, and rights in particular, invite adjudicative moral reasoning more than other legal concepts, but there is often the risk that

such moral reasoning will become untethered from positive legal sources. This risk is underlined by the fact that Ronald Dworkin, the legal philosopher who advocated judges christening legal rules with the “justification” of moral reasoning where the “fit” of legal materials ran out, appeared to never find an actual litigated instance where legal “fit” restrained moral “justification”.44 By pursuing the ancient political purpose of morally contesting the equality protecting status of laws, even where the law itself appears to direct courts towards such moral reasoning, modern professionalized judges run the risk of disguising unconstrained moral reasoning as the kind of virtuous technical adjudication that has the potential to help secure citizens from domination.45 To justify judicial review as a means for modern courts to directly pursue the more ancient purpose of courts is to invite the transformation of the modern institutions and practices that might guide the justifiable exercise of judicial review into instruments allowing courts to cloak the vice of abusing their unequal power to interfere with legal changes to the law in the garb of adjudicative virtue.46

The second lesson that can be gleaned from the institutional features and functional practices of modern courts and legislatures is that recruiting the legal function of courts to the modern political purpose of republican legislatures carries the serious risk of political injustice. The moral seriousness of this risk is equal to that posed by the legislature. The threats these institutions pose to freedom from domination require institutional arrangements and practices allocating the capacity to contest unjust legislative interference to courts, and the ability to directly respond to

45 This has the added danger of polarizing and politicizing the legal profession such that it either becomes a political coalition in its own right or factionalized into coalitions aligned with other political actors.
46 Of course, this is not a systematic argument in favour of considering such judicial review a republican “constitutional essential”, and any such argument would be conditioned by the second lesson that can be drawn from the distinctive institutional features and functional practices of modern courts and legislatures. For the idea of a ‘constitutional essential’ see, John Rawls, Political Liberalism (New York: Columbia University Press, 2005), p. 232.
and contest unjust judicial forms of interference with legislation. The reason why republicans should take the risk of political injustice posed by courts as morally equal to that posed by legislatures is implicit in their understanding of the connection between justice and freedom as non-domination. Constitutional theorists who understand political freedom as non-interference, and who take rights to stake out areas of freedom against interference by the state or other individuals, may have reason to favour adjudicative forms of state interference over legislative forms. Some constitutional theorists have argued that the negative character of adjudication as a form of state interference in the lives of citizens renders it a lesser threat to freedom than the ability of legislatures to change the law without the possibility of having their changes invalidated for violating rights.47 This might make sense given a commitment to freedom as non-interference. But on the view that freedom should be conceived of as freedom from the domination or from subjection to the arbitrary will of another, and the auxiliary thesis that political justice is characterized by citizens’ maximally equal control over state interference and non-interference alike, the negative character of a state action grants it no special advantage as a means of protecting freedom and justice.

If the negative character of a state action grants it no special philosophical advantage in protecting the justice of freedom from domination, then the fact that judicial invalidations of just statutes constitute a negative type of state action provides no reason to prefer the risk of the unjust exercise of judicial review over the enactment and application of unjust statutes. There may be non-ideal, context specific reasons for republicans to subject legislatures or courts to varying levels

of suspicion regarding their propensity for injustice, but there is no *prima facie* reason to vary such suspicion in an asymmetrical fashion. This implication of the republican critique of the concept of freedom as non-interference not only deflates one prominent justification for judicial review, but also inferentially restricts the forms of judicial review that can be justified as an ideal means of securing modern citizens from unjust domination. The inference is that because the risk of legislatures enacting politically unjust legislation is equal to the political risk of courts unjustly exercising their interpretive powers, republican constitutional norms must grant courts and legislatures equal powers of interference in their respective functions. Thus the principle implied by the republican critique of the conception of freedom as non-interference is that, absent certain non-ideal political contexts, the equally significant (though not necessarily equally *probable*) threats modern courts and legislature pose to citizens’ freedom requires that legislatures not be restricted from contesting politically unjust judicial interference in the task of making the law, nor courts from contesting politically unjust legislative interference in the adjudicative task of applying the law.

But what does it mean for courts to ‘unjustly’ or ‘justly’ interfere with legislation, or for legislatures to ‘unjustly’ or ‘justly’ interfere with judicial decisions? Modern courts can justly interfere with arbitrary exercises of the legislative function by carrying out their proper task of applying and determining the meaning of the law and refusing to apply laws which violate constitutional rights. Courts can unjustly interfere with the republican task of legislation by invalidating statutes that reflect valid changes to the law or applying statutes reflecting invalid changes, in either case enacting arbitrary changes to the law. This implies that just legislative corrections to adjudicative abuses will primarily be tied to the task of responding to the risk of unequal and technically camouflaged judicial changes to the law. Insofar as such just corrections
respond to unjust judicial decision-making, they will often simply involve legislatures’ reasserting their jurisdiction over judicial usurpations of the legislative function. However, where there is disagreement between the branches regarding what the determinate meaning of the law is, it may be unclear whether the law is in need of interpretive application or creative change. In such cases of reasonable disagreement, which institution has jurisdiction over a legal matter is up for debate and in these circumstances legislative corrections of adjudicative abuses may appear to take the form of legislative incursions on the judicial task of interpretation. Modern legislatures can interfere with the adjudicative function by fulfilling their legal-cum-political task of deliberately changing the law in a way that causes the judiciary to adapt its interpretive methods to determine the meaning of such changes. Legislatures can unjustly interfere with the task of adjudication by enacting changes that directly entail invalid applications and determinations of legal rules or standards. This suggests that the just judicial task of correcting invalid legislative exercises of the adjudicative power of interpretation will often straightforwardly involve asserting their interpretive task of applying the law in particular cases and circumstances. But where the law is indeterminate, and especially where there is inter-institutional disagreement about whether the law is indeterminate as a matter of its interpretive application or its openness to legislative change, judicial corrections of what courts take to be invalid legislation may well appear to take the shape of adjudicative law-making.

IV. Republican Dialogue:

Which of the reasons and corresponding senses of dialogue outlined in introductory section of this chapter will prove virtuous as a norm for realizing politically just forms of legislation and adjudication? Which norm of dialogue will allow for legislatures and courts to correct the unjust incursions of one branch into the function of its counterpart, including in forms of redress that
appear to take the shape of modern judicial law-making and legislative interpretation concerning legal rights? Recall that there are at least three basic normative reasons why dialogue between courts and legislatures regarding legal rights might be desirable, and each of these reasons is reliant on specific normative premises and corresponds to a particular norm of what dialogue entails. The first reason for valuing dialogue between courts and legislatures is that it will allow courts to interrogate legislatures for justifiable reasons for statutes to override rights. The second reason is that dialogue between courts and legislatures can allow courts to interrupt the legislature’s exercise of its ongoing responsibility to protect rights without unjustly interfering with the legislative function. Such interruptions are valued for their potential to facilitate the legislature’s task by means of judicial deference to any reasonable legislative responses they provoke in order to help prevent unjustifiable infringements of rights, primarily in cases where legislatures suffer from political gridlock or blind spots. The third reason is that dialogue between courts and legislatures can allow courts and legislatures to co-ordinate the construction of the indeterminate meaning of rights in a way that helps maintain the citizenry’s control over rights.

In this section I shall argue that the third constructive reason for dialogue, and its corresponding conception of what dialogue entails, is the ideal republican norm for animating politically just forms of legislation and adjudication, including what might appear to be corrective forms of judicial law-making and legislative interpretation concerning legal rights. Constructive dialogue is a norm that can be equally avowed by modern republican judges, legislators, and citizens alike in a system featuring judicial review. This is because it mitigates the risks of politically unjust adjudication by providing citizens and officials alike with the expectation that legislatures not only can, but should actively contest abuses of adjudication by using their ability to change the law to correct what they take to be mistaken interpretations of or changes to legal
rights. In contrast, interrogative and interruptive forms of dialogue threaten to turn modern courts toward the political injustice of directly pursuing the political purposes of ancient courts, thereby creating an unequal and deceitful parallel system of individualized control over changes to the law.

A. Interrogative Dialogue

Interrogative arguments in favour of dialogue advocate the most clearly anti-republican norm of dialogue. This view takes the value of dialogue to be the subjection of legislatures to a kind of Socratic interrogation by courts. The interrogative reason for favouring dialogue is rooted in the view that legislatures should be expected to regularly enact changes infringing legal rights, especially the rights of vulnerable minorities, and as result dialogue should be restricted either to the ability of legislatures to justify infringing rights to courts. This ideal of dialogue fails to account for the threat to political justice posed by forms adjudicative reasoning that are unrestricted by legal sources, and unjustifiably excludes or minimizes the possibility that just forms of legislation can correct the injustice of unequal and technically camouflaged judicial changes to the law.

Socrates’ favoured form of *elenchic* interrogation does not resemble the kind of technical legal reasoning that the modern institutional independence and professionalization of courts is designed to achieve. As such, it is quite likely that turning judicial reasoning about the violation of rights towards such a legally undirected form of reasoning will unacceptably increase the risk that such reasoning will promote the judicial pursuit of the ancient political purpose of courts, but with the unequal institutional platform and distortive technical jargon which characterizes modern courts. This Socratic ideal of dialogue is usually tied to a conception of rights as non-relationally defined and as normatively inconclusive interests. Proponents of the interrogative conception of dialogue explicitly favour dialogue as an opportunity for courts to engage in “proportionality analysis”, or the “judicial testing of the arguments and evidence presented by the government to
justify limits on rights rather than abstract and static questions of interpretation.”48 This form of practical reasoning is favoured because it “ensures that legislators and judges exercise the virtues of fair social cooperation”.49 What this means is proportionality based dialogue will ensure that legislatures only override rights where they have good reason and that democracy will be strengthened by judicial reminders about the rights of unpopular minorities, and of fundamental values that both the legislature and the executive may cast overboard in response to real or perceived emergencies. Judicial mistakes can be corrected by legislation that broadens the policy debate, refined legislative objectives and educates the court about the practical trade-offs and difficulties in achieving legislative objectives.50

On the view of rights informing the proportionality approach, rights are taken to be interests or values defined independently of one another and legal rules.51 They are also normatively inconclusive insofar as they can be justifiably infringed if they happen to have the optimized relationship to other interests in circumstances where the law infringed them for a good public purpose and does so as minimally as possible.52 For purposes of this chapter, I will assume that even if this conception of rights is compatible with the unrestricted moral practical reasoning of republican citizens, it is not the kind of legally restricted reasoning that the institutions and practices of modern courts were designed to achieve.53

It will suffice to note that this conception of rights invites unelected judges to evaluate the “reasonableness” or “substantiality” of the legislative purpose for changes to the law under the hollow pretext of deploying a technical legal “test” such as a “rational basis test”, “proportionality

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48 Roach, above n 2, p. [20].
49 Colin Farrelly, above n 26, at 525.
50 Roach , above n 2, p. [19].
52 Ibid, pp. 68-80.
53 One interesting attempt to explore the relationship between this conception of rights and the republican conception of freedom is found in Eoin Daly, “Freedom as Non-Domination in the Jurisprudence of Constitutional Rights” (2016) 28(2) *Canadian Journal of Law and Jurisprudence* 289.
test”, “balancing test”, or “endorsement test”.54 It invites them to second-guess the judgement of the legislature about the purposes of statutes and the means they employ to achieve them. Judicially questioning the purposes and means of statutes as they relate to rights involves exercising what is “the quintessence of a legislative decision” under the “moderate guise” of false techniques of legal reasoning.55 In ancient courts, citizen jurors could often seek to nullify and even punish legislators responsible for laws with unjustifiable purposes, but the justification of the judicially contested purposes and means of laws would be openly debated and then decided by hundreds of their fellow representative citizen-jurors.56 On the interrogative view, unelected and institutionally independent judges should take on the role of citizen inquisitors using the “technocratic camouflage (a multi-prong legal sounding test)” of proportionality analysis, and legislative replies to judicial decisions can seek to correct mistakes about the judicial deployment of this analysis, not mistakes about the interpretation of the content of rights.57 The legislature is a suspect in an interrogation designed not to discover its guilt, but whether it had good reason to infringe legal rights, and the citizens’ representative legislature is thereby presumed guilty until proven utilitarian. The interrogative norm of dialogue thus not only encourages courts to risk the political injustice of pursuing ancient political ends by abusing the unequal institutional platform and opaque techniques of modern courts, but also caricatures modern legislative changes to the law as decisions that can “educate the court about the practical trade-offs” involving policy objectives and rights, yet never as extra-judicial interpretations of law meant to correct abuses of

55 Michael McConnell, above n 43, at 1782.
56 M. Hansen, above n 30, p. 175.
adjudication. It thereby increases the risk of political injustice, and delegitimizes the primary way of mitigating it.

**B. Interruptive Dialogue**

As a reason for valuing dialogue between courts and legislatures, interruption is taken by many theorists to balance the interrogative concern for the unjustifiable legislative violation of rights, especially minority rights, with the constructive concern for the consistent specification and democratic legitimacy of rights. This reason justifies a norm of dialogue that is meant to allow the judiciary to interrupt the application of statutes which could reasonably be interpreted as violating legal rights, such as where laws are suspect directly on a court’s view of their legal “merits”, or which suffer from either realist “blind spots” (e.g. laws touching on the rights of underrepresented minorities) or the “burdens of inertia” (e.g. where rights issue internally divide political parties, creating gridlock) while protecting the equal control of citizens over changes to the law. The citizenry’s equal control is protected in spite of such interruptions, either by the judicial inability to subject legislative responses to interruptions to further review, or by *ex post* deferring to such responses.58 The first prominent variation on the norm requires the formal ability of legislatures to disregard or insulate their replies to judicial decisions from further judicial review, provided they reconsider their prior political judgment.59 The second maintains that the primary means of expressing such reconsideration should be by enacting an ordinary statutory reply.60

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59 Stephen Gardbaum essentially argues in favour of an interruptive norm of dialogue featuring “respectful but unapologetic” judicial review on the merits and the use of insulated (or ignoring declarations of rights incompatibility) statutory replies for legislative expressions of deliberatively reconsidered and reasonable rights disagreements with courts. In his more recent work, he does not use the term ‘dialogue’ and has explicitly commented on the infelicity of the metaphor. See Gardbaum, *The New Commonwealth Model*, pp. 15-16.

60 This variation of the theory roughly corresponds to at least part of Rosalind Dixon’s intriguing “new dialogue theory”, which differs from Gardbaum primarily in its prescription for the use of ordinary statutes as expressions of
interruptive norm of dialogue is clearly more promising than the interrogative norm insofar as its proponents acknowledge the risk of political injustice inherent in the exercise of judicial review. In the ordinary circumstances of politics, however, the interruptive norm of dialogue increases the risk of political injustice.61

The first influential variation of the norm supports courts leveraging their “virtues of skilled professionalism and judicial independence” to invalidate or declare right-incompatible statutes which on their ‘first look’ they take to violate “the best legal view on the merits.”62 This variation holds that the “legal merits” of statutes are evaluated using the dominant proportionality approach to rights, and that legislative responses to such decisions should take a form that is immune to further judicial review.63 It thereby recommends an interrogative variety of interruptive dialogue. That is, it risks the interrogative political injustice of having unelected modern courts pursue the political function of ancient courts using methods of unconstrained moral reasoning disguised as professional techniques of legally directed reasoning, but with the possibility of legislatures formally contesting conclusions. On the second influential variation of the interruptive norm, in their ‘first look’ analysis of whether statutes comply with rights, courts should use their institutional independence to abandon the professional techniques of legal reasoning that require

reasonable legislative disagreement with ‘first look’ judicial decisions. See Dixon, “The Supreme Court of Canada, Charter Dialogue, and Deference” at 257-266. However, Dixon also favours constructive judicial decision-making as evidenced in an aspect of her discussion of positive “blind spots of application” where courts interpret indeterminate laws by drawing on their “significant experience in applying laws to particular cases”, Dixon, “The Core of the Case for Weak-Form Judicial Review” at 2214-2216. But, like Gardbaum, Dixon also considered proportionality analysis to be a useful way of assessing the application of laws implicating rights in specific cases and circumstances, and on the argument offered here, proportionality analysis (at least in the interrogative sense advocated by Kent Roach and Mattias Kumm) is incompatible with the norm of legally constructing rights for particular cases and circumstances. Her view is thus partially interruptive (and interrogative in some cases), and partially constructive.

61 The ordinary “circumstances of politics” is “the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be”, J. Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999), p. 102; also see A. Weale, Democracy (Basingstoke: Macmillan, 1999), pp. 8-13.  
them to treat the legislature as a formal entity. They should liberate themselves from such formalism by attending to realist concerns, such as the relation between the underrepresentation of minorities in the legislature to statutes implicating their rights, or blockages to legislative changes implicating rights, such as partisan gridlock caused by internal divisions in parties regarding rights issues, competing legislative priorities, bureaucratic delays, etc.64 This version of the norm risks political injustice by guiding courts to the aggressive ‘first look’ interruption of statutes implicating rights because they fail to correct for the formal “application of laws to particular cases in a way that limits rights” and a host of informal-realist concerns regarding the legislative process.65

Unlike the interrogative norm of dialogue, both of these versions of the interruptive norm attempt to mitigate the risk of political injustice by allowing legislatures to reply to unjust forms of adjudication. But in spite of the possibility of legislative replies to such aggressive ‘first look’ adjudication, both accounts of the interruptive norm of dialogue diminish the likelihood of such replies and thereby augment the risk of judicial domination. The first version of the norm encourages courts to strike down statutes on their ‘first look’ using proportionality analysis, and this diminishes the likelihood of legislative replies correcting unjust refusals to apply laws or misinterpretations of right because it casts such replies in the interrogative light of challenges to the judicial evaluation of the unjustified infringement of rights, not alternative legislative interpretations of rights. In some contexts, constitutional instruments of ‘non-finality’ could allow legislatures to ignore such decisions, or to immunize their statutory replies from further review in ways which clearly indicate that statutes can express “rights-dissensus” to disagree with and displace such aggressive judicial decisions as they relate to particular interpretations of rights.66

64 Dixon, “The Supreme Court of Canada, Charter Dialogue, and Deference” at 257-266.
65 Ibid, 257-258.
But even if these kinds of mechanisms filter interrogative dialogue featuring judicial interruptions of statutes implicating rights, the interrogative character of adjudication will influence judges, legislators, and even citizens to think of statutes implicating rights adjudication as expressions of “rights-misgivings”, or disagreements about whether taking rights “to an extreme or applying [them] in cases where other important interests… are much more urgently engaged.” 67 If the police continually treat a criminal suspect’s alibi, documents, and other forms of exculpatory evidence as more or less satisfactory justifications for violating the law, then it seems likely that the suspect’s defence lawyers, witnesses, and even an innocent suspect himself, will begin to play this game.

The second version of the interruptive norm also exacerbates the threat of judicial domination by diminishing the likelihood of just legislative replies. It does this by exhorting courts to interfere with statutes in ‘first look’ cases where the risk judicial review poses to political justice is heightened, and its rewards are negligible, and to defer to statutes in ‘second look’ cases where the risk of legislatively enacted injustice is greatest. The norm exhorts courts to interrupt statutes in circumstances where the exercise of judicial review poses the greatest risk of political injustice because it asks them to disapply the statutes that legislatures are either the least willing and the most incapable of replacing or, alternatively, the most likely to replace with unjust laws. Where courts use realist techniques of looking into the informal “black box” of the legislative process to discover whether the legislature excluded or failed to consider the perspectives of minorities with rights implicated by a statute, they risk making mistaken political or social-scientific judgements. 68

If minority rights really are at stake, there is the risk that the court’s realist analysis will prove

67 Ibid, 34-39; As Waldron makes clear, it is also possible for the design of such mechanisms to exacerbate this problem with the norm.
68 For the idea of informal reasoning as looking into a “black box” see R. Pildes, “Institutional Formalism and Realism in Constitutional and Public Law” (2013) 1 The Supreme Court Law Review 1.
inaccurate or even mistakenly land it on the side of the hostile majority or plurality.\textsuperscript{69} Where such ‘first look’ judgements are used to invalidate a statute implicating such minority rights, they compound the risk of reasoning outside their professional area of competence with the risk of displacing a reasonable legislative interpretation of the rights at stake. Yet in cases featuring real majoritarian threats to indeterminate rights, the reward of taking such risks is likely to be offset by the interruptive norm’s requirement that in ‘second look’ cases courts will defer to such socially unjust yet legally reasonable interpretations of rights. Where courts interrupt oppressive but legally indeterminate statutory rights schemes enacted by truly tyrannical majorities, their interruption is likely to be reversed or even possibly to stir up much uglier statutes targeting minorities. The interruptive dialogue suggests that courts should take a realist look inside the informal ‘black box’ of the democratic process, opinion polls, etc. to aggressively invalidate statutes taken to threaten rights in light of such extra-legal judgements. This first realist look is itself risky, but the potential reward of the risk is betrayed by the interruptive norm’s recommendation that courts bracket their realist judgement and treat responses to their ‘first look’ judgement in a legally formal a deferential fashion.

On this theory of interruptive dialogue, courts can also aggressively invalidate statutes on their ‘first look’ and develop new legal rules or standards to directly address the inertia created by difficulties such as competing legislative priorities or cross-pressured coalitions of minorities. In many of these cases, judicial interruptions are unlikely to provoke ‘dialogic’ legislative replies, and therefore lack any superior respect for citizens’ equal control over changes to the law. There is considerable evidence that the prospect of judicial interference in cases where changes to the law are already a low priority actually further lowers the priority of such changes and discourages

legislation dealing with matters featuring high electoral risks.\textsuperscript{70} The true effect of interruptions meant to address low priority legislation is to help minority factions within majority government coalitions achieve their aims without forging a consensus between minority factions. Such factions will be unaccountable to the electorate for the judicial decision that favours their preferences, even if they help provoke the judicial interruption by politically blocking or delaying legislation. It seems unlikely that courts following this norm with regard to low priority legislation should expect their interruptions to spark any kind of dialogue at all. Amending statutes which implicate rights that are subject to the reasonable disagreements of cross-pressuring coalitions of minorities is unlikely to be a priority for democratic leaders, and judicial interference with such statutes would also seem unlikely to provoke dialogues involving corrective legislative responses. Such hotly contested cross-partisan issues are often low in legislative priority due to their serious moral significance, and therefore it is all the more crucial that they be resolved in a fashion that respects citizens’ equal right to control the content of the state’s law. When courts interrupt statutory rights schemes in order to address the “burdens of inertia”, their interruptions can potentially contribute to these burdens by incentivizing political actors to ignore or downplay their accountability for rights. In both versions of the norm of interruptive dialogue, the regularities of judicial and legislative behavior the norm solicits appear to minimize the probability of legislative responses correcting for the mistaken adjudicative application or invalidation of laws, and the changes such decisions can make to the law.\textsuperscript{71} This might have been acceptable for ancient courts, which

\textsuperscript{70} K. Whittington, “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court” (2005) 99(4) American Political Science 583.

\textsuperscript{71} A good example of why this norm of dialogue is misguided is how it would explain Canada’s\textsuperscript{'} \textit{R. v. Morgentaler} [1993] 1 S.C.R. 30. On the second version of the interruptive dialogue theory, the Supreme Court of Canada faced a situation in which coalitional inertia on both the left and right prevented the passage of a law liberalizing the \textit{Criminal Code} prohibition on abortion.\textsuperscript{).} The Court then struck down the prohibition for violating the \textit{Charter} (section 7) right of Canadian women to “security of person”. A pro-life bill which would have overturned the decision, and a pro-choice bill that would have affirmed it were both solidly defeated. The first compromise bill put forward by the Mulroney government, which would have imposed legal restrictions on the right the Court linked to the \textit{Charter}, was then defeated by a “paradoxical coalition of pro-life and pro-choice MP’s… by a vote of 147-76.”
counterbalanced the threat of domination from one segment of the population in legislative assembly by allowing another indicatively represented segment of the popular to interrupt its legislative acts. But the institutional independence and professionalism of modern courts means that they risk unequally and unjustly changing the law. As such, republican modern courts should adjudicate statutes with indeterminate rights implications in ways which increase the chances that their mistakes will be corrected. The interruptive norm directly conflicts with this imperative by encouraging courts to risk the political injustice of unequally changing the law to provoke ‘dialogues’ they can safely bet they’ll never face.

C. Constructive Dialogue

Constructing legal rights is a good republican reason for encouraging dialogue between courts and legislatures because it is consistent with the virtues of modern institutions and practices, and can serve as a norm for guiding dialogues involving rights in a way that helps maintain the citizenry’s control over their legal rights. In practice, a republican norm of constructive dialogue will reduce the risk of political injustice inherent in the exercise of the judicial review of statutes by providing standards for guiding courts and legislatures towards just ways of correcting unjust forms of adjudication and legislation, corrections that may even appear to be forms of judicial law-making and legislative interpretation. In particular, the republican norm of constructive dialogue will reduce the threat of judicial domination in that the standards judges, legislators, and citizens will share for distinguishing rights constructions from unjust forms of judicial law-making and

Mulroney then invoked party discipline to pass the bill in the House of Commons by a vote of 140-131, but the bill was then defeated by a tie vote (43-43) in the Senate. Canada remains one of the only modern jurisdictions with no abortion laws, even though the Supreme Court decision clearly invited a legislative response to its interruption. F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2001), pp. 162-163; The interruptive dialogue theory thus appears to justify judicial domination over all issues subject to the most politically cross-cutting kinds of reasonable disagreements about rights and should therefore be rejected by republicans.
legislative interpretation will include the expectation that legislators can and should use their power to change the law to reassert their jurisdiction over the ability to change the law against mistaken judicial interpretations usurping this function, and to enact constructions of indeterminate rights, especially to correct mistaken constructions of the judiciary. This norm of dialogue is crucial, absent special non-ideal factors, to maintaining just forms of judicial review. And while it is compatible with many different constitutional systems, it is incompatible with systems that formally or informally exclude legislatures from engaging in legal constructions of rights.

But what exactly is legal construction? A legal construction is not the interpretively discovered meaning of a legal text, nor the kind of change in legal meaning that is the effect of the invention of a wholly new meaning in a legal act of creation, but rather a kind of in-between mode of elaborating legal meaning that “is essentially creative, though the foundations for the ultimate structure are taken as given.”72 Construction corresponds to James Madison’s concept of “liquidation”, which he explained in his observation in Number 37 of The Federalist that:

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of discussions and adjudications.73

Madison’s two-fold point is that legal texts do not have a fully determined meaning and that these indeterminacies must be filled in with the constructions or liquidations involving the contributions of political and legal actors over time.74 A legal construction or liquidation is a kind of legal change that makes plain (liquidus: clear, evident) and determinate what was legally indeterminate, either

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in the sense of suffering from multiple ambiguous senses or the vagueness borderline cases, through a sufficient threshold of interaction between political and adjudicative forms of practical reasoning.75

This chapter has so far referred to the possibility that judicial corrections to unjust legislation may appear as ‘judicial law-making’ and that legislative corrections of unjust adjudication may appear to take the shape of a kind of ‘legislative interpretation’. Many such judicial corrections will appear as ‘judicial law-making’ to those who disagree with the interpretation of the determinate meaning of the law informing the correction, and many such legislative corrections will appear as a kind of illicit ‘legislative interpretation’ to those who simply take their changes to be mistaken. Yet in cases where legislation violates the determinate meaning of the law, what some might take to be ‘judicial law-making’ will simply turn out to be interpretive corrections of legislation, or judicial assertions of the adjudicative power to interpret the law. Courts can correct determinately unsound legislative changes to the law by holding them invalid using their ordinary power of interpretation. Similarly, what some improperly take to be exercises of ‘legislative interpretation’ will at times turn out to be proper legislative changes to the law that reassert legislative jurisdiction against mistaken judicial decisions. Legislatures can sometimes correct judicial incursions into the legislative function by simply exercising their proper function. Such ordinary corrective exercises of the judicial and legislative functions are not a matter of dialogue insofar as applying and changing the law according to the determinate meaning of the law is not a politically unjust form of interference with the co-ordinate branch’s function, at not least in the ordinary circumstances of politics.76 But in other cases, judicial and legislative

75 For the distinctive use of the concepts of ‘ambiguity’ and ‘vagueness’, see Lawrence Solum, “The Interpretation-Construction Distinction” (2010) 27 Constitutional Commentary 95.
76 See Webber above n 29 at p.20]
corrective interference with the alternate branch’s function will appear to be incursions for want of an understanding of the concept of a legal construction. Where the law is relevant but indeterminate in relation to whether its indeterminacy should be resolved in its interpretive application or through changes enacted for shifting reasons, courts and legislatures can both employ their legal functions to construct the underspecified meaning of the law, including correcting and contesting the alternate branch’s contributions to such construction. Judicial decisions that appear to ‘change’ the law are often neither determinate interpretive applications of the law, nor fully indeterminate ‘changes’ to the law, but rather candidate constructions of the law’s meaning left open by interpretation but structured by law. Legislative enactments that appear to ‘interpret’ the law’s meaning can also turn out not to change nor interpretively apply the law, but rather to constitute potential constructions of legally indeterminate meaning.

But what is it that makes dialogues constructive rather than conflictive contests between the branches? There are two conditions for constructive dialogue. First, constructive dialogue will not take as its subject any determinate legal rule and, second, it will require a democratically justifiable form of interaction between courts and legislatures. The first condition ensures that constructive dialogues will be consistent with the institutional independence and professional techniques that minimize the republican risk of judicial review. Any constructive dialogue will be limited by the determinate meaning of legal texts themselves, insofar as these can be ascertained using different legal techniques of reasoning and methods of interpretation. Of course, in the

77 It even seems possible for constructive dialogue to take place regarding unwritten constitutional rules, such as the Westminster norm of parliamentary supremacy, provided a determinate core legal effect of the rule is not the subject of the dialogue. This could be one way (although it might be stretch) of describing the contestation of the consistency of a “manner and form” restriction on the abolition of the Upper Chamber (Legislative Council) in the struggles between the alternating governments in the Lower House state legislature in New South Wales, the Australian and Commonwealth Courts, and the people of NSW, see Attorney General (New South Wales) v. Trethowan (1931) CLR 395 and Clayton v. Heffron (1960) 105 CLR 214.
contexts of both written and unwritten constitutions, there is a great deal of first-order disagreement about how to interpret constitutions.\textsuperscript{78} This would seem to suggest that rights constructions require some first-order agreement on how to discern the determinate meaning of the text of the constitutional bill of rights or on how a legal system’s unwritten hybrid rule of recognition and change restricts methods of statutory interpretation for discovering the determinate meaning of a statutory bill of rights.

Indeed, without \textit{some} threshold of agreement on the rules for recognizing determinately valid laws, there can be no valid consensus between adjudicative and legislative constructions.\textsuperscript{79} The professionalism of modern judges is tethered to the existence of some such threshold, however evolving or precarious it might be. The republican case for judicial review involving modern courts rests largely on the existence of some threshold of professional agreement, as the authors of the \textit{The Federalist} recognized in their arguments for judicial independence.\textsuperscript{80} This does not mean that constructions cannot exist in the face interpretive disagreements within the legal profession, or between legislatures and courts. Provided that a threshold of similar considerations of legal “fit” constrict the legal reasoning of legislators and judges, inevitable disagreements about the priority of these methods in different circumstances will leave room for political and adjudicative activity to resolve some vague or ambiguous legal rights.\textsuperscript{81} Courts engaged in constructive dialogue will look for \textit{positive} blind spots legislatures might have regarding how the application of their laws to

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\textsuperscript{79} Baude, “Constitutional Liquidation”, p. 62.
\textsuperscript{80} “...there is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information; so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilence breath of faction may poison the fountains of justice.” Alexander Hamilton, “No.81” in Hamilton, Jay, Madison, \textit{The Federalist Papers}, pp. 417-418.
\textsuperscript{81} McConnell, above n 43, at 1786.
particular cases and circumstances implicate rights. Unlike the interrogative and interruptive norms of dialogue, this basic condition on constructive dialogue orients courts towards a legally constrained form of reasoning suited to their institutional independence and professional practices, and away from contemplating ‘justified infringements’ of rights which would fall outside the bounds of constructions of what rights are. This alone renders the norm of constructive dialogue superior to its rivals.

The second condition differentiates republican constructions from politically unjust interpretations of legal rights that would otherwise appear to be “permissible” candidates for construction as a matter of their legal indeterminacy. Republican constructions can involve moral reasoning in the area of indeterminacy beyond the dimension of “fit”, and where the order or blend of techniques for distinguishing determinate from indeterminate legal rules is itself indeterminate, reasoning about legal meaning will be morally constrained by the requirement that its conclusions must be the result of co-ordinated interactions between courts and legislatures which are justifiable in relation to the risk of the political injustice of domination. This will require what Madison called a “course of authoritative expositions sufficiently deliberate, uniform, and settled” in which each branch (which for him included the Presidential executive, but need not in a Parliamentary system) directly engages with both the indeterminate question of law and the other branch’s engagement. Madison vaguely indicated that this course of practice would have a moral dimension insofar as it

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82 As mentioned above, constructive dialogue at least partially overlaps with Rosalind Dixon’s salutary recommendation that judges address “blind spots of application” in dialogue with legislatures: Dixon, “The Core Case for Weak-Form Judicial Review” at 2214.
83 This is why Webber contrasts rights constructions with the dominant proportionality approach to reasoning about rights as ‘justified’ or ‘unjustified infringements’ on rights, see Webber, above n 52, pp. 165-173.
84 Caleb Nelson compares this space of “permissible” legal constructions to the range of permissible interpretations of rules statutes grant administrative agencies under the doctrine of Chevron deference. C. Nelson, “Stare Decisis and Demonstrably Erroneous Precedents” at 5-8.
would “carry with it the public sanction”. Now, how will a norm guiding dialogue between courts and legislatures towards the construction of rights ensure that they have the equal sanction of citizens? It will not prove satisfactory to say that, with alternating considerations of the opposite branch’s prospective rights construction, the construction that de facto lasts or appears to “synthesize” and track “public opinion” is the de jure valid construction of legal meaning. Popular opinion might favour interactions between courts and legislatures which undermine the determinate “fit” of legal rules, or unequally subordinate the practical reasoning of citizens over changes to the law to unelected judges. Nor will it suffice to say that just rights constructions require that legislatures and courts both exercise a “partial-agency” over legal interpretation. This fails to explain what would be wrong with legislatures ceding all but the most obliging and minimal exercise of their partial agency in response to aggressive judicial interrogations or interruptions.

The norm of constructive dialogue will only justify constructions where courts recognize that the risks courts and legislatures pose to political justice requires that legislatures have a responsibility to construct rights that is equal to their own. The norm also entails that justifiable constructions will require legislatures to actively exercise this responsibility to correct judicial applications of invalid laws, invalidations of valid laws, and judicial interpretations of indeterminate legal rights they disagree with. In simpler words, it requires mutually reinforcing forms of judicial sharing and legislative caring. Judicial sharing of the constructive role cannot be

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90 G Webber, above n 4, at 457.
a matter of mere verbiage. Professions of judicial deference, or declarations of the existence of dialogue between the branches, are insufficient to instantiate the norm of constructive dialogue. Constructive dialogue is not tantamount to judicial deference or opinions declaring courts committed to dialogue. Courts deferentially upholding invalid laws pose a risk to political justice, and declarations of dialogue can be used to mask dominating forms of judicial interrogation and interruption. Declarations of judicial supremacy, that is, assertions of the exclusive judicial authority to constructively interpret the indeterminate law, even if limited to legal rights, are themselves inimical to the norm of constructive dialogue. This is because they actively discriminate against the equal responsibility of legislatures to construct the law in particular cases and contribute to broader norms of dialogue in which legislatures do not exercise, and are not expected to exercise, their responsibility to challenge prospective judicial constructions.\footnote{This is also why judicial supremacy cannot itself be a justifiable republican construction, as it would preclude the conditions necessary for its own just affirmation. Whittington, above n 70, at 784; See also, Stephen Gardbaum, “What is Judicial Supremacy?” in G. Jacobson and M. Score eds., Comparative Constitutional Theory (Elgar Publishing, forthcoming, 2017); For an explicit justification of judicial supremacy, see L. Alexander and F. Schauer, “On Extrajudicial Constitutional Interpretation” (1997) 110(7) Harvard Law Review 1359.} Courts declaring themselves committed to constructive dialogue must make good on their words by restricting the doctrine of \textit{res judicata} (the matter is judged) to discrete cases as they relate to particular controversies and parties, and relaxing the vertical and horizontal dimensions of the doctrine of \textit{stare decisis} (stand by prior decisions) to treat statutes elaborating prospective rights constructions, and especially those

\footnote{\textit{R. v. Mills} [1999] 3 S.C.R. 668 at [55] genuine but, alas, not robust over time.}
enacted in the wake of judicial decisions implicating the same indeterminate rights, as rival but equal candidates for precedents to relevant judicial holdings.93

Legitimate constructions also depend on a legislative duty of care. The robust instantiation of the norm of constructive dialogue demands that legislatures complement judicial commitments to sharing the interpretive role by exercising their responsibility to enact statutes pre-empting or responding to unjust exercises of judicial review and by offering amendments and affirmations to prospective judicial rights constructions. If legislatures cannot be expected to enact statutes contradicting judicial decisions that invoke purported rights constructions to apply invalid laws or invalidate valid laws, then no amount of judicial willingness to share the interpretive role will instantiate the norm. On the other hand, legislative replies to judicial rights constructions will not contribute to the norm if they simply contradict or preclude the outcome of a particular judicial decision without at least deliberately considering the rights implications of the changes the statute will enact into law –even if the considered rights implications are quite distinct from those of the

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93 If the common law doctrine of *res judicata* is taken to preclude the reconsideration of laws a court (of any level) has refused to apply on the basis of reasoning involving a prospective rights construction, even in the face of new litigants and laws raising alternative constructions, then legislatures will be unable to contest or affirm such prospective constructions. Restricting *res judicata* to discrete cases and circumstances need not involve the relitigation of legal issues, as allowing the relitigation of indeterminate constructions will not prevent prior holdings from binding past litigants in the particular circumstances related to their case and future litigants insofar as the issues they raise in their own circumstances touch on judicial constructions which have been affirmed by legislation. In fact, restricting *res judicata* in this way could return the doctrine to its Blackstonian roots. If the common law doctrine of *stare decisis* is taken to exclude consideration of legislation enacting what could be reasonably understood to be alternative rights constructions, either by lower courts bound to vertically obey the constructive holdings of higher courts, or higher courts bound to follow their past commitment to one reasonable rights construction, then legislatures will not be able to confine, contest, or affirm such constructions. Expanding *stare decisis* to allow courts to consider alternative rights constructions contradicting those of higher courts or past decisions need not free courts from treating past judicial constructions as binding when they have been affirmed by legislation, nor from treating the precedential judicial enforcement of determinate rights as binding regardless of its legislative contestation. D. Baker, above n 89, pp. 92-106; Loosening the doctrine of *stare decisis* in this fashion is far more reasonable and democratic than what some common law courts have done with the doctrine, and could transform the binding force of holdings regarding indeterminate rights back into the form of “persuasive reasoning” it resembled at the time when constitutional judicial review was first introduced into the courts of the U.S. in its founding era. Bernadette Meyler, “Towards A Common Law Originalism” (2006) 59 Stanford Law Review 551, 579-580; For recent Canadian Supreme Court cases showing evidence of disdain for the doctrine of *stare decisis* see Saskatchewan Federation of Labour v. Saskatchewan [2015] 1 S.C.R. 245 paras. 32 and 33, and Canada v Bedford, [2013] 3 S.C.R. 1101, para. 42.
courts.\textsuperscript{94} If co-ordinated with a judiciary that takes its duty to share the constructive role seriously, the legislative responsibility of care should come to inform its responsiveness to the practical reasoning of citizens concerning how legal rights relate to disagreements regarding different political issues.

While proponents of interrogative and interpretive dialogue claim legislative acquiescence to judicial law-making as a potential indicator of democratically accountable adjudication, these norms of dialogue make any legislative contestation of judicial law-making concerning rights almost impossible. It is hard to see how the failure of legislatures to respond to judicial interrogations or interruptions could be taken as an indicator of the democratic credentials of such risky forms of adjudication.\textsuperscript{95} The reality is that the lack of a particular legislative reply to a particular judicial decision implicating rights will increase in democratic significance the more citizens and legislators alike come to expect that \textit{in general} legislatures should and will contest judicial decisions they disagree with. The more citizens and legislators themselves come to expect that legislatures should and will contest judicial decisions they disagree with, the more plausible it will be for courts to take legislative affirmations or amendments to adjudicative holdings as contributing to the justification of such constructions. Conversely, the more courts can be expected to share the constructive role, the more plausible it will be for judges, legislators, and citizens to take past judicial deference or forbearance from intervening in legal areas where political activity has carved out a “longstanding consensus” as contributing to the justification of the rights

\textsuperscript{94} Though the view that legislatures are not concerned with rights or legal matters is often exaggerated, and would be counteracted by the existence of something like a norm of constructive dialogue. See Webber, above n 52, pp. 168-173.

\textsuperscript{95} This view of acquiescence as dialogue is endorsed in one of the most seminal discussions of the metaphor: P. Hogg and 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 \textit{Osgoode Hall Law Journal} 75.
constructions forming part of this consensus. Extra-judicial rights constructions can emerge from such political consensus, not as a matter of one election or poll, but from “the acquiescence of many different decision makers over a considerable period of time”. Insofar as they require both legislatures’ responsive deliberation and adjudicative consideration, legal constructions are inherently a matter of dialogue.

When a responsive line can be drawn between the equal practical reasoning of citizens, the legislative reasoning of equal democratic representatives, and judicial reasoning concerning indeterminate rights, dialogue about such rights will stand a better chance of concluding in politically just rights constructions. Tracing this line will depend on the particular arrangements of different kinds of modern courts and legislature in different constitutional and political contexts. But wherever courts and legislatures are characterized by the general modern features discussed above, the line will more equally incorporate the practical reasoning of citizens into changes to the law implicating indeterminate rights where courts share their interpretive role with legislatures and legislatures actively take their collective stake in such shared construction as a variable they will be held accountable for. Beyond the general need for constructions to be legally indeterminate and settled by deliberative political and adjudicative inter-institution interactions, Madison himself was quite vague as to precisely when ‘liquidations’ of legal rights might become justifiably established. The norm of constructive dialogue improves on this vagueness by adding the expectation of active legislative contestations of adjudicative specifications of indeterminate rights as an evaluative condition of justified constructions. Even so, it shares the opacity of Madison’s

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97 Ibid.
98 Both jointly, as an institution representing the people as a single whole and as members of the government responsible for setting and executing the legislative agenda, and singularly, as representative agents within that legislative institution and its dominant government remain individually subject to the demands of their own particular constituencies.
remarks with regard to the nature and order of the methods of interpretation used to circumscribe the limits of indeterminacy, and the precise number and character of legislative and judicial affirmations of indeterminate conceptions of rights necessary to establish justified rights constructions. In spite of this vagueness, the norm establishes that, if judicial review is part of a constitutional system, it is in the midst of constitutional dialogues featuring the shared responsibility of courts and legislatures for indeterminate legal rights that citizens themselves stand the best chance of looking both their modern representatives and judges in the eye as equals with different jobs.99

V. Conclusion:

Which norms of dialogue inform contemporary interactions between courts and legislatures in actual constitutional systems? Are these norms encouraged or discouraged by particular ways of arranging courts and legislatures? What can be said on the theory offered thus far is that the interrogative and interruptive reasons for favouring dialogue between courts and legislatures jar with the basic institutional features and practical functions of modern republican institutions. As norms, they both twist modern judicial institutions and practices towards more ancient political purposes better suited to the representative judicial assemblies of the Roman and Athenian past. It may be that reforming modern courts to have more ancient institutional features, such as periodic elections by lot, could reduce the risk the exercise of judicial review poses to political justice by refusing to apply valid statutes, upholding invalid laws, and unequally changing the law through the binding effect of adjudicative reasoning in such cases.100 But such reforms are liable to feature

99 Pettit, above n 6, at 177-179.
100 Thanks to Ben Ewing for correctly insisting that I address this possibility. I do not directly address the peculiar mix of modern and ancient judicial institutions in modern contestatory judicial elections, but I take it that even the more modern mode of responsive representation has the liability of interfering with the point of judicial independence and professionalism. For an excellent discussion of this difficulty see M. Zeisberg, “Should We Elect the Supreme Court?” (2009) 7(4) Perspectives on Politics 785.
their own risks, especially to the application of legal rules to particular circumstances, and even to the overall coherence of changes to the law as a political community reasons together about the direction of state interference. Unlike such risky norms of dialogue or institutional reforms, dialogues which limit and enable the state’s interference in the lives of its citizens will prove more likely to secure them from the political injustice of domination where courts and legislatures are equally held to account for the construction of indeterminate rights. And with such equal responsibility, comes equal suspicion.