# EXPOUNDING CONSTITUTIONAL SCHOLARSHIP

**EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY**. Grant Huscroft, ed.[1] New York, Cambridge University Press. 2008. Pp. ix + 319. $85.00.

*Grégoire C.N. Webber*[2]

## INTRODUCTION

In the first pages of *Law and Disagreement*, Jeremy Waldron reminds the reader that much of legal and political-philosophical scholarship is *monological*: the scholar presents a theory "in exactly the same spirit" as all the others; that is, by "excluding" their principles from his "conceptions of a well-ordered society", just as they exclude "[his] principles from [theirs]".[3] If the scholar engages with the competing theories of others, it is primarily "to prepare a defence of his own view against possible objections"; beyond this delimited interaction, scholars merely present "for the audience, for the public" different theories from which to select.[4] They do not, as it were, seek to advance scholarship through discussion and debate—that is, with a *dialogical* orientation.[5]

---

1. Professor and Associate Dean, Faculty of Law, University of Western Ontario.

2. B.C.L., LL.B. (McGill), D.Phil. (Oxon.), Associate Fellow, Centre for Human Rights and Legal Pluralism, McGill University. E-mail: *gregoire.webber@elf.mcgill.ca*. I would like to thank Graham Gee and Natasha Kim for instructive comments on a previous draft.

3. JEREMY WALDRON, LAW AND DISAGREEMENT 2 (1999).

4. *Id.*

5. A similar infliction is said to extend to our present undertaking—book reviewing—whereby "[t]he incentives are to write your own book and not to delay by reviewing those of others, all the while hoping that someone will review your book when it is published." Michael Taggart, *Gardens or Graveyards of Scholarship?* Festschriften *in the Literature of the Common Law*, 22 OXFORD J. LEGAL STUD. 227, 234 (2002). But almost by definition, book reviewing engages in a dialogical orientation to scholarship. The contrary "incentives" at play operate primarily in a monological orientation.

This view confronts the vocation scholars like to view themselves as engaged in: not a centered-on-self activity of demarking one's scholarship *from* all the others, but a selfless grappling of ideas *with* all the others. Indeed, this vocation plays itself out prior to the printed word of scholarship, with scholars presenting work in various venues and fora, seeking each other's advice on how best to ameliorate an argument, or whether it is worth making at all.[6] Of course, the dialogical orientation of scholarship occasionally does extend proudly to the printed word, as some of the great academic debates like the H.L.A. Hart and Lon L. Fuller debate on law and morality illustrate forcefully.[7] Moreover, journal symposia devoted to a scholar's work, or even single publication also exhibit the potential of a dialogical orientation to scholarship. And one would be remiss for not mentioning how students (and authors) of judicial opinions benefit from the dialogical disposition that sometimes animate majority and dissenting judgments, where judges seek to answer claims made in the other opinion.[8] Yet, despite the strength of contributions of dialogical scholarship, it remains in large measure the exception and a monological orientation the norm.

Grant Huscroft's edited collection of essays stands as a testament to how a dialogical orientation contributes to scholarship, and to each scholar's thinking, both with respect to the printed word and to that which precedes it. The essays in *Expounding the Constitution: Essays in Constitutional Theory* followed a colloquium where, as David Dyzenhaus explains at the beginning of his essay, the colloquium organizer (and subsequent collection editor) "prohibited formal presentation of papers, thus ensuring that the two days were entirely devoted to discussion" (p. 138, n. *). The result is a collection distinguished by the extent to which the individual essays engage with each other, as well as with the work of the contributors' previous scholarship. The collection reflects, for the most part, a con-

6. The first footnote in an academic article and the acknowledgements page of a book indicate to the reader the care with which—i.e. the *dialogical disposition* with which—the author tested the arguments before sharing them with the wider academic public.

7. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957) and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957). *See also* H.L.A. Hart, *Book Review: "The Morality of Law,"* 78 HARV. L. REV. 1281 (1965) reviewing LON L. FULLER, THE MORALITY OF LAW (1964).

8. Reference could also be made to the excellent exchanges in some blogs, such as Brian Leiter's Legal Philosophy Blog (www.leiterlegalphilosophy.typepad.com/) and Lawence Solum's Legal Theory Blog (lsolum.typepad.com/legaltheory).

certed effort on their part to speak to each other, and not only past each other to the audience. This feature is not, of course, altogether uncommon for a collection of essays growing out of a conference or colloquium, but the degree to which the essays in this collection do so explicitly and thematically is doubtless grounded in the academic approach at the gathering together of these American, Australian, British, Canadian, and New Zealand scholars.

Huscroft divides the essays into three themes: "I: Morality and the Enterprise of Interpretation"; "II: Judicial Review, Legitimacy, and Justification"; and "III: Written and Unwritten Constitutional Principles," though this grouping should not suggest that the essays and their authors do not engage beyond these permeable boundaries. I will begin with a review of the essays in the thematic ordering proposed by Huscroft; I hope to do so in a manner that avoids duplicating the excellent *survol* provided in Huscroft's introductory chapter. And so as to avoid any "implied possible invidious distinction" between the essays by omitting reference to some,[9] a word or two will be said on each one of them, even if not all engage quite so enthusiastically in the dialogical orientation that is a feature of the collection. This initial review will proceed, for the most part, in a monological orientation, for each essay contributes something to scholarship, something "for the public, for the audience" that is important to share (I). I will then, in an effort to accentuate the debates between the essays, explore the conversations carried out between the authors, both explicitly and thematically, with the aim to illustrate the dialogical orientation that permeates the collection (II). It is hoped that the review in the first half will allow the reader to see where the essays speak to each other, and how they might have done so more.

## I. ESSAYS FOR THE PUBLIC, FOR THE AUDIENCE

Part I begins with a challenging essay by Steven D. Smith, in which he asks: What does constitutional interpretation interpret? Smith's essay is appropriately positioned first: it extols a mode of scholarship, an invitation to engage with the different paradigms at play in constitutional theory, and to grapple with them. The answer to the seemingly obvious question raised proves elusive,

9. Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 633 (1962) quoted in Taggart, *supra* note 5, at 235.

even for Smith, who does not attempt an answer. Rather, Smith's approach is to examine and analyse the practice of constitutional interpretation. Although there is, for all to see, an "actual, practical activity" of constitutional interpretation (pp. 22–23), the role played by the expression "the constitution" in this activity and the many theoretical models that seek to guide it is rather like that of a *placeholder*. For some, what is being interpreted is the "enactors' intentions" or the "words of the document in historical context" or the "principles within the constitution." These approaches all differ, but all share the fact that they command "no consensus" (p. 26)—they are all "reform proposals" for how constitutional interpretation *should* be done (p. 27), not accounts of what *is* being done.[10] So while students of constitutional interpretation all consider their activity to be one of interpreting "the constitution," "some people use the phrase to refer to one sort of object while others use it to refer to another sort of object" (p. 34). In this way, "the constitution" is in truth a "facilitative modern equivocation" that allows us "to suppress that uncertainty and dissensus in order to carry on" that enterprise we call constitutional interpretation (p. 36). Perhaps the placeholder *the constitution* is helpful as a "myth" that "unite[s] us as a people" (p. 36), but whatever the virtue of proceeding this way, Smith's exercise is devoted, not to justifying the existing practice, but rather to assisting us in understanding "what on earth is going on" (p. 37).

Jeremy Waldron—whose scholarship, and especially his recent "Core of the Case Against Judicial Review,"[11] is examined by several essays—explores the differences between legislative and judicial reasoning. Waldron has previously argued that judicial reasoning can be "artificial and distorted" and burdened with the "laborious discussion of precedent", with the result that "good faith disagreement about rights get[s] pushed to the margins."[12] In this essay, Waldron argues that judicial reasoning should not aspire to be more—in fact, that it is appropriately constrained by the discussion of precedent and other sources of law. While reasons for judgment tend to resemble "the careful, measured, deliberative, and analytic way that moral philoso-

10. A point also made, among others, by Jed Rubenfeld, in FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178 (2001), and REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 1 (2005).

11. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

12. *Id.* at 1383.

phers think moral reasoners should reason" (p. 39), they do not exhibit all the virtues of moral reasoning, *and appropriately so*. For judges operate as "government officials, in the context of political institutions"—"[t]hey are not deciding what to do as individuals; they are making decisions for and about a whole society" (p. 44). The task of the judge, after all, is to perform justice *according to law*, and not to perform justice irrespective of law.[13] The task is not akin to autonomous individual moral-reasoning; reasoning morally in the name of society requires something else of the judge. In large measure, it "means discovering the results of *other people's moral reasoning*" (p. 49, emphasis in original), such as the moral reasoning of the constitution's framers or of legislators or of earlier judges, and relying on *that* moral reasoning. In this way, Waldron relies on a thesis expounded by John Finnis that legal reasoning, with its familiar sources of reasoning—"statutes and statute-based rules, common law rules, and customs"—"is (at least in large part) technical reasoning [and] not moral reasoning."[14] As we will see, this characterisation is challenged by several of the essays.

By contrast, legislative reasoning for Waldron is a way of reasoning in the name of society about important moral issues without being bound to "keep[] faith with the existing commitments of the society" (p. 59)—that is, it is reasoning "as though for the first time," "undistracted" (p. 60). Of course, it does not follow that legislatures should owe no allegiance to the acts of their predecessors; they should and experience illustrates that they do. But the legislature is a place where the existing commitments of society may be changed; indeed, it is a place where members are elected after having made promises of change. This ability to "talk directly to the issues involved" (p. 60) is important in the case of a bill of rights, where legal formulations tend to be "designed simply to finesse the very real and reasonable disagreements that are inevitable" (p. 64). Legislative reasoning should be preferred "to confront these disagreements directly," rather than judicial reasoning which proceeds by framing the questions in play as the "interpretation of those bland [legal] formulations" (p. 64). Given the differences between legislative and judicial reasoning, not only should one not evaluate the success of one mode of reasoning against the measure of the other,

13. See the discussion in James Allan's essay (p. 182).

14. John Finnis, *Natural Law and Legal Reasoning*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 142 (Robert P. George ed., 1992), referred to by Waldron on p. 41, n.52.

but one "should probably not use the judicial model as a basis for reviewing the decision made in the legislative model" either (p. 64).

Albeit from a different angle, W.J. Waluchow also tackles the question of judicial moral reasoning. Whereas Waldron focuses expressly on judicial moral reasoning, Waluchow presents his argument through the lens of the "morality to which bills of rights might sensibly be thought to make reference" (p. 67), although given the prominence Waluchow ascribes to the judicial role with regards to bills of rights, the distinction may be immaterial. He attempts to situate the relevant world of morality that judges may appeal to between "Platonic morality"—or what Waldron might term the uninhibited moral reasoning of philosophers—and "conventional or positive morality"—or the "set of beliefs and norms of the prevailing group(s) within [the] community" (p. 66). Waluchow argues for a community constitutional morality (p. 76). The term remains somewhat elusive throughout his account, but draws on the idea of a Rawlsian "overlapping consensus" (p. 69). The heart of the argument relies on a distinction between moral opinions and moral commitments and the "requirement of reflective equilibrium": the judge must confront the community's "mere moral *opinions*" (say, as set out in discriminatory legislation) with their "true moral commitments" (say, as set out in a bill of rights) (pp. 71–75, emphasis in original). The latter draw on the "constitutional law and practices" of the community (p. 76) and "precedent-setting legal judgments" of the courts (p. 83), perhaps in a manner similar to the sources Waldron identifies with the technical aspect of judicial moral-reasoning. Unfortunately, Waluchow does not explain how much is actually "committed to" by radically unspecified constitutional rights-provisions, nor does he address Waldron's point that bills of rights are drafted to *avoid*, not *overcome* reasonable disagreement. The reader is also left wondering on what basis a judge may legitimately peg a community's "opinion" as such rather than understanding it as a "judgment about the true commitments of the community," a task which he reserves for the judge (p. 81).

Bradley W. Miller challenges the orthodoxy gripping judicial reasoning with respect to "two-stage" bills of rights; that is, the adjudicative structures that "sever the definition of a right from its limitation," as are common in Canada and Europe (p.

93).[15] Although the presence of a limitation clause is "often thought of as an advance over the American model," Miller demonstrates how the case law is "exemplary of a number of problems" that might give pause before endorsing a rejection of the American approach (p. 93). Limitation clauses, properly understood, draw attention to "important goods that must be borne in mind when determining the scope of rights" (p. 94), goods that include, *inter alia*, the protection of public order, health and morals, and the protection of the rights and freedoms of others.[16] Yet, despite the explicit relation between rights and goods set out in a limitation clause, Miller demonstrates how judges in Canada isolate rights from these goods. Instead, they turn to limitation clauses only after declaring that "the right has been *violated*," and then ask whether such violation may be justified under the limitation clause (p. 95, emphasis in original). The result is that an under-defined right—which serves as no more than an "indeterminate conclusion" (p. 95)—trades "on the higher prestige and greater strength of a moral right that provides an undefeated reason for action" (p. 96). By denying that reasonable limits are "inherent in the rights themselves" (p. 96) rather than justified violations of the rights, judicial rights-talk participates in the inflation of rights-claims and the concomitant impoverishment of political discourse.[17] For Miller, what the two-stage model of justifying rights' violations fails to grasp is that the "*justification* of a right *violation*" is in truth the "*defeat* of the claim of right," having considered the other goods at play (p. 96, emphases in original).

Just as Smith's essay began Part I of the collection with a call for scholars to explore each other's vocabulary in an effort to avoid talking past each other, Larry Alexander's essay begins Part II with a similar orientation by seeking to "disentangle the issues" of constitutions, judicial review, moral rights, and democracy. But for such disentanglement, Alexander fears that "an answer to one [question] is taken to be an answer to another" (p. 119). Beginning with the *placeholder challenge* set by Smith, Alexander reviews how "the line between constitutions and or-

15. For an overview and critique of this approach in Canada, see THE LIMITATION OF CHARTER RIGHTS: CRITICAL ESSAYS ON R V. OAKES (Luc B. Tremblay and Grégoire C.N. Webber eds., 2009).

16. *See* EUROPEAN CONVENTION ON HUMAN RIGHTS. Accessible at http://www.echr.coe.int/ECHR/EN/-Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/.

17. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

dinary laws [is] a contentious one" (p. 121). Although constitutions are referred to as "higher law" that sanctions "[o]rdinary law as valid law" (p. 120), there is no ready standard by which to discriminate the constitution from ordinary law. For example, some parts of the U.S. Constitution "are higher up the validity chain than others," and not all constitutions are "entrenched against majority repeal," whereas "ordinary laws *may* be entrenched" (p. 120, emphasis in original). Moreover, not all constitutions are written. In short, "neither writtenness nor entrenchment is a necessary or sufficient characteristic of constitutions" (p. 121). Alexander proposes that instead of searching for some elusive definition, "acceptance" is what constitutions ultimately rest on. Given that in both the United Kingdom and the United States, and despite their different constitutional traditions, the legislature accepts constraints on what it should enact, Alexander frames the question for study as: "Should we formalize the constitution, and if so, how much law should be constitutionalized as opposed to left to democratic majorities?" (p. 123). As we will see below, however, several of the essays defending unwritten constitutionalism impliedly reject this framing of the question. Nevertheless, Alexander's "modest hope" of helping debaters avoid "arguing past each other" is to be celebrated in the spirit of dialogical scholarship (p. 137).

David Dyzenhaus' essay seeks to illustrate the "incoherence of constitutional positivism," primarily by relying on the scholarship of Waldron and Goldsworthy and their focus on the legislature as the final authority "over the interpretation of our society's constitutional and human rights commitments" (p. 140). Dyzenhaus argues that Waldron is inconsistent in opposing strong-form judicial review but *not* weak-form judicial review or judicial review of executive action (p. 143). For the distinction does not rest on "constitutional form"—the "formal structure prescribed by some written text"—but on how "seriously the public takes what judges say," which Waldron surely must respect (p. 142). Moreover, he argues that the legislative rights-culture Waldron assumes obtains only because legislatures are "promoted—even forced—by other institutions" to engage with rights, such that denying judicial review may undermine the rights-culture he posits to sustain his core case against judicial review (p. 148). In short, the challenge for—perhaps the incoherence of—constitutional positivism comes from the attempt to create "a world in which there is law but no judges" (p. 154).

A similar argument animates Dyzenhaus' challenge to Goldsworthy: judges and judicial decision-making cannot be divorced from law. From Dyzenhaus' judicial perspective, "the moment of indeterminacy, in the sense that Goldsworthy uses that term, never arrives" (p. 155). To maintain such a position would require judges to follow "a positivist ideal of fidelity to law" with "a completely codified legal order," which has not been realized (p. 156). The judges' interpretative role must, by necessity, go "far beyond what political positivism considers ideal" (p. 157). The result for Dyzenhaus is that, measured against the "real world of constitutionalism" (p. 159), Waldron and Goldsworthy and the school of constitutional positivism need to propose "grander proposals for legal reform if they are to avoid incoherence" (p. 160).

James Allan's essay engages the reader in an intellectual exercise: what if Professor Waldron were Justice Waldron? Drawing on much of Waldron's scholarship, and especially on his "Core of the Case Against Judicial Review,"[18] Allan suggests that Waldron J., guided by the goal to "keep to a minimum the moral input [. . .] of unelected judges," would adopt a "Holmesian or Frankurterite or Posnerite approach," that is, a "can't help it" or "puke test" before overturning legislation in the name of constitutional rights (p. 167). The reader will be reminded of James B. Thayer's famous 1893 article expounding the *rule of the clear mistake*, where it is argued that the court should be empowered to disregard legislation only where the constitutional mistake is "so clear that it is not open to rational question."[19] Echoing Dyzenhaus' "real world of constitutionalism," but in a manner than maintains Waldron's place within it, Allan suggests that this Waldron-esque judicial approach will "not [be] perfect, but as good as it gets in practice" (p. 167). Indeed, Allan cleverly has Waldron J. appeal to "a sort of redirected Dworkinianism," whereby the "best fit" is "an overarching commitment by society to a right to participate in social decision-making, even about rights" (p. 170).

In her essay, Aileen Kavanagh engages judicial deference. Rejecting Dyzenhaus' distinction between "deference as respect" and "deference as submission,"[20] Kavanagh argues that

18. *See* Waldron, *supra* note 11.

19. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

20. David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 279 (Michael Taggart ed., 1997).

deference—"a matter of assigning weight to the judgment of another"—is a matter of *degree*, with minimal judicial deference owed to the elected branches at all times for reasons of inter-institutional comity or respect (pp. 185, 188). Judges reviewing legislation or executive action "are secondary rather than primary decision-makers," with the consequence that they should not invalidate a decision "*merely* on the basis that they disagree with it" (p. 191, emphasis in original). But whereas minimal deference is always owed, *substantial* deference is owed only exceptionally (p. 191), and must be earned on the grounds of superior competence, expertise, or legitimacy. That said, Kavanagh also provides for an alternative source of deference: a showing or signalling or appearance of respect even where no great weight is attributed to the judgment of another. These are prudential reasons favouring deference: the decision not to fight a fight the court is bound to lose (p. 188). In addition to this important point, the essay also carefully reviews how "it is too simplistic to equate striking down with activitism and failure to strike down with deference" (p. 213), given the different interpretative techniques judges may employ to revise legislation short of striking it down. Irrespective of whether all would agree with Kavanagh's view on the exceptional nature of substantial deference, many could agree with her framing of the debate and of the questions requiring consideration.

Part III of the collection explores the world of unwritten constitutionalism, with two essays arguing for the inevitability of judicial reliance on unwritten law and one denying the necessary connection. T.R.S. Allan pursues the citizen-centered argument developed in his book *Constitutional Justice*.[21] Beginning with a similar indictment as found at the close of Dyzenhaus' essay, Allan argues that "the legal positivist's notion of law" cannot account "for much of our legal experience" (p. 219). That experience associates law and liberty and justice in a way that is not "wholly dependent on the specific wording of a particular constitutional text," in a way that does not treat law as "an instrument of government policy" (p. 219). Instead, by relying on a theory of "the rule of law" or "the special constitutional value of legality" inspired by Fuller, Allan develops an account of the concept of law centered on the citizen. While Allan's account "ascribes a central role to courts as authoritative interpreters of law" (p.

21. T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001).

224), he argues that "it is the citizen who is the ultimate arbiter of the law," deciding as a "matter of moral conviction, whether or not a (purported) rule *deserves* obedience" (p. 235, emphasis in original). The consequences for formal law are significant: "whatever authority is granted to statutes or precedents . . . is strictly temporary and tentative authority" (p. 235). Allan's thesis is doubtless challenging, even radical—perhaps itself taking some distance from "much of our legal experience."

Beginning on a modest tone—"[d]efending the idea of 'unwritten law' has never been easy" (p. 245)—Mark D. Walters' essay on unwritten constitutionalism notes how the "progressive march of legal theory" may be said to be "away from medieval notions of law as customs practiced time out of mind" and "away from the fiction that judges discover law" towards "modern notions of law as creative political acts recorded in writing" (p. 245). From this vantage point, unwritten constitutionalism is a curious animal: it "somehow seems to *be* without ever having been *made*" (p. 246). But relying on a historical review, Walters suggests that the expressions of written or unwritten should not be taken too literally; they may rather be "*metaphors* that symbolise distinctive approaches to constitutional interpretation" (p. 254, emphasis in original): written law (or: law-as-sovereign-will) should be understood as a "legal proposition that is set by a lawmaking using a linguistic formula that is to be taken as canonical by judges" (p. 253); by contrast, unwritten law (or: law-as-reason) should be understood as a "legal proposition that is derived through a discourse of reason" that engages in an activity of "oscillation between the specific propositions and the general principles they presuppose" (pp. 253–54). For Walters, the discourse of reason is more basic than posited law: "constitutional text is not just supplemented by unwritten principles; it *rests* upon them" (p. 265, emphasis added).

Finally, Jeffrey Goldsworthy's essay defends written law from the claims of judicially-enforceable unwritten constitutional principles, including those made by T.R.S. Allan, Dyzenhaus, and Walters. Drawing on his own historical review of parliamentary sovereignty,[22] he argues that while it was (and continues to be) "universally accepted that Parliament's authority was subject to limits," these limits "were deliberately classified as moral rather than as legal" (p. 283). There were dangers in awarding

22. JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT, HISTORY AND PHILOSOPHY (1999).

legal force to these moral limits, just as there were in not doing so, but in the end "the danger of the law thereby corrupting or annulling its own authority was widely regarded as more to be feared than the danger of acquiescence in parliamentary tyranny" (p. 283). And in response to proponents of unwritten constitutionalism who view unwritten law as that which is necessarily presupposed by law, implied by the constitution, or inherent to the common law, Goldsworthy explains how this results in allowing "judges [to] add to the constitution anything they believe to be practically necessary to satisfy contemporary values or expectations," which "surely cannot be right" (p. 308). Otherwise, "a constitution is just a set of abstract objectives, which the judges can choose to implement in any way they think fit" (p. 309). And surely that cannot be right either.

## II. A DIALOGICAL ORIENTATION TO SCHOLARSHIP

The essays comprising *Expounding the Constitution* all merit attention within a monological orientation to scholarship: they all offer "to the audience, to the public" an idea, a thought that merits sharing. Chief among those important contributions are the essays by Smith and Alexander, which remind the reader of the importance of clarity in exposition in employing terms that are more likely to camouflage rather than to illuminate meaning. (In this spirit, consider, for example, the countless potentially different uses to which "liberal" or "value" is put in contemporary constitutional scholarship.) In addition, James Allan has the reader embark on a mind game on the travails of Justice Waldron, the subject-matter of many constitutional theory seminars no doubt. For his part, Miller challenges an area of judicial decision-making that has largely escaped fundamental theoretical challenge: the logic of defining constitutional rights prior to engaging a limitation analysis.[23] But the strength of this collection of essays extends beyond the cumulative importance of these and other contributions; it lies in their interaction and cross-fertilization. Huscroft's stewardship engages the reader in a dialogical *mode* of scholarship that expounds not only the constitution, but constitutional scholarship more generally.

The authors' engagement with each other is both explicit and thematic. Of course, the explicit can be superficial, with a

23. My sympathies with Miller's argument draw from my doctoral dissertation on this question, see G.C.N. WEBBER, LIMITATION OF CONSTITUTIONAL RIGHTS AS A NEGOTIATING OF POLITICAL LEGITIMACY (DPhil thesis, University of Oxford, 2008).

mere footnote reference directing the reader to another essay within the collection grappling with the same question, without more. But even this perhaps superficial engagement should not be dismissed too lightly, as it provides the reader with a sense of coherence for the whole. In this way, it is apt to note that all but two of the eleven essays refer to at least one other essay in the collection,[24] with some referring to four and seven other essays.[25] Moreover, all essays engage with the other contributors' work, including the two which did not refer to essays in the present collection. Now, the dialogical orientation of the collection is deeper than this superficial account, and the essays by Dyzenhaus, Walters, and Goldsworthy are exemplary in this respect.

As reviewed above, Dyzenhaus devotes his essay to reviewing the "constitutional positivism" of Waldron and Goldsworthy. Beyond the review and criticism of their arguments, Dyzenhaus addresses Waldron's essay in the collection by maintaining that "constitutional positivists are just as prone as common law enthusiasts, if not more so, to romanticize their favoured institution" (p. 147), a proposition some may find surprising when comparing the essays by Waldron and Goldsworthy with those by Waluchow and T.R.S. Allan. He challenges Waldron's argument that judicial moral reasoning is inferior to legislative moral reasoning by maintaining that reasons for judgment—with their references to precedent and text and other like sources—are an expression of "the commitment that all public decisions be fully justified," in part by relying on "a progressive realization of [constitutional] commitments" (p. 149). Dyzenhaus' engagement throughout the essay with the work of other contributors assists the reader in positioning himself or herself within this world of scholarship.

Yet, at times, one senses that the "incoherence" Dyzenhaus claims labors constitutional positivism is dependent on the legal theory he espouses. In other words, the incoherence—the "incompatibility, incongruity of subjects or matters"[26]—assumes "subjects or matters" that constitutional positivists reject even if Dyzenhaus maintains they are necessary. For example, consider Dyzenhaus' following claim:

---

24. The essays by Waldron and Alexander do not engage explicitly the other essays, though we will see that they do so thematically.

25. Smith refers to the essays by T.R.S. Allan, Miller, Waldron, and Waluchow; Dyzenhaus refers to the essays by James Allan, T.R.S. Allan, Goldsworthy, Kavanagh, Waldron, and Walters.

26. OXFORD ENGLISH DICTIONARY (1994): "incoherence."

> In sum, for a political positivist, the deep mistake should be a change in political culture from one in which it is a sufficient condition for the legitimacy of a political decision that it has been voted into law by a majority in Parliament to a human rights culture, where a decision must also comply with human rights and other constitutional commitments (p. 151).

As I understand it, the school of constitutional positivism does not consider the legitimacy of a political decision to rest only on its majority vote. Its *validity* for a court may well rest on this alone, but its legitimacy need not thereby be exhausted. Indeed, as T.R.S. Allan illustrates with his citizen-centered essay, even a constitutional court judgment cannot exhaust the search for legitimacy (p. 239). Arguments about legitimacy may continue to be made after the passage of the political decision and may fuel calls for its reversal. But constitutional positivism will maintain that such reversal should proceed in the same political manner as the original decision, and not through the institution of judicial review.

Goldsworthy assists the reader in contrasting the unwritten constitutionalism of T.R.S. Allan, Dyzenhaus, and Walters with his (and Waldron's) argument. Echoing Waldron's contribution to the collection, he responds to Dyzenhaus that "[w]e are not working with a blank slate, on which we can design from scratch a new conceptual framework for our legal practices"; rather, the question is how "the balance was, in fact, struck by the statesmen, judges, and political theorists those thinking, over many centuries, forged the conceptual framework" (p. 285). In other words, he appeals to what Waldron terms *other people's moral reasoning*. In the case of statute law, that framework is said by Goldsworthy to be "predominately positivist in character, and accommodates the doctrine of parliamentary sovereignty" (p. 285). In short, Goldsworthy assists the reader in the awareness that the "subjects or matters" of each school of scholarship are different.

Walters and Goldsworthy also engage each other. Arguing that, when "properly conceived in a common-law jurisdiction," unwritten constitutionalism is "not, as Goldsworthy argues, vague or abstract," Walters maintains—drawing on T.R.S. Allan's scholarship—that it is all related to "'spirit' of legality" (p. 261). But Goldsworthy argues in turn that the spirit of legality (with its claims against private and retrospective laws) as a source for that invalidity of law is often defended in overbroad terms. For example, he illustrates how "'private', and retrospec-

tive, statutes have not only been frequently enacted, but have often been legitimate" (p. 286). Moreover, he articulates his main objection to Walters' essay as follows: the constitution may be understood to "accommodate [many] competing principle[s] or objective[s]," such that judges should not consider themselves empowered to give full effect to that which the constitution gives only partial effect (p. 310). In short, "accommodations [within the constitution] should be respected, even if judges today believe them to be regrettable" (p. 310). Although no reference is made to Alexander's essay, the reader recalls Alexander's prescient point that "if real moral rights are to be constitutionalized, they must be truncated"; otherwise, the fear that "our successors" may rely on such rights to invalidate other parts of the constitution is real and apparent (p. 126).

Although T.R.S. Allan does not engage with Goldsworthy, the latter assists the reader in discriminating between their two theoretical approaches. Goldsworthy explains that he conceives of "judicial disobedience in exceptional circumstances as a moral obligation, which overrides the moral reasons that normally support compliance with their legal obligation, whereas Allan conceives of it as both a moral and legal obligation" (p. 284). The difference is important, for obliterating any "distinction between moral and legal validity" denies any moral reason that a citizen may have for complying with an unjust yet "valid" law (p. 284). The reader here again recalls Alexander's point that the moral rights within a constitution are truncated (p. 126), this time in the sense of being "*subordinated to institutional decisions defining and implementing them*" (p. 127, emphasis in original). Except for the final authoritative decision-maker, "it is not real moral rights but rather that decision-maker's view of moral rights that is constitutionally controlling" (p. 128). If it were otherwise and each actor—institutional and individual—was "*legally* entitled to ignore the final decision maker," the legal system would no longer be a site for the "settlement of moral disagreements" (p. 128, emphasis in original). Such appears to be the consequence of T.R.S. Allan's citizen-centered constitutional argument.

Now, explicit engagement is not the only mode of engagement that animates the collection. We have just reviewed two occasions where the reader may appeal to Alexander's essay to supplement Goldsworthy's argument. Similar implicit engagement operates at numerous other points throughout the collection. As reviewed above, Waluchow's essay relies on the re-

quirement of reflective equilibrium as a guide for the judge in maintaining the true moral commitments of a society against the mere moral opinions confronting them. Similarly, Walters lauds the "oscillation between the specific propositions and the general principles they presuppose" as a mark of common law reasoning (p. 254). Although Waldron does not refer to Waluchow's or Walters' essays, he insists that the analogy between "the method of reflective equilibrium" and "legal reasoning in its rocking back-and-forth between particular judgments and general principles" is "wholly superficial" (p. 52). For Waldron, legal reasoning of the sort judges undertake is not free "to drop inconvenient precedents or modify doctrines or abstract propositions embodied in authoritative texts at will" (p. 53). This criticism raises important objections, which remain unanswered within the collection.

Moreover, although Waldron does not specifically refer to the essays by T.R.S. Allan, Walters, or Dyzenhaus, his criticism of "results-driven jurisprudence" can be taken to be directed at some of the arguments developed there (p. 56). He suggests that the push for judges to "reason autonomously" seems to be "most persuasive to a modern commentator when the judge's conscience, if indulged, would point to a conclusion that the commentator regards as morally congenial" (p. 56). This is close to James Allan's point that "it is just those judges who are most attracted to progressivist 'living tree' modes of interpretation who are least bothered by the 'according to law' suffix of the judicial oath" (p. 182).

Another unifying theme can be seen to revolve around Dyzenhaus' challenge that the "real world of constitutionalism" (p. 159) seems to have passed constitutional positivism by, such that proponents of that view need to propose "grander proposals for legal reform if they are to avoid incoherence" (p. 160). Some of the essays can be understood to be an attempt to rise to the challenge, and to make room within the "real world of constitutionalism" for the Waldrons and Goldsworthys of scholarship. For example, James Allan's essay can be seen to engage with the role of a Waldron-like judge in the real world of constitutionalism in a way that does not call for grander reform proposals. Indeed, judges all grapple with the question: when should my judgment be preferred to that of another, such that James Allan's Justice Waldron can assume the function of judge without (completely) abandoning his political-moral commitments. Moreover, Kavanagh's approach to judicial deference can also

be appreciated in this light: it is one more tool for judges to appeal to in a world of constitutional positivism.

## III. CONCLUSION

There is another, perhaps more general, comment to be made about the dialogical orientation of Huscroft's collection of essays: the contributors span five countries. It is perhaps now a commonplace for constitutional scholarship to extend beyond strict geographical demarcations, but it nevertheless warrants mention that despite the grounding of a constitution within a given legal order, constitutional scholarship lends itself to a coming together and a conversation. And it is perhaps in this way that, following Smith, we may begin to grapple with an understanding of "what on earth is going on."

Yet, no matter how commendable, Huscroft's collection of essays is not perfect in its appeal to dialogical scholarship. Consider, for example, Dyzenhaus' suggestion that the real world of constitutionalism makes no room for constitutional positivism, and Goldsworthy's similar pronouncement that those "who disapprove of [parliamentary sovereignty] are free to advocate for constitutional reform to repudiate it" (p. 285). These statements seem to be steeped in the monological orientation of speaking past each other, encouraging a premature end to debate. They suggest that the other's argument amounts to a change or revolution, a normative argument for amendment, but not an account of what is. If this was the intended meaning of the declarations, we would be compelled to ask, following Finnis: "Is not the outlawing of further questions always an occasion of suspicion in theoretical study?"[27] For such approaches come close to ceasing *to hear the other side.* In this way, it is perhaps a small irony that these statements find themselves in the two essays that are, in almost all other respects, exemplary for their dialogical orientation.

In addition, at times, the reader wonders why obvious overlap did not result in reciprocal engagement between the essays. For example, James Allan's discussion of limitation clauses (p. 168) might have nodded in the direction of Miller's essay devoted to the topic, just as Miller's description of constitutional rights as "placeholders" (p. 95) might have warranted reference

27. John M. Finnis, *Revolutions and Continuity of Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 58 (A. W. B. Simpson ed., 1973).

to Smith's suggestion that "the constitution" may also be so considered. The reader might also have hoped that Alexander's helpful interrogation of the meaning of "the constitution" and Smith's analysis of how the language of "the constitution" is employed would have engaged each other. But these are a reader's minor regrets when evaluated against the promise of dialogical scholarship maintained valiantly throughout the collection. Evaluated against the norm of monological scholarship, there is of course no fault, no regret. It is only once one sets foot on the path of expounding constitutional scholarship that one dares ask a little more of the enterprise of scholarship, and perhaps even of our place within it.