

Dialogue and Constitutional Duty

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Borders abound in constitutional structure and doctrine. The idea that there are political questions unsuitable for resolution by the courts requires a border between the merely political and the constitutional,² and within the constitutional a border between judicial constitutionalism and political constitutionalism. Classical legal thought relied on a sharp border between powers absolute in their spheres and rights equally absolute in theirs.³ Constitutional theory is obsessed with determining the allocation of authority between courts and legislatures.

Yet, the borders in constitutional law are at least as permeable as other borders. This Chapter examines and connects two domains in which borders blur. The concept of dialogue has become a central feature in contemporary thinking about constitutional review.⁴ Dialogues occur between courts and legislatures over the constitution's meaning and implementation, making less clear the line between those institutions. Constitutions typically guarantee individual rights, but modern constitutions – and, on some interpretations, older ones as well – place duties on governments, and the line between rights and duties is unclear. This Chapter links the idea of constitutional dialogue with the idea of constitutional duty, with the aim of illuminating modern constitutionalism more generally.

Scholars have examined many facets of constitutional dialogue: the relation between dialogue as usually understood – as involving interactions between legislatures and constitutional courts – and amendment processes; the timeframe within which we are to consider whether dialogue has occurred; the criteria for distinguishing between dialogic responses by legislatures and courts to judicial and legislative action and legislative and judicial capitulation to superior force; and more. In this Chapter I explore another facet, by inverting the usual assumptions about who makes the first “conversational” move and who responds. In the end this inversion may not change our understanding of constitutional dialogue, but I believe that the analysis I develop by inverting the usual assumptions brings out important features of constitutional dialogue and, ultimately, of the understandings we might have of some of a constitution's purposes.

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² “[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question. Such an objection ‘is little more than a play upon words.’” *Baker v. Carr*, 369 U.S. 186, 209 (1962) (internal citation omitted).

³ DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006, originally published 1975). See also G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (describing the U.S. Supreme Court's role in policing the boundaries between state and national power, and between government power and individual rights).

⁴ The starting point in comparative constitutional law, I believe, was Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 *OSGOODE HALL L.J.* 75 (1997). For reflections on their work, see Symposium, *Charter Dialogue: Ten Years Later*, 45 *OSGOODE HALL L.J.* 1-202 (2007). For an earlier use of the idea, see Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577 (1993).

The conventional description of constitutional dialogue is this:

(1) A legislature enacts a statute.

(2) The statute faces a constitutional challenge in court.

(3) The court invalidates the statute and in doing so (a) identifies some specific ways in which the statute violates the constitution, and (b) in the course of doing so offers its best interpretation of the relevant constitutional provisions.

(4) The legislature responds. It may (a) revise the statute by rectifying the deficiencies the court identified, drawing from the court's opinion the modifications needed to satisfy the court's objections,⁵ or (b) reenact the statute unchanged (described in the literature as an "in your face" action),⁶ rejecting the constitutional interpretation on which the court's decision rested.

(5) The statute is again challenged.

(6) The court deals with the challenge. Where the statute was modified to meet the court's objections, the court might (a) find the modifications adequate and uphold the statute, or (b) find that the modifications fall short of what is truly required, and invalidate the statute once again. Where the legislature has enacted an "in your face" statute, the court might (a) capitulate, accepting the legislature's constitutional interpretation and repudiating its own (with or without some face-saving language by the court), or (b) stand firm and invalidate the "in your face" statute. Up to this point, there has been a dialogue, and, importantly, it has been *constitutional*, that is, about the constitution's meaning. Once this point is reached, though, the metaphor of dialogue loses its appeal and some other language – "confrontation" or "crisis" perhaps – is needed.

The legislature is the "first mover" in this account.⁷ But, it might be profitable to consider situations in which the constitutional court is – in some important sense – the first mover. It is relatively easy to describe the general contours of such situations, though providing details will necessarily complicate the account. Here are two analytically equivalent possibilities:

(1) The constitution imposes an affirmative duty on the legislature to enact legislation on a specific topic, and the legislature simply fails to do anything at all. These are situations

⁵ As I discuss below, these modifications need not be seen as legislative capitulation to the court. At least sometimes they might occur because legislative reflection has led to agreement with the court's constitutional analysis, sometimes because the legislature had not focused on the constitutional issues earlier, sometimes because the court's analysis convinces some who previously believed the statute constitutional that they were mistaken.

⁶ KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 8 (2001).

⁷ My sense of the literature, but it is only a sense, is that many writers treat the court's response to the constitutional challenge as the first move, opening the dialogue with the legislature. As I develop in this Chapter, I believe that the account I offer is more perspicuous, because it makes clear the distinctions – particularly between legislative action and inaction – that we can usefully draw in thinking about constitutional dialogues.

described in the Constitution of Portugal as ones of “unconstitutionality by omission.”⁸ The constitution might impose a duty on the legislature to create a system of pensions for public employees, and the legislature may have done nothing. The Portuguese constitution says, “Whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify [the] competent legislative body thereof” – expressly inscribing a judicially initiated dialogue in the constitution.⁹

(2) The court discerns what we can describe as a “condition of unconstitutionality,” that is, a state of affairs resulting from the practical effects of the distribution of background legal rights of property, contract, and tort over which the legislature has exercised no control.¹⁰

I distinguish the two situations for expository purposes, but on a deeper level they may be identical. Roughly, in the case of unconstitutionality by omission, the legislature might claim that its constitutional duty is satisfied by the practical effects of the background rules of contract, property, and tort. Suppose the constitutional duty is that all must have minimally adequate housing. The legislature might refrain from enacting any housing program. It faces a claim of unconstitutionality by omission. It responds by contending that the background rules operate so as to generate minimally adequate housing for all. The person claiming unconstitutionality by omission denies the legislature’s assertion, but the argument has been transformed into one about whether a condition of unconstitutionality exists.

In both situations, the court moves first in identifying the legislature’s failure or the unconstitutional state of affairs and opens a dialogue with the legislature by telling it that the constitution requires that the legislature take some action.¹¹

Next I introduce some complexities. In case (1), the legislature may have enacted a statute dealing with the subject at issue, but the court may find that the legislature has not done enough to fulfill its constitutional duty. The constitution might impose a duty phrased in quantitative terms – “a duty to create a pension system for public employees sufficient to allow them to lead decent lives after retirement” –, the legislature might have created a pension system, and the court might conclude that pension system fails to satisfy the quantitative requirement.

⁸ Constitution of Portugal, art. 283(1) (on request from designated officials, “the Constitutional Court shall review ... any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable.”). The translation is taken from the web-site of the Portuguese parliament, http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf.

⁹ Constitution of Portugal, art. 283(2).

¹⁰ Or, in the case of civilian systems, where the long-established Civil Code generates background rights with the same effects in producing an unconstitutional state of affairs. In MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 156 (2008), I mention a Colombian doctrine dealing with unconstitutional “states of affairs,” which appears similar to the case I consider here, but I do not know enough about the Colombian jurisprudence to use it as an example.

¹¹ At this point the dialogue can follow the same course as in the account where the legislature is the first mover, and for purposes of this Chapter I will say nothing more about the succeeding stages in the dialogue.

We might think of this as a situation in which the legislature is the first mover, when it enacts the statute. Yet, both the complete-inaction scenario and the inadequate-action one seem to involve breaches of constitutional duties, and so I think we should initially deal with them in the same category, of judicial first-moves.¹²

Two complications can arise in case (2), involving conditions of unconstitutionality. The first is that the condition of unconstitutionality might be rectified by either the legislature, through legislation, or the courts, through an alteration in the background rules of contract, property, or tort. Consider, for example, a constitution that imposes a duty on “the State” – without specifying that the duty is imposed specifically on the legislature – to ensure that every person have access to minimally decent housing. The nation has a large population of homeless people, and so is in a condition of unconstitutionality with respect to the duty to provide housing. Noting that condition, the constitutional court could open a dialogue with the legislature by directing that the Ministry of Housing develop a plan that promises to provide housing to this population.¹³ Suppose, though, that many of the homeless have simply moved into un- or underutilized buildings owned by others. The property owners seek to evict them, and the squatters resist (physically or in court). Squatting brings into the open the role that background rules play in creating conditions of unconstitutionality. The condition of unconstitutionality with respect to housing could be rectified by changing the background property rules, by giving the homeless something like an easement over un- or underutilized buildings suitable for shelter.

Constitutional courts with authority to change the background rules can address conditions of unconstitutionality by doing so. Such actions might be said to open a dialogue with the legislature, but it is not a *constitutional* dialogue, at least in the first instance. Rather, it is a dialogic opportunity familiar to common lawyers – the ordinary dialogue that occurs when courts modify the common law, and legislatures have the opportunity to respond. I call these “common-law dialogues” for convenience, but their general description is “dialogues with respect to the background rules of contract, property, and tort.”

Common-law dialogues have two important features. First, legislative responses to common-law developments might be required to preserve the “integrity” of the common-law system as a whole. In the common-law tradition, the canon of statutory construction that statutes in derogation of the common law are to be construed narrowly captures this feature. Clarifying the concept of “integrity” here is quite difficult, of course, but I think I need only flag the question here.

Frank Michelman has identified the second important feature of common-law dialogues.¹⁴ Judges on constitutional courts are typically selected because they have qualities and abilities suitable to adjudicate constitutional cases (even if they also have authority to develop the background rules). Their development of the background rules might be more likely to disrupt the integrity of the system of such rules than would either development of those rules by

¹² I return to this later in this Chapter.

¹³ Or to expand existing housing programs to encompass it, on the model of the complexified case (1).

¹⁴ Frank I. Michelman, “The interplay of constitutional and ordinary jurisdiction,” in *COMPARATIVE CONSTITUTIONAL LAW* 278 (Tom Ginsburg & Rosalind Dixon eds. 2011).

judges chosen for their facility with those rules or – as Michelman speculates – direct invocation of the constitution and the consequent opening of a constitutional dialogue. In that case, a constitutional dialogue of the sort I have described under the heading of “case (1) complexified” might then arise. Similarly after a legislative response in a “common-law” dialogue, if the legislature’s action is challenged on constitutional grounds, for failing to go far enough to fulfill a constitutional duty.

The second, distinctive complication for constitutional dialogue in cases of conditions of unconstitutionality occurs when the constitutional court lacks authority to change the background rules.¹⁵ In such situations, the constitutional court necessarily opens a dialogue with the legislature in finding a condition of unconstitutionality, because only the legislature can deal with the condition.

Constitutional systems that have the doctrine of indirect horizontal effect go some way to adopting the model of “common law” rather than constitutional dialogue.¹⁶ Consider here the South African Constitutional Court. South Africa’s constitution directs “every court” to “develop” the law to “promote the spirit, purport and objects of the Bill of Rights.”¹⁷ The usual examples come from the law of defamation and invasion of privacy. Those torts have a long lineage, extending back into an era when constitutional concerns about freedom of expression were less fully developed than they are today, or when the courts that developed them were less sensitive to constitutional concerns, or when constitutional protections of freedom of expression had not been enacted into positive law. Many constitutional systems have confronted difficulties arising from the fact that some elements of these torts seem ill-suited to a world with significant protections of freedom of expression. Courts that can develop the background rules can do so sensitive to constitutional concerns without invoking the constitution directly.¹⁸ Courts that lack that authority can instruct the courts with that authority that they must develop the background rules appropriately. In the standard case, the constitutional court holds that the ordinary courts have failed to take constitutional values sufficiently into account in applying (or developing) the background rules, and remands the case for further consideration.¹⁹

We can push the argument further by considering the squatters’ case described earlier. Suppose an ordinary court invokes existing background property rules to uphold the squatters’ evictions in the situation described above, in a nation with a constitutionalized duty about

¹⁵ In the United States, for example, the background rules are rules of state law, which under standard interpretations the Supreme Court must take as fixed by state courts or legislatures.

¹⁶ We might see the doctrine of indirect horizontal effect as allowing the courts to avoid the second complication by transforming the problem into a case described by the first one.

¹⁷ Constitution of South Africa, § 39(2).

¹⁸ See, e.g., R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8, [2002] 1 S.C.R. 156 (developing the common law to remove the illegality under the common law of secondary labor boycotts).

¹⁹ See, e.g., BVerfGE 7 (1958) (the Lüth case). The most complete analysis of this problem of which I am aware is Frank I. Michelman, *On the Uses of Interpretive ‘Charity’: Some Notes on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa*, 1 CONST. CT. REV. 1 (2008).

housing and with a jurisdictional provision like South Africa's. The squatters invoke the constitutional court's jurisdiction, arguing that the ordinary courts have failed to "develop" property law to promote the housing obligation. Were the constitutional court to agree by creating an easement in favor of the squatters, it would modify property law appropriately, thereby opening the "common law" dialogue.²⁰

Notably, nothing like that development has occurred in South Africa, whose constitution does impose a duty with respect to housing, and it is worth considering why development of defamation law apparently seems within reach to many constitutional court judges but development of a constitutionally influenced easement seems not within reach.²¹ I can only speculate, but I believe that the reason is a sense those judges have – a sense that I think may be shared by constitutionalists more generally – that modifying elements of defamation law, even by creating new constitutionally influenced defenses is a relatively small step, not different in principle from widely accepted judicial modifications of the common law for pragmatic rather than constitutional reasons, but that creating an easement on behalf of squatters is a large step. The metaphor used to capture this sense is well-known: Common-law judges develop the law through molecular rather than molar action.²² I confess to my inability to specify even vaguely the metric for distinguishing between small and large steps, between the molecular and the moral – and I know of no substantial progress anyone else has made in specifying such a metric.²³

So far I have argued that constitutional duties open up the possibility for judicially initiated dialogues, using substantive duties as the central example. Constitutions typically impose another type of duty, that of equal treatment. The jurisprudence of remedies when courts find certain types of equality violations already contains something akin to judicially initiated dialogues. Suppose a legislature provides a discretionary benefit (one that the constitution does

²⁰ Or, as appears to be the usual practice in Germany, the constitutional court could find that the ordinary courts had failed to give appropriate weight in their development of the background law to constitutional values and direct them to reconsider their interpretation (or development) of that law so as to give those values appropriate weight.

²¹ South Africa has a non-trivial jurisprudence about squatters and evictions, but as far as I know it involves only statutory interpretation and direct constitutional analysis, for example of the constitutional adequacy of eviction procedures.

²² *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

²³ Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19 (1995), suggests that the metric is the importance of the space left open by precedent for judicial law-making, where "importance" means that a decision one or the other way will have implications for only a few closely related cases expected to arise in the future. *See id.* at 44 ("Such judicial legislation was in general appropriate, on Holmes's theory, only when it did not much matter which way the judge decided."). The issue deserves more attention than I can give it here, but a strong rule-skeptic would reject the proposition that a judge today can reasonably anticipate that her decision in the case at hand will have few implications for future cases.

not require it to provide) to one group.²⁴ Members of another group claim that the failure to provide the benefit to them violates constitutional equality principles.²⁵ The constitutional court has a choice of remedies available to it if it agrees with the claim of inequality. It can “read up” the legislation, extending the benefit to the previously excluded group, or it can read the legislation down, eliminating the benefit for all.²⁶

The usual formulations of the grounds for choosing one rather than the other remedy obscure the presence of judicially initiated dialogue here, though only slightly. Courts typically try to imagine what the legislature would do faced with the choice between extending the benefit to all or denying it to all,²⁷ reading the statute up if they imagine that the legislature would want the benefit extended and reading it down otherwise.²⁸ We would observe no legislative reaction when the judges’ projections of legislative desires are accurate, and so might not see this as an example of judicially initiated dialogue. Yet, two points are worth noting. First, the court might make a mistake about the legislature’s wishes. If so, there will be a legislative response – after a statute is read down, the legislature might extend the benefit to all, for example. Second, and perhaps more important, the general account of constitutional dialogues, even in its familiar form, does not require that legislatures actually respond to judicial invalidation of legislation. The clearest examples are these: (a) The court invalidates a single provision embedded in a complex statute, the provision is not important for the statute’s effective functioning, and no one in the legislature paid much attention either to the provision or to its potential unconstitutionality; (b) The legislature engaged in little reflection on a statute’s constitutionality, and, when the court directs the legislature’s attention to constitutional questions, the legislature agrees with the court that the statute is unconstitutional. The account of constitutional dialogues, that is, is an account of *possible* interactions between courts and legislators, not one in which any specific moves necessarily occur.

Still, even though legislatures can respond when the courts read up or read down a statute to remedy equality violations, there is an important difference between the “reading up/reading down” choice and constitutional dialogue. I have already distinguished between “common law” dialogues between courts and legislatures, and constitutional dialogues. The “reading up/reading down” choice opens up the possibility of dialogue, but one more like the former than the latter.

²⁴ The analysis is the same in cases of discretionary burdens, with appropriate changes in the description of reading up and reading down, and I therefore do not discuss burden cases separately.

²⁵ Note the structural similarity between this case and the “constitutional duty” case I have taken as the paradigm for judicially initiated dialogues: In both the constitutional challenge arises from a legislative failure.

²⁶ The term “reading down” is sometimes used to refer to the practice of construing a statute narrowly to avoid finding it unconstitutional.

²⁷ For a discussion of the doctrine, see TUSHNET, note --- above, at 155.

²⁸ This Chapter’s focus makes an extended analysis of the grounds for choice unnecessary, but I note that reading down might occur if the costs of extending the benefit are high, even though those who presently receive the benefit could be expected to provide political support in the legislature for extending the benefits to all.

The remedial choice rests on more or less pure policy judgments – should the discretionary benefit be extended or retracted? – and not on constitutional ones.²⁹

Having described the general contours of constitutional dialogues initiated by the courts, I turn to a discussion of the possible range of matters on which such dialogues might occur. I think it helpful to distinguish among several kinds of rights constitutions protect.

(1) Purely formal negative rights against the government. Constitutional rules barring the government from imprisoning those who criticize its policies – classic sedition laws – fall into this category.

(2) Negative rights against the government to which some degree of “effectiveness” is attached. In the United States some content-neutral speech regulations (formerly described as “time, place, and manner” regulations) are unconstitutional because they deny those wishing to express themselves of the effective opportunity to do so. One reason offered for finding it unconstitutional for a government to have a flat ban on the use of streets and parks for political demonstrations is that those with few monetary resources have no other venues for expressing themselves.³⁰ Note that in these cases the constitutional violation arises because of the interaction between the express government regulation and the background rules of property, contract, and tort.³¹

(3) Rights whose protection necessarily affects the protections people have against invasions of *other* constitutional rights. The tension between freedom of speech and constitutionally protected rights to informational privacy and dignity, common in most

²⁹ A final possibility, suggested to me by Gerald Neuman, moves beyond the domain of constitutional duty. A court might observe an on-going constitutional discussion in the legislature, which has not yet reached a resolution. No question of constitutional duty need be involved. The legislature might be considering a statute that imposes regulations on some form of expression, with legislators debating whether that expression even qualifies for coverage under free speech principles. (In the United States, recent cases of this sort have involved depictions of cruelty to animals (*United States v. Stevens*, 130 S.Ct. 1577 (2010)), violent video games (*Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729 (2011)), and lies as such (*United States v. Alvarez*, 132 S.Ct. --- (2012).) The court might use some pending case as the vehicle for expressing its views on the question being mooted legislatively, by invoking grounds that simultaneously dispose of the case before it and indicate the court’s position on that question, or by overt dictum. The court’s position then becomes a datum in the on-going legislative discussion. Presumably the court’s action will end a legislative discussion about what the constitutional court would do when presented with the question on which it offers its views. But, the court’s action need not end a discussion about the constitution’s meaning, a point brought out in the literature on constitutional dialogues.

³⁰ *Hague v. C.I.O.*, 307 U.S. 496 (1939).

³¹ The point is captured in A.J. Liebling’s comment that the freedom of the press is available to anyone who owns one. (The comment is attributed to Liebling in various forms.)

constitutional systems (though not in the United States), is a standard example. For the United States, the so-called “free press/fair trial” dilemma serves as an example.³²

(4) Positive rights to resources, with some quantitative dimension to the rights. These rights can be satisfied either by direct government provision or by adjusting the background rules.

(5) Pure positive absolute rights. Were nations to recognize rights to a “minimum core” of housing, medical care, and the like, as some have urged, these rights would be positive and absolute. Again, these rights can be satisfied either by government provision or by adjusting the background rules.³³

The discussion so far has suggested that judicially initiated constitutional dialogues might occur in all but the first category. The next step develops from the observation that the government has enacted some relevant legislation in almost every case of judicially initiated dialogue.³⁴ This suggests the thought that, in almost every case we could characterize the dialogue as initiated by the legislature when it enacted a statute now challenged as not going far enough to protect the rights in categories (2) through (5). That thought, as such, is relatively uninteresting, though. What *is* interesting is the idea of “enough.”

That idea raises the question, Do we think that a nation falls short of the ideal whenever it could do more to reach a maximal level of constitutional achievement?³⁵ The problem of conflicting rights shows that maximal achievement does not require a single-minded focus on any individual constitutional provision. Getting “more” freedom of expression might mean getting “less” informational privacy. Nor does ensuring that a positive right – to housing or water – is maximally achieved mean that every available resource must be devoted to achieving that right before the government turns to matters of “mere” policy, such as the choice of weapons systems to defend that nation against external attack. Standard formulations of positive rights, using phrases like “within available resources,” show this. And, sensible constitutional interpretation would find a similar limitation implicit in constitutional provisions seeming to

³² The dilemma is that sometimes making information available to the press for publication might have the effect of impairing a criminal defendant’s ability to get a constitutionally fair trial.

³³ In the United States an indigent criminal defendant’s right to counsel provided at public expenses is often offered as an example of a pure positive right. But, of course, that a defendant is indigent results from the operation of the background rules. People who can afford to hire counsel with their own resources must do so, which shows that the right to counsel is not, as such, a pure positive absolute right.

³⁴ At least if the category of “relevance” is appropriately capacious.

³⁵ I put the question in terms of “a nation” and “achievement” to avoiding prejudging the judicial role in achieving the constitutional maximum, as might be suggested for example by using the word “enforced.”

state positive rights in absolute terms. Yet, equally standard formulations such as “progressive realization” suggest that constitutional compliance is incomplete until the right is fully realized.³⁶

Suppose, then, that the government has done “a lot” in devoting resources to achieving a positive right. Under what circumstances can a court reject a claim that the government has not yet done enough?³⁷ In general, the question is about jointly maximizing all constitutional values at once. At this point the issues raised by category (3) claims – one right set against another right – recur, and the answer should be the same. Such claims involve provisions that in some sense compete with each other directly. But, constitutions are complex documents, and competition among provisions is, I think, ever-present even if not always direct or obvious. Certainly the standard positive rights compete against each other: The “within available resources” constraint means that a government that provides more housing is likely to have to provide less water. And, although it would take a great deal of work to develop this point precisely, it seems quite likely that the adjustments in background rules needed to maximize the effective provision of negative rights – one way of dealing with category (2) cases – will have some effect on the resources available to achieve the standard positive rights.

I offer this analysis with some diffidence. If it is accurate, I believe that it has interesting implications for the idea of constitutional dialogue. It suggests that constitutional dialogues may be the only sensible way to deal with everything other than pure negative rights. The reason is that courts are not well-positioned to reject an executive or legislature’s argument that it has done enough *here*, in the case at hand, because it has been doing something equally important *there*. But, dialogic review can press the executive ministry or the legislature to explain itself, and experience has shown that explanations are sometimes implausible, as the South African Constitutional Court thought they were in the *Treatment Action Campaign* case,³⁸ or unavailable, as in some of the South American cases dealing with the failure to make specific medications available through national health care systems, where the failures result from bureaucratic inertia rather than a considered judgment about medical priorities.³⁹

I began this Chapter with a simple model of constitutional dialogue in which legislatures were the first movers, then switched the order so that courts were the first movers. Doing so brought out the connection between the ideas of dialogue and constitutional duty. Then, distinguishing among types of duty suggested that constitutions require not the maximization of any – or all – constitutional values, but joint maximization in which the constitutional system as a whole achieves as much as possible even though we can see that there is something more that

³⁶ For both formulations, *see, e.g.*, Constitution of South Africa, art. 26 (2) (“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right to housing.).

³⁷ In addressing the claim the court would take into account the background rules that provide access through “the market” to the positive right.

³⁸ *Minister of Health v. Treatment Action Campaign*, (2002) 5 SA 721 (CC).

³⁹ David Landau’s argument favoring structural injunctions over dialogic review, David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 402 (2012), overlooks the fact, as I think it is, that structural injunctions are almost inevitably dialogic. For my discussion, see TUSHNET, *supra* note ---, at 248-49; [Tushnet, Response to Landau, forthcoming].

the system could do to achieve any particular constitutional value. Finally, I suggested that joint maximization implies that only dialogic review is appropriate if we are interested in constitutional systems as a whole. Overall, then, the boundaries between forms of constitutional review may be as blurred as those between constitutional rights and duties.