In Defense of Responsive Judicial Review

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I Introduction

Democracy is a foundational constitutional value: it represents the idea that government should be based on the consent of the people, and that citizens should engage in the process of self-government on terms of equality. Democracy also has a range of instrumental benefits. It arguably helps reduce conflict among states, as well as certain forms of avoidable humanitarian crisis, such as famines.[1]

Yet democracy is also a value under threat in many parts of the world, including South Asia.[2] And for constitutional lawyers, this poses the question of what constitutional law can do protect and promote democracy.

II Democracy and Responsive Judicial Review

In my new book, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Forthcoming, OUP 2022), I provide one potential answer to this question focused on the role of constitutional or appellate courts and the practice of constitutional judicial review. I argue that, in cases where the scope or meaning of constitutional language is not clear, courts should construe that language with a view to countering three broad risks to democracy: (i) sources of democratic monopoly power; (ii) democratic blind spots; and (iii) burdens of inertia. In engaging in review of this kind, I further suggest that courts should be mindful of limits on their own institutional competence and legitimacy, and the potential for their decisions to give rise to new threats to democracy – in the form of reverse democratic burdens of inertia, democratic backlash and debilitation.

This does not mean that judicial review is the *most* important means of promoting democratic responsiveness. The design of electoral systems, and performance of political parties and leaders may often be far more important.[3] Nor is my focus on courts not intended to be exclusive. As Tom Daly and Se-shauna Wheatle separately note, there are a range of constitutional institutions that can play an important role in protecting democratic norms and processes – including a range of independent "fourth branch" or "guarantor" institutions, such as electoral and human rights commissions, and transnational legal and political bodies.[4] But

[1] Amartya Sen (ed), *Peace and Democratic* Society (OpenBook Publishers, 2011). See discussion in Richard Holden and Rosalind Dixon, *From Free to Fair Markets: Liberalism after Covid-19* (Oxford University Press, 2022).

[2] Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization & The Subversion of Liberal Democracy* (Oxford University Press, 2021); Aziz Huq & Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 65; Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14 *Law and Ethics of Human Rights* 49.

[3] See e.g., Rosalind Dixon and Anika Gauja, 'Australia's Non-Populist Democracy? The Role of Structure and Policy' in Mark A. Graber, Sanford Levinson, Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018).

[4] Tom Gerald Daly, 'Courts and the Global Search for Democratic Resilience' (2022) 34 *National Law School of India Review* (forthcoming); Se-shauna Wheatle, 'Responsive Judicial Review and Multi-polar Constitutional Theories' (2022) 34 *National Law School of India Review* (forthcoming). See also Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2022) ch 1 ('*Responsive Judicial Review*').

at least under certain conditions – of sufficient independence, political support and remedial power – courts can too play an important role in buttressing democratic processes and commitments, often in ways that complement or intersect with these other forms of democratic protection. This is the essence of responsive judicial review as a form of what Wheatle calls a "multi-polar" constitutional theory.[5]

This caveat about (pre)conditions of judicial democracy protection is important. Without these conditions being present, as several contributors note, at best judicial review will be ineffective, and at worst, actively contribute to eroding democratic norms. For instance, if a court is captured or coerced by the regime, it may engage in forms of "abusive" judicial review that either directly dismantles existing democratic constitutional protections, or indirectly legitimates attempts to do so by political actors.[6] Similarly, if a court lacks broader political support, or adequate legal tools, it may engage in review designed to protect democracy – but find that its decisions are ignored, or lead to unintended and perverse consequences in the interpretation of statutes, or allocation of government resources.

III The Global Reach of Responsive Review

This might lead one to question whether there are in fact many systems worldwide where responsive judicial review is possible. Indeed, several contributors raise this question.
My own view is that, in most constitutional democracies, courts have at least some degree of independence, remedial power and political support and while this may wax and wane, it remains sufficient to support some forms of responsive review – providing courts themselves are sensitive to background shifts in political conditions. Whether this is in fact true, however, is an empirical question, and one of the great virtues to a symposium of this kind – and others like it – is that it encourages a more rigorous, global consideration of these questions, including through dialogue among scholars about different ways of understanding the same and different constitutional contexts.

Justice Chandrachud and Jahnavi Sindhu, for example, both suggest that responsive judicial review ("RJR") is a plausible model for the Supreme Court of India. In her contribution to the symposium, Andrea Katz likewise suggests that responsive judicial review offers a promising new paradigm for the US Supreme Court,[7] whereas Tom Daly asks whether even the US Court would meet the relevant preconditions for responsive judicial review.[8] This is also exactly the kind of debate that I hoped for in seeking to encourage robust global scholarly dialogue about the potential horizons for and limits of responsive judicial review, as a normative constitutional theory or model.

IV Responsive Review and Judicial Capacity

Beyond the question of whether certain courts have the capacity to engage in responsive review is a related question about individual judicial capacity. Responsive judicial review asks a lot of judges: it asks them to combine active review and carefully calibrated restraint, and hence both boldness and humility, as well a mix of legal skill and social and political awareness. A

[5] Wheatle, 'Responsive Judicial Review and Multi-polar Constitutional Theories' (n 4).
[6] David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *UC Davis Law Review* 1313; Dixon, *Responsive Judicial Review* (n 4) ch 5.
[7] Andrea Scoseria Katz, 'Against Legalism: Adopting the Lessons of Dixon's Democracy and Dysfunction in the U.S.' (2022) 34 *National Law School of India Review* (forthcoming).
[8] Daly, 'Courts and the Global Search for Democratic Resilience' (n 4).

responsive judge understands the relationship between constitutional claims and democratic values and attitudes, and between a court's own institutional legitimacy and capacity. This is also no small set of requirements.

The question, then, is whether judges are capable of delivering on these requirements. The answer to this will in part be conceptual, but for the most part empirical in nature: it depends on a close reading of the constitutional experiences of various countries, and the degree to which individual judges or courts in those countries have demonstrated a capacity to engage in successful instances of responsive review. And while I begin this task in the book, I explicitly suggest it is a question requiring close attention from other scholars, including through the kind of rich analyses provided by other articles in this volume.

My one caveat in this context would be about the claim Tom Daly makes that 'the likes of England's Lord Coke, the US Justice Brandeis, Irelands judge Walsh, Brazil's Judge Pertence, and India's Raj Khanna are born, note made'.[9] First, this list of great judges is designed to be illustrative, but notably gendered in its composition in ways should make us question its logic and construction.[10] Second, there are clearly notable judges, who have engaged in responsive judging, who have "grown into" that role through increasing judicial experience, confidence and exposure to other judges (both within their own country and elsewhere) with a more responsive approach. Perhaps the leading example in the common law world is Sir Anthony Mason, the former Chief Justice of Australia who authored notably responsive opinions such as *ACTV* and *Betfair* (and small-c constitutional equivalents such as the land rights decision in *Mabo*).[11] Mason began his time on the bench, under Chief Justice Barwick then Gibbs, as a much more legalist judge, with a less developed account of representation-reinforcement; that was an account he developed over time, in response to changes in his own role, the Court's role, and other changes in the composition of the bench, as well as new and different arguments before the Court.[12]

V New Frontiers for Responsive Review

One of the virtues of a symposium of this kind is that it draws on the collective wisdom and expertise of the various contributors to identify potential limits to the theory, and its applicability – but also ways in which it might usefully be extended to new contexts. In the book, I explicitly noted that focus was on legislative blind spots and burdens of inertia, and that there was a great deal more work to be done thinking through how responsive ideas could inform judicial approaches to the supervision of executive decision-making.[13] I am also especially grateful to Conor Casey, Se-shauna Wheatle and Justice Chandrachud for advancing this project.

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[9] Id 6.

[10] Cf Rosalind Dixon, 'Towering Versus Collegial Judges: A Comparative Reflection' in Rehan Aberyratne and Iddo Porat (eds), *Towering Judges: A Comparative Study of Constitutional Judges* (Cambridge University Press, 2021).

[11] Dixon, *Responsive Judicial Review* (n 4) ch 4. See also Theunis Roux and Rosalind Dixon, 'The Mason Court's Enduring Influence: Functionalism and Fair Markets' in Barbara McDonald, Ben Chen and Jeffrey Gordon (eds), *The Mason Court's Enduring Influence: Functionalism and Fair Markets* (Federation Press, 2022).

[12] See eg the arguments made by M Byers QC and SJ Gageler in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106: Rosalind Dixon and Amelia Loughland, 'Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia' (2021) 19(2) *International Journal of Constitutional Law* 455, 463–4.

[13] Dixon, *Responsive Judicial Review* (n 4) ch 1.

Casey, in this context, explores the relevance of responsive judicial review to debates over the constitutionality of legislative-executive delegation, and 'shifts in the balance of powers between the political executive and other bureaucratic actors'.[14] Wheatle considers the decision of the UK Supreme Court in *Miller II*, setting aside Primer Minister Boris Johnson's decision to prorogue parliament for 5 weeks pending the Brexit deadline, as an example of responsive judicial review focused on executive decision-making.[15] And Justice Chandrachud notes several decisions of the Supreme Court of India, including a series of cases relating to the management of the second wave of the COVID-19 pandemic, in which the Court 'exercised dialogic oversight' of the executive's response to the pandemic.[16]

Other contributors usefully highlight additional contexts in which a responsive approach to judicial review of legislative action could be democracy-enhancing. Andrea Katz, for example, suggests that a responsive approach could usefully inform the approach of the US Supreme Court to a range of areas, including the constitutional regulation of redistricting or partisan gerrymandering.[17] (This adds to the list I provide of potential decisions involving climate change and gun violence). Angela di Gregorio likewise points to the decision of the Constitutional Court of Italy in relation to rights of access to physician assisted suicide as a potential candidate for responsive judicial review.[18]

At the same time, it is important to note an important duality or Janus-faced quality to idea of responsive judicial review: as a theory, it simultaneously seeks to defend strong and assertive judicial intervention in defense of democracy *and* a weaker, more dialogic and calibrated approach by judges to reviewing certain forms of reasonable democratic decision. In most cases, this also leads to the embrace of a form of weak-strong or strong-weak judicial review – or combination of elements of judicial strength and weakness, calibrated to the nature and specifics of the case. And while Tamir doubts the depth and utility of this framework, Justice Chandrachud highlights it as an important part of the argument and contribution.[19]

The relevance of this, in an Indian context, is captured by Jahnavi Sindhu, who argues that a responsive approach to judicial review in India could simultaneously encourage the Supreme Court to take a more restrained approach to certain PIL cases and even more robust approach to the protection of various dignity, privacy and equality rights.[20] These two positions cohere because of the notion that responsive judicial review embraces a flexible, calibrated approach to the strength of judicial oversight and remedies. It also makes sense because, so far, the Court has tended to avoid a very strong, non-dynamic or differentiated approach to the enforcement

[14] Conor Casey, 'Comparative Political Process Theory and the Importance of Judicial Prudence' (2022) 34 *National Law School of India Review* (forthcoming) 6–12.
[15] Wheatle, 'Responsive Judicial Review and Multi-Polar Constitutional Theories' (n 4) 5.
[16] Dhananjaya Y Chandrachud, 'Book Review – Democracy and Dysfunction: Towards a Responsive Theory of Judicial Review' (2022) 34 *National Law School of India Review* (forthcoming) 6 n 28.
[17] Katz, 'Against Legalism: Adopting the Lessons of Dixon's Democracy and Dysfunction in the U.S.' (n 7).
[18] Angela di Gregorio, 'The Role of Constitutional Justice in Contemporary Democracies' (2022) 34 *National Law School of India Review* (forthcoming).
[19] Id 2–3, 5–6; Oren Tamir, 'Dixon's Theory of Responsive Judicial Review: On the Limits of Ely-Stretching (and What's the Theory Truly About?)' (2022) 34 *National Law School of India Review* (forthcoming) 15 ("the remedial discussion seems shallow").
[20] Jahnavi Sindhu, 'A Responsive Theory of Judicial Review – A View from India' (2022) 34 *National Law School of India Review* (forthcoming).

of rights in certain PIL cases, and overly declaratory as opposed to weak-strong – or penalty default – approach to the enforcement of a range of personal autonomy rights.[21]

VI Responsive Judicial Review and Democratic Backlash

It likewise bears emphasizing that courts may sometimes appear responsive, but ultimately misjudge or misapply what it is required by a responsive approach. In Mexico, for example, Mariana Velasco-Rivera suggests that the 2008 decision of the Supreme Court of Mexico on the right of access to abortion ultimately compounded, rather than overcame, obstacles to legislative reform in this area.[22] And there is no doubt that the decision provoked democratic backlash. Following the Court's decision, as Velasco-Rivera, 16 out of 32 states 'moved to adopt constitutional amendments at the state level to recognize the right to life from the moment of conception – making any attempt to liberalize access to abortion politically and legally harder to justify'.[23] And this was not accompanied by reasoned, reasonable deliberation: rather, it represented an outright rejection of the idea of constitutional dialogue on these questions.[24] The real question is what explains this – and what this says about the broader prospects for representation-reinforcing review in Mexico and elsewhere.

Two things are also important to bear in mind in this context. First, courts can do responsive decision-making well, or badly. If they do it badly, they are also more likely to provoke damaging forms of democratic backlash. Second, if a court attempts to pave the way for legislative reform that lacks majority support, this will not generally be consistent with a responsive approach. It may be, if there is specific constitutional language authorizing this approach. But absent such language, the decision will presumptively lack legal and political justification. Further, it is quite likely to occasion democratic backlash.

Both interpretations could also be applied to the judgments of the Supreme Court of Mexico in this context: On one view, the Court in 2008 tried to abstain from interfering with democratic trends toward the decriminalization of abortion, but without sufficient attention to the need to explain and justify that decision to religious Mexicans disappointed by it – or to give them some sense that the Constitution protected their concern for fetal life as well as the rights of women to reproductive freedom. On another view, the fault was not the Court's, but rather, the mismatch between public opinion in Mexico City (where abortion was decriminalized by the legislative assembly in 2007-8) and the rest of the country: while a majority of residents of Mexico City might have supported the decriminalization of abortion, there was much greater support in the rest of the country at the time for its continued prohibition.[25] It was therefore not surprising that, following decriminalization in the capital, and quite apart from the Court's decision on the question, other states moved to pre-empt and prevent the spread of this change by the adoption of right to life amendments.[26]

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[21] Id. See also Rishad Chowdhury, '"The Road Less Travelled": Article 21A and the Fundamental Right to Primary Education in India' (2010) 4 *Indian Journal of Constitutional Law* 24.
[22] Mariana Velasco-Rivera, 'On Dixon's Responsive Theory of Judicial Review: How Responsive can the Responsive Model be?' (2022) 34 *National Law School of India Review* (forthcoming).
[23] Id 2.
[24] Id.
[25] Kate S Wilson et al, 'Public Opinion on Abortion in Mexico City After the Landmark Reform' (2011) 42(3) *Studies in Family Planning* 175.
[26] *Abortion Legal in Mexico City, But Restrictions Remain in Rest of Nation and Many Latin American Countries* (Harvard T.H. Chan School of Public Health, 2012) <https://www.hsph.harvard.edu/news/hsph-in-the-news/langer-abortion-mexico/> (on the sense that but for this it would spread beyond the capital).

Of course, the risk of democratic backlash is real, even where courts do engage in responsive forms of review. The response to the decision of the UK Supreme Court in *Miller II* is arguably a good example: like Wheatle, I think *Miller II* had many of the hallmarks of a responsive judicial decision. Yet it also provoked a great deal of public criticism (as well as support) and led to the introduction of the *Dissolution and Calling of Parliament Act 2022* (UK) limiting the scope for judicial review for like cases in the future. What matters most, however, is the scope and extent of that backlash and whether it threatens the capacity of a court to uphold the (constitutional) rule of law. The limits imposed on the UK Supreme Court, under the 2022 Act, were also quite targeted and specific, and even those are yet to be tested in effectiveness.[27]

VII Democratic Foundations

In a case such as *Miller II*, the connection between judicial review and democracy is relatively clear: the UK Supreme Court in the case stepped in to bolster the role of parliament in a contested democratic decision about the scope and nature of Brexit, and to check what was arguably an abusive attempt by the Johnson government to undermine the role of parliamentary oversight of its actions. This core democratic "protection" role is also the focus of a number of other contributions to the symposium, including Tom Daly's and Conor Casey's.

Responsive judicial review, however, aims to provide an account of judicial review in both at-risk and well-functioning constitutional democracies, and of the many different ways in which democratic constitutional systems can fail to live up to ideals of responsiveness. Hence, it contemplates a role for courts both in protecting the democratic minimum core, and a constitutional system's capacity for responsiveness, and overcoming democratic burdens of inertia and blind spots in ways that help promote actual greater democratic responsiveness.
Oren Tamir questions whether the account of democracy I provide is adequate in this context: he notes that there is an uncertain connection between connections to liberal democracy and responsive review, and that I adopt somewhat different formulations at various points of the role I envisage for democratic majority opinion.[28] Some of this criticism is no doubt fair. But several things are worth noting in response: I explicitly suggest that democratic burdens of inertia and blind spots have special significance in certain contexts, namely: where they impair the realization of other constitutional values, or the realization of other constitutional commitments, such as commitments to individual rights. Burdens of inertia and blind spots are therefore phenomena that can arise in all constitutional systems – both democratic and non-democratic in nature (though it may be harder to gauge actual popular opinion in a non-democratic setting). But they have special significance for constitutional democracy, where they intersect with "thicker" liberal democratic commitments.

There is also a necessary ambiguity in the idea of majority opinion on constitutional questions: constitutional norms require reasonable, reasoned deliberation.[29] This also applies to deliberation by citizens, as well as legislators. Public "opinion" on a question must therefore

[27] Note, however, that there remain efforts further to curb judicial review in the UK: see e.g., *Judicial Review and Courts Act 2022* (UK), available at https://bills.parliament.uk/bills/3035.
[28] Tamir, 'Dixon's Theory of Responsive Judicial Review: On the Limits of Ely-Stretching (and What's the Theory Truly About?)' (n 19).
[29] John Rawls, *Political Liberalism* (Columbia University Press, 1993), Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics Human Rights* 142, Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press, 2008) and Joshua Cohen, 'Truth and Public Reason' (2009) 37 *Philosophy & Public Affairs* 2, cited in Dixon, *Responsive Judicial Review* (n 4) ch 3.

be filtered through this lens of reasonableness and deliberation. But the idea of democracy also requires that we ultimately give effect to what people actually think, not what we think they should think. This also applies to the scope and meaning of constitutional norms the scope of which are subject to reasonable disagreement. Identifying the existence, or non-existence, of burdens of inertia and blind spots therefore requires difficult evaluative judgments about what the relationship between raw public opinion (as measured by, say, public opinion polls) and the filter of reasonableness and deliberation.

VIII Stretching Ely?

Tamir suggests that my conception of judicial review, here, is extremely broad – indeed broader than any of the other leading comparative political process theories ("CPPT").[30] This is true in one respect: RJR focuses on a range of sources of democratic dysfunction that arise in well-functioning as well as at risk democracies. It is not just about the protection of thin notions of democracy and the democratic minimum core, but also thicker notions of democracy, and the promotion of responsiveness to evolving democratic understandings of rights.[31]

But this does not mean that it authorizes the broadest and most aggressive form of review, or oversight of the political process, compared to other theories. On the contrary, RJR is arguably more cabined and restrained in focus than a range of other variants of CPPT. Stephen Gardbaum, for instance, proposes five key democratic malfunctions or process-failures as the focus for judicial representation-reinforcement: (i) legislative failures to hold the executive accountable; (ii) government capture of independent institutions; (iii) capture of the political process by special interests; (iv) the outright dysfunction of the political process; and (v) the non-deliberativeness of legislative processes.[32] As I have argued elsewhere, several of these failures are also pervasive in most (even quite well-functioning) democratic systems: failures (i), (iii) and (v) in fact have substantial overlap with the idea of legislative and complex burdens of inertia, as well as legislative blind spots.[33] As Michaela Hailbronner notes, this could also lead to CPPT providing a 'very broad grant of power to courts', which arguably risks 'undermin[ing] the democratic goals [those ideas] see[k] to serve'.[34]

Gardbaum's response is to suggest that courts should focus on "core" instances of democratic dysfunction of these various kinds, or only the most serious failures of each kind. This, however, raises obvious conceptual difficulties: how do we identify the most serious failures? RJR, in contrast, suggests that in engaging in representation-reinforcing review, courts should vary the scope and intensity of review to the degree of democratic threat they observe, and further be explicitly mindful of limits on their own capacity and legitimacy, which may lead to judicial review creating new and distinct forms of reverse democratic inertia and democratic backlash. In many cases, this will also lead to a weaker, more restrained approach to judicial review than Gardbaum envisages.

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[30] Tamir, 'Dixon's Theory of Responsive Judicial Review: On the Limits of Ely-Stretching (and What's the Theory Truly About?)' (n 19).
[31] For emphasis of this point, see Chandrachud, 'Book Review – Democracy and Dysfunction: Towards a Responsive Theory of Judicial Review' (n 16).
[32] Id.
[33] See Rosalind Dixon, 'A New Comparative Political Process Theory?' (2020) 18(4) *International Journal of Constitutional Law* 1490.
[34] Michaela Hailbronner, 'Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory' (2021) 19(2) *International Journal of Constitutional Law* 1.

Perhaps Tamir should be read as saying not that I have the broadest account of CPPT, but that I have the broadest reading of Ely in this context – or go furthest in the direction of what he calls "Ely-stretching".[35] After all, countering legislative blind spots and burdens of inertia inevitably calls for the exercise of a form of substantive evaluative judgment about democratic attitudes and the weight of constitutional values or claims behind them. As Tamir notes, this was also precisely the kind of task Ely argued courts should avoid.

As I note in the book, however, that argument by Ely was also premised on a distinctively US-style form of strong judicial review. Where review was weaker, as for example in a statutory context, Ely took a different view: indeed, as I noted in chapter 2 of the book, he explicitly suggested that it might *make sense* for courts to 'protect the rights of the majority by ensuring that legislation truly reflect[s] popular values' in a common law or sub-constitutional context, where 'if the legislature [did] not approve of a court's decision' seeking to give effect to a "consensus" view of democratic values, it could "overrule" it.[36] This notion of weakened judicial finality also lies at the heart of a responsive theory of judicial review.

My contention, therefore, is that I stretch Ely, but only to some degree, and not necessarily further than other neo-Elyian CPPT scholars. But suppose one agrees with Tamir that the stretch is considerable.

IX Towards Global Constitutional Theory: Borrowing Ely & Häberle

Why connect RJR to Ely, and prior debates about representation-reinforcement, rather than simply to more contemporary comparative constitutional debates about constitutional dialogue and democratic hedging?

The answer (if one rejects the argument that there are in fact real intellectual affinities and connections) is strategic: US constitutional scholars are more likely to engage in ideas about judicial democracy protection and promotion if they are connected to longstanding US debates and theories, than if they simply have a purely comparative valence. The US and Europe also remain extremely importer exporters and importers of constitutional theoretic ideas: without connecting one's ideas to US debates, it is therefore difficult for those ideas to become part of a broader debate and dialogue about constitutional construction.

There is also nothing especially troubling or parochial about this phenomenon. Constitutional meaning, as I note in the book, is at once global and local in nature, or the product of universal and local narratives. The same is true for constitutional theory: we understand debates about judicial review through universal concepts and ideas, but also localized texts, traditions and theorists. It is therefore quite appropriate to develop new theoretic ideas in ways that seek directly to speak to those existing narratives and traditions.

This is exactly what I take Markus Kotzu to be doing, in his effort to connect the idea of responsive judging to the work of German constitutional theorist Peter Häberle.[37] Kotzu provides an insightful and sympathetic account of the arguments in chapter 8 of the book, and

[35] Tamir, 'Dixon's Theory of Responsive Judicial Review: On the Limits of Ely-Stretching (and What's the Theory Truly About?) (n 19) 5. See also Bryan Dennis Gabito Tiojanco, 'Democracy and Disengagement: Why Courts Should Leverage Democratic Virtue' (Working Paper, 2022).

[36] Tamir, 'Dixon's Theory of Responsive Judicial Review: On the Limits of Ely-Stretching (and What's the Theory Truly About?) (n 19) 5.

[37] Markus Kotzu, 'Hercules, No Lonesome Hero – Responsive Courts and Their Active Audience' (2022) 34 *National Law School of India Review* (forthcoming).

my call to judges to make careful – responsive – choices about judicial voice, narrative and tone. In doing so, he further shows how these ideas resonate with many of the ideas Häberle developed in Germany in the 1970's.

One way to read this is that few good ideas in constitutional law are truly new (alas, that is surely right). But another is that to persuade a diverse set of audiences, it is important to demonstrate the connections and resonances between RJR and their own distinctive traditions of constitutional thought. Hence, in the US, the task would be to explain the connection between these ideas and the work of a scholar such as Robert Burt.[38] But in Germany, neither Burt nor Ely are well-known.[39] The task is therefore to connect RJR to German constitutional thinkers, such as Habermas, Alexy and Häberle. And this is exactly what Kotzu does so persuasively, in ways that help pave the way for greater engagement with RJR as a paradigm in continental Europe and beyond.

X Conclusion

The task of critiquing, and defending, RJR will not end with this symposium. There is more to say on both scores than this volume permits. But the ideas have been greatly enriched by the debate thus far, and will only become stronger, as the debate continues.

[38] Robert Burt, *The Constitution in Conflict* (Harvard University Press, 1992); Dixon, *Responsive Judicial Review* (n 4).
[39] Rosalind Dixon and Michaela Hailbronner, 'Ely in the World: The Global Legacy of *Democracy and Distrust* Forty Years On' (2021) 19(2) *International Journal of Constitutional Law* 427.