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THE LIMITS OF ELY-STRETCHING

—Oren Tamir*

Professor Rosalind Dixon's impressive new book[1] aims to offer a sophisticated new theory of constitutional judging. That theory is one of *responsive* constitutional judicial review. More specifically, Dixon wants judges adjudicating constitutional cases to be responsive, in the sense of directing their unique focus to as well as fashioning remedies, for three specific 'dysfunctions' that constitutional democracies are prone to these days:

> (*) First, the 'dysfunction' of *democratic monopoly power*. In this scenario, an entity (such as a political party or an influential political leader) aggregates electoral or institutional power in ways that prove threatening to what Dixon calls—following her work with David Landau[2]—the "democratic minimum core".[3]
>
> (*) Second, the 'dysfunction' of *democratic blind spots*. Here, Dixon has in mind instances where the institutions of politics have either deliberately or inadvertently failed to fully account for how laws impact constitutional values and rights.
>
> (*) Finally, the 'dysfunction' of *democratic burdens of inertia*. By this Dixon means that she wants judges to respond to the concern that political institutions might not be sufficiently or adequately attuned to changes in constitutional

* Post-doctoral Fellow, Harvard Law School, and Global Hauser Post-doctoral Fellow, NYU School of Law. Deep thanks to Professor Amal Sethi for the invitation to contribute to this symposium and for a helpful discussion that helped me frame my thoughts. Special thanks as well (and as always) to Professor Ros Dixon for generative scholarship and for being a scholarly model to so many of us. Finally, thanks to the superb team of editors at the National Law School of Review for their helpful work on this piece and extremely helpful substantive and stylistic suggestions. I'm the only one responsible for any mistake, of course.

1 Rosalind Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (Publisher 2022).

2 Their most recent and mature statement thus far is in their co-authored book, Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford, 2021; online edn, Oxford Academic, 19 Aug. 2021).

3 See also Rosalind Dixon and David Landau, 'Competitive Democracy and the Constitutional Minimum Core' in Tom Ginsburg and Aziz Huq (eds), *Assessing Constitutional Performance* (Cambridge University Press 2016) 268.

> understandings that would *require them to act* and update old laws or enact new ones.

Dixon's responsiveness theory is undoubtedly a notable contribution to the already rich literature on constitutional judging. It displays many of Dixon's unparalleled qualities as a comparative constitutional scholar, including her truly incredible depth of knowledge of vast strands in the scholarship and public law developments in every region of the world. I also found her responsiveness to have many appealing features.

But does the book offer us a sufficiently robust theoretical grounding for what this role of responsive constitutional judging? I am not quite sure.

What is the theoretical basis that Dixon provides for her theory of judicial responsiveness? The answer to that question seems easy from reading her book: Dixon self-consciously describes her theory as neo-Elyian. That is, Dixon sees her theory of responsive judging as originating from the thinking of John Hart Ely and his own well-known and highly influential theory of process-based, "representation-reinforcing" judicial review. Even the book's subtitle is a riff on Ely's famous book *Democracy and Distrust*,[4] in which he fully synthesised his theory.

However, quite early in the book, I found myself questioning whether Ely's work meaningfully provides a sufficient foundation for the theory of responsive judicial review that Dixon is espousing. There's quite a bit of stretching of the basic Elyian themes in Dixon's exposition of her theory.

Recall Ely's distinctive defence of judicial review in a constitutional democracy and what he wanted judges to do under his theory. Influenced by the famous framework in footnote 4 of *Carolene Products*,[5] Ely argued that courts in a constitutional democracy should intervene to resolve two primary democratic malfunctions. The first is when incumbent politicians distort the political forces in their favour—or, in Ely's terms, when the "ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out".[6] This is a kind of a clear majoritarian problem that may exist in constitutional democracies. And Ely believed courts, given their relative independence and remoteness, would be well-positioned to address this sort of problem. By contrast, the second malfunction Ely identified is somewhat different: it exists when a minority group is consistently the loser in political battles. Here, no clear majoritarian problem is involved, as in Ely's first malfunction. No one

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4 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1981).

5 *United States v Carolene Products Co* 1938 SCC OnLine US SC 93 : 82 LEd 134 : 304 US 144, 152 n 4 (1938).

6 ELY, *supra* note 4, at 103.

is clogging the channels of representative democracy, for example. Instead, this malfunction represents a potentially serious threat to another democratic value that Ely (again influenced by *Carolene Products* and in accordance with broader ideas of the time)[7] has identified: that of political pluralism. When a certain group has no real chance of becoming part of the governing coalition—through alliances and other forms of governmental power-sharing or distribution mechanisms—pluralist politics isn't likely to live up to its expectations. It doesn't fully or systematically represent the entire polity. And Ely thought that courts, again because of their relative independence from the hustle and bustle of normal politics, should therefore intervene to compensate for this failure of democratic pluralism.

Obviously, this is a rather crude sketch of the basic Elyian themes. And it ignores certain complexities.[8] Still, I think it provides enough of a foundation to ask a crucial question about the book: how do Dixon's three democratic dysfunctions, described at the outset, relate to the kinds of malfunctions that preoccupied Ely?

It is quite easy to see, I believe, Dixon's call for courts to be responsive to the risk of democratic monopoly power—her first dysfunction—connected to Elyian core themes. Here, Dixon's theory does resemble a mere update, or a modest stretch, of the basic Elyian themes. Dixon herself tells the update story well: at the time of writing, Ely saw relatively "benign" forms of democratic majoritarian dysfunctions and risks to representative democracies. Ely was also closely focused on the United States (US) system instead of engaging in a more comparative approach. Fast-forward to the present and take a broader comparative perspective to the issue, and you'll see that constitutional democracy can face, and is now potentially facing, far more severe threats than those Ely originally imagined. Going much beyond the potential clogging or hindering of the normal function of constitutional representative democracies, the current trend entails trying to gradually destroy them from within by threatening what Dixon calls the "minimum democratic core".[9] If courts have a potentially attractive role in countering the more benign forms of democratic malfunctions that Ely focused on, Dixon's point is that it certainly seems at least presumptively reasonable to think that they might have a similar role to play in countering the current, more existential risks that constitutional

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7 See, eg, Robert A. Dahl, 'Pluralism Revisited' (1978) 10 Comp Pol 191.

8 For present purposes, I also bracket the well-known criticisms of Ely's theory, for example, that it is not truly about process or whether Ely's assumptions about courts' ability to counter these difficulties are viable and have been realised by experience. For a recent discussion of the second aspect, in particular, see Ryan Doerfler and Samuel Moyn, 'The Ghost of John Hart Ely' (forthcoming, 2022) 75 Vand L Rev.

9 The literature on this theme is now vast, but for some representative contributions, see Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA L Rev 78; Nancy Bermeo, 'On Democratic Backsliding' (2016) J Democracy, 5.

democracies globally face in the form of threats to the democratic minimum core.[10]

It is much more challenging, though, to connect the foundational Elyian themes the *other* two 'dysfunctions' to which Dixon calls judges to be responsive. Here, the Ely-stretching I spoke of is on full display. And it is far from being merely modest.

Take, first, the dysfunction of what Dixon calls democratic 'blind spots". In Dixon's account, these blind spots can, at times, be straightforwardly related to Elyian ideas—for example, when the blind spot stems from a situation where the view of a *minority* isn't likely to be considered because it is excluded from the normal "wheeling and dealing"[11] of politics. Moreover, Dixon sometimes speaks of blind spots that exist because of the dominance of powerful interest groups makes it hard to see a conflicting perspective. Again, this sounds very much within the clear domain of Elyian thinking about judicial review as correcting a failure of democratic majoritarianism and 'representation-reinforcing'. However, Dixon's conception of 'blind spots' as a democratic dysfunction is much broader than this. In her conception, the blind spots that courts should address and respond to can occur well beyond these cases. For example, they can arise simply due to time constraints in political institutions—especially legislatures, as well as from decision-makers' bounded rationality, and more.

The same issue of stretching arises with the third dysfunction of burdens of inertia for which Dixon asks judges' responsiveness. Again, burdens of inertia under Dixon's scheme can certainly occur for Elyian-sounding reasons. For example, such blind spots can arise because a "discrete and insular" minority isn't able to put something on the agenda and get the institutions of politics to act on it—a theme of clear powerlessness.[12] Or because powerful interest groups make sure that issues are left off the agenda—perhaps even in a tacit way and as an illustration of what Peter Bacharach and Morton Baratz called the "second face of power".[13] Once more, though, Dixon's call for responsiveness goes much further than Elyian thought might suggest. Her burdens of inertia as dysfunction would occur even when the agenda was clogged with the normal dynamics of *coalition* politics (e.g., when parties can't agree amongst

[10] I am bracketing for present purposes the question of whether and how courts should do so, as well as whether and how much we have a sufficiently robust grasp of understanding when instances of real danger to the "democratic minimum core" are occurring. I have my own doubts. See Oren Tamir, 'Can Abusive Borrowing Itself Be Abusive?' (*Balkinization*, September 26 2021) <https://balkin.blogspot.com/2021/09/can-abusive-borrowing-itself-be-abusive.html> accessed 7 March 2022; Oren Tamir, *Abusive Abusive Constitutionalism* (work in progress) (on file with the author).

[11] ELY, *supra* note 4, at 151.

[12] For an interesting discussion and a proposal about what to do with these cases, see Adrian Vermeule, 'Submajority Rules: Forcing Accountability upon Majorities' (2005) 13 J Pol Phil 74.

[13] Peter Bacharach and Morton S. Baratz, 'Two Faces of Power' (1962) 56 Am Pol Sci Rev 947.

themselves about whether to move ahead with a legislative plan). Or because of 'tunnel vision' that appears to prevent decision-makers from seeking paths for renewal and updating existing laws to reflect current constitutional values.

To be clear: Dixon does occasionally try to connect these broader 'malfunctions' of politics to the realm that comes more clearly to Elyian themes. For example, she asserts at several points in the book that these blind spots and burdens of inertia create a risk that public policy would be disconnected from *majoritarian views*. That certainly sounds like an important kind of Elyian connection—namely, that the judicial intervention is needed because something is preventing majoritarianism from being fully realised. At the same time, though, her discussion of how much her theory seeks to track this majoritarianism or fulfil it is extremely thin. Indeed, Dixon offers no real development of what it means for public opinion or majoritarianism to be reflected in policy. For instance, how do we determine when a policy is more likely to reflect majoritarian preferences or not? Are we looking at process (e.g., who's included in the deliberation) or, rather, focusing on results? In the latter context, are we looking for actual preferences or constructed ones? And what's the relevant time frame? Is it majority preferences *now* or in the more *medium* and *long term*? These are thorny issues, that a quite developed literature attempts to address, but Dixon's book doesn't seriously engage any of them.

In fact, to the extent that one can follow more concretely what's Dixon's conception of majoritarianism is, it seems that she uses *all* possible conceptions of the term at different points in her book.[14] At times, the idea of majoritarianism under Dixon's theory seems to take a more deliberative cast, focusing on process and deliberation. At other times, it takes a more pragmatic and consequentialist tack—speaking to actual preferences and results. Sometimes the idea of majoritarianism is focused on the short term—such as in the discussion of burdens of inertia in the context of coalition governments. Nevertheless, Dixon at some points seems to allude to a conception of majoritarianism focused more on the medium and long term. And so on and on.

All of this suggests to me that, at the end of the day, it's hard to see Dixon's theory as fully and even centrally Elyian in nature. Again, some important manifestations of it might be. But some, and I suspect most, are only extremely weakly related to it. Ely has been substantially stretched in Dixon's account.

Of course, this isn't to suggest that there's something inherently wrong with some measure, even a substantial one, of conceptual stretching. In a way, stretching of this kind is only natural. We see it all the time. When a concept

[14] Indeed, to me, a weakness in the book is that it is so complex and multi-layered—obviously reflecting Dixon's deep knowledge of the field and scholarship—that many of the ideas that seem distinctive in the book are sometimes tucked away or revealed to be in tension with other ideas.

or an idea is initially introduced into the world, it might be done in a very crude way that requires further development and stretching. Even if ideas are fully fleshed out when initially introduced, the ones who put them on the table for us might certainly not be aware of their potential power to explain or illuminate *other* phenomena. And as time passes by, some stretching seems appropriate not to say inevitable as new circumstances arise and the initially introduced concepts must adapt to account for them. Kuhn famously described this as the process of "normal science".[15] And legal scholars in the scholarship they produce exemplify this "normal" adaptation and stretching of initial concepts in their work all the time (to name just one example, relevant to Dixon's own work both in general and in the book, consider how the distinction between "weak" and "strong" forms of judicial review has been adapted and complicated since it was initially introduced).[16]

Moreover, Dixon is explicitly aware that she is engaged in a substantial amount of Ely-stretching, specifically pitching her theory as a form of Elyian "expansion." In fact, Dixon is far from alone in engaging in Ely-stretching. Her book is one of several recent contributions to a body of work that aims to bring Ely's insights to the comparative constitutional law scene. And the entire point of this neo-Elyian scholarship is to illustrate that Ely's original ideas require some generous measure of stretching, especially considering its parochial US focus and the changed circumstances since his time. As two leading scholars put it in their own important contribution to this body of work, the neo-Elyian scholarship offers a "broad read" of Ely.[17]

That said, Dixon's version of Ely-stretching does strike me as raising special concerns. For one thing, even if some, or perhaps most, of the other neo-Elyian theories on offer today are also exposed to the same quibbles I have raised here concerning Dixon's responsive theory, her own theory seems to methe *broadest one on offer*. For example, Stephen Gardbaum's theory of comparative political process, also explicitly influenced by Elyian themes, speaks of the need for courts to respond to *systematic*, serious failures to "core" democratic process values.[18] Dixon's call for responsive judicial review isn't qualified in the same way. Manuel Jose Cepeda and David Landau also offer avaluable discussion that presents itself as a stretch and update on Ely's core themes; however, they discuss stretching in the context of "*fragile* democracies".[19] Dixon's account is again broader than Cepeda and Landau's; her

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15 Thomas Kuhn, *The Structure of Scientific Revolutions* (2nd edn, Publisher 1970) 74–75.

16 For an account of this evolution by the scholar introducing the initial concept, see Mark Tushnet, 'Weak Form Review: An Introduction' (2019) 17 Int'l J Const L 807.

17 Manuel Jose Cepeda and David Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19 Int'l J Const L 548.

18 Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18 Int'l J Const L 1410, 1437.

19 Cepeda and Landau, *supra* note 17. See also, of course, Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University

responsive theory emphatically encompasses *established* democracy as well. Niels Petersen has also been substantially influenced by—or draws inspiration from—Elyian themes in his discussion of the appropriate role of constitutional courts. He also aims to broaden Ely's reach. Yet Petersen seems to be much closer to the original Elyian core than Dixon. Indeed, Petersen speaks mostly of judicial review as a response to the risks of "capture" and other "political market failures"[20] (in that particular expression, Petersen very much reflects the kind of stretching that Ely's theory has gone through in the US).[21] And even the "democratic experimentalist" theory of judicial review that Dixon mentions (associated most closely with Charles Sabel, William Simon, and Michael Dorf and that can also be linked to the Elyian idea of democratic dysfunction and having courts attempting to rectify it) seems narrower than her own conception of responsive judicial review. Among other things, this democratic experimentalist theorist speaks of judicial intervention in cases of institutional "failure".[22]

For another thing, and precisely because Dixon's responsive theory stretches Ely so far, at the end of the day, it seems to me that we're left substantially wanting. Ely-like ideas don't meaningfully support the kind of ambitious responsive judicial role that Dixon envisions for courts in constitutional democracies. To explain and justify her responsive theory of the judicial role in constitutional law in full, something else seems to be required. Many of the Elyian themes strike me to a large extent as a distraction.

This is of course not the place to develop in full what this alternative explanation and justification might be. But I can briefly gesture in the direction. And, interestingly, there are hints at this possibility in the book itself, but the emphasis on connecting the theory to Ely seems to (mistakenly and unjustifiably, I think) distract the focus away from them. Put briefly, in my view, the justification and explanation for judicial review under Dixon's responsive theory seems to be rooted in *governmental efficacy*: judicial review is a mechanism to make governance better—or, drawing on Jeremy Waldron, bring institutions of government to a "good working order"[23]—not very far from how

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Press 2015).

20 Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany, and South Africa* (Cambridge University Press 2017) 181.

21 For some of the debates in this context, see Einer R. Elhauge, 'Does Interest Group Theory Justify More Intrusive Judicial Review?' (1991) 101 Yale LJ 31; Thomas W. Merrill, 'Does Public Choice Theory Justify Judicial Activism After All?' (1997) 21 Harv J L & Pub Pol 219. I do introduce a certain note of caution here because I find Petersen's argument somewhat ambiguous at times. More specifically, Petersen can be read as seeking a relatively expansive judicial review not all that different from Dixon's—for example, when he identifies as one of the market failures to which he believes judges ought to direct their attention as a failure to process or be exposed to sufficient information.

22 Charles F. Sabel and William H. Simon, 'Destabilizing Rights: How Public Law Litigation Succeeds' (2004) 117 Harv L Rev 1016.

23 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346, 1360.

courts are expected to work when they supervise regulatory work in the sub-constitutional field of administrative law.[24]

And indeed, when we see *this* as the rationale or the underlying "theory" for the responsive judicial role, the expansive role that Dixon envisions for courts under her theory begins to make much more sense. For instance, the need to have courts address blind spots that regularly appear because of a lack of attention or bounded rationality is needed because blind spots are not conducive to effective governance. An effective government is one that has as few as possible blind spots in the process of formulating policies and giving content to constitutional values. Moreover, the attraction of having courts address burdens of inertia is very much the same: a government that fails to update laws in accordance with changing values or introduce laws that counter new challenges that a polity might be facing is similarly ineffective. Judicial review that is responsive to those difficulties would help make our governments more effective.

To be sure, once we recognise that a full justification for Dixon's responsive theory must bring to the fore a focus on governance effectiveness in lieu of being meaningfully and even primarily rooted in Elyian concerns, other questions begin to surface that are necessary to address, and which the book does not address (or does not address them enough). Some of these questions relate to the normative justification for such a role for courts, while others are more operational.

For instance, what's exactly the relationship between governmental efficacy and constitutionalism? After all, the connection is not entirely obvious. It seems to depend on whether we take a more *negative* or *positive* view of constitutionalism.[25] If one endorses a negative view of constitutionalism—namely, that constitutionalism is a project of constraint and limitation on governmental power—effective government means to make sure that the government is relatively small. If, by contrast, one endorses a more positive view of constitutionalism, then effective government means a more robust governmental regime.[26] The specific stand that one takes in the contrast between negative and positive

[24] Indeed, Dixon clearly recognises the connection between her theories and the role of courts in administrative law and in scrutinising normal regulatory actions (and inaction). She draws the name of her theory—responsive judicial review—from the broad world of governmental regulation. My complaint in the text is essentially that this point should be much more central to the argument in the book—at the expense of the needless and sometimes distracting Ely-stretching. I would also propose that Dixon's theory of responsive judicial review would benefit from fully exploring the implications of this regulatory analogy.

[25] On negative/positive constitutionalism tension, see N.W. Barber, *The Principles of Constitutionalism* (Oxford University Press 2018); Adrienne Stone and Lael K. Weis, 'Positive and Negative Constitutionalism and the Limits of Universalism: A Review Essay' (2021) 41 Ox J Leg Stud 1249.

[26] I note that Dixon's argument can be understood as adopting a positive constitutionalist view. I am, of course, largely sympathetic to that. I note though that in my view at least this sort of

constitutionalism also seems to have implications for how the responsive theory would be implemented. For instance, under a negative conception of constitutionalism, burdens of inertia might *not* be problematic, as governmental action and intervention into spheres of personal (and in a federal system, state) autonomy are generally suspicious. By contrast, under a positive conception of constitutionalism, burdens of inertia of this kind are indeed troubling and may justify judicial intervention.

Another question that seems important in relation to Dixon's theory, now reconstructed not as primarily or meaningfully Elyian but about a deep concern for governmental efficacy, is this: what's the connection between governmental efficacy and constitutional *democracy* in particular? The reason for asking this is that at the end of the day, the kind of dysfunctions of blind spots or burdens of inertia are not uniquely democratic.[27] They can likewise occur in totalitarian systems or in authoritarian constitutionalist systems which also prize governmental efficacy—perhaps above anything else.[28] What values are served by governmental efficacy in constitutional democracies, in particular? Dixon sometimes says that her theory is inspired by "thicker" conceptions of democracy. That said, what thick conception makes governmental efficacy particularly valuable?[29] Why are functioning and reasonably performing governmental institutions required to make constitutional democracies work?

Furthermore, realising that efficacy is a key concern under the responsive theory immediately raises the possibility of crucial *trade-offs* between governmental efficacy and other values that constitutional democracies are plausibly after. Of course, Dixon is well aware that her theory presents trade-offs. This impression is clearest when she speaks about the potential drawbacks of her theory, given the potential limitations on judges to responsibly identify the kinds of dysfunctions that stand at the heart of her theory. However, once we realise that Dixon's responsive judicial review is in large part about governmental efficacy, further trade-offs seem to arise. Should, for instance, a responsive theory of judicial review limit delegations to the executive branch or to administrative agencies? On one hand, agencies might be more efficacious,

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lens requires justification which, in turn, might reveal that at least in some domains a more negative view of constitutionalism is indeed required.

[27] I emphasise here that Dixon tries to connect her theory to democracy by building on the idea of fit between policies and majoritarianism. But, as I've suggested in the text before, the notion of majoritarianism plays only a weak role in Dixon's conception, which opens up the possibility that her theory could be easily applied beyond constitutional democracies.

[28] *Cf.* Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell L Rev 391; David S. Law, 'Alternatives to Liberal Constitutional Democracy' (2017) 77 Md L Rev 223.

[29] For a recent discussion of the importance for democracies of the values of efficacy and 'getting things done', see Richard H. Pildes, *Political Fragmentation in Democracies of the West* (unpublished manuscript), available on SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3935012>.

and the executive branch might be the "most knowledgeable branch",[30] elements that both seem important for making governments perform better. On the other hand, making agencies the primary decision-makers at the expense of legislatures or other more directly democratic institutions can create what Benjamin Barber once called a version of "thin democracy"[31] in which decisions are removed further away from the people. Moreover, Dixon's responsive theory assumes some kind of virtue in having judges *slow down* the pace of policy-making in constitutional democracies in order to ensure that the government performs and no blind spots exist. But what if the slowing down that is the result of this additional check on government power can itself harm efficacy, especially in contexts where there is a sensible claim that governments must act rapidly and with what Lon Fuller called "fiat"?[32]

Finally, if Dixon's responsive theory is chiefly about achieving governmental effectiveness, then what remedies are the most suitable? Of course, Dixon is one of our most important scholars of remedial schemes by constitutional courts. And the book often mentions the differences between weak and strong form review, a subject on which Dixon's work has had immense impact. However, from the point of view of a theory that seeks governmental effectiveness, which I believe is the focus of Dixon's responsive theory, the remedial discussion Dixon provides in the book seems again problematically thin. More needed to be said to convince us again that what courts do would be more than just "law on the books" rather than "law in real life." For example, what remedies are best at getting governments to perform better? Furthermore, given that Dixon's theory is basically about effectiveness and good performance, isn't there a need to insist that judges take a more *iterative* perspective to remedies—in other words, shouldn't they be aiming to make sure that things are actually changed on the ground?[33]

Dixon's responsive theory is bound to be influential. It is the most mature statement of one of the leading scholars of our time about a topic of central importance, if not obsession,[34] of anyone who seriously thinks about public

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[30] Cass R. Sunstein, 'The Most Knowledgeable Branch' (2016) 164 U Pa L Rev 1607. See also Jerry L. Mashaw, 'Prodelegation: Why Administrators Should Make Political Decisions' (1985)1 J L Econ & Orgs 81.

[31] Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 2004).

[32] Lon L. Fuller, 'Reason and Fiat in Case Law' 59 Harv L Rev 376 (1946). For a claim that sometimes "fiat" is so valuable that might even justify drastic measures in the name of democratic constitutionalism, see Oren Tamir, "Good" Court-Packing in the Real World, IACL-AIDC Blog, April 5 2022, available at <https://blog-iacl-aidc.org/new-blog-3/2022/4/5/ good-court-packing-in-the-real-world-z38xc>.

[33] For one recent sophisticated analysis of iterative remedial scheme, see Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge University Press 2021).

[34] Barry Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five' (2002) 112 YALE LJ 153.

law, both domestically and comparatively. But to appreciate Dixon's book and the theory it fleshes out fully, see how exactly it adds to what we already know about the subject, and continue giving shape and thought to how best to realize it, we need to largely break away from how it is pitched to us in the book. The spirit of Ely might be somewhere in this theory and captured by some of its expected applications. Much of the argument in the book seems to lie much beyond that, however.