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The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue

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The Dialogic Promise

ASSESSING THE NORMATIVE POTENTIAL OF THEORIES OF CONSTITUTIONAL DIALOGUE

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I. INTRODUCTION

In recent years, "dialogue" has become an increasingly ubiquitous metaphor within constitutional theory. It is most commonly used to describe the nature of interactions between courts and the political branches of government in the area of constitutional decision-making, particularly in relation to the interpretation of constitutional rights. Dialogue theories emphasize that the judiciary does not (as an empirical matter) nor should not (as a normative matter) have a monopoly on constitutional interpretation. Rather, when exercising the power of judicial review, judges engage in an interactive, interconnected and dialectical conversation about constitutional meaning. In short, constitutional judgments are, or ideally should be, produced through a process of shared elaboration between the judiciary and other constitutional actors.

Theories of constitutional dialogue have proliferated in recent times because of the potential that many see in them to resolve the democratic legitimacy concerns associated with

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judicial review. Within constitutional theory, contemporary scholars have tended to fixate upon finding an objective theory of interpretation that provides an appropriate methodology for judges to follow when interpreting constitutional provisions in order to enhance their legitimacy. Theories of constitutional dialogue offer an alternative way of filling the legitimacy lacuna, because if the political branches of government and the people are able to respond to judicial decisions in a dialogic fashion, the force of the countermajoritarian difficulty is overcome, or at the very least, greatly attenuated.[1] Of particular interest, many theories claim that dialogue between the judiciary and other constitutional actors is a structural feature of the United States constitutional system. This would appear to alleviate much of the anxiety about judicial review that is expressed by popular constitutionalists, who call for a reassertion of the American historical tradition of the involvement of the People in constitutional interpretation.[2] Dialogue theorists, in contrast, assert that this involvement already occurs.[3]

If anything, theories of constitutional dialogue are even more widespread outside the United States. The concept of dialogue has been popularized to the greatest extent in countries, such as Canada,[4] which have more recently adopted

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[1] *Cf.* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 978 (2003) (advocating "democratic experimentalism" in institutional design, rather than turning to constitutional dialogue, as a way of resolving democratic legitimacy concerns).

[2] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 208 (2004) [hereinafter KRAMER, THE PEOPLE THEMSELVES] ("Bear in mind that popular constitutionalism never denied courts the power of judicial review: it denied only that judges had final say."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 174 (1999) [hereinafter TUSHNET, TAKING THE CONSTITUTION] ("Populist constitutional law seeks to distribute constitutional responsibility throughout the population."); Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 4, 13-14 (2001) (supporting a system of popular constitutionalism in which the executive and legislative branches of government, as agents of the people, have an equal role to the Court in constitutional interpretation and implementation).

[3] *See, e.g.*, Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1041-42 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*] (critiquing Kramer's approach to popular constitutionalism from a dialogic perspective).

[4] *See generally* KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001) [hereinafter ROACH, THE SUPREME COURT ON TRIAL]; Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. B. REV. 481 (2001) [hereinafter Roach, *Dialogues*]; 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) [hereinafter Hogg & Bushell, *Dialogue*].

Bills of Rights.[5] Scholars frequently state that these "modern" or "weak form" Bills of Rights contemplate dialogue, due to the fact that they contain deliberate mechanisms enabling legislative responses to judicial decisions about rights.[$] In this context, not only does conceiving of constitutionalism as involving a dialogue between courts and the political branches of government temper concerns about the democratic deficit of judicial review, but it also enables the innovative institutional features of these Bills of Rights to be better incorporated into normative constitutional theory.

This article provides a critical account of theories of constitutional dialogue in order to determine which of these theories hold the greatest normative promise. This requires answering two separate questions. The first is whether theories of constitutional dialogue are able to accomplish their goal of resolving the democratic objection to judicial review. The second is whether, legitimacy aside, the different theories provide an attractive normative vision of the role of judicial review in democratic constitutionalism.

The answers to these questions vary depending on whether the theories are principally positive or normative, and on the specific dialogic role that is ascribed to the judiciary. As a general matter, the more prescriptive the theory, the less likely it is to address legitimacy concerns adequately. Because

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[5] *See, e.g.*, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 710 (2001) (arguing that the constitutional and statutory bills of rights adopted in Canada, New Zealand and the United Kingdom attempt to create "joint responsibility . . . and deliberative dialogue between courts and legislatures"); C.A. Gearty, *Reconciling Parliamentary Democracy and Human Rights*, 118 LAW Q. REV. 248, 248-49 (2002) (arguing that a significant feature of the United Kingdom Human Rights Act is the potential dialogic tension it creates between the legislature and the judiciary); Tom R. Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, 2005 PUB. L. 30$, 307 (U.K.) (arguing that a "strong form" version of dialogue best reflects the form of constitutionalism embodied in the United Kingdom Human Rights Act). In European countries with centralized systems of judicial review, the notion of constitutional dialogue has also been used to explain the relationship between constitutional courts and the political branches of government. *See, e.g.*, ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 22, 92 (2000); Alec Stone Sweet, *Constitutional Dialogues: Protecting Rights in Xrance, Germany, Italy & Spain*, *in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 8, 8 (Sally J. Kenney et al. eds., 1999).

[$] *See, e.g.*, Sandra Fredman, *Judging Democracy: The Role of the Judiciary under the HRA 1998*, 53 CURRENT LEGAL PROB. 99, 119 (2000) (arguing that due to the fact that the final word about the interpretation of rights under the Human Rights Act remains with the legislature, "a dialogue of sorts is set up between the courts and Parliament"); Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT. L. REV. 49, 49 (2004) [hereinafter Roach, *Dialogic Judicial Review*] (claiming that the structure of the Canadian Charter "contemplates and invites dialogue").

prescriptive theories tend to privilege the role of judges in constitutional decision-making, without sufficient reason, and leave limited space for independent political judgments, they fail to provide a satisfactory answer to legitimacy concerns. Positive accounts, on the other hand, often provide more persuasive evidence that concern about the countermajoritarian difficulty is overstated. However, these accounts themselves are subject to criticism, as they frequently fail to offer an attractive normative vision of what judicial review should accomplish in modern society.

This article argues that the most promising positive theories are "equilibrium" and "partnership" theories of constitutional dialogue. Equilibrium theories focus on the judiciary's capacity to facilitate society-wide constitutional debate, while partnership theories draw attention to more distinct "judicial" and "legislative" functions that the different branches of government respectively perform. These theories have considerable normative potential because they provide attractive explanations of the judicial role in dialogue that do not privilege the contributions of judges. In order to provide the most satisfying normative account of the role of judicial review in modern constitutionalism, this article concludes that equilibrium and partnership theories should be synthesized, creating dialogic fusion. This will not only produce a vision of dialogue that effectively accounts for the different roles that the various participants can play in the elaboration of constitutional meaning, but it will also enable a more comprehensive understanding of the different institutional and social aspects of constitutional dialogue.

Part II of this article explains the emergence of theories of constitutional dialogue in contemporary scholarship, connecting this to their perceived ability to resolve many of the democratic legitimacy concerns associated with judicial review. Part III provides a typology of the differing theories of dialogue, assessing each in terms of its ability to (a) address the democratic legitimacy concerns associated with judicial review, and (b) provide a normatively attractive account of the role of judicial review.[7] Although theories of dialogue abound, no

[7] The focus here will be on theories of constitutional dialogue that have emerged in the United States and Canada. Although this necessarily excludes a small amount of literature from other nations, the theories that have emerged in these two countries are by far the richest theories of dialogue that have been proposed and provide a fairly complete review of the range of features that a theory of constitutional

scholar to date has attempted to categorize them comprehensively, explaining the important ways in which the various accounts both converge and differ. Part IV then explores how a dialogic fusion between equilibrium and partnership models both satisfies concerns about the countermajoritarian difficulty and offers an attractive normative vision of constitutional dialogue, as well as proposing a range of directions for future research.

II. THE EMERGENCE OF THEORIES OF CONSTITUTIONAL DIALOGUE

Normative constitutional theory has long been dominated by concerns that judicial review is incompatible with democracy. In the United States, the issue has concerned scholars at least since Thayer famously argued, in 1893, that judicial review debilitates the political branches of government.[8] In the 19$0s, Bickel labeled the inconsistency of judicial review with democracy the "countermajoritarian difficulty."[9] Since Bickel, the question of the democratic legitimacy of judicial review has overshadowed all other theoretical inquiries within normative constitutional scholarship.[10] While this "obsession" is most apparent within American constitutional theory, due both to the lengthy history of judicial review in the United States and the passionate political and legal controversies that the exercise of this power by the judiciary has engendered, concern about reconciling

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dialogue may have. A different objection that might be raised concerning this methodology relates to the different constitutional provisions and structures of the United States Constitution and the Canadian Charter of Rights and Freedoms, which many commentators have argued affect the nature of the dialogic interactions that occur in those systems. Even accepting this is true, there nonetheless remains value in taking a step back from these distinct structural provisions in order to compare the normative and prescriptive insights that different theories of constitutional dialogue provide.

[8] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 15$ (1893).

[9] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1$ (19$2) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH]; *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) ("The 'countermajoritarian difficulty' has been the central obsession of modern constitutional scholarship.").

[10] In relation to the history of concerns about the countermajoritarian difficulty in the United States, see generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Xive*, 112 YALE L.J. 153 (2002).

judicial authority with democratic theory also animates constitutional discussion in a range of other nations.[11]

Conventional attempts to resolve the countermajoritarian difficulty, both in the United States and in other nations, have centered on proposing objective theories of constitutional interpretation in order to appropriately confine judicial discretion. This Part examines why these attempts have failed to alleviate countermajoritarian concerns. It then introduces dialogue theory's novel solution to this vexing issue.

A. The Democratic Deficit of Judicial Review and the Xailure of Contemporary Constitutional Theory

When examining why judicial review is commonly regarded as incompatible with democracy, it is helpful to return to Bickel's description of the problem in *The Least Dangerous Branch*. Bickel was concerned that when judges strike down legislation, they "thwart the will" of the prevailing political majority.[12] Although Bickel recognized that the political institutions of government often are not perfectly majoritarian and that judicial review may have ways of being responsive to majority concerns, he nonetheless argued that there remains "a serious conflict with democratic theory" due to the fact that judges are unelected and their constitutional decisions are not reversible by any legislative majority.[13] Judicial review is a "deviant institution in the American democracy" precisely because judges, who are not electorally accountable for their actions, are able to strike down legislation that has been enacted by those who represent the will of the people.[14]

Concerns about the legitimacy of judges invalidating legislation become even starker in relation to judicial decisions about the interpretation of constitutional rights. This is because the indeterminate nature of rights leads to pervasive yet reasonable disagreement about how rights should be conceived, how they should be applied in specific contexts, and

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[11] For scholarly work that raises concerns about the countermajoritarian difficulty in the Canadian context, see ALLAN C. HUTCHINSON, WAITING FOR CORAF 57-87 (1995); F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY 1$$ (2000).

[12] *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9, at 1$-17.

[13] *Id*. at 17-20.

[14] *Id*. at 18.

what other values, if any, ought to trump them.[15] In the context of such fundamental disagreement, it is questionable whether it is possible to reach "correct" answers about these issues.[1$] As a result, many now question why judges should be allowed to make final and binding decisions about the force or meaning of rights, or whether such questions should instead be left to more democratic and inclusive processes for deliberation and resolution. In the face of the indeterminacy of constitutional rights, it also remains unclear what techniques or methodology judges should use to interpret them.

In addition to their concern about judges thwarting the will of prevailing political majorities, Thayer and Bickel were uneasy about other democratic costs associated with the practice of judicial review. Thayer feared that judicial review encourages legislators to defer to judicial statements about rights rather than to engage in independent consideration of the meaning of constitutional values.[17] Echoing Thayer, Bickel commented that "[b]esides being a counter-majoritarian check on the legislature and the executive, judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process."[18] More recently, Mark Tushnet has defined these problems as "policy distortion" and "democratic debilitation."[19] Judicial review can lead to policy distortion when legislatures choose policies based on what judges have said about constitutional norms, rather than making independent judgments about what the Constitution requires

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[15] *See* JEREMY WALDRON, LAW AND DISAGREEMENT 11-12, 2$8 (1999); Richard Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); *see also* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 1 (199$) (stating that reasonable disagreement is an unavoidable feature of both politics and law); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (199$) (discussing the challenges that face the judiciary in the face of reasonable disagreement).

[1$] Recognition of this point need not equate with moral relativism, just an acknowledgement that even if right answers exist, the phenomenon of reasonable disagreement means that we may not be able to readily identify these answers. In relation to this issue, see WALDRON, *supra* note 15, *passim*; Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 58 n.12 (1997).

[17] Thayer, *supra* note 8, at 155-5$ (stating that judicial review "has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality . . . [a]nd moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it").

[18] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9, at 21.

[19] Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247, 259, 275 [hereinafter Tushnet, *Policy Distortion*]; *see also* TUSHNET, TAKING THE CONSTITUTION, *supra* note 2, at 57-$3.

in particular cases. Democratic debilitation, in contrast, occurs when legislatures enact statutes without discussing constitutional norms, instead relying on the courts to consider constitutional problems with legislation.

Responding to these concerns, contemporary scholarship has endeavored to formulate an objective theory of constitutional interpretation that both clearly defines a sphere within which judicial resolution of constitutional issues is democratically appropriate, and which provides an appropriate methodology for judges to follow in the face of indeterminate constitutional provisions. At one end of the spectrum, originalists argue that judges should confine themselves to consideration of the original intention of the Framers when deciding constitutional cases, in order to give effect to the enduring values of the People as expressed in the Constitution itself.[20] Others suggest that a more substantive approach to interpretation is required so that judges can address the fundamental moral values that are embodied in the Constitution.[21] Resting on stronger claims about judicial expertise in relation to moral principle, these "fundamental rights" theories focus less on justifying judicial review as democratically legitimate than on stressing that excessive concern with this question leads to a weakening of the judiciary's vital function of elaborating the principled basis of the Constitution. A further influential theory is John Hart Ely's "representation-reinforcing" theory of judicial review.[22] Ely asserts that judicial review can only be justified when the judiciary acts to identify and correct malfunctions in the political process. Representation-reinforcing theory thus

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[20] Differing conceptions of originalism have been proposed. *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN $-20, 193-200 (1987); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143-$0 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW vii, 23-25 (1997).

[21] Ronald Dworkin does not see judicial review as presenting democratic legitimacy problems, because the whole point of the Constitution is to protect individuals from majorities. *See, e.g.*, RONALD M. DWORKIN, A MATTER OF PRINCIPLE 57-$0, 88, 110-11 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977). In Canada, fundamental rights theory under the Canadian Charter is supported by Lorraine Weinrib. *See, e.g.*, Lorraine Eisenstat Weinrib, *Canada's Constitutional Revolution: Xrom Legislative to Constitutional State*, 33 ISR. L. REV. 13, 15, 23-2$, 43-48 (1999).

[22] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). In Canada, similar arguments have been made by Monahan, relying on Ely. *See* Patrick J. Monahan, *Judicial Review and Democracy: A Theory of Judicial Review*, 21 U.B.C. L. REV. 87, 90 (1987).

confines the judicial role to improving or perfecting the democratic process, rather than the vindication of substantive constitutional values.

Extensive scholarly criticism has revealed numerous failings with each of these theories, highlighting either that objective constraints on the judiciary do not exist, or at the very least, that these theories have failed to identify legal principles that place effective constraints on judges. Take originalism, for example, which has been widely critiqued as unrealistic and unworkable. Even if one accepted that it is appropriate to revert to the intention of the Framers in the event of ambiguity, which is highly contentious, it is impossible to accurately determine the Framers' views in relation to most constitutional provisions.[23] Turning to fundamental rights theory, its' claims that judges have special abilities in relation to questions of moral principle have also been criticized as unrealistic, given the indeterminate nature of rights. In addition, even if it is accepted that right answers exist to these questions, no consensus is possible about how judges can actually identify these answers.[24] Representation-reinforcing theory is also flawed as it is questionable whether judges can really refrain from making substantive value choices, as Ely asserts. More importantly, given that the United States Constitution protects substantive as well as procedural rights, Ely is unsuccessful in demonstrating that the Constitution privileges the values of the democratic process over these substantive commitments.[25] Despite these theorists' efforts, objective theories of interpretation have failed to achieve their goal of successfully resolving the countermajoritarian difficulty.

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[23] *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, $0 B.U. L. REV. 204, 205, 229-31, 238 (1980) (arguing that originalism fails to provide a sensible or realistic strategy for constitutional interpretation); DWORKIN, A MATTER OF PRINCIPLE, *supra* note 21, at 33-71.

[24] *See, e.g.*, WALDRON, LAW AND DISAGREEMENT, *supra* note 15, at 180-83; Paul Brest, *The Xundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 10$3, 1089 (1981) ("Even assuming that general principles can be found in social consensus or derived by moral reasoning, the application of those principles is highly indeterminate and subject to manipulation.").

[25] For criticism of Ely's theory, see, for example, Dworkin, *The Xorum of Principle*, *in* A MATTER OF PRINCIPLE, *supra* note 21, at 58-$9; Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 10$3, 10$4 (1980) (arguing that representation-reinforcing theory is "radically indeterminate and fundamentally incomplete").

B. The Turn to Dialogue

Given the difficulties encountered by other approaches, it is not surprising that theories of constitutional dialogue have emerged as one of the principal contenders in the quest for a satisfactory theory of judicial authority in constitutional decision-making. In contrast to theories of interpretation, which propose interpretive criteria that judges should use in constitutional cases, dialogue theories focus on the institutional process through which decisions about constitutional meaning are made, suggesting that this involves the shared elaboration of constitutional meaning between the judiciary and other actors. This approach holds the potential to resolve countermajoritarian concerns because of its recognition that non-judicial actors play a key role in constitutional interpretation. Specifically, the concerns that judicial review necessarily sets judges against the electorally accountable branches of government are greatly attenuated if the political branches are able to respond to judicial decisions with which they disagree.[2$]

In proposing this resolution to the countermajoritarian difficulty, theories of constitutional dialogue are allied with scholarship within the social sciences that suggest judicial review is not, in fact, countermajoritarian. As noted above, one of the key premises of the countermajoritarian difficulty is that it is democratically illegitimate for unelected and unrepresentative judges to thwart the will of the prevailing political majority. This premise rests on the assumption that when judges strike down legislation, their decisions are final, which is what serves to trump majority will.[27] Social scientists studying judicial behavior have increasingly demonstrated, however, that the assumption of judicial finality is incorrect. With respect to constitutional decisions of the Supreme Court, while a judicial decision is final in the sense that it binds the parties to the action,[28] it is rarely the final word in relation to the broader constitutional issues being considered due to a

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[2$] *See, e.g.*, Roach, *Dialogues*, *supra* note 4, at 532 ("Under a dialogic approach, the dilemma of judicial activism in a democracy diminishes perhaps to the point of evaporation.").

[27] *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, $28-29, $43-53 (1993) [hereinafter Friedman, *Dialogue*].

[28] Enforcement is not automatic, so in this sense it could be said that judicial decrees do not necessarily constitute the final word in a particular case. *See id.* at $43-45 & nn.334 & 337-42.

variety of institutional and political constraints on the Court.[29] For example, compliance with Supreme Court decisions is not guaranteed, but is dependent on political support and voluntary obedience.[30] In addition, the political branches of government can, and frequently do, challenge judicial decisions by enacting new legislation that tests or attempts to restrict court rulings.[31] In the event of vigorous disagreement, the political branches of government also have the option of punishing, or threatening to punish, the Court. The use of these techniques may then prompt the Court to revise or overturn its prior decisions.[32] Given the existence of these institutional constraints that serve to keep judicial decisions within democratic limits, the overwhelming reliance on objective interpretative theories in constitutional scholarship thus appears to be misplaced.

The theoretical challenge that this empirical insight poses to conventional debates about the countermajoritarian difficulty has arisen even more starkly in countries where structural constitutional provisions explicitly give the political branches of government the ability to override judicial decisions. One of the most notable features of the Canadian Charter is the "override" or "notwithstanding" provision contained in section 33, which grants power to the Canadian legislatures at both the provincial and federal levels to deviate from or displace most judicial interpretations of Charter rights.[33] The negotiators of the Charter considered that this

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[29] *See, e.g.*, NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 230-33 (2004) (listing ten qualifications to the "last word doctrine").

[30] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 30-3$ (1991) (discussing the limited ability of courts to achieve social change without popular support); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 81, 85 (1994) (describing how *Brown v. Board of Education* caused social change primarily through indirect means); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 310-11 (2004).

[31] *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 20$-09 (1988) (providing examples of situations where Congress has passed new laws in light of negative judicial decisions).

[32] Even if these techniques are not used, the Court might nonetheless modify its behavior to avoid a potential attack. *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 145-4$ (1999) (discussing the "rule of anticipated reactions").

[33] Certain Charter rights cannot be overridden by legislatures, such as minority language rights. Canadian Charter of Rights and Freedoms, §§ 23, 33(1), Part I of the Constitution Act, 1982, Being Schedule B to the Canada Act, 1982, ch. 11 (U.K.). There are also structural constraints on legislative use of the override. First, the legislature must expressly declare that the legislation will operate notwithstanding certain Charter rights. Second, as any override expires five years after it is enacted,

provision would overcome the democratic deficit of judicial review, as it provides a "constitutional escape valve" that legislatures can use to "correct" judicial decisions with which they disagree.[34] Further opportunity for political response is provided by section 1 of the Charter, a general limitation provision that specifies that Charter rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[35] Not only does this provision allow governments to defend statutory provisions as "reasonable limits" on Charter rights, but it also provides legislatures with the opportunity to respond to the judicial invalidation of statutory provisions by devising legislation that pursues the same objectives by less restrictive means. There is some disagreement about how effective these provisions have been in providing for political reconsideration of judicial decisions, particularly given that the override has rarely been employed by Canadian legislatures.[3$] Nonetheless, the existence of these mechanisms has also prompted constitutional theorists in Canada to engage in the search for new ways to reconcile judicial authority with democratic theory, with many turning to dialogue theories as part of this quest.

The first question that must be addressed in evaluating the normative promise of theories of constitutional dialogue is whether they successfully resolve the countermajoritarian difficulty, as their various proponents assert. The answer to this question largely turns on whether the theories are

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the legislature must explicitly reenact the measure every five years if it wants the override to continue in force. *Id*. §§ 3-5.

[34] Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. (I.CON) 1, 45 (2004). While this legislative history suggests that the override was intended to be used only subsequent to a judicial decision, it has been used preemptively on a number of occasions. *See* Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255, 25$ (2001) [hereinafter Kahana, *The Notwithstanding Mechanism*].

[35] The full text of section 1 is: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, §1, Part I of the Constitution Act, 1982, Being Schedule B to the Canada Act, 1982, ch. 11 (U.K.).

[3$] *Compare* CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER 4 (2d ed., 2001) (arguing that lack of legislative use of the override has led to the continued growth of judicial power in Canada), *with* Kahana, *The Notwithstanding Mechanism*, *supra* note 34, at 255 (arguing that while the override could be more effectively used by legislatures, it has in fact been employed more often than is commonly recognized).

principally descriptive (positive) or prescriptive. Although most theories of dialogue resist rigid categorization on these terms, due to the fact that positive theories contain prescriptive elements and vice versa, placing them along this axis does reveal important distinctions.[37] At one end of the spectrum are theories of dialogue that seek to provide a positive account of the institutional context in which the different branches of government operate, developing their normative insights on the basis of this description. Moving along the axis, we find theories that begin with explicit recognition of the fact that judicial decisions need not be final, but focus to a greater extent on proposing a prescriptive vision of how constitutional dialogue should proceed based on this positive fact. At the opposite end of the spectrum lie theories of dialogue that eschew a clear focus on positive dynamics, instead providing heavily prescriptive accounts of how a dialogic system should operate under ideal circumstances.

These distinctions have important consequences for whether different theories are able to overcome concerns about the democratic legitimacy of judicial review. If the political branches of government and other social actors are indeed able to respond to judicial decisions about the meaning of the Constitution, as highlighted by the more positive theories, then concerns about the democratic legitimacy of judicial review are greatly reduced. However, to the extent that dialogic interactions do not operate in practice, but are rather viewed as a normative ideal, a different kind of analysis must be undertaken. The success of these theories in resolving countermajoritarian concerns will vary according to whether the judicial role in constitutional decision-making is privileged, without sufficient reason, and whether sufficient space is left for independent political judgment.

Beyond legitimacy concerns, theories of constitutional dialogue must be able to stand on their own normative worth. However, theories of dialogue tend to fall short on the normative level in two distinct ways. The most heavily prescriptive theories tend to fail because they are not sufficiently grounded in how judicial review operates in the real world. In other words, even if they provide an attractive prescriptive explanation of the role that courts *should* play in

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[37] *See, e.g.*, Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 540-41 (1999) (suggesting that constitutional theories are resistant to strict classification along descriptive and normative lines).

ideal circumstances, ultimately they cannot provide a compelling normative account of the role of judicial review because their prescriptions are too disconnected from the realities of judicial practice within the broader constitutional order.

While more positive theories do not have this problem, they can fail to provide an attractive normative vision of what judicial review should accomplish in modern society. Positive theories of dialogue rest on the twin foundations that judicial decisions about constitutional meaning are not final, and that the political branches of government and other social actors are also thoroughly engaged in answering constitutional questions. However, recognizing that non-judicial actors with greater democratic credentials play a legitimate and valuable role in the interpretation of the Constitution requires these theories to justify why judges should also be involved in this task.[38] The reason why many positive theories fail in this regard is because they are unable to satisfactorily explain some special judicial role or some unique contribution that judges make to constitutional dialogue that can account for the normative value of judicial review. The most promising theories of constitutional dialogue, in contrast, are those which account for a unique judicial function that assists in reaching better answers about constitutional questions, but which does not privilege the judicial contribution over that of other actors.

III. CRITIQUING THEORIES OF CONSTITUTIONAL DIALOGUE

This Part provides a typology of the differing theories of constitutional dialogue, in order to provide a more detailed assessment of how well these theories respond to countermajoritarian concerns, and how successful they are in providing a normatively attractive account of what judicial review should accomplish in modern society. The Part begins with an examination of the most prescriptive theories, moving progressively along the prescriptive—descriptive axis towards the more positive theories of dialogue. At the end of this

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[38] *See, e.g.*, Andrew Petter, *Twenty Years of Charter Justification: Xrom Liberal Legalism to Dubious Dialogue*, 52 U.N.B. L.J. 187, 195 (2003) ("[I]n arguing that court decisions under the *Charter* are ultimately less influential than is sometimes supposed, dialogue theory calls into question why courts should be allowed to make such decisions in the first place."). *Cf.* Earl M. Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMMENT. 375, 388 (1988) ("The inability of judges to contribute uniquely to public debate undermines dialogue theory.").

assessment, we will have a clearer idea of which theories are the most normatively successful, and a better understanding of ways in which the dialogue project should be advanced in the future.

A. Theories of Judicial Method

The most prescriptive theories of constitutional dialogue can conveniently be described as *theories of judicial method*. Their unifying feature is that they advocate the self-conscious use of certain judicial decision-making techniques to enable judges to stimulate and encourage broader debate about constitutional meaning both with and within the political branches of government. Closer examination reveals, however, that these theories largely fail as visions of constitutional dialogue because their prescriptions for judicial action do not take sufficient account of the pre-existing positive dynamics of the constitutional system.

1. Judicial Advice-Giving

Judicial advice-giving theories suggest that judges use a range of proactive interpretive and decision-making techniques in order to recommend particular courses of action to the political branches and to advise them of ways to avoid constitutional problems. In general terms, all forms of advice-giving involve judges counseling the political branches of government through the use of broad non-binding dicta. The principal aim of these techniques is to ensure that the political branches learn the judiciary's views about constitutional meaning, which will assist them in drafting new legislation, or amending current legislation, so that it will survive future constitutional challenges.[39] Although judicial advice-giving theories purport to be dialogic in nature, we will see that they have a range of flaws that ultimately detract from the normative merit of this claim.

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[39] The most prominent works advocating judicial advice-giving techniques are: Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Ronald J. Krotoszynski, Jr., *Constitutional Xlares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998); and Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000).

There are two principal ways in which judges can utilize advice-giving techniques in the context of specific cases.[40] First, judges may invalidate legislation on constitutional grounds, yet also provide advice to the political branches regarding constitutionally acceptable methods for achieving the same end.[41] Commentators have referred to such methods as "constitutional road maps," enabling judges to strike down statutory provisions, but then offer a "road map" for legislators to follow when they draft new legislation.[42] Second, judges may uphold legislation as constitutional, while at the same time using techniques that encourage political actors to revise statutes in order to remove ambiguities and vagueness from the law.[43] Similar techniques are involved when judges uphold a statute as constitutional, but advise the political branches that any statute going further than the one upheld is likely to be invalidated as unconstitutional in future litigation.[44] Drawing on the approach taken by Judge Calabresi in his concurrence in *United States v. Then*,[45] these techniques enable judges to send clear warnings to Congress regarding the potential unconstitutionality of its current and future policy choices, so that legislators can avoid political courses of action that are "fraught with constitutional danger."[4$]

Theorists who favor the increased use of judicial advice-giving believe that the proactive dispensation of advice creates the conditions for productive dialogue between the courts and the political branches about constitutional meaning and

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[40] Katyal provides an extensive typology of judicial advice-giving techniques. *See generally* Katyal, *supra* note 39. In addition to the techniques discussed in this Article, he refers to "education" and "moralization." *Id*. at 1720. He does not, however, focus in great detail on these techniques due to his principal concern to promote methods of advice-giving in which the judiciary more directly guides the other branches of government. Indeed, these techniques seem to be of a different dialogic kind to other advice-giving techniques, as they enable the judiciary to influence popular discussion on constitutional issues. For further discussion of such forms of interaction, *see infra* Part III.B.2.i.

[41] *See* Katyal, *supra* note 39, at 1718 (referring to this technique as "exemplification").

[42] *See* Luna, *supra* note 39, at 1127.

[43] Katyal, *supra* note 39, at 171$-18 (referring to such techniques as "clarification," "self-alienation," and "personification").

[44] *Id*. at 1719 (referring to this technique as "demarcation"). The concept of "constitutional flares" proposed by Ronald Krotoszynski involves a similar judicial function. *See* Krotoszynski, *supra* note 39, at 8.

[45] 5$ F.3d 4$4, 4$7 (2d Cir. 1995) (Calabresi, J., concurring) (upholding federal sentencing guidelines which had a disproportionate impact on African Americans in a Fifth Amendment equal protection challenge).

[4$] Krotoszynski, *supra* note 39, at 54.

responsibility. A central aspect of this dialogue is that the political branches can learn about ways to approach constitutional problems and are encouraged to craft appropriate responses.[47] As Neil Katyal has argued, these dialogic techniques show how "the Court can be the faithful servant of constitutionalism and act as a partner with the legislature at the same time."[48] Theorists who support judicial advice-giving also claim that the dialogue that these techniques foster is normatively desirable, as its enables judges to proactively protect rights while at the same time facilitate political, rather than judicial, answers to constitutional controversies.[49] They argue that not only does this empower democratic self-government and popular accountability, but that it also alleviates concerns about the countermajoritarian difficulty.[50]

The problems with this account are so great, however, and the description of dialogue provided so theoretically impoverished, that it is questionable whether judicial advice-giving should be described as a theory of constitutional dialogue at all. First, by suggesting that courts take a proactive approach to advising and guiding the political branches, this account assumes that judges either possess a special capacity, or can be better trusted, to resolve questions of constitutional meaning and to evaluate the importance of specific constitutional values.[51] The theory thereby serves to privilege the judicial voice as the key generator of constitutional discussion and meaning. Further, this privileging of the judicial role does not successfully deal with

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[47] *See, e.g.*, Katyal, *supra* note 39, at 1794 (noting that "[s]uch advice . . . is an important step in the creation of cooperative dialogue between the branches").

[48] *Id*.

[49] *Id.* at 1712 ("[O]nce the advice giving view is adopted, a space develops for courts to act *affirmatively* without compromising the power of these other political entities.") (emphasis added).

[50] *See, e.g.*, Krotoszynski, *supra* note 39, at 59 ("Properly deployed, a constitutional flare facilitates less confrontational judicial interactions with the political branches and reduces the countermajoritarian bite of judicial review."); Luna, *supra* note 39, at 1208 ("The overarching tenor of this strategy . . . should be one of comity and cooperation with the political branches, encouraging dialogue while tempering the sting of judicial review."). Katyal acknowledges that some questions regarding the democratic legitimacy of judicial review remain with his approach. Katyal, *supra* note 39, at 1822-23. Nonetheless, he suggests that the advice-giving approach "can soften the blow of judicial review." *See id*. at 1794.

[51] Krotoszynski is most explicit about this. *See* Krotoszynski, *supra* note 39, at 53 ("[E]nunciating and protecting constitutional values constitutes a duty peculiarly within the judiciary's domain.").

democratic legitimacy concerns, as proponents of advice-giving techniques claim it does. While the utilization of advice-giving techniques may mean that fewer pieces of legislation are actively struck down by judges, to claim that democratic self-government is enhanced by these techniques is rather disingenuous, as this position does not allow real space for independent political judgment. Furthermore, given the privileging of the judiciary's voice in institutional exchanges, over time this approach is likely to lead to the gradual replacement of relevant legislative considerations with judicial perspectives.

Second, this understanding of dialogue reveals a corresponding distrust of the ability of the political branches, specifically the legislature, to reach acceptable answers without judicial intervention. This distrust appears to be based less on a fear that legislatures are not sufficiently motivated to defend rights, than on the assumption that the political branches are not institutionally competent to do so without judicial assistance.[52] Advice-giving theorists consider that legislatures are quite removed from the task of making thoughtful and principled decisions about the meaning of constitutional values, due to the force of self-interest that frequently compels them to prioritize questions of incumbency and the maximization of majoritarian preferences. In this context, these theorists assert that judicial advice provides legislators with the added incentives they need to take constitutional values seriously in the face of competing pressures.

This distrust of the political branches rests on empirically dubious assumptions about the comparative institutional competence of courts and the political branches of government that both deny any real value to the independent moral deliberations of political actors, and restrict constitutional interpretation and the evolution of constitutional meaning to judicial pronouncements.[53] If one delves a little

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[52] At times, Katyal does refer to benefits in congressional participation in constitutional decision-making, and also as to constitutional remedy. Katyal, *supra* note 39, at 1757-58, 1811. However, he ultimately considers that the Court has the greater, more important role in constitutional dialogue given the "'perspicuity' and 'systematic character' of judges." *Id.* at 1757 (quoting James Madison in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139 (Max Farrand ed., 1911)).

[53] *See, e.g.*, Janet L. Hiebert, *Parliament and Rights*, *in* PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 231, 234 (Tom Campbell et. al. eds., 2003) (describing such assumptions about comparative institutional competence as "cynical

deeper into how legislatures operate, it is apparent they do in fact have incentives to deliberate about issues of rights and are generally adept at doing so, even if they do not engage in deliberation in exactly the same fashion as courts.[54] For example, even if legislators are concerned to maximize their chances for reelection, their constituents may well care about constitutional rights and expect their representatives to take these rights seriously.[55] Legislators may also view their institutional role as one that necessitates a careful focus on rights. This can be evidenced by records of legislative debates that show representatives taking rights-based deliberation seriously and modifying their views as a result of discussion and criticism.[5$] While it may well be true that legislatures balance rights and interest-based considerations in a manner or ratio that is different than courts, given the different institutional incentives operating on the various branches of government,[57] these factors nevertheless suggest that legislatures have important contributions to make in relation to the consideration of constitutional values and do not require judicial advice to take these values into account.

In light of these considerations, judicial advice-giving can essentially be re-described as a theory that encourages activist judges to tell the political branches of government how

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and narrow"); *see also* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 821 (2002) [hereinafter Whittington, *Extrajudicial Constitutional Interpretation*] (arguing that while "[w]e may disagree with the conclusions that various extrajudicial bodies reach . . . it is difficult to maintain that such extrajudicial decisions are unconsidered or neglect considerations of justice and principle").

[54] *See, e.g.*, KRAMER, THE PEOPLE THEMSELVES, *supra* note 2, at 237-39 (discussing various institutionally specific ways in which Congress deliberates about constitutional issues); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 492 (2003) (examining the incentives on various non-judicial actors to take constitutional review seriously, and concluding that "[n]on-judicial institutions can balance competing constitutional interests, and they do so because they have incentives guiding them toward balancing").

[55] *See, e.g.*, TUSHNET, TAKING THE CONSTITUTION, *supra* note 2, at $5-$$.

[5$] *See, e.g.*, Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 S. CT. L. REV. (2d) 7, 28-29 (2004) (contrasting the "debate" among the justices of the Supreme Court in *Roe v. Wade* with debates in the British House of Commons on the Medical Termination of Pregnancy Bill to demonstrate the proficiency with which legislatures can engage in independent rights-based deliberation).

[57] Mark Tushnet, *Xorms of Judicial Review as Expressions of Constitutional Patriotism*, 22 LAW & PHIL. 353, 3$0-$1 (2003) [hereinafter Tushnet, *Constitutional Patriotism*] (discussing how the balance of interest-based and rights-based considerations of legislatures may be different to that in the judicial branch).

to interpret the Constitution.[58] While judges may not immediately strike down legislation that does not satisfy their constitutional understandings, their advice is a form of actively serving notice that they will do so in the future if legislation is not amended in accordance with standards acceptable to the Court. Accordingly, rather than supporting a genuine dialogic exchange of ideas among equals, or even the creation of greater space for the political branches to deliberate independently about questions of constitutional meaning, advice-giving simply encourages the political branches to do what the judiciary says.

2. Process-Centered Rules

Rather than telling legislators how to resolve constitutional issues, process-centered rules merely seek to ensure that the political actors who enact statutes and make public policy decisions take constitutional considerations into account. In *process-centered theories*, judges are encouraged to determine whether political officials have paid sufficient attention or adequately deliberated on policy judgments that affect substantive constitutional values. If it is determined that they have not, then the judiciary may force the political branches of government to reconsider their decisions with the appropriate level of attention to those values.[59]

A wide range of process-centered rules exist, ranging from clear statement rules, which concern the degree of clarity with which political actors must speak when enacting laws that implicate constitutional values,[$0] to constitutional "who" rules, which direct attention to the proper governmental actors to promulgate different areas of policy.[$1] Another well-known form of process-centered rule is the "second look" doctrine that

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[58] Katyal himself describes advice-giving as a "proactive" theory of judging. *See* Katyal, *supra* note 39, at 1711.

[59] The most comprehensive survey of process-centered doctrines in United States constitutional law has been provided by Dan Coenen. *See generally* Dan T. Coenen, *A Constitution of Collaboration: Protecting Xundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 18$$-$9 (2001) [hereinafter Coenen, *A Constitution of Collaboration*]; Dan T. Coenen, *Structural Review, Pseudo-Second-Look Decision Making and the Risk of Diluting Constitutional Liberty,* 42 WM. & MARY L. REV. 1881 (2001) [hereinafter *Structural Review*]; Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002).

[$0] *See* Coenen, *A Constitution of Collaboration*, *supra* note 59, at 1$03-40.

[$1] *Id.* at 1773-1805.

Judge Guido Calabresi has proposed.[$2] This doctrine is used when the legislature has acted with "haste or thoughtlessness" or "hiding" with respect to fundamental rights.[$3] This could occur for a variety of reasons, including panic or crisis, lack of time, or because the legislature has delegated certain tasks to unaccountable bureaucrats. In such circumstances, Calabresi advocates "invalidat[ing] the possibly offending law and forc[ing] the legislature to take a 'second look' with the eyes of the people on it."[$4] While judges must offer provisional definitions of rights when performing this role, the legislature can reject these suggestions if it decides to reenact the offending statutory provisions in the future in an open manner. Using the second look rule, judges can thus enhance legislative accountability while leaving the democratically elected legislature with the potential to have the final word.

Proponents of process-centered rules assert that they enable judges to initiate a process of dialogue with and among political officials, leading to the shared elaboration of constitutional meaning.[$5] The dialogic role for the judiciary in such interactions is two-fold. First, the use of these rules allows judges to step back from conclusively deciding cases in order to increase the space available for democratic deliberation and choice.[$$] At the same time, the theory continues to propose an active role for the judiciary in constitutional dialogue, as process-centered rules encourage judges to engage the political branches more explicitly and directly in constitutional debate where political officials have made policy judgments that paid insufficient attention to substantive constitutional values.[$7] The corresponding role of the political branches in this dialogue is to respond to judicial

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[$2] *See generally* Guido Calabresi, *The Supreme Court 1990 Term, Xoreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991). *See also generally* Coenen, *A Constitution of Collaboration*, *supra* note 59.

[$3] Calabresi, *supra* note $2, at 104 ("When there is hiding, neither the people nor their representatives are genuinely speaking; when there is haste, they may be speaking, but without the attention required for the protection of rights.").

[$4] *Id*.

[$5] *See, e.g.*, Coenen, *A Constitution of Collaboration*, *supra* note 59, at 1583 (stating that "[t]hrough the use of . . . process-centered rules, the Court initiates a dialogue with and among nonjudicial actors"); *see also id.* at 1587 ("All these rules . . . serve to engage political officials directly in constitutional decision-making.").

[$$] Dan Coenen links the broader logic of structural rules to deliberative democracy. *See id.* at 18$$-$9.

[$7] *Id*. at 1582.

decisions in an open, reasoned, and careful way and to make future policy decisions with appropriate levels of care and deliberation. This approach is thus an improvement on dialogic theories of judicial advice-giving, as it recognizes that legislatures can and do engage in the consideration of principle when interpreting the Constitution, but also acknowledges that sometimes they need to be more candid and open about their treatment of rights.

Process-centered theory is also more successful as a dialogic theory in other ways. First, this account minimizes democratic legitimacy concerns by increasing space for the political branches to resolve substantive questions of constitutional meaning.[88] At the same time, this understanding of dialogue is more normatively attractive than advice-giving theory because it is grounded on more realistic premises about how the legislative and political processes operate. Although supporters of process-centered rules trust that political actors are capable and competent to engage in constitutional interpretation, they suggest that they may not consistently pay sufficient attention to constitutional values due to the institutional features of, or conflicting incentives in, the political process, such as time constraints or electoral or party pressures.[89] In these circumstances, judges merely serve the useful function of engaging the political branches in a dialogue about the importance of considering constitutional values in a reasoned and consistent fashion.

Despite these advantages, this theory of dialogue does not completely overcome concerns about the democratic legitimacy of judicial review. One question that remains unanswered relates to how process-centered rules and substantive rules of judicial decision-making interact. Specifically, when should judges use process-centered rules, and when should they use substantive rules to strike down legislation* Given that the dialogue created by the use of

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[88] *See, e.g.*, Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1879 (2001) [hereinafter Tushnet, *Subconstitutional Constitutional Law*] (observing that the "entire point [of process-centered rules] is to ensure full consideration of constitutional norms by the political branches without dictating the content of those branches' conclusions").

[89] As Janet Hiebert has said, "One need not accept the claim that the judiciary is uniquely equipped to interpret rights to recognize the significance of the judiciary's relative insulation from public and political pressures." JANET L. HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE* 53 (2002) [hereinafter HIEBERT, CHARTER CONFLICTS]; *see also infra* Part III.B.4.

process-centered rules only accounts for a particular part of the judicial process, when the Court uses substantive rules the countermajoritarian difficulty again rears its head.[70]

A more fundamental criticism is that use of process-centered rules may entail unseen democratic costs. While judicial decisions using these rules leave theoretical space for independent political judgment and action, in practice the political branches may well encounter substantial difficulty revisiting their earlier decisions.[71] This means that in many circumstances, legislators will unlikely be able to take a "second look" at policy decisions, even if the judiciary leaves them with the opportunity to do so. For example, the political equilibrium that existed at the time of a statute's enactment may have changed, making it more difficult for the legislature to achieve consensus on the issue in question. Furthermore, the issue may no longer have sufficient political salience, nor be considered sufficiently important, to warrant taking up further time and legislative resources. As a result, the theory of constitutional dialogue based on process-centered rules may not leave as much space for independent political judgment as first appears.

3. Judicial Minimalism

In contrast to the theories examined above that center on how judges can actively encourage dialogue with the political branches, *judicial minimalism* involves judges stepping back from deciding cases in order to allow increased space for democratic consideration and choice. This approach to judicial decision-making can be traced to the work of Alexander Bickel. Bickel was a strong supporter of the "passive virtues," which include such techniques as ripeness, standing, mootness, the void for vagueness doctrine, the political questions doctrine, and the grant of certiorari.[72] In contrast to the Supreme Court's ability to strike down or

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[70] Coenen himself acknowledges that this is a problem. *See* Coenen, *Structural Review*, *supra* note 59, at 1890-91.

[71] On some of the possible difficulties with legislative action following judicial invalidation on process-centered grounds, see Mark Tushnet, *Subconstitutional Constitutional Law, supra* note $8, at 1872-7$; Mark Tushnet, *Alternative Xorms of Judicial Review*, 101 MICH. L. REV. 2781, 2794-95 (2003).

[72] On the passive virtues, see generally BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9, at ch. 4 and Alexander M. Bickel, *Xoreword: The Passive Virtues*, 75 HARV. L. REV. 40 (19$1).

uphold legislation, the passive virtues are judicial techniques of "not doing" that allow the Court to "persuad[e] before it attempts to coerce."[73] While Bickel considered that the Court has a special role to play in judicial review due to its ability to protect and defend principle,[74] the passive virtues enable judges to reduce their involvement in controversial or sensitive constitutional issues in order to protect themselves from potential political backlash. At the same time, judicial use of the passive virtues encourages constitutional dialogue as they give the political branches of government, together with society, the opportunity to debate and resolve divisive constitutional issues through democratic channels, while the issue of principle "remains in abeyance and ripens."[75]

Cass Sunstein, the principal contemporary proponent of "judicial minimalism," advocates that in deciding cases, judges should adopt the strategy of "saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[7$] Sunstein goes much further than Bickel in examining ways in which judges can exercise self-restraint when they decide cases that bear on controversial constitutional issues.[77] In particular, he focuses on strategies that lead judges to issue narrow and shallow holdings, as opposed to wide and deep holdings, when they do decide a case. The principle of narrowness counsels that judges should try to hand down decisions that are no broader than necessary to resolve the case at hand.[78] Shallowness, in contrast, requires judges to avoid consideration of questions of basic principle as much as possible and instead aim to reach "concrete judgments on particular cases, unaccompanied by abstract accounts about

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[73] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9, at 28, 88.

[74] *See infra* Part III.B.2.

[75] *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9, at 244-72 (describing the Southern opposition to *Brown v. Board of Education* and the judicial strategies used to reduce political backlash). In this dialogic vein, Bickel described the passive virtues as ways of "eliciting answers, since so often they engage the Court in a Socratic colloquy with the other institutions of government and with society as a whole." *Id.* at 70-71.

[7$] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME]; *see also generally* Cass R. Sunstein, *The Supreme Court 1995 Term – Xoreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (199$).

[77] This is explained by the fact that Sunstein, unlike Bickel, favors techniques of judicial minimalism for their promotion of deliberative democracy. *See infra* note 84.

[78] SUNSTEIN, ONE CASE AT A TIME, *supra* note 7$, at 10-11 (describing minimalist judges as "decid[ing] the case at hand; they do not decide other cases too").

what accounts for those judgments."[79] Although Sunstein does not himself describe judicial minimalism as a theory of constitutional dialogue, the dialogic nature of the theory has been observed and supported by a number of scholars.[80] On their understanding, techniques of judicial minimalism are a form of passive judicial participation in constitutional dialogue because they enable judges to open a dialogue with the political branches of government, which serves to encourage the political resolution of constitutional issues that are the subject of disagreement.

As other commentators have observed, judicial minimalism is quite successful in responding to the countermajoritarian difficulty. By encouraging debate and deliberation in the political branches, the use of judicial minimalist techniques enhances the space available to the political branches to flesh out democratic resolutions to constitutional issues, specifically issues of rights, which are the subject of disagreement.[81] At the same time, the theory also responds to concerns about policy distortion and democratic debilitation. Policy distortion is reduced by encouraging the resolution of constitutional issues through democratic channels, as legislatures must make independent decisions about what the Constitution requires in specific cases. The problem of democratic debilitation is also reduced as the use of minimalist techniques sends a message to legislatures that they cannot defer to judges to resolve difficult and contentious constitutional questions.

While these are positive contributions, it is arguable that judicial minimalism goes *too* far in downplaying the legitimacy and competency of the judiciary to participate in decisions about constitutional meaning. In this regard, despite the virtues of dialogue in enhancing democratic debate, Sunstein considers that judicial minimalism should be limited to cases that "involve issues of high factual or ethical

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[79] *Id*. at 13.

[80] *See, e.g.*, Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 73, 77-79 (2000) (describing Sunstein's decisional minimalism as a form of passive judicial participation in constitutional dialogue); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, $$ GEO. WASH. L. REV. 298, 309 (1998) (describing judicial minimalism as a way in which "the Court can open a dialogue with other governmental actors").

[81] *See, e.g.*, Stephen M. Griffin, *Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review*, 17 CONST. COMMENT. $83, $88-89 (2000) (discussing some of the strengths of Sunstein's approach to understanding the Supreme Court).

complexity that are producing democratic disagreement."[82] In other cases, the use of minimalist techniques may increase judicial decision and error costs, and may threaten the rule of law to the extent that it makes planning more difficult. Sunstein also argues that judges have a specialized institutional role to play where it appears that the political process has failed. In such circumstances, maximalist rulings may be required in order to ensure adherence to the preconditions of democracy, such as freedom of speech, and to guard against defects in the democratic processes.[83]

This explanation of the utility of maximalist judicial decisions does not explain why the judicial role should be limited in all other cases to one of minimalism. Sunstein favors judicial minimalism solely because it promotes greater democratic deliberation within the political branches.[84] Most dialogue theorists, however, also favor a dialogic understanding of judicial review due to the potential it creates for reaching better answers to constitutional questions. If one takes this view, then a more substantive conception of the judicial role may be favored for its potential to help us reach deep and broad consensus about constitutional meaning, or for its potential to produce answers that combine the unique institutional perspectives of diverse dialogic actors.[85] There are thus other possible roles that a strong judicial voice in constitutional dialogue could play, which judicial minimalism fails to consider. These understandings of the value of

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[82] SUNSTEIN, ONE CASE AT A TIME, *supra* note 7$, at 4$; *see also id*. at 2$3 (observing that "[m]inimalism is not always the best way to proceed").

[83] *See id*. at 54-57 (outlining a number of problems identified with minimalism in particular cases).

[84] Put another way, Sunstein favors minimalism for its promotion of the deliberative democratic ideals of government. *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 7$, at 24 ("There is a close connection between minimalism and democracy. . . . [T]he American constitutional system aspires not to simple majoritarianism, and not to the aggregation of private 'preferences,' but to a system of deliberative democracy."). In relation to Sunstein's conception of deliberative democracy, see generally CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

[85] *See, e.g.*, Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101, 124 (2000) (arguing that Sunstein's minimalism does not appropriately balance "the risks of judicial activism against the risks of judicial quietism," given the important educative role that Court can play in constitutional dialogue). *Cf*. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1492-1513 (2000) (criticizing substantive, as opposed to procedural, minimalism for downplaying the special institutional competence of courts to protect individual rights against the majority); Wexler, *supra* note 80, at 337 (while favoring judicial minimalism in many circumstances, suggesting that the Court also "stands in a unique position to spur and influence public debate").

constitutional dialogue and the strength of these different conceptions of the judicial role will be considered later in this article.[8$] For now, however, the point is flagged that one's views about the normative value of dialogue will influence conceptions about the judicial role, and judicial minimalism may go too far in downplaying the judiciary's substantive contribution to broader constitutional discussion.

Thus far, theories of judicial method have been critiqued for their inability to overcome the countermajoritarian difficulty, and on the basis of the problematic roles that they propose for the judiciary in constitutional dialogue. An additional problem with *all* of these theories as normative visions of dialogue is that they are not sufficiently connected to how judicial review operates in practice.[87] Even if they provide some attractive prescriptions regarding the role that judges should play in judicial review under ideal circumstances, these prescriptions will have little worth if they are unlikely to be realized in light of the actual positive dynamics of the constitutional system in which judges operate. In this regard, theorists of judicial method do not grapple sufficiently with the question of the extent to which the realization of constitutional dialogue depends not only on judicial action, but also on how the political branches of government respond to judicial decisions in practice. In particular, if the forms that political branch responses take are less dependent on the specific decision-making techniques used by judges than on the broader institutional dynamics of the constitutional order, then these theorists are wrong to assume that their visions of dialogue can be achieved simply by the judicial use of such techniques. The normative value of theories of dialogic judicial method and their account of the role of judicial review in modern constitutionalism is ultimately diminished as a result of this lack of grounding in the positive dynamics of the constitutional system from which they emerge. Fortunately, however, there remains a range of theories of constitutional dialogue that do begin from a more promising institutional perspective.

[8$] *See infra* Parts III.B.3-4 & IV.

[87] *See, e.g.*, Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309 (2002) (arguing that normative constitutional theory should not develop without a firm understanding of constitutional politics).

B. Structural Theories of Dialogue

Structural theories of dialogue are based on the recognition that institutional or political mechanisms exist within constitutional systems that enable political actors to respond to judicial decisions in the event of disagreement. On this more positive understanding, dialogue about constitutional meaning emerges when these mechanisms of response are engaged, enabling a dynamic process of to-and-fro to take place between judges and other constitutional actors. To the extent that such dialogic dynamics are widespread as a positive matter, structural theories largely alleviate concerns that judicial review operates in a countermajoritarian fashion.[88] However, as theories veer further towards the prescriptive, they have greater difficulty resolving the potential democratic costs of judicial review.

In relation to whether structural theories provide a more satisfying normative account of constitutional dialogue, the results are also mixed. In order to do so, they must be able to propose some special judicial role that judges perform in that dialogue. Some positive theories of dialogue do not account for any special judicial role. Other theorists do propose a unique judicial contribution to dialogue that is thought to contribute to better answers to constitutional questions.[89] In many cases, however, that role nonetheless fails to provide a normatively satisfying account of dialogic judicial review because it privileges the judicial contribution, which may overwhelm the potential for dialogic contributions by the equally important political branches of government. The most promising theories of dialogue are those that successfully propose a unique judicial role that does not privilege the dialogic contributions of judges in this way.

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[88] *Cf.* Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451 (2003) (distinguishing between rights-based objections and consequentialist objections to judicial enforcement of constitutional rights).

[89] What constitutes a "better" answer in different theories varies in a way that parallels their differing conceptions of the judicial role. Those based on a special judicial role in relation to principle conceive of better answers as answers which are more principled. Theories which conceive of a special judicial role in relation to facilitating constitutional debate consider better answers to be those which are more durable and widely accepted within society. Finally, theories based on distinctly "judicial" functions that judges perform in constitutional decision-making consider answers to be better if they are made as a result of the combination of unique institutional perspectives of different constitutional actors. *See infra* Part III.

1. Coordinate Construction Theories

The most straightforward structural theories of dialogue are those based on *coordinate construction* of the Constitution. Coordinate construction is the oldest conception of constitutional interpretation as a shared enterprise between the courts and the political branches of government, having first been espoused by James Madison.[90] While acknowledging that issues of constitutional interpretation would normally fall to the judiciary in the ordinary course of government, Madison rejected the view that judicial decisions had any unique status, as the Constitution did not provide for any specific authority to determine the limits of the division of powers between the different branches. Similarly, Thomas Jefferson considered that each branch of government must be "co-ordinate and independent of each other," and that each branch has primary responsibility for interpreting the Constitution as it concerns its own functions.[91]

Many scholars have criticized Madison's and Jefferson's vision of coordinate construction as dangerous, given that it fails to specify the areas of the Constitution in relation to which each branch should have final interpretive authority. Without doing so, each branch might advocate rival interpretations, none of which would have any greater authority or "finality" than another, leading to interpretive anarchy.[92] Scholars have also suggested that complete independence of the branches to engage in constitutional interpretation in relation to their own functions is inconsistent with the system of checks and balances in the United States Constitution.[93]

In the United States, coordinate construction theory has been revived in recent years in ways that purport to deal with

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[90] On Madison's position, see generally ROBERT A. BURT, THE CONSTITUTION IN CONFLICT ch. 2 (1992).

[91] FISHER, *supra* note 31, at 238. On Jefferson's position, see *id.* at 238-39; JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 78-8$ (1984).

[92] *See, e.g.*, Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1379 (1997) (describing "protestantism" in constitutional interpretation, which entails parity of interpretive authority between the three branches of government, as leading to "interpretive anarchy").

[93] *See, e.g.*, AGRESTO, *supra* note 91, at 82-83 ("[I]f each branch could absolutely and with finality decide for itself the bounds of its own power, where would be the checking*").

these concerns.[94] Neal Devins and Louis Fisher draw on the earlier theories to propose a largely descriptive model of constitutional dialogue that does not involve complete decentralization of interpretive authority, but instead suggests that the judiciary and the other branches of government interact in a dialogic way to shape the meaning of the Constitution.[95] According to this understanding, not only does each branch of government engage in constitutional construction by interpreting its own constitutional functions, but they also each have an additional role in relation to interpreting the Constitution more broadly.[9$] This does not lead to interpretive anarchy, however, because it involves an interactive process in which each branch of government is checked by the others, including the Supreme Court.[97]

While the Court places checks on the other branches through the exercise of judicial review, the political branches can also place checks on the Court when they disagree with its interpretation of the Constitution. This system of mutual checks is important because all the branches of government, including the Court, may reach unconstitutional results. Given that decisions of the Court are open to scrutiny and challenge by other public officials, judicial decisions are not final; "at best, [they] momentarily resolve the dispute immediately

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[94] *See, e.g.*, Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter,* 48 REV. POL. 401, 411-12, 417 (198$) (supporting modified "departmentalism"); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (suggesting that "the power to interpret law is not the sole province of the judiciary; rather, it is a divided, shared power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers").

[95] *See generally* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (199$); FISHER, *supra* note 31; Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) [hereinafter Devins & Fisher, *Judicial Exclusivity*]. More recently, see DEVINS & FISHER, *supra* note 29, at 239. In Canada, while it has not been argued that a system of dialogue based on coordinate construction exists as a matter of description, there is some support for the theory at the normative level. *See* MANFREDI, *supra* note 3$, at 188 (arguing that a coordinate construction approach to the Canadian Charter is normatively desirable as it would allow legislature and executives to share with courts "equal responsibility and authority to inject meaning into the indeterminate words and phrases of the Charter"); Christopher P. Manfredi & James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 OSGOODE HALL L.J. 513, 522-24 (1999).

[9$] *See* Devins & Fisher, *Judicial Exclusivity*, *supra* note 95, at 10$ (describing the constitutional system of coordinate construction as one in which "each branch [is] capable of and willing to make independent constitutional interpretations").

[97] As Fisher says, "Judicial review fits our constitutional system because we like to fragment power. We feel safer with checks and balances . . . . This very preference for fragmented power denies the Supreme Court an authoritative and final voice for deciding constitutional questions." FISHER, *supra* note 31, at 279.

before the Court."[98] Direct challenges come in such forms as refusals to comply, refusals to enforce, and threats to pack the Court.[99] Congress and state legislatures can generate more subtle challenges by enacting statutes that defy or test the limits of judicial interpretations. Parties to litigation can also bring fresh proceedings at a later date in order to prompt the Court to reconsider specific decisions. In such circumstances, the Court may revise and perhaps reverse previous decisions, thereby allowing the constitutional interpretations of other branches to become authoritative.

The effect of these dynamics enabling the political branches to place checks on the Court does not mean that judges are powerless to move constitutional debate forward. Rather, the Court can pronounce its views and make "exploratory movements" that may nudge the debate about constitutional meaning ahead. This may then lead to the adoption of new constitutional interpretations by the other branches.[100] In these circumstances, the Court will only be checked if it steps too far out of line with the views of the political branches and other social forces. Additionally, it may not be checked at all if legislative inertia about a particular issue is too great, or if the political branches prefer the judiciary to maintain control over a particular issue.[101] The result of this interactive process in which no branch dominates and in which constitutional meaning steadily forms *is* constitutional dialogue, as "all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional issues."[102] In addition to describing the positive dynamics of constitutional interpretation in the United States, this understanding of dialogue is also supported as a normatively desirable way for constitutional meaning to develop over time, both because the American constitutional system demonstrates a clear

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[98] Devins & Fisher, *Judicial Exclusivity*, *supra* note 95, at 91.

[99] *See generally* FISHER, *supra* note 31, at ch. $.

[100] *Id*. at 27$; *see also* DEVINS & FISHER, *supra* note 29, at 234 ("Courts sometimes get out in front of an issue and, in so doing, set in motion a constructive interbranch dynamic that otherwise wouldn't take place.").

[101] *See, e.g.*, DEVINS, *supra* note 95, at 139-45, 150-53 (describing legislative inertia regarding abortion).

[102] FISHER, *supra* note 31, at 275; *accord* DEVINS & FISHER, *supra* note 29, at 239.

preference for fragmented power,[103] and because such "vigorous interchange" between equal actors results in more "vibrant and durable" interpretation of the Constitution.[104]

In both its descriptive and normative dimensions, coordinate construction has a number of beneficial features. First, Devins and Fisher make a valuable contribution by providing concrete examples that demonstrate that judges do not have a monopoly on constitutional interpretation.[105] These empirical insights reveal that constitutional interpretation, as a matter of description and as a matter of historical practice in the United States, occurs in diverse forms and is undertaken by a range of constitutional actors.[10$] Given that the bulk of normative constitutional theory begins from the premise of judicial supremacy and rarely questions whether this is correct as a matter of description, this is, in itself, an important contribution. Second, and perhaps most importantly, this account effectively stresses that the political branches of government are competent and motivated to engage in constitutional interpretation. This is an improvement on many conventional theories of constitutional interpretation (and even many theories of dialogue), which rest on the empirically contentious assumption that the political branches are not sufficiently motivated to give adequate attention to issues of principle, nor institutionally capable of engaging in principled constitutional interpretation.[107]

Coordinate construction also does a better job of rebutting concerns about the democratic legitimacy of judicial review than the theories of judicial method surveyed in the previous Part.[108] Particularly in its descriptive dimensions, by demonstrating that the judiciary often does not have the final

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[103] *See, e.g.*, FISHER, *supra* note 31, at 279 ("Judicial review fits our constitutional system because we like to fragment power. We feel safer with checks and balances . . . .").

[104] DEVINS, *supra* note 95, at 1$2; DEVINS & FISHER, *supra* note 29, at 235 ("[H]ydraulic pressures within the political system make the Constitution more enduring and stable.").

[105] *See, e.g.*, DEVINS & FISHER, *supra* note 29, at chs. 3-9 (describing the process of coordinate construction in diverse constitutional areas, including federalism, the war power, privacy and race).

[10$] *See, e.g.*, KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 5 (1999); Louis Fisher, *Constitutional Interpretation by Members of Congress*, $3 N.C. L. REV. 707 (1985); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997) (discussing "nonjudicial constitutional interpretation").

[107] *See supra* notes 53-57 and accompanying text.

[108] *See supra* Part III.A.

word on constitutional questions, this account largely displaces countermajoritarian concerns.[109] No matter what form of adjudication the Court undertakes, its decisions are subject to the political process and to continued checking and political revision.

Despite these positive contributions, coordinate construction ultimately fails to provide either a satisfactory descriptive or normative account of constitutional dialogue. As a matter of description, Devins and Fisher seem to understate the dialogic role of the judiciary. In analyzing the dialogue prompted by *Roe v. Wade*,[110] for example, Devins describes the "institutional tugs and pulls" that took place between various constitutional actors.[111] Each branch of government had different views about the controversy, and "pushed and influenced" the others about its views. Nonetheless, in time, the elected branches came to accept and embrace judicially created norms about abortion, which ultimately set the parameters of the constitutional debate.[112] According to Devins, the Court's views grew to be so influential not because of any special content of judicial decisions or any special judicial role in the debate, but largely due to legislative acquiescence and because the political branches seemed to prefer that the Court retain principal control over the issue.[113]

It is unlikely, however, that this description completely reveals the nature of the Court's involvement in dialogue in the United States. Although Devins alludes to a possible educative function of the Court in his discussion of the abortion controversy, he does not develop this suggestion in any detail.[114] Other scholars who have examined the abortion controversy, in contrast, have not been so reticent about describing additional

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[109] *See* FISHER, *supra* note 31, at 273 ("It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society.").

[110] 410 U.S. 113 (1973).

[111] DEVINS, *supra* note 95, at 137; *see also* Devins & Fisher, *Judicial Exclusivity*, *supra* note 95, at 85 ("The tugs and pulls of politics . . . make the Constitution more relevant and more durable.").

[112] DEVINS, *supra* note 95, at 148 ("Without question, the Court has set the parameters of elected-government decision-making.").

[113] *See, e.g.*, *id.* at 145, 152; *see also* DEVINS & FISHER, *supra* note 29, at 235 ("Although the Court [in *Casey*] signaled its increased willingness to uphold abortion regulations, state lawmakers (fearing a backlash from pro-choice voters) have typically steered clear of the abortion issue.").

[114] DEVINS, *supra* note 95, at 149 ("The executive, legislative and judicial branches are engaged in an ongoing dialogue, with each branch checking (and perhaps educating) the others.").

judicial contributions to that dialogue. These commentators claim that although the Court's word has, over time, resolved the abortion controversy to a large extent (or at least stabilized it), judicial decisions have also served to facilitate broader constitutional debate by drawing various interested groups in society into the discussion, and shaping the content of the debate that continues to take place.[115] Furthermore, evidence suggests that the abortion debate did not only involve different constitutional actors struggling against each other. Instead, the different branches of government including the Court, together with the people, were educated by the dialogic input of each other, leading to substantive modification of their positions and further constitutional change over time as the parties adapted their views.[11$] This competing description of the abortion debate suggests that the Court plays a more substantive role in constitutional dialogue than coordinate construction theorists recognize.

A second, and more damaging, critique of coordinate construction relates to its competitive vision of constitutional dialogue. The theory's focus on mutual competition for constitutional meaning, due to the central position of checks and balances in the theory, suggests that consensus is only achieved once the political process has run its course. In the result, whichever branch is the strongest institutionally on a particular constitutional issue will prevail in the battle for constitutional meaning or, at the least, the other participants in the dialogue will acquiesce to that branch's views.[117] The ultimate goal of constitutional dialogue on this understanding is to reach better, more durable and widely accepted answers about constitutional meaning. According to Devins and Fisher, the more competing voices involved, the more likely it is that this goal will be achieved.[118]

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[115] *See* Friedman, *Dialogue and Judicial Review*, *supra* note 27, at $58-$8 and references contained therein. In relation to Friedman's account of dialogue, see *infra* Part III.B.3.

[11$] *See, e.g.*, Friedman, *Dialogue and Judicial Review, supra* note 27, at $$3 ("This process can hardly be described exclusively as the Court speaking and the legislatures listening. The Court undoubtedly was educated along the way, as to both the types of regulation that might occur and the intensity of popular opinion."); *see also infra* Part III.B.3.

[117] *See, e.g.*, DEVINS & FISHER, *supra* note 29, at 23$ ("Attaining an equilibrium . . . require[s] all branches and all levels of government to do battle with one another.").

[118] *See, e.g.*, DEVINS, *supra* note 95, at 1$2 ("[T]he more actors are interpreting the Constitution and butting heads with each other, the better.").

It is questionable, however, whether a system of mutual competition for constitutional meaning is really the best way to achieve enduring and widely supported answers about constitutional meaning. If parties merely fight for their views to be accepted and the strongest party wins, it seems more likely that acquiescence rather than enduring agreement will be the result. In contrast, reaching stable and more widely accepted answers seems more feasible if the different parties to dialogue actively discuss their views and learn from one another's perspectives.

Conceiving of the judiciary as simply adding another competitive voice to constitutional dialogue also seems to be a thin reed on which to justify judicial involvement, as it does not explain any distinctive or unique judicial contribution that adds something substantive to the shared elaboration of constitutional meaning.[119] If judges are just another voice,[120] then arguably this role could better be performed by a non-judicial and possibly more democratic institution or range of institutions within society. We are therefore left with the need to find a theory that proposes some institutionally unique role that judges perform in dialogue that assists in achieving better results.

2. Theories of Judicial Principle

In contrast to coordinate construction, which proposes no special role for the judiciary in constitutional dialogue, positive *theories of judicial principle* propose that judges perform a unique dialogic function based on their special institutional competence in relation to matters of principle. Some scholars claim that dialogue is generated as a result of the political branches checking the principled interpretations of the Court in the event of judicial error. Others downplay the role of the political checks on the Court, and instead focus on how dialogue emerges through the legislative articulation of

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[119] Devins and Fisher have more recently claimed that each party to constitutional dialogue has "unique strengths and weaknesses" and may have unique perspectives on constitutional issues, based largely on the idea that judges and politicians "sometimes react[] differently to social and political forces." DEVINS & FISHER, *supra* note 29, at 234, 238. They do not develop these points in detail. If they did, it may be that their views will shift further along the continuum of dialogue theories and away from a coordinate construction approach.

[120] *See, e.g.*, MANFREDI, *supra* note 3$, at 199 (arguing that the Court simply "add[s] another thoughtful voice to the continuing public debate about the principles by which we should be governed").

policy objectives when the legislature responds to judicial decisions. Nonetheless, due to the way in which these theories privilege the judicial role, they are also normatively deficient because they ultimately result in top-down descriptions of legislative acquiescence to judicial pronouncements of principle.

a. Principle and Political Checks on the Court

Alexander Bickel was the first constitutional theorist to propose an account of dialogue that was based on a strong judicial role in relation to principle.[121] Bickel considered that the judiciary has a special ability to preserve, protect, and defend principle due to its political insulation and the "marvelous mystery of time" that comes from considering the constitutionality of legislation in the context of concrete cases, which gives courts the capacity for "'sober second thought.'"[122] In order to identify and extract the deep and enduring constitutional principles valued by society, he counseled that judges should immerse themselves in the historical traditions of society and in the "thought and vision of the philosophers and the poets."[123] Bickel recognized, however, that Congress and the political branches of government may be better situated to determine fundamental societal values in many circumstances, given their relative proximity to the people. Accordingly, judges should seek to declare principles that will gain general and widespread acceptance in the foreseeable future. In this educative role, "[t]he Court is a leader of opinion, not a mere register of it."[124]

Although Bickel considered that judges are better situated to be a "voice of reason" than the political branches, he was also receptive to the fact that "elements of explosion" and violent political backlash can lead to the defeat of judicial decisions with which society strongly disagrees.[125] As discussed previously, this may lead the judiciary to employ the "passive

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[121] *See generally* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9.

[122] *Id*. at 25-2$, 188, 2$1 (quoting Justice Stone).

[123] *Id*. at 23$.

[124] *Id*. at 239.

[125] *See id.* at 244-72 (describing the Southern opposition to *Brown v. Board of Education* and the judicial strategies used to reduce political backlash); *see also* BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1978) [hereinafter BICKEL, THE IDEA OF PROGRESS] ("The effectiveness of the judgment [of the Supreme Court] universalized depends on consent and administration.").

virtues," such as standing, mootness, and the political question doctrine, in order to avoid principled judgment on contentious social issues.[12$] In other circumstances, the judiciary can, and does, use the alternative strategy of provoking and prompting the other branches of government to consider its views about principle. It does so by engaging them and the people in "dialogues and 'responsive readings'" about the meaning of constitutional values.[127] Alternatively, conversations can be commenced by the political branches, though such dialogues may be "less polite" given they do not begin from a position of principle.[128]

Bickel's dialogic legacy is evident in a number of contemporary theories of constitutional dialogue, popular in both the United States and Canada, which propose a similar role for the judiciary in relation to questions of principle.[129] Michael Perry, for example, portrays the form of principle that judges identify in self-consciously moral-political terms, describing the function of judges as "prophetic; it is to call the American people . . . to provisional judgment."[130] In performing this prophetic function, Perry argues that the judiciary is both

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[12$] *See supra* Part III.A.3.

[127] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 9, at 20$; *see also id.* at 240 (discussing the Court's "continuing colloquy with the political institutions and with society at large").

[128] *Id.* at 239.

[129] In the United States, Michael Perry has been the principal proponent of this view of dialogue. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS ch. 4 (1982) [hereinafter PERRY, THE CONSTITUTION]; MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS (1994); Michael J. Perry, *The Constitution, The Courts and the Question of Minimalism*, 88 NW. U. L. REV. 84 (1993) [hereinafter Perry, *Minimalism*]; Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. $35 (2003) [hereinafter Perry, *Protecting Human Rights*]. Similar theories of constitutional dialogue have been proposed by John Agresto, Paul Dimond and Stanley Ingber. *See*, *e.g.*, AGRESTO, *supra* note 91; PAUL R. DIMOND, THE SUPREME COURT AND JUDICIAL CHOICE (1989); Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 4$ RUTGERS L. REV. 1473 (1994). Support for this model in the Canadian context is found in Perry, *Protecting Human Rights*, *supra*, and in the work of Paul Weiler. *See* Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51, $0-$1 (1984) [hereinafter Weiler, *Rights and Judges*]; Paul C. Weiler, *Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?*, $0 DALHOUSIE REV. 205 (1980) [hereinafter Weiler, *Of Judges and Rights*].

[130] PERRY, THE CONSTITUTION, *supra* note 129, at 98-99. John Agresto speaks in the grandest fashion about the Court's role in constitutional dialogue based on its ability to consider questions of principle, when he describes "its potential to help us apply and develop our fundamental principles and constitutional commands, [and] its ability . . . to help bring our philosophy to bear on our actions, to work out our present and our future in terms of our inheritance from the past." AGRESTO, *supra* note 91, at 15$-57; *see also* Ingber, *supra* note 129, at 1541-43 (describing a preeminent dialogic role for the judiciary in relation to principle).

forward-looking and backward-looking; in other words, it "resolves moral problems not simply by looking backward to the sediment of old moralities, but ahead to emergent principles in terms of which fragments of a new moral order can be forged."[131] As a matter of comparative institutional competence, the judiciary is best suited to perform this function because of its insulation from the vagaries of politics, and because no other institution of government regularly deals with moral issues in a prophetic way.[132]

While the judiciary is described as the institution most likely to make superior pronouncements in relation to principle, these theorists accept that judges can sometimes engage in "false prophecy."[133] In order to solve this problem, they provide a description of a dialectical system of review that allows the judiciary's mistakes to be corrected by a system of political checks. According to Perry, the most significant source of political control in the United States is the power of Congress to limit the Supreme Court's appellate jurisdiction.[134] Other potential political checks include the ability of Congress to rewrite voided legislation, its ability to circumscribe the holding of decisions in order to restrict their effects, the possibility of constitutional amendments or the appointment of new Justices to the Court, or, in a more specific context, Congress's ability to propose its own views about constitutional interpretation and enforcement under section 5 of the Fourteenth Amendment.[135] The relevant political check in Canada, in contrast, is the section 33 override contained in the Canadian Charter.[13$] This mechanism, which is generally

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[131] PERRY, THE CONSTITUTION, *supra* note 129, at 111.

[132] *See id*. at 102 ("[T]he politically insulated federal judiciary is more likely . . . to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions.").

[133] *Id*. at 115.

[134] Perry rejects other sources of political control over the judiciary, such as the impeachment process, constitutional amendment, the appointments process, and budgetary control of the federal judiciary, as insufficient to check the Court. *See id*. at 12$-28.

[135] *See* AGRESTO, *supra* note 91, at 12$-31; *see also* DIMOND, *supra* note 129, at 4 (suggesting more general and widespread checks on the Court "either by acquiescing in the ruling or by framing a different understanding, whether by legislation, argument before the Court or in other public arenas, our conduct, the appointment of new Justices, or constitutional amendment").

[13$] *See* Perry, *Minimalism*, *supra* note 129, at 155-5$; Perry, *Protecting Human Rights*, *supra* note 129, at $$$-$7, $77 n.107; Weiler, *Rights and Judges*, *supra* note 129, at 79-84. While Perry considers that section 33 of the Canadian Charter enables this form of constitutional dialogue in that country, he no longer claims that

regarded as a more effective check than those available in the United States, enables Canadian courts to perform their valuable role of speaking to issues of principle, while at the same time reserving an "escape valve" or "final say" for the legislature, "to be used sparingly in the exceptional case where the judiciary has gone awry."[137]

Theorists of judicial principle argue that the combination of these checks in different systems results in judicial rulings that are provisional, thereby initiating an ongoing dialogue about constitutional meaning.[138] First, the electorally accountable branches of government make a policy choice about a given issue. The court will then evaluate that policy choice and either accept or reject it on principled grounds. Finally, if the court rejects the policy choice, the political branches may respond to that decision either "by tolerating it, or, if the decision is not accepted, or accepted fully, by moderating or even by undoing it," through the use of political checks.[139] As a result of this dialectical process, and due to the court's principled role within this process, "what emerges is a far more self-critical political morality than would otherwise appear, and therefore likely a more mature political morality as well . . . that is moving (inching*) toward . . . right answers."[140]

Similar to other structural theories, this conception of dialogue is successful in displacing many democratic legitimacy concerns, due to its recognition that judicial decisions are subject to democratic revision and response. Perry also claims that the theory solves some of the democratic costs traditionally associated with judicial review, as the ability of the legislature to respond to judicial decisions significantly enhances the "political capacity" of the people and encourages

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this kind of dialogue is possible in the United States because he does not consider that the checks in place are sufficient to constrain the judiciary. *See* Perry, *Protecting Human Rights*, *supra* note 129, at $73-7$.

[137] Weiler, *Rights and Judges*, *supra* note 129, at 79, 84. This is consistent with the views of the negotiators of the Charter. *See supra* note 34 and accompanying text.

[138] *See* DIMOND, *supra* note 129, at 4 (stating that as a result of these checks, judicial rulings become "provisional rulings that initiate an ongoing dialogue with the people").

[139] PERRY, THE CONSTITUTION, *supra* note 129, at 112.

[140] *Id*. at 113; *see also* AGRESTO, *supra* note 91, at 10 ("[C]onstitutional interpretation is not and was never intended to be solely within the province of the Court, for constitutional government implies . . . the interactive understanding of the people, their representatives and their judges.").

"greater citizen participation in . . . 'the conversation about constitutional meaning.'"[141] Furthermore, this model is an improvement on coordinate construction because it proposes a unique contribution that the judiciary makes to constitutional dialogue.

This account of dialogue nonetheless suffers from a range of difficulties concerning the precise function that it assigns to the judiciary, and the process by which the political branches can respond to judicial rulings. These difficulties arise from the fact that the theory rests on empirically dubious assumptions about judicial and legislative competences, rather than a more factually grounded explanation of institutional interactions between different constitutional actors.[142] First, the claim that judges have superior abilities in relation to matters of principle is difficult to support empirically. As previously observed in relation to fundamental rights theories of interpretation,[143] given the existence of pervasive and intractable disagreement about the meaning of rights, it is unrealistic to expect that judges can resolve such "hard questions" in a way that finally settles rights claims.[144] Judicial review that is premised on the superior moral reasoning of judges also cannot be reconciled with democratic values more broadly, because it suggests that elitist rule is preferable to leaving decisions in the hands of the people's representatives.

Most scholars who favor this understanding of dialogue nonetheless argue that judges remain better suited to decide matters of principle due to their comparative institutional competences. In particular, they claim that the political insulation of the judiciary protects courts from the kind of self-interested behavior that is thought to negatively affect the deliberations of political actors, which leaves judges with a comparative advantage as moral deliberators.[145] This claim,

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[141] Perry, *Protecting Human Rights*, *supra* note 129, at \$91-92 (quoting Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)*, \$3 U. COLO. L. REV. 389, 407 (1992)).

[142] Ferejohn and Kramer make a similar criticism of Bickel: "Bickel's analysis consisted more of exhortation than any kind of institutional explanation of an observable phenomenon." John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 9\$2, 978 n.31 (2002).

[143] *See supra* Part II.A.

[144] *See* WALDRON, *supra* note 15, at 12 ("The issues that rights implicate . . . are simply hard questions – matters on which reasonable people differ.").

[145] *See, e.g.*, PERRY, THE CONSTITUTION, *supra* note 129, at 102 ("As a matter of comparative institutional competence, the politically insulated federal judiciary is

however, rests on empirically questionable claims about both judicial and legislative behavior.[14$] In relation to the political branches, these theorists assert that legislatures are too self-interested to adequately deliberate on issues of moral principle, but they provide no factual support for such claims. As discussed earlier in relation to advice-giving theories, this claim rests on controversial empirical assumptions about political behavior and legislative deliberation.[147] Similarly, claims that the judiciary has institutional advantages in relation to the consideration of principle rest on idealized assumptions about how judges decide cases. Even a brief historical overview suggests that these assertions merely rest on the "hope" that judicial review offers, given that courts have not always been the institution of government to protect rights best.[148] Indeed, in his later work, Bickel himself moved away from the idea that judges have a special ability to decide cases on the basis of principle, due to what he perceived to be significant failures of the Court in this regard.[149]

If we consider the written opinions of judges in greater detail, it also becomes clear that they are not always, perhaps not even often, remarkable examples of moral deliberation. Rather than centering on considerations of political morality, judicial decisions are more commonly based on purely legal grounds, reflecting the centrality of doctrinal argument to the judicial task.[150] Furthermore, even when individual justices consider issues of principle in the context of a particular case, they must ultimately overcome disagreement with other

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more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer . . . than is the political process . . . .").

[14$] The argument that decisions about rights should be given to judges as a result of their insulation from self-interest also contradicts other epistemic precepts, such as the principle that such decisions should be made by actors who have a sufficient stake in the matter to decide in a responsible manner. *See* WALDRON, *supra* note 15, at 253.

[147] *See supra* notes 53-57 and accompanying text.

[148] On the twin narratives of the "hope" and "threat" of judicial review in constitutional scholarship, see Barry Friedman, *The Importance of Being Positive: The Nature and Xunction of Judicial Review*, 72 U. CIN. L. REV. 1257, 12$7-70 (2004) [hereinafter Friedman, *The Importance of Being Positive*].

[149] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 3-5 (1975) (suggesting that judges merely impose personal values when deciding cases); *see also* BICKEL, THE IDEA OF PROGRESS, *supra* note 125, at 179.

[150] *See* Jeremy Waldron, *Eisgruber's House of Lords*, 37 U.S.F. L. REV. 89, 103 (2002) ("The opinions of the Court are paragons perhaps of dense and complex doctrinal argument, and often they involve pyrotechnic displays of ill-temper on questions of interpretive strategy of the justices. But they are risible as examples of moral deliberation.").

justices on the Court about the outcome, typically by way of compromise or by vote. Considerations of moral principle are likely to be modified or diluted as a result of this necessity for compromise. While these features of the judicial role may support the argument that judges face fewer incentives to act purely on the basis of self-interest, they do not support the claim that principle will be more adequately dealt with in the judicial rather than the legislative branch, nor that more principled answers will be reached as a result of judicial participation in constitutional dialogue.[151]

The strongest critique of this account of dialogue is that it contains an overwhelming internal contradiction.[152] This has two dimensions. First, if the judiciary is indeed the superior institution to deliberate on issues of principle, why should the political branches of government be trusted to correct judicial mistakes* If one begins with the assumption that the political branches are primarily motivated by expediency rather than principle, as these theorists do, then it is difficult to justify why political actors should be able to overturn judicial decisions that are grounded in principle. The most common reason these scholars propose is that political oversight is required to guard against the possibility of judicial mistake. However, this raises the second dimension of the contradiction in these theories: if the political branches are able to overturn decisions that are reached by judicial error, then an overarching theory of interpretation is still required to objectively determine those cases in which the judiciary has actually fallen into error. As discussed previously, no adequate objective interpretive theory currently exists to assist in this task.[153]

The claim that courts have comparative institutional competence in relation to principle also undermines the argument that this account solves some of the democratic costs associated with judicial review. Although judicial decisions can be challenged by the political branches of government, if we accept that courts have superior decision-making abilities in relation to principle, it is likely that legislatures will defer to judicial interpretations on these matters rather than make their own independent judgments. Legislators may then come

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[151] *See id*. at 10$; DEVINS & FISHER, *supra* note 29, at 22$ ("A multimember Court, like other parts of government, gropes incrementally toward consensus and decision through compromise, expediency, and ad hoc actions.").

[152] *See, e.g.*, PERETTI, *supra* note 32, at $9-71.

[153] *See supra* Part II.A.1.

to rely on judges to consider constitutional problems with legislation at a later date, rather than consider these matters for themselves at the time of enactment. The combination of these critiques means that we are left with yet another normatively deficient account of constitutional dialogue.

b. Principle and Legislative Articulation of Policy

Rather than focus on the role of the legislature in placing political checks on the Court, other theories of judicial principle stress that the legislative branch adds something substantive to constitutional dialogue due to its unique voice and comparative institutional competence in relation to policy making.[154] Legislative policy making is a complex process, which requires legislators to consider how multiple, competing objectives can best be achieved and to make difficult predictions about the impact of particular policies on different social actors.[155] Given the unique legislative expertise in relation to such issues, dialogue about constitutional meaning emerges when the legislature responds to the judiciary in a way that respects judicial pronouncements of principle, but which also allows the legislature to articulate the importance of its wider policy objectives.[15$]

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[154] While Perry acknowledges that the political branches have comparative institutional competence in relation to policy making, he does not explicitly build this into his theory of dialogue, instead conceiving of the legislative contribution to constitutional dialogue as one of placing checks on the Court. *See supra* Part III.B.2.i.

[155] *See, e.g.*, JANET L. HIEBERT, DEP'T OF JUST., CAN., ENRICHING CONSTITUTIONAL DIALOGUE: VIEWING PARLIAMENT'S ROLE AS BOTH PROACTIVE AND REACTIVE 7-8 (2000), *available at* http://www.justice.gc.ca/en/ps/rs/rep/2000/rp2002-7.pdf. [hereinafter HIEBERT, ENRICHING CONSTITUTIONAL DIALOGUE]. This reflects the distinction the Legal Process School made between judicial principle and legislative policy making as a way of constraining judicial discretion within acceptable boundaries. *See* Dorf, *supra* note 1, at 920-29.

[15$] This version of dialogue theory can be helpfully contrasted with Richard Fallon's theory of "implementing the Constitution." *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001). According to Fallon, the Court has a comparative advantage to the political institutions of government in considering questions of principle. *Id*. at 10-11, 40. However, while the Court is an important forum of principle, it is not *only* a forum of principle, since in the context of reasonable disagreement it must make a variety of practical calculations in order to successfully implement the Constitution. *Id.* at 3$. Implementation of the Constitution is a collective function that is also engaged in by the other institutions of government and, indeed, the primary responsibility of implementing the Constitution rests on the political branches. *Id.* at 37, 39. As a result of this, despite the Court's special role in relation to principle, its overall constitutional function is best described in terms of implementation rather than interpretation due to the fact that it necessarily operates within "a shared project of constitutional implementation." *Id.* at 41.

This theory of dialogue has become extremely popular within Canadian constitutional theory in recent years, due to the combined contributions of Peter Hogg and Alison Bushell, and Kent Roach.[157] Indeed, Hogg and Bushell's account is often regarded as the seminal explanation of dialogue under the Canadian Charter.[158] While the theory as currently described by these scholars is accordingly tied to the structural features of the Charter, we will see that its description of dialogic dynamics could also have explanatory or normative power in the United States.

Similar to the theories of judicial principle considered in the previous section, this account of dialogue begins with the assertion that the judiciary has a unique ability to provide a strong voice in relation to principle. Kent Roach is most explicit about this,[159] describing how the Court "starts the conversation" with the legislature about Charter values when it decides a case, and in doing so, "draw[s] the attention of the legislature and society to fundamental values."[1$0] Roach does not claim that courts will always reach the right answers about principle. Nevertheless, he does consider that the judiciary has special institutional expertise to interpret rights and consider matters of principle due to its relative political insulation.[1$1]

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[157] *See* ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4; Hogg & Bushell, *Dialogue*, *supra* note 4; Peter W. Hogg & Allison A. Thornton, *Reply to "Six Degrees of Dialogue*,*"* 37 OSGOODE HALL L.J. 529 (1999) [hereinafter Hogg & Thornton, *Reply*]; Roach, *Dialogues*, *supra* note 4; *see also* Kent Roach, *American Constitutional Theory for Canadians (and the Rest of the World)*, 52 U. TORONTO L.J. 503 (2002); Roach, *Dialogic Judicial Review*, *supra* note $.

[158] Most academic commentators who discuss the dialogue metaphor in the Canadian context begin with Hogg & Bushell's analysis. *See, e.g.*, Jean Leclair, *Judicial Review in Canadian Constitutional Law: A Brief Overview*, 3$ GEO. WASH. INT'L L. REV. 543, 547-50 (2004); Leighton McDonald, *Rights, 'Dialogue' and Democratic Objections to Judicial Review*, 32 FED. L. REV. 1, 1-$ (2004).

[159] Hogg and Bushell focus less attention on describing the judicial role in dialogue, as their principal interest is in examining "legislative sequels" following judicial nullification of statutes, in order to support their empirical claims that dialogue is an institutional feature of constitutional review under the Charter. *See* Hogg & Bushell, *Dialogue*, *supra* note 4, at 79-81, 9$-98. Nonetheless, their account of dialogue contains the clear assumption that judges have a special role to play in the dialogue about the meaning of Charter values in relation to principle. *See, e.g.*, *id.* at 79 (suggesting that legislative responses should be "properly respectful of the *Charter* values that have been identified by the Court").

[1$0] ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 285; Roach, *Dialogues*, *supra* note 4, at 484.

[1$1] *See, e.g.*, ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 285 ("The Court, is the one that must initiate the conversation, because the principles of fairness, fundamental freedoms, and respect for the rights of minorities are ones that are likely to be ignored or finessed in the legislative and administrative processes.").

Although the judiciary is regarded as having a strong role to play in judicial review on the basis of principle, the legislature can make its own unique contributions to constitutional understanding based on its comparative institutional ability to assess how policy objectives can best be achieved. These theorists thus claim that judicial decisions function as the beginning of a dialogue with the political branches "as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole."[1$2] The judiciary has the primary role in defining the principles laid down by the Charter, and is able to assist in achieving more principled answers by injecting considerations of principle into constitutional discussions.[1$3] Legislatures, on the other hand, can remind courts why limits on rights may be required in particular contexts, and discuss why they may have considered and rejected other alternatives.[1$4]

Tying their account to the structural features of the Canadian Charter, these theorists regard section 1 of the Charter as the key feature that facilitates constitutional dialogue because it enables productive discussion to take place between the judicial and legislative branches.[1$5] Under section 1, the rights that are guaranteed by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[1$$] Most cases that involve legislation being struck down center on the reasonableness of the means that the legislature has

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[1$2] Hogg & Bushell, *Dialogue*, *supra* note 4, at 105 (emphasis omitted).

[1$3] *See* ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 23$-37 (arguing that a strong dialogic judicial role "encourage[s] judges to inject considerations of moral principles . . . into democratic debates about the difficult issues that end up in Charter litigation").

[1$4] *See, e.g.*, *id.* at 293. Roach considers this form of dialogue to be a continuation of the dialogue between courts and legislatures that is achieved under the common law. *Id*. at 254-$3; Roach, *Dialogues*, *supra* note 4, at 503-17.

[1$5] Unlike in many theories, the principal focus here is *not* on the section 33 override. Hogg and Bushell, for example, say little about this provision, merely noting that it is "relatively unimportant" to the development of constitutional dialogue under the Charter due to the fact that a political climate has developed against its use. Hogg & Bushell, *Dialogue*, *supra* note 4, at 83-84. Roach, in contrast, claims that the override is a tool of "extraordinary dialogue" which results in a "shouting match" between courts and legislatures and should therefore only be used in exceptional circumstances. ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 250; Roach, *Dialogues*, *supra* note 4, at 487, 503. As to why this reflects a position of legislative acquiescence to judicial principle, see *infra* note 174 and accompanying text.

[1$$] Canadian Charter of Rights and Freedoms, § 1, Part I of the Constitution Act, 1982, Being Schedule B to the Canada Act of 1982, ch. 11 (U.K.).

chosen to pursue a legislative objective, rather than the legislative objective itself.[1$7] Debate then centers on the means by which particular policies should be pursued. This structure enables legislatures to limit rights according to the standards that the Supreme Court has set for section 1 justification.[1$8] As a result, a "constructive and respectful" or ordinary dialogue can take place between courts and legislatures which permits them "to speak in strong but distinct and complementary voices."[1$9] While the Court engages the legislature in relation to questions of principle, the legislature in turn engages the Court in relation to how policy objectives can best be achieved and why limits on rights may be required in particular contexts. If the Court nonetheless decides to invalidate statutory provisions, this need not frustrate legislative agendas because the legislature can respond by "devis[ing] a response that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded."[170]

While this account of dialogue that the Canadians propose rests largely on section 1 of the Charter, it is possible to extrapolate its understanding of dialogic dynamics to the United States constitutional system.[171] On the one hand, it is true that section 1 creates a distinct two-step analytic structure, which enables the Court to first identify the applicable right and then determine whether restrictions on this right are justified.[172] This can be contrasted with the position in the United States, where there is no comparable limitation clause in the Constitution and where judges instead

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[1$7] *See* HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 47; Hogg & Bushell, *Dialogue*, *supra* note 4, at 85.

[1$8] The standards prescribed by *R. v. Oakes*, [198$] S.C.R. 103, 138-40, are: (1) the law must pursue an important objective; (2) the law must be rationally connected with the objective; (3) the law must impair the objective no more than necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on the persons to whom it applies.

[1$9] ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 13.

[170] Hogg & Bushell, *Dialogue*, *supra* note 4, at 79-80 (emphasis omitted). In general terms, Hogg and Bushell suggest that dialogue occurs "[w]here a judicial decision is open to legislative reversal, modification, or avoidance" by the legislative process. *Id.* at 79.

[171] *Cf.* ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 290 (arguing that this type of dialogue is not possible in the United States because the United States Bill of Rights establishes "absolute" rights); *see also id.* at 15$ (describing rights in the United States as "absolute and final"); *id.* at 292 ("[I]t is a serious mistake to lump the Canadian *Charter* with the American *Bill of Rights*.").

[172] *Id.* at 15$.

define constitutional rights in a single step. Despite these differences, however, it is generally agreed that all rights contained in constitutional instruments are subject to limits. Judicial consideration of these limits in the United States simply takes place at the level of defining the applicable right when the Supreme Court refers to the justifications that the government has provided for its actions in legal argument.[173] As a result, although constitutional decisions in the United States may not have the same structure as in Canada, the political branches in the United States have similar opportunities to argue before the Court regarding how its policy objectives can best be achieved. Furthermore, when responding to judicial decisions invalidating statutory provisions, Congress retains similar leeway to enact new legislation in an effort to achieve its objectives, while at the same time taking the Court's pronouncements about constitutional values into account.

While this conception of dialogue offers the legislature a distinctive role in responding to judicial decisions, a number of problems remain due to the fact that the judiciary is still regarded as possessing superior abilities in relation to principle.[174] First, this account is based on the same negative assumptions regarding the legislative branch, and the same idealized accounts of the judicial role, as other theories of dialogue based on judicial principle.[175] Second, although the theory purports to describe substantive dialogic roles for both the judiciary and the legislature, the nature of constitutional

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[173] *See* Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. TORONTO L.J. 89, 92 (2003) (discussing the similarities between rights definition and government justification in the United States and Canada) [hereinafter Tushnet, *Judicial Activism or Restraint*]. *Cf.* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. $52, $98 (2005) (observing the "sheer ubiquity" of balancing-type tests in constitutional jurisprudence in a range of nations); Wexler, *supra* note 80, at 330 (arguing that in the United States context, use of intermediate scrutiny constitutes a form of balancing which allows the Court to "instigate a dialogue among itself, its coordinate branches of government, and society at large").

[174] As developed in the Canadian context, the account can also be criticized on the basis that it does not explain the use of section 33 very well, which Roach himself explicitly acknowledges. *See* ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, at 250 ("This response explains less well the extraordinary dialogues that occur when legislatures and courts engage in shouting matches and showdowns over whether a particular decision made by the Court was right or acceptable."). It fails in this regard because incorporating section 33 into an account of dialogue requires an acknowledgement that the legislature may engage in its own principled interpretation of Charter values, a move that these theorists are reluctant to take.

[175] *See supra* Part III.B.2.i.

dialogue remains very judicial-centric.[17$] Even though legislatures are assigned a substantive role, there is nonetheless an extreme reluctance to acknowledge a legitimate role for the political branches as independent interpreters of constitutional rights.[177] While courts articulate principle, the legislative role in the dialogue is merely passive or reactive, confined to "mouth[ing] the language of limits."[178] In addition, not only do judges get to speak in the rhetoric of rights, but as a practical matter, they also have the primary voice in determining whether a given limit on rights can be justified. As a result, even the legislature's contribution in this area may be a great deal weaker than these theorists suggest.[179] Constitutional rights are thus likely to assume "a superordinate importance, resistant to balancing."[180]

The subordinate and secondary dialogic position of the legislature also raises great concerns about the impact of judicial review on legislative reasoning and deliberation.[181] The risk that legislatures will choose to adopt policies based on what judges have said about constitutional values increases if legislators are not considered to have a legitimate role in interpreting those values. In the context of constitutional decision-making in Canada, a number of commentators suggest that this form of democratic debilitation is, in fact, occurring, as legislatures will often simply insert judicially-approved "Charter-speak"[182] into legislation, rather than engage in deeper reflection and independent deliberation about the

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[17$] *See, e.g.*, HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 4$ ("Hogg and Bushell portray Parliament's role as clearly secondary under the constitutional division of labour . . . . The judiciary speaks – Parliament listens.").

[177] *See* Manfredi & Kelly, *supra* note 95, at 523 (arguing that the most crucial flaw in Hogg and Bushell's normative argument "is its assumption of a judicial monopoly on correct interpretation," and that "[c]ontrary to what Hogg and Bushell assert, legislatures are never subordinating themselves to the *Charter per se*, but to the Court's interpretation of the *Charter*'s language").

[178] *See* Petter, *supra* note 38, at 19$.

[179] *Id*. at 19$-97.

[180] Jeremy Webber, *Institutional Dialogue between Courts and Legislatures in the Definition of Xundamental Rights: Lessons from Canada (and elsewhere)*, *in* CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE $1, 97 (Wojciech Sadurski ed., 2002).

[181] *See* Manfredi & Kelly, *supra* note 95, at 522; Tushnet, *Judicial Activism or Restraint*, *supra* note 173, at 94-100 (critiquing Roach's conception of dialogue under the Charter).

[182] Hogg & Bushell, *Dialogue*, *supra* note 4, at 101.

meaning of Charter values.[183] While this vision of constitutional dialogue is an improvement on the theories of dialogue considered thus far, due to both its description of more substantive forms of engagement between the branches of government and the substantive justification it provides for judicial participation in dialogue, it ultimately remains normatively deficient as a theory of dialogue due to its continued privileging of the judicial role.

3. Equilibrium Theories

Equilibrium theories of dialogue provide an alternative way of conceiving of the special judicial role in constitutional dialogue that does not privilege judicial contributions. In these theories, the judge's role is described as one of fostering *society-wide* constitutional discussion that ultimately leads to a settled equilibrium about constitutional meaning. While this provides a much more promising account of constitutional dialogue than the theories examined thus far, it ultimately fails to provide a complete account of the role of judicial review within the constitutional system.

The most prominent descriptions of constitutional dialogue in this vein have been developed by Barry Friedman and by Robert Post and Reva Siegel.[184] Friedman's is the most positive account, as it is explicitly grounded in social science studies regarding institutional interactions between the

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[183] *See, e.g.*, HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 222 (noting that in certain instances, legislative response to judicial decisions in Canada has been to "'Charter proof' new legislation so as to address and anticipate the judiciary's specific and likely concerns"); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, $9 MOD. L. REV. 7, 27 (200$) ("[W]hat is occurring . . . is the introduction of judicial influence at early stages of policy development, long before judicial review occurs, resulting in the further isolation of parliament."); MANFREDI, *supra* note 3$, at 180 ("The Court's monopoly over constitutional interpretation means that public policy will always be set closer to judicial preferences than to legislative preferences.").

[184] In relation to Friedman's account of dialogue, see generally Friedman, *Dialogue*, *supra* note 27; Friedman, *The Importance of Being Positive*, *supra* note 148. In relation to Post and Siegel's account, see generally Robert C. Post, *Xashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) [hereinafter Post, *Xashioning the Legal Constitution*]; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Xive Power: Policentric Interpretation of the Xamily and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; Post & Siegel, *Popular Constitutionalism*, *supra* note 3; Robert C. Post & Reva B. Siegel, *Protecting the Constitution Xrom the People: Juricentric Restrictions on Section Xive Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*].

judiciary, the political branches, and the people.[185] These studies show that while the Supreme Court has significant leeway in making pronouncements, if it strays too far from what the other branches of government and the people accept, political constraints such as the power of judicial appointments and popular backlash will bring the Court back into line.[18$] Friedman relies on this evidence principally to stress the role of public opinion as one of the principal forces controlling the Court. Although this mechanism is not understood perfectly, social science evidence increasingly suggests that judicial outcomes tend to run in line with public opinion over the longer term.[187]

While these studies show that the Court is heavily constrained, Friedman argues that judicial decisions still play an important function in the constitutional system as they serve to spark (or continue) a broader national discussion about constitutional meaning.[188] As a result, the Court acts as the shaper and facilitator of society-wide discussion about constitutional values. When it declares its own views about the meaning of constitutional text, the Court actively channels and fosters ongoing societal debate by synthesizing the various, and possibly disparate, views about constitutional meaning and by articulating that debate in an explicitly constitutional form.[189]

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[185] *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) [hereinafter Friedman, *Politics of Judicial Review*]; *see also* Friedman, *Dialogue*, *supra* note 27, at $71-72 ("[T]he constraint in dialogue is inherent and systemic: judges are constrained by the system of government in which they operate.").

[18$] Friedman, *Dialogue*, *supra* note 27, at $79 & n.522 (citing ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (19$0); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, $ J. PUB. L. 279 (1957)). The political constraints that operate on a Supreme Court Justice in the United States include strategic interaction with other judges on a collegial court, the pressures imposed by judges lower in the judicial hierarchy regarding how decisions are to be interpreted, inter-branch constraints which result from struggles with the political branches, and popular opinion regarding constitutional meaning and the practice of judicial review. *See* Friedman, *Politics of Judicial Review*, *supra* note 185, at 270-329 and the social science references referred to therein.

[187] Friedman, *The Importance of Being Positive*, *supra* note 148, at 1295 ("In the long run, as popular opinion shifts, judicial decisions and ultimately constitutional meaning shift with it."). *See generally* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 259$, 2$13-29 (2003) [hereinafter Friedman, *Mediated Popular Constitutionalism*] (exploring the extent to which public opinion can, and does, serve as a monitor of judicial activity); Friedman, *Politics of Judicial Review*, *supra* note 185 (same).

[188] Friedman, *Dialogue*, *supra* note 27, at $54 ("The Court may offer an interpretation that is operative for a time, but the Court's opinions lead debate on a path that often ultimately changes that interpretation.").

[189] *See, e.g.*, *id.* at $$8-71 (describing the various roles of the judiciary in constitutional dialogue).

In the process, the Court also mediates the views of different participants in the debate and focuses the terms in which future debate might proceed. The Court's decisions then facilitate further debate, either by acting as a catalyst for discussion along particular lines or by prodding other institutions into deliberative action.

As a result of these dynamics, Friedman describes the function of judicial review in the United States constitutional system as one of promoting and facilitating constitutional dialogue.[190] The Court's participation in this dialogue is dynamic—not only does it spark a process of national discussion, but it is also, in turn, affected and shaped by this conversation.[191] When a decision is rendered it is subject to discussion and debate within society. Over time, if there is enough popular disagreement with the Court's ruling, new legislation may be passed and legal challenges brought that test the finality of the decision in a more concrete sense. As a result of this dissent and debate, the Court may ultimately come to reconsider and refashion its decision. Under this model, the perspectives of non-judicial actors may therefore influence the Court as much, if not more, than the Court itself influences the rest of society.[192] Over time, this process produces a relatively enduring constitutional equilibrium that is widely accepted by all the participants in the national discussion. Friedman further argues that the dialogic role the judiciary performs is a valuable one, as it "achieves the separation of constitutional requirements from immediate political preferences,"[193] and, in the long term, the production of

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[190] Friedman, *The Importance of Being Positive*, *supra* note 148, at 1295-9$ ("Prompting, maintaining, and focusing this debate about constitutional meaning is the primary function of judicial review."); Friedman, *Politics of Judicial Review*, *supra* note 185, at 334 ("[J]udicial review serves to channel and foster societal debate about constitutional meaning.").

[191] *See* Friedman, *Dialogue, supra* note 27, at $79 (This "dynamic tension [is what] moves the system of constitutional interpretation along.").

[192] This judicial function is thus different than an educative role, as the Court is not the only actor influencing constitutional meaning. *Cf.* Bickel's theory, *supra* Part III.B.2.i.

[193] Friedman, *The Importance of Being Positive, supra* note 148, at 1291. Friedman describes this as an important aspect of constitutionalism, as the distinction between the Constitution and ordinary law means, at the very least, that the Constitution cannot mean whatever the majority happens to think it means at a particular point in time. *Id.* at 1297-98; *see also* Friedman, *Mediated Popular Constitutionalism*, *supra* note 187, at 2$02; Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 7 (1998) ("The role of constitutional interpreter is to reconcile our deepest constitutional commitments, revealed by all of our constitutional history, with today's preferences.").

stable and broadly supported answers to questions of constitutional meaning.[194]

This understanding of how the institutional dynamics of the constitutional order lead, in the fullness of time, to a stable equilibrium about constitutional meaning echoes the model of "law as equilibrium" that William Eskridge and Philip Frickey have proposed.[195] Drawing on positive political theories of institutional interaction, Eskridge and Frickey argue that the different branches of government seek "to promote [their own] vision of the public interest."[19$] As a result of the political constraints on each branch, that vision can only be achieved within a complex interdependent system in which each branch of government competes and bargains strategically with the others about their different views of constitutional meaning.[197] An understanding of dialogue based on these institutional interactions might lead one to think that this is another competitive theory of constitutional dialogue. However, the focus here is less on how different institutional actors engage in a tussle to promote their own views about constitutional meaning, and more about how judicial and non-judicial actors come to learn, debate, and adapt or modify their views due to their interdependent participation in constitutional dialogue.[198]

Relying heavily on positive evidence about the ways in which political and social actors respond to the Court, Friedman's account suggests that concerns about the countermajoritarian difficulty in the United States are often overstated.[199] This conclusion is challenged, however, by Post and Siegel as part of their slightly different description of constitutional dialogue as equilibrium. Utilizing a different methodology, they suggest that concerns remain about the possibility of judicial overreaching even under an equilibrium theory of dialogue.

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[194] Friedman, *Mediated Popular Constitutionalism*, *supra* note 187, at 2$02 ("[T]he judiciary plays an important role in identifying those constitutional values that achieve widespread support over time. This is not an exclusively judicial role, but given the functions performed by the different branches this task falls largely on the judiciary.").

[195] William N. Eskridge, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 2$, 32 (1994).

[19$] *Id*. at 28.

[197] *Id.* at 28-29.

[198] *See* Friedman, *Dialogue*, *supra* note 27, at $54 ("The process of reaching an interpretative consensus on the [constitutional] text is dynamic.").

[199] Friedman, *The Importance of Being Positive*, *supra* note 148, at 1272-82.

As a matter of description and as a structural feature of the United States constitutional system, Post and Siegel agree with Friedman that the Supreme Court is necessarily engaged in a dialogue with the "constitutional culture" of the nation about constitutional meaning.[200] Their understanding is, however, based principally on historical and cultural examples,[201] rather than the kinds of positive social science evidence on which Friedman relies.[202] These rich historical examples show that, while the Court plays an active role in inspiring or facilitating popular understandings of the Constitution, changing constitutional understandings of the people can also enable the Court "to learn . . . about a better way to interpret the Constitution."[203] Constitutional law pronounced by the Court therefore does not develop in isolation from, nor without incorporating, the values and beliefs of non-judicial actors in society. As a result, the Court's decisions will only acquire ongoing legitimacy if the nation comes to accept them over the long term and some period of "relatively secure equilibrium" results.[204] Similar to Friedman, they claim that this system of constitutional dialogue is normatively desirable, due to the fact that over the longer term it produces answers which broadly conform to the constitutional understandings of the people.

Post's and Siegel's reliance on historical description rather than positive social science evidence has consequences in relation to what they see as lingering democratic legitimacy concerns associated with judicial review. While they argue, on

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[200] This has been described in greatest detail in Robert Post's 2002 Supreme Court foreword. *See* Post, *Xashioning the Legal Constitution*, *supra* note 184, at 11; *see also* Post & Siegel, *Legislative Constitutionalism*, *supra* note 184, at 1983. In using the term "constitutional law," Post is referring to "constitutional law as it is made from the perspective of the judiciary." Post, *Xashioning the Legal Constitution*, *supra* note 184, at 8. "Constitutional culture," in contrast, refers more specifically to the beliefs and values of non-judicial actors about the meaning of the Constitution. *Id*.

[201] *See, e.g*., Post & Siegel, *Legislative Constitutionalism*, *supra* note 184, at 1950 ("History demonstrates that constitutional law is in continual dialogue with the constitutional culture of the nation."). *See also generally* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (describing stories of the Equal Rights Amendment and the Nineteenth Amendment as examples of the role of a mobilized citizenry in the making of American constitutional law).

[202] Social science evidence has, however, influenced their work. *See, e.g.*, Post, *Xashioning the Legal Constitution*, *supra* note 184, at 35-3$ (discussing the insights of political scientists and historians who study the Supreme Court).

[203] Post & Siegel, *Legislative Constitutionalism*, *supra* note 184, at 2059.

[204] Post, *Xashioning the Legal Constitution*, *supra* note 184, at 107-08. Post thus describes legal authority as developing "diachronically" across time. *Id*.

the one hand, that constitutional dialogue is institutionally "inescapable,"[205] they nonetheless attribute a great deal of power to the Court to control the amount and extent of dialogue that takes place in relation to certain issues of vital importance to the nation. For instance, in their scholarship concerning section 5 of the Fourteenth Amendment, Post and Siegel describe a Court that has stifled constitutional dialogue by preventing Congress from acting on its own interpretation of constitutional rights.[20$] More generally, Post has described the Court as constructing a "membrane" that separates its views about constitutional meaning from those of other actors.[207] While the Court generally allows this membrane to remain highly porous so as to facilitate constitutional dialogue, the Court can stiffen the membrane if it forms the view that popular attitudes threaten significant constitutional values.[208]

Due to this potential for judicial overreaching, Post and Siegel argue that the Court should exercise a degree of self-restraint when performing its judicial review functions.[209] If it does not, they fear that "the technical legal reason of constitutional law will . . . suffocate the political dimensions of the Constitution."[210] A different way of understanding this is that legal pronouncements of judicial supremacy may foster social and political beliefs that the judiciary is the ultimate interpreter of the Constitution. Over the long term, this may mean that the political branches of government and the people change how they react to judicial decisions and refrain from challenging the Court, thereby downgrading their roles in the constitutional dialogue and exacerbating democratic legitimacy concerns.[211]

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[205] *Id*. at 9.

[20$] *See generally* Post & Siegel, *Legislative Constitutionalism*, *supra* note 184; Post & Siegel, *Protecting the Constitution*, *supra* note 184.

[207] Post, *Xashioning the Legal Constitution, supra* note 184, at 9-10, 41 (describing the "membrane" between constitutional law and constitutional culture).

[208] *Id*. at 41, 49-50.

[209] *Id*. at 37 ("The dependence of constitutional law on this continuing dialogue counsels restraint in the exercise of judicial review. This is because the legitimacy of judicially fashioned constitutional law is understood to depend upon its grounding in constitutional culture." (citation omitted)).

[210] Post & Siegel, *Popular Constitutionalism*, *supra* note 3, at 1041.

[211] Post and Siegel claim that this has occurred in relation to Congress' power under section 5 of the Fourteenth Amendment, arguing that Congress has recently seemed "disengaged and possibly confused" about the situations and circumstances in which it can and should exercise this power, due to a series of aggressive rulings by the Court. Post & Siegel, *Protecting the Constitution*, *supra* note 184, at 43 (citing Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress*

Although Post and Siegel are right to worry about the issue of judicial overreaching, their concern that this is likely to occur in relation to issues of vital importance to the nation is misplaced. In such high saliency cases, the social science literature that Friedman relies on reveals that although the Court may perceive itself as the ultimate interpreter of the Constitution, this does not mean that the Court can actively control how non-judicial actors implement or respond to its decisions.[212] Rather, on a strictly positive account, these cases are likely to prompt national dialogue about constitutional meaning, which will serve to bring the Court into line over the longer term.

If Post and Siegel directed their attention to low saliency cases, however, the story about judicial overreaching is likely to be different. The Court may be in a better position to cement its own views on issues of relatively low political salience that are unlikely to engage popular discussion in any meaningful way. In such cases, the time that is needed for other actors to respond to the Court may bolster more assertive judicial action. This highlights the difficulty with Friedman's account, which is that he does not take full account of the potential for judicial overreaching in cases that do not engage widespread constitutional discussion.[213] If the long term effects of judicial action in these cases are such that non-judicial actors increasingly refrain from challenging the Court, then it may be true that this account of dialogic judicial review suffers from lingering democratic debilitation effects.

While equilibrium theory does not completely resolve concerns about the countermajoritarian difficulty, it is more successful than any of the theories previously examined in this

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Crusade, 51 DUKE L.J. 435 (2001)). In relation to these concerns, see also KRAMER, THE PEOPLE THEMSELVES, *supra* note 2, at 233; TUSHNET, TAKING THE CONSTITUTION, *supra* note 2, at 194.

[212] Friedman suggests, for example, that there is good reason to think that the Supreme Court's "federalism revolution," which has been critiqued by Post and Siegel as an example of judicial overreaching, is "perfectly consistent with popular opinion." Friedman, *The Importance of Being Positive*, *supra* note 148, at 1299. Friedman is also of the view that recent judicial decisions temper concerns that the judiciary is usurping power within the constitutional system. *Id.* at 1298-1302.

[213] Friedman does allude to this when he states, "*Some* judicial decisions do strike a national nerve, and when they do, they rouse opposition." Friedman, *The Importance of Being Positive*, *supra* note 148, at 1297 (emphasis added); *see also* Friedman, *Dialogue, supra* note 27, at $04 n.135 ("[A]ll branches of government likely will be countermajoritarian in some instances. Indeed, the Court might confine its countermajoritarian activity to certain special cases, legitimating these with otherwise frequent reference to majority will.").

article in positing a substantive dialogic role for the judiciary that justifies its involvement in judicial review. Critical to the normative appeal of these theories is the society-wide nature of dialogue, which is rather different than the strictly institutional accounts that are found in most other theories.[214] The role of channeling and fostering societal discussion recognizes that the Court is not simply an additional voice in constitutional dialogue, but actively engages in a generative exchange that ultimately leads to a settled equilibrium about constitutional meaning. This is normatively desirable because the judicial moderation and facilitation of the contributions of different dialogic participants assists in the search for more widely accepted and enduring answers to questions of constitutional meaning.

As a matter of description, we might, however, question whether the level of engagement of the people in constitutional dialogue in the United States is as extensive as this account suggests. For example, there is a large body of empirical evidence that reveals widespread political apathy amongst citizens in contemporary American society.[215] In recent years, citizen interest in politics has declined, together with levels of popular participation. Popular input in many circumstances, whether through elections or social movements, also appears to be limited to discrete groups of well-educated and wealthy individuals.[21$] Nonetheless, the complete picture remains unclear because social science data increasingly suggests that judicial outcomes tend to fall into line with public opinion over the longer term, with constitutional meaning also shifting accordingly.[217] Such evidence does support the recognition of the people as participants in constitutional dialogue, even if we do not understand precisely the ways in which they influence

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[214] *See* Friedman, *Dialogue*, *supra* note 27, at $58 n.410 ("I differ with – or move a step past – Fisher in that I believe that all branches facilitate a dialogue in which the people give content to the constitutional text."). Devins and Fisher do contemplate a greater role for the people in their recent work. *See* DEVINS & FISHER, *supra* note 29, at $; Devins & Fisher, *Judicial Exclusivity*, *supra* note 95, at 94-98, 104. Nonetheless, they still preserve the most important roles in constitutional dialogue to the three branches of government, due to the basis of their theory in coordinate construction and institutional checks and balances.

[215] *See* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 913 (2005) (examining empirical research which suggests that "the People have little interest in increased civic responsibility or greater popular accountability in politics").

[21$] *Id.* at 931 & n.251 (citing empirical studies which suggest that "[w]ealth and education are the strongest predictors of political participation").

[217] *See supra* note 202 and accompanying text.

constitutional debate. Given the evidence of growing civic disengagement, however, we should also think about practical strategies that would enable the views of the citizenry to be incorporated more completely into constitutional dialogue in the future.

Even if some aspects of the people's positive role in the American system fail to be completely understood, the normative desirability of connecting debate and discussion about constitutional values to broader society is clear. This is closely linked to a particular understanding of constitutionalism that views the Constitution not only as a document of positive law that creates government institutions and defines rules of governmental behavior, but also as an "expression of the deepest beliefs and convictions of the . . . nation, of our 'fundamental principles as they have been understood by the traditions of our people and our law.'"[218] One of the functions of a Constitution is to constitute the character and sensibilities of a nation, allowing for the possibility of self-revision and transformation over time as the nation's self-understanding grows and changes.[219] As Hanna Pitkin has said, "[I]n this sense, our constitution is less something we *have* than something we *are* . . . . This sense of 'constitution,' then, is activating and empowering, calling us to our powers as co-founders and to our responsibilities."[220]

An analogy can be drawn between this understanding of constitutionalism and arguments made in various nations regarding the effect of entrenching human rights guarantees in national law. Commentators have suggested that one of the most important effects of the entrenchment of fundamental

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[218] *Compare* Post, *Xashioning the Legal Constitution, supra* note 184, at 3$ (quoting Lochner v. New York, 198 U.S. 45, 7$ (1905) (Holmes, J., dissenting)), *with* SANFORD LEVINSON, CONSTITUTIONAL FAITH 4$-50 (1988), *and* Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 37$ (1994) (Levinson offers a contrasting view regarding the necessity of active, independent constitutional interpretation by citizens.).

[219] Mark Tushnet refers to this as expressivism. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 12$9-85 (1999); *see also* Mark Tushnet, *Xidelity as Synthesis: Constituting We the People*, $5 FORDHAM L. REV. 1557, 1558 (1997) ("A people can be constituted in many ways. But any one people is historically constituted in only one way. And here is where constitutional law comes in.").

[220] Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 1$7, 1$7-$8 (1987); *see also* Roger Cotterrell, *The Symbolism of Constitutions: Some Anglo-American Comparisons*, *in* A SPECIAL RELATIONSHIP*: AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK 25 (Ian Loveland ed., 1995).

rights is to create a human rights culture that provides a value system by which a society lives and conducts itself.[221] In order to achieve this deep culture of respect for rights, human rights values must be effectively internalized by all members of a society.[222] The best way to achieve this and to foster the legitimacy of constitutional commitments to rights as important expressions of a nation's self-understanding may well be adapting or designing systems of constitutional dialogue in a way that recognizes the central place of the people in ongoing discussion about fundamental values.[223] This is also likely to foster greater confidence among members of the populace that they can have a legitimate voice in the debate about constitutional meaning and change within their society.

While this account has great normative appeal as a way of understanding constitutional dialogue, it ultimately fails to provide a *complete* account of the role of judicial review in democratic constitutionalism. In this regard, we first need to ask whether similar dialogic dynamics are likely to be observable or achievable in constitutional systems outside the United States. If they are not, then this account is unlikely to provide a normatively satisfying vision of constitutionalism

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[221] *See* FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UK'S NEW BILL OF RIGHTS 213 (2000) ("It is not possible in a democracy to attempt to create a human rights culture without involving the people in its formation. And it is simply not sustainable to pin so much on the idea of human rights . . . without widespread participation in developing its meaning and scope.").

[222] As one commentator has stated, "[h]istory and experience suggest that, to be effective, a bill of rights must be embedded in a culture of democratic constitutionalism" and a more effective national scheme of rights protection may be achievable when it involves the community that the bill of rights is designed to serve. George Williams, *Constructing a Community-Based Bill of Rights*, *in* PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS, *supra* note 53, at 247, 249. *Cf.* Cheryl Saunders, *Protecting Rights in Common Law Constitutional Systems: A Xramework for a Comparative Study*, 53 VICTORIA U. WELLINGTON L. REV. 83, 95 (2002) ("The rights instruments and the debate associated with their operation in practice . . . have a potential educative effect for the community as a whole, and thus, may contribute to the development of civil society.").

[223] This understanding of the position of the people within the constitutional system can be contrasted with that proposed by Bruce Ackerman. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10 (1991). Ackerman argues that constitutional meaning is determined by the people in rare moments of "higher lawmaking," and that the role of the judiciary is to "protect[] the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations." *Id*. at 10. The understanding of dialogue discussed here proposes a more direct role for the people in determining constitutional meaning, not only at times of "higher lawmaking," but also during periods of "normal lawmaking." *See id*. at 299-301 (distinguishing between "higher lawmaking" and "normal lawmaking").

that has general appeal, even if it succeeds in providing this in relation to the United States system.

In this regard, Mark Tushnet has suggested that this form of long-term dialogue is a unique feature of the American system. According to Tushnet, this is because the process of dialogue in the United States is necessarily more informal and extended in time than in countries, such as Canada, where direct institutional mechanisms exist for the political branches to challenge judicial decisions.[224] Conversely, he argues that a different kind of short-term dialogue is more likely in Canada, due to the ability of the political branches to more rapidly override or revise judicial decisions.[225]

While the specific course of institutional interactions in the United States and Canada is certainly likely to be affected by differences in the structural mechanisms that exist in those countries, this does not mean that broader dialogue about constitutional values involving the people does not, or could not, occur within the Canadian constitutional system. As a result, even if a form of shorter term institutional dialogue takes place in specific cases due to the structural features of the Canadian Charter, longer term society-wide dialogue may still take place between the Court, the political branches, and the people regarding the meaning of the broad constitutional values that arise in those cases. Indeed, rather than viewing these interactions as different forms of dialogue, the better view is that they are different aspects of the same dialogue, as the specific institutional interactions that take place in the context of individual cases can, in due course, form part of a broader societal dialogue about constitutional meaning. Ultimately, the extent to which dialogue takes place in this form in Canada, or in other countries, will depend on the positive dynamics of those constitutional systems.[22$] However,

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[224] *See, e.g.*, Tushnet, *Constitutional Patriotism*, *supra* note 57 (distinguishing between dialogue in weak and strong form systems of judicial review, in part, on the basis of the time over which the dialogue is likely to take place).

[225] Tushnet remains skeptical, however, regarding whether even short-term dialogue really exists as a matter of description in Canada, given the apparent delegitimization of the override. *See*, *e.g.*, Tushnet, *Alternative Xorms of Judicial Review*, *supra* note 71; Mark Tushnet, Marbury v. Madison *Around the World*, 71 TENN. L. REV. 251, 2$4-74 (2004).

[22$] Whether dialogue presently takes place in this form in Canada is presently uncertain, given the relative dearth of political science literature on such issues. One recent exception which takes a broader positive analysis of dialogue in Canada focuses on the nature of dialogue in Canada between the federal government and the lower

given that there is nothing in principle that suggests that these dynamics cannot exist in other nations, this account of dialogue does have the potential to provide a normatively satisfying vision of constitutionalism outside, as well as inside, the United States.

This discussion nonetheless points to a different reason why the equilibrium model remains an incomplete understanding of the role of judicial review in modern constitutionalism. Paradoxically, this also relates to the model's focus on forms of dialogue that engage society as a whole. Although it has been argued that broadening the focus to society-wide dialogue is a significant theoretical contribution, the singular nature of this focus underplays the institutional aspects of constitutional dialogue. Furthermore, there is a vital need for a supplemental account of how constitutional dialogue does, or can, proceed at the institutional level between the judiciary and the political branches of government, given that society-wide dialogue is unlikely to take place in relation to a range of constitutional issues of relatively low political salience.[227] Fortunately, there remains one account of constitutional dialogue that can assist us in this regard.

4. Partnership Theories

The *partnership model of dialogue* centers on the recognition that the differently situated branches of government can make distinct contributions to constitutional dialogue in a way that does not privilege the judicial role. This account recognizes that each branch of government learns from the specific dialogic inputs of the other branches in an

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courts. *See* Matthew A. Hennigar, *Expanding the 'Dialogue' Debate: Canadian Xederal Government Responses to Lower Court Charter Decisions*, 37 CAN. J. POL. SCI. 3 (2004).

[227] Friedman suggests that the Court renders decisions in "explicitly constitutional terms," but this does not, in itself, articulate any more distinctive institutional competences that the Court brings to its dialogic role. *See* Friedman, *The Importance of Being Positive*, *supra* note 148, at 1291. In contrast, Post and Siegel do recognize "institutionally differentiated ways" in which the judiciary and the political branches engage in constitutional discussion. Post & Siegel, *Legislative Constitutionalism*, *supra* note 184, at 198$. For example, they consider that courts have the institutionally specific role of defining and enforcing rights in particular cases in the procedural context of adjudication, whereas Congress derives its specific institutional competences from its democratic responsiveness. *See, e.g.*, *id*. at 19$$-$7, 1970. Their explanation of dialogue, however, centers to a greater extent on broader dialogue with the constitutional culture of a nation, rather than on these institutional aspects.

institutionally diverse constitutional order.[228] Judicial and non-judicial actors are thus conceived as equal participants in constitutional decision-making, both of whom dialogically contribute to the search for better answers as a result of their unique institutional perspectives.[229]

The most prominent account of constitutional dialogue as partnership in this institutional vein has been proposed by Janet Hiebert in the context of the Canadian Charter, though her views about institutional interactions can be applied more generally to the United States and other nations.[230] Hiebert begins with the claim that both courts and legislatures share responsibility for making judgments about constitutional values and for assessing the reasonableness of their own actions in light of those values.[231] This focus on legislative, as well as judicial, responsibility is important because it recognizes that not all legislation will be subject to challenge before the courts. If legislatures did not engage in their own

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[228] *Cf.* Keith E. Whittington, *In Defense of Legislatures*, 28 POL. THEORY $90, $97 (2000) ("[I]nstitutions . . . develop distinct missions, cultures, modes of behavior, norms, and such, which affect both the behavior of individuals within those institutions and their collective output.").

[229] While a number of theorists of constitutional dialogue describe their theories as "partnership" theories, it is questionable whether these are truly partnership theories in the terms in which that expression is used in this Article. Tsvi Kahana, for example, has developed a self-described partnership approach as part of his goal of providing a theoretical justification for the existence and use of the override provision in the Canadian Charter. *See* Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 255-5$ (2002). Kahana conceives of the Court's role as one of deliberation and of promoting discussion and debate about constitutional meaning, but also posits an additional unique contribution that judges can make to constitutional dialogue, due to the fact that courts have the specialized capacity to "interpret[] texts, specify[] ideas, and offer[] legal reasoning," whereas legislatures do not. *Id.* at 250. As a result of these special legal skills, the legislature can read decisions of the Court and learn from judicial deliberations, allowing it to subsequently conduct its own deliberation in those terms. However, Kahana does not consider whether the legislature has a different and equally important perspective to offer in the dialogue about constitutional meaning, as he ultimately considers that while legislatures and courts are equally motivated to interpret the Constitution, courts are more *competent* to engage in constitutional interpretation than legislatures. *Id*. As a result, Kahana's attempts to justify an additional, institutionally specific role for the judiciary and the legislature in constitutional dialogue thus continue to privilege the ability of judges to interpret the Constitution, leading to another rather judicial-centric and unequal account of constitutional dialogue which it is difficult to call a "partnership" model.

[230] HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 50-72; *see also* Hiebert, *Parliament and Rights*, *supra* note 53; Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 19$3 (2004) [hereinafter Hiebert, *New Constitutional Ideas*] (discussing both the Canadian Charter and the United Kingdom Human Rights Act).

[231] *See, e.g.*, HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 52 ("[E]ach body [must] satisfy itself that its judgment respects Charter values.").

independent interpretation of constitutional values, then the overriding goal of constitutionalism, namely "ensuring that state actions are consistent with its normative values," may not be completely realized.[232] While courts and legislatures share responsibility for respecting constitutional values, each has a "distinct relationship" to a constitutional conflict.[233] This is not only because they are differently situated, but also because they each bring distinct and valuable perspectives to constitutional judgment given their different institutional characteristics and responsibilities.[234]

Hiebert describes a number of distinct perspectives and abilities that judges and legislatures bring to constitutional judgments. In relation to the judiciary, she rejects the view that courts are better able to resolve disagreements about the meaning of rights in a principled manner.[235] She does nevertheless consider that the relative insulation of judges from political and social pressures gives them a greater degree of freedom to identify circumstances in which legislative goals unduly restrict rights or have unintentional consequences that unnecessarily restrict rights.[23$] In addition, interpreting and defining rights is at the core of judicial decision-making because it is a task that judges regularly and deliberately perform.[237]

Hiebert also argues that there are distinct disadvantages with the judicial role, which means that judges can actively learn from the legislature's different perspective.

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[232] *Id*. at 220.

[233] *Id.* at 51.

[234] *See, e.g.*, Hiebert, *Parliament and Rights*, *supra* note 53, at 239 ("The two institutions share responsibility for evaluating the merits of legislative choices and bring to their respective judgments different perspectives that reflect their distinctive roles and the fact that they are situated differently, relative to the Charter conflict.").

[235] *See, e.g*., HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 54 ("The proposition that only judges are capable of making conscious and principled decisions where rights are affected underestimates the extent to which Charter evaluation has become an intrinsic part of the policy process.").

[23$] *Id*. at xii.

[237] *Id*. at 53. Hiebert does, however, argue that the Court has a particular responsibility in its dialogic interactions with the legislature in relation to what she terms "core rights" under the Charter, which she describes as the "broad range of requirements necessary for the people to govern themselves in a representative system." *Id*. at 57. While she does not claim that the judiciary has special abilities in relation to interpreting these rights, she does consider that courts have a special responsibility to ensure that Parliament has taken such rights seriously. *Id*. at $9-70. This part of Hiebert's analysis can be criticized, as it appears to assume that courts indeed perform a more principled role in relation to such issues. The theory remains coherent as a theory of constitutional dialogue, however, without this added element.

In this regard, the legislative branch has an advantage in addressing the question of when the pursuit of policy objectives might necessitate the restriction of rights, given its access to resources and the policy expertise that exists within the political branches of government. In contrast to judicial decisions, policy decisions are based upon "specialized expertise, relevant information and data, previous trials and failures, comparative experience, and informed best estimates."[238] Accordingly, although the legislature might benefit from a well-reasoned judicial decision when determining whether its objectives are sufficiently important to justify any limitation of rights, this judicial input should not be privileged and should "not replace political judgment."[239]

As a result of these distinct perspectives and their "separate yet interconnected" positions in the constitutional order, the judiciary and the legislature are able to engage in a dialogue about constitutional meaning, in which both should exercise modesty about their own conclusions and listen to and learn from each other's perspectives, modifying their own views accordingly.[240] In the Canadian context, this potential for institutional dialogue can be realized in a number of different ways. First, Hiebert suggests that dialogue begins with legislators in most circumstances when they initially consider whether legislation is consistent with the Charter. It then continues in the context of individual cases, where the deliberations of the legislature are conveyed through legal argument and where the deliberations of the court are revealed through its judgments, with both parties learning from each

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[238] Hiebert, *Parliament and Rights*, *supra* note 53, at 240.

[239] *Id.* at 239. Hiebert also considers that any form of interaction in which the judicial voice is privileged is not healthy for the institution of democratic government, as this would diminish "political responsibility to pursue important policy goals and may lead to the unnecessary use of non-ambitious or ineffective means to pursue these objectives." HIEBERT, CHARTER CONFLICTS, *supra* note $9, at xiii.

[240] HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 51. Hiebert previously referred to the metaphors of dialogue and conversation to describe her preferred forms of interaction between courts and legislatures in the Canadian context. *See* JANET L. HIEBERT, LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW 124-25, 154-55 (199$); Janet L. Hiebert, *Why Must a Bill of Rights be a Contest of Political Wills? The Canadian Alternative*, 10 PUB. L. REV. 22 (1999); HIEBERT, ENRICHING CONSTITUTIONAL DIALOGUE, *supra* note 155, at 1. She has now revised her views slightly and refers to her theory as a "relational approach." HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 50-51. While her terminology has changed, the theory can still be regarded as a "dialogue" theory, as the general thrust of her views about the institutional interactions that should take place between the judiciary and legislatures in Canada remain the same.

others' views.[241] The dialogue then returns to the legislature, which considers if and how to respond to the court's decision. This approach also leaves space for the legislature to make use of the section 33 override in cases where the judiciary has nullified legislation on Charter grounds.[242] In such circumstances, the legislature may consider the views of the judiciary, while at the same making its own principled assessment about how the rights in question should best be protected.

Although Hiebert ties her account of dialogue to the Canadian Charter, there is no reason why this way of understanding institutional interactions cannot be extended to other nations, including the United States, because the positive features of the judicial and legislative processes that she describes will be closely analogous in most constitutional systems. In the United States, the fact that the political branches of government appear before the Supreme Court in constitutional cases and can respond to judicial decisions with which they disagree in a variety of ways highlights that the potential for the different branches to engage in a productive partnership exists in this system. As a result, the partnership model demonstrates that the potential exists for institutional "conversations occurring in both directions," which have the potential to "ratchet up" the degree and quality of the scrutiny that is brought to bear on the consideration of how legislative actions impact constitutional rights.[243]

Compared to theories discussed previously which refer to a special dialogic role for the judiciary in relation to matters of principle, the institutionally distinct roles of the judiciary in partnership with the legislature that Hiebert proposes are somewhat more modest. However, they are also more realistic, given that they are based on positive features of the judicial and legislative processes. In addition, they recognize that the

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[241] HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 50-51.

[242] Hiebert considers that the override should only be used following a decision by the country's highest court, as otherwise the Supreme Court's contribution would be omitted from constitutional deliberations. *Id.* at $3. This view about confining the use of the override to situations in which the Supreme Court has had an opportunity to speak is shared by other commentators. *See, e.g.*, ROACH, THE SUPREME COURT ON TRIAL, *supra* note 4, 28$-87; Kahana, *The Notwithstanding Mechanism*, *supra* note 34.

[243] Hiebert, *Parliament and Rights*, *supra* note 53, at 239 ("The Charter's virtue lies in its capacity to 'ratchet up' the quality of scrutiny that is brought to bear on the validity of governmental action, not in its promise for judicial resolution of legislative conflicts involving rights.").

judiciary has an important adjudicative function to perform in disputes about rights, but refuse to make empirically questionable assumptions[244] about the moral superiority of the judicial process.[245]

This account also offers a unique way of overcoming the countermajoritarian difficulty at the institutional level, due to the fact that it does not privilege the judicial role in constitutional dialogue and leaves sufficient space for the political branches to work out democratic resolutions to constitutional issues. This is, however, a prescriptive vision of how dialogue should proceed, albeit one which is firmly grounded in the positive features of the constitutional system. As a result, there remains some risk that legislatures may not be able to fully live up to their dialogic role in practice, and may instead gradually come to defer to judicial pronouncements about constitutional meaning over time. As observed previously in relation to process-centered rules, legislatures may encounter substantial difficulty in revisiting earlier decisions due to the practical realities and time constraints inherent in the legislative process.[24$] Furthermore, Hiebert herself increasingly questions whether this vision of constitutional dialogue is fully achievable in Canada, despite the existence of express institutional mechanisms such as the section 33 override, because the political culture in Canada does not fully accept the legitimacy of political judgments about rights that differ from judicial interpretations.[247] Therefore, if this vision of constitutional dialogue is to become a complete reality, it will be necessary to think about how ways to structure the political branches, or the rules under which they operate, to enhance their abilities to participate in the resolution of constitutional issues.

On the normative level, the partnership conception of constitutional dialogue is worth pursuing because it provides one of the more satisfying accounts of the dialogic judicial role that we have encountered thus far. Of particular importance, it proposes a special and valuable judicial role, which recognizes that judges make unique institutional contributions to dialogue in individual cases as a result of the unique

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[244] *See supra* notes 53-57, 141-150 and accompanying text.

[245] *Cf. supra* Part III.B.2.

[24$] *See supra* Part II.A.2.

[247] *See* Hiebert, *New Constitutional Ideas*, *supra* note 230 (discussing this problem in relation to both Canada and the United Kingdom).

features of the adjudicative process. This conception of the judicial role also ensures that the judiciary's contributions are not privileged over the distinct dialogic contributions that legislatures are able to make. However, this vision of dialogue also remains incomplete because it restricts its focus to forms of institutional dialogue between the branches of government. The incompleteness that exists here is the converse of that identified in relation to the equilibrium model, which directed greater attention to the society-wide aspects of dialogue. As observed in relation to that model, we need to examine both the institutional and broader society-wide aspects of constitutional dialogue in order to achieve the most normatively satisfying understanding of the role of judicial review in modern society. This suggests that a synthesis between these most promising institutional and society-wide accounts of constitutional dialogue is the best way to proceed with the dialogic project.

IV. DIALOGIC FUSION

The most promising vision of constitutional dialogue, and, consequently, the strongest normative account of the role of judicial review in modern constitutionalism emerge when the equilibrium and partnership understandings of dialogue are combined. On the one hand, this synthesis helps resolve lingering democratic legitimacy concerns with the partnership model.[248] More importantly, this dual-track vision enables a more comprehensive understanding of the different institutional and social aspects of constitutional dialogue, and of the various unique ways in which different actors participate in the search for constitutional meaning.

The value of incorporating the equilibrium account into a comprehensive understanding of constitutional dialogue results from its conception of the judicial role as one of facilitating and fostering society-wide constitutional discussion and debate. As we have seen, this account has significant normative promise because it enables us to understand how more enduring and widely accepted answers can emerge through the process of society-wide constitutional discussion. The equilibrium account is also valuable due to its inclusion of the people as dialogic partners and its recognition of the importance of involving the citizenry in ongoing debate about

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[248] *See supra* notes 204-205 and accompanying text.

constitutional meaning and change within society. Despite these positive features, however, the equilibrium account does not succeed completely in resolving the countermajoritarian concerns associated with judicial review, given that cases of relatively low political salience are unlikely to engage society-wide discussion. In addition, the account remains incomplete because it cannot explain fully the institutional aspects of constitutional dialogue.

These lingering difficulties with the equilibrium model are overcome by synthesizing its understanding of dialogue with that encompassed in the partnership model. As discussed in the previous Part, the partnership account of dialogue proposes that judges and legislatures bring unique institutional perspectives to the consideration of constitutional meaning due to their "separate yet interconnected" positions in the constitutional order. If the branches listen and learn from one another's differing perspectives on constitutional meaning, then better answers will be arrived at in individual cases. The dynamic fusion of these two understandings highlights that judges can both facilitate constitutional discussion at a society-wide level and make unique institutional contributions to the consideration of constitutional values in the context of individual cases. In turn, judges can also respond dialogically at the level of individual cases to the distinctive contributions of the legislature in relation to constitutional meaning, and to the developing views of broader constitutional culture. On this dual-track understanding of constitutional dialogue, there are two distinct aspects to the role of judicial review in modern society. First, judicial review assists in the production of more durable and widely accepted answers to constitutional issues that engage society as a whole. Second, judicial review also aids the improved institutional resolution of constitutional questions at the level of individual cases, due to the unique perspectives provided by judges and the political branches of government in dialogue with one another. In turn, these inter-branch interactions also form part of any society-wide dialogue that takes place. In the context of pervasive yet reasonable disagreement about the meaning of rights, this combined understanding offers the best chance of producing answers to constitutional questions that are not only satisfying in the

context of the resolution of individual cases, but which are also satisfying to the citizenry as a whole.[249]

This novel way of understanding the role of judicial review opens a number of avenues for future research in the field of constitutional theory. The principal area of inquiry that should be pursued relates to how we might foster both the institutional and the broader social aspects of this vision of dialogue within the United States and abroad. In relation to the society-wide aspects of constitutional discussion, it remains important in the United States to think about practical strategies that will enable the views of the citizenry to be incorporated more completely into constitutional dialogue, due to the evidence of growing civic disengagement.[250] Outside the United States, the extent to which the judiciary actually facilitates society-wide debate is uncertain in many nations, due to the lack of positive evidence about these issues. In relation to those systems, it will first be important to examine the extent to which these broad dialogic dynamics currently exist, before beginning to think about the best ways to modify or adapt these systems in order to incorporate more completely the judicial role of facilitating broader constitutional discussion.[251]

In relation to the institutional aspects of constitutional dialogue, we need to consider in further detail the range of institutionally distinct contributions that the judicial and legislative branches bring to the dialogue. Once this is done, we should also consider ways in which these different contributions can best be harnessed in order to facilitate a greater degree of institutional dialogue as partnership. In this regard and drawing on Hiebert's description, we can propose a broader range of institutionally distinct contributions that the judicial and legislative branches are able to bring to the process of constitutional dialogue.

The legislative branch has distinct advantages in institutional dialogue in dealing with polycentric issues and in considering how to balance the pursuit of policy objectives with

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[249] *Cf.* Whittington, *Extrajudicial Constitutional Interpretation*, *supra* note 53, at 84$ ("In the context of reasonable disagreement, it seems appropriate to allow broad participation in the decision as to the content of our principles rather than remove that decision to an elite institution that will then seek to impose its ruling on, or against, the people at large.").

[250] *See supra* Part III.B.3.

[251] *See supra* notes 207-208.

the recognition and protection of constitutional rights.[252] The comparative ability of legislatures to make these judgments rests on the superior fact-gathering capabilities and specialized policy expertise of the political branches. These capabilities also mean that legislatures are able to act positively to protect rights and to experiment with rights protection and enforcement in ways that extend beyond the remedial power of the judiciary.[253] In short, legislatures have distinct advantages in considering how the protection and interpretation of constitutional rights fits into the "big picture" of political decision-making for the benefit of society as a whole.

This broad focus nonetheless means that the individual effects of legislation may not always be readily apparent in the drafting process. It is also unlikely that legislatures will focus on the individual effects of statutes to any significant extent due to the fact that modern legislation tends to be enacted in open-ended and general terms. As Victor Ferreres has observed, this can be traced to the fact that it is increasingly difficult to achieve consensus around specific rules as a result of incentives for legislative compromise and decision-making by voting.[254] In these circumstances, the judiciary performs an important implementation function by considering the concrete consequences of statutes in the context of the facts of particular cases. In so doing, the judiciary is able to highlight the individualized effects of legislation that may have gone unobserved by the legislature. The judiciary therefore has a comparative advantage in being able to highlight the "small picture" regarding the legal or constitutional consequences of legislation in specific cases.[255]

The judiciary also performs a special institutional function due to its comparative temporal advantage in

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[252] *See generally* Lon L. Fuller, *The Xorms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing the nature of polycentric inquiries).

[253] Post and Siegel recognize that Congress can establish comprehensive regulatory and administrative schemes to enhance the protection of constitutional rights, which go beyond the bounds of the remedial power of the judiciary. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 184, at 2007.

[254] *See* Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT'L J. CONST. L. 4$1, 471-72 (2004); *see also id.* at 472 (regarding the judiciary fitting "the pragmatic needs of modern society").

[255] *Cf.* Whittington, *Extrajudicial Constitutional Interpretation*, *supra* note 53, at 84$ (suggesting that "[t]he judiciary's most useful role may be in framing constitutional disputes for extrajudicial resolution and in enforcing the principled decisions reached elsewhere rather than in autonomously and authoritatively defining constitutional meaning").

ensuring that sufficient attention is paid to constitutional values. As previously observed, while recognizing that legislatures are motivated and competent to engage in constitutional interpretation, the reality of the legislative process means that legislators may not always have sufficient time to devote to complete constitutional exegesis on every issue.[25$] Legislators have a variety of roles to perform in addition to their function of enacting legislation, such as party functions, meeting with constituents, and overseeing government administration, which may sometimes draw them away from core legislating.[257] Furthermore, the legislature's need to confront seemingly urgent issues may sometimes result in hastily enacted laws, without sufficient attention paid to measures that may unduly restrict rights. Without succumbing to generalized fears about legislative expediency and self-interest, judges can help ensure that sufficient legislative attention is paid to constitutional values. Judges are able to assist in this way because they often have more time to devote to this task without the immediate pressure of conflicting incentives in the context of their dispute resolution function.[258] In common law systems, the judiciary's ability to make this contribution is bolstered by procedures, such as certiorari and the ability to avoid constitutional questions where ordinary legal grounds of decision are available, which enable the Court to decide which, and how many, constitutional cases it will focus on in detail.[259]

[25$] *See supra* Part III.A.2.

[257] *See, e.g.*, Keith E. Whittington, *An "Indispensable Xeature"? Constitutionalism and Judicial Review*, $ N.Y.U. J. LEGIS. & PUB. POL'Y 21, 27 (2002) ("Legislators have multiple roles to fulfill, in addition to making law, that include overseeing government administration and serving constituents. As a consequence, the legislature may not always give sufficient attention to particular concerns such as civil liberties. In passing specific laws, therefore, it may make sense for courts to insist on some further demonstration from legislatures that they have performed their legislative role properly . . . .").

[258] Janet Hiebert focuses on this issue in developing her relational approach, arguing that judicial decisions can legitimately encourage legislatures "to give more sensitivity and thought" to how they propose to accomplish legislative objectives. *See* HIEBERT, CHARTER CONFLICTS, *supra* note $9, at 70-71. In essence, this approach involves the use of process-centered rules, such as those discussed in Part III.A.2. Ideally, when thinking about institutional design, we might want to structure a system so that the chances of legislative haste or thoughtlessness are minimized. To the extent that this is not possible, however, some utility in process-centered rules under a structural understanding of constitutional dialogue may remain.

[259] *See generally* Victor Ferreres Comella, *The Consequences of Centralizing Judicial Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705 (2004).

With these institutionally distinct roles in mind, further research should be undertaken in order to understand how best to design or structure institutions in order to foster institutional dialogue grounded in these differing contributions. In many national settings, including the United States, this could be achieved by modifying the rules through which the operations of the judiciary and the political branches are arranged.[2$0] In other countries, this might also involve aspects of constitutional design to broaden the avenues through which the judiciary and the political branches listen to and learn from each other's unique perspectives.[2$1]

There are thus a host of issues that require further consideration in order to enable this broader dual-track vision of constitutional dialogue to be realized more completely in constitutional systems around the globe. Resolving these questions of institutional choice is complex, and will ultimately require fact-specific and nation-specific inquiries into how institutional arrangements operate in different constitutional settings.[2$2] This research agenda is, however, well worth pursuing, not only because a broader understanding of constitutional dialogue that encompasses both institutional and society-wide aspects is more normatively attractive than any other understanding of dialogue previously examined, but also because it provides the strongest justification for the role of judicial review in democratic constitutionalism.

V. CONCLUSION

Theories of constitutional dialogue make important contributions to our understanding of judicial review. This article has revealed, however, that there is a great degree of

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[2$0] *See, e.g.*, Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1278 (2001) (examining how the rules that structure congressional operations can be modified to produce "the right quantity and quality of congressional deliberation on constitutional questions").

[2$1] For example, this option is possible in Australia where debate continues about the possible design of a federal constitutional or statutory bill of rights. *See generally* GEORGE WILLIAMS, THE CASE FOR AN AUSTRALIAN BILL OF RIGHTS (2004). In a different context, the issue of broad constitutional reform is being pressed in the United Kingdom, including the creation of a new Supreme Court. *See, e.g.*, BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES (Andrew Le Sueur ed., Oxford University Press 2004).

[2$2] McDonald, *supra* note 158, at 25; Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1558 (2002) (arguing that one of the dilemmas of institutional choice is that "we can't assess judicial review without answering questions that we lack the information to answer").

variance in the extent to which theories of dialogue are able to resolve countermajoritarian concerns and provide an attractive normative vision of the role of judicial review in democratic constitutionalism. In broad terms, we have seen that positive theories tend to have the greatest success responding to democratic legitimacy concerns, due to the fact that they highlight the ability of the political branches of government and other social actors to respond to judicial decisions in the event of disagreement. More prescriptive theories, in contrast, are generally less successful in resolving these concerns as they tend to privilege the judicial role in constitutional decision-making, without adequate reason, and leave insufficient space for independent political judgment about constitutional meaning.

The success of the different theories in providing a satisfying normative vision of constitutional dialogue is also mixed. Theories of judicial method, which are the most strongly prescriptive, are most susceptible to normative failure because their prescriptions for judicial action are too far removed from how judicial review operates in the real world. Conversely, structural theories of dialogue, which have firmer positive foundations, are most likely to fall normatively short in relation to providing a satisfying justification for the role of courts in dialogic judicial review.

In light of these difficulties, the greatest potential for achieving a normatively satisfying understanding of constitutional dialogue emerges through the dynamic fusion of the equilibrium and partnership models of dialogue. As we have seen, equilibrium theories focus on the role of the judiciary in facilitating and fostering society-wide constitutional discussion, while partnership models draw attention to more distinct institutional functions that the judicial and legislative branches perform in dialogue with one another. The synthesis of these understandings highlights that dialogue should ideally incorporate both society-wide and institutional aspects. Most importantly, this dual-track understanding of dialogue provides the strongest normative vision of the role of judicial review in modern constitutionalism, and also the greatest possibility for designing improved constitutional systems that can truly live up to the dialogic promise. The challenge that remains for constitutional theorists is to think of creative design mechanisms that will enable this vision of dialogue to be more fully achieved in constitutional systems throughout the world.