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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# 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 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,

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the force of the countermajoritarian difficulty is overcome, or at the very least, greatly attenuated. 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. Dialogue theorists, in contrast, assert that this involvement already occurs.

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, which have more recently adopted Bills of Rights. Scholars

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2 See, e.g., Mark Tushnet, Taking the Constitution Away from the Courts 174 (1999) [hereinafter Taking the Constitution] (“Populist constitutional law seeks to distribute constitutional responsibility throughout the population.”); Larry D. Kramer, The Supreme Court, 2000 Term – Foreword: We the Court, 115 Harv. L. Rev. 4, 13 (2001) (supporting a system of popular constitutionalism in which the executive and legislative branches of government, as agents of the people, have a equal role to the Court in constitutional interpretation and implementation); Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 208 (2004) [hereinafter 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.”).


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 prescriptive theories tend to privilege the role of judges in constitutional decision-making, without sufficient reason, and leave 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 (2000); Alec Stone Sweet, Constitutional Dialogues: Protecting Rights in France, Germany, Italy & Spain, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 8 (Sally J. Kenney et al. eds., 1999).

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 difficulty, as they frequently fail to offer an attractive normative vision of what judicial review should accomplish in modern society.

This Article claims 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 as 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 these two accounts of constitutional dialogue should be synthesized. 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. Although theories of dialogue abound, no 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 could best be achieved and proposes 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. In the 1960s, Bickel labeled the inconsistency of judicial review with democracy the “countermajoritarian difficulty.” Since Bickel, the question of the democratic legitimacy of judicial review has overshadowed all other theoretical inquiries within normative constitutional

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 which a theory of constitutional 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 that 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.


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 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 Failure of Contemporary Constitutional Theory

In 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

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are unelected and their constitutional decisions are not reversible by any legislative majority.\textsuperscript{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.\textsuperscript{14}

Concerns about the legitimacy of judges invalidating legislation become even starker in relation to judicial decisions about the interpretation of constitutional rights, given that the indeterminate nature of rights leads to pervasive yet reasonable disagreement about how rights are to be conceived, how they are to be applied in specific contexts, and what other values, if any, ought to trump them.\textsuperscript{15} In the context of such fundamental disagreement, it is questionable whether it is possible to reach “correct” answers about these issues.\textsuperscript{16} 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.

\textsuperscript{13} \textit{Id.} at 17–20.
\textsuperscript{14} \textit{Id.} at 18.
\textsuperscript{15} \textsc{Jeremy Waldron}, \textsc{Law and Disagreement} 11–12, 268 (1999); Richard Pildes, Rights as Trumps. \textit{See also} Cass R. Sunstein, \textsc{Legal Reasoning and Political Conflict} 35 (1996) (discussing the challenges that face the judiciary in the face of reasonable disagreement); Amy Gutmann \& Dennis Thompson, \textsc{Democracy and Disagreement} 1 (1996) (reasonable disagreement is an unavoidable feature of both politics and law).
\textsuperscript{16} 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, \textsc{Law and Disagreement}, supra note 15; Richard H. Fallon, \textit{The Supreme Court 1996 Term, Foreword: Implementing the Constitution}, 111 Harv. L. Rev. 54, 58 n.12 (1997).
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.\(^\text{17}\) 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 to seriously to weaken the democratic process.”\(^\text{18}\) More recently, Mark Tushnet has defined these problems as “policy distortion” and “democratic debilitation.”\(^\text{19}\) 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 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

\(^{17}\) Thayer, supra note 8, at 155–56 (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…. And moreover, even in matters of legality, they have felt little responsibility; if we were wrong, they say, the courts will correct it.”).

\(^{18}\) BICKEL, THE LEAST DANGEROUS BRANCH, supra note 9, at 21.

\(^{19}\) TUSHNET, TAKING THE CONSTITUTION, supra note 2, at 57–63, Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 Mich. L. Rev. 245, 247, 259, 275 [hereinafter Policy Distortion].
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.\(^\text{20}\) Others suggest that a more substantive approach to interpretation is required so that judges can address the fundamental moral values that are contained in the Constitution.\(^\text{21}\) 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.\(^\text{22}\) 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 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

\(^{20}\) Differing conceptions of originalism have been proposed, for example, by \textit{Raoul Berger, Federalism: The Framers’ Design} (1987); \textit{Robert H. Bork, The Tempting of America} (1990); \textit{Antonin Scalia, A Matter of Interpretation} (1997).

\(^{21}\) Ronald Dworkin does not see judicial review as presenting democratic legitimacy problems as the whole point of the Constitution is to protect individuals from majorities. \textit{See, e.g., Ronald Dworkin, Taking Rights Seriously} (1978); \textit{Ronald Dworkin, A Matter of Principle} (1985). In Canada, fundamental rights theory under the Canadian Charter is supported by Lorraine Weinrib: \textit{see, e.g., Lorraine Eisenstat Weinrib, Canada’s Constitutional Revolution: From Legislative to Constitutional State}, 33 \textit{Israel L. Rev.} 13 (1999).

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. Turning to fundamental rights theory, its claims that judges have special abilities in relation to questions of moral principle have also been disapproved 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. 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. Despite these theorists’ valiant efforts, objective theories of interpretation have thus been unable to achieve their goal of successfully resolving the countermajoritarian difficulty.

B. The Turn to Dialogue

Given the difficulties encountered by other approaches, it is perhaps not surprising that theories of constitutional dialogue have emerged as one of the principal

23 See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 BOSTON UNIV. L. REV. 204 (1980) (arguing that originalism fails to provide a sensible or realistic strategy for constitutional interpretation); Dworkin, The Forum of Principle, in A MATTER OF PRINCIPLE, supra note 25.
24 See, e.g., Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 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.”); Waldron, Law and Disagreement, supra note 16.
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.26

In proposing this resolution to the countermajoritarian difficulty, theories of constitutional dialogue are allied with scholarship within the social sciences which suggests that 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

26 See, e.g., Roach, The Supreme Court on Trial, supra note 4, at 532 (“Under a dialogic approach, the dilemma of judicial activism in a democracy diminishes perhaps to the point of evaporation.”).
the action,\textsuperscript{28} it is rarely the final word in relation to the broader constitutional issues being considered due to a variety of institutional and political constraints on the Court.\textsuperscript{29} For example, compliance with Supreme Court decisions is not guaranteed, but is dependent on political support and voluntary obedience.\textsuperscript{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.\textsuperscript{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.\textsuperscript{32} Given the existence of these institutional constraints 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 provisions of the Constitution 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

\textsuperscript{28} Though enforcement is not automatic, so in this sense it could be said that judicial decrees do not even necessarily constitute the final word in a particular case: \textit{see id. at 643–45 and footnotes therein.}

\textsuperscript{29} \textit{See, e.g.}, \textsc{Neal Devins \& Louis Fisher}, \textsc{The Democratic Constitution} 230–33 (2004) (listing ten qualifications to the “last word” doctrine).

\textsuperscript{30} \textit{See} \textsc{Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change} (1991) (regarding the limited ability of courts to achieve social change without popular support); \textsc{Michael J. Klarman}, \textit{How Brown Changed Race Relations: The Backlash Thesis}, 81 J. Am. Hist. 81 (1994) (describing how \textit{Brown} v. Board of Education caused social change only indirectly); \textit{see also} \textsc{Michael J. Klarman, Racial Equality} (2004).

\textsuperscript{31} \textit{See, e.g.}, \textsc{Louis Fisher, Constitutional Dialogues: Interpretation as Political Process} 206–207 (1988) (providing examples of situations where Congress has passed new laws in light of negative judicial decisions).

\textsuperscript{32} Even if these techniques are not used, the Court might nonetheless modify its behavior to avoid a potential attack: \textit{see} \textsc{Terri Jennings Peretti, In Defense of a Political Court} 145–46 (1999) (discussing the “rule of anticipated reactions”).
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. The negotiators of the Charter considered that this provision would overcome the democratic deficit of judicial review, as it provides a “constitutional escape valve” which legislatures can use to “correct” decisions of the courts with which they disagree. Further opportunity for political response is provided by section 1 of the Charter, a general limitation provision which provides that Charter rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” 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 which 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. Nonetheless, the existence

33 Certain Charter rights cannot be overridden by legislatures, such as minority language rights. 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, the legislature must explicitly reenact the measure every five years if it wants the override to continue in force.

34 Sujit Choudhry, The Lochner Era and Comparative Constitutionalism, 2 I.CON 1 (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 (2002) [hereinafter 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.”

36 Compare CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER (2nd ed., 2001) (arguing that lack of legislative use of the override has lead to the continued growth of judicial power in Canada), with Tsvi Kahana, The Notwithstanding Mechanism, supra note 34 (arguing that while the override could be more effectively used by legislatures, it has in fact been employed more often than is commonly recognized).
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 principally descriptive (positive) or
prescriptive. Although most theories of dialogue resist rigid categorization on these
terms, due to the fact that descriptive theories contain prescriptive elements and vice
versa, placing them along this axis does reveal important distinctions. 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 which 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

37 See, e.g., Richard H. Fallon, How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 540–1
(1999) (suggesting that constitutional theories are resistant to strict classification along descriptive and

normative lines).
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 are not considered to 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 that is left for independent political judgment.

Beyond legitimacy concerns, theories of constitutional dialogue must be able to stand on their own normative worth. Theories of dialogue tend to fall short on the normative level, however, in two distinct ways. The most heavily prescriptive theories are most susceptible to failure 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 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 are at greater risk of foundering in relation to providing 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 production of constitutional meaning requires these theories to justify why judges should also be involved in this task. The reason that many positive theories fail in this regard is because they are unable to propose a satisfying explanation of some special judicial role or some unique contribution that judges make to constitutional dialogue which 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 assessment, we will have a clearer idea of which theories are the most normatively successful in the constitutional dialogue family, and a better understanding of ways in which the dialogue project should be further advanced in the future.

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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, 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, yet 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

There are two principal ways in which judges can utilize advice-giving techniques in the context of specific cases. First, judges may invalidate legislation on constitutional grounds, yet also provide advice to the political branches regarding constitutional methods for achieving the same end. 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. 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. 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. Drawing on the approach taken by Judge Calabresi in his concurrence in United States v. Then, 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.”

40 Katyal provides an extensive typology of judicial advice-giving techniques: see generally id. 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, however, 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 id. at 1718 (referring to this technique as “exemplification”).

42 See Luna, supra note 39, at 1127.

43 Katyal, supra note 39, at 1716–17 (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 43.

45 56 F. 3d 464 (2d Cir. 1995) (upholding federal sentencing guidelines which had a disproportionate impact on African Americans in a Fifth Amendment equal protection challenge).

46 Krotoszynski, supra note 39, at 54.
Theorists who favor the increased use of judicial advice-giving believe that the proactive dispensation of advice creates the conditions for a productive dialogue between the courts and the political branches about constitutional meaning and 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. 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.”

Theorists who support judicial advice-giving also claim that the dialogue that these techniques create is normatively desirable, as it enables judges to proactively protect rights while at the same time facilitate political, rather than judicial, answers to constitutional controversies. They argue that not only does this empower democratic self-government and popular accountability, it also alleviates concerns about the countermajoritarian difficulty.

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, in suggesting that courts should take a proactive approach to advising and guiding the political branches, this account assumes that judges either possess a special capacity, or

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47 See, e.g., Katyal, supra note 39, at 1794 (“Such advice … is an important step in the creation of cooperative dialogue between the branches.”).
48 Id. at 1794.
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.”).
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. Nonetheless, he suggests that the advice-giving approach “can soften the blow of judicial review”: see Katyal, supra note 39, at 1794.
can be better trusted, to determine questions of constitutional meaning and to evaluate the importance of specific constitutional values. The theory thereby serves to privilege the judicial voice as the key generator of constitutional discussion and meaning. It is also difficult to see how this privileging of the judicial role can successfully deal with democratic legitimacy concerns, as proponents of advice-giving techniques claim. 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 judicial voice in institutional exchanges, over time this approach is likely to lead to the gradual replacement of relevant legislative considerations with legal 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 grounded in the assumption that the political branches are not institutionally competent to do so without judicial assistance. Legislatures are considered to be quite removed from the task of making thoughtful and principled decisions about the meaning of constitutional values, due to the force of self-interest which frequently compels them to prioritize questions of incumbency and the maximization of majoritarian preferences. In this context, judicial

51 Krotoszynski is most explicit about this: see supra note 39, at 53 (“[E]nunciating and protecting constitutional values constitutes a duty peculiarly within the judiciary’s domain.”).

52 At times, Katyal does refer to benefits in congressional participation in constitutional decision-making, and also as to constitutional remedy. However, he ultimately considers that the Court has the greater, more important role in constitutional dialogue given the “‘perspicuity’ and ‘systematic character’ of judges.” (Katyal, supra note 39, at 1757–58).
advice is seen to provide 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 competences 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 deeper into how legislatures operate, it is apparent that legislatures 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.\(^{56}\) While it may well be true that legislatures balance

\(^{53}\) See, e.g., Janet L. Hiebert, *Parliament and Rights, in Protecting Human Rights* 231, 234 (Tom Campbell et. al. eds., 2003) (describing such assumptions about comparative institutional competence as “cynical and narrow”). See also Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C.L. REV. 773 (2002) [hereinafter *Extrajudicial Constitutional Interpretation*] (arguing that while “[w]e may disagree with the conclusions that various extrajudicial bodies reach … it is difficult to maintain that 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.”).


rights- and interest-based considerations in a manner or ratio that is different to courts, given the different institutional incentives operating on the various branches of government, 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 which encourages activist judges to tell the political branches of government how to interpret the Constitution. 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 amongst 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-

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Medical Termination of Pregnancy Bill, as examples of the proficiency of legislatures to engage in independent rights-based deliberation.)


58 Katyal himself describes advicegiving as a “proactive” theory of judging: see Katyal, *supra* note 39, at 1711.
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.  

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, to constitutional “who” rules, which direct attention to the proper governmental actors to promulgate different areas of policy. Another well-known form of process-centered rule is the “second look” doctrine that Judge Guido Calabresi has proposed. This doctrine is used when the legislature has acted with “haste or thoughtlessness” or “hiding” with respect to fundamental rights. 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.”

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61 Id. at 1773–1805.


63 Calabresi, supra note 62, 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.”).

64 Id.
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.65 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.66 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.67 The corresponding role of the political branches in this dialogue is to respond to judicial 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

65 See, e.g., Coenen, A Constitution of Collaboration, supra note 59, at 1583 (“Through 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.”).
67 Id. at 1582.
Constitution, but 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 due to the increased space that is created for the political branches to resolve substantive questions of constitutional meaning. At the same time, this understanding of dialogue is more normatively attractive than that based on advice-giving as it is grounded in more realistic premises about the operation of the legislative and political processes. 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. 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 understanding of dialogue has some difficulty in completely overcoming 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

68 See, e.g., Mark Tushnet, Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?, 42 WM. & MARY L. REV. 1871, 1879 (2001) [hereinafter 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.”).
69 As Janet Hiebert has said, “[o]ne 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.” HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT’S ROLE? 53 (2002) [hereinafter CHARTER CONFLICTS]. See also infra Part III.B.4.
use process-centered rules, and when should they use substantive rules to strike down legislation? Given that the dialogue created by the use of 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.\textsuperscript{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 in revisiting their earlier decisions.\textsuperscript{71} This means that in many circumstances, it will be unlikely that they will 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 legislative time. As a result, the theory of constitutional dialogue based on process-centered rules may not leave as much space for independent political judgment as it first appears to on the surface.

3. Judicial Minimalism

In contrast to the theories examined above which center on how judges can actively encourage dialogue with the political branches, \textit{judicial minimalism} involves

\textsuperscript{70} Coenen himself acknowledges that this is a problem: see Coenen, \textit{Structural Review}, supra note 59, at 1890–1.

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 uphold legislation, the passive
virtues are judicial techniques of “not doing” that allow the Court to “[p]ersuade 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,”
avovates that in deciding cases, judges should adopt the strategy of “saying no more

72 On the passive virtues, see generally BICKEL, THE LEAST DANGEROUS BRANCH, supra note 9, at ch. 4;
73 BICKEL, THE LEAST DANGEROUS BRANCH, supra note 9, at 115.
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 society as a whole”: id. at 70–71.
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. In particular, he focuses on strategies which 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.\textsuperscript{77} 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 what accounts for those judgments.”\textsuperscript{78} 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.\textsuperscript{79} On their understanding, techniques of judicial minimalism are a form of passive judicial participation in constitutional dialogue as 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


\textsuperscript{77} Id. at 10–11 (describing minimalist judges as “decid[ing] the case at hand; they do not decide other cases too”).

\textsuperscript{78} Id. at 13, 11–14.

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. 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 complexity that are producing democratic disagreement”. In other cases, the use of minimalist techniques may increase judicial decision costs 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

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81 SUNSTEIN, ONE CASE AT A TIME, supra note 76, at 46. See also id. at 243 (observing that minimalism “is not always the best way to proceed”).
to the preconditions of democracy, such as freedom of speech, and to guard against defects in the democratic processes.  

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 due to its promotion of greater democratic deliberation within the political branches. 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 which combine the unique institutional perspectives of diverse dialogic actors. 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 constitutional dialogue and the strength of these different conceptions of the judicial role will be considered later in this Article. For now, however, the point is flagged that one’s views about the normative value of dialogue will influence conceptions about the

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82 See id. at 54–57 (outlining a number of problems identified with minimalism in particular cases).
83 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 76, 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).
84 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 79, 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.”).
85 See infra Parts III.B.3., III.B.4. & IV.
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 these theories as normative visions of dialogue is that they are not sufficiently connected to how judicial review operates in practice.86 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 emerge from a more promising institutional perspective.

**B. Structural Theories of Dialogue**

*Structural theories of dialogue* are based in 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.\(^{87}\) 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, which tends to be favored because it is thought to assist in achieving better answers to constitutional questions.\(^{88}\)

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\(^{88}\) What constitutes a “better” answer in different theories varies in a way which 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
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 which are able to propose a unique judicial role that does not privilege the dialogic contributions of judges in this way.

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.89 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.90

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 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.

89 On Madison’s position, see generally ROBERT A. BURT, THE CONSTITUTION IN CONFLICT ch. 2 (1992).
relation to which each branch is to 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.91 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.92

In the United States, coordinate construction theory has been the subject of a revival in recent years in ways that purport to deal with these concerns.93 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.94 On this understanding, not only does each branch of government engage in constitutional interpretation by interpreting its own constitutional functions, but they also each have an

91 See, e.g., Larry Alexander and Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359, 1379 (1997) (describing the “protestant” view of constitutional interpretation, which entails parity of interpretive authority between the three branches of government, as leading to “interpretive anarchy”).
92 See, e.g., AGRESTO, supra note 90, at 82–83 (“If each branch could absolutely and with finality decide for itself the bounds of its own power, where would be the checking?”).
93 See, e.g., Walter F. Murphy, Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter, 48 REV. POL. 401 (1986) (supporting “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”).
94 See generally NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996); Neal Devins & Louis Fisher, Judicial Exclusivity and Political Instability, 84 VA. L. REV. 83 (1998); FISHER, supra note 29. More recently, see DEVINS & FISHER, supra note 29. 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 Christopher P. Manfredi & James B. Kelly, Six Degrees of Dialogue: A Response to Hogg and Bushell, 37 OSGOODE HALL L.J. 513 (1999); MANFREDI, supra note 36 (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”: id. at 188).
additional role in relation to interpreting the Constitution more broadly.\(^{95}\) This does not lead to interpretive anarchy, however, as it involves a more interactive process in which each branch of government is checked by the others, including the Supreme Court.\(^{96}\)

While the Court places checks on the other branches through the exercise of judicial review, political checks can also be placed on the Court when political actors disagree with its interpretation of the Constitution. This system of mutual checks is important as it is possible for all the branches of government, including the Court, to 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 before the Court.”\(^{97}\) Direct challenges come in such forms as refusals to comply, refusals to enforce, and threats to pack the Court.\(^{98}\) Congress and state legislatures can also 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.

\(^{95}\) Devins & Fisher, supra note 94, at 106 (describing the constitutional system of coordinate construction as one in which “each branch [is] capable of and willing to make independent constitutional interpretations.”).

\(^{96}\) As Fisher says, “[j]udicial 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 in deciding constitutional questions.” (Fisher, supra note 29, at 279).

\(^{97}\) Devins & Fisher, supra note 94, at 91.

\(^{98}\) See generally Fisher, supra note 29, at ch. 6.
Rather, the Court can pronounce its views and make “exploratory movements” that may edge the debate about constitutional meaning ahead. This may then lead to new constitutional interpretations being adopted by the other branches.\textsuperscript{99} 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.\textsuperscript{100} The result of this interactive process in which no branch dominates the others and in which constitutional meaning is steadily formed is constitutional dialogue, as “all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional issues.”\textsuperscript{101} 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 be developed over time, both because the American constitutional system demonstrates a clear preference for fragmented power,\textsuperscript{102} and because such “vigorous interchange” between equal actors results in more “vibrant and durable” interpretation of the Constitution.\textsuperscript{103}

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 which demonstrate that judges do not have a monopoly on

\textsuperscript{99} Id. at 276. \textit{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.”).

\textsuperscript{100} \textit{See, e.g.}, DEVINS, supra note 94, at 139–45, 150–53 (describing legislative inertia regarding abortion).

\textsuperscript{101} FISHER, supra note 29, at 275; DEVINS \& FISHER, supra note 29, at 239.

\textsuperscript{102} \textit{See, e.g.}, FISHER, supra note 94, at 279 (“Judicial review fits our constitutional system because we like to fragment power. We feel safer with checks and balances …”).

\textsuperscript{103} DEVINS, supra note 94, at 162; DEVINS \& FISHER, supra note 29, at 235 (“[H]ydraulic pressures within the political system make the Constitution more enduring and stable.”).
constitutional interpretation. 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.  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 is effective in stressing that 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.

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 Section. Particularly in its descriptive dimensions, by demonstrating that the judiciary often does not have the final word on constitutional questions, this account largely displaces the concern that judicial review enables judges to overturn decisions of the elected representatives of the people. No matter what form of adjudication the

105 See supra Part III.A.
106 See Fisher, supra note 29, at 273 (“It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society.”).
Court undertakes, its decisions are subject to the political processes 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 describing the dialogue prompted by *Roe v. Wade*,\(^\text{107}\) for example, Devins describes the “institutional tugs and pulls” that took place between various constitutional actors.\(^\text{108}\) 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.\(^\text{109}\) 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.\(^\text{110}\)

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

\(^{107}\) 410 U.S. 113 (1973).

\(^{108}\) *Devins*, supra note 94, at 137. *See also* Devins & Fisher, *supra* note 94, at 85 (“The tugs and pulls of politics … make the Constitution more relevant and more durable.”).

\(^{109}\) *Id.* at 148 (“Without doubt, the Court has set the parameters of elected-government decision-making.”).

\(^{110}\) *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.”).
does not develop this suggestion in any detail. Other scholars who have examined the abortion controversy, in contrast, have not been so reticent about describing additional 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 took place. Furthermore, evidence suggests that the abortion debate did not only involve different constitutional actors struggling against each other but, in fact, 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. 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

111 DEVINS, supra note 94, at 149 (“The executive, legislative and judicial branches are engaged in an ongoing dialogue, with each branch checking (and perhaps educating) one another.”).
112 See Friedman, Dialogue and Judicial Review, supra note 27, at 658–68 and references contained therein. In relation to Friedman’s account of dialogue, see infra Part III.B.3.
113 See, e.g., id. at 663 (“This process can hardly be described exclusively as the Court speaking and the legislature 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 further infra Part III.B.3.
other participants in the dialogue will acquiesce to that branch’s views.\textsuperscript{114} 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 will be achieved.\textsuperscript{115}

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 is going to 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 which adds something substantive to the shared elaboration of constitutional meaning.\textsuperscript{116} If judges are just another voice,\textsuperscript{117} 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

\textsuperscript{114} See, e.g., DEVINS & FISHER, supra note 29, at 236 (“Attaining an equilibrium … require[s] all branches and all levels of government to do battle with one another.”).

\textsuperscript{115} See, e.g., DEVINS, supra note 94, at 162 (“[T]he more actors are interpreting the Constitution and butting heads with each other, the better.”).

\textsuperscript{116} 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.

\textsuperscript{117} See, e.g., MANFREDI, supra note 36, at 199 (arguing that the Court simply “[a]dds another thoughtful voice to the continuing public debate about the principles by which we should be governed.”).
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 policy objectives when the legislature responds to judicial decisions. Nonetheless, these theories also remain deficient as they both ultimately result in top-down descriptions of legislative acquiescence to judicial pronouncements of principle, due to the way in which they privilege the judicial role.

i. 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.118 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”.119 In order to identify and extract

118 See generally BICKEL, THE LEAST DANGEROUS BRANCH, supra note 9.
119 Id. at 188, 25–26.
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.” 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 which 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.”

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. As discussed previously, this can lead the judiciary to use the passive virtues, which enable them to avoid principled judgment in relation to contentious social issues. 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. Alternatively, conversations can be commenced by the political branches of government,

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120 Id. at 236.
121 Id. at 239.
123 See supra Part III.A.3.
124 BICKEL, THE LEAST DANGEROUS BRANCH, supra note 9, at 209. See also id. at 240 (discussing the Court’s “continuing colloquy with the political institutions and with society at large”).
though such dialogues may be “less polite” given they do not begin from a position of principle.

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.\textsuperscript{125} 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.”\textsuperscript{126} In performing this prophetic function, Perry argues that the judiciary is both 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.”\textsuperscript{127} As a matter of comparative institutional competence, the judiciary is best suited to perform this function because of its insulation from the vagaries


\textsuperscript{126} \textit{Perry, The Constitution, supra} note 125, 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 with the past.” (\textit{Agresto, supra} note 90, at 156–7). \textit{See also} Ingber, \textit{supra} note _, at 1541–3 (describing a preeminent dialogic role for the judiciary in relation to principle). \textsuperscript{127} \textit{Id.} at 111.
of politics, and given the absence of any other institution of government that regularly deals with moral issues in a prophetic way.128

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.”129 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.130 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’ ability to propose its own views about constitutional interpretation and enforcement under section 5 of the Fourteenth Amendment.131 The relevant political check in Canada, in contrast, is the section 33 override contained in the Canadian Charter.132 This mechanism, which is generally regarded as a more effective check than those available in the United States,

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128 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.”).
129 Id. at 115.
130 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 126–28.
131 AGRESTO, supra note 90, at 126–30, 130–31. See also DIMOND, supra note 125, 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.”).
132 Perry, Protecting Human Rights, supra note 125, at 676; Perry, Minimalism, supra note 125, at 153–60; Weiler, Rights and Judges, supra note 125, at 60–61; Weiler, Of Judges and Rights, supra note 125. Perry no longer considers that this kind of dialogue is possible in the United States, as he does not consider that the checks in place are sufficient to constrain the judiciary: see Perry, Protecting Human Rights, supra note 125, at 676. He does consider, however, that section 33 enables this form of constitutional dialogue in Canada.
enables 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.”

Theorists of judicial principle argue that the combination of these checks in different systems results in judicial rulings which are provisional, thereby initiating an ongoing dialogue about constitutional meaning. 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. 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.”

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,

133 Weiler, Rights and Judges, supra note 125, at 84, 79. This is consistent with the views of the negotiators of the Charter: see supra note 34.
134 See Dimond, supra note 125, at 4 (stating that as a result of these checks, judicial rulings become “provisional rulings that initiate an ongoing dialogue with the people.”).
135 Perry, The Constitution, supra note 125, at 112.
136 Id. at 113. See also Agresto, supra note 90, at 10 (“Constitutional interpretation is not and was never intended to be solely within the province of the judiciary, for constitutional government implies … the interactive understanding of the people, their representatives and their judges.”).
as the ability of the legislature to respond to judicial decisions significantly enhances the “political capacity” of the people and encourages “greater citizen participation in… ‘the conversation about constitutional meaning.’”\textsuperscript{137} Furthermore, this model is an improvement on coordinate construction as it does propose 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.\textsuperscript{138} 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,\textsuperscript{139} 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.\textsuperscript{140} Judicial review that is premised on the superior moral reasoning of judges also cannot be reconciled with democratic values more broadly, as this suggests that elitist rule is preferable to leaving decisions to be made by the fallible representatives of the people.

\textsuperscript{137} Perry, \textit{Protecting Human Rights}, supra note 125, at 691–92.
\textsuperscript{139} See supra Part II.A.
\textsuperscript{140} See WALDRON, \textit{LAW AND DISAGREEMENT}, supra note 15, at 12 (“The issues that rights implicate … are simply hard questions – matters on which reasonable people disagree.”).
Most scholars who favor this understanding of dialogue nonetheless argue that judges remain better suited to determining 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.\textsuperscript{141} This claim, however, rests on empirically questionable claims about both judicial and legislative behavior.\textsuperscript{142} In relation to the political branches, these theorists are content to state 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 above in relation to advice-giving theories, this claim rests on controversial empirical assumptions about political behavior and legislative deliberation.\textsuperscript{143} 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.\textsuperscript{144} Indeed, in his later work Bickel himself moved away from the idea that judges have a special ability to

\textsuperscript{141} See, e.g., PERRY, THE CONSTITUTION, supra note 125, at 102 (“As a matter of comparative institutional competence, the politically insulated judiciary is 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”).

\textsuperscript{142} 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, LAW AND DISAGREEMENT, supra note 15, at 253.

\textsuperscript{143} See supra Part III.A.1.

\textsuperscript{144} 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 Function of Judicial Review, 72 U. CINN. L. REV. 1257 (2004) [hereinafter Positive].
Decide cases on the basis of principle, due to what he perceived to be significant failures of the Court in this regard.\textsuperscript{145}

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.\textsuperscript{146} Furthermore, even when individual justices consider issues of principle in the context of a particular case, they must ultimately overcome disagreement with other 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 there are likely to be fewer incentives on judges to act purely on the basis of self-interest, they do not sustain 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.\textsuperscript{147}

The strongest critique that can be made of this account of dialogue is that it contains an overwhelming internal contradiction.\textsuperscript{148} This has two dimensions. First, if

\textsuperscript{145} BICKEL, THE MORALITY OF CONSENT, supra note 10, at 3–5 (suggesting that judges merely impose personal values when deciding cases); see also BICKEL, THE IDEA OF PROGRESS, supra note 122, at 179.

\textsuperscript{146} See Jeremy Waldron, Eisgruber's House of Lords, 37 Univ. San Fran. L. Rev. 89, 103 (2002) (“The opinions of the Court are paragons 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.”).

\textsuperscript{147} See id. at 106; DEVINS & FISHER, supra note 94, at 226 (“A multimember Court, like other parts of government, gropes incrementally toward consensus and decision through compromise, expediency, and ad hoc actions.”).

\textsuperscript{148} On this point, see Peretti, supra note 32, at 69–71.
the judiciary is indeed a 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 that 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: the claim that the political branches should be able to overturn decisions which result from judicial error is theoretically deficient, as it requires an overarching theory of interpretation 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.  

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 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

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149 See supra Part II.A.1.
enactment. The combination of these critiques means that we are left with yet another normatively deficient account of constitutional dialogue.

ii. 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. 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. Given the unique expertise of the legislature in relation to such issues, dialogue about constitutional meaning emerges when the legislature responds to judiciary in a way that respects the Court’s principled pronouncements, but which also allows it to articulate the importance of its wider policy objectives.

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150 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 IV.B.1.


152 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, as in the context of reasonable disagreement it must make a variety of practical calculations in order to successfully implement the Constitution: id. at 36. 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,
This theory of dialogue had become most extremely popular within Canadian constitutional theory in recent years, due to the combined contributions of Peter Hogg and Alison Bushell, and Kent Roach. Indeed, Hogg and Bushell’s account is often regarded as the seminal explanation of dialogue under the Canadian Charter. 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 claim that the judiciary has a unique ability to provide a strong voice in relation to principle. Kent Roach is most explicit about this, describing how the Court “initiates a conversation” with the legislature about Charter values when it decides a case, and in doing so, “draws the attention of the legislature and society to fundamental values.” Roach does not claim that courts will always reach the right answers about principle, given the critique of fundamental rights theory.

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. See Hogg & Bushell, Dialogue, supra note 6; Peter W. Hogg & Alison A. Thornton, Reply to “Six Degrees of Dialogue”, 37 OSGOODE HALL L.J. 529 (1999) [hereinafter Reply]; ROACH, THE SUPREME COURT ON TRIAL, supra note 5; Roach, Dialogues, supra note 5. See also Kent Roach, American Constitutional Theory for Canadians (and the Rest of the World), 52 UNIV. TORONTO L.J. 503 (2002); Roach, Dialogic Judicial Review and Its Critics, supra note 6.


155 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. Nonetheless, their discussion of dialogue makes clear that they consider that judges have a special role to play in the dialogue about the meaning of Charter values in relation to principle.

156 Roach, Dialogues, supra note 4, at 484; ROACH, THE SUPREME COURT ON TRIAL, supra note 4, at 285.
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.\footnote{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 abilities in considering 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.”\footnote{Hogg & Bushell, Dialogue, supra note 4, at 105.} 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.\footnote{See Roach, The Supreme Court on Trial, supra note 4, at 236–37 (arguing that a strong dialogic judicial role “encourages judges to inject considerations of moral principles … into democratic debates about the difficult issues that end up in Charter litigation.”).} 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.\footnote{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 254–63; Roach, Dialogues, supra note 4, at 503–17.}

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 due to the fact that it enables productive discussion to take place between the
judicial and legislative branches. 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.” Most cases that involve legislation being struck down center on the reasonableness of the means that the legislature has chosen to pursue a legislative objective, rather than the legislative objective itself. 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 Court has set for section 1 justification. 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.” While the Court engages with the legislature in relation to questions of principle, the legislature in turn engages with 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 as legislatures can respond by “[devising] a response that is properly respectful of the Charter values that have been

161 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, 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, Dialogues, supra note 4, at 487, 503; ROACH, THE SUPREME COURT ON TRIAL, supra note 4, at 250). In relation to why this reflects a position of legislative acquiescence to judicial principle, see infra note 170 and accompanying text.
162 Canadian Charter, § 1.
163 See Hogg & Bushell, Dialogue, supra note 4, at 85; HIEBERT, CHARTER CONFLICTS, supra note 69, at 47.
164 The standards prescribed by the R. v. Oakes, [1986] 1 S.C.R. 103 at 138–39 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.”
165 ROACH, THE SUPREME COURT ON TRIAL, supra note 4, at 13.
identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.”

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. 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. This can be contrasted with the position in the United States, where no comparable limitation clause is contained in the Constitution and where judges instead 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. 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 put arguments before the Court regarding how its policy objectives can best be achieved. Furthermore, when

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166 Hogg & Bushell, Dialogue, supra note 4, at 79–80. 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).

167 Cf. Roach, who argues that this type of dialogue is not possible in the United States because the United States Bill of Rights establishes “absolute rights.” (ROACH, THE SUPREME COURT ON TRIAL, supra note 4, at 290). See also id. at 156 (describing rights in the United States as “absolute and formal”); id. at 292 (“it is a serious mistake to lump the Canadian Charter with the American Bill of Rights”).

168 Id.

169 See Mark Tushnet, Judicial Activism or Restraint in a Section 33 World, 53 UNIV. TORONTO L.J. 89, 92 (2003) (discussing the similarities between rights definition and government justification in the United States and Canada). Cf. David S. Law, Generic Constitutional Law, 89 MINN. L. REV. 652, 698 (2005) (observing the “sheer ubiquity” of balancing-type tests in constitutional jurisprudence in a range of nations); Wexler, supra note 89, 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”).

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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.¹⁷⁰ 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.¹⁷¹ Second, although the theory purports to describe substantive
dialogic roles for both the judiciary and the legislature, the nature of constitutional
dialogue remains very judicial-centric.¹⁷² 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.¹⁷³
While courts articulate principle, the legislative role in the dialogue is merely passive or
reactive, confined to “mouth[ing] the language of limits.”¹⁷⁴ In addition, not only do
judges get to speak in the rhetoric of rights, but as a practical matter, they also have the

¹⁷⁰ 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.
¹⁷¹ See supra Part B.2.i.
¹⁷² See, e.g., HIEBERT, CHARTER CONFLICTS, supra note 69, at 46 (“Hogg and Bushell portray Parliament’s
role as clearly secondary under the constitutional division of labour. … The judiciary speaks – Parliament
listens.”).
¹⁷³ See Manfredi & Kelly, supra note 94, 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.”).
¹⁷⁴ See Petter, supra note 38, at 196.
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.\textsuperscript{175} Constitutional rights are thus likely to assume “a superordinate importance, resistant to balancing.”\textsuperscript{176}

The subordinate and secondary dialogic position of the legislature also raises great concerns about the impact of judicial review on legislative reasoning and deliberation.\textsuperscript{177} The risk that legislatures will choose to adopt policies based on what judges have said about constitutional values is increased if legislators are not themselves considered to have a legitimate role in interpreting those values. In the context of constitutional decision-making in Canada, it has been suggested that this “weakening of the sinews of democracy” has already occurred, as legislatures will often simply insert judicially-approved “Charter-speak” into legislation rather than engage in deeper reflection and independent deliberation about the meaning of Charter values.\textsuperscript{178} While this vision of constitutional dialogue is thus an improvement on the theories of dialogue considered thus far, due to its description of more substantive forms of engagement between the parties 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.

\textsuperscript{175} Id. at 196–97.
\textsuperscript{176} Jeremy Webber, Institutional Dialogues Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere), in CONSTITUTIONAL JUSTICE EAST AND WEST 61, 97 (Wojciech Sadurski ed. 2002).
\textsuperscript{177} See Manfredi & Kelly, supra note 94, at 522; Tushnet, Judicial Activism or Restraint, supra note 169, at 94–100 (critiquing Roach’s conception of dialogue under the Charter).
\textsuperscript{178} See, e.g., Hiebert, CHARTER CONFLICTS, supra note 69, 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.”); Manfredi, supra note 36, 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.”).
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, this 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 remains unable 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. Friedman’s is the most positive account, as it is explicitly grounded in social science studies regarding institutional interactions between the judiciary, the political branches and the people. These studies show that while the Supreme Court has significant leeway in the pronouncements that it can make, 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 it back into line. Friedman relies on this

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180 See Friedman, The Politics of Judicial Review (unpublished manuscript, 2005, on file with author) [hereinafter Politics of Judicial Review]; see also Friedman, Dialogue, supra note 27, at 671–72 (“[T]he constraint in dialogue is inherent and systemic: judges are constrained by the system of government in which they operate.”).

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.\textsuperscript{182}

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.\textsuperscript{183} As a result, the Court acts as the shaper and facilitator of society-wide discussion about constitutional values. In declaring its own views about the meaning of the 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.\textsuperscript{184} In the process, the Court also mediates the views of different participants in the debate and shapes 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, prodding other institutions into deliberative action, or protecting political institutions so that debate can more readily occur.

\textsuperscript{182} Friedman, \textit{Positive}, supra note 144, at 1295 (“In the long run, as popular opinion shifts, judicial decisions and thus constitutional meaning shift with it.”). \textit{See generally} Barry Friedman, \textit{Mediated Popular Constitutionalism}, 101 MICH. L. REV. 2596, 2613–2629 (2003) (exploring the extent to which public opinion can, and does, serve as a monitor of judicial activity); Friedman, \textit{Politics of Judicial Review}, supra note 179 (same).

\textsuperscript{183} Friedman, \textit{Dialogue}, supra note 27, at 654 (“The Court may offer an interpretation that is operative for a time, but the Court’s opinions lead debate on a path that ultimately changes that interpretation.”).

\textsuperscript{184} \textit{Id.} (“[J]udicial decisions are rendered in explicitly constitutional terms, framing the debate about them in the same way.”).
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.\(^{185}\) The Court’s participation in this dialogue is dynamic, as not only does it spark a process of national discussion, but it is also, in turn, affected and shaped by this conversation.\(^{186}\) When a decision is handed down it is subject to discussion and debate within society and, 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 decisions, with the perspectives of non-judicial actors as much, if not more, of an influence on the Court than the other way around.\(^{187}\) Over time, a relatively enduring constitutional equilibrium is then produced that is widely accepted by the different participants in the national discussion. Friedman argues that the dialogic role the judiciary performs is a valuable one, as it assists in achieving the “separation of constitutional requirements from immediate political preferences”\(^{188}\) and, in the long

\(^{185}\) Friedman, *Positive*, supra note 144, at 1295–6 (“Prompting, maintaining, and focusing this debate about constitutional meaning is the primary function of judicial review.”); Friedman, *Politics of Judicial Review*, supra note 179, at [29] (“Judicial review can be understood as serving the function of channeling and fostering societal debate about constitutional meaning.”).

\(^{186}\) See Friedman, *Dialogue*, supra note 27, at 679 (this “dynamic tension [is what] moves the system of constitutional interpretation along.”).

\(^{187}\) This judicial function is thus different to an educative role, as the Court is not the only actor influencing constitutional meaning (cf. Bickel, see Part III.A.2.).

\(^{188}\) Friedman, *Positive*, supra note 144, at 1291. Friedman describes this is 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. *See also* Friedman, *Mediated Popular Constitutionalism*, supra note 181, at 2602; 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.”).
term, the production of stable and broadly supported answers to questions of constitutional meaning.¹⁸⁹

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.¹⁹⁰ Drawing on positive political theories of institutional interaction, Eskridge and Frickey suggest that the different branches of government each have the goal of seeking “to promote [their own] vision of the public interest.”¹⁹¹ 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. An understanding of dialogue based on these institutional interactions might lead one to think that this is another rather 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, than it is on how judicial and non-judicial actors come to learn, debate, and adapt or modify their views due to their interdependent participation in constitutional dialogue.¹⁹²

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

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¹⁸⁹ Friedman, Mediated Popular Constitutionalism, supra note 181, at 2602 (arguing that the Court has an important role in “identifying those constitutional values that achieve widespread support over time”). This is not a role that only courts perform, “but given the functions performed by the different branches this task falls largely on the judiciary.” (Id.).


¹⁹¹ Id. at 28.

¹⁹² As Friedman states, “[t]he process of reaching an interpretative consensus on the [constitutional] text is dynamic.” (Friedman, Dialogue, supra note 27, at 654.)
countermajoritarian difficulty in the United States are often overstated. 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 with this account of dialogue.

As a matter of description and as a structural feature of the constitutional system of government in the United States, 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.\(^{193}\) Their understanding is, however, based principally on historical and cultural examples,\(^{194}\) rather than on the kinds of positive social science evidence on which Friedman relies.\(^{195}\) 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, and a mobilized citizenry, can also enable the Court “to learn … about a better way to interpret the Constitution.”\(^{196}\) Constitutional law as pronounced by the Court therefore cannot 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

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\(^{193}\) This has been described in greatest detail in Robert Post’s 2002 Supreme Court foreword. See Post, supra note 178, at 11. See also Post & Siegel, Legislative Constitutionalism, supra note 178, 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, supra note 178, 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.).

\(^{194}\) See, e.g., Post & Siegel, Legislative Constitutionalism, supra note 178, at 1950 (“History demonstrates that constitutional law is in continual dialogue with the constitutional culture of the nation.”). See also Reva B. Siegel, Text in Context, 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).

\(^{195}\) Social science evidence has, however, influenced their work: see, e.g., Post, supra note 178, at 35 (discussing the insights of political scientists and historians who study the Supreme Court).

\(^{196}\) Post and Siegel, Legislative Constitutionalism, supra note 178, at 2059.
ongoing legitimacy if the nation comes to accept them over the long term and some period of “relatively secure equilibrium” results. 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 some consequence in relation to what they see as some lingering democratic legitimacy concerns associated with judicial review. While they argue, on the one hand, that constitutional dialogue is institutionally “inescapable,” they nonetheless attribute a great deal of power to the Court to control the amount of, and extent to which, dialogue takes place in relation to certain issues of vital importance to the nation. In their scholarship concerning section 5 of the Fourteenth Amendment, Post and Siegel have described a Court which has stifled constitutional dialogue by preventing Congress from acting on its own interpretation of constitutional rights. More generally, Post has described the Court as constructing a “membrane” that separates its views about constitutional meaning from those of other actors. 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.

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197 Id. at 38; Post, supra note 178, at 107–08. Post thus describes legal authority as developing “diachronically” across time (id.).
198 Post, supra note 178, at 9.
199 See generally Post & Siegel, Legislative Constitutionalism, supra note 178; Post & Siegel, Protecting the Constitution, supra note 178.
200 Post, supra note 178, at 9, 41 (describing the “membrane” between constitutional law and constitutional culture).
201 Id. at 41, 49–50.
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.\textsuperscript{202} If it does not, they fear that “the technical legal reason of constitutional law will … suffocate the political dimensions of the Constitution.”\textsuperscript{203} 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.\textsuperscript{204}

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 it can actively control how its decisions are affected by non-judicial influences.\textsuperscript{205} Rather, on a strictly positive

\textsuperscript{202} Post, \textit{supra} note 178, 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.”).

\textsuperscript{203} Post & Siegel, \textit{Popular Constitutionalism, supra} note 3, at 1041.

\textsuperscript{204} 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: see Post & Siegel, \textit{Protecting the Constitution, supra} note 178, at 43. In relation to these concerns, see also KRAMER, \textit{THE PEOPLE THEMSELVES, supra} note 2, at 233; TUSHNET, \textit{TAKING THE CONSTITUTION, supra} note 2.

\textsuperscript{205} 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, \textit{Positive, supra} note 144, at 1299). Friedman is also of the view that recent judicial decisions temper concerns that the judiciary is usurping power within the constitutional system: Friedman, \textit{Politics, supra} note 179, at [24].
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 in such cases as issues of relatively low political salience are unlikely to engage popular discussion in any meaningful way. The time that is needed for other actors to respond to the Court may bolster more assertive judicial action in such cases. This highlights the difficulty that remains with Friedman’s account, which is that he does not take full account of the potential for judicial overreaching in cases which do not engage widespread constitutional discussion. 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 some lingering democratic debilitation effects remain with this dialogic account of judicial review.

While equilibrium theory thus does not completely resolve concerns about the countermajoritarian difficulty, it is more successful than any of the theories previously examined in this Article in positing a substantive dialogic role for the judiciary which can justify its involvement in judicial review. Critical to the normative appeal of these theories is the society-wide nature of dialogue, which is rather different to the strictly institutional accounts that are found in most other theories. The role of channeling and

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206 Friedman does allude to this when he states that “[s]ome judicial decisions do strike a national nerve, and when they do, they rouse opposition.” (emphasis added): see Friedman, Positive, supra note 144, at 1297. See also Friedman, Dialogue, supra note 27, at 604 n.135 (“all 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.”).

207 See Friedman, Dialogue, supra note 27, at 658 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 &
fostering societal discussion recognizes that the Court is not simply an additional voice in constitutional dialogue, but actively engages in a generative exchange which 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. 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. 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. 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 constitutional debate. Given the evidence of growing civic disengagement, however, we

FISHER, supra note 29, at 6; Devins & Fisher, supra note 94, 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. 208 See Doni Gewirtzman, Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture, 93 GEO. L. J. 897 (2005).
209 See supra note 195 and accompanying text.
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 which 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.’” One of the functions of a Constitution is thus 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. As Hanna Pitkin has said, “in 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.”

An analogy can be drawn between this understanding of constitutionalism and arguments that have been made in a range of nations regarding the effect of entrenching human rights guarantees in national law. Commentators have suggested that one of the

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most important effects of the entrenchment of fundamental rights is to create a “human
rights culture” that provides a value system by which a society can live and conduct
itself. In order to achieve this deep culture of respect for rights, human rights values
must be effectively internalized by all members of a society. 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 which recognizes the central place of the people in
ongoing discussion about fundamental values. This is also likely to foster greater
confidence amongst 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 thus has much normative appeal as a way of understanding
constitutional dialogue, it ultimately remains unable 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

213 See FRANCESCA KLUG, VALUES FOR A GODLESS AGE 213 (2000) (“It is not possible in a democracy 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.”).
214 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
(2003) (“The rights instruments and 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.”).
215 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 (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”).
constitutional systems outside the United States. If they are not, then this account is unlikely to provide a normatively satisfying vision of constitutionalism 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, in which direct institutional mechanisms exist for the political branches to challenge judicial decisions.\(^{216}\) 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.\(^{217}\)

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

\(^{216}\) 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).

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.\textsuperscript{218} However, given that there is nothing in principle which suggests that these dynamics cannot exist in other nations, this account of dialogue thus 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 conversely 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.\textsuperscript{219}

\textsuperscript{218} In Canada this 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 courts: see Matthew A. Hennigar, Expanding the ‘Dialogue’ Debate: Canadian Federal Government Responses to Lower Court Charter Decisions, 37 CAN. J. POL. SCI. 3 (2004).

\textsuperscript{219} 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, Positive, supra note 144, at 1291. In contrast, Post & Siegel do recognize “institutionally differentiated ways” in which the judiciary and the political branches engage in constitutional discussion (Post & Siegel, Legislative Constitutionalism, supra note 178, at 1986). For example, they consider that courts have the institutionally specific role of defining and enforcing rights in particular cases in the
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. Instead, this account recognizes that each branch of government can learn from the specific dialogic inputs of the other branches in an institutionally diverse constitutional order. Judicial and non-judicial actors are thus conceived as equal participants in constitutional decision-making who can both dialogically contribute to the search for better answers as a result of their unique institutional perspectives.

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procedural context of adjudication, whereas Congress derives its specific institutional competences from its democratic responsiveness (see, e.g., id. at 1966–67; 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.

220 Cf. Keith Whittington, In Defense of Legislatures, 28 POL. THEORY 690, 697 (2000) (“Institutions … develop distinct missions, cultures, modes of behavior, norms, and such, which affect both the behavior of individuals within those institutions and their collective output.”).

221 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. Tsivi 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 Tsivi Kahana, Understanding the Notwithstanding Mechanism, 52 UNIV. TORONTO L.J. 221, 255 (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.
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 could nevertheless be applied more generally to the United States and other nations. 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. This focus on legislative, as well as judicial, responsibility is important as it recognizes that not all legislation will be subject to challenge before the courts. If legislatures did not engage in their own 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. While courts and legislatures thus share responsibility for satisfying themselves that constitutional values are respected, each has a “distinct relationship” to a constitutional conflict. 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.

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

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223 See, e.g., Hiebert, Charter Conflicts, supra note 69, at 52 (“[E]ach body [must] satisfy itself that its judgment respects Charter values”).
224 Id. at 220.
225 Id. at 51.
226 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.”).
view that courts are better able to resolve disagreements about the meaning of rights in a principled manner. 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. 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.

Hiebert also argues that there are distinct disadvantages with the judicial role which mean that judges can actively learn from the legislature’s different perspective. 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.” Accordingly, although the legislature might benefit from a well-reasoned judicial decision when determining whether its objectives are sufficiently important to justify any possible rights

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227 *See, e.g.*, HIEBERT, CHARTER CONFLICTS, supra note 69, 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.”).
228 *Id.* at xii.
229 *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 have a special responsibility to ensure that Parliament has taken such rights seriously: id. at 69–70. 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.
infringement, this judicial input should not be privileged and should not replace political judgment.²³¹

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 have a degree of modesty about their own conclusions and listen to and learn from each other’s perspectives, modifying their own views accordingly.²³² In the Canadian context, this potential for institutional dialogue can be realized in a number of different ways. First, Hiebert suggests that dialogue will begin with legislators in most circumstances, when they consider whether legislation, upon initial enactment, 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 others’ views.²³³ The dialogue then returns to the legislature as it 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 in which the judiciary has nullified legislation on Charter

²³¹ 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”: id. at xiii.
²³² HIEBERT, CHARTER CONFLICTS, supra note 69, at 51. Although 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 (1996); 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 151, at 1), she has now revised her views slightly and refers to her theory as a “relational approach” (HIEBERT, CHARTER CONFLICTS, supra note 69, at 50–51). While her terminology has changed, the theory can still be regarded as a “dialogue” theory, as general thrust of her views about the institutional interactions that should take place between the judiciary and legislatures in Canada remain the same.
²³³ HIEBERT, CHARTER CONFLICTS, supra note 69, at 50–51.
grounds. In such circumstances, the legislature will be in a position to consider the views of the judiciary, while at the same time remaining able to make 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, as 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 also highlights that the potential for the different branches to engage in a productive partnership exists in this system. As a result, the partnership model enables us to recognize the more general potential that 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.

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. They are, however, also more realistic, given that they are based on positive

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234 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 63. 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 Kahana, supra note 36; ROACH, supra note 4.

235 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.”).
features of the judicial and legislative processes. Additionally, they recognize that the judiciary has an important adjudicative function to perform in disputes about rights, but refuse to make empirically questionable assumptions about the moral superiority of the judicial process.\textsuperscript{236}

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, though one which is firmly grounded in the positive features of the constitutional system. As a result, there does remain 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 well encounter substantial difficulty in revisiting earlier decisions due to the practical realities and time constraints inherent in the legislative process.\textsuperscript{237} Furthermore, Hiebert is herself increasingly questioning whether this vision of constitutional dialogue is fully achievable in Canada, despite the existence of 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.\textsuperscript{238}

If this vision of constitutional dialogue is to become a complete reality, it will therefore be necessary to think about how ways to structure the political branches, or the rules

\textsuperscript{236} Cf. supra Part III.B.2.
\textsuperscript{237} See supra Part II.A.2.
\textsuperscript{238} See Janet L. Hiebert, New Constitutional Ideas, supra note 221 (discussing this problem in relation to both Canada and the United Kingdom).
under which they operate, to enhance their abilities to participate in the resolution of constitutional issues.

On the normative level, this conception of constitutional dialogue as partnership is indeed worth pursuing as it provides one of the more satisfying accounts of the dialogic judicial role that we have encountered in this Article. Recognizing that judges make unique institutional contributions to dialogue in individual cases as a result of the unique features of the adjudicative process, a special and valuable judicial role is thereby proposed. This conception of the judicial role also succeeds in ensuring that the judiciary’s contributions are not privileged over the distinct dialogic contributions that legislatures are able to make. At the same time, this vision of dialogue also remains incomplete, due to the fact that 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 to resolve lingering democratic legitimacy concerns with the partnership model. More importantly, this combined 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 normative promise as 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 constitutional meaning and change within their 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 as it cannot explain fully the institutional aspects of constitutional dialogue.

These lingering difficulties with the equilibrium model can be 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

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239 See supra notes 204–05 and accompanying text.
constitutional meaning due to their “separate yet interconnected” positions in the constitutional order. If the branches listen and learn from one another, then better answers can be arrived in individual cases as a result of the combination of these differing institutional perspectives.

The dynamic fusion of these two understandings enables us to see 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 in relation to constitutional issues which engage dialogue with 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 the institutional participants in dialogue. In turn, these interactions will 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.  

240 Cf. Whittington, Extrajudicial Constitutional Interpretation, supra note 53, at 846 (“In the context of reasonable disagreement, it seems appropriate to allow broad participation in the decision as to the content
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 needs to 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.\textsuperscript{241} Outside the United States, the extent to which the judiciary indeed performs the role of facilitating society-wide debate is currently 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 in which these systems can be modified or adapted to incorporate more completely this judicial role of facilitating broader constitutional discussion.\textsuperscript{242}

In relation to the institutional aspects of constitutional dialogue, there is a need to consider in further detail the range of institutionally distinct contributions that the judicial and legislative branches are able to bring to that dialogue. Once this is done, it will then be possible to think about ways in which these different contributions can best be harnessed to facilitate a greater degree of institutional dialogue as partnership. In this regard and drawing on Hiebert’s description, it is possible to suggest a broader range of

\footnotesize{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.
\textsuperscript{241} See supra Part III.B.3.
\textsuperscript{242} See supra notes 207–08.}
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 the recognition and protection of constitutional rights.243 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 what is possible to achieve through the remedial power of the judiciary.244 In short, therefore, 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 be so 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 quite 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

243 On the nature of polycentric inquiries, see generally Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353 (1978).
244 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 178, at 2007.
compromise and decision-making by voting. In these circumstances, the judiciary can play an important implementation function in 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.

The judiciary can also perform a special institutional function due to its comparative temporal advantage in ensuring that sufficient attention has been 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. 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 this task. Furthermore, the legislature’s need to confront seemingly urgent issues may sometimes result in laws enacted in haste, without

245 See Victor Ferreres Comella, The European Model of Constitutional Review of Legislation, 2 I.CON 461, 471–72 (2004). See also id. at 472 (regarding the judiciary fitting “the pragmatic needs of modern society”).
246 Cf. Whittington, Extrajudicial Constitutional Interpretation, supra note 53, at 846 (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.”).
247 See supra Part III.A.2.
248 See, e.g., Keith E. Whittington, An “Indispensable Feature”? Constitutionalism and Judicial Review, 6 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.”).
sufficient attention paid to measures which may unduly restrict rights. Without succumbing to generalized fears about legislative expediency and self-interest, in this context judges can also help to ensure that sufficient legislative attention has been paid to constitutional values. Judges can assist in this way because they often have greater time to devote to this task without the immediate pressure of conflicting incentives in the context of their dispute resolution function.²⁴⁹ 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.²⁵⁰

With these institutionally distinct roles in mind, further research needs to be undertaken in relation to 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.²⁵¹ In other countries, this might also involve aspects of constitutional design to broaden the

²⁴⁹ 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 69, at 1, 70–71. In essence, this involves the use of process-centered rules, such as those discussed in Section III.C. Ideally, when thinking about institutional design, we might want to structure a system so that the chances of this occurring 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.


²⁵¹ 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”).
avenues through which the judiciary and the political branches can listen to and learn from each other’s unique perspectives.\textsuperscript{252}

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.\textsuperscript{253} This research agenda is, however, well worth pursuing, as not only is this broader understanding of constitutional dialogue encompassing both institutional and society-wide aspects more normatively attractive than any of the other understandings of dialogue examined in this Article, but it also provides the strongest justification for the role of judicial review in democratic constitutionalism.

V. CONCLUSION

Theories of constitutional dialogue do make important contributions to our understanding of judicial review. This Article has revealed, however, that there is a great degree of variance in the extent to which theories of dialogue are able to resolve countermajoritarian concerns or 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 in responding to democratic legitimacy.

\textsuperscript{252} For example, this is possible in Australia where debate continues about the possible design of a federal constitutional or statutory bill of rights: see, e.g., 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., 2003).
\textsuperscript{253} McDonald, supra note 154, 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.”).
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 quite mixed. Theories of judicial method, which are the
most strongly prescriptive theories, are most susceptible to normative failure as 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
fusion provides the strongest normative vision of the role of judicial review in modern
constitutionalism, and also the greatest possibilities 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.