Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights

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ABSTRACT

In recent years, weak-form bills of rights have generated much excitement in contemporary constitutional scholarship because they are believed to create a new balance between parliamentary and judicial supremacy based on inter-branch “dialogue” between courts and legislatures. Few scholars, however, have examined the foundational question of whether judges and legislators can actually be expected to behave in a way that realizes the dialogic potential of weak-form instruments. This Article takes a new approach to this question, applying the insights of positive theory to engage in a comprehensive assessment of the behavior we can realistically expect of courts and legislatures in both strong- and weak-form systems of judicial review. To the extent that there are discernable differences between systems regarding how the judiciary and the legislature interact, the Article claims that this behavior is more likely to be driven by the existence of structural and/or strategic impediments to effective political action in a particular constitutional system, rather than by any normative desire that judges and legislators may have to engage in inter-branch “dialogue.” This analysis does not lead to the conclusion, however, that the concept of dialogue should be completely discarded. Instead, the Article takes its positive analysis one step further to claim that weak-form theorists have simply been looking for dialogue in the wrong place. In fact, all systems of judicial review, both strong- and weak-form, should be understood as generating a broader form of society-wide dialogue between the judiciary, the political branches and the people about the meaning and interpretation of fundamental rights.
I. **INTRODUCTION**

Since the end of World War II in 1945, an “astonishing growth of constitutionalism” has taken place around the world. Stemming in large part from a commitment to safeguard minorities from the potential tyranny of majority rule, constitutional design since that time has centered on the widespread adoption of charters of fundamental rights and the empowerment of judges to interpret these rights and provide remedies where they have been infringed. Although there are significant variations in the form that judicial review takes in different nations, the vast majority of systems have followed the American approach of granting judges the unreviewable power to set aside legislation that conflicts with protected rights.

In more recent years, a number of Commonwealth nations have begun to experiment with alternative models of rights protection. Concerned that granting the judiciary the unreviewable power to nullify legislation subverts democratic ideals of government, these countries have adopted bills of rights that seek to ensure that courts can play a role in the protection of rights without rejecting the importance of the legislative perspective. “Weak-form” bills of rights accomplish this by adopting innovative power-distributing mechanisms that grant judges a central role in the interpretation and application of fundamental rights, while at the same time empowering the legislature to have the final word.

Weak-form bills of rights have generated much excitement in contemporary constitutional scholarship because they are believed to create a “third model of constitutionalism that stands between the two polar models of constitutional and legislative supremacy,” thereby “decoupl[ing] judicial review from judicial supremacy.” They are also frequently praised for creating the framework for “dialogue” between courts and legislatures regarding the determination of questions of fundamental rights. Precisely because judges do not have the final word, dialogue theorists argue that weak-form bills of rights create the potential for a

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3 See, e.g., ALEXANDER M. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 18 (1962) (describing judicial review as a “deviant institution in American democracy” because of its countermajoritarian tendencies); JEREMY WALDRON, *Law and Disagreement* ch. 10 (1999) (suggesting that judicial review under a bill of rights inevitable results in harm to the principle of democratic participation).


7 See infra Part II.
collaborative and continuing conversation between the branches about the optimal way to protect and enforce rights that “promises to add new dimension and perspective to the task of constitutional interpretation and to enrichen the enterprise.”

The process of sharing the interpretation of rights through inter-branch dialogue is also thought to reconcile the tension that exists between judicial review and democracy, because although judges can make an important contribution with respect to fundamental rights, this “rarely raises an absolute barrier to the wishes of democratic institutions.”

Although weak-form dialogue theorists claim that these new bills of rights create the structural potential for inter-branch dialogue, they also argue that judges and legislators must engage in a genuine and open conversation, learn from the other’s unique institutional perspective and, where appropriate, modify their own positions accordingly if the dialogic potential of weak-form instruments is to be realized in practice. Weak-form dialogue theory is thus a heavily prescriptive theory of judicial review that conceives of dialogue between the branches predominantly as a matter of principled institutional choice. What remains uncertain, however, is whether judges and legislators are likely to adopt a normative posture of dialogue when performing their roles under weak-form bills of rights.

The twin goals of this Article are to determine whether the normative behavioral assumptions of weak-form dialogue theory are realistic and, if not, to consider what this means for the future significance of “dialogue” as an explanatory concept under weak-form bills of rights. In pursuing the first goal, the Article applies the insights of positive theory to consider the nature of the interactions between judges and legislators that we can actually expect under weak-form instruments. Positive theory holds great potential to help us understand this question because in contrast to normative or prescriptive constitutional theory, which centers on how judges should behave and the attitude they should take to the work of other institutions, positive scholars are more interested in the alternate question of how judges in fact behave when they decide cases. In order to answer this question,

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8 Gardbaum, supra note 1, at 747.
9 Peter W. Hogg & Allison A. Bushell, The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All), 35 OSGOODE HALL L.J. 75, 81 (1997); see also KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 226 (2001) [hereinafter ROACH, SUPREME COURT ON TRIAL] (“Democracy is maintained and even enhanced by the ability of legislatures to limit or even override rights as declared by courts.”).
10 See infra Part II.
11 See, e.g., CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001) (setting out standards for judicial review so that the judiciary can appropriately contribute to American democracy); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that judges should exercise their judicial review powers only when this identifies and corrects malfunctions in the political process).
positive theorists focus on the motivations and incentives that drive judicial – and legislative – behavior and the various forces that impact on institutional decision-making.

One of the most influential strands of positive theory focuses on judicial decision-making in the separation of powers context. This account centers on the recognition that the three branches stand in a system of separated powers in which each branch —including the judiciary — has a variety of ways in which it can constrain the others and impede the realization of their preferences. Faced with this potential implementation problem, each branch can be expected to act strategically and to adjust its behavior in anticipation of how the others might respond. For the judiciary, this means that judges necessarily consider whether the political branches are willing and able to use their available tools of constraint to overcome judicial rulings. If there are significant structural or strategic impediments to effective political action in a particular constitutional system, judges will have a greater degree of freedom to pursue their own preferences in particular cases without fear of a political response.

Drawing on these positive insights about the “mutual strategic interplay” between judges and legislators, this Article makes a number of original claims about the institutional behavior that can be expected under weak-form bills of rights. Of primary importance, it suggests that the judiciary and the legislature can be expected to behave strategically regardless of the form that a particular national bill of rights takes. To the extent that there are discernable differences between systems in relation to how the judiciary and the legislature interact, this behavior is more likely to be driven by the existence of structural and/or strategic impediments to effective political action in a specific constitutional system, rather than by any normative desire that judges and legislators may have to engage in inter-branch “dialogue.”

Despite the fatal blow that these positive claims strike to the behavioral assumptions of weak-form dialogue theory, this Article does not argue that the concept of dialogue should be completely discarded. In fact, a closer examination of positive insights reveals that weak-form theorists have simply been looking for dialogue in the wrong place. This Article instead claims that all systems of judicial review, both strong-form and weak-form, can be expected to generate similar forms of society-wide dialogue between the judiciary, the political branches and the people about the meaning and interpretation of rights, stemming from the system of constraints on judicial behavior. Dialogue is thus best understood as a general and wide-ranging feature of the strategic relationship between the judiciary and other actors, rather than a more limited form of institutional interaction that is created by the adoption of specific weak-form bill of rights mechanisms.

The Article takes the following form. Part II introduces the two leading weak-form bill of rights models that have been adopted in Canada and the United Kingdom. It also considers the weak-form dialogue literature that has arisen from “political actions, including Supreme Court decision making, through the rigorous application of social science techniques.”

13 See infra Part III.A.
surrounding these instruments and the claims that this literature makes regarding the ways that judges and legislators should behave in order to achieve desirable inter-branch interactions. Part III turns to positive theory and utilizes its insights about strong-form systems to examine the forms of behavior we can expect of the judiciary and the legislature under each of the leading weak-form models of judicial review. In order to test these behavioral claims, Part IV then takes a closer look at the experience of Canada and the United Kingdom with their respective charters of rights and how the judiciary and the legislature have actually performed their roles under those instruments. This examination reveals that although Canadian and British judges and legislators have not regularly engaged in the kinds of interactions advocated by weak-form dialogue theorists, they have behaved consistently with the expectations of positive theory.

Having highlighted the fundamental problems with the behavioral assumptions of weak-form dialogue theory, Part V explains why dialogue nonetheless remains a useful concept provided we understand it in a different way to weak-form theorists. In this vein, Part V proposes the alternate reformulation of dialogue as a society-wide practice. Although this form of dialogue can be expected to occur in the great majority of systems in which judges are granted the power to review legislation for compatibility with protected rights, this Part concludes by considering which models of judicial review are likely to promote the most successful operation of society-wide dialogue.

II. WEAK-FORM BILLS OF RIGHTS AND THE EVOLUTION OF DIALOGUE THEORY

The unifying feature of the weak-form model of judicial review is that it seeks to balance the judicial protection of rights with a greater role for legislative judgment. There are, nonetheless, critical differences in the power-distributing mechanisms that weak-form bills of rights incorporate to achieve this balance. The two principal approaches are represented by the bills of rights that have been adopted in Canada and the United Kingdom. Under the Canadian legislative override model, judges are granted the power to strike down legislation that conflicts with protected rights, while legislatures retain the decisive ability to override judicial invalidations in the event of disagreement. The British declaration of incompatibility model, in contrast, restricts judges to issuing non-binding declarations that challenged legislation is incompatible with protected rights. It is then a matter for Parliament to decide whether the statute in question should be amended in light of the court’s ruling.

This Part briefly introduces the Canadian and British models of rights-based judicial review and discusses how theories of inter-branch dialogue have emerged as leading ways of conceiving the relationship between judges and legislators in these weak-form systems. It also explores whether dialogue theory, as presently conceived

15 A slightly different variation of the weak-form model exists under the New Zealand Bill of Rights Act. See New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109 (N.Z.). Given that the New Zealand model has been widely criticized for its ineffective protection of rights and has proved to be unpopular in bills of rights debates in other nations, this Article restricts its focus to the two leading weak-form models.
in Canada and the United Kingdom, provides a satisfying explanation of judicial and legislative behavior under these weak-form models.

A. The Canadian Charter of Rights and Freedoms — The Legislative Override Model

The Canadian Charter of Rights and Freedoms is widely considered to be the pioneer of the new weak-form approach to judicial review.\textsuperscript{16} Prior to the enactment of the Charter in 1982 as part of the repatriation of the Canadian Constitution from the United Kingdom,\textsuperscript{17} Canada’s federal and provincial legislatures exercised the power of parliamentary supremacy. Although courts played a role in interpreting Canada’s existing constitution, this did not extend to reconciling parliamentary supremacy with fundamental rights; judicial power was instead limited to consideration of questions concerning the division of powers between federal and provincial legislatures.

The enactment of the Charter fundamentally altered the constitutional role of the judiciary in Canada. Similar to the constitutional protection of rights in the American setting, the Charter grants judges full powers of judicial review to enforce protected rights.\textsuperscript{18} In contrast to the United States, however, the Charter also grants Canadian legislatures the formal power to overcome judicial invalidations on Charter grounds pursuant to the legislative override, or “notwithstanding” clause, contained in section 33. According to this provision, the federal Parliament or the legislature of a province may “expressly declare” by a simple majority that a law “shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of [the] Charter.”\textsuperscript{19} These sections include the “fundamental freedoms” such as the freedoms of religion and expression, due process and equality rights, but not democratic rights, mobility rights, language rights or education rights. In the event of judicial invalidation, Canadian legislatures can accordingly re-enact the offending legislation with a “notwithstanding” clause to ensure its continued validity.\textsuperscript{20} Declarations made under section 33 have effect for a maximum period of five years, but they can be renewed by the legislature upon their expiration.\textsuperscript{21} While such a declaration is in force, further judicial review of the relevant legislation is excluded.


\textsuperscript{18} Canadian Charter, § 52.

\textsuperscript{19} Canadian Charter, § 33(1).

\textsuperscript{20} While the legislative history to the passage of section 33 suggests it was intended to be used only subsequent to a judicial decision, it has been used preemptively on a number of occasions. Given that such preemptive uses have been widely criticized and have never been characterized a dialogic feature of the Charter, this Article focuses solely on use of the override power following judicial invalidation of legislation.

\textsuperscript{21} Canadian Charter, § 33(3), (4).
The section 33 override was proposed during governmental negotiations about the Charter as a way to assuage provincial concerns that the Charter would abandon the foundational principle of parliamentary supremacy and surrender provincial powers to the federal government under a scheme of nationalized rights.\textsuperscript{22} Although the provision was thus introduced as a tool for preserving regional differences, over time the democracy-enhancing potential of the override has become the primary focus of constitutional theorists. Following the passage of the Charter, many commentators came to champion the legislative override for the imaginative way it empowers courts to protect human rights, while at the same time preserving the ability of the legislature to have the final say about their meaning and interpretation.\textsuperscript{23} At long last, it seemed, a structural device had been formulated that could balance parliamentary and judicial supremacy, resulting in a more democratically sound system of judicial review.\textsuperscript{24}

The unique way in which the legislative override promised to reconcile the judicial protection of fundamental rights with democratic concerns soon led Canadian theorists to suggest that the provision promotes an interactive and democratic dialogue between courts and legislatures. The most prominent early proponent of the dialogue approach was Paul Weiler, who was also one of the principal architects of section 33.\textsuperscript{25} According to Weiler, although judicial review of the constitutionality of legislation is a vital part of a democratic system of government, this practice should not be determinative because judges can sometimes make mistakes. A legislative override power is thought to balance these concerns by creating a dialogue about constitutional meaning in which courts can perform their valuable judicial review role and deliberate on questions of principle, but which reserves an “escape valve” or “final say” for the legislature “to be used sparingly in the exceptional case where the judiciary has gone awry.”\textsuperscript{26}

In subsequent years, Canadian theorists have developed more sophisticated accounts of the dialogic potential of the section 33 override. In particular, while Weiler conceived of the override principally as a tool for the legislature to correct judicial errors, subsequent work has expanded on the roles that both courts and legislatures should play in dialogue with one another in a legislative override system.\textsuperscript{27} In some accounts, it is suggested that courts should make important

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\item See, e.g., ROACH, SUPREME COURT ON TRIAL, supra note 9, at 292 (“The Charter has created a fertile and democratic middle ground between the extremes of legislative and judicial supremacy.”).
\item See Weiler, Rights and Judges, supra note 22; Paul Weiler, Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights, [1980] DALHOUSE REV. 205.
\item Weiler, Rights and Judges, supra note 22, at 84, 79.
\item For a discussion of the normative value of the judicial and legislative roles proposed in different theories of dialogue, see generally Christine Batup, The Dialogic Promise: Assessing the Normative
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contributions on questions of principle, while legislatures can add an important perspective to constitutional debates about rights in relation to the articulation of policy. 28 In other theories, both courts and legislatures are regarded as institutions capable of making principled decisions, but are thought to bring more distinct institutional contributions to Charter conflicts based on their distinctive constitutional roles and the fact that they are differently situated in relation to Charter conflicts. 29 Regardless of the precise roles that are prescribed for the branches, however, these theories all suggest that the override enables courts and legislatures to engage in an interactive partnership in which each branch can bring its unique perspective to bear on the meaning and interpretation of rights, ultimately leading to better answers. 30

In order for this interactive inter-branch partnership to be practically achieved, weak-form dialogue theorists counsel the judiciary and the legislature to behave in a dialogically appropriate fashion in their interactions with one another. On the one hand, weak-form dialogue theorists suggest that the judiciary should show respect for the legislature by listening to its justifications for legislative measures before deciding to strike down a law. Judges should, nonetheless, be prepared to act on the basis of their sincere institutional views and nullify legislation if they form the view that the legislature has not acted in a way that shows sufficient respect for fundamental rights. The legislature, in turn, should carefully consider what the court has said in its ruling and attempt to “address its merits and engage in a principled discussion” before deciding whether to use the override. 31 If the legislature decides that its original legislation was justified, despite judicial concerns, then it should give effect to its sincere views by invoking the section 33 override power. 32 According to weak-form dialogue theorists, although the override provision creates the framework for inter-branch dialogue, whether dialogue is actually achieved as a practical matter accordingly depends heavily on the normative behavioral choices of the different branches.


28 See, e.g., ROACH, SUPREME COURT ON TRIAL, supra note 9, at 286 (suggesting that in inter-branch dialogue, courts are best suited “to bring to the table the importance of fundamental values”, while legislatures are best at “bring[ing] knowledge of regulatory objectives and obstacles that the court may otherwise have difficulty appreciating.”).

29 See Janet L. Hiebert, Parliament and Rights, in PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 231, 239 (Tom Campbell et. al. eds., 2003) (suggesting that the branches can “bring to their respective judgments different perspectives that reflect their distinctive roles and the fact that they are differently situated, relative to the Charter conflict.”).

30 See, e.g., CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER 191 (2d ed., 2001) (suggesting that the section 33 override can “encourage a more politically vital discourse on the meaning of rights and their relationship to competing constitutional visions than what emanates from the judicial monologue that exists in a regime of judicial supremacy.”); Tsvi Kahana, Understanding the Notwithstanding Mechanism, 52 U. TORONTO L.J. 221, 263 (2002) (proposing a dialogic model of “deliberative disagreement” in which courts and legislatures can engage in “constructive deliberation” with each other).

31 Kahana, Understanding the Notwithstanding Mechanism, supra note 30, at 264.

32 See, e.g., Slattery, supra note 23 (suggesting that section 33 promotes a “continuing dialogue” between courts and legislatures which rests less on each branch policing the other than on their individual assessments of their own actions in light of Charter values).
Actual experience with the override has cast significant doubts on whether courts and legislatures can or do behave in the way that weak-form dialogue theorists prescribe. Despite scholarly praise for the override, the provision has been rarely utilized by Canadian legislatures to respond to judicial rulings about Charter rights. In fact, the override has been used only twice by provincial legislatures to respond to judicial rulings, and actively contemplated in only a handful of other cases. Even more strikingly, the federal Parliament has never used the override, nor seriously considered doing so.

The reason why the override has been used so infrequently in Canada is generally attributed to historical circumstance, specifically Quebec’s audacious uses of the mechanism in the early years of the Charter’s operation. Quebec first used the override just nine weeks after the Charter came into effect, when the province passed a law that invoked the provision in a blanket fashion with respect to all existing Quebec legislation. The provincial government took these steps to express its anger that the Charter had been adopted over Quebec’s objections and as a way of opting out of the document to the greatest extent possible.

Quebec’s early use of the override power created significant controversy in Canada. A much greater political storm was to follow in 1988, however, when that province again used the override power in response to the Supreme Court’s ruling in *Ford v. Quebec.* In that case, the Supreme Court invalidated a Quebec law that required public signs and commercial advertising to be in the French language only. Given that an override clause was already included in the legislation, the Court struck down the law on non-Charter grounds. That override was, however, due to expire very soon after the ruling and the Court stressed that once this occurred, the law would abridge the freedom of expression guaranteed by section 2 of the Charter. Within a week of this decision, the Quebec legislature passed a new statute that invoked section 33 and reauthorized Quebec’s ban on English in commercial signs. Quebec’s francophone majority applauded this result, but the reaction in other quarters was almost universally negative. In particular, Quebec’s English speaking minority and the population of the rest of Canada were highly critical of the legislation because it was thought to be an attempt to subordinate the minority rights of English speakers in Quebec to the majority French speakers.

In combination with the Quebec’s earlier blanket use of the override, the province’s actions following *Ford* are widely regarded as having created a “political climate of resistance” to the override’s use. This explanation suggests that the lack of use of section 33 is merely an “historical accident” that may not be replicated if

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34 See generally Kahana, *Public Discussion,* supra note 22.
35 All existing legislation was repealed and reenacted with a notwithstanding provision. See An Act Respecting the Constitution Act, 1982, SQ 1982, c.21.
37 Hogg & Bushell, *supra* note 9, at 83.
similar provisions were adopted in other nations. If this is true, then it would remain theoretically possible for the judicial and legislative branches in other nations to choose to engage in genuine and productive dialogue with one another using a similar tool. This assumes, however, that judges and legislators would be both willing and able to act in the sincere and collaborative fashion that Canadian dialogue theorists propose if a legislative override were available.

It is impossible to provide a definitive answer about the validity of these normative behavioral assumptions given that Canada is presently the only country to have adopted the legislative override model. Subsequent developments in Canadian dialogue theory and anecdotal evidence about judicial and legislative behavior in Canada nonetheless appear to cast significant doubt on whether these assumptions are realistic. In this regard, although section 33 remains the most unique feature of the Charter — and the single element that originally led scholars to proclaim that the Charter created a third model of dialogic constitutionalism — its desuetude has prompted Canadian dialogue theorists to suggest that other, less distinctive, features of the Charter also have significant dialogue-promoting capacities. In particular, theorists now place much greater emphasis on section 1 of the Charter for promoting vibrant dialogue between the judiciary and the legislature in Canada.

Section 1 of the Canadian Charter of Rights and Freedoms is often referred to as the “reasonable limitation” provision. This clause provides that rights guaranteed by the Charter are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In practice, this means that Charter rights can be limited by legislation that meets the standards that the Supreme Court of Canada has set for section 1 justification.

According to the Supreme Court, a law can only be justified as a “reasonable limit” on Charter rights if it satisfies a proportionality test; that is, the law must pursue an important objective, be rationally connected with that objective, impair Charter rights no more than necessary to accomplish the objective, and not have a disproportionately severe effect on the persons to whom it applies. Most disputes center on the third part of this test, namely, the minimal impairment requirement.

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38 MANFREDI, supra note 30, at 194.
39 Jeffrey Goldsworthy, Judicial Review, Legislative Override and Democracy, 38 Wake Forest L. Rev. 451, 470 (2003) (suggesting other nations might have a different experience with an override provision).
40 The Charter of Human Rights and Responsibilities that was recently adopted in Victoria, Australia, contains an override provision. See Charter of Human Rights and Responsibilities Act 2006 § 31 (Vic.). This provision is radically different to that found in the Canadian Charter, however, because in all other respects, the Victorian Charter is a declaration of incompatibility model of rights protection. The override provision in this context simply provides formal recognition that Parliament can enact legislation that is incompatible with the Charter.
41 See generally Hogg & Bushell, supra note 9; ROACH, SUPREME COURT ON TRIAL, supra note 9, Kent Roach, Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures, 80 Can. B. Rev. 481 (2001).
42 Canadian Charter, § 1.
44 See Hogg & Bushell, supra note 9, at 85.
When a law is invalidated using section 1, the reason tends to be that the court concludes that the relevant legislative objective was not pursued by the least restrictive means available, rather than viewing that objective as improper or insufficiently important. As a result, legislatures are commonly left with the ability to re-enact legislation afresh that pursues the same objective but by less invasive means.

Weak-form dialogue theorists claim that the reasonable limitation provision contained in section 1 of the Charter promotes “an expansive and constructive conversation” between the branches both because it allows legislatures to defend statutory provisions as reasonable limits on Charter rights, and because it provides them with the dialogic opportunity to respond to the judicial invalidation of statutory provisions by devising legislation that pursues the same objectives by less restrictive means. 45 Section 1 is thus thought to “allow[] courts to bring concerns about respecting rights to the attention of governments” while also “allow[ing] governments to explain to the courts and the people their regulatory ambitions, the alternatives considered and the tradeoffs made.” 46 Similar to the theories of inter-branch dialogue proposed in relation to the section 33 override, it is also expected that both judges and legislators will make a normative choice to engage in dialogue with each other and learn from their mutual conversations under section 1.

Unlike the situation with section 33, weak-form dialogue theorists in Canada have been able to point to a range of cases in which courts have invalidated legislation on section 1 grounds, with legislatures responding by amending the offending provisions to pursue the same objectives by less restrictive means. 47 Nevertheless, critics have been effective in showing that even in such cases, the interactions between the branches are difficult to describe as genuinely dialogic in nature. For example, legislative amendments often merely incorporate judicial suggestions when a law has been invalidated under section 1, which appears more akin to legislative acquiescence than genuine dialogue in the sense envisaged by weak-form dialogue theorists. 48 Simple failures to respond are also not uncommon, even in those cases where section 1 analysis has left clear space for a legislative response. 49

Legislative acquiescence or failures to respond under section 1 might simply demonstrate that Canadian legislatures agree with the judiciary’s Charter rulings. Given the frequency of this kind of behavior, however, it seems more probable that

45 ROACH, SUPREME COURT ON TRIAL, supra note 9, at 293. See also Hogg & Bushell, supra note 9, at 84–87 (outlining the dialogic features of section 1). This is a less distinctive provision on which to ground inter-branch dialogue theory in Canada because a similar structure of rights exists across constitutional systems. See generally Stephen Gardbaum, Limiting Constitutional Rights, 54 UCLA L. REV. (2007).

46 ROACH, SUPREME COURT ON TRIAL, supra note 9, at 13.

47 See, e.g., Hogg & Bushell, supra note 9, at 96–98; ROACH, SUPREME COURT ON TRIAL, supra note 9.


49 Id. at 520.
legislatures are either unwilling or unable to engage in productive and honest dialogue with the judiciary about the meaning of Charter rights and the best way to balance these rights against competing objectives. This anecdotal evidence thus indicates that judges and legislatures do not regularly or consistently behave in a way that realizes any dialogic potential of section 1, just as they do not in relation to section 33. It therefore seems likely that the failure of the override to promote dialogue between the branches is not solely the consequence of historical circumstance, but may also stem from more fundamental flaws in the normative assumptions of weak-form dialogue theory.

B. The United Kingdom’s Human Rights Act, 1998 — The Declaration of Incompatibility Model

The second leading weak-form approach to judicial review is the declaration of incompatibility model adopted in the United Kingdom with the passage of the Human Rights Act of 1998 (the “HRA”). The HRA, which came into force on October 1, 2000, was a key element of the newly enacted Labour government’s platform to take human rights seriously. The way in which this goal should be achieved posed something of a dilemma, however, given the government’s twin desire to retain the doctrine of parliamentary sovereignty, which is considered to be the foundational principle of British constitutionalism. Although the Canadian Charter was highly influential in early debates about the form that a bill of rights should take, it was ultimately thought to provide too much power to the judiciary at the expense of Parliament given that it empowers judges to strike down conflicting legislation. On the other hand, supporters of a British bill of rights did not favor the enactment of an ordinary statute as this was considered unlikely to provide sufficient protection for rights.

Faced with these concerns, the HRA represents a novel solution to the problem of reconciling parliamentary supremacy with the judicial protection of fundamental rights. Designed to incorporate the principal human rights provisions of the European Convention on Human Rights (the “Convention”) into domestic British law, the Act creates a statutory charter of rights in the United Kingdom that is broadly comparable in content to other national bills of rights. The power that the HRA grants to the judiciary is, however, much more limited than in other nations. First, section 3 of the HRA directs judges to interpret primary (as well as secondary) legislation “so far as it is possible to do so ... in a way which is compatible with the

Convention rights.” If a court concludes that this is not possible and that the primary legislation is incompatible with a Convention right, the HRA does not allow the court to set aside the legislation. Instead, section 4 restricts the court to issuing a formal declaration of that incompatibility. In the event that a declaration of incompatibility is made, the legislation in question continues to have full effect and validity and it is left to independent political judgment to decide whether the law should be amended in light of the court’s ruling and, if so, how. If a decision is made to amend the legislation, in the ordinary course of events this will be done through the regular parliamentary process. If a more urgent response is desired, however, the HRA also provides for a “fast track” procedure that permits the relevant minister to amend the incompatible legislation by a “remedial order” that is laid before and approved by both Houses of Parliament.

The issue of judicial enforcement is the most innovative feature of the HRA. Similar to the Canadian system, courts are positioned to have the penultimate say about protected rights. Nevertheless, whereas the judiciary’s penultimate say in Canada is legally authoritative unless overturned by the legislature, in the United Kingdom the judiciary’s penultimate say only becomes law if Parliament decides to amend the conflicting legislation to remove the incompatibility. The declaration of incompatibility mechanism is accordingly both “less straightforward and direct than the Canadian override in that a legislature is not simply faced with the option of overturning or preempting a court decision, for there is no binding decision without parliamentary response to the declaration of incompatibility.”

The unique way in which the HRA distributes power between the judiciary and the political branches of government has led many British scholars, similar to their Canadian counterparts, to argue that the Act establishes the structural foundations for inter-branch dialogue. Given the young age of the statute, the

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55 Human Rights Act, 1998, c.42, § 3(1) (U.K.). Similar interpretive provisions have been routinely included in the declaration of incompatibility systems recently adopted in other jurisdictions. See Human Rights Act 2004 § 30(1) (A.C.T.) (providing that when “working out the meaning of a Territory law, an interpretation that is consistent with human rights is to be preferred to any other interpretation.”); Charter of Human Rights and Responsibilities Act 2006 § 32(1) (Vic.) (“So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”).

56 Human Rights Act, 1998, c.42, § 4(1)-(2) (U.K.). This provision only applies to primary (or parliamentary) legislation. If a court concludes that secondary legislation (or legislation resulting from Parliament’s delegation of its powers to the executive branch) is incompatible with a Convention right, it may fashion relief that removes that incompatibility unless primary legislation prevent this. In that case, the court may only make a declaration of incompatibility. See id. § 4(3)-(4).

57 Id. § 4(6) (providing that a declaration of incompatibility “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given”).

58 See id. § 10 and schedule 2 (outlining the complex procedures for a remedial order to be made).

59 See Perry, supra note 4, at 670 (discussing the difference in penultimate authority between courts and legislatures under the Canadian and British rights instruments).

60 Gardbaum, supra note 1, at 739.

theoretical discussion of dialogue remains somewhat underdeveloped compared to Canadian scholarship. The work that has been produced thus far nevertheless appears to rely on similar normative behavioral assumptions to those underpinning Canadian weak-form dialogue theory.

The key feature of the HRA that is considered to provide an “engine” for dialogue is the declaration of incompatibility provision contained in section 4. As noted above, when judges determine that legislation is incompatible with Convention rights and that it is not possible to interpret it in a consistent manner, section 4 enables them to express this conclusion by issuing a non-binding declaration of incompatibility. Although this is a weaker form of judicial power than the power to strike down legislation, dialogue proponents nevertheless praise the declaration of incompatibility mechanism for enabling courts to inject their “important but not decisive” perspective into debates about the meaning and interpretation of Convention rights. In fact, British theorists suggest that this weaker form of judicial power can actually improve prospects for inter-branch dialogue because it lessens the risk that legislatures will blindly acquiesce to judicial pronouncements on rights.

Unlike the situation in Canada, where the overall structure of the Charter is now praised for facilitating inter-branch dialogue, British dialogue theorists have not been universally positive about all of the structural features of the HRA. In particular, some have expressed concern about the effect of section 3 of the HRA on productive dialogue between the branches. On its face, section 3 requires courts to take a strong interpretive approach to ensure that legislative provisions are interpreted compatibly with Convention rights whenever this is possible. There nonetheless remains significant latitude in relation to how narrowly or widely judges

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62 Hickman, supra note 61, at 308; see also Clayton, supra note 61, at 46 (“[T]he principle of ‘democratic dialogue’ is implicit in the structural features of the Act.”).

63 Fredman, supra note 61, at 119.

64 The precise roles that judges and legislators should play are not as highly theorized in British as in Canadian dialogue theory. In general, it appears to be commonly thought that judges have an important contribution to make as guardians of principle because legislators are not well suited to this task. See Hickman, supra note 61; Edwards, supra note 61. Others suggest that both judges and legislators can play important roles in relation to principle yet learn from each other’s unique institutional perspective. See Nicol, Law and Politics, supra note 61.

65 See, e.g., Edwards, supra note 61, at 867 (arguing that the Human Rights Act’s dialogic structure, leaving the final word with Parliament and the executive, “reduc[es] the chances of judicial imperium”); Nicol, Law and Politics, supra note 61, at 747 (“Section 4 declarations … enable courts to influence political debate without stifling it.”).

might read this provision.\footnote{See, e.g., Richard Clayton, \textit{The Limits of What’s Possible: Statutory Construction under the Human Rights Act}, 2002 EUR. HUM. RTS L. REV. 559; Conor Gearty, \textit{Reconciling Parliamentary Democracy and Human Rights}, 118 L. Q. REV. 248 (2002); Conor Gearty, \textit{Principles of Human Rights Interpretation} (2005); Aileen Kavanagh, \textit{The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998}, 24 OXFORD J. LEGAL STUD. 259 (2004).} Taken to the extreme, section 3 might be construed exceedingly narrowly so that its mandate is effectively “reduced to an empty shell.”\footnote{Gearty, \textit{Reconciling Parliamentary Democracy and Human Rights}, supra note 67, at 250; see also David Bonner, Helen Fenwick & Sonia Harris-Short, \textit{Judicial Approaches to the Human Rights Act}, 52 INT’L & COMP. L.Q. 549, 555 (2003) (“[Section 3] can be characterized idiomatically as a ‘bend me, shape me’ clause, treating legislation as highly malleable material that can be moulded through ‘interpretation’ to achieve a better ‘fit’ with the intended receptacle (the Convention rights).”).} Alternatively, the provision might be read so broadly that all legislation is interpreted as compatible with Convention rights unless it is expressly stated not to be.

Weak-form dialogue theorists in the United Kingdom tend to disfavor expansive interpretations of section 3 on the basis that this would leave little space for the operation of dialogue between the branches using the declaration of incompatibility tool.\footnote{Klug, \textit{Judicial Deference}, supra note 66, at 130 (suggesting that frequent use of section 3 “to effectively rewrite legislation … will undermine the careful balance set in motion by the Act.”).} This is not to say that inter-branch “dialogue” cannot occur under section 3; after all, it always remains open to Parliament to enact new legislation that modifies a section 3 interpretation if it forms the view that the judiciary’s actions do not reflect an appropriate interpretation of rights or do not strike the optimal balance between rights and competing objectives.\footnote{See, e.g., Clayton, supra note 61, at 46; Hickman, supra note 61, at 326-29 (suggesting that sections 3 and 4 simply allow for different kinds of inter-branch dialogue).} Weak-form dialogue theorists nevertheless tend to consider that frequent use of the section 3 interpretive power by courts is less democratically desirable than section 4 declarations of incompatibility because this would render judicial views final unless or until overturned by Parliament, thereby “shift[ing] too far towards a constitutional democracy.”\footnote{See Alison Young, Ghaidan v. Godin-Mendoza: Avoiding the Deference Trap, 2005 PUB. L. 23, 33 (U.K.); see also ROACH, SUPREME COURT ON TRIAL, supra note 9, at 64-65; Nicol, \textit{Law and Politics}, supra note 61, at 747-48.} In addition, if a convention were to develop in favor of courts interpreting section 3 very broadly, it is thought that this might lead judges to favor strained and less transparent interpretations rather than express their sincere views about the incompatibility of legislation with protected rights using their declaratory powers.\footnote{See Thomas Poole, \textit{Bills of Rights in Australia}, 4 OXFORD U. COMMONW. L.J. 197, 203 (2004).}

In line with these views, British dialogue theorists counsel the branches, particularly the judiciary, to make certain normative behavioral choices to ensure that genuine and open dialogue between them is achieved.\footnote{See, e.g., Nicol, \textit{Law and Politics}, supra note 61 at 742 (“These institutions, it is hoped, should engage in a common enterprise, fostering an ongoing dialogue to establish which arguments deserve recognition in the rights discourse.”) (emphasis added).} If judges form the sincere view that legislation is incompatible with protected rights after listening to
Parliament’s justifications for the measures, they should strive to make use of section 4 declarations of incompatibility to the extent that this is possible.\textsuperscript{74} It is then expected that Parliament will listen to and take account of the judiciary’s unique perspective before deciding whether to amend or repeal the statute in question. If, despite the judiciary’s input, Parliament believes that its original legislative choices were sufficiently protective of rights, then it need take no action.\textsuperscript{75} Similar to the process of dialogue envisaged under the Canadian Charter, it is thought that if the branches behave in this way, a collaborative process of dialogue will result “that involves input from each body at different junctures and ... take[s] a conversational form.”\textsuperscript{76}

Just as in Canada, however, it remains unclear whether the judiciary and Parliament in the United Kingdom can or do behave in a way that is consistent with the normative behavioral assumptions of weak-form dialogue theory. If the judiciary and Parliament were following dialogue theorists’ prescriptions, we would expect to find significant uses of the section 4 declaration of incompatibility power — in preference to section 3 interpretations — together with responses to judicial declarations that reflect considered and independent parliamentary judgment. Consistent with Canadian experience, current experience with the HRA provides only equivocal support for these behavioral claims. Specifically, in the six years since the Human Rights Act came into force, British courts have made fairly equal use of their powers under sections 3 and 4. On the one hand, section 3 has been used fourteen times to interpret legislation so that it is compatible with Convention rights.\textsuperscript{77} In contrast, fifteen declarations of incompatibility have been issued under section 4 that have not been overturned on appeal.\textsuperscript{78}

Although the relatively equal number of cases involving section 3 and section 4 of the Human Rights Act is likely to be of some concern to weak-form dialogue theorists, these figures at least indicate that judges have felt prepared to make use of their section 4 powers to clearly speak out when they consider that legislation is incompatible with protected rights. Greater doubts about the behavioral assumptions underpinning weak-form dialogue theory emerge when we consider the responses

\textsuperscript{74} See, e.g., id. at 744 (“[C]ourts should uncompromisingly tell their truth on human rights.”). Weak-form dialogue theorists in the United Kingdom thus counsel courts to make “more rather than fewer,” even “routine,” uses of section 4 declarations of incompatibility rather than relying too heavily on section 3. See Gearty, Reconciling Parliamentary Democracy and Human Rights, supra note 67, at 250; Klug, Judicial Deference, supra note 66, at 131.

\textsuperscript{75} Nicol, Law and Politics, supra note 61, at 743 (describing dialogue in which “courts present their thoughtful opinions on rights, which Parliament can substitute with its own favoured interpretation.”).

\textsuperscript{76} Hickman, supra note 61, at 309; see also id. at 335 (“[T]he various branches do not merely counteract protectively, but they also interact productively, even conversationally.”) (emphasis in original).

\textsuperscript{77} See United Kingdom, Department of Constitutional Affairs, Table of Cases; Ghaidan v. Godin-Mendoza, [2004] 2 A.C. 557 (Steyn, L.J., appendix to judgment); Hugh Tomlinson QC, Human Rights Act Now We Are Six: Case Law on Convention Rights (2006).

\textsuperscript{78} See United Kingdom, Department of Constitutional Affairs, Table of Cases, supra note 77; Ghaidan v. Godin-Mendoza, [2004] 2 A.C. 557 (Steyn, L.J., appendix to judgment); Tomlinson, supra note 77. There are also six additional cases in which a declaration of incompatibility was made in relation to primary legislation that was subsequently overturned on appeal. See United Kingdom, Department of Constitutional Affairs, Table of Cases, supra note 77.
that these declarations have elicited from the political branches of government. If Parliament were responding in the manner advocated by weak-form dialogue theorists, we would expect to see disagreement with judicial declarations being regularly expressed or, at the very least, on occasion. Contrary to these expectations, however, the British Parliament has almost universally responded to judicial declarations of incompatibility by amending or repealing the relevant primary legislation in accordance with the court’s ruling. The only instances in which such action has not yet been forthcoming are recent decisions in which remedial measures are presently under parliamentary consideration and are expected to be enacted in due course. In combination with the Canadian experience, the British example thus reinforces concerns that the normative behavioral assumptions of weak-form dialogue theory may be fundamentally flawed.

III. THE LESSONS OF POSITIVE THEORY

In order to shed greater light on the question of whether the normative behavioral assumptions of weak-form dialogue theory are realistic, this Part turns to positive theory to explore what forms of behavior we can actually expect of judges and legislators under weak-form instruments. Positive theory is a particularly useful tool for this task because rather than focusing on how the judiciary and the legislature should act, it centers more directly on what judicial and legislative actors actually do when performing their decision-making roles. In so doing, positive theory also illuminates the various forces that impact on judicial decision-making and enables us to scrutinize the range of incentives and motivations that are likely to drive judicial and legislative action. As we will see, when these insights are applied to the context of weak-form models of judicial review, it becomes clear that the central assumptions about judicial and legislative behavior that underlie weak-form dialogue theory are almost certainly unsound.

A. Positive Theory and Institutional Behavior

1. The Separation of Powers Game

Over the last two decades, positive scholars, particularly in the United States, have produced a substantial body of work examining the diverse influences on judicial decision-making and the factors that motivate judges when exercising their judicial review powers. Some of this work focuses on influences that are internal to judges or that result from intra-judicial relationships, either between judges sitting on a particular court or between courts at different levels in the judicial hierarchy. Another branch of positive scholarship focuses on the position of the judiciary in the

79 See R (on the application of Gabaj) v. First Secretary of State, [2006] EWHC (Admin) (unreported); R (on the application of Morris) v. Westminster City Council, [2006] 1 WLR 505.
80 See supra note 12 and accompanying text.
81 For detailed discussions of the varying strands of positive theory and its application to legal scholarship, see Barry Friedman, The Politics of Judicial Review, 84 TEXAS L. REV. 257 (2005) [hereinafter Friedman, Politics].
separation of powers context.\textsuperscript{83} This theoretical approach holds significant promise to help us understand the behavior of judges and legislators in weak-form systems of judicial review, not only because it sheds light on external, inter-branch influences on judicial decision-making, but also because it helps us to understand important aspects of the behavior of the political branches when reacting to judicial rulings.

Positive political theorists who study judicial decision-making in the separation of powers context use rational choice methods to model law-making as a game of strategy in which the three branches of government, as rational actors, seek to achieve their goals in the face of institutional constraints and imperfect information.\textsuperscript{84} These models are often referred to as the “separation of powers game.”\textsuperscript{85} Although the models can be very complex, the basic premise of this approach is that because the three branches of government are embedded in a system of separated powers in which each branch can check or constrain the others, they cannot achieve their own preferences without taking the preferences of the others into account.\textsuperscript{86} These preferences are most commonly defined as policy-based, but can also encompass broader institutional or legal goals.\textsuperscript{87} Faced with this potential implementation problem, the branches can be expected to engage in anticipated response calculations, which simply means that they will strategically anticipate the likely responses of other institutional players to their decisions and adjust their actions accordingly.\textsuperscript{88}

In explaining how the strategic dynamics of the separation of powers game operate in practice, positive scholars have tended to focus on strong-form models of judicial review and, in particular, the United States system. In order to understand the core claims of this account, it is therefore helpful to begin with the strong-form


\textsuperscript{86} See LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 17 (1998) (“[W]e cannot fully understand the choices justices make unless we also consider the institutional context in which they operate.”); William N. Eskridge, Jr. & Philip P. Frickey, Law as Equilibrium, 108 HARV. L. REV. 26, 28-29 (1994) (“Congress, the executive, and the courts … seek[] to promote [their] vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs.”).

\textsuperscript{87} For this reason, it has been accepted that judges might focus on maximizing “their legal or political preferences, or something else entirely.” Frank B. Cross & Blake L. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 NW. U.L. REV. 1437, 1446 (2001).

\textsuperscript{88} See generally TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 145-46 (1999) (discussing the “rule of anticipated reactions”).
example. The following Section will then consider more directly how the strategic interplay between the branches might be expected to vary in the context of weak-form judicial review.

At first glance it is difficult to see why judges would act strategically in a strong-form system of judicial review, given that their constitutional rulings cannot be overturned by ordinary legislative means. This claim becomes more familiar, however, once we recollect Hamilton’s famous refrain that the judiciary is the “least dangerous branch” of government because judges possess neither the power of the “purse” nor of the “sword.” 89 Lacking the power of enforcement, judges must rely on the political branches to ensure that their rulings are effective. 90 In this vein, social scientists have highlighted a variety of constraints under which judges in strong-form systems operate when undertaking constitutional review.

Taking the United States as our example, although the only way to achieve formal revision of constitutional rulings in that country is by constitutional amendment, 91 the elected branches have a variety of more informal tools at their disposal to discipline the judiciary, particularly the Supreme Court, in the event of disagreement with its rulings. 92 Congress and other governmental actors can evade judicial decisions by failing or refusing to take implementation action, or by passing legislation in defiance of judicial rulings. They can also attempt to pack the courts in an effort to alter judicial policy, or reduce or withdraw the jurisdiction of courts in controversial areas. 93 Judges can also be impeached or removed, judicial salaries or funding to the courts can be reduced, and efforts can be made to appoint judges who are more sympathetic to the constitutional policy preferences of the political branches.

Although most of these tools are not very targeted means of response, this does not negate their power to constrain judicial behavior because they are directed at the heart of the judiciary’s institutional integrity. 94 Tools which attack the Court reflect the fact that the judiciary is dependent on the political branches not only to implement its rulings, but also to sustain its institutional authority within the constitutional order. While refusals to implement judicial decisions do not punish

90 See, e.g., Bradley Canon & Charles Johnson, Judicial Policies: Implementation and Impact 1 (1999) (“[I]n virtually all instances, courts that formulate policies must rely on other courts or on non-judicial actors to translate these policies into action”).
91 This is a notoriously difficult and time-consuming procedure that has only been successfully invoked on four occasions. See Louis Fisher, Constitutional Dialogues: Interpretation as Political Process 201-06 (1988).
92 See generally id. at ch. 6 (discussing the various forms of constraint on judicial action).
93 The most well known example in United States history is President Franklin Delano Roosevelt’s Supreme Court-packing plan. See William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 216 (1995).
94 See Cross & Nelson, supra note 87, at 1459-60 (observing that these tools “strike at the very independence of the judiciary itself and the powers and resources that judges require or strongly desire.”); Keith E. Whittington, Legislative Sanctions and the Strategic Environment of Judicial Review, 1 Int’l J. Const. L. 446, 449 (2003) (“What is at issue in any decision to sanction the courts is the judiciary’s institutional integrity, not just the outcome of a particular case.”).
the judiciary in the same way, they do counter judicial preferences and undermine the future significance of judicial rulings. The fact that these tools are rarely used also does not negate from their potential force due to the phenomenon of anticipated reactions. Judges remain aware that the bag of tools exists and can be used against them if they stray too far from the preferred views of political actors. According to the positive account of judicial decision-making, judges can therefore be expected to think ahead and anticipate what kinds of political responses are likely, adjusting their rulings accordingly.

2. Impediments to Political Action

Thus far, the positive account of judicial decision-making in strong-form systems appears to indicate that where judicial and political branch preferences diverge, we would expect to find judges engaging in anticipated responses to avoid the risk of punishment by political actors. One consequence of this would be that we would rarely expect to see open conflict between the political branches and the judiciary when judges render constitutional decisions. It is clear that this is not a sufficient explanation of judicial-legislative interactions, however, as history is replete with examples of constitutional courts in strong-form systems handing down decisions that are criticized or openly attacked by the political branches. While some of this might be explained by incomplete information available to judges about political branch preferences, it seems unlikely that this is the complete story.

Consistent with this intuition, positive scholars have suggested that when assessing the likelihood that constraints will be placed on their actions, strategic justices will not limit themselves to considering how far their own preferences diverge from those of the political branches. In addition, and of equal importance, they can also be expected to take into account the extent to which political actors are both willing and able to act on their sincere preferences to overcome judicial rulings.

In other words, although the political branches may have various ways they can respond to judicial decisions, if there are significant structural or strategic impediments to effective political action in a particular constitutional system, they may be unwilling or unable to use these tools. To the extent that this is true, judges will have a greater degree of freedom to pursue their own understandings, even when these diverge from immediate political preferences, and will accordingly be less likely to engage in anticipated response calculations.

95 See, e.g., Cross & Nelson, supra note 87, at 1470 (discussing this effect of failure to implement judicial decisions).

96 See Lee Epstein, Jack Knight & Andrew D. Martin, The Supreme Court as a Strategic National Policymaker, 50 EMORY L.J. 583, 610 (2001) (providing empirical support for the proposition that Supreme Court Justices “adjust their decisions in anticipation of the potential responses from the other branches of government”). When adjusting their actions, judges can be expected to look to the preferences of the existing legislature, rather than the enacting legislature, as the existing legislature will be the one to act against the judiciary in the event of disagreement. See Ferejohn & Weingast, Positive Theory, supra note 85, at 270 (noting that under positive theory, “the preference configuration of the current legislature is far more important for the results of statutory interpretation than is that of the enacting legislature.”).

97 See, e.g., Maltzman et al., supra note 84, at 49.
Structural barriers to effective political action result from those institutional features of a political system that make it difficult for the legislature to act, even when a majority of legislators do not support what the judiciary has done in a particular case.98 The critical factor in this regard is the number of veto points there are in the policy-making process that allow specified institutional actors to block changes to the status quo.99 As the number of these veto points grows, the number of “veto players” who must cooperate to ensure the passage of legislation also increases.100 The consequence of this is that legislation will only be passed if all of the veto players agree that the proposed political solution is preferable to that chosen by the court. If any of the veto players consider that the proposed legislative alternative is less desirable than the solution chosen by the court, then political “gridlock” will result and passage of the legislation will be halted.101 In these circumstances, the judicial ruling will stand, even if it conflicts with the preferences of a legislative majority.

One structural aspect of political systems that influences the number of veto points and the resulting potential for gridlock is the extent to which power is divided horizontally between the legislature and the executive.102 As a general rule, the potential for gridlock increases as one moves from pure parliamentary systems towards the presidential model. In parliamentary systems which unite legislative and executive power, the prime minister commonly gives orders to members of his or her own party to enact government-sponsored legislation, which forestalls serious challenges through the legislative process.103 These dynamics are reinforced by the fact that strong party discipline tends to be a common feature of the parliamentary model.104 In presidential systems, in contrast, presidents typically have some kind of veto power over legislation, with the result that the legislature and the executive must negotiate to a greater extent over proposed laws.105

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98 See generally KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); Ferejohn & Shipan, supra note 85.
99 See KREHBIEL, supra note 98, at ch.6 (discussing “veto pivots” in the lawmaking process in the United States).
100 See GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002).
101 KREHBIEL, supra note 98, at 26 (defining gridlock as “the absence of policy change in equilibrium in spite of the existence of a legislative majority that favors change”).
102 Other structural aspects of political systems that influence the number of veto points are the structure of the committee system in the legislative branch and fragmentation of political parties. See, e.g., Ferejohn & Shipan, supra note 85; Rafael Gely & Pablo T. Spiller, A Rational Choice Theory of Supreme Court with Applications to the State Farm and Grove City Cases, 6 J.L. ECON. & ORG. 263 (1990); Maltzman et al., supra note 84, at 46-47.
103 See ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 212-23 (2000) (discussing how “separating power causes government to proceed more by bargains and less by orders”).
105 See John Ferejohn, Judicializing Politics, Politicizing Law, 65 LAW & CONTEMP. PROBS. 41, 58 (2002) (discussing how “power tends to be more fragmented in presidential than in parliamentary systems); Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 633, 645-48 (describing how presidential systems have a tendency to come to a political impasse).
The number of veto points in a political system and the potential for gridlock is also influenced by whether a system is unicameral or bicameral. While only one set of legislators must agree on a course of action in a unicameral system, both houses must concur in a bicameral system, at least where the constitution gives veto power to the upper chamber. Layering this structural feature of political systems on to the first, we can generally predict that there will be the least potential for gridlock in unicameral parliamentary systems, slightly more gridlock potential in bicameral parliamentary systems, more again in unicameral presidential systems, culminating in the greatest potential for gridlock in nations with bicameral presidential systems.

In addition to structural considerations, positive scholars have also suggested a broad range of strategic incentives motivating political respect for judicial rulings. Just as with the structural factors considered above, where these incentives are effective we can expect to find frequent political compliance with or implementation of judicial decisions, even where they diverge significantly from immediate political preferences. In turn, judges will retain significant strategic freedom to pursue their own preferences in specific cases.

The nature of the strategic incentives motivating political respect for judicial rulings can be expected to vary depending on the specific institutional and political dynamics of a constitutional system. For example, in some jurisdictions, the legislature might want to maintain an independent judiciary and ensure the future significance of its rulings as an “insurance policy against future electoral defeat.” Legislative majorities might also gain an informational advantage from active judicial review because judges can signal information about the concrete effects of legislation that was unavailable when the law was enacted. In other contexts, political actors might want to avoid responsibility for difficult decisions by passing them to an independent judiciary for resolution. Relying on an independent judiciary can also allow them to achieve policy goals that are too controversial to

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106 See, e.g., Cooter, supra note 103, at 223-25 (discussing the necessity for bargaining between the upper and lower houses of the legislature in a bicameral system).
107 Another factor that may increase barriers to action in a political system is the committee system in the legislative branch. See, e.g., Ferejohn & Shipp, supra note 85; Gely & Spiller, supra note 102.
110 See Mark A. Graber, The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary, 7 STUD. AM. POL. DEV. 35 (1993) [hereinafter Graber, The Non-Majoritarian Difficulty] (arguing that political leaders can get the courts to resolve controversial issues and hopefully get the resolution to “stick” in a way that allows the dominant coalition to be held together); Keith E. Whittington, ‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005) (arguing that judicial review might be supported by existing power holders when current elected officials are obstructed from fully implementing their own policy agenda).
pursue by other means. A further important incentive, specific to federal political systems, is that a federal government might value an independent judiciary for its role in monitoring the actions of sub-national governments or ensuring that the federation remains a successful one.\footnote{See Whittington, Legislative Sanctions, supra note 94, at 456-59.}

One of the most powerful forces leading political actors to enforce judicial rulings in the face of conflicting preferences, and one which is likely to be found in the overwhelming majority of constitutional systems, is high levels of public support for an independent judiciary.\footnote{See generally VANBERG, supra note 14, at ch.2 (2005); Georg Vanberg, Legislative-Judicial Relations: A Game Theoretic Approach to Constitutional Review, 45 AM. J. POL. SCI. 346 (2001).} The reason why this is such a compelling incentive does require some explanation, however, given that history has shown, on multiple occasions and in a diverse range of nations, that legislatures can frequently gain political capital by acting against the judiciary when its decisions run counter to popular views. The public support thesis nevertheless suggests that popular sentiment for an independent judiciary may actually protect it from political override or sanctions in a wide range of circumstances, even if the public disagrees with individual judicial rulings.\footnote{See, e.g., Gregory A. Caldeira, Neither the Purse or the Sword: Dynamics of Public Confidence in the Supreme Court, 80 AM. POL. SCI. REV. 1209 (1986) (suggesting that the backing force for the judiciary is public support); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, On the Legitimacy of National High Courts, 92 AM. POL. SCI. REV. 343, 343 (1998) (“[W]ith limited institutional resources, courts are ... uncommonly dependent upon the goodwill of their constituents for both support and compliance.”); Walter Murphy & John Tanenhaus, Publicity, Public Opinion and the Court, 84 NW. U. L. REV. 985 (1990).}

In order to understand this, we need to delve further into the mechanics of popular support. In this regard, social scientists have divided popular support for the judiciary into two components: specific and diffuse support.\footnote{See DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965). For a detailed analysis of the political science literature concerning the connection between specific and diffuse support, see Friedman, Politics, supra note 81, at 325-28.} Specific support refers to satisfaction with particular judicial rulings. Diffuse support, in contrast, refers to the more general support a national judiciary holds as an institution, distinct from its individual rulings.

Although research in this area has a number of limitations, principally related to the difficulties involved in separating the two forms of support, studies suggest that a dynamic relationship exists between specific and diffuse support. Diffuse support is “an attitude that evolves over time,” due to the slow accretion of positive messages about the judiciary and its constitutional role.\footnote{Gibson et al., supra note 113, at 345.} As a result, consistent specific support for judicial decisions can eventually lead to the acquisition of high levels of diffuse support over time.\footnote{Id. at 349-52.} Once diffuse support has been established, it is deeper and more constant than specific support and tends to be insulated to a significant extent from shifting views about particular judicial rulings. This means that if a national judiciary has been successful in building up diffuse support, it will be provided with some protection from popular disagreement with specific
decisions.\textsuperscript{117} Indeed, this appears to be what has occurred in most advanced Western democracies, where courts tend to enjoy considerable public support, particularly when compared to levels of public support for the other branches of government.\textsuperscript{118}

While this is the general rule, there does appear to be a distinction between how positive and negative reactions to specific rulings affect diffuse support. Although both kinds of reaction influence levels of support, negative reactions appear to be more readily forgotten, even if intensely held, whereas positive reactions tend to stick in the public consciousness over the longer term.\textsuperscript{119} The overall effect of these dynamics is that if a national judiciary has successfully built up diffuse support over time, it will have a greater degree of freedom to render unpopular rulings on occasion without risking significant dips in its levels of diffuse support.\textsuperscript{120} The political branches, in turn, will find it difficult to act against the judiciary in specific cases given the risk of electoral backlash, at least where citizens are aware of the judicial decision in question and are able to monitor political attempts at evasion.\textsuperscript{121} Where these twin conditions are satisfied, popular support for the judiciary thus operates as a most compelling incentive motivating political respect for judicial decisions.

3. The Constrained Judiciary

The additional layer to the positive account of judicial and political branch decision-making discussed in the previous Section suggests that some combination of structural and strategic impediments to political action is likely to prevent the political branches from regularly acting against the judiciary in most strong-form systems of judicial review, even in the event of significant disagreement with judicial results. We might therefore expect that judges in strong-form systems will be largely unconstrained in their actions and retain wide latitude to establish their own understandings as law. There are two reasons, however, why this conclusion is flawed.

First, even if structural and strategic forces within a political system are such that political actors will only infrequently act in response to judicial rulings, this does not mean that they will never do so. For example, even if an extensive set of veto points frequently hinders the legislative policy-making process, political responses to judicial decisions will still be possible if specific rulings were to diverge dramatically from the ideal preferences of the various veto players in the system.

\textsuperscript{117} See, e.g., Walter F. Murphy, Joseph Tanenhaus & Daniel Kastner, Public Evaluations of Constitutional Courts: Alternative Explanations (Harry Eckstein et al. eds., 1973) (suggesting that specific support may be closely correlated to diffuse support).

\textsuperscript{118} See, e.g., Gibson et al., supra note 113 (comparing the high levels of diffuse support for the US Supreme Court with that of other national constitutional courts).

\textsuperscript{119} See Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2618 (2003) (describing negative reactions to judicial rulings as having a “shorter half-life”).

\textsuperscript{120} Gibson et al., supra note 113, at 356 (“It appears that satisfaction slowly evolves into institutional legitimacy, and the degree of connection between specific and diffuse support is contingent on the institution’s age.”).

\textsuperscript{121} See Vanberg, supra note 14, at 21 (proposing high levels of popular support for the judiciary and citizen awareness of political attempts at evasion as the two conditions “that tap separate dimensions of the enforcement problem.”).
Strategic justices will also be aware that even if political actors are routinely motivated not to act against the judiciary, they might nevertheless calculate that the benefits of independent judicial review are outweighed by its costs in particular cases. Furthermore, although public support will often motivate political actors to respect judicial rulings, it will be less likely to do so where the citizenry are unaware of particular rulings and are unable to effectively monitor political attempts at evasion. In all of these circumstances, strategic justices will remain mindful that their decisions can be overcome, and can therefore be expected to temper their rulings in anticipation of such a result.

Secondly, even if justices in a particular system are not significantly constrained vis-à-vis the political branches within the constitutional system, this does not mean that they are not constrained by other forces. In this regard, just as the dynamics of popular support can constrain political action against the judiciary, they can also act as a brake on judicial power.\textsuperscript{122} Given that public support constitutes an important resource protecting the judiciary from political attack, a concern to maintain this support is likely to influence judicial behavior. Due to the way in which public support operates, judges are also likely to be aware that popular responses to specific rulings can have implications for diffuse support.\textsuperscript{123} This recognition can thus be expected to lead judges to remain sensitive to popular opinion, avoiding frequent decisions on highly salient issues that conflict with popular attitudes so as to maintain and consolidate their long-term support.\textsuperscript{124}

These hypotheses about the constraint of popular opinion on judicial action are supported by empirical evidence. In the United States, for example, where the majority of studies have been undertaken, there is strong evidence that judicial rulings do not deviate far from dominant popular opinion over the long term.\textsuperscript{125} Furthermore, if the two are in conflict, they do not stay this way for long, with judicial outcomes tending to shift in line with popular attitudes over time.\textsuperscript{126} This does not mean that judges will actually track public opinion, or that they will not hand down unpopular decisions on occasion. It does mean, however, that they are

\textsuperscript{122} See Friedman, \textit{Politics}, supra note 81, at 320-28; Peretti, supra note 88, at 163-84; Vanberg, \textit{supra} note 14, at 49-53.

\textsuperscript{123} See \textit{supra} notes 114-21 and accompanying text.

\textsuperscript{124} See, e.g., Peretti, \textit{supra} note 88, at 181-82 (suggesting the Court will find itself in difficulty if it repeatedly decides cases “out of sync with dominant public opinion”); Thomas W. Merrill, \textit{The Making of the Second Rehnquist Court: A Preliminary Analysis}, 47 ST. LOUIS U.L.J. 569, 628 (2003) (“[A] strategic Justice will realize that the decisions of the Court will be implemented by the other branches of government only if they do not deviate too far from dominant public opinion.”).

\textsuperscript{125} The precise dynamics of the connection between popular opinion and judicial outcomes, however, remains poorly understood. See Friedman, \textit{Mediated Popular Constitutionalism}, \textit{supra} note 119; Friedman, \textit{Politics of Judicial Review}, \textit{supra} note 81, at 325.

\textsuperscript{126} See, e.g., Robert A. Dahl, \textit{Democracy and Its Critics} 190 (1989) (“[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country.”); Robert G. McCloskey, \textit{The American Supreme Court} 224 (1960) (“[I]t is hard to find a single instance when the Court has stood firm for very long against a really clear wave of public demand.”).
likely to be aware that diffuse support may be lost if they were to hand down too many unpopular rulings, leading to a greater risk of political backlash in response.\textsuperscript{127}

In combination, these positive insights enable us to make a number of general predictions about judicial and legislative interactions in strong-form systems of judicial review. First and most generally, because the three branches stand in a system of separated powers, they can be expected to behave strategically in their interactions with one another in order to maximize their chances of establishing their preferences as law. Although the political branches have a variety of tools they can use against the judiciary in the event of disagreement with its decisions, the extent to which these are ultimately used will depend on the various structural forces and/or strategic incentives that can forestall or impede political action in a particular national system. The greater the power of these forces, the more freedom judges will have to establish their own understandings as law without risking a political response.

Even in systems where structural forces and strategic incentives are very strong, however, judicial freedom of action is not unlimited. Instead, judges remain constrained both because they will be aware that political responses will still be possible in certain cases, and because a concern to maintain popular support is likely to keep judicial rulings from shifting too far from popularly accepted views. Accordingly, we can expect that judges will adjust their rulings in order to avoid these results. In sum, therefore, the strategic dynamics of strong-form systems can generally be predicted to “leave[] judges reasonable discretion to effect their preferences in a single case but keep[] them from going too far in too many cases or ignoring the concerns of other institutions in general.”\textsuperscript{128}

\textbf{B. Positive Theory and the Dynamics of Weak-Form Systems of Judicial Review}

The fundamental precepts of positive theory, as gleaned from its application to strong-form systems of judicial review, can be applied to gain valuable insight into both the soundness of the normative behavioral assumptions underlying weak-form dialogue theory and the kinds of behavior we can in fact expect judges and legislators to engage in under weak-form charters of rights. Most generally, positive scholarship indicates that judges and legislators in all constitutional systems can be expected to act strategically (or interdependently) in their mutual interactions, regardless of the form that a particular national bill of rights takes. Judges are likely to act strategically when they realize that their fate rests on the preferences and actions of other institutional actors, and adjust their rulings in anticipation of the actions they expect those actors to take. Legislators, in turn, are likely to engage in strategic calculations both when determining whether successful political action is possible in light of the preferences of the various veto players in the constitutional


\textsuperscript{128} Cross & Nelson, \textit{supra} note 87, at 1473; see also \textit{VANBERG}, supra note 14, at 175 (“The power of constitutional courts is considerable but constrained.”).
system, and when weighing whether the costs of responding to specific judicial rulings outweigh the benefits of such a response.\textsuperscript{129}

This claim that strategic behavior will be common across constitutional systems does not mean that judges and legislators are only capable of acting on the basis of strategic considerations. In reality, it is likely that judges and legislative actors will be driven by a complex and entwined set of factors of a legal, ideological and strategic nature.\textsuperscript{130} Positive theory makes clear, however, that the branches can be expected to choose optimal strategies if they want their decisions to be effective, given the complex institutional environment in which they operate.\textsuperscript{131} While it would therefore be incorrect to claim that judges and legislators can never act in a way that is consistent with weak-form dialogue theory, the need for the branches to adjust to their environment nonetheless indicates that it will be rare to find judges and legislators in weak-form systems regularly acting on the basis of any normative desire to engage in inter-branch “dialogue” with one another.

The observation that judges and legislators are likely to act strategically in making their decisional choices tells us little, however, about the specific strategic moves that these actors are likely to make under the different weak-form models of judicial review. In strong-form systems, we have seen that the most important factors are likely to be the nature of the structural and/or strategic impediments to political action in a particular constitutional system and the operation of public support for an independent judiciary. Further consideration, however, must also be given to how the innovative power-distributing mechanisms contained in weak-form bills of rights might also affect strategic dynamics between the branches.

1. The Legislative Override Model

As observed previously, the structure of judicial review under the legislative override model has important similarities with that found in strong-form systems of judicial review. Of central importance in both systems is the fact that the judiciary is empowered to strike down legislation to enforce protected rights. The key difference of import between the two models relates to the formal ability of the legislature in an override system to overcome judicial rulings about fundamental rights by an ordinary legislative majority.

Considering this structural feature in isolation, we might expect that it would foster different strategic dynamics to those found in strong-form systems of judicial review. As we have seen, aside from the constitutional amendment power, the political branches in strong-form systems are restricted to blunt sanctioning tools

\textsuperscript{129} Legislators can and do, of course, act strategically in other ways, but consideration here is limited to strategic responses to the judiciary.

\textsuperscript{130} See, e.g., James L. Gibson, \textit{From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior}, \textit{5 POL. BEHAV.} 7 (1983) (“Judges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do. Individuals make decisions, but they do so within the context of group, institutional, and environmental constraints.”).

\textsuperscript{131} See, e.g., Mark Tushnet, \textit{Evaluating Congressional Constitutional Interpretations: Some Criteria and Two Informal Case Studies}, \textit{50 DUKE L.J.} 1395, 1396 (2001) (“Incentives and institutional characteristics only conduce to behavior, they do not determine it.”).
when they want to respond to constitutional rulings of the judiciary.\textsuperscript{132} While these tools can be very effective in constraining judges because they place the judiciary’s institutional integrity at risk, and not just the outcome of a specific case, this fact is also likely to weigh heavily on legislators when deciding whether sanctioning action should be pursued.\textsuperscript{133} If political actors are concerned to maintain the benefits of independent judicial review in a particular system, it is likely they will have greater difficulty reaching agreement that attacking the judiciary as an institution is an appropriate or legitimate response.\textsuperscript{134} Accordingly, we would expect such sanctioning action to be relatively rare. The override mechanism, in contrast, provides legislatures with a seemingly easy and straightforward way to respond to and set aside specific judicial rulings in a targeted fashion, focusing debate on the merits of individual cases rather than on the more controversial issue of the appropriate limits of judicial independence.\textsuperscript{135}

The apparent ease with which the legislative override can be used compared to the blunt methods of response available in strong-form systems does not mean, however, that we would expect to find legislatures regularly employing this power. One potential explanation for this rests on the phenomenon of anticipated reactions. In the context of the override, judges would be aware that if legislators made use of their override powers in a particular case, this would represent a severe blow to the achievement of judicial goals. In addition, if the override were to be used too frequently, this would also send a strong signal about the judiciary’s relative weakness as an institution, thereby damaging its longer term legitimacy.\textsuperscript{136} In light of this, judges can expected to calibrate their rulings in advance to minimize the override’s actual use.\textsuperscript{137}

The formal ease with which a legislative override can be employed thus suggests that it may operate as an effective constraint on judicial behavior, perhaps an even more powerful form of constraint than blunt sanctioning tools. This explanation is incomplete, however, because we have not yet factored in the various reasons why legislative actors may be unwilling, or unable, to make ready use of a legislative override, despite its formal ease of use. First, as observed previously,

\textsuperscript{132} See Whittington, Legislative Sanctions, supra note 94, at 449 (“The political power to sanction the Court [in the United States] is a blunt instrument.”).
\textsuperscript{133} See id. at 450.
\textsuperscript{134} See, e.g., Leuchtenberg, supra note 93, at 132-62 (discussing Roosevelt’s failed “court-packing” plan of February 1937).
\textsuperscript{135} See, e.g., Roach, Supreme Court on Trial, supra note 9, at 33 (“The 1982 Canadian Charter … ensures that a determined government can quickly enact effective replies to Court decisions.”). Cf. Mark Tushnet, Judicial Activism or Restraint in a Section 33 World, 53 U. Toronto L.J. 89, 97 (2003) [hereinafter Tushnet, Judicial Activism or Restraint] (suggesting that practical barriers may nonetheless make it can be difficult for the legislature to use the override power).
\textsuperscript{136} See, e.g., Christopher P. Manfredi, The Unfulfilled Promise of Dialogic Constitutionalism: Judicial-Legislative Relationships under the Canadian Charter of Rights and Freedoms, in Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia 239, 253 (Tom Campbell et al. eds., 2006); Vanberg, supra note 14, at 27.
\textsuperscript{137} See, e.g., William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991); William N. Eskridge, Jr., The Judicial Review Game, 88 Nw. U.L. Rev. 382, 386 (1993) (“[A] rational Supreme Court will usually interpret statutes and the Constitution in ways that avoid an immediate override by the political process.”).
there may be structural features of the constitutional system that promote political gridlock. The greater the number of veto points there are in a particular constitutional system, the more difficult it will be for a legislative majority to gain the support of the various veto players that use of the legislative override is an appropriate response to individual judicial decisions.

Second, and of equal importance, we can expect that most political systems will contain some variety of strategic incentives motivating political respect for judicial rulings. These incentives might stem, for example, from a desire to avoid responsibility for difficult decisions or from a desire to achieve policy goals that are too controversial to pursue by ordinary political means. A legislature might still be able to achieve these goals even if it made isolated uses of an override, given that such action does not directly attack the judiciary’s institutional integrity. Regular use of an override mechanism to avoid judicial decisions is nevertheless likely to undermine the future significance of judicial review because it would send a clear signal that judicial views are frequently not worthy of respect. If a legislature wants to maintain the benefits of independent judicial review for its own purposes, it would therefore be unlikely to resort to its override powers except on isolated occasions.

Similar to strong-form systems of judicial review, the incentive that is most likely to motivate legislative actors not to make use of an override power is high levels of public support for the judiciary. Although use of the override does not directly attack the judiciary as an institution, the public is still likely to demand political compliance with judicial rulings and disfavor uses of the override if they believe that respect for judicial decisions is important. It would also be difficult for a legislature to hide use of an override from the public, at least in relation to high salience cases. In such circumstances, judicial rulings striking down legislation and changing the law in relation to a particular issue are likely to receive considerable media attention, as are legislative debates about whether those rulings should be overcome, thereby ensuring that the issue remains on the public radar. Provided that levels of support for the judiciary are in fact high, the fear of a popular backlash can therefore be expected to encourage political actors not to use the override power in most cases, even if they disagree with the merits of a specific judicial ruling.

These considerations do not mean, of course, that a legislature will never be able to make use of an override power in a nation where the judiciary holds significant popular support. It always remains possible, for example, that judges will miscalculate the degree of specific support that exists for a particular ruling or in relation to a particular issue, and that this action will lead a sufficient proportion of

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138 Whittington, Legislative Sanctions, supra note 94, at 464-65 (suggesting that the legislature would lose much of the value of independent judicial review if an override were frequently used).
139 Cf. Janet L. Hiebert, Parliamentary Bills of Rights: An Alternative Model?, 69 Mod. L. Rev. 7, 27 (2006) (suggesting that a general culture has emerged in Canada in which political disagreement with judicial interpretations of rights are not considered “constitutionally appropriate.”).
140 See Kahana, Public Discussion, supra note 33, at 268-72 (discussing strong public attention and reaction to specific uses of the override in Canada that involved controversial social issues).
the population to support action overriding the court’s decision.\textsuperscript{141} Over the longer term, the judiciary might also find that its levels of diffuse support are damaged if it renders too many rulings that conflict with prevailing popular views, in which case the public may come to support more frequent uses of the override.\textsuperscript{142} On the whole, however, provided a national judiciary retains high levels of popular support amongst its public, we would not expect to see regular use of any override power by that nation’s legislative branch. Conversely, this also does not mean that we would expect to see judges freely imposing their own preferences when deciding rights-based cases, given the way in which popular opinion also constrains judicial action. What it does mean is that when judges speak out in a way that conflicts with political branch preferences, we are unlikely to see frequent political responses using an override mechanism.

In combination, this analysis indicates that although the legislative override mechanism is unique in the way in which it enables an ordinary legislative majority to directly set aside judicial rulings, it is far from unique in the impact it is likely to have on the strategic dynamics of judicial review. While the override power is formally easier to employ than the blunt tools of response common in strong-form systems of judicial review, the fact that repeated uses of an override can similarly harm the institutional integrity of the judiciary is likely to encourage political actors not to make frequent use of this mechanism. In most constitutional systems, we can also expect that some combination of structural features of the system and other strategic incentives is likely to prevent or forestall political actors from making regular use of an override, just as these factors will inhibit political actors in strong-form systems from making regular use of blunt sanctioning tools. As a result, and perhaps somewhat surprisingly given the way in which the legislative override model has been praised for pioneering a third model of constitutionalism, we can expect to find little difference in the general form of inter-branch interactions in both strong-form and legislative override systems of judicial review. To the extent that there are differences in judicial-legislative interactions in such systems, this will stem from the specific structural and strategic forces present that motivate political branch respect for judicial rulings, rather than from the mechanisms of legislative response that have been adopted.

2. The Declaration of Incompatibility Model

The claim that similar forms of interaction between the branches are likely in both strong-form and legislative override systems of judicial review can largely be explained by the parallel structure of those two models of judicial review: namely, both systems empower judges to strike down legislation, but simply have different mechanisms available to the political branches to respond to judicial rulings in the event of disagreement. The declaration of incompatibility model, in contrast, operates in a more distinctive way. Rather than allowing judges to invalidate

\textsuperscript{141} See supra notes 122-24 and accompanying text.
\textsuperscript{142} See, e.g., Lori Hausegger & Troy Riddell, The Changing Nature of Public Support for the Supreme Court of Canada, 37 CAN. J. POL. SCI. 23, 43 (2004) (“[Public] opposition might … make it difficult for the Court to legitimize the policy choices it makes. This latter consequence … might make judicial decisions more susceptible to the use of the Charter’s ‘notwithstanding’ clause.”).
legislation and then providing legislatures with an *ex post* method of negating judicial decisions, it instead places an *ex ante* restriction on judicial action by limiting judges to the issuance of purely hortatory statements about the impact of legislative measures on rights.\footnote{See supra notes 56-58 and accompanying text.}

On first appearances, it might be thought that strategically minded judges would take advantage of a declaration of incompatibility power to declare more frequently that challenged legislation is incompatible with protected rights than in systems where doing so would require them to invalidate the legislation in question. Striking down legislation, after all, has the potential to place the court in direct confrontation with the political branches due to the force of the court’s intervention in the policy process. Merely announcing an incompatibility between legislation and protected rights, on the other hand, does not place the legislature’s policy choices at the same degree of risk because the legislature can simply ignore the court’s ruling in the event of disagreement. The act of issuing a declaration of incompatibility would therefore seem to provide the judiciary with greater protection from subsequent political attack than if judges had the power to invalidate legislative choices.

This is not a complete answer, however, as we must also account for the fact that judges are unlikely to issue frequent declarations of incompatibility if they calculate that these declarations will be ignored or not implemented by the political branches. In this regard, the strategic calculations that judges can be expected to make are similar, but not identical, to those of judges who are concerned to ensure that their binding rulings are not overcome by political actors. At the most basic level, judges want their decisions to be effective and can therefore be expected to avoid courses of action that are unlikely to achieve this goal.\footnote{See Stephen M. Griffin, *American Constitutionalism, From Theory to Politics* 127 (1996) (observing that the “Court is aware that its rulings can be difficult to enforce and may be ignored” which “can influence the willingness of the Court to take on certain cases and may limit the remedies the Court applies in cases it does decide.”)).} In addition, the continued institutional authority of the judiciary and the future significance of its decisions may be at risk if the political branches consistently ignore declarations of incompatibility over the long term.\footnote{See, e.g., Poole, supra note 72, at 202 (“One (unintentional) effect of granting judges power short of constitutional review may be to reduce their bargaining strength – at least when compared to their colleagues who operate within more orthodox legal constitutional frameworks – the effect of which may be to make judges less inclined to speak up (or speak up so forthrightly).”).} This damage is unlikely to occur as rapidly as if regular *ex post* sanctions were placed on courts because mere inaction sends a more subtle message about the institutional position of the judiciary than overt sanctioning action. Nonetheless, over the longer term repeated failures to act may have a similar effect because they send a strong signal that judicial input on questions of rights is not considered as valuable or influential as legislative determinations, thereby exposing the judiciary’s relative weakness as an institution.\footnote{Vanberg, supra note 14, at 27 (“A successful evasion of a ruling is costly for the court as an institution because it undermines the court’s authority by challenging its role in the policymaking process and demonstrates its relative weakness.”); Cross & Nelson, supra note 87, at 1470 (“[F]ailure
The possibility that the political branches will fail to act on judicial declarations is quite real because of the way in which the unique power-distributing structure of the declaration of incompatibility model shifts the burden of legislative inertia.\textsuperscript{147} In systems in which judges have the power to strike down legislation, those who want to overcome an invalidation bear the burden of legislative inertia because the judicial ruling stands unless or until the necessary majority takes action in response. In a declaration of incompatibility system, in contrast, those who want action to be taken removing the incompatibility identified by the court bear the burden of legislative inertia. In this situation, the legislature itself is the beneficiary of the inertia because its original measures stand unless or until it decides to take remedial action.\textsuperscript{148} In the event that the sitting legislature has the same policy preferences as the enacting legislature, the incentives motivating legislative action would therefore need to be incredibly weighty to overcome the benefits of this inertia.\textsuperscript{149} In addition, if there are structural features of the constitutional system that promote political gridlock, this will make it more difficult for the legislature to act even if a majority is convinced that remedial action should be taken.

The incentives that might motivate political actors to take remedial action in a declaration of incompatibility system are likely to be much the same as those found in other systems of judicial review. As we have already seen, there are a variety of nationally specific reasons why legislators might place value on a strong and independent judiciary. If any of these incentives, or a combination thereof, carried particularly strong weight in a specific national context, they could be expected to prompt remedial measures following a judicial declaration in order to preserve the judiciary’s authority as an institution and ensure the future significance of its rulings.

In stark contrast to other models of judicial review, however, it is unlikely that public support for the judiciary would operate as such a powerful incentive for legislative action following a judicial declaration of incompatibility. If levels of popular support for the judiciary in a particular nation are high, then the public will expect the political branches to take action implementing judicial declarations. Even if this is true, however, it would be relatively easy for political actors in a declaration of incompatibility system to hide failures to take remedial action from the public.\textsuperscript{150} For example, if the public expected compliance with a judicial declaration in a particular case and pushed hard for an appropriate response, the legislature might announce its intention to amend the law in question in line with judicial views. The legislature would nevertheless retain significant leeway to back out of this commitment due to the time it takes for measures to pass through the legislative process to implement drains the court’s policy decision of meaning, may eliminate any policy benefit that the court hoped to achieve, and may incidentally undermine the future significance of judicial decisions. As such, it removes the incentive for courts to act contrary to the interests of other branches.”).

\textsuperscript{147} See generally Perry, supra note 4, at 670-71; ROACH, SUPREME COURT ON TRIAL, supra note 9, at 63.
\textsuperscript{148} See Kahana, Understanding the Notwithstanding Mechanism, supra note 30, at 250-51.
\textsuperscript{149} See supra note 96.
\textsuperscript{150} Vanberg, supra note 112, at 347 (“Voters must be able to monitor legislative responses to judicial rulings effectively and reliably.”).
process. As time continues to pass, issues can simply fade from the public radar and the public may be unaware that remedial action is never taken. Public concern about the issue may also simply fade with the passage of time.

Even if the public and the media continue to monitor the legislature, elected representatives may still be able to evade compliance. In this regard, even if legislative actors were to amend a statute or enact new legislation following a judicial declaration, they would retain significant discretion to change the law in a way that appears to implement the judiciary’s preferences but which actually avoids the full implications of the ruling. While the public might become aware of such evasion, this is less likely to happen if the judicial declaration concerns a highly technical area of the law or relates to issues of relatively low political salience.

While this analysis paints a clear picture of expected judicial and legislative behavior in relation to the declaration of incompatibility mechanism itself, the strong interpretive provisions that are commonly found in this weak-form model are also likely to influence strategic dynamics between the branches. Although there will be limits to how far judges can go in “interpreting” legislation, strong interpretive provisions provide strategically minded judges with an alternative and more effective way of achieving their preferences than by issuing a declaration of incompatibility. Of critical importance from a strategic perspective, if judges are able to implement their own preferences about the meaning and interpretation of rights by interpreting legislation so that it is compatible with protected rights, this will ensure that their preferences remain legally effective unless or until the legislature amends the statute or takes other remedial action. By reversing the effects of legislative inertia, the judiciary is thus more likely to see its preferences stand over the longer term, subject, of course, to the ever present risk of popular backlash.

The legislature would also face special difficulties if the court concluded that statutory language would violate protected rights unless interpreted in a particular way. In these circumstances, the only way the legislature could pursue its own understanding of the rights in question would be to re-enact the offending statute making clear that it meant what it said the first time. Over time, this action can be

151 It would make little difference if a “fast track” procedure, such as that found under the HRA, were in place because there is no requirement that such a process must be used. See supra note 58 and accompanying text.

152 Vanberg, supra note 112, at 347 (“[A] legislative collation may choose to comply procedurally (it does not revise the statute) but not substantively (the particular revision chosen still maintains the essence of the offending provision.”).

153 VANBERG, supra note 14, at 22 (“On issues that have low saliency, evasion is a much safer alternative than on issues that voters are intensely aware of.”).

154 See supra note 55 and accompanying text.

155 See Poole, supra note 72, at 202 (suggesting that an “unintended side-effect” of the declaration of incompatibility model is that it encourages judges to “interpret their way to results rather than referring them back to the legislature for a final decision.”). The extent of judicial discretion is likely to depend on the specific wording of the provision that is adopted.

156 See, e.g., Klug, Judicial Deference, supra note 66, at 130 (“The danger of proceeding through ‘the backdoor’ [with section 3] is a backlash which could halt further progress.”).

expected to be subject to further judicial interpretation. While the court might respond by reconsidering its initial interpretation of the right, it could also interpret the legislation in the same way it originally did. If this occurred, the legislature would be left with little practical option other than to modify the statute in accordance with the court’s interpretation of protected rights.

Taking these various considerations into account, this analysis indicates that we can expect to see rather different strategic moves by judges and legislators in declaration of incompatibility systems as compared to both legislative override and strong-form systems of judicial review, which can be attributed to the unique power-distributing mechanism central to the declaration of incompatibility model. On the one hand, we would expect to find judges in a declaration of incompatibility system preferring to use their interpretive powers whenever possible, rather than to issue declarations that may never become legally effective. In circumstances where this option is not workable, however, judges are likely to have much less discretion to pursue their own understandings of rights than under either the legislative override or strong-form models of judicial review, and can thus be expected to engage in anticipated reactions to avoid declarations of incompatibility whenever possible. This result is attributable both to the hortatory nature of declarations of incompatibility which shifts the burden of legislative inertia, and to the fact that public support for the judiciary is unlikely to be such a strong motivating force for political branch remedial action under this model. Only if other incentives are sufficiently powerful to motivate legislative actors to overcome their inertia, and the structural features of the political system are such that gridlock is uncommon, would we expect these dynamics to change.

IV. CANADIAN AND UNITED KINGDOM EXPERIENCE WITH WEAK-FORM MODELS OF JUDICIAL REVIEW

Given that positive theory is a form of predictive theory, it remains to be explored whether this account does, in fact, successfully explain the behavior of judges and legislatures under the leading weak-form bills of rights models. In order to do so, this Part returns to the Canadian and British experience with their respective charters of rights to assess how well experience in those nations fits with positive predictions. As we will see, the available evidence strongly supports positive expectations about judicial and legislative behavior under both the legislative override system and the declaration of incompatibility models.

A. Canadian Experience with the Legislative Override Model

As discussed in Part II, despite the hopes of many constitutional theorists, the legislative override contained in section 33 of the Canadian Charter has been rarely used by legislatures in Canada to respond to judicial decisions about the meaning and interpretation of rights. It is possible that this result could be attributed to successful anticipated reactions by the judiciary, based on the desire to avoid confrontations with the political branches. This is not a complete explanation, however, because it does not account for why the override is so infrequently used even when the political
branches disagree with individual judicial rulings.\textsuperscript{158} Consistent with the positive account of the legislative override model outlined in the previous Part, it instead appears that there are a variety of impediments to effective political action in Canada that prevent legislatures from regularly resorting to the override, even in the event of strong disagreement with specific judicial decisions. The force of these impediments is diminished in certain provinces, however, which also explains why the only uses of the section 33 override to respond to judicial rulings have taken place in Quebec.

Turning first to possible structural barriers to effective political action, the nature of parliamentary government in Canada is such that there does not appear to be a significant amount of political gridlock in that nation at either the federal or provincial levels. At the federal level, Canada has a parliamentary system of government with strong party discipline, which forestalls serious challenges to government-sponsored legislation as it passes through the legislative process.\textsuperscript{159} Although there is a bicameral system of Parliament and the Senate has a formal veto power over government bills, in practice the Senate rarely rejects bills that have been passed by the directly elected House of Commons. This stems from the fact that Senators are appointed by the Prime Minister, rather than elected directly by the people.\textsuperscript{160} Furthermore, unlike in many nations where parliamentary committees have great influence over legislative measures implicating rights, there is no federal parliamentary committee in Canada that is charged with examining whether use of the legislative override is appropriate or desirable in individual Charter cases.\textsuperscript{161} Provincial legislatures similarly conform to the parliamentary model, with a common tradition of strong party discipline.\textsuperscript{162} In addition, and in contrast to the federal bicameral system, legislatures in the provinces are all unicameral.\textsuperscript{163} Taking these federal and provincial features of government into account, this suggests that structural barriers to political action are much less likely in Canada than they are in many other nations.\textsuperscript{164}

In contrast to the minimal structural barriers to effective political action in Canada, there do appear to be a variety of powerful strategic incentives motivating political respect for judicial rulings in that nation. The first and most powerful strategic incentive is high levels of public support for the judiciary. While research in this area remains rather underdeveloped,\textsuperscript{165} the available social science evidence

\begin{itemize}
\item \textsuperscript{158} See Christine Bateup, Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective, 21 TEMP. INT’L & COMP. L.J. 1, 8-9 (2007) [hereinafter Bateup, Expanding the Conversation] (discussing the few instances in which section 33 has been used to respond to judicial decisions).
\item \textsuperscript{159} See generally MICHEL ROSSIGNOL, CROSSING THE FLOOR AND THE PARTY SYSTEM 8, 13 (1987); SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA (1989).
\item \textsuperscript{160} CAN. CONST. (Constitution Act, 1867), § 24.
\item \textsuperscript{161} See, e.g., Hiebert, Bills of Rights, supra note 139, at 12-13; JAMES B. KELLY, GOVERNING WITH THE CHARTER: LEGISLATIVE AND JUDICIAL ACTIVISM AND FRAMERS’ INTENT 245-55 (2005).
\item \textsuperscript{162} See generally LIPSET, supra note 159.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Cf. Tushnet, Judicial Activism or Restraint, supra note 135, at 97 (suggesting that there remain notable structural barriers to political action in the Canadian parliamentary system).
\item \textsuperscript{165} See Hausegger & Riddell, supra note 142, at 27-31.
\end{itemize}
indicates that diffuse support for the Supreme Court of Canada has remained at consistently high levels over the last two decades. Clear majorities of Canadians also report that they are comfortable with the courts having the final say about whether a law violates the Charter and that they are satisfied with the way the Supreme Court has been doing its job.

The nature of the connection between specific and diffuse support for the judiciary in Canada also appears to be consistent with studies undertaken in other nations. On the one hand, the Supreme Court of Canada has a sizable reservoir of support amongst its public and this support is not easily lost in the face of individual decisions that run counter to popular attitudes. Nonetheless, studies have also shown that “[t]he cumulative effect of consistent disagreement with Court rulings is markedly greater than the impact of single decisions in isolation.” Thus, if the Court were to hand down a series of salient rulings over time with which a significant proportion of the public disagreed, the data indicates that this is likely to lead to a discernable drop in levels of diffuse support for the judiciary.

This evidence demonstrating high levels of support for the Supreme Court amongst the Canadian populace supports the proposition that Canadian legislatures are generally motivated not to use their override powers because doing so would lead to a significant risk of electoral backlash. Legislative majorities are also likely to be “caught” by the public when contemplating use of the override power because discussions about this issue tend to receive considerable media attention in Canada, at least in relation to high salience cases. Indeed, on the rare occasions when Canadian legislatures have used, or have considered using, the section 33 override following a Supreme Court ruling, a significant popular outcry has followed, indicating high levels of public awareness of legislative proposals for action. It is likely that some of this negative public reaction stems from popular agreement with the position that the Court has taken. Nonetheless, even when there has been

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167 See Parkin, supra note 166, at 369 (referring to studies indicating that roughly 70% of Canadians prefer that the courts have the final say when a law conflicts with the Charter, while less than 25% favor the legislature having this role); Fletcher & Howe, Canadian Attitudes, supra note 166, at 11-12 (referring to polling data indicating that 60% of Canadians preferred the Court, rather than the legislature, having the final say).
169 Id. at 54.
170 Id. at 52; see also Hausegger & Riddell, supra note 142 (finding some support for the hypothesis that the connection between specific and diffuse support has increased as the Court has become more polarized).
171 See, e.g., Bateup, Expanding the Conversation, supra note 158, at 44-45 (discussing media attention to, and public discussion of, the Alberta government’s proposal to use the override in response to Vriend v. Alberta, [1998] S.C.R. 493 (Can.)).
172 This is true, for example, in relation to the Alberta legislature’s failed attempt to override Vriend v. Alberta, [1998] S.C.R. 493 (Can.). See generally id. at 45-46.
notable popular opposition to a specific ruling, the judiciary appears to have been protected by the strong levels of diffuse support that it holds.\textsuperscript{173}

Although popular support thus appears to be a powerful incentive motivating Canadian legislators not to use their override powers, this analysis requires some additional refinement in relation to the provinces. As observed previously, the only circumstances in which use of the section 33 override has been seriously contemplated have involved provincial legislatures.\textsuperscript{174} Furthermore, the only province to have successfully utilized the override to respond to judicial rulings is Quebec.\textsuperscript{175} Closer examination reveals, however, that greater preparedness to use the legislative override in specific provinces is consistent with positive expectations because the judiciary does not appear to receive the same level of protection from public support in some provinces as in other parts of the nation.

Beginning with Quebec, the available evidence indicates that overall satisfaction with the Supreme Court is fairly high in that province, though slightly lower than in the rest of Canada.\textsuperscript{176} Polling data nevertheless indicates that Quebecers are manifestly more open to the idea of doing away with the Supreme Court completely if it began to consistently make decisions that ran counter to dominant popular opinion.\textsuperscript{177} A majority of Quebecers also support reducing the power of the Court to decide controversial issues, in contrast to other Canadians who are relatively content with the Court playing this role.\textsuperscript{178} Levels of diffuse support for the judiciary thus appear to be discernibly lower in Quebec than in the rest of Canada.

These dynamics regarding popular support are replicated amongst other Canadians with strong provincial attachments. This is most apparent in the Western provinces, such as Alberta, where citizens frequently express discontent that they do not have a greater say in national affairs.\textsuperscript{179} While overall satisfaction with the Court remains significant for those with strong provincial attachments, these attachments do make a significant difference to other levels of support for the Court. For

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\item \textsuperscript{173} See, e.g., R.J.R.-MacDonald v. Canada, [1995] S.C.R. 199 (Can.) (invalidating federal legislation that banned tobacco advertising on freedom of the press grounds). Although this decision was very unpopular, potential use of the override was ultimately more unpopular than the ruling itself. See Leeson, supra note 17, at 320; JANET L. HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT’S ROLE? ch.4 (2002).
\item \textsuperscript{174} See supra notes 33-34 and accompanying text.
\item \textsuperscript{175} The Alberta government preemptively invoked the override clause in 2000 in an attempt to preserve the opposite sex definition of marriage. This was ineffective, however, as provincial governments do not have the power to define marriage in Canada. See Bateup, Expanding the Conversation, supra note 158, at 49.
\item \textsuperscript{176} Fletcher & Howe, Canadian Attitudes, supra note 166, at 16 (reporting that 69\% of Quebecers express satisfaction with the Supreme Court, compared to 79\% of respondents in the rest of Canada).
\item \textsuperscript{177} Id. at 17, 19 (showing that while only 36\% of Canadians agreed with this proposition, 55\% of Quebecers were open to doing away with the Court if it began to consistently make decisions with which people disagreed).
\item \textsuperscript{178} Id. at 17-18 (51\% in favor and 33\% against).
\item \textsuperscript{179} For a recent discussion, see ROGER GIBBONS & LOLEEN BERDAHL, WESTERN VISIONS, WESTERN FUTURES: PERSPECTIVES ON THE WEST IN CANADA (2003) (arguing that Western Canadians feel alienated from the rest of Canada, including the federal government, and are concerned that their political goals are not shared by the rest of the country).
\end{itemize}
example, studies suggest that 64 percent of such people agree that the Court’s power to decide controversial cases should be reduced, and the same percentage agree that it might be best to do away with the Court altogether if it started to make a large number of decisions with which people disagreed.\textsuperscript{180}

These statistics concerning popular support are not specific to the Court’s role in Charter cases, but concern its constitutional role more generally. It is therefore possible that lower levels of diffuse support for the Court amongst Quebecers and other Canadians with strong provincial attachments are connected to the judiciary’s contentious role in federalism cases.\textsuperscript{181} At the very least, however, the available evidence is consistent with the proposition that Quebecers and others with strong provincial attachments may be more likely to support provincial use of the override in circumstances where the Court acts against dominant public opinion in their province. If this is true, we would expect these dynamics to motivate the Court to avoid frequent invalidations in relation to issues likely to provoke significant provincial controversy.

This expectation has in fact been borne out in practice, with the Supreme Court only rarely invalidating legislation in core areas of provincial responsibility.\textsuperscript{182} In particular, minority language and education rights cases, which have generated significant public controversy in Quebec — and other provinces — since the Charter’s enactment, have resulted in the invalidation of legislation on only four occasions.\textsuperscript{183} While firm conclusions are difficult to draw, this anecdotal evidence provides strong support for the hypothesis that strategic dynamics between courts and legislatures operate slightly differently in provinces such as Quebec than in the rest of Canada.

Consideration of the provincial situation also reveals an additional incentive that appears likely to motivate the federal government in Canada to respect Supreme Court Charter rulings even in the event of significant disagreement. Specifically, the federal government has a powerful incentive not to undermine the long term significance of constitutional review by making frequent use of the override because it relies on the Supreme Court as a partner in maintaining the Canadian federation.\textsuperscript{184} Although the threat of secession has subsided somewhat in recent years, Quebec nationalism remains an ever present force in Canadian politics.\textsuperscript{185} If secessionist sentiment were to reemerge in Quebec, this might also exacerbate the push for

\textsuperscript{180} Id.
\textsuperscript{181} See id. at 20 (“Federal authority and the Supreme Court’s role in division of powers and reference cases are contentious issues in Quebec. Many Quebecers likely oppose the Supreme Court not because it sometimes strikes down legislation passed by elected bodies, but because they reject federal authority.”).
\textsuperscript{182} See KELLY, supra note 161, at 147.
\textsuperscript{184} See Bateup, Expanding the Conversation, supra note 158, at 33-39.
\textsuperscript{185} See PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? (3d ed. 2004) (discussing the effects of Quebec nationalism on Canadian federal politics).
greater power in the Western provinces. It is thus clearly in the federal government’s strategic interests to foster a strong federal judiciary that can assist it in consolidating the supremacy of the Canadian Constitution and ensuring the maintenance of the present federal structure. Safeguarding the judiciary’s institutional authority by avoiding the legislative override also enables the federal government to shift responsibility for controversial policy goals to judges when this might provoke a provincial backlash.

While care must be taken in drawing firm conclusions from limited empirical data, the available evidence strongly supports positive expectations about judicial and legislative behavior under the legislative override system in Canada. Despite the dominant narrative that historical circumstance alone explains the desuetude of the Canadian override, it instead appears likely that a combination of strategic incentives motivating political respect for judicial rulings in Canada is also at play. Of primary importance, popular support for the judiciary operates as a powerful incentive, particularly outside Quebec and the Western provinces. The federal government also has an important interest in sustaining a powerful federal judiciary to support its institutional position vis-à-vis the provinces. Particularly at the federal level, these incentives thus explain why we do not see frequent resort to the override, even in the event of significant political disagreement with individual judicial rulings. This does not mean, however, that judicial freedom of action is unlimited due to the way in which popular opinion also operates as a notable constraint on judicial action. Indeed, if the Canadian judiciary were to render too many Charter rulings that conflict with prevailing popular opinion, particularly in relation to controversial social issues, the public may come to support more frequent use of the override power. Accordingly, and as predicted, the result is a similar form of strategic dynamics to what we might expect to find in a strong-form system of judicial review.

B. British Experience with the Declaration of Incompatibility Model

In contrast to Canadian experience, which fits well with positive predictions, British experience with the HRA appears to raise greater questions regarding the

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186 See Gibbons & BerdaHL, supra note 179.
188 See generally Bateup, Expanding the Conversation, supra note 158.
189 See Sujit Choudhry & Claire E. Hunter, Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. Nape, 48 McGill L.J. 525, 543 (2003) (suggesting that positive evidence might indicate that the override has not been delegitimized in Canada and may come to be used again in the future if circumstances change).
190 Positive insights also help us to understand the operation of section 1 in the Canadian context. As discussed previously, weak-form dialogue theorists in Canada now argue that section 1 is the key provision enabling dialogue between the branches under the Charter. See supra notes 41-46 and accompanying text. The use of reasonable limits analysis is better viewed, however, as a form of strategic behavior by the judiciary. In effect, this action reduces the risk that the override will be employed by leaving space for less confrontational legislative responses. See Bateup, Expanding the Conversation, supra note 158, at 40 n.221.
explanatory force of positive theory. After all, contrary to the general predictions made in the previous Part, judges in the United Kingdom have not been particularly reluctant to issue declarations of incompatibility under section 4 of the HRA. Furthermore and also contrary to the expectations outlined in Part III, the British Parliament has almost universally responded to judicial declarations of incompatibility by amending or repealing the statute in question.

The previous Part did explain, however, that its general predictions regarding the declaration of incompatibility model would not be applicable in all constitutional settings. As a general rule, it was suggested that the way in which the unique power-distributing structure of the declaration of incompatibility model shifts the burden of legislative inertia means that legislatures will be unlikely to respond to judicial declarations by taking remedial action in most constitutional systems, particularly if the structure of the constitutional system promotes political gridlock. Consequently, it was also suggested that judges can generally be expected to avoid declarations of incompatibility whenever possible so as to avoid damage to their institutional integrity. It was also recognized, however, that there would be exceptions to these general rules in certain constitutional settings. In this regard, these general dynamics would not apply in settings where particularly weighty incentives existed motivating political branch respect for, and implementation of, judicial declarations of incompatibility. As we will see, this exception is in fact the rule in the United Kingdom, where one particularly powerful and nationally-specific incentive appears to motivate the political branches to take regular remedial action following judicial declarations.

In order to understand the dynamics of the British system, it is helpful to begin by taking a closer look at the fourteen cases in which British courts have rendered declarations of incompatibility and which have led to parliamentary responses. In two of these cases, the offending provisions were no longer in force when the declarations of incompatibility were announced. This fact is likely to have encouraged judicial resort to the declaration of incompatibility power, as there was simply no risk that these rulings would not be effective in light of the prior legislative repeals. Issuing declarations of incompatibility in these cases was also a valuable strategic move in the early years of the HRA’s operation because they provided judges with a non-controversial context in which to assert their new powers. In so doing, the judiciary was able to assert itself as a key player in the new system of rights protection established by the HRA.

191 There is a notable dearth of social science evidence regarding institutional behavior and the operation of public support in the United Kingdom. The following analysis is thus necessarily restricted to consideration of more anecdotal evidence about judicial and legislative behavior in the British setting.
192 See supra notes 78-79 and accompanying text.
194 See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES ch.3 (2003) (discussing various circumstances in which judiciaries exercising new judicial review powers can strategically cultivate their influence).
Closer examination of the rulings in which declarations of incompatibility were issued also reveals that eleven of these cases involved legislation that was in force prior to the enactment of the HRA.195 There are two related reasons why declaratory action in these cases is not necessarily inconsistent with positive expectations. First, the fact that judicial declarations were made in relation to older statutes can be viewed as consistent with the British government’s general intention, when it enacted the HRA, to alter conceptions of what forms of political action are now legally acceptable. The passage of the HRA is therefore likely to have sent a signal to British judges that they should update older statutes to ensure that they conform to the new rights regime.196 In addition, encouraging the judiciary to scrutinize and update legislation enacted in an earlier policy context, rather than leaving this task to Parliament itself, can be seen as an efficient political strategy given limited parliamentary time and resources.197 As the years pass, however, and older legislation is progressively updated, we can expect that the numbers of declarations of incompatibility rendered in relation to older statutes will also decline.

The second, and related, reason why the numbers of declarations of incompatibility that have been issued in relation to older statutes is not necessarily in conflict with positive expectations is because judicial action in these cases might have been consistent with the preferences of the sitting Parliament. Most generally, the fact that Labour remains in power continues to send a clear signal to the courts about existing political branch preferences regarding the protection and enforcement of Convention rights. More specifically, the courts might also have declared legislation incompatible with protected rights in particular cases because they formed the view that those laws did not conform to the substantive preferences of the sitting, as opposed to the enacting, Parliament.198

While these two factors provide some explanation as to why Parliament has routinely responded to declarations of incompatibility with conforming remedial action, they do not, by themselves, provide a complete explanation of the dynamics of judicial and legislative behavior under the HRA. There is because there is an even more powerful and unique motivating force that appears to operate in the British

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196 See, e.g., KELLY, supra note 161, at 149 (“[J]udicial activism may be an irrelevant empirical consideration if the Court simply invalidates statutes enacted in a pre-rights policy context”).
197 See Segal, supra note 83, at 31 (noting the “transition costs and opportunity costs to passing legislation.”).
198 See, e.g., Barry Friedman & Anna L. Harvey, Electing the Supreme Court, 78 Ind. L.J. 123 (2003) (showing that the United States Supreme Court is more likely to invalidate legislation when an ideologically similar Congress is in power).
setting and in a wider range of cases. This is connected to the United Kingdom’s obligations as a signatory to the European Convention on Human Rights.

As a matter of international law, the European Convention became binding on the British government when it came into force on September 3, 1953.\textsuperscript{199} Although no action was taken to give domestic effect to the rights contained in the Convention until the passage of the HRA, individuals have been able to bring individual petitions before the European Court of Human Rights (the “European Court”) since 1966. This right of individual petition remains in force today provided that all domestic remedies have first been exhausted. Following the enactment of the HRA, this means that where the British government and the courts have failed to remedy a violation of Convention rights — including cases where the judiciary has been restricted to issuing a declaration of incompatibility and Parliament has failed to take remedial action — individual litigants can take their case to the European Court in Strasbourg.\textsuperscript{200} Although rulings of the European Court do not automatically take effect as domestic law, the British government is treaty-bound to respect the Court’s decisions.

The threat of individual petition and the risk that the United Kingdom would suffer significant political embarrassment if it were to lose a case before the European Court create real indirect pressure and a strong incentive for the British government to respond to a judicial declaration of incompatibility by amending the relevant legislation in accordance with judicial views.\textsuperscript{201} As Michael Perry has observed, it was in part to avoid such embarrassment that the British Parliament adopted the HRA in the first place, as the United Kingdom had already lost a number of high profile rights cases before the European Court.\textsuperscript{202} Specifically, it was thought that if British courts could protect Convention rights at the domestic level, this would both lessen the number of cases in which the United Kingdom was brought before the European Court and would also mean that the government would be less likely to lose cases in Strasbourg.\textsuperscript{203}

In circumstances where the European Court has already ruled that certain kinds of legislative measures conflict with Convention rights, British courts are in the strongest strategic position to render declarations of incompatibility in relation to similar national measures. Indeed, on a number of occasions when British courts have issued declarations that legislation is incompatible with Convention rights, they have been acting to give domestic effect to the existing jurisprudence of the European Court.\textsuperscript{204} Even in cases where the European Court has not yet ruled, the

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  \item \textsuperscript{199} See WADHAM & MOUNTFORD, supra note 52, at ch.2.
  \item \textsuperscript{200} European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Art. 34.
  \item \textsuperscript{201} See Lord Irvine of Lairg, Sovereignty in Comparative Perspective: Constitutionalism in Britain and America, 76 NYU L. REV. 19 (2001); Perry, supra note 4, at 670-71; Adrienne Stone, The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act, in SCEPTICAL ESSAYS ON HUMAN RIGHTS, supra note 2, at 409.
  \item \textsuperscript{202} Perry, supra note 4, at 671.
  \item \textsuperscript{203} See, e.g., HOUSE OF COMMONS, HANSARD, Feb. 16, 1997, col.780 (Jack Straw).
  \item \textsuperscript{204} For example, in \textit{R (Anderson) v. Secretary of State for the Home Department}, [2003] 1 AC 837, the House of Lords issued a declaration of incompatibility on the ground that a power conferred on the
continuing possibility of individual petition to that Court is likely to act as a very strong incentive for the political branches to respond to a judicial declaration with genuine remedial legislation. The fact that there are few conditions for political gridlock in the United Kingdom, with a parliamentary system of government with strong party discipline and an appointed upper chamber, also ensures that the government is generally able to guarantee the passage of remedial legislation through Parliament, even if individual parliamentarians disagree with this course of action. Knowledge of these factors is likely to lead to more frequent declarations of incompatibility being issued by judges, even when judicial preferences are inconsistent with the preferences of the sitting Parliament. It also means that British courts can more confidently use their interpretive powers under section 3 of the HRA to read legislation compatibly with Convention rights, even if this conflicts with legislative intention.

This analysis does not mean that British judges are completely free to pursue their own preferences when the possibility exists of an appeal to the European Court. Of principal importance, and similar to other systems of judicial review, the British judiciary is likely to be constrained by popular opinion when making decisional choices. The force of popular opinion as a constraint on judicial behavior is currently quite difficult to test in the British context, given the dearth of social science scholarship addressing this question. Nevertheless, studies that have been undertaken in other nations have shown that, as a general rule, the age of judicial institutions tends to correlate with high levels of popular support because “to know something about courts is to be favorably oriented toward them.” Similarly, these studies also suggest that the degree of connection between specific and diffuse support is also contingent on the age of the judicial institution. Even taking this consideration into account, however, judges in the United Kingdom retain significant power to pursue their own preferences under the HRA due to the operation of the European incentive.

Although this account of the strategic dynamics between British judges and legislators does conform with positive expectations, it nonetheless represents an exception to how the declaration of incompatibility model has been predicted to operate in most national contexts. Although there are a very small number of declaration of incompatibility systems now in operation in other jurisdictions, those

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Home Secretary by section 29 of the Crime (Sentencing) Act 1997 to control the release of mandatory life sentence prisoners was inconsistent with the right to a fair trial under Article 6 of the European Convention. Two recent decisions of the European Court had already come to similar conclusions. See Stafford v. United Kingdom, 35 EUR. Ct. H.R. 1121 (2002); Benjamin v. United Kingdom, 36 EUR. Ct. H.R. 1 (2002). Similarly, in Bellinger v. Bellinger, [2003] 2 AC 467, the House of Lords made a declaration of incompatibility under section 4 of the Human Rights Act that statutory provisions preventing a transsexual from marrying were incompatible with Articles 8 and 12 of the Convention. One year earlier, the European Court had already announced that United Kingdom law in this area was incompatible with these Convention rights. See Goodwin v. United Kingdom, 35 EUR. Ct. H.R. 447 (2002).

[205] See WALDRON, supra note 104 (discussing party discipline in the United Kingdom context).
[206] See supra note 122-27 and accompanying text.
[208] Id. at 356.
systems are presently too new to provide any helpful information.\textsuperscript{209} As a result, it remains for another time to consider whether these more general predictions are valid. The positive analysis that has been undertaken in this Article nevertheless fits with the actual behavior of judges and legislators in the nations that have been examined better than any other theory that has presently been proposed. We should therefore be confident that the predictions that have been made offer valuable insight into judicial-legislative dynamics across the different models of judicial review.

V. \textbf{REFRAMING THE CONCEPT OF DIALOGUE}

The positive analysis undertaken in Parts III and IV has yielded some interesting and possibly unexpected conclusions about the kind of behavior we can expect of judges and legislators under the leading weak-form bills of rights models. First and most generally, positive theory indicates that judges and legislatures will act strategically in their interactions with each other regardless of the form that a particular national bill of rights takes. While strategic judicial and legislative behavior is likely to be a universal feature of constitutional systems, Parts III and IV also demonstrated that the form of rights-based judicial review that a particular nation has adopted can have a significant impact on the strategic interplay between the branches. Contrary to what we might initially expect, the most important factor in this regard is not the distinction between strong-form and weak-form models of judicial review. It instead relates to whether judges are granted the power to strike down legislation, or whether they are restricted to purely hortatory statements that legislation is incompatible with protected rights.

It is clear that these positive claims pose a fatal challenge to weak-form dialogue theory because they starkly reveal the flaws inherent in that theory’s normative behavioral assumptions. This does not mean, however, that the concept of “dialogue” should be entirely discarded. Dialogue in fact remains a highly useful theoretical concept, provided we understand that weak-form dialogue theorists have simply been looking for dialogue in the wrong place. Rather than understanding dialogue as a limited form of institutional interaction between judges and legislatures that is facilitated by the adoption of weak-form instruments and requires the branches to adopt a specific normative posture to each other’s rights-based contributions, this Part instead proposes that dialogue is best understood as a more general and wide-ranging feature of the strategic relationship between the judiciary and other actors. On this understanding, both strong-form and weak-form systems can be expected to generate similar forms of \textit{society-wide} dialogue between the judiciary, the political branches and the people about the meaning and interpretation of rights. Certain judicial review forms can nonetheless be favored over others due to the way in which they enhance the potential for more productive society-wide discussion.

A. \textbf{The Concept of Society-Wide Dialogue}

The theory of constitutional dialogue as a society-wide practice was first proposed by American scholars as a way of explaining the nature and function of

judicial review in the United States. Their aim in so doing was to articulate a descriptive theory of judicial review that takes constitutional politics seriously and more accurately reflects how judges, particularly Supreme Court Justices, behave than conventional normative scholarship. Consistent with these goals, the theory of society-wide dialogue draws on positive insights to highlight the mutual interdependencies between different constitutional actors and the way in which institutional and political constraints impact on constitutional judging.

Recognizing that judicial review involves the exercise of interdependent power, this account of dialogue starts from the premise that judicial decisions are not necessarily the final word on the constitutional issues being considered in a case. Judicial review nevertheless plays an extremely important function in the constitutional system because judicial decisions spark (or continue) a broader societal discussion between the judiciary, the political branches, and the people about constitutional meaning and the particular rights and values at stake in specific cases. Although discussion about these issues may already be taking place within society without judicial prompting, judicial decisions about controversial issues that are framed in constitutional terms can help to actively channel, maintain and focus the terms of that debate within both the political branches and the populace. The fact that judges speak in this way may also serve to enhance broader public consideration of particular controversies by “increasing popular awareness of certain fundamental issues.” Judicial decisions can then set off a process of further debate, either by acting as a catalyst for discussion along particular lines or prodding other institutions into deliberative action.


211 See, e.g., Mark A. Graber, Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship, 27 Law & Soc. Inquiry 309, 331 (2002) (“Theories of judicial review that take constitutional politics seriously explain whether judicial practice over the past 200 years can be justified, not whether some hypothetical judicial practice satisfies the appropriate normative standards.”)

212 See, e.g., Friedman, Dialogue, supra note 210, at 653 (explaining that the word ‘dialogue’ “emphasizes that judicial review is significantly more interdependent and interactive than generally described.”).


214 See Friedman, Dialogue, supra note 210, 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.”); Post, supra note 210, at 76 (conceiving of the judicial development of constitutional law as “a dialogue with the constitutional culture of the nation”).

215 See Friedman, Positive, supra note 210, at 1295-96 (“Prompting, maintaining and focusing this debate about constitutional meaning is the primary function of judicial review.”).

The judiciary’s participation in society-wide dialogue is not limited, however, to sparking a process of national conversation. The dynamic and interactive nature of dialogue also means that judges are affected and shaped by the conversation that takes place due to the possibility of popular disagreement motivating disciplinary action by the political branches.\textsuperscript{217} It is for this reason that public opinion operates as such a strong driving force for the process of society-wide dialogue.\textsuperscript{218} When a controversial judicial ruling is handed down, this tends to prompt discussion and debate about the merits of that decision within society. Frequently, much of this reaction is critical, allowing those who disagree with the ruling to come together in opposition.\textsuperscript{219} Over time, the discussion may lead to shifts in popular attitudes towards the position that the Court has expressed. Alternatively, if the Court has misjudged the amount of popular disagreement that exists in relation to a specific issue, the ongoing debate may lead to a solidifying of popular opinion at odds with the Court’s ruling and encourage the political branches to reach into their bag of tools to bring the judiciary back into line. As a result of this dissent, the judiciary may, over the longer term, come to reconsider and reshape its decisions in particular areas, with the perspectives of non-judicial actors as much, if not more, of an influence on judges than the other way around.\textsuperscript{220} As these dynamics play out over the long term, a relatively stable and enduring equilibrium about constitutional meaning will result that is broadly accepted by the various participants in the national conversation.\textsuperscript{221}

This description of dialogue as a society-wide practice provides a rather different vision of dialogue than that proposed by weak-form theorists. As we have seen, weak-form dialogue theory tends to be largely prescriptive, positing ideal forms of judicial and legislative behavior that are necessary for weak-form dialogue to be realized in practice.\textsuperscript{222} Weak-form dialogue theorists also propose a strictly inter-branch account of dialogue that concentrates solely on interactions between courts and the political branches of government. The theory of society-wide dialogue is, in contrast, a heavily descriptive — or positive — account of dialogue

\textsuperscript{217} See Friedman, Dialogue, supra note 210, at 679 (“[This] dynamic tension [is what] moves the system of constitutional interpretation along.”).

\textsuperscript{218} See Friedman, Positive, supra note 210, at 1294-95 (identifying popular opinion as one of the principal driving forces of constitutional dialogue); Friedman, Politics, supra note 81, at 334 (arguing that the system of judicial review in the United States is “dialogic and self-enforcing” because it “creates continual exchange between constitutional meaning and popular opinion, though systematically and at a remove.”).

\textsuperscript{219} See, e.g., Michael J. Klarman, How Brown Changed Race Relations, supra note 127 (describing the enormous white “backlash” against Brown, which united those opposed to the decision).

\textsuperscript{220} As Friedman states, the fact that there is some slack between the Supreme Court and popular views means that the Court is not immediately responsive to popular opinion, but instead to “a body of opinion that endures over time.” Friedman, Positive, supra note 210, at 1297. This ensures that constitutional change will occur only after an intense national debate about an issue has taken place.

\textsuperscript{221} See Post, supra note 210, at 108 (arguing that a “relatively stable equilibrium” develops over time “in which the beliefs and values of the nation … will roughly correspond to the constitutional standards … enforced by the Court.”); Barry R. Weingast, The Political Foundations of Democracy and the Rule of Law, 91 AM. POL. SCI. REV. 245, 245 (1997) (suggesting that “democratic stability depends on a self-enforcing equilibrium” and that “it must be in the interests of political officials to respect democracy’s limits on their behavior”).

\textsuperscript{222} See supra Part II.
that is firmly grounded in the social science evidence examined in Parts III and IV regarding how judicial review actually operates. On this understanding, dialogue is not just some normative ideal to be pursued, but a richer description of actual practices that stem from the broader institutional environment in which judges operate. Of equal importance, and as a consequence of this positive focus, this alternative vision of dialogue does not focus narrowly on inter-branch relations in the context of individual cases, but on broader forms of society-wide conversation between the judiciary, the political branches and the populace that take place about the meaning of fundamental values over the longer term.\(^{223}\) In so doing, the theory thus recognizes the central role of public support for the judiciary as a key determinant of both judicial and political branch behavior.

This central focus on the society-wide aspects of dialogue does not mean that the branches cannot make institutionally distinct contributions to the broader dialogue that takes place. In fact, in addition to the judiciary’s role in channeling and fostering societal debate about fundamental values, both the judiciary and the legislature can make important contributions to society-wide discussions based on their distinct perspectives and unique institutional capacities.\(^{224}\) Judges, for example, have distinct institutional advantages in highlighting the individualized effects of legislation that may have gone unnoticed by the legislature.\(^{225}\) They also have comparative temporal advantages in ensuring that sufficient attention is paid to constitutional values in the legislative process.\(^{226}\) The legislative branch, in contrast, has distinct institutional advantages in dealing with polycentric issues and in considering how to balance the pursuit of policy objectives with the recognition and protection of fundamental rights.\(^{227}\)

Drawing attention to the institutionally distinct contributions that judges and legislators can bring to society-wide dialogue does not entail prescribing that these actors \textit{should} make particular contributions, or that the participants in dialogue \textit{should} learn from each others’ input. Rather, the value in this exercise lies in identifying what the judiciary and the legislature \textit{do} in fact bring to discussions about fundamental rights in specific cases, by virtue of their institutional status. Dialogic learning might result from these contributions, but this will simply be a functional by-product of the process of dialogue rather than the result of any normative choice.


\(^{224}\) See generally Bateup, \textit{The Dialogic Promise}, supra note 27, at 1174-79.

\(^{225}\) See, e.g., Jeremy Webber, \textit{A Modest (but Robust) Defence of Statutory Bills of Rights, in Protecting Rights Without a Bill of Rights}, supra note 136, at 263, 276 (“That is a key characteristic of judicial decision-making: the attempt to ensure that the application of general norms is attentive to the details of particular circumstances.”).

\(^{226}\) See, e.g., Keith E. Whittington, \textit{An “Indispensable Feature”? Constitutionalism and Judicial Review}, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 21, 27 (2002) (arguing that due to the multiple roles legislatures have to fulfill, they “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.”).

\(^{227}\) See generally Lon L. Fuller, \textit{The Forms and Limits of Adjudication}, 92 HARV. L. REV. 353 (1978) (discussing the nature of polycentric inquiries).
that the participants make to engage in “dialogue” with one another. Furthermore, drawing attention to these institutional contributions should not detract from the fact that the contributions of the branches form merely one part of broader societal dialogue about fundamental meaning.

Based as it is on positive evidence regarding the operation of judicial review, the society-wide account of dialogue accordingly has considerable explanatory power.\textsuperscript{228} The positive, society-wide account of dialogue also has substantial normative merit in its own right stemming from the society-wide nature of the dialogue that takes place.\textsuperscript{229} Society-wide dialogue can be seen as a democratic strength because it ensures that national discussion and debate take place about issues of fundamental importance to society. This ensures that understandings about fundamental rights are continually developed and gradually modified over the longer term in response to new social conditions.\textsuperscript{230} As part of this process, the judicial facilitation and moderation of the contributions of the different dialogic participants, including the people, can assist in the search for more widely accepted and enduring answers to questions regarding fundamental values. The ultimate effect is thus to preserve popular input into debates about fundamental values, thereby ensuring that the people remain involved in working out their society’s core commitments over time.\textsuperscript{231}

B. Society-Wide Dialogue and Weak-Form Models of Judicial Review

Although the society-wide understanding of dialogue was developed to describe the nature of judicial review in the United States, the fact that it is grounded in positive insights about judicial and legislative behavior suggests that it can be readily extended to other national contexts where judges exercise the power of rights-based judicial review, whether constitutional or statutory in form.\textsuperscript{232} Given that all national judiciaries operate in an institutional environment that places limits on their sphere of action, we can predict that a similar process of dialogue about fundamental rights between the judiciary, the political branches and the people will be generated in a range of constitutional settings.\textsuperscript{233} Dialogue can therefore be conceived as a more general and wide-ranging feature of the strategic relationship between the judiciary and other political and social actors, rather than a limited form

\textsuperscript{228} On whether it provides a \textit{complete} explanation of how judicial review operates, see Bateup, \textit{The Dialogic Promise}, supra note 27, at 1166-68.

\textsuperscript{229} See id. at 1165-66.

\textsuperscript{230} See Ginsburg, \textit{supra} note 194, at 72 (“The ongoing process of interpretation means that the Constitution is continually being developed and subtly adjusted to new social conditions.”).

\textsuperscript{231} See, e.g., Christopher L. Eisgruber, \textit{The Fourteenth Amendment’s Constitution}, 69 S. CAL. L. REV. 47, 53 (1995) (“Constitutionalism is, among other things, a way for the political community to ‘talk out’ its political identity.”); Friedman, \textit{Politics, supra} note 81, at 334 (“Judicial review is simply a practice that permits and yet focuses popular discussion over the meaning of the Constitution, assisting us as a polity to reach decisions consistent with our deepest values.”).

\textsuperscript{232} While the positive account of dialogue developed in the United States is not restricted to constitutional judging in the context of rights, dialogue most commonly occurs in rights-based cases because these cases are generally the most controversial and highly salient with the public.

\textsuperscript{233} See, e.g., Ginsburg, \textit{supra} note 194, at 72 (suggesting that judges can play a role in constitutional dialogue in both established and emerging democracies as a result of strategic institutional dynamics).
of institutional interaction that is created by the adoption of particular weak-form bill of rights mechanisms.\textsuperscript{234}

The extension of the positive account of dialogue to other settings also has considerable normative appeal given the way in which this account resolves the democratic legitimacy concerns associated with judicial review, though it does so in quite a distinct fashion to weak-form dialogue theory.\textsuperscript{235} Weak-form dialogue theory attempts to reconcile judicial authority with democratic theory by proposing specific roles for the branches to perform when they interact with one another. According to this heavily prescriptive vision, democratic concerns with judicial review are only overcome if judges and legislators actually perform in a normatively appropriate fashion. The positive account of dialogue, in contrast, bridges the divide between judicial review and democracy by demonstrating that institutional constraints in fact operate to keep judicial decisions within democratic limits. Given that the political branches and the people can, and do, respond to judicial rulings in a dialogic fashion, the force of the democratic objection to judicial review is thereby overcome as a positive fact.

While there are strong positive and normative reasons to extend this alternative understanding of dialogue to other nations, some further consideration must be given to how the precise dynamics of dialogue will vary in different constitutional settings. Even though we can expect that society-wide dialogue will be a common feature of rights-based judicial review, this does not mean that dialogue will evolve in precisely the same way, or take place to the same extent, in all national contexts. Of principal importance, judges in different constitutional systems will have varying abilities to speak out with a strong voice and foster dialogue about fundamental rights based on the extent to which they are effectively constrained.

As we have seen, while judges in all constitutional systems are constrained due to the complex institutional environment in which they operate, the overall force of these constraints varies as a practical matter depending on the structural impediments that exist to effective political action and the strength of incentives motivating political branch respect for judicial rulings in specific constitutional systems. Where there are few or only weak constraints on judicial behavior, we would expect to find judges speaking out more frequently on the basis of their own understandings about rights by taking such action as invalidating legislation. The ability of judges to act in this fashion is likely to lead to a more vibrant process of society-wide dialogue than in systems where judges are more effectively constrained.\textsuperscript{236} This is because the possibility of divergence between judicial and popular views and the ensuing “clash of argument” are the principal factors that

\textsuperscript{234} For a discussion of how this form of dialogue appears to be operating in Canada, see Bateup, Expanding the Conversation, supra note 158.

\textsuperscript{235} See generally Bateup, The Dialogic Promise, supra note 27 (discussing how different theories of dialogue attempt to reconcile judicial review with democratic legitimacy concerns).

\textsuperscript{236} Cf. Kahana, Understanding the Notwithstanding Mechanism, supra note 30, at 248-49 (suggesting that the legislature and the public will be more likely to “attach weight to judicial deliberations and seriously discuss the relevant constitutional matters” if judges have the power to strike down legislation).
create the dynamic tension to move dialogue forward. Controversial judicial decisions inevitably stir up dust and give critics a reason to come together in opposition to judicial views. This disagreement then serves as a “creative force” that invigorates a robust debate and ensures that the national conversation continues in a dynamic fashion long after the judiciary has spoken.

Although the divergence of judicial and popular views and the expression of disagreement are the primary forces that help to drive vibrant society-wide dialogue, this does not mean that dialogue cannot occur in less confrontational circumstances. Animated discussions about controversial issues can also take place when judges are deferential to political preferences, or where there is no judicial involvement in the debate at all. Nevertheless, when significant disagreement exists about a particular issue, strong judicial contributions can help to ensure that rights issues remain in the headlines for a longer period of time, thus exposing them to broader and more robust debate. In so doing, there is also greater potential for the people to remain involved in working out their society’s core understandings about rights over the long term.

These general insights enable us to make a number of more specific predictions about how the different models of judicial review will impact the operation and evolution of society-wide dialogue about rights. As we have seen, the institutional and strategic dynamics of strong-form judicial review and the legislative override model are similar because both systems empower judges to invalidate legislation; they simply have different mechanisms available to the political branches to respond to judicial rulings in the event of disagreement. It is unlikely that these mechanisms will be used in the vast majority of cases, however, because some combination of structural and strategic impediments to effective political action is likely to exist in most constitutional settings. We can accordingly expect that

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237 Nicol, Law and Politics, supra note 61, at 745 (“[I]t is through the clash of argument … that the ‘best’ arguments about human rights can in the long form prevail.”); see also Friedman, Dialogue, supra note 210, at 679 (“The divergence between popular sentiment and the judiciary is what makes the dialogue work. … Judicial action creates the dynamic tension that moves the system of constitutional interpretation along.”).

238 See Friedman, Positive, supra note 210, at 1291 (noting that dialogue happens in part because of “judicial ruling[s] that seem to some at least to interfere with judgments made by the democratic political process.”).


240 See, e.g., Jeremy Waldron, Some Models of Dialogue Between Judges and Legislators, 23 S. Ct. L. Rev. (2d) 7, 28-29 (2004); Kahana, Understanding the Notwithstanding Mechanism, supra note 30, at 281 (“Nothing prevents the public from engaging in rigorous public debate, even in areas where the court has said nothing”).

241 See, e.g., Nicol, Law and Politics, supra note 61, at 747 (strong judicial action “tend[s] to grab the headlines, thereby exposing rights issues to wider debate and forcing them on the political agenda.”); Kahana, Understanding the Notwithstanding Mechanism, supra note 30, at 278 (judicial decisions that might prompt use of an override “put the issue on the national agenda for a longer period of time … [creating] an opportunity for a longer and gradual public discussion.”).

242 The abortion controversy in the United States is a good example of this. See, e.g. DEVINS, supra note 210; Friedman, Dialogue, supra note 210, at 658-68.

243 See Gibson et al., supra note 113 (showing that high levels of public support for the judiciary exist across a range of nations).
because national judiciaries in both strong-form and legislative override systems will generally retain significant discretion in relation to the actions they take, they will often be able to speak with a stronger voice and play an important role in fostering and facilitating society-wide dialogue about fundamental rights and values.\(^{244}\)

In stark contrast to the dialogic dynamics of strong-form and legislative override systems, we would not expect to find judges in most declaration of incompatibility systems playing such a robust role in society-wide dialogue. As we have seen, the unique structure of that system means that political incentives to implement judicial rulings must be incredibly weighty to overcome the effects of legislative inertia, even if few structural barriers exist to effective political action. Because such incentives are unlikely to exist in most national settings, judges can be expected to be more effectively constrained than under alternative models of judicial review. In turn, this will lead judges to be more deferential to political preferences and to avoid issuing declarations of incompatibility whenever possible.\(^{245}\) To the extent that these dynamics operate in a particular system, we are therefore likely to find a more impoverished form of dialogue about fundamental rights.\(^{246}\)

To a certain extent, the broad interpretive powers that judges are routinely granted under the declaration of incompatibility model may counteract these dynamics. Given that strong interpretive provisions provide judges in declaration of incompatibility systems with an alternative way to pursue their own preferences, interpretive rulings in controversial areas might also result in significant public opposition and argument, thereby creating the necessary dynamic tension to keep societal debate moving forward.\(^{247}\) It is nevertheless likely that interpretive action will only infrequently lead to vibrant dialogue about rights because statutory rulings are often rather obscure and inaccessible to the general public.\(^{248}\) As a result, while interpretive rulings might assist judges in prompting dialogue in isolated cases, this action also runs the risk of masking the real issues and failing to engage the public consciousness sufficiently for a robust and interactive societal discussion to take place.

\(^{244}\) See, e.g., Whittington, Legislative Sanctions, supra note 94, at 473 (“The U.S. Supreme Court can generally act ‘sincerely’ on its constitutional understandings because the strategic environment for such actions has been generally favorable.”).

\(^{245}\) As the United Kingdom example demonstrates, however, exceptions can exist if the incentives motivating political branch implementation of judicial declarations are sufficiently strong.

\(^{246}\) In the United Kingdom, in contrast, we can expect that dialogue will evolve in a similar fashion to strong-form and legislative override systems of judicial review because of the different strategic dynamics present in that country.

\(^{247}\) See, e.g., R v. A, [2002] 1 A.C. 45 (in which the House of Lords relied on its section 3 powers under the Human Rights Act to read a provision that generally prohibited the admissibility of sexual history evidence of the complainant in rape trials to contain an “implied provision” that evidence which is required for a fair trial could be admitted by the judge). This decision was the subject of significant controversy and debate in the United Kingdom. See Aileen Kavanagh, Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisited, 2005 EUR. HUM. RTS. L. REV. 259.

\(^{248}\) See, e.g., Poole, supra note 72, at 203 (suggesting that a choice to use interpretive powers “favour[s] the quicker but relatively obscure process of statutory interpretation over the slower but more open and interactive process of judicial challenge and legislative amendment.”).
In conclusion, although declaration of incompatibility systems are likely to foster some society-wide dialogue about fundamental rights, the chances of regular and vibrant dialogue evolving appear greater in both strong-form and legislative override systems due to the increased power judges have in those systems to directly pursue their own understandings about rights. If one of our goals when designing a system of rights-based judicial review is to achieve productive forms of dialogue about rights, strong-form and legislative override systems of judicial review are therefore likely to be superior to the declaration of incompatibility model in the majority of national contexts. Ultimately, however, and contrary to what proponents of weak-form judicial review might lead us to believe, “the pertinent choice lie[s] not between dialogue and no dialogue, but between … dialogue in which judges have more or less voice.”

VI. CONCLUSION

Since Canada pioneered the weak-form model of judicial review with the enactment of the Canadian Charter of Rights and Freedoms in 1982, weak-form bills of rights have been praised around the world for creating a new balance between parliamentary and judicial supremacy based on inter-branch dialogue between the judiciary and the legislature. In order for the dialogic potential of these instruments to be realized, however, weak-form theorists counsel judges and legislators to adopt a particular normative posture towards each other’s rights-based contributions. Although weak-form dialogue theory remains highly popular in nations that have adopted these new rights instruments, this Article has drawn on positive insights to demonstrate that the normative behavioral assumptions underlying this theory are, in fact, fundamentally flawed.

In the process of critiquing weak-form dialogue theory, this Article has also explored what kinds of behavior can be expected of the branches as they perform their roles under weak-form instruments. Rather than pursuing some normative desire to engage in inter-branch “dialogue” with one another, it has been argued the branches are likely to behave strategically in their mutual interactions. This does not mean, however, that the form a bill of rights takes is irrelevant to behavioral outcomes. Instead, it has been suggested that the structure of a bill of rights can have a considerable impact on behavior because the mechanism chosen to distribute power between judges and legislatures can alter the strategic balance between the branches and, therefore, their expected strategic moves.

Although this Article has rejected the explanatory value of weak-form dialogue theory, it has nonetheless claimed that “dialogue” remains a highly useful concept provided we understand it in a rather different way to weak-form theorists. On this alternative understanding, which is also grounded in positive theory, all systems of judicial review generate society-wide dialogue between the judiciary, the political branches and the people about the meaning and interpretation of rights.

249 Cf. Leighton McDonald, New Directions in the Australian Bill of Rights Debate, 2004 PUB. L. 22, 29 (U.K.) (suggesting that the stronger-form of judicial review under the Canadian Charter might generate “more or ‘better’ dialogue” than the declaration of incompatibility model in the United Kingdom).

250 Poole, supra note 72, at 202.
Certain judicial review forms promote more productive dialogic interactions than others, however, because they enable judges to have a more robust voice and foster more vibrant societal discussion about rights. Judged on this feature, both strong-form and legislative override models of judicial review can generally be preferred to the declaration of incompatibility model because they provide greater space for a vigorous judicial role.

In terms of constitutional design, if a nation wants to adopt a dialogic system of judicial review, we should accordingly favor the distribution of power between judges and legislators that is found in strong-form or legislative override systems over that found under the declaration of incompatibility model. This conclusion does require some qualification, however. First, this Article does not claim that strong-form and legislative override systems are the only forms of judicial review that will result in robust society-wide dialogue; it has not considered, for example, the impact that alternative systems, such as the Kelsenian model commonly found in Europe, might have on the operation of societal dialogue about rights. In addition, although strong-form and legislative override systems can generally be expected to result in more productive forms of dialogue than the declaration of incompatibility model, definitive conclusions can only be drawn on a case-by-case basis. Specifically, it would be prudent to first consider what system-specific incentives exist in a particular national setting before predicting how the various models of judicial review might operate there, as the British example makes especially clear. Predictions about the possibilities for society-wide dialogue in a particular nation should only be made, therefore, after these preliminary matters have been considered.

Perhaps most importantly, we should also remember that achieving dialogue may not be the only goal of constitutional designers. In this regard, while both strong-form and legislative override systems are likely to foster vibrant society-wide dialogue in most national settings, there may be other non-dialogic reasons to favor one model of judicial review over another. For example, rule of law concerns may lead us to favor the incorporation of a legislative override rather than leaving the political branches to resort to blunter sanctioning tools in the event of disagreement with judicial rulings. Alternatively, given that strong-form judicial review is commonly, though incorrectly, regarded as synonymous with judicial supremacy, there may be greater publicly and political acceptance of a bill of rights containing a legislative override or some other weak-form mechanism. To the extent that actually achieving dialogue remains a priority, however, we must discard understandings of

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251 See, e.g., Victor Ferreres Comella, Constitutional Dialogues Between Courts and Legislatures: Some Potential Advantages of the Kelsenian Model of Judicial Review (June 31, 2004) (unpublished manuscript, on file with author); Alec Stone Sweet, Constitutional Dialogues: Protecting Rights in France, Germany, Italy & Spain, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 8, 8 (Sally J. Kenney et al. eds., 1999).

252 See Comella, supra note 251, at 2 (“Other goals may be paramount and may require us to introduce rules that make the system of judicial review ‘second-best’ in terms of dialogue.”).

253 See, e.g., John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. CAL. L. REV. 353, 355-65 (distinguishing between “legitimate” and “illegitimate” interference with the judiciary.).
weak-form and strong-form models of judicial review that are based on unfounded normative assumptions in favor of alternatives that better reflect how judicial review actually operates in the real world.