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Nicholas Stephanopoulos

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THE CASE FOR THE LEGISLATIVE OVERRIDE

Nicholas Stephanopoulos^{*}

What is the optimal arrangement of judicial review? Most scholars who have addressed this question have assumed that there are only two important alternatives: judicial supremacy and parliamentary sovereignty. The literature has neglected the conceptual space that exists between these two poles, in particular the innovative legislative override model. This article describes and evaluates the experiences of the two countries that have adopted the override, Canada and Israel. It also introduces a refined override model that promises to protect fundamental rights while promoting democratic decision-making. Finally, the article explains which institutional and political contexts are hospitable to the override and which are not.

INTRODUCTION	251
I. THE LEGISLATIVE OVERRIDE IN PRACTICE	254
A. Canada	254
B. Israel	259
II. THE LEGISLATIVE OVERRIDE IN THEORY	261
A. The Values at Stake	261
B. Pieces of the Puzzle	263
1. Supermajority Requirement for the Legislative Override ...	264
2. No Preemptive Use of the Legislative Override	265
3. Only Allow the Federal Legislature To Use the Override...	265
4. Sunset Provision for Legislative Overrides	266

^{*} J.D., Yale Law School, 2006; M.Phil, University of Cambridge, 2002; A.B., Harvard University, 2001. I am grateful to Jack Balkin, Owen Fiss, David Fontana, Sanford Levinson, Peter Schuck, and James Whitman for reading earlier drafts of this comment and offering innumerable helpful suggestions. I am also indebted to participants at the third annual Young Scholars Conference at Yale, where a version of this comment was presented.

5. Applicable to All Indeterminate Provisions of Constitution, Except Those Dealing with Elections.....	268
6. Requirement of Explicit “Notwithstanding” Language.....	269
C. The Override’s Place in the Literature	269
III. THE LEGISLATIVE OVERRIDE SYSTEM VERSUS ITS RIVALS	272
A. Values Realized	273
B. Institutional Incentives Under the Override	278
1. T ₁ : The Drafting and Passage of a Law That Raises Constitutional Questions.....	278
2. T ₂ : The Supreme Court’s Decision Whether To Strike a Federal Law	280
3. T ₃ : The Legislature’s Decision on Whether To Use the Override.....	282
4. T ₄ : The Legislature’s Decision on Whether To Renew the Override	284
C. Canada Revisited	284
D. Israel Revisited	288
IV. THE APPLICABILITY OF THE LEGISLATIVE OVERRIDE TO DIFFERENT SETTINGS	290
CONCLUSION	294

INTRODUCTION

Imagine two hypothetical laws that the U.S. Congress might pass. The first, the National Security Act of 2006, seeks to combat terrorism by authorizing the President to detain indefinitely any person whom he deems a threat to the nation’s safety. Under the statute, the government only needs to provide some evidence that a person endangers national security, and the person may then be detained until he is determined no longer to pose a threat. The second law, the Better Neighbors Act of 2006, aims to reduce violence against Muslim-Americans by making it a federal crime to be in possession of a weapon within 200 feet of a mosque. What would the fate of these two statutes—both duly passed by Congress and signed into law by the President—be?

Under the U.S. system of judicial review, of course, the Supreme Court would eventually have the chance to evaluate both statutes’ constitutionality. And based on recent precedent, it is likely that both laws would be invalidated. The National Security Act probably runs afoul of the Court’s holding in *Hamdi v. Rumsfeld* that a citizen may be deprived of his liberty only after being afforded “a fair opportunity to rebut the [g]overnment’s factual asser-

tions before a neutral decisionmaker.”¹ The Better Neighbors Act is probably outside the scope of Congress’s lawmaking authority under either the Commerce Clause or Section 5 of the Fourteenth Amendment. The possession of weapons near mosques is no more related to interstate commerce than the possession of guns near schools,² and no more congruent and proportional to constitutional violations than violence by private actors against women.³ Under the American model of judicial review, then, both statutes would likely meet a quick end at the hands of the Supreme Court.

The statutes’ fate, though, would be very different under other models of judicial review. Under the traditional British system, Parliament is restrained in the laws that it can pass only by its own better judgment. With no written constitution to limit the legislature’s lawmaking options, the National Security Act and the Better Neighbors Act would both unquestionably be valid. Under the *modern* British and New Zealand systems, on the other hand, courts would do their best to interpret the two statutes in accordance with the European Convention on Human Rights and the New Zealand Bill of Rights, respectively. If the statutes could not be reconciled with the Convention or Bill of Rights, they would remain good law but, in Britain, courts would declare them incompatible with the Convention.⁴ In Germany, the statutes would be stricken if they are held unconstitutional by the courts, and would also be unrescuable even by constitutional amendment if they are

¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). In addition, the National Security Act could be construed as making it a crime to “threaten” national security, in which case all the procedural protections of the Fourth, Fifth, and Sixth Amendments would have to be provided. *Cf.* *Kansas v. Hendricks*, 521 U.S. 346 (1997).

² *See United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional as beyond Congress’ Commerce Clause power a federal statute banning the possession of firearms within 1000 feet of a school).

³ *See United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional as beyond Congress’ Section 5 power a federal statute creating a civil remedy for victims of gender-related violence).

⁴ For more information on the modern British and New Zealand systems of judicial review, see KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 62-64 (2001); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 727-39 (2001); Michael Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 667-69 (2003); Kate Malleson, *A British Bill of Rights: Incorporating the European Convention on Human Rights*, in *JUDICIAL POWER AND CANADIAN DEMOCRACY* 27, 37 (Paul Howe & Peter H. Russell eds., 2001). In Britain, a court’s declaration of a statute’s incompatibility with the Convention is non-binding, but is expected to prompt Parliament to amend the statute. Gardbaum, *supra*, at 733-34.

found to violate certain unamendable constitutional provisions.⁵ Finally, in Canada and Israel, the statutes would be invalidated if found unconstitutional—but the legislature could then override the courts' holdings through new majority votes indicating its desire to pass the laws “notwithstanding” their conflict with the Charter or Basic Law.

The fate of the National Security Act and the Better Neighbors Act is therefore highly linked to the applicable system of judicial review. Depending on the legal regime, the statutes might be automatically valid, valid but construed to avoid conflict with quasi-entrenched rights, invalid but redeemable through future legislation, invalid but redeemable through constitutional amendment, or invalid with no possibility of rescue. Which of these outcomes is best? In other words, what is the optimal arrangement of judicial review for a country? This article argues that a variant of the Canadian/Israeli legislative override model is generally the best choice. The legislative override has functioned reasonably well in practice, and if revised somewhat it promises to protect fundamental rights while still allowing democratic expression on constitutional issues.

Importantly, this article approaches the issue of comparative judicial review from an *ex ante* perspective, rather than with an eye toward any particular country's legal and political situation. Though I refer frequently to the two hypothetical U.S. statutes introduced above, I do so only because examples help to illustrate the differences between the legislative override system and other arrangements of judicial review. My argument is not that the United States (or any other nation) should necessarily adopt the legislative override model, but rather that a country operating behind a veil of ignorance—and hence not subject to the transition costs that a country with an established judicial review system would incur—should choose the override.⁶ Constitutional draftsmanship, not the future of American judicial review, is this article's overriding concern.

The article begins on a descriptive note, by summarizing in Part I the experiences of the two countries that have adopted the legislative override, Canada and Israel. Part II transitions into theory. It discusses the values that systems of judicial review aim to secure, and presents the constitutional arrangement—a legislative override system, based loosely on the Canadian and Israeli models—that promises to best achieve these values. The Part

⁵ These unamendable provisions are GRUNDGESETZ [GG] [Constitution] art.1 (F.R.G.) (“The dignity of man is inviolable.”) and GRUNDGESETZ [GG] [Constitution] art.20 (F.R.G.) (“The Federal Republic of Germany shall be a democratic and social federal state.”).

⁶ See *infra* Part IV, for analysis of the implications of transition costs for the choice among different judicial review models.

also positions the proposed model within the academic literature on judicial review and the countermajoritarian difficulty. Part III, the analytical heart of the article, uses the hypothetical National Security Act and Better Neighbors Act to compare the legislative override system to its rivals, in terms of both values secured and incentives generated for different institutional actors. The Part also returns to the Canadian and Israeli examples in order to evaluate them and explain how they might have been improved under the system proposed in Part II. Finally, Part IV examines the applicability of the legislative override model to different institutional, political, and cultural settings. It contends that the override is generally a country's best option, but that it may not be an appropriate choice for nations that have recently endured the abuse of a minority at the hands of a majority, or that already possess other well-established judicial review systems.

I. THE LEGISLATIVE OVERRIDE IN PRACTICE

Before examining the legislative override's theoretical advantages over other arrangements of judicial review, it is worth looking at how the countries that have adopted the override have fared with it. This look abroad is especially important because American scholars have so far paid little attention to the Canadian and Israeli experiences with the override, and because even in Canada "so little has been written about [the override,] the most unique feature of the Charter."⁷ In this Part, I describe the most prominent uses (and attempted uses) of the legislative override in Canada and Israel. I attempt no *evaluation* here, as analysis of the Canadian and Israeli examples is more sensibly undertaken after this article's variant of the Canadian/Israeli model has been introduced.⁸

A. Canada

The Canadian legislative override (also known as the "notwithstanding" clause) emerged from heated backroom talks in November 1981 among the provincial premiers and Prime Minister Pierre Trudeau. Trudeau had long wished for Canada to have a written constitution, and he pressed hard for the adoption of the Charter in 1980-82. Many of the provincial governments, though, were reluctant to surrender power, either to Ottawa or to the judiciary. Saskatchewan, Newfoundland, and Alberta, notably, insisted on the leg-

⁷ Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 221 (2002).

⁸ For analysis of the Canadian and Israeli experiences with the override, see *infra* Sections III. C and III. D.

islative override as the sine qua non of their consent to the Charter. (Quebec and Manitoba, both of which opposed the Charter outright, were not represented at these negotiations. Quebec had taken a hard line on provincial sovereignty, while the Manitoban Premier was an outspoken critic of entrenched bills of rights.) In the end, a deal was reached in which “the provinces traded the amending formula [i.e. the override] for the charter.”⁹ Even with the override agreed upon, debate swirled around precisely to which provisions of the Charter the notwithstanding clause should be applied. The federal delegation was adamant that language rights be placed beyond the override’s ambit, Saskatchewan and Newfoundland were satisfied with applying the notwithstanding clause only to sections 7-15 of the Charter (legal and equality rights), while Alberta insisted on also applying the override to the fundamental freedoms of section 2.¹⁰

The provision that eventually materialized in the wake of this horse-trading—section 33 of the Canadian Charter of Rights and Freedoms—allows both the federal Parliament and the provincial legislatures to “expressly declare” by a simple majority that a law “shall operate notwithstanding a provision included in section 2 or sections 7-15 of [the] Charter.”¹¹ A law may be passed “notwithstanding” the Charter whether or not a court has already ruled it unconstitutional. Sections 2 and 7-15 of the Charter include many but not all of the Charter’s most important rights guarantees: the fundamental freedoms of section 2 (conscience, religion, expression, assembly, etc.), the legal rights of sections 7-14 (life, liberty, security, freedom from search and seizure, etc.), and the equality rights of section 15 (“equal protection and equal benefit of the law”)—but not democratic rights, mobility rights, language rights, or education rights.¹² In addition, an override “cease[s] to have effect five years after it comes into force,” but may be re-enacted by the legislature upon its expiration.¹³

It did not take long after the Charter’s passage for the legislative override to be used. The Quebec National Assembly enacted Bill 62, An Act Respecting the Constitution Act,¹⁴ just nine weeks after the Charter came into effect. This law attached an override provision to *every* Quebec statute on the books at that point, thereby immunizing the entire Quebec statutory code

⁹ Howard Leeson, *Section 33, the Notwithstanding Clause: A Paper Tiger?*, in JUDICIAL POWER AND CANADIAN DEMOCRACY 297, 311 (Paul Howe & Peter H. Russell eds., 2001).

¹⁰ *Id.*

¹¹ CONSTITUTION ACT, 1981, § 33 (Can.).

¹² *Id.* §§ 2, 7-15.

¹³ *Id.* § 33.

¹⁴ An Act Respecting the Constitution Act, R.S.Q., ch. L-4.2 (1982).

from constitutional challenge on the basis of § 2 and §§ 7-15 of the Charter. As Christopher Manfredi writes, "Bill 62 forcefully confirmed Quebec's continued opposition both to the process that produced the Constitution Act, 1982, and to the substance of the new constitution."¹⁵ The ruling Parti Québécois continued attaching notwithstanding clauses to each new law until its replacement in office by the Quebec Liberals in 1985. In the courts, the Quebec Court of Appeal found that the omnibus use of the legislative override was invalid because "the fundamental freedoms and legal guarantees which may be disregarded . . . are so important that they should be expressly stated so as to bring into sharp focus the effect of the overriding provisions and the rights deprived."¹⁶ However, the Quebec Court of Appeal was overruled by the Canadian Supreme Court in *Ford v. Quebec*,¹⁷ where the Supreme Court held that "a s. 33 declaration is sufficiently express if it refers to the number of the [Charter] section . . . to be overridden."¹⁸ After *Ford*, it was established that the override could be used preemptively, and that it required only a formal mention of the Charter provisions being overridden.¹⁹

The second important use of the legislative override was by Saskatchewan in 1986.²⁰ The Saskatchewan Government Employees' Union (SGEU) had launched a series of rotating strikes in the fall of 1985, in an effort to pressure the government into agreeing to a new labor contract. A mediator released a compromise proposal to end the strikes in January 1986, but the SGEU rejected the plan. Saskatchewan Premier Grant Devine then decided to force the SGEU back to work through legislation. The resulting statute, Bill 144, contained a notwithstanding clause applying to § 2(d) of the Charter, which protects the freedom of association. In 1984, the Saskatchewan Court of Appeal had nullified a provincial law ordering dairy workers back to their jobs, and Devine and the legislature wanted to avoid a similar fate for Bill 144.²¹

¹⁵ CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER; CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 176 (2001).

¹⁶ *Alliance des Professeurs de Montreal v. Attorney-General of Quebec*, [1985] D.L.R. 354.

¹⁷ *Ford v. Quebec*, [1988] S.C.R. 712.

¹⁸ *Id.* at 715.

¹⁹ For an in-depth discussion of *Ford v. Quebec*, see Lorraine E. Weinrib, *Learning to Live with the Override*, 35 MCGILL L.J. 541 (1990).

²⁰ For information on Saskatchewan's use of the override, see generally MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 77 (1989); MANFREDI, *supra* note 15, at 185; Leeson, *supra* note 9, at 314-15.

²¹ See MANDEL, *supra* note 20, at 77; MANFREDI, *supra* note 15, at 185; Leeson, *supra* note 9, at 314-15.

Quebec again exercised its override power in 1988, in what remains the most controversial use of the notwithstanding clause. In *Ford v. Quebec*, the Canadian Supreme Court had not only ruled that a blanket legislative override was permissible, but had also stricken Quebec's Bill 101, which prohibited the use of English on commercial signs. According to the Court, Bill 101 abridged the freedom of expression protected in § 2(b) of the Charter, and "the *exclusive* use of French has not been . . . justified" by Quebec's interest in preserving the province's "visage linguistique."²² Within a week of the Court's decision in *Ford*, the Quebec legislature passed a new statute, Bill 178, that invoked the notwithstanding clause and re-authorized Quebec's policy banning English on commercial signs. (Bill 178 did represent a partial compromise, in that English was banned on exterior signs, but allowed on interior commercial signs.²³) Quebec's francophone majority cheered this use of the legislative override, but the reaction elsewhere in Canada was sharply negative. Three English-speaking ministers resigned in protest from Quebec Premier Robert Bourassa's cabinet. Canadian Prime Minister Brian Mulroney blasted section 33 of the Charter as the "major fatal flaw of 1981," and declared that any constitution "that does not protect the inalienable and imprescriptible rights of individual Canadians is not worth the paper it is written on."²⁴ And Manitoba Premier Gary Filmon reacted by withdrawing a resolution to ratify the Meech Lake constitutional accord from the province's legislature, thereby fatally undermining the accord's prospects for national ratification. Interestingly, Quebec allowed the override to expire in 1993, and the new legislation passed by the legislature closely resembled the policy implicitly approved by the Court in *Ford*, namely the predominant but not exclusive use of French on outdoor signs.²⁵

For more than a decade after Quebec's 1988 use of the override, no Canadian legislature invoked the notwithstanding clause, causing many commentators to view it as a dead letter. In 1999, though, Alberta preemptively exercised its override power in a statute defining marriage as a union of a man and a woman. There had been no Court decision requiring the Albertan government to recognize same-sex marriages, but the legislature was con-

²² *Ford v. Quebec*, [1988] S.C.R. 712, 780 (emphasis added).

²³ Quebec Premier Robert Bourassa believed that this approach gave sufficient weight to the rights of the English-speaking minority in Quebec. See ROACH, *supra* note 4, at 190.

²⁴ Patrick James et al., *Introduction: The Myth of the Sacred in the Canadian Constitutional Order*, in THE MYTH OF THE SACRED: THE CHARTER, THE COURTS, AND THE POLITICS OF THE CONSTITUTION IN CANADA 3, 3 (Patrick James et al. eds., 2002).

²⁵ *Ford*, [1988] S.C.R. at 717 ("[R]equiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French '*visage linguistique*' in Quebec . . .").

cerned that a future Court ruling might do so.²⁶ The Supreme Court had recently decided the case of *M. v. H.*,²⁷ in which it concluded that same-sex couples were entitled to the same social and economic benefits as married couples. In response, Alberta wanted to send “a clear message to the court system . . . that any move to change the definition of marriage would be a mistaken interpretation of the intent of the Legislature and the Charter.”²⁸ Surprisingly, Alberta’s use of the override in the contentious context of same-sex marriage attracted little attention in the rest of Canada, probably because of a “lack of public awareness of the legislation.”²⁹

In addition to these four notable uses of the legislative override, there have also been numerous minor exercises of the override power, mostly by Quebec. Tsvi Kahana notes that Quebec has used the override twelve times with little or no public attention: “[T]he twelve ignored uses of the [notwithstanding clause] in Quebec were not mentioned—still less discussed, analyzed, or criticized—in two of Quebec’s main newspapers.”³⁰ These twelve uses were all preemptive, were all provisions within much longer bills, and all dealt with pension plans, education, or agricultural development.³¹ Outside Quebec, the Yukon Territory used the legislative override, again with no public attention, to shield a bill regulating nominations to the Land Planning Board and Committees from constitutional scrutiny.³²

On a few occasions, furthermore, use of the override was debated but subsequently rejected by Canadian legislatures. In March 1998, Alberta considered invoking the notwithstanding clause to shield a bill compensating victims of the province’s eugenics laws from constitutional challenge on the grounds that it impermissibly prohibited victims from suing for additional compensation. A loud outcry ensued, causing the Albertan Premier to withdraw the notwithstanding clause from the bill, and state that “it became abundantly clear that . . . the use of any tool . . . to undermine [the Charter] is something that should be used only in very, very rare circumstances.”³³ A

²⁶ See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CANADIAN PUBLIC ADMINISTRATION 255, 273 (2001).

²⁷ *M. v. H.*, [1999] S.C.R. 3.

²⁸ ALBERTA LEGISLATIVE ASSEMBLY, DEBATES (2000).

²⁹ Kahana, *supra* note 26, at 273. Kahana also notes that the override was probably unconstitutional since “marriage and divorce is a federal rather than a provincial responsibility and section 33 does not apply to that part of the Constitution.” *Id.* at 268.

³⁰ *Id.* at 259.

³¹ *Id.* at 258.

³² *Id.*

³³ MANFREDI, *supra* note 15, at 187-88.

few weeks later, the Alberta legislature again turned its attention to the override after the Canadian Supreme Court handed down its decision in *Vriend v. Alberta*,³⁴ where it “read in” sexual orientation as a factor on the basis of which the provincial government could not legally discriminate. The Alberta legislature had purposely excluded sexual orientation from its human rights code and strongly opposed the Court’s ruling, but was unable to use the override because of the earlier controversy over the eugenics victim compensation bill.³⁵ Finally, the federal Parliament considered invoking the notwithstanding clause in response to a Supreme Court decision invalidating its ban on tobacco advertising on freedom of the press grounds.³⁶ Despite strong popular opposition to the ruling—as well as the fact that tobacco advertising was one of the specific cases where the drafters of the Charter had thought that an override would be appropriate—Parliament deferred to the Court and re-drafted its legislation in accordance with the Court’s ruling.³⁷

B. Israel

Israel’s history with the legislative override is far more limited than Canada’s. Questions linger, in fact, about whether Israel’s Basic Law amounts to an entrenched legal document at all, and whether the Knesset can be bound by a constraint purely of its own making. I do not address here the nature of the Basic Law, but rather note that the Knesset has effectively conceded to the Israeli Supreme Court the power to nullify statutes inconsistent with the Basic Law. In *Bergman v. Minister of Finance*,³⁸ *Agudat Derekh Eretz v. Broadcasting Authority*,³⁹ and a handful of other cases, the Supreme Court invalidated laws duly passed by the Knesset without ever having its power to do so challenged.⁴⁰

³⁴ *Vriend v. Alberta*, [1998] S.C.R. 493.

³⁵ It is also unclear whether using the override to disregard *Vriend* would have been that politically advantageous for Albertan politicians. “Two-thirds of Albertans in a poll conducted for the government supported the decision not to use the notwithstanding clause.” MANFREDI, *supra* note 15, at 196.

³⁶ *R.J.R.-MacDonald v. Canada*, [1995] S.C.R. 199.

³⁷ Leeson, *supra* note 9, at 320 & n.62.

³⁸ HCJ 98/69 *Bergman v. Minister of Finance and Others* [1969] IsrSC 23(1) 693.

³⁹ HCJ 246/81, 260/81 *Agudat Derekh Eretz v. Broadcasting Authority* [1981] IsrSC 35(4) 1.

⁴⁰ These judgments all recommended changes to the nullified statutes that would eliminate their conflict with the Basic Law. The Knesset accepted the Court’s recommendations, re-passing the laws with those revisions.

Israel's legislative override emerged in the aftermath of its 1992 "constitutional revolution."⁴¹ Whereas the chapters of the Basic Law had only dealt with the institutional structure of the Israeli government up until that point, two new chapters dealing with individual rights were added in 1992: Human Dignity and Liberty, and Freedom of Occupation. Soon after these chapters were added, the Court ruled in *Meatreal v. Prime Minister*⁴² that the government's refusal to allow a private company to import non-Kosher frozen meat violated the right of freedom of occupation. Unwilling to abandon the policy of non-importation of non-Kosher meat, the religious parties in the Knesset urged that changes be made to the Basic Law itself. Thanks to their pressure, the Knesset added a notwithstanding clause to the Freedom of Occupation chapter of the Basic Law in March 1994. That chapter now states that "a statutory provision which infringes freedom of occupation will be valid . . . if it is included in a statute enacted by a majority of the Knesset members and expressly declares that it is valid despite the Basic Law."⁴³ In addition, uses of the notwithstanding clause expire after four years unless they are re-authorized by the Knesset. Israel's legislative override, therefore, requires a simple majority, is restricted to the Knesset, may be used preemptively, requires only general "notwithstanding" language, applies only to the right to freedom of occupation, and has a four-year sunset provision.

Ironically, the day that the Knesset incorporated the legislative override into the Freedom of Occupation chapter of the Basic Law is also the only time that the override has been used to date. Immediately after amending the Basic Law to include the notwithstanding clause provision, the Knesset passed the Import of Frozen Meat Law,⁴⁴ declaring that, despite the Court's judgment to the contrary, non-Kosher frozen meat could not be imported into Israel. Meatreal, the same plaintiff that had brought the original petition challenging the government's meat importation policy, subsequently sued again. In *Meatreal v. Knesset*,⁴⁵ the Israeli Supreme Court, following in the footsteps of its Canadian counterpart in *Ford v. Quebec*, found that use of the notwithstanding clause immunizes Knesset statutes from attack on the grounds that they conflict with the Basic Law. Since this ruling, the Knesset has made no further use of its override power. It had an opportunity to do so when its Investment Portfolio Managers' Law was nullified by the Court be-

⁴¹ Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH L. REV. 415, 432 (2000).

⁴² H CJ 3872/93 *Meatreal v. Prime Minister* [1993] IsrSC 47(5) 485.

⁴³ Basic Law: Freedom of Occupation, 1992, S.H. 150.

⁴⁴ The Import of Frozen Meat Law, 1994, S.H. 104.

⁴⁵ H CJ 4676/94 *Meatreal v. Knesset* [1997] IsrSC 50(5) 15.

cause the law's restrictions on working in the securities industry conflicted with the right to freedom of occupation.⁴⁶ However, the Knesset chose to amend the law in accordance with the Court's decision rather than attempt to override the ruling.

II. THE LEGISLATIVE OVERRIDE IN THEORY

With the Canadian and Israeli experiences with the legislative override in mind, it is possible to return to this article's central question: What is the optimal arrangement of judicial review for a country? In this Part, I first lay out the array of values that judicial review systems seek to secure. I then introduce the arrangement—a variant of the Canadian and Israeli models—that promises to attain the best combination of those values. Finally, I outline the major positions in the academic debate about judicial review and the counter-majoritarian difficulty, and explain the legislative override's contribution to the dialogue.

A. *The Values at Stake*

The question of what system of judicial review a nation should adopt is essentially a constrained maximization problem. There are several values that arrangements of judicial review aim to achieve, but there are tradeoffs between schemes as to which values are attained and which are not. For example, U.S.-style judicial review may do an excellent job of protecting fundamental rights, while less consistently allowing democratic majorities to express their will on constitutional issues. Another system, such as British parliamentary supremacy, may improve the correlation between public opinion and public policy, but at some cost in the preservation of individual liberties. The only way to choose among these and other arrangements is to weigh the values' relative importance, predict the likely consequences of each arrangement for each value, and then select the scheme that promises to attain the optimal combination of values.

What, then, are these values that systems of judicial review strive to secure, and how can they be prioritized? In rough order of importance,⁴⁷ the

⁴⁶ HCJ 1715/97 *The Investment Portfolios Managers' Association v. Minister of Finance* [1997] IsrSC 51(4) 367.

⁴⁷ Different people will rank these values in different ways. For me, the two most important values must be the ones that constitute the term "liberal democracy," that is, the protection of individual rights and the expression of the majority will. After these two, the richness of a country's public discourse seems most significant, followed closely by the predictability and stability of constitutional norms. I rank public discourse above legal stability because life is probably better in a constitutionally volatile world characterized by informed, reasoned delib-

following five values appear to be implicated in the decision of which system of judicial review to adopt:⁴⁸ First, the protection of fundamental individual rights. In a liberal society that affirms the dignity and autonomy of the individual, there is probably no goal more pressing for a system of judicial review than the safeguarding of the individual's rights against the forces (both public and private) that threaten them. By most accounts, these rights are better protected by the judiciary than by any other branch; "judicial review of constitutional rights . . . places a higher priority on principled resolutions than would be accorded by the bureaucracy or [legislature]."⁴⁹

The second value that should be considered when choosing among systems of judicial review is a democratic majority's ability to have its wishes enacted into law. As Janet Hiebert writes, "any society that aspires to be democratic should resolve the most important of its social priorities through its elected legislatures rather than in courts."⁵⁰ Democratic decision-making is undermined by systems of judicial review that give courts the final say on constitutional questions, and advanced by arrangements that allow legislative and popular involvement in constitutional interpretation.

The third value at stake is the quality of discourse in a nation's public sphere (including both institutional settings such as legislative debates, and less formal contexts such as Op-Ed pages and group meetings).⁵¹ Mark Tushnet has argued convincingly that U.S.-style judicial review "debilitates" public deliberation by forcing legislators to "act in the shadow of the courts' constitutional interpretation," and causing "the public [to] find itself entirely

eration than in a constitutionally stable world marred by a barren public sphere. Finally, I consider the quality of relations among the branches of government to be the least important of these values; the U.S. system's "checks and balances" approach, for one, invites—and has thrived despite—inter-branch discord.

⁴⁸ One omission from this list of values is the fit of a system of judicial review with a country's historical and cultural experience. This consideration is omitted because it is unclear (in the abstract) how fit varies across different judicial review models. *See also, infra* Part IV, (arguing that the suitability of the legislative override for a particular country depends on that country's historical experience and the transition costs that would be incurred in switching to the override).

⁴⁹ JANET L. HIEBERT, *CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE?* 24 (2002).

⁵⁰ JANET L. HIEBERT, *LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW* 115 (1996).

⁵¹ High-quality public discourse increases the information available to citizens, deepens their connection to the state, and arguably improves public policy decisions. *See generally* JOSEPH BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994); JAMES FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996).

removed from the domain of constitutional discourse.”⁵² A system that emphasized non-judicial voices in the constitutional conversation, on the other hand, would presumably improve the quality (and stakes) of public discourse.

The fourth value is the stability and predictability of constitutional norms. As with other areas of the law, citizens, businesses, and legislatures all benefit from being able to predict with a good deal of certainty what the outcome in a given constitutional case will be. U.S.-style judicial review, though not always predictable, is intrinsically more stable than “a regime in which each . . . election serves as a national referendum about . . . constitutional truth.”⁵³ The final value implicated by the choice among judicial review arrangements is the quality of relations between the different branches of government. Judicial supremacy on constitutional issues may foster anger by the other branches at having their policies nullified, and provoke retaliation through constitutional amendment, court-packing, or outright disobedience. But greater legislative involvement in constitutional decision-making soothes this frustration and “recognizes the need for dialogue and joint responsibility between legislatures and courts in protecting fundamental liberties.”⁵⁴ These, then, are the values that constitutional draftsmen must simultaneously maximize in the arrangement of judicial review that they select.

B. Pieces of the Puzzle

This article’s thesis is that our draftsmen should choose the legislative override system. Compared to U.S.-style judicial supremacy or British parliamentary sovereignty—or any other existing judicial review model—the legislative override system attains a better combination of the above values. Below I describe the six key provisions that I believe should be included in a legislative override system, and discuss their likely consequences for the values implicated by judicial review. As will quickly become apparent, the six provisions resemble the Canadian and Israeli overrides in some respects, but substantially depart from them in others.

⁵² Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 247, 265, 275 (1995).

⁵³ Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 370 (2000).

⁵⁴ Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 434 (2003).

1. Supermajority Requirement for the Legislative Override

The legislature should be able to override the Court's⁵⁵ judgment when the Court invalidates a statute or executive action on constitutional⁵⁶ grounds. This power, the essence of the legislative override system, allows democratic majorities to translate their policy positions into law, even in areas that raise constitutional questions. It also improves the quality of public discourse by inviting legislators and the broader public to ponder constitutional issues, and by offering a reason for debate to continue even after the Court has reached its decision.⁵⁷

However, the legislative override power should require a supermajority—say, two-thirds or three-fourths of the legislative body—before it can be exercised. This supermajority requirement, which does not exist in Canada or Israel, serves two distinct purposes. First, and more importantly, it prevents the legislative override from being used too lightly, or from becoming an instrument for the deprivation of rights. If substantially more votes must be mustered to exercise a legislative override than to pass a regular bill, the override will only be used on the rare occasions when a Court ruling provokes broad public hostility and a legislative consensus against it. The debate accompanying a measure that requires a supermajority to pass is also likely to be more vigorous and informed than the debate over a typical statute, thereby providing further protection for individual rights. Second, a supermajority requirement indicates institutionally that the legislature holds genuine respect for the Court's authority and judgment. The judiciary, as a coordinate branch of government, is so worthy of deference that its rulings can only be overturned by the explicit assent of a supermajority of the nation's legislators. Though it may sound radical to an American observer, then, a legislative override authorized by supermajority vote is actually "perfectly consistent with the constitutional theory of checks and balances," as it would allow "Congress to override judicial vetoes by an extraordinary ma-

⁵⁵ Throughout the article, I assume that it is *Supreme* Court decisions that will be overridden by the legislature. But there is no reason why lower federal court decisions could not also be overridden, assuming that the Supreme Court has chosen not to hear the case. Only the *final* court decision for a given case, whatever the level of the court, should be subject to the override, so that the various stages of appeal may clarify and improve the judiciary's view of the questioned law's constitutionality.

⁵⁶ When Court decisions have a statutory basis, of course, the legislature can overrule them through its normal lawmaking procedures; the legislative override is unnecessary.

⁵⁷ Much more will be said about the advantages of the legislative override system in Part III. I am more concerned here with laying out the various elements of the override system than carefully defending them against all possible attacks.

jority in the same way that it can override presidential vetoes.”⁵⁸

It should be noted briefly that while the legislative override would substantially alter the relationship between the legislature and the judiciary (compared to under U.S.-style judicial review), it would have little impact on the executive branch’s institutional role. The President would still be entrusted with executing the laws, supervising the administrative state, and taking the lead in foreign policy. The only difference would be that executive actions held unconstitutional by the courts, like statutes, could be salvaged by means of the legislative override. The President *himself* could not disregard court rulings, but he could be authorized to do so by the legislature, in accordance with the procedures outlined in this section.

2. No Preemptive Use of the Legislative Override

The legislature should be able to use the override only when the Court has *already* found a law unconstitutional. In contrast to the Canadian and Israeli models, the legislature should not be able to preemptively “bullet-proof” statutes from constitutional challenge in the courts. Disallowing preemptive overrides helps protect individual rights guarantees (and other constitutional provisions) by giving the judiciary the initial opportunity to present its judgment and defend its reasoning. Subsequent discussion of the bill in question will inevitably be shaped by the Court opinion’s language and logic, and advocates of the override will need to engage and rebut the Court’s arguments. Permitting overrides to be exercised only in response to a particular Court judgment will also improve the public debate over the override’s use. “The public will be aware, because of the judicial decision, precisely of what will be lost or gained by invocation of the override. The apathy which is bred by uncertainty and generality will be diminished.”⁵⁹

3. Only Allow the Federal Legislature To Use the Override

The legislative override power should be reserved for the federal legislature alone. Federal subunits, such as American states or Canadian provinces, should not have the authority to set aside Supreme Court rulings in-

⁵⁸ MANFREDI, *supra* note 15, at 176; see also Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51, 84 (1984) (“Any measure that could be navigated through all the branches of the national legislative process, each reflecting a variety of constituencies and points of view, might well be considered a more sensible approach to the problem than would a verdict from a bare majority of five on the Court.”).

⁵⁹ Donna Greschner & Ken Norman, *The Courts and Section 33*, 12 QUEEN’S L.J. 155, 192 (1987).

validating their laws. The first reason to deny federal subunits the override power is because it is far more likely that a *local* majority (or supermajority) will be inclined to infringe individual rights than a national majority. While national majorities in favor of a given law typically reflect the input of many different constituencies, with diverse priorities and interests, local majorities can more easily emerge along pure ethnic, racial, or sectarian lines. As Paul Weiler writes, “[f]or many people, reflection on what might have happened after *Brown v. Board of Education* had Mississippi had a legislative override on [F]ourteenth [A]mendment issues is sobering enough to discredit the entire notion [of subunit overrides].”⁶⁰ Second, allowing subunits to override Supreme Court decisions is consistent with only quite extreme forms of federalism.⁶¹ A subunit override provision implies that local political decisions may trump national constitutional norms. Assuming a sufficiently motivated local legislature, a subunit could entirely exempt itself from the values that bind the rest of the country, thereby subverting the very notion of a unitary state.⁶²

4. Sunset Provision for Legislative Overrides

Legislative overrides, once passed by the federal legislature, should expire after a certain number of years (ideally spanning a national election), at which point they could be renewed by a new supermajority vote.⁶³ A sunset provision of this sort is employed by both Canada and Israel, and serves two of the values articulated above. First, it ensures that the national conversa-

⁶⁰ Weiler, *supra* note 58, at 85. Weiler points out that Canadian provinces are also much more likely to violate individual rights than the national Canadian government. French-Catholics in Manitoba, Chinese in British Columbia, and English-speakers and Jehovah's Witnesses in Quebec are just a few of the groups whose rights have been infringed by provincial actions in the past. *Id.* at 85 n.106.

⁶¹ Federalism is not one of the values that I argued is implicated by schemes of judicial review. It was omitted because (1) unlike all the other values, it is not at all clear whether it is better to have “more” or “less” federalism; and (2) whether subunits have the override power is the only aspect of the legislative override debate that touches on federalism concerns.

⁶² The only reasons that I can see for giving the override power to federal subunits are if historical experience creates confidence that the subunits are unlikely to wield the override power egregiously, or if subunits demand the override power as a price for agreeing to the constitution in the first place. Both of these arguments apply to the drafting of the Canadian Charter.

⁶³ Applying to legislative overrides Bruce Ackerman's idea of a “supermajoritarian escalator,” by which states of emergency would require ever-larger legislative majorities at each vote to be maintained, one can also imagine a system where the percentage of the vote required for passage rises each time the legislative override is up for renewal. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

tion about constitutional interpretation will continue for years, as neither the initial Court ruling nor the subsequent legislative override will mark the end of the debate. Especially if an election is held between the use of the override and its subsequent expiration, the override will likely be a major campaign issue, and legislators will have the benefit of the voters' input when deciding whether to renew it.⁶⁴ Second, a sunset provision reduces the danger that the override poses for individual rights. An override passed in the heat of a popular uproar over a controversial Court decision will expire a few years down the road, along with its potentially rights-infringing elements, unless a sober second look at the override confirms that it should be renewed. The nation's experience with the override in the period after its exercise will also guide legislators' votes on whether to renew it. If history shows the Court's original reasoning to be prescient, legislators will be more likely to allow the override to expire; conversely, if the Court's logic appears as flawed years later as at the time of decision, legislators will probably renew the override.

Moreover, a sunset provision is in no way incompatible with the rule of law. It is true that a sunset provision allows statutes to be passed by the legislature, stricken by the Court, re-authorized by legislative override, and invalidated anew once the designated number of years has elapsed. Statutes may therefore transition into and out of legality several times in their lifetime.⁶⁵ But this possibility is not inconsistent with the rule of law since the sunset provision's rules are known in advance by all parties. Laws are stricken, renewed, and stricken once again in accordance with predetermined procedures, making the sunset provision no different than the very similar clauses that are frequently attached to ordinary legislation.⁶⁶ A sunset provision does generate more flux in constitutional doctrine and statutes' applicability—but clear *ex ante* procedures, not perfect legal stability, are the hallmark of the rule of law.

⁶⁴ Pushing this point to its natural conclusion, Manfredi argues all legislative overrides should expire at each national election. The newly elected legislators would then decide whether to renew each override, or allow them to expire for good. MANFREDI, *supra* note 15, at 192.

⁶⁵ Court decisions, similarly, may be initially binding (when they are issued), then of no precedential value (when they are overridden), then binding once again (when the override expires). This obviously creates some complications for the doctrine of *stare decisis*. But these complications are unlikely to be too serious given that court rulings in systems without overrides are overruled without undermining the concept of legal precedent, and that lower courts in an override system would likely wait until they knew the legislature's response to a controversial high court decision before relying on that decision.

⁶⁶ See, e.g., Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (stating that various tax cuts will expire in 2010).

5. Applicable to All Indeterminate Provisions of Constitution, Except Those Dealing with Elections

Legislatures should be able to override Court rulings on the basis of all constitutional clauses other than determinate provisions and provisions governing electoral processes. (By “determinate” provisions, I mean clauses whose meaning cannot reasonably be disputed, such as “two Senators from each State.”⁶⁷ “Indeterminate” provisions, on the other hand, are clauses about whose meaning reasonable people may disagree, such as “equal protection of the laws”⁶⁸ or “freedom of speech.”⁶⁹) The purpose of the legislative override is to give the legislature a role in constitutional *interpretation*, not to allow it to disregard clear constitutional dictates. No override should be possible, then, vis-à-vis clauses whose meaning is undisputed, as any exercise of the override in this context would smack of extraconstitutionality.

It may, of course, be quite difficult in practice to distinguish between determinate and indeterminate provisions. Opponents of a given use of the override will likely argue that the constitutional provision at issue is determinate (and correctly construed by the Court), while supporters of the override will contend that the provision is indeterminate. The solution to this dilemma is for the document that describes the override’s characteristics—to be it the constitution itself, a constitutional amendment, or a simple statute—to specify to which provisions the override applies. Canada and Israel both employ a pre-commitment strategy of this sort,⁷⁰ and have avoided any controversy over when the override is available and when it is not.

A different logic explains why constitutional provisions regulating the electoral process should be exempt from legislative override: the potential for legislative self-dealing. If the legislature could disregard unfavorable Court judgments on issues such as voting rights, electoral district-drawing, and the timing of elections, a rogue legislature could subvert the democratic process and entrench its power. Withdrawing constitutional clauses dealing with the electoral process from the scope of the override power provides “insurance against the . . . possibility of a government’s attempting to perpetuate itself in [office] by denying basic rights of participation.”⁷¹

⁶⁷ U.S. CONST. art. I, § 3, cl. 1.

⁶⁸ U.S. CONST. amend. XIV, § 1.

⁶⁹ U.S. CONST. amend. I.

⁷⁰ In Canada, the override may be used only to disregard Court decisions based on sections 2, 7-15 of the Charter, i.e. fundamental freedoms, legal rights, and equality rights. *See supra* notes 11-12. In Israel, the override only applies to Court decisions based on the freedom of occupation. *See supra* note 43.

⁷¹ Weiler, *supra* note 58, at 82.

6. Requirement of Explicit “Notwithstanding” Language

Unlike in Canada and Israel, all uses of the legislative override should explicitly refer to the Court ruling that they are setting aside as well as the constitutional clauses invoked in the ruling⁷² (e.g. “notwithstanding the Supreme Court’s decision in *United States v. Lopez*,⁷³ interpreting Article I, Section 8 of the Constitution,⁷⁴ the United States Congress passes the Gun-Free School Zones Act”). This strict wording requirement makes very clear what the stakes are when use of the override is being considered, inevitably “draw[ing] the proposal to the attention of the opposition, the press, and the general public.”⁷⁵ Public discourse when an override has been proposed is likely to be quite vigorous, and infused with deep questions about the meaning and popular understanding of the constitution. In this atmosphere of heightened scrutiny, the likelihood that fundamental rights will be violated by the legislature is reduced, since the political costs of exercising the override without broad public support are magnified by the debate’s high profile.

C. *The Override’s Place in the Literature*

The legislative override model introduced above is not, of course, the first effort to resolve what Alexander Bickel famously described as the “countermajoritarian difficulty” with judicial review.⁷⁶ Many scholars have written about judicial review, arguing that it should be maintained in its classic U.S. format, that it should be modified somewhat, or that it should be abolished altogether. This article’s proposal, though, differs in important respects from the major academic perspectives on judicial review, and describes a middle ground between judicial supremacy and parliamentary sovereignty that is all too often ignored in the literature.

One prominent school of thought argues that there is nothing wrong with U.S.-style judicial supremacy. According to proponents such as Ronald Dworkin, Laurence Tribe, and Owen Fiss, judges are uniquely positioned, by

⁷² I do not believe that the override wording should state that the law is passed notwithstanding the relevant constitutional clause itself. As mentioned above, I am defending the legislative override as a means for involving the legislature in constitutional interpretation and enforcement, not as a way for it to ignore what it *actually* believes to be the constitution’s dictates.

⁷³ See *United States v. Lopez*, 514 U.S. 549 (1995).

⁷⁴ U.S. CONST. art. I, § 8, cl. 1, 3 (“The Congress shall have power . . . to regulate Commerce . . . among the several States.”).

⁷⁵ Weiler, *supra* note 58, at 81.

⁷⁶ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962).

virtue of their training and independence, to reflect on and decide constitutional questions.⁷⁷ Legislatures, in contrast, “see their primary function in terms of registering the actual, occurrent preferences of the people,” and are “not ideologically committed or institutionally suited to search for the meaning of constitutional values.”⁷⁸ Bruce Ackerman’s theory of constitutional moments, similarly, finds judicial review unproblematic because “courts *serve* democracy by protecting the hard-won judgments of a mobilized citizenry against fundamental change by political elites.”⁷⁹ This article’s proposal clearly clashes with the views of Dworkin, Tribe, and Fiss, which protect rights and reasoned discourse only by sacrificing an inordinate degree of democratic decision-making. Ackerman’s theory also fails to save judicial review from the charge that it is undemocratic, since the legislature typically seeks not to *undo* a historic constitutional moment, but merely to express its disagreement with the courts about what that moment meant.

A second school of thought takes the opposite position, that courts’ very power to strike unconstitutional laws should be eliminated. Robert Bork has called for the abolition of judicial review because, “as our institutional arrangements now stand, the Court can never be made a legitimate element of a basically democratic polity.”⁸⁰ Despite holding very different political views, Mark Tushnet has echoed Bork’s recommendation while arguing that eliminating judicial review would result in the development of a “vibrant populist constitutional law.”⁸¹ This article’s proposal also obviously clashes with this position, which upholds majoritarian expression above all other values, and would drastically reduce the protection afforded to fundamental rights.

Third, and most interesting for the purposes of this article, several scholars have attempted to soften the undemocratic edges of judicial review without abandoning the basic parameters of the American model. Bickel argued

⁷⁷ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 15 (2d ed. 1988); Ronald Dworkin, *Constitutionalism and Democracy*, 3 *EUR. J. PHIL.* 1, 11 (1995); Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979). For a ringing affirmation by the Court of its own supremacy, see *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (*Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution,” and this idea “has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

⁷⁸ Fiss, *supra* note 77, at 10.

⁷⁹ Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 465 (1989) (emphasis added); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

⁸⁰ Robert Bork, *Our Judicial Oligarchy*, *FIRST THINGS*, Nov. 1996, at 21, 23.

⁸¹ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 177 (1999).

that judges should exercise the “passive virtues” by using procedural techniques (e.g. standing, ripeness, the discretionary certiorari power, etc.) to avoid answering constitutional questions.⁸² The “legislative constitutionalism” model advanced by writers such as Robert Post, Reva Siegel, Keith Whittington, and Larry Kramer encourages courts to show more deference toward the legislature’s constitutional judgments, in particular when the legislature employs its Fourteenth Amendment enforcement power to remedy constitutional violations.⁸³ And Judge Guido Calabresi has called on courts to avoid conventional “Type I” judicial review, and to strike laws primarily when they violate the antidiscrimination principle (“Type II” review) or are the product of undue legislative haste or subterfuge (“Type III” review).⁸⁴

The fundamental problem with these approaches is that they do not go far enough. All of them would reduce judicial arbitrariness and improve democratic accountability compared to a system of pure judicial supremacy, but the balance they would strike between protecting fundamental rights and promoting democratic decision-making is still far from satisfactory. When judges operating under Bickel’s framework decide that it is time for action rather than passivity, it is little consolation to the legislature whose laws are stricken that the courts were patient before exercising their authority. Similarly, the formal structure and power relations of the legislative constitutionalism system are identical to the institutional status quo. Courts might be more deferential toward certain legislative interpretations of the Constitution, but they would still retain the unchallenged authority to strike statutes that go too far. As Post and Siegel write, “extrajudicial constitutional interpretation [would] co-exist with judicial review.”⁸⁵ Moreover, the legislative constitutionalism model (at least in Post and Siegel’s formulation) extends only to congressional use of the Fourteenth Amendment enforcement power.

⁸² BICKEL, *supra* note 76, at 111-99.

⁸³ See Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Robert E. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

⁸⁴ Guido Calabresi, *The Supreme Court 1990 Term Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991).

⁸⁵ Post & Siegel, *supra* note 83, at 2028; see also Kramer, *supra* note 83, at 7-8 (The advocates of legislative constitutionalism “all ultimately accept some version of judicial supremacy,” proposing systems where “[t]he political branches are permitted, in effect, to behave like naughty lower courts, free to ignore the spirit though not the letter of judicial precedent.”).

In every other context—in particular, when the dispute is whether a statute infringes protected rights rather than whether Congress has the authority to pass the statute—courts would need to show no particular deference toward the legislature's judgment. Finally, Calabresi makes clear that he would not eliminate Type I judicial review entirely,⁸⁶ and provides the legislature with no recourse when its statutes are stricken (with the limited exception that the *procedural* defects of statutes invalidated pursuant to Type III review could be remedied). In contrast to this article's proposal, Bickel, Post, Siegel, Calabresi, et al. take for granted the formal characteristics of American judicial review, and their theories accordingly are unable to transcend the American model's limitations.

III. THE LEGISLATIVE OVERRIDE SYSTEM VERSUS ITS RIVALS

Parts I and II above described the Canadian and Israeli experiences with the legislative override and introduced what I consider to be the optimal arrangement of judicial review. But there has been no systematic comparison yet between the override and other judicial review systems. This Part provides that comparative analysis, first in terms of the values secured by different schemes of judicial review, and second in terms of the incentives that different arrangements generate for courts, legislatures, and the public. After comparing the legislative override system to its most prominent rivals, I return to the Canadian and Israeli experiences and explain how they might have been improved under the arrangement proposed in Part II.

Rather than compare the override to its rivals in the abstract, this Part's first two sections invoke the hypothetical statutes mentioned at the beginning of the article. I assume that both the National Security Act and the Better Neighbors Act would be found unconstitutional by American courts.⁸⁷ I also treat the two statutes as archetypes, respectively, of "bad" and "good" unconstitutional legislation: that is, legislation that blatantly violates fundamental rights, and legislation backed by strong policy arguments whose constitutionality is a close call. The National Security Act is similar to the World War I-era Espionage Act, to President Roosevelt's executive order that resulted in the confinement of a hundred thousand Japanese-Americans during World War II, and to some of the more extreme government policies

⁸⁶ See Calabresi, *supra* note 84, at 135 ("[T]here does exist in our polity a degree of consensus over the propriety of Type I protection for certain categories of rights. . . . To treat even these rights as subject to legislative reconsideration inevitably and unintentionally begins an erosion of these rights that is neither justified nor desirable.").

⁸⁷ See *supra* notes 1-3.

enacted during the ongoing war on terror.⁸⁸ Many of our courts' proudest moments have come when they condemned such actions,⁸⁹ and many of their darkest when they failed to intercede.⁹⁰ The Better Neighbors Act, on the other hand, resembles the Gun-Free School Zones Act and the Violence Against Women Act, laws that were passed by wide margins, that threatened no fundamental rights, and that were stricken by a divided Court in highly controversial decisions.⁹¹ History has not redeemed the Court's decisions in *Lopez* and *Morrison*; indeed, the view in much of the academy is that those cases "resurrect the mindless formalism of the *Lochner* Court."⁹²

A. *Values Realized*

How do the values attained by the legislative override model compare to those attained by other judicial review systems? What values are served by enabling the legislature to override the Court's rulings that the National Security Act and Better Neighbors Act are unconstitutional, as opposed to treating the Court's rulings as final, or not allowing judicial review in the first place?

Comparing the override first to U.S.-style judicial supremacy, it is true that the former will likely be somewhat worse at protecting fundamental rights, because of the lower barriers to egregious legislative (and executive) behavior that it implies. The legislature will always have the formal power to disregard Court rulings and re-pass troubling statutes like the National Security Act. There are several reasons, though, why the risk of legislative tyranny under the override system is not nearly as high as some critics allege.⁹³

⁸⁸ For example, the government's attempt to detain alleged enemy combatants until the end of hostilities after providing just "some evidence" of their belligerent status. The Court rejected this attempt in *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004).

⁸⁹ See, e.g., *Hamdi*, 542 U.S. at 507; *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

⁹⁰ See, e.g., *Korematsu*, 323 U.S. at 214; *Abrams*, 250 U.S. at 616.

⁹¹ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

⁹² Tom Stacy, *What's Wrong with Lopez*, 44 U. KAN. L. REV. 243, 244 (1996).

⁹³ See, e.g., JONATHAN BLACK-BRANCH, *RIGHTS AND REALITIES: THE JUDICIAL IMPACT OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS ON EDUCATION, CASE LAW, AND POLITICAL JURISPRUDENCE* 29 (1997) ("[A] legislature could deny individual freedoms to meet certain ends, such as social, linguistic, or political agendas."); Reginald A. Whitaker, *Democracy and the Canadian Constitution*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY, AND THE CONSTITUTION ACT* 240, 257 (Keith Banting & Richard Simeon eds., 1983) ("Even if [the legislative override] is sparingly employed, it constitutes a kind of potential constitutional denial

First, the system's many built-in structural safeguards—the supermajority requirement, the ban on preemptive override use, the reservation of the override power to the federal legislature alone, the sunset provision, and the mandatory “notwithstanding” language—radically reduce the likelihood of the legislature violating civil liberties. To permanently set aside the Court's invalidation of the National Security Act, for instance, a federal legislative supermajority would need to be assembled, the override would need to be explicitly and publicly employed, and the whole process would need to be repeated a few years later when the override expired. Given that courts rarely deviate too far from majority opinion,⁹⁴ any context in which the override's built-in safeguards fail to thwart egregious legislative behavior is likely to be a context in which the courts would not have invalidated the offensive behavior in the first place.⁹⁵

Second, the only situations where the legislative override is *likely* to be used (assuming legislative good faith) are those in which the Court has advanced a controversial and deeply unpopular interpretation of a certain con-

of individual rights.”). Of course, these criticisms were leveled at the Canadian override, which lacks many of the safeguards of this Article's proposal.

⁹⁴ See, e.g., THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 192 (1989) (“Overall, the evidence suggests that the modern Court has been an essentially majoritarian institution. Where clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls.”); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) (“[F]or most of the period since 1956, the Court has been highly responsive to majority opinion.”).

⁹⁵ See MANFREDI, *supra* note 15, at 189 (“[T]he corruption of any state” where legislative tyranny ensued under the override system “would be so complete as to permeate every institution, including the courts.”). An argument can be made that an arrangement of U.S.-style judicial review would be less susceptible to this kind of systemic corruption than the legislative override system. Because a political majority in the U.S. requires many years to fill the courts with its appointees, there would need to be an extended period of corrupt intolerant government before the judiciary could be made to abandon its historical commitment to protecting individual rights. In a legislative override system, in contrast, a corrupt intolerant majority could immediately start overriding Supreme Court decisions. There are several problems with this argument. First, judges in a legislative override system can also have life tenure, meaning that it would take an ill-intentioned majority just as long to seize control of the courts in one system as in the other. Second, while a legislative majority in an override system can immediately set aside Supreme Court decisions, the process of doing so is intentionally difficult, and subject to built-in correction through the sunset provision. Third, it may actually be better for a country's long-term constitutional health if a corrupt majority overrides a “good” Court decision, thereby incurring widespread condemnation and eventual reversal through the sunset provision, than if Court decisions are always set in stone and unassailable through regular legislative means.

stitutional provision. An override under these circumstances—one resuscitating the stricken Better Neighbors Act, for example—does not constitute a clear constitutional violation, but rather a clash between two “different political conceptions [of the constitution] contending with one another,”⁹⁶ in which it is not at all clear why the side of the courts should prevail.⁹⁷ The judicial position on the provisions in question may be more accurate doctrinally, but the legislative interpretation will often be a truer reflection of the public’s evolving constitutional understanding.

Third, the inter-branch discourse and public debate fostered by the legislative override may result in a more nuanced explication of constitutional provisions than judicial decision-making alone can produce. As Walter Tarnopolsky writes, “civil liberties are best protected if the issues are clarified in a kind of public dialogue between the legislative and judicial branches of government . . . because public and institutional deliberation promotes deeper knowledge and appreciation of individual rights.”⁹⁸ In the case of the Better Neighbors Act, the Commerce Clause and Fourteenth Amendment enforcement power will be better debated and understood if Congress and the public are active participants in constitutional interpretation rather than a passive audience to the Court’s pronouncements.

The legislative override model will also probably possess slightly⁹⁹ less stability and predictability of constitutional norms than U.S.-style judicial review. Both actual use of the override, and the knowledge that it exists as an available legislative tool, are likely to heighten the volatility of constitutional doctrine. In contrast to its minor concessions in the areas of individual rights and legal stability, however, the legislative override system will likely perform far better in promoting democratic decision-making, more constructive inter-branch relations, and richer public discourse. The very existence of an override means that Bickel’s countermajoritarian difficulty largely dis-

⁹⁶ MANDEL, *supra* note 20, at 79.

⁹⁷ See also HIEBERT, *supra* note 49, at 54 (“[The legislature’s disagreements with the Court] are not from a lack of respect for rights but from its different judgment about the priority that should be accorded to the conflicting rights and values at issue.”); Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451, 452 (2003) (“[The legislative override’s] real purpose is to enable legislatures to override judicial interpretations or applications of [constitutional] rights with which they reasonably disagree.”).

⁹⁸ Walter S. Tarnopolsky, *The Constitution and Human Rights*, in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY, AND THE CONSTITUTION ACT 261, 271 (Keith Banting & Richard Simeon eds., 1983).

⁹⁹ Only slightly less, because (1) the legislative override is likely to be used only rarely; and (2) as discussed below, courts may temper their more activist—and hence unpredictable—rulings when faced with the possibility of their judgments being set aside.

appears, as the public and their elected representatives are provided with the means to express themselves when they disagree with the Court on constitutional issues. The Court's invalidation of a law such as the Better Neighbors Act is not the end of the discussion, but rather a cue for the next line of constitutional dialogue.

Much of the rancor that final judicial authority engenders in the democratic branches of government would also vanish under a legislative override system, since actions of the legislature and the executive deemed unconstitutional by the Court would no longer automatically be thwarted.¹⁰⁰ Congress would not have to return to the drawing board in frustration after the Better Neighbors Act is stricken, but could re-pass the law over the courts' objections.¹⁰¹ Finally, features of the override such as its "notwithstanding" language, its expiration after a set time period, and its usage only in the aftermath of a Court decision ensure that constitutional discussion would be far more extensive and meaningful than in contemporary American society. Instead of being choked off by an authoritative Court ruling, the public debate about the constitutionality of the National Security Act or Better Neighbors Act would continue as the legislature considered use of the override, and later as it mulled renewing the override or allowing it to expire.

The advantages of the legislative override system are even clearer when it is compared to traditional British parliamentary sovereignty. First, fundamental rights are obviously better safeguarded, *ceteris paribus*, under a system with a written constitution and with judicial authority to strike laws deemed incompatible with the constitution. Even if rulings by the Court can be overturned in exceptional cases by a legislative supermajority, civil liberties are still afforded far more protection than in a regime where judicial rulings of unconstitutionality cannot be made in the first place. Under a regime of pure parliamentary sovereignty, for instance, the National Security Act would be immune from any judicial scrutiny at all. Second, a parliamentary system *does*, by definition, result in more majoritarianism than a legislative override system (or any other constitutional system). But it does so in the areas where we are most suspicious of majority rule—that is, in situations where the legislature is tempted for political reasons to infringe individual rights, but is prevented from doing so by the intentionally unwieldy provisions built into the override instrument. The National Security Act would be

¹⁰⁰ The *courts* might be irritated at their relative loss of power, but this temporary irritation is a small price to pay for a judiciary that more explicitly takes into account the legislative and public understanding of the constitution.

¹⁰¹ The same is true, of course, of the National Security Act. But, as argued above, it is my view that the override would probably not be employed to rescue the National Security Act.

good law in a parliamentary system, but this is not an outcome that we should embrace given the statute's negative consequences for civil liberties.

Third, relations between the judiciary and the legislature are likely to be far more constructive when neither branch is obviously predominant over the other, as opposed to when courts confront an unassailable and incontrovertible legislative power. Courts' ability to strike laws like the National Security Act or Better Neighbors Act under the override system forces the legislature to take the judiciary's views into account, even if it is ultimately free to disregard them. Fourth, the stability and predictability of law must be greater when legal debates are tethered by a constitutional text rather than subjected to the changing whims of Parliament. The existence of the override allows more legal flux than U.S.-style judicial review, but far less than parliamentarism. Finally, public discourse under a regime of parliamentary sovereignty avoids the debilitating effects of judicial supremacy—but only by forsaking the deliberative benefits implicit in a written constitution that articulates a nation's deepest civic values. Majorities are never frustrated by having courts nullify laws that they support, but they also have difficulty viewing legislative debates through any prism other than prudentialism.

As for the modern United Kingdom and New Zealand systems of *hortatory* judicial review (in which the Court can declare a law to be incompatible with the European Convention or Bill of Rights, but cannot actually strike it), they still fail to protect individual rights sufficiently. Because “those who want Parliament to accept a judicial declaration of incompatibility bear the burden of legislative inertia,”¹⁰² it is substantially more difficult for constitutionally questionable laws to be revised or rescinded under a system of hortatory judicial review than under the legislative override. Judicial pronouncements that the National Security Act or Better Neighbors Act are incompatible with the European Convention or Bill of Rights, for example, would have no effect unless they prodded the legislature into revising the statutes. The modern British and New Zealand approaches *do* offer more assurances that rights will not be violated than traditional parliamentary sovereignty, and also improve public deliberation and inter-branch relations by initiating a constitutional dialogue between the legislatures and the courts. But, in all these respects, they still lag behind the legislative override system, which more jealously guards civil liberties, and establishes the institutional conditions for a richer and more enduring debate. Hortatory judicial review may be preferable to pure parliamentary sovereignty, but there seems to be no good reason to adopt it over the more robust legislative override model.

¹⁰² Perry, *supra* note 4, at 670.

B. *Institutional Incentives Under the Override*

The discussion to this point has hinted at, but not made explicit, the incentives that the Court, legislature, and public would face under the legislative override system at different points in the political process. Here, I outline the motivations that would likely drive judicial, legislative, and popular behavior under a legislative override, thereby lending further support to this article's claims about the override's merits.¹⁰³ Because U.S.-style judicial review is in my view the most important rival of the legislative override system, I also discuss the incentives that it generates.¹⁰⁴ This section takes for granted Eskridge and Frickey's contention that "each branch . . . acts strategically, calibrating its actions in anticipation of how other institutions [will] respond."¹⁰⁵

1. T₁: The Drafting and Passage of a Law That Raises Constitutional Questions

Under the familiar American system, Congress cannot just pass whatever law it thinks is best. Whenever a bill touches on a constitutionally sensitive area—e.g. free speech, religion, criminal procedure, Commerce Clause authority, to name just a few—Congress must anticipate court objections, and tailor the bill so as to avoid them to the greatest extent possible.¹⁰⁶ There comes a point, presumably, at which the additional legislative effort required

¹⁰³ This discussion of incentives generated inevitably overlaps with the earlier analysis of the values secured by the override system compared to U.S.-style judicial review. I have tried to keep redundancy to a minimum.

¹⁰⁴ On the other hand, I do not explicitly discuss the incentives produced by pure parliamentary sovereignty or hortatory judicial review. The incentives under pure parliamentary sovereignty are relatively obvious—and not very relevant to a discussion that presumes a written constitution—while the incentives under hortatory judicial review are similar to those under the legislative override, but muted because of the courts' merely advisory power.

¹⁰⁵ William N. Eskridge & Philip P. Frickey, *The Supreme Court 1993 Term Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 29 (1994).

¹⁰⁶ Cf. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 160 (1997) (observing that both houses of Congress held hearings on the constitutionality of the Religious Freedom Restoration Act). I am assuming here that Congress is interested, at least to some degree, in actually enacting policies that it considers to be prudent. Obviously, if legislators are solely concerned about winning political points, they will show little interest in trifling issues like whether the bills they pass are constitutional. Even under a wholly cynical view of lawmaking, however, politicians would need to pay some attention to the constitutionality of bills because constitutional arguments are an important part of the public debate on many issues, and may therefore have an impact on politicians' electoral fates.

to shield a bill from constitutional challenge outweighs the potential benefit, as measured by the incremental reduction in the probability of the law being nullified. Still, Congress must spend significant time and effort considering the constitutionality of a bill's provisions, as likely to be evaluated by contemporaneous *and* future courts, instead of the bill's actual merits. This characteristic of congressional legislating produces all sorts of perverse incentives. "Too many constitutional norms [are injected] into the lawmaking process,"¹⁰⁷ and legislators (and the public) become either "disillusioned with the procedures of representative government,"¹⁰⁸ or preemptively angry at the courts that are expected to prevent the majority's wishes from being realized. I have assumed so far that the Better Neighbors Act was actually passed by Congress. But as this discussion illustrates, it is quite possible that the judiciary's expected response to the statute would either prevent it from ever being enacted, or force Congress to substantially amend it so that it complies with the courts' constitutional interpretation.

Under an override system, in contrast, the legislature need not agonize to the same extent over a bill's constitutionality in the eyes of the judiciary. Since the Court's say is not necessarily final, the legislature can more expeditiously pass laws like the Better Neighbors Act even though it is aware that those laws might be found unconstitutional. For two reasons, though, the legislative override system should not cause the legislature casually or frequently to pass constitutionally questionable bills. First, the intentional cumbersomeness of the override process means that a legislative majority can rarely anticipate with much certainty that it will be able to muster the necessary votes to use the override in the future. Because of this uncertainty, the legislature will still try to pass bills that present as few constitutional difficulties to the judiciary as possible, so as to minimize the likelihood of the Court striking a law and the legislature then being unable to override this ruling—which is the worst possible outcome for the legislature. The constitutionally questionable laws that the legislature passes will therefore resemble the Better Neighbors Act more than the National Security Act, since the latter statute's constitutional flaws are more glaring, and overriding a Court ruling striking it would be more difficult.

Second, as long as a country's constitution is viewed as legitimate, legislators concerned about reelection will respect—or, at least, seek to *appear* to respect—its provisions. The "political accountability of the [legislature's] members ensures . . . that they take due care in developing and applying

¹⁰⁷ Tushnet, *supra* note 52, at 247.

¹⁰⁸ Peter H. Russell, *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts*, 25 CAN. PUB. ADMIN. 15, 32 (1982).

[constitutional] standards,”¹⁰⁹ and that they do not pass laws to which the public may object precisely because of their dubious constitutionality. In particular, rights-infringing statutes like the National Security Act would face great hurdles in being enacted, under both U.S.-style judicial review and the override system, since perceived incompatibility with the constitution carries negative political consequences. The only situation, then, when a legislature under the override system is likely to pass laws that it believes the courts may nullify is when it regards these laws as deeply important and necessary, and consistent with a reasonable interpretation of the constitution.

2. T₂: The Supreme Court’s Decision Whether To Strike a Federal Law

Once a constitutionally questionable bill has become law in the U.S., and a case testing its constitutionality has been decided by a circuit court, the Supreme Court has two decisions to make: whether to grant certiorari; and, if it grants cert, how to decide the case. Under the American model of judicial review, the Court is relatively unconstrained in making these choices. For the most part, it alone determines which cases it will hear. And the Justices are free to decide cases on the basis of political ideology, jurisprudential philosophy, partisan allegiance, policy preferences, the relevant case law, or any other factor. To be sure, there are *some* constraints on what the Court can do, since decisions that are out of step with popular opinion may provoke resistance or disobedience by other political actors, and erode the Court’s authority and credibility. Fear of losing legitimacy may therefore cause the Court not to accept for review some cases in which it is interested, to reduce the scope of some rulings, and perhaps even to decide some cases differently. Generally speaking, though, the Court is accountable in the short term to no one but itself. It may strike the Better Neighbors Act even though it knows the law is wildly popular.

Under a legislative override system, on the other hand, the Court *is* accountable for its decisions, since the legislature possesses the explicit power to pass laws “notwithstanding” the Court’s rulings. The Court’s dominant incentive within this arrangement is to avoid having its judgments overridden by the legislature, as overrides diminish the Court’s authority and result in its least desired legal outcomes coming about. This incentive should cause the Court to change its behavior in two important (and largely positive) ways. First, it will be forced to consider more carefully the likely legislative and public response to any decision that it makes to strike a law as un-

¹⁰⁹ MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 13-14 (1996).

constitutional.¹¹⁰ To prevent its rulings from being overridden, the Court will endeavor to issue judgments that most people support—or, at least, that a supermajority of legislators do not oppose. This greater attention to legislative and public opinion suggests that so-called “activist” judgments, where the Court deviates substantially from the norms and policies that society is prepared to accept, will decrease in frequency. Instead, an “environment in which the Court ha[s] to incorporate calculations about likely legislative responses to its judgments . . . encourage[s] strategic moderation of judicial review.”¹¹¹ The Court will be less likely to invalidate the well-liked Better Neighbors Act, while, depending on the National Security Act’s popularity, probably still willing to strike that statute.¹¹²

Second, regardless of the substance of a decision, the Court will seek to make its opinions as persuasive as possible to the legislature and the public. Knowing that its opinions will be read and evaluated not just by lower courts and academics, but also by legislators, pundits, and concerned citizens debating whether to use the override, the Court is likely to de-emphasize dry legal doctrine, and phrase its opinions in resonant language intended to appeal to ordinary people. A decision striking the Better Neighbors Act could not rely on arid formalism, but would have to speak in the practical vocabulary that comes naturally to citizens and legislators. Court incentives under the override system would therefore tend to create a jurisprudence of lower stakes and greater eloquence.

¹¹⁰ Some commentators argue that the reverse is more likely to be the case, i.e. that the override will encourage the Court to issue bolder rulings, secure in the knowledge that legislators will be able to override decisions that they perceive as too unpopular or controversial. *See, e.g.,* Weiler, *supra* note 58, at 80 n.98 (“To my mind, a major virtue of the [legislative override is] that it could elicit more vigorous judicial scrutiny of a broad range of civil rights issues, because it would give our judges a sense of security from the presence of a legislative safety net beneath them.”). This argument has been proven wrong empirically, as the Canadian courts were more restrained when the legislative override was considered a legitimate option, and have grown bolder as the override has become more of a dead letter. The claim is also implausible, as it assumes an irrational nonchalance about being overridden on the part of the courts.

¹¹¹ MANFREDI, *supra* note 15, at 188.

¹¹² If we assume that the National Security Act is also very popular, and that there is a high institutional price to be paid for striking it, then it is unlikely that courts under *any* system would invalidate it. The U.S. Supreme Court, notably, failed to invalidate either the Espionage Act or the World War II internment of Japanese-Americans, even though there was no possibility that it could be overridden.

3. T₃: The Legislature's Decision on Whether To Use the Override

In the U.S., the formal political process is essentially over once the Supreme Court nullifies a federal law. Legislators may complain furiously about the Court's decision, turn its "activism" into a campaign issue, and try to pass similar laws that avoid the constitutional pitfalls that led to the first statute's demise. But, barring a constitutional amendment,¹¹³ the original law cannot be rescued. The debate over the Court's decision may rage for a time, but it is likely to be a very frustrating discussion, full of anger but helpless to ameliorate the situation. President Clinton, for example, declared that he was "terribly disappointed" by the invalidation of the Gun-Free School Zones Act, but did not question the Court's authority to rule as it did.¹¹⁴

The great appeal of the legislative override system is that the Court's ruling no longer represents the end of the political process. Confronted with a Court decision striking one of its laws, the legislature has the authority to pass the stricken law anew, now immunized from constitutional challenge for a number of years. The legislature's incentive to use the override will be strongest when a Court ruling has incited broad and deep popular opposition, and when the Court itself was fractured in reaching its decision. Under these circumstances, legislators will be able to profit politically from invoking the override, and the Court's divisions will lessen the potential negative consequences of disagreeing with the judiciary about the constitution's meaning.¹¹⁵ Judicial invalidation of the Better Neighbors Act is a paradigmatic example of such a situation (assuming the Court is as divided as it was in *Lopez* and *Morrison*).

There are, however, several reasons why situations like the striking of the Better Neighbors Act will seldom arise, and why the override will probably be exercised only rarely. First, a politically savvy Court, aware that the

¹¹³ Even if it were easier to pass constitutional amendments in the U.S., it does not follow that Supreme Court decisions opposed by the legislature, mostly involving policy matters, should be addressed by changes in the nation's constitutive text. See MANFREDI, *supra* note 15, at 171 ("[T]o rely on a process this cumbersome as the primary response to Supreme Court . . . decisions is questionable when most of those decisions involve policy-oriented disputes . . .").

¹¹⁴ See Ann Devroy & Al Kamen, *Clinton Says Gun Ruling Is a Threat*, WASH. POST, Apr. 30, 1995, at A1. Congress did pass a revised version of the statute, applicable only to guns that have traveled in interstate commerce. That statute's constitutionality has not been adjudicated.

¹¹⁵ It is also possible that the legislature would often use the override in response to highly technical Court decisions that create little public interest. I doubt this would be the case because most constitutional questions are of broad interest, and because the mention alone of using the override is likely to produce widespread media attention.

legislature has the power to set aside its decisions, is unlikely to frequently issue rulings that create widespread antagonism. The Court will pick its battles carefully, handing down judgments that it expects the legislature to oppose only when it is confident of public support. The Court in an override system would probably choose not to invalidate the Better Neighbors Act, and if it struck the National Security Act it would do so in language calculated to maximize public backing for its action. Second, regardless of the direction of the Court's rulings, legislators will be reluctant, in most circumstances, to directly challenge the Court's moral authority on issues of rights and constitutional interpretation. As Jeffrey Goldsworthy writes, "the most likely reason for legislators not using the override is that the electorate is unlikely to trust their judgment about constitutional rights more than the judges' judgment."¹¹⁶ Legislative reluctance to confront the Court will be highest in situations like the invalidation of the National Security Act, where the Court portrays itself as the guardian of civil liberties and accuses the legislature of tyrannical inclinations.

Third, the legislative majority that produced the stricken law is more likely to weaken in the face of an adverse Court decision than to intensify into the required supermajority.¹¹⁷ The political landscape may have changed since the law was originally passed; some legislators may be convinced by the Court ruling not to renew their support for the law; initial opponents of the law will see their position strengthened by the Court's endorsement of their position; and the Court itself may tailor its decision by preserving popular provisions of the statute and striking only selected objectionable portions. These factors are all magnified in the case of a law, like the National Security Act, that was likely passed with some queasiness by the legislature. Finally, several features of the legislative override make it difficult for the legislature to deploy in any but the most egregious circumstances: the requirement of including explicit "notwithstanding" language, the need to assemble a legislative supermajority, the impossibility of preemptively "bulletproofing" legislation, and the sunset provision. For these reasons, the legislature's incentive to use the override will generally be weak, and will likely only be heightened on those rare occasions when there is a public consensus that the Court has erred or overreached, and needs to be pulled back towards the public's contrasting constitutional understanding.

¹¹⁶ Goldsworthy, *supra* note 97, at 456.

¹¹⁷ See Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. OF TORONTO L.J. 89, 96-97 (2003) ([Even with a legislative override,] minority faction[s] within the ruling party can exercise the kind of veto [over override use] that a president can in a separation of powers system.).

4. T₄: The Legislature's Decision on Whether To Renew the Override

Once the legislature has overridden a Court judgment, the resuscitated law's story is still not over. Under the institutional arrangement that I am defending, the legislature must decide after some specified time period whether to renew the override or not. When the legislature faces this decision, the heated emotions that may have characterized the initial override debate will probably have subsided. Critics of the Court's ruling, after all, will have succeeded in reversing its holding through legislative means, and will have had little reason to maintain their mobilization indefinitely. In this less polarized, more discreet environment, the political stakes for legislators should be lower, and they should be able to evaluate the question of override renewal more strictly on its merits. If the law sustained by the override has performed poorly and engendered continuing criticism from judges, academics, and other commentators, legislators may refuse to re-authorize the override without paying the political price that this stance would have cost them initially. Legislators may have been pressured to use the override to resuscitate the National Security Act, for instance, but these stresses would be diminished when the override came up for renewal. On the other hand, if the passage of time shows that it was the judiciary that overreacted in striking the statute, and that the law has functioned without damaging the country's constitutional culture, legislators will probably quickly vote to renew the override.¹¹⁸ I would expect this to be the case with an override that salvaged the Better Neighbors Act. In essence, the override's sunset provision gives the legislature an opportunity to re-evaluate its choices with the benefit of hindsight, and to get things right the second (or third, or fourth) time around.

C. *Canada Revisited*

The two sections above compared the legislative override system to U.S.-style judicial review, traditional British parliamentary sovereignty, and the modern British and New Zealand regime of hortatory judicial review. They did not, however, appraise this article's proposed system against the actual Canadian and Israeli models. This section and the one that follows evaluate in some detail the Canadian and Israeli experiences with the legisla-

¹¹⁸ Two interesting questions are whether there should be any restriction on the number of times an override can be renewed, or conversely if an override should no longer *need* to be renewed after a certain number of votes in its favor. I would answer both questions in the negative. Overrides should be renewable as long as a legislative supermajority continues to support them, but respect for the judiciary and its primary role in constitutional interpretation demands that override renewal always be deliberate rather than automatic.

tive override, and show how they might have been improved under this article's proposed arrangement.

Beginning with Canada, there seems to be a general consensus outside Quebec that the override is barely legitimate because it provides insufficient protection for individual rights. Academics may rave that "the override gives Canada an opportunity to get the best out of British and American constitutionalism,"¹¹⁹ but politicians and other commentators are far harsher in their judgments. As mentioned earlier, Prime Minister Mulroney attacked the override as the "fatal flaw" of the Charter after it was used by Quebec in the context of language rights.¹²⁰ Prominent New Democratic Party MP Svend Robinson called for Parliament to "delete this section, which so effectively guts the provisions of the Charter."¹²¹ Well-respected lawyers such as Edward Greenspan argued that "the whole object of a charter is to say, you never opt out, they're inalienable rights,"¹²² and the Canadian Bar Association's "official position since entrenchment has been unwavering opposition" to the legislative override.¹²³

In my view, the override's record vis-à-vis the protection of fundamental liberties is actually more positive than its critics' rhetoric would suggest. It has only been used on a handful of major occasions, indicating that there is certainly no widespread practice of Canadian legislatures blithely violating Charter-guaranteed rights for momentary political advantage. The override has also usually been exercised preemptively, meaning that there was generally no definitive judicial judgment about individual rights that the legislature was disregarding. In at least one case (Saskatchewan), a later Supreme Court ruling¹²⁴ determined that the law shielded by the override was not unconstitutional in the first place, which "meant that the use of the [notwithstanding clause] was unnecessary," and a fortiori not a subversion of constitutionally protected liberties.¹²⁵ And in the case of Quebec's override of the Court's decision in *Ford*, it is quite possible that the compromise enacted in Bill 178—allowing English on interior commercial signs, but French alone on exterior signs—would have been ruled constitutional by the Court if it had not been immunized by means of the override. Furthermore, the more

¹¹⁹ Peter H. Russell, *Standing Up for Notwithstanding*, 29 ALBERTA L. REV. 293, 294 (1991).

¹²⁰ See *supra* text accompanying note 24.

¹²¹ MANDEL, *supra* note 20, at 76.

¹²² *Id.* at 75.

¹²³ *Id.* at 76.

¹²⁴ *RWDSU v. Govt. of Saskatchewan*, [1987] S.C.R. 460 (ruling that the right to freedom of association does not include the right to strike).

¹²⁵ Kahana, *supra* note 29, at 269.

problematic uses of the override have all been allowed to expire when the five-year sunset provision kicked in, which suggests that rights violations, even when they occur under the Charter, are unlikely to persist indefinitely. Finally, most of the areas in which the override has been exercised—commercial signs' language, the right to strike, etc.—are undoubtedly important, but do not seem to strike at the core of personal freedom in a liberal democracy.

Regarding the other values that systems of judicial review seek to secure, however, the Canadian legislative override's performance has been more disappointing. The override has been used only once to explicitly disregard an unpopular Court decision, when "demonstrations involving up to 15,000 people . . . in the streets of Montreal" and the battle-cry, "ne touchez pas Loi 101," prompted Quebec's legislature to override *Ford v. Quebec*.¹²⁶ On the numerous other occasions when controversial Court decisions have provoked broad public opposition—e.g. *R.J.R.-MacDonald*¹²⁷ (tobacco advertising), *Morgentaler v. The Queen*¹²⁸ (abortion), *Sauvé v. Canada*¹²⁹ (prisoner voting rights), etc.—no override was passed, suggesting that majority preferences on key issues were stifled by the Court's judgments. The adoption of the override also did not lead to a richening of public discourse or an improvement in relations among the branches of government, largely because these effects cannot transpire when the override is used preemptively (and often surreptitiously). Various commentators have noted the *potential* of the override to stimulate dialogue and inter-branch cooperation,¹³⁰ but its empirical performance has been poor. In Saskatchewan and Alberta, for instance, the preemptive use of the override stifled public discussion of the right to strike and same-sex marriage, respectively, and prevented the development of a constructive inter-branch discussion on those issues. As Kent Roach notes, "[f]or all intents and purposes, Alberta has stopped democratic dialogue on whether laws that restrict marriage to heterosexuals

¹²⁶ ROACH, *supra* note 4, at 190.

¹²⁷ *R.J.R.-MacDonald, Inc. v. Canada*, [1995] 3 S.C.R. 199.

¹²⁸ *Morgentaler, Smoling, and Scott v. The Queen*, [1988] 1 S.C.R. 30.

¹²⁹ *Sauvé v. Canada*, [1993] 2 S.C.R. 438.

¹³⁰ *See, e.g.*, Gardbaum, *supra* note 4, at 747 ("The enforced dialogue, competition, and joint responsibility between courts and legislatures that the Commonwealth model aims to ensure promises to add new dimension and perspective to the task of constitutional interpretation."); Gal Dor, *Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective*, 11 *IND. INT'L & COMP. L. REV.* 1, 23-24 (2000) ("The Notwithstanding Clause could theoretically play a positive role in the Canadian constitutional system by promoting a complex partnership through institutional dialogue between supercourts and super-legislatures.").

constitute unjustified discrimination against gays and lesbians.”¹³¹ There was lively debate over Quebec’s override on the subject of language rights—but this is precisely because it was the lone override to be passed retroactively rather than preemptively.

In my view, Canada’s problems with the legislative override could have been largely avoided by the adoption of an arrangement similar to that described in Part II. First, reserving the override power for the federal government alone would have prevented the notwithstanding clause from becoming delegitimized nationwide by its controversial use in a single province. Instead of being available to every provincial legislature, for whatever purpose it deemed appropriate, the override would only have been exercised when (if ever) there was broad *national* support for its use. Keeping the override power in the hands of Parliament could also have helped to alleviate the ongoing tension between Quebec and the rest of Canada. Without a provincial legislative override, Quebec would never have expected to be able to deviate from national constitutional norms. With section 33 in its current form, though, there is “an unforeseen political dynamic that [may] eventually divide Quebec and the rest of Canada,”¹³² as Quebec disassociates itself from certain Charter provisions and the rest of Canada reacts with consternation to Quebec’s actions.¹³³

Second, disallowing preemptive use of the override would have had the clear effect of promoting public deliberation, improving inter-branch relations, and better safeguarding individual rights. If Alberta or Saskatchewan had been forced to wait for an unfavorable Court judgment before invoking the notwithstanding clause, the judiciary would have had the opportunity to present its viewpoint on the law in question as persuasively as possible, media scrutiny of the override use would have been far more intense, and the public would have been able to discuss the matter at length before the legislature voted. Even if the override was eventually passed but continued to provoke vehement criticism, as was the case with Quebec’s override of *Ford v. Quebec*, vigorous dialogue and enhanced inter-branch communication would at least have transpired. Third, wording overrides differently, so that they are passed notwithstanding the Court’s *interpretation* of a constitutional

¹³¹ ROACH, *supra* note 4, at 200.

¹³² PATRICK MONAHAN, POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM, AND THE SUPREME COURT OF CANADA 118-19 (1987).

¹³³ Of course, the reverse might be true as well. Without an override to let off steam, Quebec might bridle at following national constitutional norms with which it disagrees. It is necessary to weigh Quebec’s potential dissatisfaction under a unitary constitutional system against the rest of Canada’s current frustration with Quebec’s constitutional secessionism.

provision rather than in spite of the clause *itself*, would have increased the perceived legitimacy of the override, and made the national government more willing to set aside Court decisions largely viewed as erroneous. Finally, a sufficiently strict supermajority requirement for override use—the last provision argued for in Part II of this article, but missing from the Canadian system—would have changed the calculations that Canadian political actors faced before resorting to the notwithstanding clause. Knowing that they would have to muster a supermajority to pass an override, legislators would have been less inclined to pursue that option unless they were confident of broad public support—an element missing in the Alberta and Saskatchewan cases. Clearly, there are sound political reasons why an arrangement akin to that introduced in Part II was not adopted in Canada in 1982, but it does appear that an override power that was more limited in certain respects would have better served Canada than its actual system of judicial review.

D. *Israel Revisited*

The Israeli experience with the legislative override is more difficult to evaluate than the Canadian one because the Knesset has only invoked the notwithstanding clause once—in the very bill that prompted the clause's adoption. Nevertheless, in the context of the Import of Frozen Meat Law, it does not appear that the Knesset seriously considered the impact on individual rights that use of the override would have. The legislative debate focused on what provisions needed to be included in the law to satisfy the religious conservative Shas Party and convince Shas to rejoin the governing coalition. At Shas's insistence, sections of the statute that addressed concerns about meat importers' rights were actually scrapped: "During the plenum debate, a clause which granted compensation to importers hurt by the law was eliminated, and the name of the law was changed to make it clear that *all* types of non-kosher meat are forbidden."¹³⁴ The rapidity of the Knesset's debate, beginning after the notwithstanding clause was introduced into the Basic Law and concluding at 4 AM that morning, also suggests that the statute's implications for individual rights were not a major concern for legislators.

By definition, the inclusion of the notwithstanding clause in the Import of Frozen Meat Law means that the wishes of the parliamentary majority were enacted where otherwise they would have been frustrated by the

¹³⁴ Evelyn Gordon, *Knesset Panel Approves Party Financing Reform*, JERUSALEM POST, Mar. 17, 1994, at 2 (emphasis added).

Court's decision. Still, there is reason to doubt that the Import of Frozen Meat Law represented a triumph of democratic decision-making, since the non-Shas legislators voting in favor of the bill were motivated more by a desire to appease the religious parties than by genuine conviction about the law's merits. As for fostering public discourse, the override was modestly successful. The actual parliamentary debate over its use was disappointingly brief, but "the battle over importation of non-Kosher meat" raged both before and after the override's use, both inside and outside the Knesset.¹³⁵ When the override expired in 1998, a more high-profile discussion ensued about whether it should be renewed. Opponents of renewal argued that the statute "hurt the values of the Basic Law," and that "[i]t's Kosher but it stinks."¹³⁶ Proponents, who eventually prevailed, contended that the law's infringement of individual rights was minimal, and that the status quo on non-Kosher meat importation should be maintained.¹³⁷ Unlike the override's initial use in 1994, then, the debate over its renewal was well-informed and infused with arguments about constitutional meaning. Finally, the override seems to have improved inter-branch communication and cooperation in two ways. It allowed the Court, in its subsequent decision in *Meatreal v. Knesset*, to articulate how the notwithstanding mechanism would operate in Israel, and to explain that the Import of Frozen Meat Law would continue to function despite its conflict with the right to freedom of occupation. It also assuaged growing fears among legislators that the Court's newly claimed power of judicial review had "set[] the stage for the court's intervention in the legislative activity of the Knesset."¹³⁸

The Knesset's very limited use of the legislative override makes rather speculative any effort to assess how Israel's experience with the notwithstanding clause would have differed if an arrangement like that described in Part II had been adopted. A supermajority requirement for exercising the override, though, would probably have contributed to a more vigorous initial debate on attaching the notwithstanding clause to the Import of Frozen Meat Law. It also might have galvanized opponents of the override, who knew they had no hope of winning a simple majority vote, to make more impassioned constitutional and rights-focused arguments in the hope of mustering the support of the requisite minority of the Knesset. The fact that the Israeli legislative override can be exercised preemptively has not yet caused any

¹³⁵ Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 640 (1999).

¹³⁶ Liat Collins, *Meat Law Passes Final Reading*, JERUSALEM POST, Mar. 19, 1998, at 4.

¹³⁷ *Id.*

¹³⁸ Dor, *supra* note 130, at 4.

problems, but creates the possibility of a future Knesset shirking the terms of the Basic Law with little discussion or public oversight. Finally, the limitation of the override to the right of occupation alone means that the potential benefits of the notwithstanding clause—less democratic debilitation, richer public dialogue, improved inter-branch relations—are not being realized in most areas of the Basic Law. The small number of Court decisions invalidating Knesset laws means that Israel has not yet confronted the full force of the counter-majoritarian difficulty. But as Court rulings that strike statutes due to incompatibility with the Basic Law multiply, the Knesset will have strong incentives to broaden the scope of the notwithstanding clause beyond the right of occupation.

IV. THE APPLICABILITY OF THE LEGISLATIVE OVERRIDE TO DIFFERENT SETTINGS

This article has argued that the legislative override system, as presented in Part II, is superior to any other arrangement of judicial review. This position, though, has implicitly assumed that the hypothetical country seeking to decide which model of judicial review to adopt meets certain conditions: a reasonably robust level of development, a coherent (or at least not excessively fragmented) national identity, no recent history of majority tyranny, and the presence of a legitimate and well-respected Court and national legislature—that is, conditions akin to those in contemporary America. What happens if these conditions are not met? Is the legislative override still preferable to all other systems of judicial review? It is to these questions that I turn in this section.¹³⁹

The one situation where the legislative override seems manifestly inappropriate is in a country that has recently experienced serious abuse of a minority group at the hands of the majority, or that has good reason to fear such oppression in the future.¹⁴⁰ Under these circumstances, the overriding objective of the constitution must be to protect minority rights, and prevent future mistreatment of the minority. Assuming that the country has democratic elections resulting in parliamentary control for the majority, as well as robust constitutional guarantees of individual rights, a legislative override provision

¹³⁹ Shockingly little commentary exists on these questions. Paul Weiler is the only author I have found who explicitly addresses how the most appropriate system of judicial review might vary based on a nation's particular circumstances. See Weiler, *supra* note 58.

¹⁴⁰ Some examples might be Turkey (abuse of Kurdish minority by Turkish majority); Iraq (past abuse of Shias and Kurds by Sunnis, future danger of abuse of Sunnis by Shias); Kosovo (past abuse of Albanians by Serbs, future danger of abuse of Serbs by Albanians); and Zimbabwe (ongoing abuse of white minority by African majority).

would give the majority an easy mechanism for disregarding these rights guarantees and harming the members of the minority. The danger of oppression is especially great if the country has a unicameral parliamentary system, where the approval of a majority or supermajority in one legislative chamber is all that is needed to exercise the override.¹⁴¹ Depending on the depth of hostility between the majority and minority, it is true that U.S.-style judicial review also may not shield the minority from majority tyranny. In the famous words of Learned Hand, “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”¹⁴² Still, there is no reason to make the effectuation of majority oppression easier than it would be in a system where courts have the final word on laws’ constitutionality—an effect that the legislative override would unfortunately have under these difficult conditions.

Conversely, the legislative override system is most apposite when there is a relatively low probability that the majority will deliberately violate minority rights. As Paul Weiler writes, the legislative override “rests on the assumption that the chief threat to rights...comes from legislative thoughtlessness about particular intrusions [It] contemplates no serious danger of outright legislative oppression; certainly none sufficient to concede ultimate authority to . . . judges and lawyers.”¹⁴³ When the risk of majority tyranny is low, then, the legislature can be trusted to use the override in more salutary fashion—not to infringe individual rights, but to express its disagreement with the Court when the Court has reached an unpopular judgment on the basis of a controversial interpretation of the constitution. Empirical evidence, rather than any a priori theory, must ultimately be relied upon to determine the risk of majority tyranny, and hence the relative appeal of the legislative override for a given country.

A second variable that bears on the applicability of the legislative override is the relative legitimacy of the legislature and Court in a particular country. The override is least appropriate when the legislature has been discredited due to its past actions—such as abuses of rights, corruption, or general incompetence—but the courts are considered more fair and professional.

¹⁴¹ Other electoral mechanisms making it easier to pass laws would have similar effects. Legislative majorities are far easier to form in a first-past-the-post system, for example, than a proportional representation system. On the other hand, features that make it more difficult to pass laws—bicameral legislatures, presidential veto power, etc.—have the obvious effect of making the override more difficult to employ.

¹⁴² Learned Hand, Speech at “I Am an American Day” Ceremony, Central Park, New York City (May 21, 1944).

¹⁴³ Weiler, *supra* note 58, at 84.

In these situations (e.g. post-apartheid South Africa, post-communist Hungary), U.S.-style judicial review is probably the best arrangement, as people are likely to distrust the legislature and side with the courts in any inter-branch dispute over constitutional meaning. On the other hand, countries that have traditions of strong and effective legislatures, but where courts have played little historical role in the exposition of constitutional values, are especially fertile ground for the legislative override system. In these nations (e.g. Britain, pre-Charter Canada, pre-Basic Law Israel), the transition from *no* judicial review to essentially unchallengeable judicial review would be needlessly jarring, and would provoke howls of protest from disempowered legislators. A shift to a legislative override arrangement, however, would be politically smoother, and a better reflection of the relative institutional capacity and authority of the government's branches.

A final factor that should influence a country's decision whether to adopt the legislative override is the magnitude of the transition costs of switching from one system of judicial review to another. A country that is drafting a constitution from scratch and that has little historical attachment to any particular judicial review model can evaluate rival regimes strictly on their merits. A country that already possesses a functional judicial review system, though, must take into account the costs it would incur in transitioning to the legislative override. First, beneficiaries of the status quo—for example, legislators in a parliamentary system, and the judiciary as well as parties who have prevailed in constitutional litigation in a regime of U.S.-style judicial review—would probably oppose a switch to the override. The parliamentary legislators and U.S.-style judges would both experience a relative loss of power in an override system, while parties who have benefited from Court decisions would have those favorable rulings suddenly subject (at least in theory) to legislative revision. Second, there is a significant uncertainty cost to adopting a new arrangement of judicial review. This article has argued throughout that the legislative override model would sufficiently protect fundamental rights, but a country cannot verify that claim until well after it has implemented its new system. For countries that are not drafting constitutions behind a veil of ignorance, then, the legislative override should only be adopted when its benefits (greater democratic expression, improved public discourse, more constructive inter-branch relations) outweigh *both* its disadvantages (slightly less protection for individual rights, more legal instability) and the inevitable transition costs incurred in switching systems of judicial review.¹⁴⁴

¹⁴⁴ It is worth pointing out that the transition costs incurred in switching from either judicial or legislative supremacy to the override are smaller than those incurred in shifting from one pole

Assuming that a country has decided to adopt the override, it then faces the further question of whether *all* the provisions described in Part II are appropriate for its situation. In my view, most parts of the override package should always be implemented when it has been determined that the override is the preferred arrangement of judicial review for a country. Two of the package's elements, though, may be applicable in some contexts but not suitable in others. First, the exclusive allocation of the override power to the federal government is sensible when a country possesses a unified national identity. In this case, allowing federal subunits to disregard Court decisions can undermine the development of national constitutional norms, and facilitate the violation of rights by ill-motivated local majorities. Even if a country is divided along ethnic, religious, or racial lines, making some form of federalism a logical choice, the benefits derived from a single constitutional culture will often outweigh the subunits' understandable desire to decide for themselves whether to follow federal Court decisions. But there must come a point at which this calculus reverses, and it becomes preferable to bestow the override power to the subunits. As in Canada, the subunits may insist on the override power as a condition for their joining the new constitutional order. Alternatively, it may be clear that the constitutional norms that much of the nation embraces would create endless resentment in one or more subunits (e.g. if Christians in Nigeria had to follow Islamic *Sharia* law, or if Kurds in Iraq had to dismantle the separate governing structures they created over the course of the 1990s). In these situations, a subunit override power is simply a manifestation of the country's political realities—not the cause, but rather the result of, an existing centrifugal dynamic.

Second, the applicability of the override to all indeterminate provisions of the constitution (except for those regulating the electoral process) is appropriate in most cases. While it may be theoretically preferable to distinguish between "core" and "non-core" rights, of which only the latter would be susceptible to legislative override, this distinction is impossible in practice. Any right designated as "core"—free speech, for example, or due process of law—would inevitably include both "core" and "non-core" aspects of personal liberty.¹⁴⁵ If the legislature is to have the power to override the

to the other. The Canadian and Israeli transition costs in switching from legislative supremacy to the override, for instance, do not appear to have been inordinately large. While no country has moved from U.S.-style judicial review to the override, the transition costs of such a move should also not be excessive. Courts would still exercise their power of judicial review, but there would be a new wrinkle in that their rulings would occasionally be set aside through the override.

¹⁴⁵ For example, the right to publish articles critical of the government is surely much more fundamental than the right to wear a jacket saying "Fuck the draft" in a courthouse, yet both

Court's judgments in "non-core" settings, there is no way to selectively strip it of the authority to use the override in "core" situations as well. This argument may fail, however, with regard to countries that *are* willing to tie the legislature's hands in some "non-core" contexts, in order to eliminate any danger that the legislature will use the override in a particular "core" situation. Canada, for instance, placed educational rights outside the reach of the notwithstanding clause, so that no legislative majority could undermine parents' ability to have their children educated in either English or French. More significantly, countries that have undergone terrible periods of oppression, but have nevertheless chosen to adopt a legislative override system, may wish to exempt certain rights from the override's scope. Following the example of postwar Germany, provisions relating to human dignity and democracy may be situated outside the override's reach, and even beyond constitutional amendment. This selective application of the override cannot be done without a cost—namely, that the many benefits of the override will not accrue in the areas that are exempted from its reach—but this is a price that certain countries may be willing to pay.

What this means is that the legislative override system, as outlined in Part II, is not necessarily appropriate in every circumstance. In many situations—as long as there is no legacy of majority tyranny, the legislature has sufficient legitimacy, and the country is not excessively fractured—the advantages of the override should easily outweigh the disadvantages. But there are clearly some situations where the override arrangement must be tweaked before it can be instituted, and still other contexts where the legislative override is inappropriate to begin with. There are few universal truths in the arena of comparative constitutional design, so it should be unsurprising that the best system of judicial review varies across time and place.

CONCLUSION

This article began by describing the range of judicial review systems in use around the world, and observing how dramatically the fate of two hypothetical statutes could vary across the various systems. The four Parts of the article then introduced a variant of the Canadian/Israeli legislative override model, and argued that this variant is generally the optimal arrangement of judicial review. Part I summarized the Canadian and Israeli experiences with the override. Part II outlined the key components of the override sys-

are protected by the First Amendment. We might want the government to be able to use the override only in the latter case, but it is virtually impossible to see what constitutional wording would allow this result.

tem in what I consider to be its ideal form, and positioned the override within the academic literature on judicial review. Part III contended that the override system is superior to its primary rivals in terms of the values it secures and the institutional incentives it generates, and provided further analysis of the Canadian and Israeli examples. Finally, Part IV discussed the contexts in which the override system may not actually be the best choice for a given country.

The cynical observer may ask what the point is of adding yet another option to the growing roster of judicial review models. With the United States, Canada, Britain, New Zealand, and Germany all already serving as templates for different systems, is there really a need for still another arrangement? The answer is twofold. First, countries engaged in constitutional drafting have a strong interest in selecting a judicial review system that is not just *workable*—as all the existing models surely are—but *optimal*. If the arguments I have presented on behalf of the legislative override have merit, then this article's proposed system is of more relevance to countries in the throes of constitutional debate than any extant judicial review model.

Second, there is a tendency in the United States (and other countries with entrenched judicial supremacy) to overlook what Stephen Gardbaum has termed the "new Commonwealth model of constitutionalism."¹⁴⁶ Because the Canadian, modern British, and New Zealand judicial review systems all evolved in traditionally parliamentary countries, American scholars have been slow to recognize that those systems prove that there is a continuum between judicial and legislative ascendancy rather than two opposite poles.¹⁴⁷ This article's proposed arrangement—which arises from an *ex ante* analysis of the values that judicial review systems seek to secure, rather than any particular country's history—may dramatize to the American audience the conceptual space that exists between U.S.-style judicial review and historic British parliamentary sovereignty. In comparative judicial review, as in much else, there exists a "third way" that promises to capture many of both poles' benefits while avoiding many of their costs. The more attention that this middle road receives, the better.

¹⁴⁶ Gardbaum, *supra* note 4, at 707.

¹⁴⁷ *Id.* at 708-10.

