

# A Turn to Politics: Sanford Levinson's *Our Undemocratic Constitution* and Debates in Contemporary Constitutional Theory

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## I. INTRODUCTION

In the last generation, politics has replaced philosophy as constitutional theory's center of gravity. While theorists once focused on judicial authority and looked to philosophy to validate the principles of justice that judges enforced, they now tend to consider how judges fit into the broader political process that defines constitutional doctrine. This essay considers how the change obscures important questions about the nature of democratic government. It does so by examining Sanford Levinson's recent book, *Our Undemocratic Constitution*.<sup>1</sup>

At first glance, Levinson's book would appear to be an odd choice. He is not interested in constitutional doctrine or how it came to be.<sup>2</sup> He brackets issues that have tended to dominate debates in constitutional theory, issues such as whether women have a right to choose to have abortions.<sup>3</sup> Levinson, instead, calls for a constitutional convention to consider amendments that would eliminate structural flaws in American constitutional de-

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1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

2. *Id.* at 5.

3. *Id.* at 23.

sign, flaws that explain why American constitutionalism fails to satisfy a common-sense understanding of democratic government.<sup>4</sup> In so doing, he makes his case to the people themselves.<sup>5</sup> It is this attempt to bridge academic theory to the practice of politics that is emblematic of constitutional theory's emphasis of politics over philosophy.

Levinson follows a path that the political theorist Michael Walzer suggested a quarter of a century ago.<sup>6</sup> Walzer argued that philosophical conclusions about justice have no special authority in democratic politics and that philosophers, like other citizens, must expose their conclusions to the give and take of democratic discussion and be willing to adapt their arguments to address the concerns of their fellow citizens and to respect a shared history.<sup>7</sup> However, Levinson must avoid certain normative questions in order to persuade people to heed his call for constitutional reform.<sup>8</sup>

This is not surprising. Politics can intrude on philosophy just as philosophy can intrude on politics.<sup>9</sup> Walzer wrote at a time when law professors turned to the judiciary to enforce philosophical conceptions of justice, and this is why he emphasizes the problem of philosophy intruding on politics.<sup>10</sup> Nonetheless, he recognizes that philosophical engagement demands that philosophers separate themselves from their community so that their deliberations about justice are not distorted by the practices and conventions of the politics they experience.<sup>11</sup>

Levinson writes as a citizen who seeks to forge a consensus for constitutional change appropriate for people who share his experience of American constitutional democracy.<sup>12</sup> The perspective of citizenship is much narrower than that of philosophy; while philosophers might ask what the best institutional arrangement is, citizens must seek the best arrangement for people who do things the way they do.<sup>13</sup> And Levinson leaves important normative questions unanswered for political reasons.<sup>14</sup>

Moreover, many constitutional theorists now write from a similar perspective, even those who write for a scholarly audience and address questions of judicial authority that have dominated traditional debates.<sup>15</sup> And this perspective has great significance for how they view these questions.

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4. *Id.* at 9.

5. *Id.* at 3-11, 167-80.

6. Michael Walzer, *Philosophy and Democracy*, 9 *POL. THEORY* 379 (1981).

7. *Id.* at 396.

8. *See infra* text accompanying notes 79-103.

9. *See* Walzer, *supra* note 6, at 383.

10. *Id.* at 387-88.

11. *Id.* at 380.

12. *See* LEVINSON, *supra* note 1, at 3-9.

13. *See* Walzer, *supra* note 6, at 383.

14. *See infra* text accompanying notes 80-102.

15. *See infra* text accompanying notes 104-11.

Indeed, as judicial intrusions into politics have become part of a conventional understanding of American constitutional democracy, many theorists now assume the legitimacy of these intrusions without grappling with broader normative issues.<sup>16</sup>

## II. FROM PHILOSOPHY TO POLITICS

As political philosophy was enjoying a renewed ascendance, Walzer argued against those who would have judges intervene in democratic politics to advance philosophical truths claiming universal validity.<sup>17</sup> He claimed that political authority in a democracy follows from the particular understandings and conventions of members of the actual community.<sup>18</sup>

Law professors' turn to philosophy, however, was animated by the quest to solve the countermajoritarian difficulty, a problem that invited philosophical solution.<sup>19</sup> And their subsequent turn to politics reflects constitutional theory's failure to solve this problem.<sup>20</sup>

### A. THE COUNTERMAJORITARIAN DIFFICULTY AND ITS AFTERMATH

The countermajoritarian difficulty associates judicial authority with the principles that judges enforce.<sup>21</sup> More particularly, theorists believe that judicial review undercuts two bases of democratic legitimacy. Elected institutions (1) define values that better reflect the will of citizens, and (2) allow citizens to control their government.<sup>22</sup> Constitutional theorists sought to ground judicial authority in legal principles that could overcome these con-

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16. See *infra* text accompanying notes 112-35.

17. See Walzer, *supra* note 6, at 379, 387-91.

18. *Id.* at 396-97.

19. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 2-3, 16-23 (1962).

20. See Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory*, 18 J.L. & POL. 851, 854-60 (2002).

21. *Id.* The quest to solve the countermajoritarian difficulty was an attempt to identify a theory of constitutional interpretation that would allow people to consider these conflicts as settled by a pre-existing law. Although the problem is associated with Bickel, debates in constitutional theory took a path that Bickel warned against. Bickel recognizes that judicial review needs special justification, because judges enforce disputed interpretations of constitutional law. Indeed, he criticizes John Marshall's opinion in *Marbury v. Madison* for framing the question of judicial review to emphasize its legal aspects (judges enforcing pre-existing legal norms) and for ignoring the political reality of judges defining the norms they enforce. BICKEL, *supra* note 19, at 2-4 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). This is what Bickel means when he says that Marshall's opinion not only begs the question, it begs the wrong question. *Id.* at 2.

22. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1, 101-04 (1980). Ely frames what I have called the conventional view of the countermajoritarian difficulty. *Id.*; see also Ward, *supra* note 20, at 854-60.

cerns.<sup>23</sup> They identified principles that had broad normative appeal, principles that should trump decisions of elected institutions.<sup>24</sup> They also sought principles that had sufficient objectivity to limit judicial discretion such that people could believe that those principles, rather than the political preferences of judges, were the basis of judicial decisions.<sup>25</sup>

We can see why constitutional theorists would mine political philosophy as a source of authoritative principles. Political philosophers made claims of moral truth to resolve questions of justice.<sup>26</sup> As a consequence, their arguments had the elements of normativity and objectivity that this framework demanded.<sup>27</sup>

The quest to solve the countermajoritarian difficulty failed, however.<sup>28</sup> Disagreements about justice made it impossible for theorists to identify principles that had broad normative appeal and that retained this appeal when defined at a level of abstraction necessary to constrain judicial discretion.<sup>29</sup> Principles that have broad appeal in the abstract lose that appeal when applied to concrete legal issues.<sup>30</sup> People, for example, do not agree whether principles of equality justify or work counter to affirmative action programs, or on how to resolve conflicts among these principles, such as

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23. See generally ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975); Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 *GEO. L.J.* 1191 (1978); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221 (1973); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 *HARV. L. REV.* 769 (1971). In seeking solutions to the countermajoritarian difficulty, theorists looked to reason, nature, and tradition to find authoritative legal principles. They also defended principles that they claimed were supported by popular consensus and sought consensus in the political community's past, present, and perhaps even its future. See, e.g., ELY, *supra* note 22, at 69-70. Ely interprets Bickel as making such an argument, though Ely's interpretation is not consistent with my reading of Bickel's view of the countermajoritarian difficulty. ELY, *supra* note 22, at 69-70.

24. See ELY, *supra* note 22, at 60-69.

25. *Id.* at 43-72.

26. See DWORKIN, *supra* note 23.

27. See Walzer, *supra* note 6, at 383.

28. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

29. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

30. See *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

whether principles of free speech extend to communications that subordinate others.<sup>31</sup>

Consider John Hart Ely's critique of nonoriginalist—what he calls noninterpretivist—theories of judicial review.<sup>32</sup> He uses the play between abstract principles and their concrete application to illustrate that these theories do not identify an acceptable source of values that will limit judicial discretion.<sup>33</sup> Indeed, his book became a model for criticizing arguments that claimed to solve the countermajoritarian difficulty, a model that is subsequently used against Ely's own argument, that judges should enforce certain core procedural principles that define American democracy.<sup>34</sup>

As theorists moved beyond the countermajoritarian difficulty, scholarly attention shifted from principles of justice that are outside of the democratic political process, and scholars paid greater attention to the process that resolved disagreements about justice.<sup>35</sup> Ely's argument suggests this transition, but it does not characterize his own work. Although he contends that judges contribute to democratic government, Ely does not argue that judges participate in the democratic political process that defines constitutional values. They, instead, enforce principles that are external to both the judicial process and the political process.<sup>36</sup>

By contrast, many constitutional theorists today have moved beyond the question of whether judges have special authority that justifies their

31. See ELY, *supra* note 22, at 60-69.

32. See ELY, *supra* note 22. I follow Paul Brest in using the term "nonoriginalist" in order to avoid the mistaken impression that noninterpretivists do not interpret the text of the Constitution and to achieve clarity given that the primary critics of nonoriginalist judicial review call themselves originalists. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1979).

33. ELY, *supra* note 22, at 11-42.

34. ELY, *supra* note 22, at 101-04. Ely's critics note that Ely does not define his conception of democracy at a level of abstraction necessary to limit judicial discretion and that judges' concerns for doctrinal outcomes will inevitably determine the principles that they believe constitute American democracy. See generally STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 160 (1996); PAUL W. KAHN, *LEGITIMACY AND HISTORY* 149-50 (1992); ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 173-74 (1985); TUSHNET, *supra* note 29, at 94-107; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

35. See, e.g., SOTIROS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (1999); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (2001); Gerald F. Gaus, *Public Reason and the Rule of Law*, in *NOMOS XXXVI: THE RULE OF LAW* 328 (Ian Shapiro ed., 1994).

36. See ELY, *supra* note 22, at 101-04.

intervention in democratic politics.<sup>37</sup> They conceive of the judiciary as a political institution, one that complements elected institutions within the broader democratic process that defines principles of justice.<sup>38</sup>

More significantly, constitutional theorists now tend to consider judicial authority a component of an institutional arrangement that purports to represent the authority of the American people. Some theorists, for example, defend conceptions of popular constitutionalism in which the American people resolve disagreements about justice.<sup>39</sup> These theorists consider the authority of judicial interpretations of constitutional law relative to those of elected officials and other political actors, or argue that judges should be excluded from democratic politics altogether.<sup>40</sup> Others focus on how judges can decide cases in a manner that makes the political process work better.<sup>41</sup>

#### B. LEVINSON AND CONSTITUTIONAL THEORY'S TURN TO POLITICS

These changes suggest that politics has displaced philosophy as constitutional theory's center of gravity, and Levinson's book is emblematic of the change. First, rather than address particular issues of constitutional interpretation, he considers questions of constitutional structure, namely what it means for political institutions to be well ordered.<sup>42</sup> Levinson points to structural features of the Constitution that work contrary to a common-sense view of democratic government.<sup>43</sup>

Second, Levinson's argument focuses on the American people, rather than the Court or its decisions.<sup>44</sup> He assumes that political authority follows

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37. See, e.g., Keith E. Whittington, *Constitutional Theory and the Faces of Power*, in *THE JUDICIARY AND AMERICAN DEMOCRACY* 163-65 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

38. ELY, *supra* note 22, at 101-04.

39. See, e.g., NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 217 (2004); LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 58 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

40. See sources cited *supra* note 39.

41. See generally ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); SEIDMAN, *supra* note 35; CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999). As the American people have taken on greater significance, we have seen an increase in scholarship aimed at an audience wider than that sought by earlier generations of constitutional theorists. Perhaps we should not be surprised that scholars who address the critical issues of the day would seek the greater influence that comes with a wider audience, but it is surprising when their arguments address esoteric questions concerning the role of judicial authority and the nature of American democracy. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); SEIDMAN, *supra* note 35; CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999); see also BORK, *supra* note 23; DEVINS & FISHER, *supra* note 39; JEFFERY ROSEN, *THE MOST DEMOCRATIC BRANCH* (2006); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* (2001).

42. LEVINSON, *supra* note 1, at 5-6.

43. *Id.* at 11-24.

44. *Id.* at 3-24.

from people acting through political institutions and not from institutional decisions that advance a correct view of justice.<sup>45</sup> As a consequence, his argument is designed to gain the support of the people themselves, who he assumes have authority to answer foundational questions of political structure, and is less concerned with identifying the best institutional arrangement or the one most likely to secure justice.

Levinson contends that American political institutions fail to represent people equally and yield policies that do not address the needs of the majority of citizens.<sup>46</sup> He identifies various structural features that ensure that some citizens will receive more representation than others.<sup>47</sup> The Senate, he notes, is apportioned such that the citizens of Wyoming enjoy the same representation as the citizens of California, even though California has seventy times the population.<sup>48</sup> Citizens of smaller states, therefore, enjoy better access to senators, an advantage that is magnified because small states tend to have less diverse populations.<sup>49</sup> As a consequence, senators of small states are more likely than their big state colleagues to be responsive to constituents and, having fewer interests to represent, are well situated to achieve leadership positions that strengthen the position from which they represent these constituents.<sup>50</sup>

Similarly, Levinson notes that the Electoral College undercuts ideals of equal representation.<sup>51</sup> Candidates can win the presidency without gaining a majority, or even a plurality, of the popular vote, and nonpopulous states enjoy greater influence in the Electoral College than their more populous counterparts.<sup>52</sup> It also creates incentives for candidates to focus on battleground states, particularly those that are rich in delegates.<sup>53</sup> Therefore, campaigns direct resources at citizens who live in these states, and those citizens are in a position to have greater influence on agendas of different campaigns.<sup>54</sup>

Levinson also associates these institutional features with the failure of American democracy to serve the interests of the majority of citizens.<sup>55</sup> He discusses how powerful senators direct disproportionate sums to their constituents and how numerical minorities advance their interests by exploiting the many veto points of the legislative process, and thereby prevent the

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45. *Id.* at 11.

46. *Id.* at 29, 38, 49.

47. *Id.* at 25-79.

48. LEVINSON, *supra* note 1, at 29.

49. *Id.* at 54-55.

50. *Id.* at 55-62.

51. *Id.* at 81-97.

52. *Id.* at 87, 89-90.

53. *Id.* at 87-89.

54. LEVINSON, *supra* note 1, at 88-89.

55. *Id.* at 9.

passing of important legislation that can serve the public weal.<sup>56</sup> He identifies policies that clearly favor minority over majority interests or a clear, common good, policies such as the Alaskan bridge to nowhere or the inequitable division of dollars earmarked for homeland security.<sup>57</sup>

Levinson is most persuasive in citing ample evidence that the American people do not like their government.<sup>58</sup> He cites statistics that indicate people's dissatisfaction with government and each institution of government in particular.<sup>59</sup> His argument amounts to the claim that "[e]ven if no two persons can necessarily be expected to agree on what kind of change is desirable, it should be relatively easy these days to find a wide range of agreement that the American system is impervious to needed changes."<sup>60</sup>

It is here that the connection to Walzer is most apparent. Levinson treads where he finds consensus. People can embrace his structural argument regardless of their interests and most ideological positions, and this allows Levinson to respect people's self-understanding, as it relates both to important interests and, particularly, to their sense of sharing a distinct history.<sup>61</sup>

Levinson adroitly anticipates readers who might question his motives or might suspect that he hides the ideological implications of his argument. Indeed, by acknowledging his own ideological preferences, Levinson deflates skepticism that would otherwise distract readers or, more likely, would lead them to dismiss the book outright.<sup>62</sup> Moreover, he supports his argument with examples that are decidedly bipartisan. To illustrate deficiencies in the Electoral College, he pairs Nixon's defeat in the 1960 election with Gore's defeat in 2000.<sup>63</sup> He notes that the filibuster has grounded the agenda of President Bush as well as of President Clinton and that the President's veto has thwarted both Republican and Democrat Congresses.<sup>64</sup>

Levinson, then, is careful to avoid the impression that he is a partisan pitchman who wants to trick readers into believing something they do not believe. But the book's rhetorical power follows from the respect he shows his audience, respect made clear by his willingness to address them as equals and, what is more, to see himself as one with his audience.<sup>65</sup> And though Levinson is provocative, he takes seriously people's fundamental

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56. *Id.* at 35-36, 56-58.

57. *Id.* at 56-57.

58. *Id.* at 7-9.

59. *Id.*

60. LEVINSON, *supra* note 1, at 38.

61. *Id.* at 16-20, 29, 38, 49.

62. *Id.* at 37.

63. *Id.* at 82-83.

64. *Id.* at 41.

65. *Id.* at 3-11.

beliefs, including, perhaps especially, their love of country.<sup>66</sup> He embraces a common history through appeals to political ideals set out in the Constitution's preamble and conspicuously cites to founders as authority for his argument.<sup>67</sup> His respect for our constitutional heritage eliminates distance with his readers, allowing him to speak about the implications of principles that are genuinely shared.

Levinson's book stands out as an act of constitutional politics, taking to heart Walzer's injunction that the philosopher who ventures into democratic politics must

address the concerns of his fellow citizens, try to answer their questions, [and] weave his arguments into the fabric of their history. He must, indeed, make himself a *fellow* citizen in the community of ideas, and then he will be unable to avoid entirely the moral and even the emotional entanglements of citizenship. He may hold fast to the philosophical truths of natural law, distributive justice, or human rights, but his political arguments are most likely to look like some makeshift version of those truths, adapted to the needs of a particular people . . . .<sup>68</sup>

Rather than assert the validity of philosophical conclusions, Levinson forges a compromise that is responsive to other citizens' views, a compromise recognizing that citizens enjoy equal authority to define the institutional arrangements that govern them.<sup>69</sup>

The remainder of this essay considers consequences that this political perspective has for normative debates in constitutional theory. With the shift to politics, the people replace the Court as both the object and subject of constitutional theory. In general terms, constitutional theorists assume that political authority rests with the people and seek to influence how people might exercise it or describe how political institutions represent the people's will.

This creates at least two problems for normative discussion. The first follows when theorists jump into politics and attempt to influence the people themselves. Levinson argues for structural changes that will bring American constitutionalism into line with ideals of democracy, but he does not address adequately the question of what makes a government democratic.<sup>70</sup> To do so would undermine his political goal—forging a consensus

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66. LEVINSON, *supra* note 1, at 167-80.

67. *Id.* at 4, 9, 12-13, 16-19, 34-35, 62, 66, 104, 116, 131, 133, 175.

68. Walzer, *supra* note 6, at 396.

69. LEVINSON, *supra* note 1, at 3-9.

70. *See infra* text accompanying notes 80-112.

for institutional reform. Levinson, thus, brackets two kinds of normative questions. He focuses on structure in order to temper controversies associated with issues of constitutional interpretation and the questions of justice that inform them.<sup>71</sup> But his structural argument also brackets higher order normative claims about the nature of democracy, claims that are as controversial as the substantive claims of justice that he tries to avoid.<sup>72</sup>

Given that Levinson's book is primarily an act of constitutional politics rather than a work of constitutional theory, we should not be surprised that he skirts normative issues for reasons of political expediency. Indeed, this is what Walzer suggested he must do if he is to influence his fellow citizens.<sup>73</sup>

It is a more serious problem, however, when debates in constitutional theory fail to address these normative issues adequately, and this is the second problem to be considered. Constitutional theorists assess different institutional arrangements in order to identify the best ones. Although they might like to have the people act on their conclusions,<sup>74</sup> it is more important that their conclusions be valid. This is less likely when they write from an internal perspective.<sup>75</sup>

Consider Walzer's argument itself. Rather than attempt to convince people of the need for institutional reforms that would impede judicial intervention in democratic politics, he assesses the conflict between philosophy and democracy from a philosophical perspective. He detaches himself from the practices of the community in order to increase the likelihood that his conclusions will be valid, even though the community might reject these conclusions and, according to Walzer, have the authority to do so.<sup>76</sup>

By contrast, many constitutional theorists now consider judicial authority from a perspective inside the political community. They tend to take it as a given that American political institutions represent the authority of the people and, as a consequence, do not address what it means to represent the will of the people or, more generally, what is the best institutional arrangement to secure the ends of democratic government. More particularly, judicial supremacy is now widely thought to be a characteristic of American democracy, and it has gained legitimacy as an aspect of constitutional politics, even though people have never consented to the practice and though it is not at all clear that they should.<sup>77</sup> The question of whether judi-

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71. See *supra* text accompanying notes 43-69.

72. See Walzer, *supra* note 6, at 386.

73. *Id.* at 396.

74. *Id.* at 389.

75. *Id.* at 383.

76. *Id.* at 387.

77. See *infra* text accompanying notes 112-33.

cial supremacy is justified looks very different from an external perspective.<sup>78</sup>

### III. NORMATIVE DISCUSSION AND CONSTITUTIONAL THEORY'S TURN TO POLITICS

#### A. LEVINSON'S NORMATIVE DISCUSSION

We have seen that Levinson's structural argument associates institutional flaws with political outcomes that run counter to a reasonable person's understanding of democratic government.<sup>79</sup> His argument is deceptive, however, because people can agree that certain outcomes offend norms of democratic government without agreeing about what it means for a government to be democratic.<sup>80</sup> Indeed, Levinson secures consensus by avoiding controversial questions about the nature of democratic government.<sup>81</sup>

Levinson, for example, asserts that the constitutional convention has authority to resolve conflicts about democracy without telling us why.<sup>82</sup> He suggests that the convention will be intensely deliberative and that its decisions will be determined by majority vote.<sup>83</sup> He, however, does not discuss the conditions for a discussion that is adequately deliberative;<sup>84</sup> nor does he explain the voting rules that are necessary for us to consider a majority vote as authoritative and why a majority vote is sufficient compared to other voting rules. To do so is beyond the scope of his project; Levinson seeks to inspire political action, not to validate a particular conception of deliberative democracy.<sup>85</sup>

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78. See *infra* text accompanying notes 134-41.

79. See *supra* text accompanying notes 43-70.

80. See *supra* note 35.

81. Levinson conflates two questions: (1) what it means for institutions to represent the authority of the people such that we can take seriously the claim that they express the public's will, and (2) how to adjudicate conflicts about the meaning of democracy. He believes that the American people should resolve conflicts about the meaning of democracy and will do so at the constitutional convention, as the convention speaks with the authority of the people. LEVINSON, *supra* note 1.

82. *Id.* at 172-78.

83. *Id.*

84. See Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 DRAKE L. REV. 971 (2007).

85. We can see that Levinson pursues political change as an insider working within the rules established by the Constitution. In fact, he treats the Constitution as legal authority where it applies directly to his political purpose. Indeed, this is one of the few places in the book where an issue of constitutional interpretation arises: Levinson argues that we can amend the Constitution through a process that seems to vary from the text of Article V. LEVINSON, *supra* note 1, at 173-75.

Though Levinson's structural argument gives us some sense of his conception of democracy, it too is vague. We have seen that he favors an institutional arrangement that represents people equally and that advances important interests.<sup>86</sup> But his argument is negative; it identifies particular pathologies that follow from the Constitution's institutional design. This negative focus helps Levinson to avoid both abstract questions of what it means to represent people equally and more concrete questions about what institutions must do to represent people adequately.

For example, while we know the Senate violates norms of equal representation, we never gain a clear sense of what equal representation entails or the type of institutional arrangement that would secure it. And while Levinson believes that the elimination of veto points would increase the likelihood Congress will pass "wonderful" legislation,<sup>87</sup> we do not know the types of interests that would be advanced by such legislation or what it means for legislation to advance the common good.<sup>88</sup>

These omissions become important when we consider that many people do not share Levinson's optimism that more legislation might lead to wonderful legislation. They would favor impediments to legislation to ensure that laws have broad-based support, the kind of democracy Levinson rejects.<sup>89</sup> Conservatives, for example, would believe that by broadening the coalition necessary to legislate, we militate against rash and poorly conceived change.<sup>90</sup> Or they might simply want to reduce the volatility of government and to secure the benefits of a more predictable and consistent legislative scheme.<sup>91</sup>

This conservative critique of majoritarianism is both structural and substantive. Conservatives would favor institutions that promote stability and work against imprudent legislation. They also would associate impru-

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86. See *supra* text accompanying notes 43-70.

87. LEVINSON, *supra* note 1, at 36.

88. Consider again Levinson's discussion of the constitutional convention that will answer such questions. He is confident that adequate deliberation will ensure that the convention protects fundamental constitutional rights, but he does nothing more than name the rights that should be protected without saying what it means to do so or how to weigh them against other rights or against commitments to order and security. Indeed, we have seen that these are questions Levinson must bracket if he is to sustain consensus for his critique. *Id.* at 175.

89. *Id.* at 33-34, 37. It is more accurate to say that Levinson believes that American constitutionalism has failed to attain the kind of consensus-based democracy that its proponents defend.

90. GEORGE W. CAREY, *THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC* (1994).

91. See *id.*; MICHAEL OAKESHOTT, *ON HUMAN CONDUCT* (1975); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

dent legislation with particular governmental actions. It is not a stretch to think that the legislation Levinson favors will involve government intrusions in civic or private life that come into conflict with principles of constitutional justice that many conservatives endorse.<sup>92</sup> Similarly, libertarians would have reason to favor consensus-based democracy if they thought that it would lead to a smaller government and, thus, create a broader scope for the liberties that define their own view of constitutional justice.<sup>93</sup>

Moreover, Levinson's argument loses rhetorical punch when we consider particular pathologies he identifies in light of more abstract considerations of democratic government. While something seems wrong when elections do not secure changes that voters sought or presidents assume office having received fewer votes than their opponents, these problems take on a different cast if we are committed to governing by consensus. Lame-duck presidencies and congresses impede changes that might not be fully thought out or that have been unduly influenced by the short-term conditions that sometimes determine the outcome of a single election, or even an election cycle. They also reinforce the lesson that what unites Americans runs deeper than the preferences expressed through institutions that purport to represent them at any particular point in time.<sup>94</sup>

Similarly, the Electoral College seems to fail when the country is divided, and especially when it is equally divided, as was the case in Kennedy's victory over Nixon and Bush's victory over Gore.<sup>95</sup> But a tainted outcome would seem a better measure of the election than the false suggestion of a clear-cut winner. More significantly, such an outcome poses an impediment to those who would translate a victory into a call for action in the name of a very narrow agenda.<sup>96</sup> And again, the Electoral College reinforces the lesson that the presidency is part of an institutional arrangement

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92. See, e.g., JONAH GOLDBERG, *LIBERAL FASCISM* (2007); BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* (1960).

93. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RICHARD EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006); 3 FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* (1978).

94. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-34 (1991).

95. LEVINSON, *supra* note 1, at 89, 92-93.

96. The Bush presidency seems to provide contrary evidence, but President Bush's success in advancing a very narrow agenda is tied to the unusual circumstance of the September 11th attack. Indeed, prior to this attack, a comparison to administrations that were elected in similar historical circumstances would lead one to predict that the Bush administration would be ineffectual. See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

that is supposed to represent everyone, not just the majority that happens to coalesce at a particular point in time.<sup>97</sup>

This is not to say that we should reject Levinson's proposal or favor a consensus-based conception of democracy over the majoritarian democracy that informs Levinson's structural argument. We can see, however, that Levinson fails to adequately address the normative considerations that underlie the different conceptions. Instead, he suggests that the rise of partisan political parties has made it so that American political institutions do not advance the ends of either conception of democracy.<sup>98</sup> But he does not address the point in much detail. His argument seems to depend almost entirely on the success of the Bush administration in concentrating power, notwithstanding its threadbare political majority.<sup>99</sup> And his analysis does not give adequate account to the role that September 11th might have played in President Bush's success or to the difficulties faced by the Bush administration once the attacks began to recede and ordinary politics began to return.<sup>100</sup>

More significantly, even if we were to accept Levinson's assertion that the rise of partisan parties works against consensus-based democracy, we still must decide how to reform American constitutionalism, whether to design institutions better suited for consensus-based democracy or to pursue majoritarian democracy. Levinson's negative argument emphasizes people's dislike of the American democracy without addressing the normative considerations that should inform this choice. We have seen that such an argument would expose deeper disagreements about what democracy should be and, thus, would work against his political goal—building consensus in favor of constitutional change.<sup>101</sup>

Levinson's book is extraordinary in the relish with which it pursues changes that go to the foundations of our political system. But absent the kind of cataclysmic event that makes foundational political change possible, people's perceptions of their interests and fear of change, in all likelihood, will prevent agreement beyond the conclusion that American democracy is far from perfect.<sup>102</sup>

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97. JAMES W. CEASAR, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* (1979); RICHARD P. MCCORMICK, *THE PRESIDENTIAL GAME: THE ORIGINS OF AMERICAN PRESIDENTIAL POLITICS* 7, 16-27 (1982).

98. LEVINSON, *supra* note 1, at 33, 63-69, 77.

99. *Id.* at 33.

100. See Kenneth D. Ward, *The Fog of War: Checks and Balances and National Security Policy*, 67 MD. L. REV. 36 (2007).

101. See *supra* text accompanying notes 80-100; *infra* text accompanying notes 102-13.

102. See, e.g., R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 373-74, 394-95 (1986).

Indeed, structural changes of the kind that Levinson seeks are more likely to be secured by the operation of the ordinary political process rather than by constitutional amendment of the Article V variety or similar process that can claim with plausibility to speak in the name of the people.<sup>103</sup> Therefore, if ordinary political processes do not speak with the authority of the people, as Levinson contends, it would seem important that constitutional theorists assess institutional changes from a perspective that is external to the process that makes those changes. The next section illustrates how an internal perspective would impede a normative assessment of such changes.

B. THE INTERNAL PERSPECTIVE IN CONTEMPORARY CONSTITUTIONAL THEORY

Debates in contemporary constitutional theory reflect the change in orientation we have associated with the shift from philosophy to politics. Many theorists now focus on structural questions.<sup>104</sup> They address how institutional arrangements represent the authority of the people rather than how judges should interpret the Constitution for their decisions to be legitimate.<sup>105</sup>

What is most striking, perhaps, is how the debate about judicial review changes when our perspective shifts from philosophy to politics. In favoring democracy over philosophy, Walzer considered the conflict from a philosophical perspective—a perspective outside of the political community.<sup>106</sup>

One would expect that, as a citizen, he would favor institutional reforms to impede judges who would intervene in democratic politics to vindicate principles of justice. But judicial review in this form appears consistent with a conventional understanding of how American democracy operates and when viewed from an internal perspective, seems to gain authority as a component of a political process that is itself legitimate.<sup>107</sup>

Many theorists seem to find judicial review legitimate given its contribution to American democracy. Some theorists, for example, describe how judges represent interests that would otherwise go unrepresented within our institutional structure or identify institutional features that explain why ju-

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103. See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

104. See Kenneth D. Ward, *Bickel and the New Proceduralists*, in *THE JUDICIARY AND AMERICAN DEMOCRACY* 163-65 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

105. See *supra* notes 36, 39, 44.

106. See William A. Galston, *Community, Democracy, Philosophy: The Political Thought of Michael Walzer*, 17 *POL. THEORY* 119, 127 (1989).

107. *Id.* at 129; see also DEVINS & FISHER, *supra* note 39; ROSEN, *supra* note 41; Friedman, *supra* note 28.

dicial decisions do not stray far from the opinions of the majority.<sup>108</sup> Others describe how judges have advanced our deliberation about constitutional values or how judges might have encouraged greater deliberation by deciding cases differently.<sup>109</sup>

But these theorists are not interested in abstract questions of what it means for a government to be adequately deliberative or representative, or in comparing how different institutional arrangements might manifest the virtues of deliberation or representation. Much as Levinson assumed any action that arose from a constitutional convention would be legitimate, this work tends to situate the interactions of judges and elected officials within a broader political process that has, what is assumed to be, legitimate authority to speak for the people. Therefore, rather than compare an institutional arrangement with judicial review to alternatives that might advance different normative commitments or consider whether an alternative arrangement might secure a superior form of democracy, these theorists describe how, in practice, American constitutionalism advances or might advance norms that they associate with democracy.<sup>110</sup> Such comparisons become more important when we consider that the current practice of judicial review is not established by the Constitution and is instead a construction of political institutions that purport to speak in the name of the people.<sup>111</sup>

Consider the question of judicial supremacy, a question that has gained prominence in recent debates.<sup>112</sup> In general terms, the question of judicial supremacy goes to the status of conflicting interpretations of the Constitution, to wit, whether judges or elected institutions should have final say

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108. See Galston, *supra* note 106, at 29; see also DEVINS & FISHER, *supra* note 39; PERETTI, *supra* note 35; ROSEN, *supra* note 41; Friedman, *supra* note 28; Barry Friedman, *William Howard Taft Lecture: The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1291, 1297-98 (2004).

109. See sources cited *supra* note 40; see also MACEDO, *supra* note 35; Friedman, *supra* note 28.

110. The same is true of theorists who argue against judicial review or seek to curtail its exercise but do so from an internal perspective. Mark Tushnet, for example, attempts to persuade people that judicial review does not advance good interests in comparison to those that would be advanced if questions of constitutional meaning were left entirely within the purview of elected officials. Consider as well the Duke colloquium that considered term limits for Supreme Court Justices. Many of the contributors assumed that judges decide cases to advance political preferences and, rather than consider whether an institutional structure that impeded such judging would better reflect democratic ideals, they proposed institutional reforms that would recalibrate the Court to bring it closer to the electoral cycle. See TUSHNET, *supra* note 39. See generally REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006).

111. See WHITTINGTON, *supra* note 103.

112. See, e.g., DEVINS & FISHER, *supra* note 39; KRAMER, *supra* note 39; THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe ed., 2004); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007).

about what the Constitution means.<sup>113</sup> The people of the United States have never considered and expressed their consent to judicial supremacy through either formal or informal political process.<sup>114</sup> But from an internal perspective it seems to gain authority as part of a conventional understanding of American democracy.

Keith Whittington, for example, describes how judicial supremacy came to characterize our politics.<sup>115</sup> He contends that the Constitution leaves open the question of which institution has authority to resolve disagreements about its meaning and that this question is contested as people pursue particular disagreements about constitutional meaning.<sup>116</sup> In this view, the abortion debate is both an argument about whether the Fourteenth Amendment protects a woman's right to choose and an argument about who ultimately resolves the question of whether the Fourteenth Amendment protects this right.

Whittington associates the rise of judicial supremacy with elected officials acting in their own self-interest.<sup>117</sup> These officials expand judicial authority in order to enforce the commitments of the dominant political regime against the interests opposed to the regime, most typically regional or local interests, such as when New Dealers relied on judges to define and enforce their commitment to civil rights.<sup>118</sup> This strengthens judges' positions to resolve intramural conflicts among political actors when they disagree about the meaning of the regime to which they are affiliated, because those disagreements both dilute the authority that could be used against the judges and ensure that judges would find allies to support controversial rulings.<sup>119</sup> Judicial supremacy, in Whittington's view, describes the circumstances in which judges will tend to prevail in the contest to determine constitutional meaning; it is not a claim about the nature of judicial authority under the Constitution.<sup>120</sup>

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113. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 783-86 (2002). Whittington follows the tendency among constitutional theorists to frame the problem in terms of how much deference elected officials owe to judicial decisions. *Id.* at 773. And as he notes, the debate focuses on the question of who settles the question when institutions disagree about what the Constitution means. *See generally* WHITTINGTON, *supra* note 103. I use judicial supremacy to characterize the political environment in which institutions advance competing interpretations. *See* Kenneth D. Ward, *Against Judicial Supremacy, Legislative Overrides as a Check on Judicial Review* (Jan. 1, 2009) (unpublished manuscript, on file with author).

114. For a discussion of informal constitutional amendments, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

115. *See* WHITTINGTON, *supra* note 112.

116. *Id.* at 26-27.

117. *Id.* at 254-84.

118. *Id.* at 105-24.

119. *Id.* at 24.

120. *Id.* at 25-27.

Nonetheless, Whittington finds virtue in judicial supremacy.<sup>121</sup> He suggests that judicial supremacy adds nuance to American democracy in that institutional authority to say what the Constitution means is calibrated to the level of consensus about what the Constitution means.<sup>122</sup> The constraint on judicial authority increases when people agree about what the Constitution means, or when they are united in rejecting the Court's interpretation of constitutional law.<sup>123</sup> But, in the absence of such consensus, judges can enforce interpretations of the Constitution that have support but that might go unenforced in a government in which authority to interpret the Constitution was more readily held accountable.<sup>124</sup>

Whittington's normative conclusions are very close to the practices he describes.<sup>125</sup> He assesses the regime from within: he explains why officials might have constructed a regime characterized by judicial supremacy and identifies benefits that might follow from their construction.<sup>126</sup> But he asserts that these are benefits without addressing the higher-order question of what virtues should be exhibited in a democratic government and without any real comparative analysis that would explain why we should favor an institutional arrangement characterized by judicial supremacy over alternative arrangements.<sup>127</sup>

We find a similar perspective among many theorists who reject judicial supremacy.<sup>128</sup> They too assume judicial supremacy to be a characteristic of American constitutional democracy and associate the contest for authority to determine what the Constitution means with particular disagreements about constitutional doctrine.<sup>129</sup> For example, Robert Bork and Mark Tushnet, respectively, have proposed reforms to limit or eliminate judicial review and do so based on an assessment of how judges will resolve important questions of constitutional law.<sup>130</sup>

Larry Kramer also argues for political action to combat judicial supremacy but, in contrast to Bork and Tushnet, does so within the context of

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121. WHITTINGTON, *supra* note 112, at 293-96.

122. *Id.*

123. *See id.* at 49-81.

124. *Id.* at 293-96.

125. *See generally id.*

126. *Id.* at 28-82, 285-96.

127. *See generally* WHITTINGTON, *supra* note 112.

128. *See generally* ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96-119 (1996); RICHARD JOHN NEUHAUS, *THE END OF DEMOCRACY?: THE CELEBRATED FIRST THINGS DEBATE WITH ARGUMENTS PRO AND CON AND "THE ANATOMY OF A CONTROVERSY"* (Mitchell S. Muncy ed., 1997) [hereinafter *THE END OF DEMOCRACY*]; THAT EMINENT TRIBUNAL, *supra* note 112; TUSHNET, *supra* note 39.

129. *See generally* BORK, *supra* note 128, at 96-119; THAT EMINENT TRIBUNAL, *supra* note 112; *THE END OF DEMOCRACY*, *supra* note 128; TUSHNET, *supra* note 39.

130. *See* BORK, *supra* note 128; TUSHNET, *supra* note 39.

particular contests about constitutional meaning, rather than through institutional reforms.<sup>131</sup> He believes that we resolve the question of judicial supremacy through political action and contends that people should reclaim from the Court the authority to say what the Constitution means.<sup>132</sup> Kramer, however, says surprisingly little about why they should do it. Although he associates judicial supremacy with the view that judges make better decisions than legislators and promote stability by resolving disputes with finality,<sup>133</sup> Kramer does not address these questions.<sup>134</sup> Indeed, he indicates that they do not matter all that much because judicial supremacy's authority as a normative construct depends on what citizens actually do: whether they defer to the Court's understanding of the Constitution or whether they force the Court to accede to the authority of the people.<sup>135</sup>

We have seen that theorists who consider judicial supremacy from an internal perspective focus on the political interests that gain from judicial supremacy and tend to assess judicial authority based on a prediction of how judges will resolve salient issues of constitutional law. The question of judicial supremacy, however, looks very different when we step outside the practice of American constitutionalism. Most significantly, perhaps, we see that judicial supremacy is an institution in need of justification.<sup>136</sup> But the external perspective also helps us answer the question of whether judicial supremacy is justified. It allows us to focus on consequences of institutions that follow from the nature of the institutional arrangements themselves, as opposed to ephemeral considerations related to immediate debates about constitutional doctrine, considerations that explain whether elected officials and citizens will help the Court to sustain controversial decisions.<sup>137</sup>

### C. JUDICIAL SUPREMACY FROM AN EXTERNAL PERSPECTIVE

Because judicial supremacy characterizes American constitutionalism, it would seem that it derives legitimacy because people approve of the prac-

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131. See generally KRAMER, *supra* note 39. Kramer associates judicial supremacy with particular conditions of twentieth-century politics and argues that through most of our history elected officials were more likely to assert their own authority to interpret the Constitution and, thus, played a greater role in the process that determines its meaning. Kramer attributes its rise to: (1) a distrust of popular government that becomes heightened with the rise of fascism, and (2) the need to preserve stability in a time of highly partisan conflicts. See *id.* at 8, 188-89, 222, 234-36.

132. *Id.* at 246-47.

133. *Id.* at 188-89, 222, 234-36.

134. *Id.* at 227-48. Instead, he suggests that judicial supremacy needs special justification because popular constitutionalism is more consistent with our republican commitments. *Id.*

135. KRAMER, *supra* note 39, at 241-48.

136. See *infra* text accompanying notes 138-48.

137. See *infra* text accompanying notes 138-48.

tice, even if they have never consented to it. But that is not the case. As Whittington makes clear, the Constitution leaves the nature and scope of judicial authority an open question, one that people *continue* to contest politically.<sup>138</sup>

What is more, Whittington's account suggests that it would be a mistake to interpret people's tolerance of judicial supremacy as approval of the institution.<sup>139</sup> His story is one in which the people's representatives accede to judicial supremacy as an expedient.<sup>140</sup> Elected officials support particular decisions of the Court rather than supporting judicial supremacy itself and do so in order to escape accountability for votes they believe would alienate important constituencies.<sup>141</sup> For example, Whittington describes how President Clinton signed a bill that he believed was in tension with principles of free speech and then relied on the Court to take whatever heat would come from enforcing those principles.<sup>142</sup> Also, southern politicians increased the authority of judges to enforce New Deal commitments and also attacked those judges for defining civil rights for African Americans, whether or not the officials themselves supported the rights in question.<sup>143</sup>

As a consequence, it would be wrong to say that either the people or their representatives support judicial supremacy itself. They, at most, help the Court to sustain particular decisions because of the substance of those decisions, and they do so to secure political outcomes that could not be gained through legislation. This would suggest that judicial supremacy not only lacks the consent of the people but also rests on a foundation of judicial decisions that could not gain sufficient support through majoritarian political processes.<sup>144</sup>

The Constitution leaves open the question of who has authority to resolve disagreements about constitutional doctrine. But when the American people are divided about the meaning of their constitutional commitments,

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138. See WHITTINGTON, *supra* note 112, at 25-27.

139. *Id.* at 152-57.

140. *Id.* at 82-229.

141. *Id.* at 134-52, 195-210.

142. *Id.* at 208-10.

143. *Id.* at 144-52. Whittington illustrates how the Court's leadership on civil rights "allowed legislatures to play to their individual constituencies by either directing blame at the Court or lining up with it." WHITTINGTON, *supra* note 112, at 149.

144. Note that this is not an argument against judicial supremacy; it only claims that judicial supremacy cannot claim authority as an expression of the people's will. And Whittington would recognize this. He does not claim that judicial supremacy has popular support or that we make American constitutionalism more democratic when we allow institutions to compete politically for the authority to resolve disagreements about the Constitution. WHITTINGTON, *supra* note 112. Whittington, instead, suggests that there is a virtue in supplementing democracy with a nondemocratic institution, one that can make decisions that could not be attained through a process that is more responsive to majorities. *Id.*

judges enjoy significant political supports that help them to sustain controversial interpretations of constitutional law. These supports give judicial decisions something like a presumption of authority.<sup>145</sup> It is not surprising then that many opponents of judicial supremacy seem to be motivated by ideological considerations or encourage challenges to particular decisions.<sup>146</sup> In assessing their claims, we must ask whether such a presumption of authority is justified.

There are at least two ways that an external perspective might help us consider the question of judicial supremacy. The first is familiar; we might ask whether judicial supremacy will advance an attractive conception of justice as defined from an external perspective.<sup>147</sup> This approach suggests a division of labor between philosophers who identify principles of justice and political scientists who focus on the tendencies of different institutional arrangements to determine whether they are likely to advance those principles.<sup>148</sup>

However, the external perspective helps us to address the question of judicial supremacy in a second way, one that has the potential to reinvigorate debates in constitutional theory. Whittington illustrates how, from an internal perspective, judicial supremacy is inextricably linked to controversial interpretations of constitutional law, which in today's political climate are often related to issues such as abortion, gay rights, and the meaning of the Establishment Clause.<sup>149</sup> By removing ourselves from political competition, the external perspective allows us to consider questions of institutional authority in isolation from such hot-button issues.<sup>150</sup>

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145. See Ward, *supra* note 113.

146. See *supra* note 128.

147. This is the approach that Walzer criticized, an approach that I have associated with debates about the countermajoritarian difficulty. See *supra* text accompanying notes 21-27.

148. Martin Shapiro, *Political Jurisprudence, Public Law, and Post Consequentialist Ethics: Comment on Professors Barber and Smith*, 3 *STUD. AM. DEV.* 89 (1989). It also is reminiscent of the type of constitutional theory that Walzer criticized. Walzer, however, argued that philosophy should not intrude in the political process and suggested that philosophical considerations should influence political deliberations about the best institutional arrangement. Walzer, *supra* note 6.

149. WHITTINGTON, *supra* note 112.

150. In so doing, we identify structural arguments that are similar to Levinson's attempt to bracket controversial questions of constitutional doctrine, but these arguments consider constitutional structure from an external perspective. LEVINSON, *supra* note 1. The change in perspective is important because it allows us to clarify how claims about structure relate to claims about substantive justice.

We have seen that Levinson's structural argument masks a contested claim about justice, one that is associated with interests that people seek to advance politically. LEVINSON, *supra* note 1. This creates two problems: (1) it seems that his argument is intended to advance political interests associated with a controversial view of justice, and (2) people will contest Levinson's call for a constitutional convention because they believe that

Consider, for example, Alexander and Schauer's defense of judicial supremacy.<sup>151</sup> They argue that judges perform an important settlement function, and their claim does not depend on how judges interpret the Constitution or whether judicial decisions are likely to advance justice.<sup>152</sup> Similarly, Jeremy Waldron argues against judicial supremacy because he believes that the legislative process, in contrast with the judicial process, treats people with equal concern and respect.<sup>153</sup> His argument goes to the nature of the legislative process; it is a claim about how the process functions without regard to the substance of laws that legislators might pass.<sup>154</sup>

These arguments focus on the nature of institutions, rather than the conflicts about justice that tend to overwhelm discussion when institutional authority is contested politically. They take on greater importance because political contests for authority tend to become proxies for fights about what people want institutions to do with that authority. We have seen, for example, that judicial supremacy follows from a political settlement that is sustained by ephemeral considerations of how judges and elected officials resolve constitutional issues at particular points in time—considerations having nothing to do with the nature of the institutions themselves.<sup>155</sup>

Indeed, Waldron rejects judicial supremacy because he believes its justification depends on contested claims about justice.<sup>156</sup> His argument turns on a distinction between the process that we—a collective—should use to settle our disagreements about justice and the substantive values that I—an individual—believe should guide the Court or other institution that

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their interests would be hurt by the reforms Levinson suggests. *See* discussion *supra* Part II.A.

Note that any structural argument will face the second problem; people will contest institutional reforms that they believe work against their interests, regardless of whether those reforms do in fact work against their interests. They would also contest reforms that might advance their interests if they thought it would put at risk a status quo that they believe is favorable to their interests. We, however, can frame structural arguments that address the first problem. It is possible to justify institutional arrangements based on reasons having nothing to do with the interests or conceptions of justice we would like those institutions to advance.

This is not to say that such justifications are neutral. The authority might be prone to advance some interests over others, which is why people would contest it. Nonetheless, the justification itself does not depend on certain interests being advanced at the expense of others, as was the case when Levinson sought to make it easier to legislate in the name of progressive legislation. LEVINSON, *supra* note 1.

151. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

152. *Id.* at 1359.

153. JEREMY WALDRON, *LAW AND DISAGREEMENT* 3-4, 7, 159-61 (1999).

154. *See* Kenneth D. Ward, *The Politics of Disagreement*, 65 REV. POL. 425, 433-40 (2003).

155. *See supra* Part II.B.

156. *See* WALDRON, *supra* note 153.

resolves these disagreements.<sup>157</sup> Waldron believes constitutional theory should address the question of how to respond to disagreements about justice as opposed to the substantive question of what justice requires.<sup>158</sup> And he contends that we must justify the institutional arrangements that resolve these disagreements without reference to the substantive values that are the subject of the disagreements themselves.<sup>159</sup>

Waldron justifies legislative authority to resolve disagreements about constitutional law based on considerations that do not prejudge those disagreements.<sup>160</sup> He believes that legislatures, by their nature, allow every view a chance to be heard and every person an equal vote in the process.<sup>161</sup> In so doing, they advance a procedural ideal of equality and advance this ideal no matter how they resolve particular issues of substantive justice. The legislative process, according to Waldron, advances a norm of equality, even though one legislature might pass a law that redistributes wealth broadly while another might pass laws that promote great discrepancies in wealth.<sup>162</sup>

This is not to say that the legislative process operates in the way that Waldron envisions.<sup>163</sup> Moreover, even if this were the case, it might also be true that judicial supremacy can be grounded in considerations that have nothing to do with the substance of the cases that judges must decide. Indeed, we have seen that Alexander and Schauer give us such an argument.<sup>164</sup> Waldron, however, makes a powerful argument that we should justify institutional arrangements based on considerations that are not related to the substantive questions those institutions resolve.<sup>165</sup>

This is not the place to assess Waldron's argument.<sup>166</sup> For now, we only note that such an assessment is difficult when we situate the question of institutional authority within broader political fights to resolve questions of constitutional interpretation. More generally, we have seen that this internal perspective distracts attention from considerations that follow from

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157. *See id.*

158. *See id.* at 191.

159. *See id.* at 3-4, 7, 159-61.

160. *See Ward, supra* note 154.

161. *See WALDRON, supra* note 153, at 3-4, 7, 159-61.

162. *See Ward, supra* note 104.

163. Keith E. Whittington, *In Defense of Legislatures*, 28 POL. THEORY 690 (2000) (reviewing JEREMY WALDRON, *LAW AND DISAGREEMENT* (2001); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999)).

164. Alexander & Schauer, *supra* note 151.

165. *See WALDRON, supra* note 153.

166. At a minimum, it depends on contestable assumptions about the purpose of political association.

the nature of different institutional arrangements that might be relevant to the justification of those arrangements.<sup>167</sup>

#### IV. CONCLUSION

Constitutional theorists turned to politics as they recognized that philosophical arguments could not resolve the disagreements about the substantive issues that divide citizens. They put these disagreements to the side by focusing on the institutional arrangements that resolve such questions—institutional arrangements that represent the authority of the American people. But these theorists bracket higher order normative questions about the nature of democracy, and these questions seem to be as divisive as the questions of substantive justice that sparked the turn to politics. Indeed, disagreements about the nature of democracy undermine Levinson's attempt to build consensus for constitutional reform.<sup>168</sup>

The difficulty of these disagreements becomes apparent from the external perspective that characterizes philosophy. As Walzer notes, philosophers consider normative questions unconstrained by the understandings and conventions of their community.<sup>169</sup> They assess American constitutionalism without assuming the authority of the political institutions they examine and without preconceived notions of the interests those institutions should advance. It is not surprising then that this external perspective helps us to identify disagreements about what American democracy should be. The question remains, however, whether philosophy can help us to resolve these disagreements. That is a question best left to another essay.

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167. See *supra* text accompanying notes 117-28.

168. See *supra* Part II.A. His failure is reminiscent of Ely's earlier failure to resolve the countermajoritarian difficulty by having judges enforce values that define American democracy. See *supra* note 34.

169. See Walzer, *supra* note 6, at 396-97.