# LEGISLATIVE SUPREMACY

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ABSTRACT

*This essay develops an institutional perspective to consider limitations on judicial authority. Rather than assume that judicial decisions put an end to disagreements about what the Constitution means, this perspective focuses on the political contests that occur after judges make disputed interpretations of constitutional law. This perspective shows that scholars both exaggerate the role of judicial review in enforcing constitutional limits and underestimate the political instability that follows from difficulty in challenging controversial judicial holdings. Together, these claims are the beginning of an argument defending a form of legislative supremacy that would allow Congress and the President to override judicial precedents through ordinary legislation, after which judges would be bound to apply that legislative interpretation of constitional law.*

This essay develops an institutional perspective to argue for limitations on judicial authority. Rather than assume that judicial decisions put an end to disagreements about what the Constitution means, this perspective focuses on the political contests that occur after judges make disputed interpretations of constitutional law. This perspective shows that scholars both exaggerate the role of judicial review in enforcing constitutional limits and underestimate the political instability that follows from difficulty in challenging controversial judicial holdings. Together, these claims are the beginning of an argument defending a form of legislative supremacy that would allow Congress and the President to override judicial precedents through ordinary legislation, after which judges would be bound to apply that legislative interpretation of constitutional law.[1]

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1. I assume that a constitutional amendment would be necessary to institute a legislative override and recognize that there is little chance that such an amendment could be ratified in the foreseeable future. My proposal is intended to provoke discussion of the proper extent of judicial authority and the consequences institutional design has for constitutional politics. I have not defined the contours of the override process in order to focus attention on the normative argument. Although my analysis does not specify how the legislative override would work, I envision a form of veto in which legislators reject the Court's interpretation of the Constitution and reinstitute the prior status quo. Such a process would retain features of the current system that advance important rule of law

People are reluctant to consider legislative supremacy because they fear majoritarian tyranny. The notion of a legislative override evokes Robert Bork's attempt to eviscerate judicial authority in order to advance a conservative agenda or, perhaps, Theodore Roosevelt's attempt to do so to advance a progressive one.[2] It might seem that a legislative override would give elected officials final authority to say what the Constitution means and allow them to define the limits to their authority. But this is not the case. Although a legislative override would make it easier for elected officials to challenge the status quo that judges set when they interpret the Constitution, there are institutional considerations that will make it difficult to pass overrides.

An institutional perspective also helps us to distinguish judicial supremacy, which is at odds with legislative supremacy, and judicial review, which is not. The legislative override does not eliminate judicial review and therefore my argument is more moderate than Mark Tushnet's proposal[3] to remove considerations of constitutional interpretation from the Article III jurisdiction of federal judges and Jeremy Waldron's argument[4] that Europeans should not adopt the American model of a judicially enforceable Bill of Rights.

Finally, my argument addresses two divergent strands of the literature on judicial supremacy. It supports popular constitutionalists who reject judicial supremacy as contrary to citizens having final word on what the Constitution means.[5] By making it easier to contest judicial interpretations of constitutional law, a legislative override should increase the occasions of institutional conflict that yield appeals to the public. But it would do so without leaving the law unsettled. My argument thus addresses the concerns of judicial supremacists such as Larry Alexander and Frederick Schauer, who contend that judicial supremacy promotes the Judiciary's

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values. *See* Larry Alexander and Frederick Schauer, *On Extra Judicial Constitutional Interpretation* 110 HARV. L. REV. 1359 (1997).

2. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 117–19 (1996); Theodore Roosevelt, *Judges and Progress*, OUTLOOK 40 (Jan. 6, 1912).

3. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

4. JEREMY WALDRON, LAW AND DISAGREEMENT 3, 4, 7, 159–61 (1999).

5. Popular constitutionalists such as Larry Kramer and Neal Devins and Louis Fisher endorse coordinate review; they believe that elected officials are under no obligation to defer to judicial interpretations of constitutional law when exercising their own independent authority. They contend that American constitutionalism is designed such that judges and elected institutions will sometimes advance conflicting views of what the Constitution means and, when such conflicts arise, these officials have an incentive to appeal for public support of their favored view. *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 58 (2004); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 217 (2004).

performance of an important settlement function.[6] A legislative override would not impair people's ability to know what the law is and, at the same time, would correct for the instability of the current regime in which some citizens believe themselves marginalized—perhaps even disenfranchised—because of the obstacles they face in challenging judicial interpretations of constitutional law.

The essay has four sections. The first section distinguishes judicial supremacy from judicial review. The second illustrates how the debate on judicial supremacy focuses on the narrow problem of who settles questions of constitutional law. The third develops a broader institutional perspective to illustrate why elected officials would continue to be bound by constitutional limits if we were to allow legislative overrides of judicial interpretations of constitutional law. The final section uses this perspective to argue that a legislative override would promote political stability, by encouraging the political participation that popular constitutionalists seek without undermining the settlement function that grounds the strongest argument for judicial supremacy.

## I. JUDICIAL SUPREMACY AND JUDICIAL REVIEW

Constitutional theorists often discuss judicial supremacy under the rubric of judicial review.[7] A judge exercises judicial review when, in deciding a case, she refuses to give effect to what is deemed an unconstitutional act of another institution of government. Judicial supremacy describes what happens *after* judges exercise judicial review. It defines the status judicial precedents have when challenged by elected institutions, and it thus describes the political field on which judges and elected officials contest their disagreements about what the Constitution means.

Judicial review seems to imply judicial supremacy to the extent that a judge cannot invalidate an act of an elected official without her view of the Constitution having greater authority than the view that is invalidated. And we would settle the question of judicial supremacy, if we were to amend

6. *See generally* Alexander and Schauer, *supra* note 1.

7. Keith Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L.REV. 773, 783–86 (2002). Whittington also distinguishes judicial supremacy and judicial review. But he follows the tendency among constitutional theorists to frame the problem in terms of how much deference elected officials owe to judicial decisions. And, as he notes, the debate focuses on the question of who settles the question when institutions disagree about what the Constitution means. I use judicial supremacy to characterize the political environment in which institutions advance competing interpretations.

the Constitution to eliminate judicial review by forbidding the Court from considering the Constitution when it is asked to give effect to the actions of other political institutions.[8]

But judicial review would survive in a regime that allowed judges to interpret the Constitution subject to a legislative override. Judicial authority would be circumscribed to some extent, because legislators could prevent judges from applying their interpretations of the Constitution to future cases.[9] As we will see in the third section, however, the effectiveness of judicial review will depend on political variables that determine how easy it will be for legislators to, in fact, override a judicial precedent.[10] For now, we only note that judges could exercise judicial review and have some chance of sustaining their interpretations of constitutional law, even if we were to deny their decisions any presumption of authority.

And this suggests a final preliminary point: the essay uses the term legislative supremacy only to characterize the institutional position of legislators relative to judges, as it pertains to ongoing contests about what the Constitution means. It makes no claim about who should have final authority or where sovereignty is located in our system of government. This distinction is important. Kramer, for example, rejects both judicial and legislative supremacy because he believes that final authority should rest with the people themselves and not their agents.[11] But we will see that a legislative override would not give legislators final word about the

8. *See* TUSHNET, *supra* note 3, at 175. Tushnet makes this proposal. We will see that Tushnet is interested in whose view of the Constitution should prevail when we disagree about what the Constitution means, and this might explain why he views legislative supremacy as an alternative to judicial review. Many scholars, by contrast, mistakenly assume that a legislative override would eliminate judicial review and reject the argument for legislative supremacy, fearing that elected officials would be free to violate the Constitution.

9. The essay does not consider the question of what would happen if legislators could reverse a decision that invalidates a law as applied to a particular case. Most constitutional theorists assume that judicial decisions should be final as they apply to the litigants. Although there might be arguments for curtailing this authority, they would seem to be in conflict with fundamental assumptions about the rule of law and, in turn, the separation of powers. Legislators would not be bound by their own law, if they can excuse select litigants from its reach.

10. To be effective, legislative authority does not depend on legislators being able to override particular decisions in the way that judges need this authority to make judicial review effective. Legislators can check the Court without overriding particular decisions. They have means for securing judicial compliance, such as threats of impeachment, loss of jurisdiction, or even non-compliance with judicial decisions—that judges do not have when legislators refuse to comply with their decisions. Consequently, in a regime characterized by legislative supremacy, legislators would be able to advance their views of what the Constitution means, even if they cannot reverse the holdings of particular cases.

11. KRAMER, *supra* note 5, at 58.

Constitution; it would only reshape the political contests that ensue after judges advance controversial interpretations of constitutional law. Indeed, it would seem that Kramer should endorse such a reform, if it would increase the likelihood that the people will be called on to resolve disagreements between their elected and judicial agents.[12]

## II. THE SCHOLARLY DEBATE: JUDICIAL SUPREMACY AND THE RESOLUTION OF DISAGREEMENTS

The debate about judicial supremacy focuses on who resolves disagreements about constitutional doctrine. We will see that this focus prevents theorists from considering how the institutional position of judges and elected officials influences their interactions and the consequences this has for our understanding of the appropriate extent of judicial authority.

Consider three types of claims that address judicial supremacy in terms of how we resolve disagreements: (1) descriptive claims that identify the institutions that have in fact resolved disagreements; (2) substantive claims that assess institutional authority based on an expectation of what constitutional doctrine should be; and (3) structural claims that assess such authority based on an expectation of how institutions might contribute to the process that resolves disagreements.

(1) Descriptive claims address whether judges have final say about what the Constitution means. They consider the influence non judicial actors have in shaping constitutional doctrine. Neal Devins and Louis Fisher, for example, reject judicial supremacy as a description of constitutional politics. They contend that "constitutional law is produced by many forces: political and legal, non judicial and judicial, national and local, public and private."[13]

J. Mitchell Pickerill uses the term judicial primacy to describe the role of the Court and judicial review in determining constitutional meaning. The Court, according to this view,

> "has the *primary* institutional responsibility for interpreting the Constitution, and that Congress's motivations and its likelihood of engaging in constitutional construction are limited by the majoritarian and representative nature of the institution. . . . [T]he

12. *Id*. at 250–51. Kramer identifies alternative institutional mechanisms for advancing the ends of popular constitutionalism but does not believe that constitutional reform is a realistic prospect given the obstacles presented by the Article V amendment process.

13. DEVINS & FISHER, *supra* note 5, at 217.

> Court is not 'supreme' in the sense that it always has final say and is unaccountable to Congress . . . ."[14]

Similarly, there is a rich literature that describes the conditions that explain why elected officials would defer to judicial interpretations of constitutional law. This literature suggests that the second face of power characterizes judges' relationship to elected officials.[15] Judicial decisions, according to this view, significantly determine the meaning of the Constitution, but the decisions themselves reflect the preferences of other institutional actors.[16]

We will also see that Kramer uses descriptive claims as part of a normative argument against judicial supremacy. Kramer contends that it is only fairly recently that judicial supremacy comes to characterize American constitutional politics.[17] He examines various conflicts about what the Constitution means to illustrate 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.[18]

(2) Substantive claims emphasize values that some theorists believe constitutional law should reflect. They assess judicial authority based on how judges have resolved particular questions of constitutional interpretation, expectations of how judges will decide such questions, or theories of democratic government that entail particular conclusions about constitutional doctrine.

Substantive claims often arise in the context of fights about constitutional doctrine. Justices, for example, have claimed final authority to say what the Constitution means in defending precedents such as those that integrated schools,[19] secured the right of women to have abortions,[20]

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14. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 152 (2004) (internal citations omitted).

15. Peter Bacharach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV 947, 947–52 (1962). Bacharach and Baratz contrast the first face of power in which someone uses power to advance a particular end with the second face of power in which power is manifest in "non events." Power, according to this view, is manifest, when one institution defers to another institutional actor by refusing to use their authority to advance preferences that conflict with the preferences of those other actors.

16. *See, e.g.*, John A. Ferejohn & Larry Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 977–78 (2002); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 138–81 (1998); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 123–75 (1964).

17. KRAMER, *supra* note 5, at 8.

18. *Id.*

19. Cooper v. Aaron, 358 U.S. 1 (1958).

20. Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992).

and narrowed religious exemptions to generally applicable laws.[21] And conversely, people who challenge such precedents reject claims of judicial supremacy. *The First Things* Symposium provides a notable example.[22] The symposiasts appeal to Lincoln's famous challenge to *Dred Scott*; Lincoln accepted the authority of the Court's holding as it applied to the parties but asserted his own authority to interpret the Constitution independently in the exercise of his constitutional powers.[23] Because these claims are so closely associated with doctrinal disputes, they inevitably focus on how we should resolve such disagreements.[24]

Other theorists make substantive claims that look beyond particular doctrinal fights to assess judicial authority based on a prediction of whether judges will advance a compelling understanding of constitutional law. Ronald Dworkin, for example, defends an expansive conception of judicial authority because he expects that judges will make better decisions than legislators regarding the conditions necessary to secure equal status for citizens.[25] By contrast, Robert Bork and Mark Tushnet, theorists on the opposite side of the political spectrum, argue that judicial review should be significantly curtailed or eliminated based on their assessments of the values that judges are likely to advance.[26]

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21. Boerne v. Flores, 521 U.S. 507 (1997).

22. THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS, (Richard John Neuhaus ed. 1997) [hereinafter THE END OF DEMOCRACY]. The Symposium addresses a wide range of issues relating to how citizens should respond to Supreme Court decisions they believe outside of the Court's legitimate authority. The themes of the original symposium continue to be explored in a successor volume, THE END OF DEMOCRACY? II A CRISIS OF LEGITIMACY (Mitchell S. Muncy ed., 1999) [hereinafter THE END OF DEMOCRACY? II].

23. Robert H. Bork, *Our Judicial Oligarchy*, *in* THE END OF DEMOCRACY? *supra* note 22, at 17; The Editors of FIRST THINGS, *Correspondence*, *in* THE END OF DEMOCRACY? *supra* note 22, at 119–20; Russell Hittinger, *Government By the "Thoughtful Part," in* THE END OF DEMOCRACY? II, *supra* note 22, at 22–23, 34–35; Hadley Arkes, *Prudent Warning and Imprudent Reactions*, *in* THE END OF DEMOCRACY? II, *supra* note 22, at 80; Robert P. George, *Justice, Legitimacy and Allegiance*, *in* THE END OF DEMOCRACY? II, *supra* note 22, at 102–03.

24. And to the extent they make the claim that elected institutions should resolve ambiguous constitutional provisions, they do so based on the expectation that elected institutions will reach better decisions. *See* Gary D. Glenn, *The Venerable Argument Against Judicial Usurpation*, in THE END OF DEMOCRACY? II, *supra* note 22, at 110–12; George W. Carey, *The Philadelphia Constitution: Dead or Alive*, *in* THE END OF DEMOCRACY? II, *supra* note 22, at 235.

25. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 16, 34 (1996).

26. BORK, *supra* note 2, at 22, 96–119; TUSHNET, *supra* note 3. Tushnet's argument is like Dworkin's in that he examines whether an institutional process will promote certain values he associates with the Declaration of Independence. He concludes that the Court's record does not give us reason to override a presumption favoring democratic decision-making. On the other hand, Tushnet's argument is structural to the extent he claims that the process of popular government better reflects those same values.

On the one hand, Bork and Tushnet are unusual in considering institutional reforms that limit judicial authority. On the other hand, the ideological quality of their arguments, especially Bork's,[27] reinforces our tendency to confuse the question of what authority judges should have and the question of how judges should interpret the Constitution.[28] Each attacks judicial supremacy in order to advance a particular conception of constitutional law. This distracts attention from important structural considerations that should inform our assessment of whether to limit judicial authority by assigning priority to legislative interpretations of constitutional law.

Kramer makes a different type of substantive claim. His argument resembles those made by the *First Things* symposiasts in that he wants to counteract the increasing tendency of citizens to defer to Supreme Court interpretations of the Constitution and thereby reduce the threshold—at least marginally—at which political challenges to the Court succeed.[29] But where the symposiasts seek to challenge particular Supreme Court precedents, Kramer aims at the claim of judicial supremacy itself.[30] He contends that people have the authority to say what the Constitution means and should reclaim this authority from the Court.[31]

Kramer, however, says surprisingly little about why we should favor his alternative interpretation of Article III. He associates judicial supremacy with the view that judges make better decisions than legislators and promote stability by resolving disputes with finality.[32] But he does not address these questions.[33] Indeed, he indicates that they do not matter all that much, because judicial supremacy's authority as a normative construct depends on our attitude about self government, whether we defer to the Court's understanding of the Constitution or force the Court to accede to

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27. Bork's argument is polemical and clearly intended for a broader audience than the scholarly community that tends to dominate debates in constitutional theory.

28. I discuss this tendency *infra* pp. 335–36.

29. *See* KRAMER, *supra* note 5, at 233. He considers judicial supremacy

> "an ideological tenet whose whole purpose is to persuade ordinary citizens that, whatever they may think about the Justices' constitutional rulings, it is not their place to gainsay the Court. . . . The object of judicial supremacy is . . . to maximize the Court's authority by inculcating an attitude of deference and submission to its judgments."

30. *Id*. at 249–53.

31. *Id*. at 246–47.

32. *Id*. at 188–89, 222, 234–36. Kramer associates the appeal of judicial supremacy with two conditions that arise in the late twentieth century: (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.

33. KRAMER, *supra* note 5, at 227–48. Instead, he suggests that judicial supremacy needs special justification because popular constitutionalism is more consistent with our republican commitments.

the authority of the People.[34] Judicial supremacy, according to this view, is a question that we resolve through political action, and Kramer's history aims to help citizens resolve the question correctly.

(3) Structural Claims emphasize the process we should use to resolve disagreements about the Constitution and are less concerned about particular questions of constitutional doctrine. This is not to say that structural claims have no concern with substance or that we can cleanly disentangle the structural and substantive aspects of such claims. We use the distinction to indicate that the arguments under consideration emphasize consequences of institutional authority that do not depend on how officials—whether judicial or elected—decide any particular question of constitutional law.

Structural claims are like substantive claims in that they associate judicial supremacy with a need to resolve disagreements about the Constitution. Indeed, some structural claims defend judicial supremacy based on the need to enforce the substantive limits the Constitution imposes on elected institutions.[35] Others focus more on the problem of disagreement itself, as opposed to how those disagreements should be resolved. Consider, for example, Alexander and Schauer's justification of judicial supremacy. They contend that we have an obligation to defer to Supreme Court interpretations of constitutional law, because the Court performs a valuable settlement function by resolving our disagreements and thereby promoting the good of social coordination.[36]

The opponents of judicial supremacy have also emphasized the need to resolve disagreements. Waldron defends legislation as a process that treats people with equal respect by ensuring that each person's view is counted the same in the process that resolves disagreements.[37] Others contend that by giving elected officials and citizens greater say about what the Constitution means, we increase the readiness with which people defer to constitutional authority.[38] These theorists suggest that when people see

34. KRAMER, *supra* note 5, at 241–48.

35. DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 291–92 (1986); Thomas I. Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U. L. REV. 133, 142; ROBERT A. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 16 (1971).

36. Alexander and Schauer, *supra* note 1, at 1359.

37. WALDRON, *supra* note 4, at 3, 4, 7, 159–61.

38. *See* DEVINS & FISHER, *supra* note 5, at 228–30; SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY, 121–26 (1992); STEPHEN MACEDO, THE NEW RIGHT v. THE CONSTITUTION 59 (1986).

themselves as responsible for the content of constitutional law, they will be more willing to undertake the obligations it imposes.[39]

Structural arguments take institutions seriously in that they approach the question of judicial supremacy with an eye to the consequences that follow from different political arrangements. They recognize that we use institutions to address disagreements about what the Constitution means and therefore should assess these institutions based on considerations that are at least somewhat independent of how we want them to settle particular issues of constitutional doctrine.

Nonetheless, these structural arguments approach the question of judicial supremacy from a similar perspective as the descriptive and substantive approaches. They focus on the need to resolve disagreements about what the Constitution means. While substantive approaches view disagreements as aberrations that we overcome by empowering an institution that is likely to interpret the Constitution correctly, structural approaches tend to treat disagreement as a disease that the political structure has to eradicate and consider different methods of doing so.

This is not to say that these scholars believe that our disagreements will end once judges or other institutional actors make a final decision. Indeed, they are sensitive to the depth of these disagreements and know that they survive our attempts to resolve them. But they treat institutions as independent variables and consider the different ways these variables influence the resolution of disagreements.[40] Therefore, they miss significant consequences that flow from the interaction of different institutions as they conduct ongoing disagreements.

The next section considers judicial authority in light of the political fight that ensues once judges make disputed interpretations of constitutional law. It considers political consequences that follow from how disagreements are conducted as opposed to how they are resolved. More particularly, it looks at how the relative institutional position of judges and elected officials influences the conduct of disagreements and how this bears on our understanding of the authority judges should have.

But first we must revisit the distinction between judicial review and judicial supremacy. We do so in order to detach judicial supremacy from

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39. *Id*.

40. *See* BURGESS, *supra* note 38, at 121–26; Walter, Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 421 (1986). Murphy, for example, endorses a modified version of departmentalism in which we assign authority for resolving disagreements based on the circumstances in which those disagreements arise. Burgess emphasizes that institutions shape people and that a well ordered system of political institutions will expand the range of disagreements that can be resolved by appeals to the Constitution.

the notion that judges derive authority by enforcing constitutional limits. This notion is an important component to the justification of judicial review, and it becomes associated with judicial supremacy because constitutional theorists have not been careful in distinguishing judicial supremacy and judicial review.

In debating judicial review, constitutional theorists tend to emphasize the checking function that judges perform. The strongest justifications, such as Hamilton's Federalist 78[41] and Marshall's opinion in *Marbury v. Madison*,[42] assume the Constitution, as higher law, is binding on the institutions it grants authority. Judicial authority to enforce the Constitution, according to this view, is a natural consequence of the authority the Constitution has as law.[43] This argument works when the Constitution is relatively clear or when there is a transparent line of reasoning that connects a judicial decision to the Constitution.

Judicial review, however, becomes an issue when the Constitution is not clear and when we have significant disagreements about its meaning, such as those involving race, religion and privacy. Because these disagreements do not end when judges interpret the Constitution, theorists address the question of judicial authority with an eye to the political contests that will ultimately resolve them. And judicial review becomes linked with the question of judicial supremacy.

Theorists, therefore, often address the question of judicial supremacy indirectly. They treat it as a supplement to the checking function associated with judicial review and assume the reasons that justify judicial review also explain why judges' views of the Constitution should prevail. This is why the question of judicial supremacy lurked in the background as an earlier generation of theorists wrestled with the counter-majoritarian difficulty.[44] These theorists defended theories of constitutional

41. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

42. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

43. *See* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989).

44. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 2–3, 16–23 (1962). *See also* Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory*, 18 J. L. & POLITICS 851, 854–60 (2002). The quest to solve the counter-majoritarian difficulty was an attempt to identify a theory of constitutional interpretation that 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. This is what Bickel means when he says that Marshall's opinion not only begs the question, it begs the wrong question.

interpretation that would allow judges to enforce the Constitution in a non-controversial manner and, in so doing, sought to justify judicial review without addressing the question of why judges should have authority to resolve disagreements about what the Constitution means.[45]

The quest failed; theorists could not identify a method of interpretation that would allow us to believe that judges enforce the Constitution itself and not a disputed interpretation of the Constitution.[46] It is our recognition of this failure that moves the question of judicial supremacy to the forefront, namely what happens after judges advance disputed interpretations of constitutional law.[47]

Nonetheless, these earlier debates have a lingering influence on the scholarly discussion of judicial supremacy. By emphasizing how we resolve disagreements, scholars assume the same perspective as the earlier debates. While theorists once asked if judges would interpret constitutional limits correctly, substantive approaches now consider whether judges advance good values when they enforce constitutional limits. And although structural and descriptive approaches are less concerned with the particular limits that judges might enforce, they assess judicial authority in terms of how we resolve controversies about these limits. They look at who triumphs when judicial and elected institutions clash. As a result, the debate about judicial supremacy continues to center on the checking function that judges perform without considering all the costs associated with the exercise of judicial power.

The remainder of this essay considers political variables that influence what happens after judges advance disputed interpretations of

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45. JOHN HART ELY, DEMOCRACY AND DISTRUST 1, 101–04 (1980). Ely frames what I have called the conventional view of the counter-majoritarian difficulty. *See* Ward, *supra* note 44, at 854–60. In seeking solutions to the counter-majoritarian 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 generally* ALEXANDER 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); Antonin Scalia, *A Matter of Interpretation*, in A MATTER OF PRINCIPLE (Amy Gutmann ed. 1996); 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); 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). Ely interprets Bickel as making such an argument, though Ely's interpretation is not consistent with my reading of Bickel's view of the counter-majoritarian difficulty. *See*JOHN HART ELY, DEMOCRACY AND DISTRUST, at 69–70.

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

47. *See* Whittington, *supra* note 7, at 778.

constitutional law, variables that have great significance for our discussion of the appropriate extent of judicial authority and our consideration of legislative supremacy as an alternative to judicial supremacy.

## III. LEGISLATIVE SUPREMACY: AN INSTITUTIONAL PERSPECTIVE

This section responds to scholars who are loath to consider constitutional reforms that would institute a legislative override because they fear that judges will not be able to enforce constitutional limits on elected institutions.[48] On the one hand, judges are not likely to deter a strong majority intent on exceeding constitutional limits whether we institute judicial supremacy, legislative supremacy, or a regime that leaves the status of judicial decisions an open question. On the other hand, the institutional position of judges takes on greater significance when there is no clear majority favoring an interpretation of the Constitution. In such circumstances judges can set a status quo that thwarts a divided majority. A legislative override would strengthen the institutional position of elected officials relative to judges and thus would narrow the range of decisions that would be invulnerable to challenge. But we will see that this range would remain fairly broad, notwithstanding the possibility of override.

There is a growing literature indicating that judges reinforce rather than limit governing majorities. The notion that judges align themselves with the governing political coalition is not new. It has received empirical support in an influential article by Robert Dahl[49] as well as in a burgeoning literature that examines the complex interaction between judges and the reigning political regime.[50] This literature suggests that we should not assume that judges will protect us when powerful majorities seek to skirt constitutional limits. Ferejohn and Kramer, for example, have argued that judicial independence is constrained by institutional pressures that lead judges to curtail their own authority.[51]

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48. *See, e.g*, MICHAEL PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 135–36 (1982); Arkes, *supra* note 23, at 78–79, 83; RICHARDS, *supra* note 35, at 291–92; EMERSON, *supra* note 35, at 142; DEVINS & FISHER, *supra* note 5, at 234.

49. Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

50. *See* Cornell Clayton and J. Mitchell Pickerill, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233–48 (2004); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 593–94 (2005). *See also*, Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35–73 (1993).

51. *See* Ferejohn & Kramer, *supra* note 16.

It would seem that a legislative override would further weaken an already weak Judiciary. But judges are not likely to challenge elected officials who are supported by a strong majority regardless of whether we institute a legislative override. Judges, for example, will be hesitant to enforce constitutional limits for the benefit of particularly unpopular claimants no matter the regime.[52] Indeed, they might be more likely to use their authority to legitimate the actions of elected officials.[53] This is not to say that we should ignore the problem of majoritarian tyranny but to recognize the need for a non-judicial remedy.[54]

The Judiciary, by contrast, is more formidable when confronting a divided majority. In these circumstances, there are at least two reasons to believe that judges will be well positioned to enforce constitutional limits notwithstanding a legislative override. First, judges will have allies to support their decisions, especially decisions that clearly follow from the Constitution. They will derive support from people who believe the interpretation is correct and that there is no reason to sacrifice fidelity to the Constitution. They will also derive support from people who care little about constitutional fidelity but believe that the disputed interpretation advances important ends. And though these potential allies were not strong enough to prevent elected officials from violating the Constitution, they will often have sufficient strength to deter elected officials from reversing a judicial decision that vindicates the Constitution, especially after a judicial decision signals a conflict of constitutional magnitude. It would be harder, then, for elected officials to reverse a judicial decision that checks their authority than it was for those same officials to violate the Constitution in the first place.

This suggests the second reason that judges would remain effective in enforcing constitutional limits: legislators would have to pass new laws in order to control their judicial subordinates. To do so, they would have to navigate a process that presents greater obstacles than the one judges now

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52. Consider, for example, the Court's reversing itself on the death penalty, *Gregg v. Georgia*, 428 U.S. 153 (1976), or on the state's authority to investigate communists, *Barenblatt v. United States*, 360 U.S. 109 (1959). It is also likely that the threat of legislative reprisals deters judges from ruling in favor of unpopular claimants. Consider, for example, *Maryland v. Craig*, 497 U.S. 836 (1990), limiting the applicability of the Sixth Amendment's confrontation clause in a case involving the sexual abuse of a young child, or *Korematsu v. United States*, 323 U.S. 214 (1944), validating the forced confinement of United States citizens of Japanese ancestry during World War II.

53. *See* BICKEL, *supra* note 44, at 71.

54. *See generally* Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY (I. Dilliard ed., 1953).

must navigate to assert their supremacy over elected officials, administrators and lower courts.

In passing an override, legislators do not make the same choice that was made when they legislated; they do not choose between the original status quo and the second status quo they had set with legislation.[55] Judges introduce a new status quo when they interpret the Constitution in that they assign the Constitution a meaning that was at best disputed when the legislation was passed. Legislators must choose between this third status quo and the second status quo. Moreover, judges can interpret the Constitution with an eye toward dividing the legislative coalition that established this second status quo. And even in the absence of such strategic judging, the coalition would fall apart if some members would prefer legislation that instituted yet another status quo, one that achieved the policy outcome of the second status quo without conflicting with the constitutional interpretation of the third.[56]

In other words, it is easier for judges to sanction their subordinates under the existing regime than it would be for legislators under a system of legislative supremacy.[57] Indeed, we gain a better sense of the consequences of legislative supremacy by considering the current position of the Judiciary when judges interpret ordinary statutes. Legislative overrides occur more than scholars once thought but they are relatively rare.[58] They tend to occur when judges lack knowledge of the current Congress's preferences, especially in circumstances in which judges seem to have no interest in checking legislators and, instead, act as their agents.[59] They are rare because judges can avoid such sanctions so long as

55. To simplify the analysis, I focus on what would happen when the Court strikes down federal legislation. But the same analysis will hold when a Congress that is predisposed to favor the decisions of state officials reviews constitutional interpretations that limit those decisions. The example should not be read as limiting my proposal to cases in which judges have checked federal officials.

56. *See* Pickerill, *supra* note 14.

57. And note well that under the current regime, appellate judges have some success in making the law reflect their preferences. *See* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002).

58. William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 337, 377–78, 416 (1991). Eskridge identifies conditions that make overrides likely and these are circumstances in which judges lack knowledge of the current Congress's preferences. Eskridge also notes that overrides seldom occur when judicial decisions satisfy a constituency that is in a position to block Congressional overrides. Indeed, this is the most important point for my argument. Judicial decisions that enforce clear constitutional limits are likely to find such constituencies, and, whether we institute judicial supremacy, legislative supremacy, or leave the question undecided, judges will not usually attempt to check elected institutions in the absence of such constituencies.

59. The most obvious example would be circumstances in which judges invite overrides to correct for unintended consequences that clearly follow from a straight forward reading of statutory text. *See* Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme*

they interpret the law so that at least one key institutional actor prefers the judges' interpretation to the competing view expressed in the override—a key actor would be anyone in a position to stop the override, such as the median vote on a relevant committee, the median vote in each house of Congress, or the President, who could veto a bill and thereby shift the median congressional vote.[60] Legislators, therefore, override judicial interpretations of statutes when they are unified and, correlatively, when there are no important constituencies supporting the judges' interpretation.[61] It is not likely that these conditions will arise when judges enforce relatively clear provisions of the Constitution.[62]

## IV. THE JUDICIARY AS A SOURCE OF POLITICAL INSTABILITY

Our concern that judges have sufficient authority to enforce constitutional limits distracts attention from a different problem. Judges might have too much influence when they advance disputed interpretations

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*Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999). Similarly, Jeb Barnes has found that overrides succeed when there is dissensus among judges about what statutes entail *and* when such dissensus results from forces other than partisan disagreement among the judges. Barnes suggests that in the absence of partisan disagreement, judges seek to clarify the law and act as agents for legislators. Consequently, the overrides in these cases do not pertain to contexts in which judges check legislators. Indeed, Barnes finds that overrides tend to be ineffective when judges have an interest that they are asserting contrary to the interests of legislators, most notably when they defend interests of discrete and insular minorities. *See* JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 169–71, 178–79 (2004).

60. *See* Eskridge, *supra* note 58, at 378–80; *see also* Whittington, *supra* note 7, at 834; Sven Steinmo, *American Exceptionalism Reconsidered: Culture or Institutions*, *in* THE DYNAMICS OF AMERICAN POLITICS: APPROACHES AND INTERPRETATIONS (Lawrence C. Dodd & Calvin Jillison eds., 1994).

61. This conclusion finds support from Canada's experience after instituting a legislative override provision with section 33 of the Canadian Charter of Rights and Freedoms. The legislative override has not played a significant role in limiting judicial authority under the Charter, and its influence has been experienced mainly at the provincial level of government. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY (2004); Stephen Gardbaum, *The New Commonwealth Models of Constitutionalism*, 49 AM. J. COMP. L. 707, 707–60 (2001); Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1229–1310 (1990).

62. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997). On the other hand, our attitude about judicial supremacy will influence the strength of the Court's institutional position. People who believe they have an obligation to defer to judicial interpretations of constitutional law will be more likely to resist efforts to overturn precedents, no matter their own view of the Constitution. This might explain why people today seem to defer to judicial authority, notwithstanding the Constitution's silence on the question. And though we should expect them to be more skeptical of judicial decisions were we to institute a regime of legislative supremacy in which reversals of courts became familiar events, some people would still defer to a Judiciary they perceived as an institution with special competence to say what the law is.

of constitutional law.[63] The advantages that help judges enforce clear limits on elected institutions also help them to sustain controversial interpretations of those limits. Given that such influence might be a source of political instability, we should consider whether a legislative override is necessary to strengthen the institutional position of elected officials.

In the current regime, we overturn judicial decisions through the Constitution's amendment procedures, a process that is much more difficult to navigate than the legislative process. The process for appointing judges provides an alternative, but it also poses greater obstacles than legislating and is not a reliable mechanism for controlling judicial authority. As a consequence, the advantage that judicial decisions enjoy in the current regime is much greater than would occur in a system with a legislative override. The advantage is magnified when people disagree about what the Constitution means. These disagreements increase the likelihood that judges will attract political support to ensure that their decisions survive potential challenges and that they will have great influence over constitutional doctrine.

Constitutional theorists seem to have an endless supply of arguments to explain why judges should have such influence. They identify values

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63. We must be clear that judges do not enforce constitutional limits in such cases and, instead, advance controversial conceptions of what the Constitution means. It begs the question of the Constitution's applicability if we place judges on the side of the Constitution and assume that elected officials act in bad faith when they disagree about its application.

Although it is clear that the Constitution places limits on elected politics, we disagree about the scope of the limits. Thus, we cannot say with certainty how legislative supremacy would influence the Court's checking function, because we are not certain about when the function is applicable. Indeed, the judicial check becomes a redundancy in circumstances when we are sure of its applicability; electoral incentives provide a sufficient check on legislators. We add a judicial supplement because people can agree there are additional circumstances in which the limit will be applicable without agreeing on what those circumstances are.

In deciding whether to institute a legislative override, then, the question is not whether judges will be able to enforce constitutional limits; the consensus that animated the constitutional constraint is likely to remain evident to people, and either elected officials will be loath to cross such a limit or people will support judicial enforcement of a clear constitutional limitation. The question becomes what is the best institutional structure for applying the Constitution to a range of circumstances in which we agree that elected officials should be limited but are uncertain where the limit should be drawn.

Although the check on elected officials will be applied differently in a system with a legislative override, there would still be a check. It would encompass actions elected officials forego and also those thwarted by judicial decisions with enough popular support to be sustained. And while this check would be effective over a broader range of circumstances in a system of judicial supremacy or one that is neutral between the two, we would not favor these systems in order to ensure that judges *enforce* constitutional limits on elected officials. Rather, our reasons would have to do with how we expect judges to *define* the check itself. The claim that legislative supremacy allows elected officials to ignore constitutional limits, then, is really just a substantive argument in different dress; judges are likely to make better decisions than elected officials about when the Constitution is applicable.

judges advance when they interpret the Constitution. But judges do not end our disagreements about constitutional doctrine.[64] Judicial authority becomes a source of instability, when people who continue to contest these disagreements believe that judicial decisions place them at an unfair disadvantage. Theorists have not addressed adequately the risk of instability that follows from the strength of judges' institutional position.

Consider again the *First Things* symposium. Earlier we noted that the symposiasts argue against judicial supremacy, in order to advance a substantive conception of what the Constitution means. The symposiasts also identify a cost of judicial authority that follows from the institutional position judges enjoy. They suggest that judicial decisions sometimes disenfranchise people by making it harder to advance their understanding of what the Constitution means. The symposiasts contend that judicial decisions about privacy and the relationship between church and state have made it nearly impossible to advance certain conceptions of constitutional law, and many religious people, according to this view, believe that their perspectives are no longer relevant to our deliberations about the Constitution.[65]

One might respond that the advantage judges enjoy is mitigated, because they respond to the same public opinion that controls elected institutions.[66] Indeed, we have already noted a rich literature that associates the exercise of judicial authority with the interests of powerful political majorities. But this mistakes the problem that we are considering; the problem is not that judges wield a counter-majoritarian authority. It is that judicial decisions disenfranchise people who can no longer use the legislative process to advance their view of the Constitution and, instead, must use a process that poses significantly greater obstacles than the legislative process. Both majorities and minorities face this problem when they seek to override judicial decisions.[67]

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64. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 145–56 (1989); Charles H. Franklin & Liane Kosaki, *Republican School Master: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 763, 768 (1989).

65. Charles W. Colsen, *Kingdom in Conflict*, in THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS 42 (Richard John Neuhaus ed., 1997); *See also* Hittinger, *supra* note 23, at 29; Hadley Arkes, *in* THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS 39 (Richard John Neuhaus ed., 1997).

66. *See* Marshall, *supra* note 64; Dahl, *supra* note 49.

67. Keith Whittington illustrates this point in a different context. He examines political supports that allow judges to exercise authority and avoid reprisals by elected institutions. Whittington identifies circumstances in which judges can resolve disagreements within a majority coalition and thus advance the interest of some members at the cost to others. Although these political benefits would explain why elected institutions would tolerate expansive judicial authority, they also reinforce

More significantly, the problem is likely to be associated with controversies that manifest deep divisions in the political community such as those that animate the *First Things* symposium. In these circumstances, it is folly to believe that judicial decisions do anything more than establish the status quo from which an ongoing dispute will proceed. Consequently, scholars would do well to concentrate on questions of how best to manage such conflicts and the ease with which we can correct mistaken decisions, and they should be less concerned with the substance of judicial decisions and whether judges represent the majority's will.[68]

The depth of these disagreements ensures that judges will be in a strong position to defend the status quo they set, no matter the side they favor. Therefore, judicial decisions achieve a de facto status, when they should only be momentary pauses in ongoing discussions about what the Constitution means. Indeed, many citizens respect these decisions as if they have the same authority as those that clearly follow from the text of the Constitution.

Why would this be a source of political instability? We know that the losing side must pursue its values and interests through procedures that are much more formidable than the legislative process. The obstacles they pose reflect the strong social consensus that should support constitutional limits, but the depth of these controversies indicates the absence of such a consensus. Judges, instead, have intervened to favor one side and exploited an institutional position that allows them to remove the fight from the legislative process. Consequently, people suddenly find themselves at a significant disadvantage when they try to advance their understanding of the Constitution. The fight about what the Constitution means has for all practical purposes been preempted, even though a considerable number of people continue to contest it.

Judicial decisions, then, impose a great cost on citizens who reject the Judiciary's view of the Constitution. While it would be an exaggeration to

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the point that judges can sustain highly controversial decisions that impose great costs on particular groups of citizens. *See* Whittington, *supra* note 50; Graber, *supra* note 50.

68. There are scholars who have argued that judges should decide cases with an eye to the instability that their decisions might introduce. These scholars recognize the importance of having institutions that resolve disagreements in a manner that treats citizens as equals and respects their different views. While these arguments are sensitive to the institutional consequences that follow from the exercise of judicial authority, they are less concerned with the institutional position of judges relative to elected officials. Indeed, they resemble many of the arguments that we have considered in that they emphasize how issues should be resolved and miss consequences that follow from the interaction of different institutional actors. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT, (1992); CASS R. SUNSTEIN, ONE CASE AT A TIME, (1999); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION (2001).

say that these citizens find themselves opposed to the Constitution itself, it is accurate to say that their opponents can claim—with greater plausibility—to be on the side of the Constitution. The stakes of constitutional litigation increase because people know that to prove such claims wrong would require either a constitutional amendment or an act of political will that is, at a minimum, more considerable than was necessary to advance one's views under the previous status quo.

Moreover, our institutions must bear additional pressure as these decisions provide political entrepreneurs an incentive to direct resources and energies to the most divisive issues, issues where we are least likely to find common ground. These actions, in turn, increase the likelihood that controversies will spread to fights that are plausibly related though seemingly less volatile—the fight over stem cells is more intense because it is seen as an extension of the abortion controversy—and will influence fights that have no relationship, because interest groups support candidates over a range of issues in order to leverage their influence on particular issues.

By focusing on how we resolve disagreements, scholars underestimate the instability that follows when judges exploit their institutional position to sustain highly controversial decisions. Consider again Alexander and Schauer's argument that judicial supremacy facilitates social cooperation by enabling judges to perform a valuable settlement function. Critics respond by noting that Alexander and Schauer do not address the empirical question of whether judges resolve disagreements with the finality or coherence necessary to perform this function. Indeed, our experience is to the contrary; political controversies linger long after judges decide cases, and these controversies have a tendency to unsettle doctrine.[69]

It is more significant, however, that Alexander and Schauer consider judicial supremacy as a remedy for disagreement without addressing adequately the cost of their cure. Because they focus on the benefits that follow when judges settle particular disagreements, they do not consider instability that results when judges preempt ongoing discussions about constitutional doctrine. They do not see the possibility that citizens might believe themselves disenfranchised when issues of constitutional interpretation are removed from elected institutions. The possibility is

69. *See* TUSHNET, *supra* note 3, at 27–29; KRAMER, *supra* note 5, at 234–36. This is not a fair criticism, however. Alexander and Schauer only claim that people should defer to judicial decisions because judges might perform this settlement function, and they indicate that institutional reforms would be necessary to increase the likelihood that people will indeed comply.

beyond their gaze. What is more, a legislative override would address this problem while promoting the rule of law virtues that animate Alexander and Schauer's argument. People would continue to know what the law is, when to be alert to the possibility of doctrinal change, and where to look to determine whether change has occurred. And judges would be in a position to shape the broader discussion of unsettled doctrinal questions, because legislators would have to decide the issues framed by the Judiciary.

Some popular constitutionalists also have recognized potential instability resulting from a judicial monopoly on constitutional interpretation. Devins and Fisher, for example, contend that constitutional doctrine better reflects people's views when elected officials have a say about what the Constitution means, and that people will not accept the authority of the Judiciary or even of the Constitution itself, if they believe themselves excluded from deliberations about its meaning.[70]

Nonetheless, Devins and Fisher view the problem of judicial supremacy from the same perspective as Alexander and Schauer: they ask who should have a say about what the Constitution means. They differ only in concluding that constitutional doctrine will be more representative and thus stable, if more people get to speak. They do not address the critical question of how loud these voices must be if people are to recognize themselves as participants in a discussion about the Constitution. To do so, they would have to look beyond how we have resolved doctrinal disagreements and consider how judges' institutional position shapes the field on which these disagreements are contested.[71]

From this perspective, we see that a legislative override might be necessary to ensure that people have an adequate say. Devins and Fisher, by contrast, reject legislative supremacy because they believe judges play an important role in shaping constitutional values.[72] And this conclusion reflects their focus on how we resolve controversies. They do not ask if judges will be able to play the role they envision in a government that institutes a legislative override and, instead, seem to assume that judicial review would be eliminated in such a government.[73]

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70. *See* DEVINS & FISHER, *supra* note 5, at 5, 229.

71. Devins and Fisher are more sensitive to these influences when they discuss separation of powers cases. They argue that the weakness of judges' institutional position prevents them from enforcing their decisions when they intervene in conflicts between elected institutions. *See id*. at 77–102.

72. *Id*. at 234.

73. Many constitutional theorists make a similar mistake. They claim judicial review contributes to constitutional politics by making it more deliberative, principled, equitable, or advancing some

Consider their discussion of *Planned Parenthood v. Casey*.[74] They contrast the conception of abortion rights articulated in *Casey* with the original decision in *Roe v. Wade*;[75] *Casey* reaffirms abortion rights, but it allows abortion to be regulated. Devins and Fisher contend that *Casey* is a better reflection of citizens' attitudes about abortion and that the decision is the fruit of political challenges to *Roe*. Indeed, they think that *Casey* reaches the only viable compromise among competing views.[76]

It is odd to think of *Casey* as a compromise, given that the holding does not reflect the pro-life position that abortions be significantly curtailed. To do so, one must agree with Devins and Fisher that as a practical matter abortion would not be significantly curtailed under any tolerable legal regime.[77] More importantly, they seem to assume that the abortion controversy had to be resolved in order to move past the pre-*Roe* regime in which abortion was prohibited in nearly every state.[78] They suggest that judicial review was necessary to prevent this outcome, and, by implication, that a legislative override would deter the kind of activism that was necessary to reach the equilibrium *Casey* finally achieved.[79]

While it might be true that abortion law changed because judges exercised judicial review, we have seen that judges would retain this authority in a system of legislative supremacy. A legislative override would only make it easier to challenge the status quo that judges establish and thereby increase the likelihood that neither the pro-choice nor the pro-life position will be made the law of the land. Devins and Fisher do not consider this possibility because they focus on how we resolve disagreements. As a consequence, they ignore the political instability that is introduced when judges resolve controversies that do not lend themselves to compromise and preempt ongoing discussions about constitutional doctrine.

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other value. And while their arguments depend on an institutional position that allows judges to change the status quo, these theorists say little about how easy it should be for judges to sustain their decisions once the status quo has been changed. But barring assumptions about what the substance of constitutional doctrine should be, it is difficult to see how constitutional politics would be diminished if it were easier to challenge the status quo judges set.

74. 505 U.S. 833 (1992).

75. 410 U.S. 113 (1973).

76. *See* DEVINS & FISHER, *supra* note 5, at 137–39, 235–37. Devins and Fisher recognize, however, that abortion is too divisive an issue to be resolved by a single decision.

77. They imply that eliminating the significant number of abortions that were performed after *Roe* would come at too great a sacrifice of liberty.

78. *Id*. at 236.

79. *Id*. at 234–37.

But Devins and Fisher seem to recognize the benefits of leaving these controversies unsettled. They suggest that a narrower holding in *Roe* would have reduced the political pressure placed on the Court and would have given both pro-life and pro-choice supporters an incentive to pursue their disagreement in the legislative arena.[80] It is puzzling, therefore, that they do not consider how a system with a legislative override might change the interaction between judges and elected institutions. In such a system judges would have an incentive to write narrower decisions to avoid reversals, decisions that invite the institutional colloquies that Devins and Fisher deem essential to our deliberations about constitutional values.[81] A system of legislative supremacy would promote the stability that they believe follows when elected institutions participate in our deliberations about the Constitution.[82]

Finally, Devin's and Fisher's focus on the need to resolve the abortion controversy would explain the strangest aspect of their analysis. They claim that *Casey* is a relatively stable settlement. Although they recognize that *Roe* unleashed forces that brought political upheaval and that abortion is a permanent part of a political landscape, they do not see that the abortion controversy has continued to be heated after *Casey* and, perhaps, became inflamed with the plurality opinion's claim of judicial supremacy.[83] Indeed, this claim is at the center of a recent volume of essays arguing against judicial supremacy and also animates the *First Things* Symposium.[84]

For many, *Casey* places the Constitution on the wrong side of a culture war. While we might dispute the origins and the significance of the conflict, it is clear that citizens on both sides assume that the Judiciary is the central battleground. This assumption has ramifications for our political discourse at all levels of government and for policy decisions that are far removed from the conflict itself. These issues would be divisive no doubt under any institutional structure. A system of legislative supremacy,

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80. *Id*. at 237.

81. *Id*. at 237–38.

82. Devins and Fisher seem to assume that a legislative override would provide final authority to say what the Constitution means. They, like Kramer, juxtapose judicial and legislative supremacy and endorse a system of coordinate construction, because it affords people a greater role in determining constitutional meaning. And, as we saw with Kramer, a political system characterized by legislative supremacy might advance this goal.

83. Planned Parenhood v. Casey, 505 U.S. at 851.

84. *See* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe ed., 2004); THE END OF DEMOCRACY?, *supra* note 22.

however, is more likely to diffuse them. Such a system reduces the stakes of institutional decisions by making them more vulnerable to challenge.

## V. CONCLUSION

Although there is reason to believe that judicial authority is a source of instability, it is premature to conclude that we need a legislative override to counteract it. We lack an adequate understanding of the consequences likely to follow from the different institutional arrangements we might use to manage highly volatile social controversies. Such an understanding will be elusive, however, so long as we frame the debate about judicial supremacy to emphasize the resolution of disagreements. Indeed, by directing attention to the political contests that arise after judges make disputed interpretations of constitutional law, we can see that a legislative override is not likely to increase the threat of majoritarian tyranny and might reduce the instability that follows from controversial judicial holdings.